

1977—1978 ANNUAL SURVEY OF LABOR RELATIONS AND EMPLOYMENT DISCRIMINATION LAW*

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INTRODUCTION

This comment is the seventeenth in a series of annual efforts designed to keep practitioners abreast of significant changes in labor and employment discrimination law. Past *Surveys* have reported important developments occurring from April 1 of one year to March 31 of the following year. However, since this *Survey* year did not coincide with the Supreme Court Term, timely coverage of Supreme Court decisions handed down between the end of the *Survey* year and the close of the Supreme Court Term was not possible. In order to rectify this situation, the Editorial Board has decided to shift the *Survey* year to coincide with the Supreme Court Term. Accordingly, future *Surveys* will report developments occurring from August 1 of one year to July 31 of the following year. To effectuate this change, this comment covers decisions rendered from April 1, 1977 through July 31, 1978.

It is important to note that the *Survey* does not attempt to cover all decisions rendered during the year. Instead, the *Survey* seeks to provide comprehensive treatment of those cases which consolidate, add substance to, expand upon, or depart from prior law.

I. NLRB JURISDICTION

A. *Foreign-Related Employers Doing Business in the United States:*
State Bank of India; SK Products

In two related *Survey* year decisions, *State Bank of India*¹ and *SK Products Corp.*,² the National Labor Relations Board held that it possesses and will exercise the statutory authority to assert jurisdiction over the commercial operations of foreign and domestic corporations which have a "close relationship" with a foreign government.³ The decisions in *State Bank of India* and *SK Products Corp.* mark a dramatic reversal from prior Board policy. Since its 1967 decision in *British Rail-International, Inc.*,⁴ the National Labor Relations Board had declined to assert jurisdiction over the commercial activities of foreign governments or their agents conducted within the United States. The Board's position was premised upon the conclusion that it would be an inappropriate exercise of its discretion to assert jurisdiction over domestic corporate employers occupying a "close relationship" with a foreign government.⁵

¹ 229 N.L.R.B. 838, 95 L.R.R.M. 1141 (1977).

² 230 N.L.R.B. No. 186, 95 L.R.R.M. 1498 (July 27, 1977).

³ 229 N.L.R.B. at 842-43, 95 L.R.R.M. at 1147.

⁴ 163 N.L.R.B. 721, 64 L.R.R.M. 1432 (1967). In this precedent setting case, the Board exercised its discretion not to assert jurisdiction over British Rail-International (BRI), a New York corporation engaged in the sale of rail tickets and room and meal vouchers in connection with rail travel in the United Kingdom. Although incorporated under the laws of New York, BRI was wholly owned by the British Railways Board, an agency of the Ministry of Transport of the United Kingdom. *Id.* at 721, 64 L.R.R.M. at 1432.

⁵ *Id.* at 722, 64 L.R.R.M. at 1144; *see also*, *AGIP, USA, Inc.*, 196 N.L.R.B. 1144, 1144, 80 L.R.R.M. 1245, 1246 (1972). In *AGIP*, the Board declined to assert its discretionary jurisdiction over AGIP, USA, a Delaware corporation functioning as the

As a result of the discretionary basis of the Board's policy, however, the Board found it unnecessary to address the issue whether it had the statutory authority under the National Labor Relations Act (or Act) to assume jurisdiction over such employers.

The opportunity for the Board to reevaluate its jurisdictional policy arose in *State Bank of India* when the Chicago Joint Board, Clothing and Textile Workers, ALF-CIO, sought to represent a stipulated bargaining unit of workers employed by the State Bank of India's Chicago, Illinois branch office.⁶ Although authorized by the State of Illinois to engage in a general banking business,⁷ the State Bank of India (SBI) was organized and owned by an agency of the Indian Government.⁸ As a result of the State Bank of India's relationship with the government of India, the union's representation petition presented two questions for Board consideration. First, the Board confronted the question whether it possessed the requisite statutory authority under the Act to assert jurisdiction and to direct an election.⁹ Second, the Board needed to determine whether it should abandon its discretionary policy of declining to assert jurisdiction over domestic employers found to have a "close relationship" with a foreign state.¹⁰ Both questions were subsequently answered in the affirmative.¹¹

Addressing initially the issue of statutory authority, the Board first focused upon the scope of its jurisdictional power over domestically operated

United States purchasing agent for its Italian parent corporation, Ente Nazionale Idrocarburi (ENI). *Id.*, 80 L.R.R.M. at 1245-46. ENI itself was wholly owned by the Italian Government and was one of three divisions of the Italian Ministry of Partecipazione Nazionale. *Id.*, 80 L.R.R.M. at 1245.

⁶ 229 N.L.R.B. at 838, 95 L.R.R.M. at 1142.

⁷ *Id.* at 839, 95 L.R.R.M. at 1142. The State Bank of India's Chicago, Illinois, branch office was licensed to engage in a full spectrum of banking functions by the State of Illinois under that state's Foreign Banking Office Act of 1973, ILL. ANN. STAT. ch. 16½, §§ 501-519 (Smith-Hurd Supp. 1977). 229 N.L.R.B. at 839, 95 L.R.R.M. at 1143. Responsibility for the daily operations and personnel decisions involving the Chicago branch lay with the local branch officers. The branch manager was authorized to initiate recommendations regarding terms and conditions of employment based on the prevailing local conditions, subject to approval by SBI's central offices. *Id.*, 95 L.R.R.M. at 1144. The State Bank's international division and its overseas branch section located in Bombay, India, however, made general policy decisions regarding SBI's overseas operations. *Id.*, 95 L.R.R.M. at 1143.

⁸ 229 N.L.R.B. at 838, 95 L.R.R.M. at 1143. The State Bank of India was incorporated in India under the State Bank Act which provides that the Indian Government must hold at least fifty-five percent of the outstanding stock issued by the State Bank. At present, ninety-two percent of the State Bank's stock is owned by the Reserve Bank of India, a wholly owned and controlled agency of the Indian Government. The Reserve Bank of India and the Indian Government determine the goals of the State Bank. In addition, the State Bank Act mandates that no fewer than nine of the State Bank's eighteen directors must be directly appointed by the Government of India. *Id.*

⁹ *Id.*, 95 L.R.R.M. at 1142.

¹⁰ *Id.*

¹¹ *Id.*

foreign corporations. With respect to the State Bank of India, the Board noted that SBI's foreign organization and incorporation were immaterial to the Board's statutory authority to assert jurisdiction.¹² Since SBI was engaged in authorized commercial banking operations within the United States, it was subject to the plenary jurisdiction of the Board regardless of the country of incorporation.¹³

After finding that SBI's foreign incorporation did not preclude the assertion of jurisdiction, the Board turned to the question whether the Indian Government owned and operated Chicago branch bank was an employer as defined in section 2(2)¹⁴ of the Act.¹⁵ Although noting that section 2(2) excludes from the definition of "employer" the "United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any state or political subdivision thereof . . .," the Board concluded that the State Bank of India did not fall within the exclusions.¹⁶ The Board inferred an intent to exclude foreign government owned entities from the exclusions of section 2(2) on the ground that the terms of the section were expressly defined in relation to the antecedent "United States."¹⁷ As a result, the Board determined that the State Bank of India's status as a government owned corporation or an instrumentality of a foreign state was insufficient to exclude the bank from the coverage of the Act. Accordingly, the Board found that, for the purpose of asserting jurisdiction, SBI was an employer as defined in the Act.¹⁸

Having concluded that the State Bank of India was not an exempt employer under the terms of section 2(2) of the Act, the Board proceeded to examine whether the Supreme Court's decision in *McCulloch v. Sociedad Nacional de Marineros de Honduras*¹⁹ requires an expression of affirmative congressional intent in order for the NLRB to assert jurisdiction over the commercial operations of an agent or instrumentality of a foreign government.²⁰ In *McCulloch*, the Board had asserted jurisdiction over foreign flag vessels of a wholly owned foreign subsidiary of an American corporation.²¹ The Su-

¹² *Id.* at 840 & n.8, 95 L.R.R.M. at 1144 & n.8.

¹³ *Id.* at 840, 95 L.R.R.M. at 1144.

¹⁴ 29 U.S.C. § 152(2) (1976).

¹⁵ 229 N.L.R.B. at 840, 95 L.R.R.M. at 1144.

¹⁶ *Id.*

¹⁷ *Id.* at 840 & n.9, 95 L.R.R.M. at 1144 & n.9.

¹⁸ *Id.* at 840, 95 L.R.R.M. at 1144. SBI did not contest the alleged impact of the general banking operations of the Chicago branch upon interstate commerce. Rather, SBI stipulated that during 1976 the Chicago branch had a gross volume of business in excess of one million dollars and engaged in interstate financial transactions exceeding one hundred thousand dollars. *Id.*

On the basis of the stipulated facts, the Board concluded that SBI's Chicago operations fell within the terms of section 2(6) and 2(7) of the Act, 29 USC §§ 152(6) & 152(7) (1976). 229 N.L.R.B. at 840, 95 L.R.R.M. at 1144. The Board also found that SBI's Chicago banking operations satisfied the Board's \$50,000 discretionary jurisdictional standard applicable to that type of enterprise. *Id.* at 840 & n.7, 95 L.R.R.M. at 1144 & n.7.

¹⁹ 372 U.S. 10 (1963).

²⁰ 229 N.L.R.B. at 840, 95 L.R.R.M. at 1144.

²¹ 372 U.S. at 14-15.

preme Court, however, concerned with the international ramifications of Board jurisdiction over the internal management and affairs of foreign flag vessels,²² concluded that the Board lacked jurisdiction over such vessels.²³ The Court, relying on a territorial interpretation of the National Labor Relations Act,²⁴ found that the jurisdictional provisions of the Act were not intended to extend to the maritime operations of foreign registered vessels.²⁵ Consequently, in the absence of a clear expression of congressional intent to apply the Act to such vessels, the *McCulloch* Court refused to sanction the exercise of Board jurisdiction.²⁶

On the basis of *McCulloch*'s admonition against extension of Board jurisdiction into areas of international significance without an express congressional mandate, SBI maintained that the petitioning union had failed to demonstrate the requisite legislative intent to vest jurisdiction in the NLRB over the business enterprises of foreign governments.²⁷ The Board, however, determined that SBI's interpretation of *McCulloch* was inapplicable for two reasons. First, the Board noted that *McCulloch* never dealt with the issue of NLRB jurisdiction over the commercial activities of foreign governments conducted within the territorial limits of the United States.²⁸ Second, the Board reasoned that *McCulloch*'s admonition against extension of NLRB jurisdiction was limited in application to those instances where neither the situs nor the impact of the labor dispute were within the territorial United States.²⁹ Because of the *McCulloch* Court's territorial interpretation of the NLRA, the Board reasoned that a foreign government controlled corporation engaged in commerce within the United States would have to prove either a congressional intent to *exclude* domestic employers from the coverage of the Act or an intent to *preclude* the Board from exercising jurisdiction over such employers in order to avoid NLRB jurisdiction.³⁰ The Board determined that, absent such a showing by SBI, there was no reasonable basis for the conclusion that the Act was intended to exclude SBI solely on the basis of the employer's "close relationship" to a foreign state.³¹ Thus, the Board concluded that it had the statutory authority to direct a representation election for SBI's Chicago, Illinois branch employees.³²

Having resolved the question of statutory authority to assert jurisdiction over foreign state businesses within the United States, the Board determined further that it should no longer decline, as a matter of discretion, to exercise jurisdiction over such employers.³³ In so doing, the Board overruled its ear-

²² *Id.* at 21.

²³ *Id.* at 22.

²⁴ *Id.* at 17-20.

²⁵ *Id.* at 21-22.

²⁶ *Id.*

²⁷ 229 N.L.R.B. at 840, 95 L.R.R.M. at 1144.

²⁸ *Id.* at 841, 95 L.R.R.M. at 1145.

²⁹ *Id.*

³⁰ *Id.* at 840, 95 L.R.R.M. at 1144-45.

³¹ *Id.* at 841, 95 L.R.R.M. at 1145.

³² *Id.* at 838, 95 L.R.R.M. at 1142.

³³ *Id.* at 842, 95 L.R.R.M. at 1147.

lier decision in *British Rail-International, Inc.*³⁴ The Board could discern no public policy or policy of the Act which, on the ground that the employer is found to be an "agency" or "instrumentality" of a foreign government, justified adherence to its practice of declining jurisdiction.³⁵ Consequently, the Board concluded that it would better effectuate the policies of the Act to assert jurisdiction over employees employed within the territorial jurisdiction of the United States by an "agency" or "instrumentality" of a foreign state engaged in commerce within the meaning of the Act.³⁶

While the rationale of *State Bank of India* focused on domestic policy considerations arising from a local employer's relationship with a foreign state, the Board did not foreclose the possibility that it will decline, as a matter of discretion, to assert jurisdiction where the international implications are compelling. The Board has recognized that the impact upon foreign relations is a relevant and proper factor to be considered when determining whether to assert jurisdiction.³⁷ *State Bank of India*, however, imposed no restrictions on the Board's exercise of its discretionary power to decline jurisdiction. Rather, *State Bank of India* merely expanded the range of commercial enterprises subject to Board jurisdiction by concluding that domestic policy implications fail to warrant the discretionary exclusion of foreign state businesses from the provisions of the Act.³⁸ As a result, *State Bank of India* left unrestrained the Board's power to decline jurisdiction where foreign policy requires.

³⁴ *Id.* See text and notes 4-5 *supra*.

³⁵ *Id.*, 95 L.R.R.M. at 1146.

³⁶ *Id.* at 842-43, 95 L.R.R.M. at 1147. The Board buttressed its conclusion that no valid justification remained for declining jurisdiction with reference to the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 (1976). 229 N.L.R.B. at 842, 95 L.R.R.M. at 1146. That Act defines the jurisdiction of United States courts in suits against foreign states, including political subdivisions, agencies, and instrumentalities thereof, arising from the commercial activities of the foreign state occurring within the United States by declining to extend the doctrine of sovereign immunity to a foreign state's acts. 28 U.S.C. §§ 1605(a)-1605(b) (1976). With the exception of punitive damages, the Foreign Sovereign Immunities Act provides that a foreign state is liable to the same extent as a private individual in similar circumstances. 28 U.S.C. § 1606 (1976). Although acknowledging that the Foreign Sovereign Immunities Act affected judicial rather than administrative determinations of claims by foreign states to sovereign immunity, the Board nevertheless reasoned that that Act provided an analogous justification for its decision to treat foreign state enterprises as it would similarly circumstanced private corporations. 229 N.L.R.B. at 842, 95 L.R.R.M. at 1146.

³⁷ See *Contract Servs. Inc.*, 202 N.L.R.B. 862, 864, 82 L.R.R.M. 1757, 1759 (1973). The Board, in *Contract Servs.*, concluded that it had the statutory authority to assert jurisdiction over a United States corporation employing Panamanian nationals in the Canal Zone. *Id.* However, the Board, as a matter of discretion, elected not to assert jurisdiction over the employer for fear of having a negative impact on the volatile United States-Panama negotiations regarding Panamanian sovereignty. *Id.* at 1759-60, 82 L.R.R.M. at 864-65.

³⁸ See 229 N.L.R.B. at 842, 95 L.R.R.M. at 1146.

In *SK Products Corp.*,³⁹ the second *Survey* year decision to address the Board's discretionary jurisdictional policy, the NLRB clarified its decision in *State Bank of India*. The controversy involving SK Products arose when Teamsters Local 473 sought to represent a stipulated bargaining unit of workers employed at SK Products' Illinois furniture factory.⁴⁰ SK Products (SK) is a wholly owned, controlled, and managed American subsidiary of a Yugoslavian parent.⁴¹ SK took the position that the Board should decline to assert jurisdiction, consistent with its established policy, because SK's Yugoslavian parent participated in policy decisions affecting the wood product industry at the highest levels of the Yugoslavian Government.⁴² The Board reasoned that *SK Products Corp.* presented a stronger argument for assertion of jurisdiction than did *State Bank of India* since SK was an American corporation, whereas SBI was a foreign corporation licensed to transact business in the United States.⁴³ The Board noted that when a foreign state chooses to incorporate under the laws of an American state, the entity established is presumptively engaged in commercial or private activities.⁴⁴ The Board explained that this presumption negates the contention that the operations of the corporation represent an exercise of foreign sovereignty.⁴⁵ As a result of its status as a domestic incorporator, the foreign state has implicitly consented to the treatment of the corporation as a citizen of the state of incorporation, thereby surrendering any claims to sovereignty.⁴⁶ Accordingly, the Board concluded that SK's status as an American corporation justified assertion of jurisdiction, regardless of SK's affiliation with the Yugoslavian Government.⁴⁷

³⁹ 230 N.L.R.B. No. 186, 95 L.R.R.M. 1498 (July 27, 1977).

⁴⁰ *Id.*, 95 L.R.R.M. at 1498.

⁴¹ *Id.*, 95 L.R.R.M. at 1499. SK's parent, Slovenijales, is an economic enterprise socially owned by its workers for the benefit of Yugoslavia. *Id.* Because it is Yugoslavia's second largest producer of wood products, Slovenijales participates in high level government policy decisions regarding the wood products industry. *Id.* In addition, Slovenijales sends representatives to various Yugoslavian governmental departments although its officers are not considered to be governmental officials and the delegates are compensated by suborganizations of Slovenijales. *Id.*

⁴² *Id.*, 95 L.R.R.M. at 1498-99.

⁴³ *Id.*, 95 L.R.R.M. at 1500-01.

⁴⁴ *Id.*, 95 L.R.R.M. at 1501.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* In response to SK Products' contention that the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 (1976), did not extend or expand the authority of administrative agencies over domestic firms wholly owned or closely related to foreign governments or their instrumentalities, the Board developed its treatment of the sovereign immunity concept advanced in *State Bank of India* with reference to an American corporation. See note 36 *supra*. The Board found that under the definition of an "agency or instrumentality" of a foreign government contained in the Foreign Sovereign Immunities Act, SK's incorporation under the laws of New Jersey defeated claims of entitlement to foreign sovereign immunity. 230 N.L.R.B. No. 186, 95 L.R.R.M. at 1500-01. Section 1603(b)(3) of the Foreign Sovereign Immunities Act of 1976 defines an "agency or instrumentality of a foreign state" as any entity—"(3) which is neither a citizen of a State of the United States as defined in Section 1332(c) and (d) of this title, nor created under the laws of any third country." 28 U.S.C. §

State Bank of India and its companion case, *SK Products Corp.*, remove the shield of immunity which the National Labor Relations Act previously accorded to the commercial activities of foreign governments within the United States. It is submitted that this result is based upon a sound interpretation of the jurisdictional scope and underlying policy of the Act. The Supreme Court, in *McCulloch v. Sociedad Nacional de Marineros de Honduras*, construed the jurisdictional boundaries of the NLRA as encompassing labor disputes arising only among domestic employers and their local employees.⁴⁸ As a result, where matters involving labor-management relations occur within the territorial sovereignty of the United States, the NLRA presumptively authorizes Board jurisdiction over their resolution. The Board's decision requiring either a demonstration of congressional intent to exclude from the NLRB's jurisdiction domestic employers having a "close relationship" with a foreign government or an intent to preclude the Board from exercising its jurisdiction over such employers is consistent with the territorial construction of the NLRA recognized by the Supreme Court. Moreover, as the Board has acknowledged, it would be anomalous to conclude that Congress intended to immunize the commercial operations of foreign governments or their agents within the territorial United States from the provisions of the NLRA, while requiring compliance with other federal statutes regulating the transaction of business.⁴⁹ Consequently, there is no reasonable basis for the conclusion that the National Labor Relations Act excludes domestic employees and their local employers who otherwise satisfy the requirements of the Act merely because of their relationship to a foreign state.

In both *SK Products Corp.* and *State Bank of India*, the Board has recognized that, with the expansion of foreign nationalized industries in the United States, a policy of continuing to decline jurisdiction over such employers would insulate a substantial segment of the American labor force from the protection of the NLRA. Therefore, the decisive question for the Board in the future is whether the commercial operations of an "agency" or "instrumentality" of a foreign state in the United States meet the minimum jurisdictional standards established for the enterprise in question. Where these requirements are met, an employer's connection with a foreign government will no longer play a determinative role in the decision to assert Board jurisdiction unless the international implications are compelling. Consequently, the domestic employees of foreign nationalized industries will now have the opportunity to organize and bargain collectively according to the provisions of the Act.

1603(b)(3) (1976). Section 1332(c) of Title 28 of the United States Code provides that a corporation shall be deemed to be a citizen of any State in which it has been incorporated. 28 U.S.C. § 1332(c) (1976).

⁴⁸ 372 U.S. at 18 (quoting *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 144 (1957)). For the purpose of asserting jurisdiction under the Act, the Board has not distinguished between United States citizens and foreign nationals employed within the United States. See, e.g., C. P. Clare, 191 N.L.R.B. 589, 590, 77 L.R.R.M. 1535, 1536 (1971) (NLRB jurisdiction asserted over Mexican Nationals working in the United States pursuant to "green card" permits).

⁴⁹ 230 N.L.R.B. No. 186, 95 L.R.R.M. at 1501.

B. Law Firms: Foley, Hoag & Eliot

In *Foley, Hoag & Eliot*,¹ decided this *Survey* year, the National Labor Relations Board asserted jurisdiction over law firms for the first time.² Although the Board previously had recognized its statutory authority to assert jurisdiction over law firms,³ it had declined to do so on the ground that a law firm's connection with interstate commerce was merely incidental,⁴ and thus potential labor disputes between law firms and their employees had only a minimal impact on interstate commerce.⁵ In *Foley, Hoag*, the Board reversed its previous policy, holding that law firms as a class have a sufficient impact on commerce to warrant the Board's assertion of jurisdiction.⁶

The opportunity for the Board to reevaluate its jurisdictional policy with respect to law firms arose when representatives of a prospective bargaining unit of file clerks and messengers of the Boston law firm Foley, Hoag & Eliot filed a petition for certification.⁷ After the regional director dismissed the petition, the union filed a request for Board review of the dismissal and reconsideration of the Board's policy of declining to assert jurisdiction over law firms.⁸

Foley, Hoag & Eliot did not contest the Board's statutory jurisdiction over law firms under sections 2(6) and (7)⁹ of the National Labor Relations Act.¹⁰ Section 14(c)(1) of the Act, however, authorizes the Board to decline jurisdiction over any class of employers when, in its opinion, the effect of a labor dispute on commerce is not substantial enough to warrant the exercise of its jurisdiction.¹¹ Thus, the issue in *Foley, Hoag* was whether law firms as a class

¹ 229 N.L.R.B. No. 80, 95 L.R.R.M. 1041 (May 4, 1977).

² *Id.*, 95 L.R.R.M. at 1043.

³ See, e.g., *Bodle, Fogel, Julber, Reinhardt & Rothschild*, 206 N.L.R.B. 512, 512, 84 L.R.R.M. 1321, 1321 (1973); *Evans & Kunz, Ltd.*, 194 N.L.R.B. 1216, 1216, 79 L.R.R.M. 1181, 1182 (1972).

⁴ See *Bodle, Fogel, Julber, Reinhardt & Rothschild*, 206 N.L.R.B. 512, 513, 84 L.R.R.M. 1321, 1322 (1973).

⁵ *Id.*

⁶ 229 N.L.R.B. No. 80, 95 L.R.R.M. at 1043.

⁷ *Foley, Hoag & Eliot* employs about 150 persons, including approximately sixty attorneys. Its gross annual revenue exceeds \$500,000 and is derived primarily from the firm's provision of legal services to clients subject to the National Labor Relations Act. *Id.*, 95 L.R.R.M. at 1041. These facts are significant because they indicate that *Foley, Hoag & Eliot* clearly met the jurisdictional standards set by the Board pursuant to § 14(c)(1) of the National Labor Relations Act, 29 U.S.C. § 164(c)(1) (1976). The Board's jurisdictional standard for nonretail businesses is \$50,000 outflow or inflow, direct or indirect. *Siemons Mailing Serv.*, 122 N.L.R.B. 81, 85, 43 L.R.R.M. 1056, 1058 (1958). Since indirect outflow refers to "sales of goods or services to users meeting any of the Board's jurisdictional standards . . ." *id.*, *Foley, Hoag & Eliot*'s provision of legal services to clients subject to the Act satisfies this minimum jurisdictional requirement.

⁸ 229 N.L.R.B. No. 80, 95 L.R.R.M. at 1041.

⁹ 29 U.S.C. §§ 152(6), 152(7) (1976).

¹⁰ See Brief in Support of Employer's Opposition to Petitioner's Request for Review at 39.

¹¹ 29 U.S.C. § 164(c)(1) (1976). This section effectuates one of the primary purposes of the National Labor Relations Act—the elimination of interruptions of in-

have a substantial effect on interstate commerce. The Board decided that they do.¹²

The principal reason for the Board's conclusion was the Supreme Court's recent decision in *Goldfarb v. Virginia State Bar*.¹³ In *Goldfarb*, the Court held that legal services performed locally may effect interstate commerce enough to bring a law firm within the ambit of the Sherman Act.¹⁴ As the Court stated, "[i]n the modern world it cannot be denied that the activities of lawyers play an important part in commercial intercourse . . ."¹⁵ The Board regarded *Goldfarb* as dispositive of the issue before it in *Foley, Hoag*.¹⁶ Since it was clear from the decision in *Goldfarb* that law firms substantially effect interstate commerce, the Board concluded that its assertion of jurisdiction over law firms was proper.¹⁷

As additional support for its decision to exercise jurisdiction, the Board noted that labor disputes in law firms may disrupt commerce. It observed that law firms play such a vital role in commerce that without their services clients

interstate commerce due to labor strife—by allowing the Board to employ its limited resources in only those cases where the employer's operations have a substantial impact on interstate commerce. See also 29 U.S.C. § 151 (1976). The Board has declined to assert its jurisdiction over employers who, in the Board's opinion, do not have a substantial impact on interstate commerce. See, e.g., Centennial Turf Club, Inc., 192 N.L.R.B. 698, 698, 77 L.R.R.M. 1894, 1895 (1971) (declined to assert jurisdiction over race tracks). In addition, the Board may set minimum jurisdictional standards for various classes of employers to insure that it deals only with that part of an industry which exerts a substantial impact on commerce. See, e.g., Salt & Pepper Nursery School & Kindergarten No. 2, 222 N.L.R.B. 1295, 1296, 91 L.R.R.M. 1338, 1339 (1976) (jurisdictional standard for day care centers: \$250,000 gross annual revenue); East Oakland Community Health Alliance, Inc., 218 N.L.R.B. 1270, 1271, 89 L.R.R.M. 1372, 1374 (1975) (jurisdictional standard for health care institutions: \$250,000 gross annual revenue for hospitals, \$100,000 gross annual revenue for nursing homes).

¹² 229 N.L.R.B. No. 80, 95 L.R.R.M. at 1043. See also Bodle, Fogel, Julber, Reinhardt & Rothschild, 206 N.L.R.B. 512, 516, 84 L.R.R.M. 1321, 1325 (1973) (Members Fanning and Penello, dissenting).

¹³ 421 U.S. 773 (1975). The Court held that a minimum fee schedule for title searches by attorneys violated the Sherman Act, 15 U.S.C. §§ 1 *et seq.* (1976), and reasoned that since title searches frequently are financed by funds from outside the state they are part of an "interstate transaction." 421 U.S. at 783-84. The local nature of the services performed does not necessarily negate their effect on interstate commerce. See *id.* at 783. Consequently, the Court found that a minimum fee schedule for title searches was a restraint on interstate commerce within the meaning of § 1 of the Sherman Act. *Id.* at 785. The Court cautioned, however, that "there may be legal services that involve interstate commerce in other fashions, just as there may be legal services that have no nexus with interstate commerce and thus are beyond the reach of the Sherman Act." *Id.* at 785-86.

¹⁴ 421 U.S. at 785-86.

¹⁵ *Id.* at 788.

¹⁶ 229 N.L.R.B. No. 80, 95 L.R.R.M. at 1043. Although *Goldfarb* involved the Sherman Act rather than the National Labor Relations Act, the Board was cognizant of Congress' intent in the National Labor Relations Act "to exercise fully the same plenary and comprehensive commerce power which it had exercised in regulating commerce under the Sherman Act." *Id.*, 95 L.R.R.M. at 1043 (quoting *Van Camp Sea Food Co.*, 212 N.L.R.B. 537, 537, 86 L.R.R.M. 1573, 1574 (1974)).

¹⁷ 229 N.L.R.B. No. 80, 95 L.R.R.M. at 1043.

would be unable to engage in normal business.¹⁸ Furthermore, recognizing that the impact on commerce resulting from the disruption of a law firm's operations is similar to the impact resulting from the disruption of the operations of other service enterprises over which the Board already has extended jurisdiction, the Board found no justification for distinguishing between law firms and other businesses for jurisdictional purposes.¹⁹

The Board's decision seems unassailable, particularly in light of the Board's customary test for determining whether an employer's activity has a sufficiently substantial impact on interstate commerce to warrant the exercise of jurisdiction. Under this test, the magnitude of a specific employer's interstate operations is irrelevant so long as there is some connection with commerce beyond *de minimis*.²⁰ The Board must consider the impact on commerce of the totality of operations by *all* employers in the class and the effect on commerce of *all* disruptions of these operations by labor strife.²¹ Under the Board's own test, it could continue to decline to assert jurisdiction over law firms only if it decided that law firms as a class do not have a substantial impact on interstate commerce. The Board noted in *Foley, Hoag* that although law firms' operations might be considered primarily local, law firms as a class significantly affect commerce because of their vital role in a multitude of commercial transactions.²² This has been recognized in contexts other than the NLRA. Legal services provided incident to real estate transactions have been held to fall within the parameters of commerce for purposes of the Sherman Act,²³ Title VII,²⁴ and the Fair Labor Standards Act of 1938.²⁵ While decisions finding jurisdiction in the context of other statutes are not controlling, they are highly probative because of the similarity between the jurisdictional grants in each of these statutes and that in the NLRA.²⁶ Consequently, given the implicit legislative preference in the Act²⁷ for the asser-

¹⁸ *Id.*, 95 L.R.R.M. at 1042.

¹⁹ *Id.*

²⁰ *See, e.g.*, NLRB v. Fainblatt, 306 U.S. 601, 607 (1939).

²¹ *See* NLRB v. Reliance Fuel Oil Corp., 371 U.S. 224, 226 (1963) (*per curiam*); Polish Nat'l Alliance v. NLRB, 322 U.S. 643, 648 (1944).

²² *See* 229 N.L.R.B. No. 80, 95 L.R.R.M. at 1042.

²³ *Id.*

²⁴ *See* 42 U.S.C. § 2000e(h) (1976); EEOC v. Rinella & Rinella, 401 F. Supp. 175, 181-82 (N.D. Ill. 1975).

²⁵ 29 U.S.C. § 201 *et seq.* (1976). *See* Wage & Hour Opinion Letter, 6 LAB. REL. REP. (BNA) § 91, at 904 (June 2, 1964).

²⁶ *Compare* Sherman Act, § 1, 15 U.S.C. § 1 (1976), and Title VII, 42 U.S.C. §§ 2000e(g), (h) (1976), with National Labor Relations Act, §§ 2(6), 2(7), 29 U.S.C. §§ 152(6), 152(7) (1976).

The Supreme Court has drawn on Sherman Act cases in deciding whether activities of employers affected interstate commerce for purposes of the National Labor Relations Act. *See generally* NLRB v. Fainblatt, 306 U.S. 601, 605 n.1 (1939); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 34 (1937).

²⁷ *Cf.* National Labor Relations Act, § 1, 29 U.S.C. § 151 (1976) ("It is . . . the policy of the United States to . . . protect the exercise by workers of full freedom of association . . ."). Congress manifested an intent to exercise the full sweep of its constitutional authority in the Act by regulating not only commerce but also matters which

tion of jurisdiction and the generally recognized importance of legal services in interstate commerce, the Board's decision in *Foley, Hoag* seems correct.

The decision in *Foley, Hoag*, however, does not mean that the Board intends to assert jurisdiction over all law firms. Consistent with its policy of setting minimum monetary standards for classes of employers,²⁸ the Board announced the jurisdictional standard for law firms in *Camden Regional Legal Services, Inc.*,²⁹ decided shortly after *Foley, Hoag*. In *Camden*, the Board stated that it would assert jurisdiction over law firms with gross annual revenues in excess of \$250,000.³⁰

In addition to the question of minimum jurisdictional requirements, the Board's decision in *Foley, Hoag* left open two other questions: whether legal service corporations are included in the Board's jurisdiction over law firms and whether the Board will approve a bargaining unit of attorneys in the context of a law firm.³¹ In another Survey year decision, *Wayne County Neighborhood Legal Services, Inc.*,³² the Board addressed the question whether legal service corporations are law firms for purposes of the Board's jurisdiction. The Board chose to treat a nonprofit legal services corporation as a law firm because it found no significant differences between the corporation and private law firms.³³ Consequently, the Board extended its jurisdiction to encompass nonprofit legal services corporations.³⁴

Wayne County also approved a bargaining unit of attorneys.³⁵ The approval of an attorney bargaining unit raises two concerns which, although they did not arise in *Wayne County*, are likely to be significant issues in other

"affect commerce." See *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226-27 (1963) (*per curiam*); *Polish Nat'l Alliance v. NLRB*, 322 U.S. 643, 648 (1944).

²⁸ See note 11 *supra*.

²⁹ 231 N.L.R.B. No. 47, 95 L.R.R.M. 1545 (Aug. 8, 1977).

³⁰ *Id.*, 95 L.R.R.M. at 1545. The Board based its jurisdictional standard for law firms on data collected by the Bureau of the Census and the American Bar Foundation. *Id.*, 95 L.R.R.M. at 1545 & n.5. However, the Board did not include any specific data in *Camden* which it considered relevant, nor did it indicate how it arrived at the \$250,000 figure. See *id.*

³¹ The prospective bargaining unit in *Foley, Hoag* consisted only of clerical and secretarial employees. See text at note 7 *supra*.

³² 229 N.L.R.B. No. 171, 95 L.R.R.M. 1209 (May 27, 1977).

³³ The Board stated that "[t]he only apparent differences between the Employer and a private law firm are that all attorneys receive an annual salary as opposed to sharing in the firms' profits, and the Employer, rather than being paid for services rendered, is annually funded independently of the clients represented." *Id.*, 95 L.R.R.M. at 1210-11 (footnote omitted). The Board also noted that the payment of the legal services attorneys is similar to the payment of associates and other nonpartners in private law firms. *Id.*, 95 L.R.R.M. at 1210 n.5.

³⁴ *Id.*, 95 L.R.R.M. at 1211. See *Legal Services for Nw. Pa.*, 230 N.L.R.B. No. 103, 95 L.R.R.M. 1403, 1404 (July 7, 1977); *Camden*, 231 N.L.R.B. No. 47, 95 L.R.R.M. at 1545.

³⁵ *Wayne County*, 229 N.L.R.B. No. 171, 95 L.R.R.M. at 1212. This did not mark, however, the first time the Board has approved a bargaining unit consisting of attorneys. See, e.g., *Air Line Pilots Ass'n, Int'l*, 97 N.L.R.B. 929, 931, 29 L.R.R.M. 1155, 1156 (1951) (labor union employer); *Lumbermen's Mut. Cas. Co.*, 75 N.L.R.B. 1132, 1137-39, 21 L.R.R.M. 1107, 1108-09 (1948) (insurance company employer).

cases: the notion of attorneys as confidential employees³⁶ and the exclusion of attorneys who perform supervisory functions.

Historically, the Board has declined to include in a bargaining unit employees "who assist and act in a confidential capacity to persons who exercise 'managerial' functions in the field of labor relations."³⁷ Labor attorneys representing management participate in the formulation and effectuation of their clients' labor relations policies and perform basically the same functions as a labor relations executive employed directly by the client.³⁸ Although, as members Murphy and Walther noted in dicta in *Foley, Hoag*, attorneys are arguably "confidential employees,"³⁹ they believe that any problems can be dealt with on an individual basis.⁴⁰ While the Board is willing to approve a bargaining unit of attorneys who either do not practice labor law or do not represent management in labor matters⁴¹—such as those in *Wayne County*—it may not approve a bargaining unit of attorneys in a law firm that conducts a management-related labor law practice.

The NLRA's exclusion of "supervisory employees" from the Act's protection also may limit the attorneys who will be included in such a unit.⁴² Attorneys who, through the exercise of independent judgment, hire, promote, discharge, assign, discipline or direct other employees of the firm may be excluded from a bargaining unit.⁴³

³⁶ *Foley, Hoag*, 229 N.L.R.B. No. 80, 95 L.R.R.M. at 1043 n.12. See Bodle, Fogel, Julber, Reinhardt & Rothschild, 206 N.L.R.B. 512, 514, 84 L.R.R.M. 1321, 1323 (1973).

In *Bodle*, the Board stated that "potential conflicts of interest are likely to develop if employees of law firms are to be represented by, and owe substantial loyalty to, an organization which may well have interests conflicting with those of clients whom the lawyers represent." *Id.* This concern arose in *Bodle* even though the Board was dealing with a potential bargaining unit that did not include attorneys. Any concern over a conflict of interest would seem to be enhanced where the prospective bargaining unit consists of attorneys since they undoubtedly have greater access to information about their clients than other firm employees. However, unlike the cases involving private law firms, *Wayne County* does not discuss conflict of interest. Perhaps, public legal service corporations whose clients are individuals rather than businesses do not present the opportunity for a conflict of interest. If the Board is still concerned about a possible conflict of interest in the context of a private law firm, it is not troubled by conflicts in the context of a public legal services corporation.

³⁷ *Ford Motor Co.*, 66 N.L.R.B. 1317, 1322, 17 L.R.R.M. 394, 395 (1946).

³⁸ See *Foley, Hoag*, 229 N.L.R.B. No. 80, 95 L.R.R.M. at 1043 n.12.

³⁹ *Id.* See *Air Line Pilots Ass'n, Int'l*, 97 N.L.R.B. 929, 930-31, 29 L.R.R.M. 1155, 1156 (1951).

⁴⁰ 229 N.L.R.B. No. 80, 95 L.R.R.M. at 1043 n.12.

⁴¹ See *Wayne County*, 229 N.L.R.B. No. 171, 95 L.R.R.M. at 1212 (approving a bargaining unit of attorneys not engaged in a labor law practice); *Air Line Pilots Ass'n, Int'l*, 97 N.L.R.B. 929, 931, 29 L.R.R.M. 1155, 1156 (1951) (approving a bargaining unit of attorneys employed by a labor union).

⁴² National Labor Relations Act, §§ 2(3), 2(11), 29 U.S.C. §§ 152(3), 152(11) (1976). See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274 n.4 (1974); *New York Univ.*, 221 N.L.R.B. 1148, 1149, 91 L.R.R.M. 1165, 1169 (1975).

⁴³ See *Wayne County*, 229 N.L.R.B. No. 171, 95 L.R.R.M. at 1212 (approved bargaining unit excluded supervisory attorneys).

Although the possible problems of attorneys as confidential or supervisory employees did not arise in *Wayne County*, where the Board was confronted with a bargaining unit of members of a nonprofit legal services corporation, the problems probably will arise when the Board faces a prospective bargaining unit of attorneys in private law firms. Thus, these issues are likely to be important in future cases involving Board certification of attorney bargaining units.

II. REPRESENTATIONAL AND ORGANIZATIONAL ACTIVITY

A. Elections

1. Conduct During Campaign: Shopping Kart

Since its inception, the National Labor Relations Board has struggled with the problem of misleading campaign statements as part of its responsibility to supervise union representation elections. In 1962 the Board announced in *Hollywood Ceramics Co.*¹ that it would set aside an election when one party has made a misrepresentation during the campaign which involved a substantial departure from the truth, at a time which prevented the other party from making an effective reply, so that the misrepresentation likely had a significant impact on the outcome of the election.² This *Survey* year, in *Shopping Kart Food Market, Inc.*,³ the Board expressly overruled its long-standing *Hollywood Ceramics* policy. The Board declared that it will no longer set aside representation elections on the basis of misleading campaign statements.⁴

The dispute in *Shopping Kart* arose when the union's vice-president, addressing employees on the night before a representation election, overstated the employer's profits for the preceding year.⁵ After the union's election victory, the employer filed an objection to certification of the union, alleging that the union vice-president misrepresented material facts which affected the election's outcome. The Regional Director dismissed the objection, concluding

¹ 140 N.L.R.B. 221, 51 L.R.R.M. 1600 (1962). *Hollywood Ceramics* involved a last-minute handbill, grossly understating the wage rates paid by the employer and exaggerating the rates paid by union organized plants in the same industry, which the Board found to be false and misleading. *Id.* at 225, 51 L.R.R.M. at 1602.

² *Id.* at 223, 51 L.R.R.M. at 1601. In addition to its power to order a new election, the Board also has the power, if it deems the interference with employee free choice sufficiently serious, to order an offending employer to recognize and bargain with a union which has lost a representation election. *NLRB v. Gissel Packing Co.*, 395 U.S. at 575, 610-615 (1969).

³ 228 N.L.R.B. 1311, 94 L.R.R.M. 1705 (1977).

⁴ *Id.* at 1313, 94 L.R.R.M. at 1708.

⁵ The union's vice-president and business manager told the employees that the employer's profits for the preceding year were \$500,000. Uncontroverted evidence later established the profits to be approximately \$50,000. *Id.* at 1311, 94 L.R.R.M. at 1705. The profitability of a company has been recognized as an important factor in an employee's decision whether to vote for union representation. *See Argus Optics v. NLRB*, 515 F.2d 939, 945, 89 L.R.R.M. 2280, 2284 (6th Cir. 1975).

that the statement did not constitute a material misrepresentation within the *Hollywood Ceramics* rule.⁶ The Board unanimously affirmed the Regional Director's refusal to set aside the election and, by a three to two margin, overruled *Hollywood Ceramics*.⁷

The majority in *Shopping Kart* stated that, as a general policy, the Board no longer will examine the truth or falsity of parties' campaign statements and thus will no longer invalidate elections on the basis of campaign misrepresentations.⁸ The Board noted, however, that it will continue to set aside elections where forged documents are used,⁹ or where the Board and its processes are improperly involved.¹⁰ The Board also stated that it will continue to intervene where campaign conduct other than misrepresentation interferes with an election.¹¹

The *Shopping Kart* Board, in narrowing the instances in which it will set aside a union representation election, did not ignore the *Hollywood Ceramics* Board's concern for ensuring employees complete freedom of choice in selecting a bargaining representative. The Board believed, however, that the standards announced in *Hollywood Ceramics* were too subjective and actually impeded rather than promoted employee free choice.¹² The majority noted that the Board and the courts applied these subjective standards inconsistently, resulting in a body of confusing rulings which did not provide work-

⁶ His dismissal was based on the absence of evidence that the employees believed the union's vice-president had any knowledge about the employer's profits. 228 N.L.R.B. at 1311, 94 L.R.R.M. at 1705. The Regional Director relied on Cumberland Wood and Chair Corp., 211 N.L.R.B. 312, 86 L.R.R.M. 1426 (1974), which held that for a statement to constitute a "misrepresentation" it must refer to a matter about which the person making the statement either has or could reasonably be perceived to have knowledge. *Id.* at 314, 86 L.R.R.M. at 1427. See also *NLRB v. A.G. Pollard Co.*, 393 F.2d 239, 242, 67 L.R.R.M. 2997, 2999 (1st Cir. 1968) (test is not "whether the speaker in fact had special knowledge, but . . . whether the listeners would believe that he had").

⁷ Members Penello and Walther joined in a plurality opinion overruling *Hollywood Ceramics*. Chairman Murphy concurred in a separate opinion. 228 N.L.R.B. at 1314, 94 L.R.R.M. at 1708. This discussion will refer to Members Penello, Walther and Murphy as the majority. Members Fanning and Jenkins dissented, urging continued adherence to *Hollywood Ceramics*. *Id.* at 1315, 94 L.R.R.M. at 1709.

⁸ *Id.* at 1311, 94 L.R.R.M. at 1705.

⁹ *Id.* at 1313-14, 94 L.R.R.M. at 1708. *E.g.*, *Cascade Corp.*, 205 N.L.R.B. 638, 84 L.R.R.M. 1093 (1973); *United Aircraft Corp., Pratt & Whitney Aircraft Div.*, 103 N.L.R.B. 102, 31 L.R.R.M. 1437 (1953).

¹⁰ 228 N.L.R.B. at 1313-14, 94 L.R.R.M. at 1708. *E.g.*, *Formco, Inc.*, 233 N.L.R.B. No. 5, 96 L.R.R.M. 1392 (Oct. 19, 1977); *Dubie-Clark Co.*, 209 N.L.R.B. 217, 85 L.R.R.M. 1322 (1974); *Allied Electric Prods., Inc.*, 109 N.L.R.B. 1270, 34 L.R.R.M. 1538 (1954).

¹¹ 228 N.L.R.B. at 1314, 94 L.R.R.M. at 1708.

¹² *Id.* at 1312, 94 L.R.R.M. at 1706. The exercise of a "free choice" implies that the employees have access to relevant information and that they cast their ballots under circumstances that are free from inaccurate representations of material facts and from influences that distort their assessment of the consequences of unionization. See generally Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 46-52 (1964).

able guidelines for assessing the propriety of campaign representations.¹³ Such uncertainty, in turn, provoked protracted litigation because the losing party in an election routinely objected to the opponent's campaign statements, necessitating Board inquiry and delaying implementation of the election results.¹⁴ Thus, the *Shopping Kart* majority perceived that the value of Board conducted elections in resolving questions of representation was undermined by the confusion and delay which the *Hollywood Ceramics* rule occasioned.¹⁵

In addition to finding the *Hollywood Ceramics* rule counterproductive, the Board posited another reason for not inquiring into election campaign statements. Specifically, the Board stated that employees are "mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it."¹⁶ In support of this position the majority cited a recent empirical study of NLRB elections. The study concluded that the majority of employees are not attentive to representation campaigns and that campaign statements therefore have no significant impact upon their voting behavior.¹⁷ Rather, the majority of employees are primarily influenced by job satisfaction, working conditions, and a predisposition for or against unions.¹⁸

Not all members of the *Shopping Kart* Board, however, viewed the *Hollywood Ceramics* rule as unwarranted. Dissenting Members Fanning and Jenkins defended the *Hollywood Ceramics* Board's conclusion that election safeguards are necessary to ensure that employees vote on the basis of complete and accurate information.¹⁹ The dissenters noted that the *Hollywood Ceramics* rule has three salutary effects. First, the rule has a significant deterrent effect. Parties are more conscious of the accuracy of their representations when they know that a material misrepresentation is grounds for the invalida-

The Board has characterized its responsibility to ensure employee free choice as follows:

In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish these conditions; it is also our duty to determine whether they have been fulfilled.

General Shoe Corp., 77 N.L.R.B. 124, 127, 21 L.R.R.M. 1337, 1341 (1948).

¹³ 228 N.L.R.B. at 1312, 94 L.R.R.M. at 1706.

¹⁴ *Id.* at 1312, 94 L.R.R.M. at 1707. One commentator observed that "[t]he utility of elections lies in final, definitive and unchallenged results; elections become useless when the results are challenged, uncertain, or rejected. Elections are intended to establish and stabilize representation, not to leave it unsettled and in dispute." Samoff, *NLRB Elections: Uncertainty and Certainty*, 117 U. PA. L. REV. 228, 228 (1968).

¹⁵ 228 N.L.R.B. at 1312, 94 L.R.R.M. at 1706.

¹⁶ *Id.* at 1313, 94 L.R.R.M. at 1707.

¹⁷ Getman and Goldberg, *The Behavioral Assumptions Underlying NLRB Regulation of Campaign Misrepresentation: An Empirical Evaluation*, 28 STAN. L. REV. 263, 283 (1976). See also Getman, Goldberg and Herman, *NLRB Regulation of Campaign Tactics: The Behavioral Assumptions on Which the Board Operates*, 27 STAN. L. REV. 1465 (1975).

¹⁸ Getman and Goldberg, *supra* note 17, at 269-73.

¹⁹ 228 N.L.R.B. at 1315, 94 L.R.R.M. at 1709. (Members Fanning and Jenkins, dissenting).

tion of an election.²⁰ Second, because employees are aware of the Board's election safeguards, they place confidence in the integrity of the election process.²¹ Third, by insisting upon truthful and accurate statements, the *Hollywood Ceramics* rule ensures that erroneous information does not influence the final election results.²²

Dissenting Members Fanning and Jenkins also challenged the majority's assertion that the Board and the courts have applied inconsistently the *Hollywood Ceramics* rule. They interpreted the variation between the Board's and the courts' application of *Hollywood Ceramics* not as "judicial disenchantment with the rule, but only disagreement with how strictly the rules should be applied."²³ Moreover, the dissenters believed any delay in the implementation of election results was an "unavoidable characteristic" of maintaining high campaign standards.²⁴ Finally, the dissenters predicted an increase in the number and degree of campaign misrepresentations as a result of what they characterized as *Shopping Kart's* "almost anything goes" standard.²⁵ After *Shopping Kart*, the dissenters reasoned, campaigning parties will barrage voters with misinformation which could preclude them from making a free and reasoned choice. Unlike the majority, the dissenters were unwilling to assume that employees can adequately decipher campaign misrepresentations.²⁶

After the close of the Survey year and while this issue was in the process of being printed, the Board overruled its Shopping Kart decision and readopted the standards set forth in Hollywood Ceramics. General Knit of California, Inc., 239 N.L.R.B. No. 101, 99 L.R.R.M. 1687 (Dec. 6, 1978). The General Knit Board believed that the Hollywood Ceramics rule better protects employee free choice and the fairness of Board elections than did Shopping Kart. Id., 99 L.R.R.M. at 1691. The Board also found that the "Hollywood Ceramics rule . . . assures the public that the Board will not tolerate substantial or material misrepresentations made in the final hours of an election campaign and thereby gives stability to any bargaining relationship resulting from the election." Id.

²⁰ *Id.* at 1317, 94 L.R.R.M. at 1710.

²¹ *Id.*, 94 L.R.R.M. at 1711.

²² *Id.*

²³ *Id.*, 94 L.R.R.M. at 1710. See *LaCrescent Constant Care Center, Inc. v. NLRB*, 510 F.2d 1319, 1324, 88 L.R.R.M. 2849, 2853 (8th Cir. 1975). The *LaCrescent* court quoted approvingly from *Hollywood Ceramics*, but differed with the Board's decision to certify the election, concluding that a particular statement "was a complete falsehood which cannot be characterized as less than a 'substantial departure from the truth' under the *Hollywood Ceramics* test." *Id.* See also *NLRB v. Carlton McLendon Furniture Co.*, 488 F.2d 58, 62, 85 L.R.R.M. 2177, 2179 (5th Cir. 1974) (court described its own parallel test and concluded that the Regional Director erred in finding a last-minute handbill immaterial); *NLRB v. Cactus Drilling Corp.*, 455 F.2d 871, 876, 79 L.R.R.M. 2551, 2555 (5th Cir. 1972) (court was not satisfied with the Board's "strict" application of the opportunity to reply criterion).

²⁴ 228 N.L.R.B. at 1318, 94 L.R.R.M. at 1711.

²⁵ *Id.* at 1316, 94 L.R.R.M. at 1710.

²⁶ *Id.*, 94 L.R.R.M. at 1709.

2. *Prepaid Union Dues: Aladdin Hotel*

In *Aladdin Hotel Corp.*,¹ decided this *Survey* year, the National Labor Relations Board held that a union may require a majority of employees to prepay a reduced initiation fee and one month's dues, both of which are nonrefundable, before the union files a petition for a representation election.² *Aladdin Hotel* is important because it further defines the Board's concept of fair union campaign tactics. In addition, *Aladdin Hotel* demonstrates the Board's refusal to extend the principles expressed in *NLRB v. Savair Manufacturing Co.*,³ the Supreme Court's most recent, major decision concerning permissible union campaign practices. The Board's decision in *Aladdin Hotel* therefore may foreshadow a conflict between the Board and the Court over what practices constitute permissible union campaign tactics.

The facts of *Aladdin Hotel* are sufficiently similar to those in *NLRB v. Savair Manufacturing Co.* to invite a comparison of the two cases. In *Savair*, a union circulated "recognition slips" among employees and promised that employees who signed the slips before the election would not have to pay "initiation fees" or "fines" if the union won the election.⁴ The Supreme Court held that the union's practice of waiving initiation fees for employees joining the union before the representation election, but not waiving fees for employees joining after the election, enabled the union "to buy endorsements and paint a false portrait of employee support during its election campaign."⁵ Furthermore, the Court noted that although employees who signed recognition slips were not legally bound to vote for the union, they nevertheless may have felt obligated to do so.⁶ The *Savair* Court thus held that the union's practice of waiving initiation fees only for employees who signed recognition slips before the representation election coerced employees to support the union and thus undermined their freedom of choice.⁷

The dispute in *Aladdin Hotel* revolved around the union's policy of requiring a majority of the prospective bargaining unit employees to pay a reduced initiation fee and one month's dues before the union would file a petition for a representation election.⁸ If, after receiving the advances and filing the petition, the union won the election, it would apply these funds to the employees' first monthly dues.⁹ If, however, the union lost the election, it would retain

¹ 229 N.L.R.B. 499, 95 L.R.R.M. 1150 (1977).

² *Id.* at 499, 95 L.R.R.M. at 1151. *Cf.* *Jarp Corp.*, 230 N.L.R.B. No. 97, 95 L.R.R.M. 1425, 1425 (July 6, 1977) (union policy of retaining initiation fees paid prior to representation election, regardless of election outcome, was proper).

³ 414 U.S. 270 (1973).

⁴ *Id.* at 272-73.

⁵ *Id.* at 277.

⁶ *Id.* at 277-78.

⁷ *Id.* at 278. Although, as the Court noted, the union did not violate any specific provision of the National Labor Relations Act, the Court concluded that the union's practice violated the general principles underlying § 7 and § 9(c)(1)(A), 29 U.S.C. §§ 157, 159(c)(1)(A) (1976). 414 U.S. at 278-79.

⁸ *Aladdin Hotel*, 229 N.L.R.B. at 499, 95 L.R.R.M. at 1151. If a majority of employees did not pay the initiation fees and first monthly dues in advance, the union would not file a representation petition and would refund the advances. *Id.*

⁹ *Id.*

the funds to defray its campaign expenses.¹⁰ In contrast to the union's practices in *Savair*, the union in *Aladdin Hotel* purported to offer reduced initiation fees to employees who paid their union dues *after* the representation election as well as those who paid the dues *before* the election, and hence, did not directly violate the *Savair* rule.¹¹ Nevertheless, the employer in *Aladdin Hotel* argued that although the union's policy did not directly violate the *Savair* rule, it did violate the spirit of the rule by undermining the freedom of choice of those employees who prepaid the union dues.¹²

In rejecting the employer's contention, the Board first noted that the union did not improperly induce employees to pay the initiation fees prior to the representation election.¹³ The Board remarked that, unlike the union's practice in *Savair*, the union's practice in this case was not objectionable on the grounds that it allowed the union to "buy endorsements" and present an exaggerated display of employee support. Indeed, the Board speculated that the union's practice served to give an understated indication of employee support.¹⁴ The Board concluded that although the union's policy led a majority of employees to make an early commitment to the union, this commitment was not binding, and therefore, the Board found the union's practice unobjectionable.¹⁵ The Board also rejected the employer's contention that the employees' contribution of money, as opposed to other forms of employee support, created an unalterable obligation to vote for the union.¹⁶ Thus, the Board held that the union's practice did not unlawfully induce or coerce employees to vote for the union in the representation election.

Although the Board's holding does not literally contradict the *Savair* rule, it does violate the principles behind the rule in several ways. As the dissenting members of the *Aladdin Hotel* Board, Members Penello and Walther, suggested, the Board underestimated the economic "arm twist" to vote for the union caused by the employees' prepayment of dues and their knowledge that the money would be "lost" if the union lost the election.¹⁷ More importantly, however, it is suggested that the Board misconceived the proper focus of its examination of union campaign tactics by emphasizing the coerciveness of the

¹⁰ *Id.*

¹¹ *Id.* Although *Savair* dealt only with a union policy of *waiving* initiation fees for employees who joined the union prior to a representation election, 414 U.S. at 272-73, the Board extended the *Savair* doctrine to cover a union's practice of *reducing* initiation fees for employees who joined the union prior to an election. See B.F. Goodrich Tire Co., 209 N.L.R.B. 1175, 1175-76, 85 L.R.R.M. 1529, 1529 (1974).

¹² See text at notes 23-25, *infra*.

¹³ 229 N.L.R.B. at 499, 95 L.R.R.M. at 1151. Indeed, the Board believed that if the union's policy had any effect on employees' decisions whether to support the union, the effect was to discourage their support. As the Board stated, "[o]ne might well question the wisdom of a union organizing policy that offers nothing to prospective employees but instead seeks their financial support for the unionization effort." *Id.* at 500, 95 L.R.R.M. 1151.

¹⁴ *Id.* at 500 & n.4, 95 L.R.R.M. at 1152 & n.4.

¹⁵ *Id.* at 500, 95 L.R.R.M. at 1151.

¹⁶ *Id.* at 500 & n.3, 95 L.R.R.M. at 1151-52 & n.3.

¹⁷ *Id.* at 501, 95 L.R.R.M. at 1152-53 (Members Penello and Walther, dissenting).

solicitation of dues rather than the later effect of the solicitation upon the employees' freedom of choice in the representation election.

The source of the Board's regulatory control over campaign practices, sections 9(a) and (c) of the NLRA,¹⁸ concerns employees' selection of bargaining representatives via a balloting process rather than an individual solicitation process. Section 9(a) of the Act allows employees to choose or reject a bargaining agent by majority rule; section 9(c) of the Act gives effect to section 9(a) by authorizing the Board to take a secret ballot of employees to determine their choice.¹⁹ In conjunction with its authority to direct the balloting of employees, the Board has wide discretion to establish procedures safeguarding employees' freedom of choice in the election.²⁰ Thus, the *Savair* rule—prohibiting unions from offering free membership in the union to employees in exchange for an early commitment to the union—stems from the Board's authority to regulate the election of bargaining representatives and to safeguard employees' freedom of choice in the election.²¹ In light of the Board's responsibility to safeguard employees' freedom of choice, the Board's emphasis in *Aladdin Hotel* on the question whether the union coerced employees to prepay the union dues was improper. Instead, the Board should have emphasized the question whether the union's prepayment and forfeiture policy improperly induced employees who prepaid the dues to vote for the union.²²

In addition to the Board's failure to accord determinative weight to the pertinent issue, when the Board did address this issue, it underestimated the economic persuasion to vote for the union which the union's prepayment and forfeiture policy created. As the dissenters noted, the union itself was aware that its prepayment and forfeiture policy was a strong inducement to vote for the union, at least for those employees who had prepaid the dues.²³ One of the union's primary reasons for instituting the policy was to insure before the election that a majority of the employees were committed to the union and were not simply "window shopping."²⁴ As the dissent stated:

¹⁸ 29 U.S.C. §§ 159 (a), (c) (1976).

¹⁹ *Id.*

²⁰ *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946).

²¹ *Savair*, 414 U.S. at 276-77.

²² Moreover, the Board's conclusion in *Aladdin Hotel* that the union did not improperly induce employees to prepay the dues disregards the Court's suggestion in *Savair* that employees' fear of facing a wrathful union regime, if the union wins the election, may induce them to indicate support for the union prior to the election whether or not they actually intend to vote for the union. *See id.* at 281. If an employee's refusal to sign a recognition slip presents an ominous situation, as in *Savair*, an employee's refusal to help out a union financially at a time when it claims to need economic support, as in *Aladdin Hotel*, is an even more ominous situation. However, the Board did not consider whether employees' fear of facing an angry union regime, should the union win, may have influenced their decision to indicate support for the union by prepaying the dues.

²³ 229 N.L.R.B. at 501, 95 L.R.R.M. at 1153 (Members Penello and Walther, dissenting).

²⁴ *Id.* at 501, 95 L.R.R.M. 1152. The union's other reason for its prepayment and forfeiture policy was to help defray the costs of lost elections. *Id.*

Since under the Union's policy the only way an employee can avoid losing his prepaid money is to vote for the Union regardless of how his sentiments may have changed during the course of the election campaign, this policy clearly undermines the freedom of choice [in the election] which the Board seeks to foster.²⁵

The dissenters' position that the union's prepayment and forfeiture policy coerced employees who had prepaid the dues to vote for the union finds support in *Savair*. In *Savair*, the Court found that although offering free membership in the union to employees who signed union recognition slips did not legally bind employees to vote for the union, "certainly there may be some employees who would feel obligated to carry through on their stated intention to support the union."²⁶ The Court implied that the feeling of obligation created by the employees' written commitment to the union undermined their freedom of choice in the election.²⁷ If the *Savair* Court is correct, giving money to the union prior to an election creates an even stronger inducement to vote for the union.²⁸ Consequently, for those employees who prepaid the dues, the union's practice in *Aladdin Hotel* undermined the freedom of choice in the election to an even greater extent than the union's practice in *Savair*.²⁹

The Board's refusal to extend *Savair* to analogous situations, presents a potential for conflict between the Board and the courts over what practices constitute permissible union campaign tactics. For the present, however, it is clear that *Aladdin Hotel* will have a significant impact on union campaign practices. Obviously, *Aladdin Hotel's* approval of a union policy requiring a majority of employees to prepay nonrefundable initiation fees will help unions to de-

²⁵ *Id.* at 501, 95 L.R.R.M. at 1153. The majority of the Board concluded that employees who prepaid the dues "lost" the money the moment they paid the dues, since, win or lose, the union retained the money; hence, the employees had nothing more to lose by voting against the union. *Id.* at 500, 95 L.R.R.M. at 1151. This conclusion, however, ignores the presumption that a successful union would use the dues in its efforts to help the employees. Thus, dues paid to a successful union are not "lost" but are simply an advance against services to be rendered to the employees in the future, whereas dues paid to an unsuccessful union are, indeed, "lost" since the union cannot render the services to the employees despite the advance.

²⁶ *Savair*, 414 U.S. at 277-78.

²⁷ *Id.*

²⁸ See *Aladdin Hotel*, 229 N.L.R.B. at 501, 95 L.R.R.M. at 1153 (Members Penello and Walther, dissenting); *Jarp Corp.*, 230 N.L.R.B. No. 97, 95 L.R.R.M. 1425, 1426 (July 6, 1977) (Member Walther, dissenting).

²⁹ The dissent raises one other, less significant flaw in the Board's decision in *Aladdin Hotel*. The dissent maintained that the Board erred in failing to consider whether the promise of reduced initiation fees for employees joining the union during the "organizing campaign" led employees to believe that the reduced fees were available only to employees joining the union *before* the election. 229 N.L.R.B. at 502, 95 L.R.R.M. at 1153. This criticism of the Board's decision seems valid because of the meaning normally attributable to the phrase "organizing campaign." Indeed, the Board recently held that a union's promise of reduced initiation fees during "this campaign" was the equivalent of a promise of reduced fees only for employees joining the union *before* the election. *Deming Div. Crane Co.*, 225 N.L.R.B. 657, 659, 93 L.R.R.M. 1181, 1182 (1976). Consequently, the Board in that decision held that the union's promise violated the *Savair* rule. *Id.*

fray the expenses of conducting union campaigns. Unions can assess early in the campaign the strength of employee support and can discontinue campaigns if the union does not command majority support, thus saving some of the costs of conducting a full campaign that ultimately would prove unsuccessful. Moreover, even if the union loses the election, it still can use the dues collected to offset the expense of the unsuccessful campaign. Consequently, unions adopting an *Aladdin Hotel* prepayment and forfeiture policy can insure that virtually every full campaign it conducts will end either in a successful election or one which does not deplete union funds.

B. Bargaining Unit Determination

1. Religious/Lay Faculty Units: Niagara University; St. Francis College.

Since 1970, the National Labor Relations Board has asserted jurisdiction in labor disputes involving private nonprofit colleges and universities.¹ This assumption of jurisdiction has required the Board to determine appropriate bargaining units for teachers at colleges founded by religious orders. Because the teaching faculty at such a college often consists of both lay and religious members,² the Board frequently has faced the question whether to exclude from the bargaining unit faculty who are members of the founding religious order. In 1971, the Board handed down its first decision on this issue in *Fordham University*.³ In *Fordham*, the Board included the full-time Jesuit faculty members of Fordham University in the faculty bargaining unit.⁴

¹ See Cornell Univ., 183 N.L.R.B. 329, 334, 74 L.R.R.M. 1269, 1275 (1970). See also NLRB v. Wentworth Inst., 515 F.2d 550, 556, 89 L.R.R.M. 2033, 2037 (1st Cir. 1975).

For an analysis of problems spawned by this assumption of jurisdiction see generally Kahn, *The NLRB and Higher Education: The Failure of Policymaking Through Adjudication*, 21 U.C.L.A. L. REV. 63 (1973); Menard and DiGiovanni, *NLRB Jurisdiction over Colleges and Universities: A Plea for Rulemaking*, 16 WM. & MARY L. REV. 599 (1975).

The determination of appropriate bargaining units for college teaching professionals has been particularly troublesome. Unit determination problems have included: multiple campus versus single campus units, department chairmen as supervisors, part-time faculty, satellite faculty, and the collective exercise of supervisory authority. See Menard, *Exploding Representation Areas: Colleges and Universities*, 17 B.C. IND. & COM. L. REV. 931 (1976); Moore, *The Determination of Bargaining Units for College Faculties*, 37 U. PITT. L. REV. 43 (1975).

² There are approximately 250 colleges and universities in the United States founded by religious orders or dioceses. The percentage of faculty who are of the same religious order as that founding the institution varies widely. See College and University Department, National Catholic Educ. Ass'n, *Relations of American Catholic Colleges and Universities with the Church* (April 1976), reprinted in 74 CATHOLIC MIND 51, 53 (Oct. 1976).

³ 193 N.L.R.B. 134, 78 L.R.R.M. 1177 (1971).

⁴ In *Fordham*, the union wished to include the Jesuits in the unit. The employer took no position on this issue. The Jesuits constituted 70 of the 500 full-time faculty and could leave the order at any time. There was no evidence that membership in the order was "in any way inconsistent with collective bargaining with respect to a

Two years after *Fordham*, in *Seton Hill College*,⁵ the Board excluded the religious faculty members of Seton Hill College from the faculty bargaining unit. In so doing, the Board overruled its earlier decision in *Fordham*, to the extent that *Fordham* was inconsistent with *Seton Hill*.⁶ In *Seton Hill*, the college was owned by the Order of the Sisters of Charity of Seton Hill, and fifty percent of the college's board of trustees were members of the order.⁷ Due to their vow of poverty, religious faculty members did not receive wages directly. Instead, these wages were paid to the order, and, pursuant to a contractual agreement, the order returned a fixed percentage of the salaries to the college.⁸ The Board excluded members of the order from the faculty bargaining unit primarily for two reasons. First, the Board found that because the order owned and administered the college, and because each member of the order had taken a vow of obedience, a religious faculty member would "be subject to a conflict of loyalties."⁹ Second, the Board determined that religious faculty members did not have the same economic interests as lay faculty members since they had taken a vow of poverty and were under a contractual obligation to return a substantial part of their salaries to the college.¹⁰ Accordingly, the Board concluded that a separate bargaining unit of lay faculty was appropriate.

During the *Survey* year, two courts of appeals, the Second Circuit in *Niagara University v. NLRB*¹¹ and the Third Circuit in *NLRB v. St. Francis College*,¹² reversed bargaining unit determinations by the Board which, on the basis of *Seton Hill*,¹³ had excluded religious faculty. In each case, the circuit courts

Jesuit's salary or other terms and conditions of employment." *Id.* at 139, 78 L.R.R.M. at 1183-84.

⁵ 201 N.L.R.B. 1026, 82 L.R.R.M. 1434 (1973). Seton Hill College was founded by the Order of the Sisters of Charity of Seton Hill. In 1973, members of the order constituted 58 of the 92 persons on the faculty. *Id.* at 1026, 82 L.R.R.M. at 1434.

⁶ *Id.* at 1027 n.4, 82 L.R.R.M. at 1435 n.4.

⁷ *Id.* at 1026, 82 L.R.R.M. at 1434.

⁸ *Id.* at 1026-27, 82 L.R.R.M. at 1435.

⁹ *Id.* at 1027, 82 L.R.R.M. at 1435.

¹⁰ *Id.* The Board also stressed that the college had established a separate program of fringe benefits for the lay faculty. *Id.*

¹¹ 558 F.2d 1116, 95 L.R.R.M. 3354 (2d Cir. 1977).

¹² 562 F.2d 246, 96 L.R.R.M. 2134 (3d Cir. 1977).

¹³ Subsequent to *Seton Hill*, the Board relied on this decision to exclude members of religious orders from the bargaining unit when the particular order operated the institution. Thus, the Board excluded religious faculty members in Catholic high schools from the teachers' bargaining unit in *Cardinal Timothy Manning*, 223 N.L.R.B. 1218, 1223, 92 L.R.R.M. 1114, 1120 (1976) (parochial high schools in the Los Angeles area). Similarly, it excluded from bargaining units health care employees of a religious order which owned and operated a hospital, nursing home or healthcare center. See *St. Rose de Lima Hosp., Inc.*, 223 N.L.R.B. 1511, 1513, 92 L.R.R.M. 1181, 1184 (1976) (exclusion of nurses of the Sisters of St. Dominic in hospital owned and operated by the order); *Carroll Manor Nursing Home*, 202 N.L.R.B. 67, 68, 82 L.R.R.M. 1479, 1481 (1973) (exclusion of 15 Sisters of the Order of Carmelite Sisters who lived and worked at the home); *Saint Anthony Center*, 220 N.L.R.B. 1009, 1011, 90 L.R.R.M. 1405, 1409 (1975) (exclusion of members of the Sisters of Charity of the Incarnate Word whose order owned and operated the geriatric care center).

distinguished *Seton Hill*, and found the Board's unit determinations arbitrary and unsupported by substantial evidence in the record.

In *Niagara*, the university refused to bargain with the Niagara University Lay Teachers Association, the certified representative of full-time faculty members, because the bargaining unit excluded religious faculty.¹⁴ Niagara College was founded by the Vincentian fathers, and is located in the Eastern Province of that order. The religious faculty at the college was composed of eighteen Vincentian fathers—seventeen from the Eastern Province and one from the New England Province—and three nuns.¹⁵ The college held title to all buildings and property on the campus. A seventeen member board of trustees, of whom not more than one-third could be Vincentians, governed Niagara.¹⁶ As in *Seton Hill*, the Eastern Province Vincentians teaching at the college did not receive their salary checks directly, and these were sent instead to the Province.¹⁷ However, although the Eastern Province annually donated a portion of these wages to the college, the Province was not, as in *Seton Hill*, under a contractual obligation to do so.¹⁸ The Regional Director nevertheless concluded that the religious faculty at Niagara College did not share a "community of interest with the lay faculty," and therefore excluded them from the bargaining unit.¹⁹ The Board, without opinion, upheld the Regional Director's decision.²⁰

After Niagara College filed a petition for review with the Second Circuit, the Board issued a decision clarifying the original bargaining unit determination. In *Niagara University* [Niagara II],²¹ the Board amended the original bargaining unit to include the four faculty members who were from religious orders other than the Eastern Province—three nuns and a priest from the New England Province—but maintained its exclusion of faculty members from the Eastern Province.²²

¹⁴ 558 F.2d at 1118, 95 L.R.R.M. at 3355.

¹⁵ The full-time faculty consisted of 134 lay and twenty-one religious members. *Id.* at 1117, 95 L.R.R.M. at 3354.

¹⁶ The Provincial of the Congregation of the Mission, Eastern Province, was required to be an ex officio member of the board. *Id.* at 1117-18, 95 L.R.R.M. at 3354-55.

¹⁷ *Id.* at 1121 & n.4, 95 L.R.R.M. at 3357 & n.4.

¹⁸ *Id.*

¹⁹ *Id.* at 1118, 95 L.R.R.M. at 3354-55.

²⁰ *Id.* Accordingly, the Board found that Niagara engaged in unfair labor practices under the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), (5) (1976). See *Niagara Univ.*, 226 N.L.R.B. 918, 920, 94 L.R.R.M. 1082, — (1976).

²¹ *Niagara Univ.*, 227 N.L.R.B. No. 33, 94 L.R.R.M. 1001, 1003 (Dec. 16, 1976) [hereinafter *Niagara II*].

²² The Board found that, unlike the Eastern Province fathers, neither the Vincentian father of the New England Province nor the three nuns were "part of the employer." The Board also found that their vows of poverty did not establish a separate community of interests between lay and religious faculty. *Id.*, 94 L.R.R.M. at 1001-02. In the Board's opinion, it was only important in finding a community of interest with the lay faculty that these religious faculty members did not return all or part of their paychecks to the employer—Niagara University—through their religious order as did the Eastern Province fathers. *Id.*, 94 L.R.R.M. at 1003.

Reviewing the Board's exclusion of the Eastern Province Vincentians, the Second Circuit first found that the identity of interests between the Eastern Province Vincentians and the employer was not sufficient to exclude them from the bargaining unit.²³ The court next determined that the Eastern Province Vincentians' vow of poverty should have no bearing on whether they shared a community of interest with the lay faculty members.²⁴ Likewise, the court of appeals found that the Eastern Province's return of a portion of its members' salaries to the college constituted a non-obligatory gift which did not affect the community of interest between the religious and lay faculty members.²⁵ The Second Circuit thus concluded that the Board's exclusion of the Eastern Province Vincentians from the faculty bargaining unit was arbitrary and unsupported by substantial evidence.²⁶

St. Francis presented a factual situation similar to *Niagara*. Founded by the Franciscan Order, St. Francis College operated as a nonprofit corporation and held title to all college property.²⁷ The College was administered by a board of trustees, a majority of whom were Franciscans.²⁸ Salaries of Franciscan faculty members were paid directly to the monastery where they lived, which in turn made a substantial voluntary gift back to the college.²⁹ As in *Niagara*, the Board excluded the religious faculty members from the bargaining unit,³⁰ finding that the "special relationship" between the Franciscan faculty and St. Francis College created a conflict of loyalties for the Franciscans, and that the Franciscans' interest in their salaries differed significantly from that of the lay faculty.³¹

Reviewing the Board's decision, the Third Circuit questioned the Board's reliance on *Seton Hill*, and concluded that the Board had abused its discretion in excluding the Franciscans.³² The court of appeals found nothing in the record indicating that the Franciscans differed from the lay faculty in terms of their employee-employer relationship.³³ Furthermore, the court held that the Franciscans' vow of poverty was an inconsequential factor in unit determination.³⁴ Unlike the situation in *Seton Hill*, the Franciscan monastery's return to the college of part of the faculty members' salaries was a gift.³⁵ Accordingly, the court denied the Board's petition to enforce an unfair labor practice order against St. Francis College.³⁶

²³ 558 F.2d at 1119, 95 L.R.R.M. at 3356.

²⁴ *Id.* at 1121-22, 95 L.R.R.M. at 3358.

²⁵ *Id.*

²⁶ *Id.*

²⁷ 562 F.2d at 251, 96 L.R.R.M. at 2137.

²⁸ *Id.*

²⁹ *Id.*

³⁰ The faculty bargaining unit consisted of sixty-six full-time faculty members. Six members of the Franciscan Order were excluded from the unit by the union. *Id.* at 248, 96 L.R.R.M. at 2135.

³¹ *Id.* at 253, 96 L.R.R.M. at 2138.

³² *Id.* at 255, 96 L.R.R.M. at 2140-41.

³³ *Id.* at 253, 96 L.R.R.M. at 2139.

³⁴ *Id.* at 254-55, 96 L.R.R.M. at 2139-40.

³⁵ *Id.* at 255, 96 L.R.R.M. at 2140.

³⁶ A concurring opinion noted the lack of objective evidence offered by the Board, but emphasized that the holding of this case was limited to the facts before the

The Second Circuit, in *Niagara*, and the Third Circuit, in *St. Francis*, each focused on the two major justifications advanced by the Board for excluding the religious faculty from the faculty bargaining units: the lack of common economic interests among religious and lay faculty because of the religious members' vow of poverty, which included a contribution of part of their salary to their employer-college, and the alleged identity of interest between the employer and the religious faculty.³⁷ As to the first justification, the Second Circuit in *Niagara* noted an inconsistency in the Board's position.³⁸ Although the Board excluded Eastern Province Vincentian faculty members from the Niagara bargaining unit on the ground that the fathers' vow of poverty³⁹ undercut any "common economic interest" among religious and lay faculty members, the Board, in its interim clarification decision in *Niagara II*,⁴⁰ included in the bargaining unit religious faculty who, though not Eastern Province Vincentians, had taken a vow of poverty.⁴¹ The Board stated in *Niagara II* that it did "not believe that the way a person chooses to spend his or her money is a relevant consideration with respect to questions of unit placement."⁴² According to the Board's own analysis, therefore, the vow of pov-

court. *Id.* at 255, 257, 96 L.R.R.M. at 2141, 2143 (Rosenn, J., concurring).

It must be noted that in neither *Niagara* nor *St. Francis* did the Board or court of appeals address the problems of religious discrimination or first amendment rights raised by the exclusion of the religious faculty. For example, *St. Francis College* argued that the exclusion of the Franciscans violated: (1) the first amendment's free exercise and establishment clauses, (2) Title VII of the Civil Rights Act of 1964, and (3) "the equal protection guarantee of the due process clause of the fifth amendment." 562 F.2d at 255 n.15, 96 L.R.R.M. at 2141 n.15. However, the court in *St. Francis*, like the court in *Niagara*, based its decision on secular labor law principles of unit determination.

The first amendment issue has been raised recently in a similar context in cases involving the Board's assumption of jurisdiction over Catholic elementary and secondary schools. This assumption of jurisdiction has been successfully challenged as violative of the first amendment principle of separation of church and state. See *Catholic Bishop of Chicago v. NLRB*, 559 F.2d 1112, 95 L.R.R.M. 3324 (7th Cir. 1977), *cert. granted*, 98 S.Ct. 1231 (1978).

³⁷ In *St. Francis*, the court characterized the concept as a "conflict of loyalties." 562 F.2d at 253, 96 L.R.R.M. at 2138.

³⁸ 558 F.2d at 1120-21, 95 L.R.R.M. at 3356-57.

³⁹ The Regional Director found:

Under his vow of poverty, a Vincentian Father has a right to ownership but can not use the property without the permission of his superiors. All monies earned by the Vincentian Fathers are given to their Provinces and they in return receive a monthly personal allowance. Further, the members of the Order are provided with food, clothing and shelter by their Provinces.

558 F.2d at 1120, 95 L.R.R.M. at 3356.

⁴⁰ 227 N.L.R.B. No. 33, 94 L.R.R.M. 1001 (Dec. 16, 1976).

⁴¹ See text and notes 21-22 *supra*.

⁴² 227 N.L.R.B. No. 33, 94 L.R.R.M. at 1003 (footnotes omitted). In an accompanying footnote the Board stated:

The alleged pertinence of questions on how money is spent seems in part to rest on an unstated and unproven assumption that a desire for income is somehow related to the particular manner in which it is spent; i.e., on how

erty taken alone did not suffice to separate the Vincentians' interests from those of the lay faculty.⁴³ Rather, as the Board indicated in *Niagara II*, the inquiry as to whether the fathers shared a community of interests with the lay faculty should focus on the fact that the Vincentian fathers assigned their paychecks to their Province which in turn made a gift to the university.⁴⁴

The *Niagara* court then proceeded to examine the significance of the Vincentians' monetary contribution to the university. The Second Circuit found that there was no evidence that the Eastern Province Vincentians were under a *contractual obligation* to return part of their salaries to the university.⁴⁵ On this basis, the court distinguished *Seton Hill*, where such a contractual obligation had existed.⁴⁶ The court further determined that it was of no consequence that the Vincentian faculty's paychecks were sent directly to the Province; the controlling consideration was that the money returned to the university by the Province was a *gift*.⁴⁷ The court therefore concluded that the Vincentians' return of a portion of their salary to the school through their Province was not sufficient to undercut the community of interests between the lay and religious faculty.⁴⁸

In *St. Francis*, the Third Circuit also referred to the Board's language in *Niagara II*⁴⁹ in assessing the effect of the Franciscan faculty members' vow of poverty.⁵⁰ As did the Second Circuit in *Niagara*, the Third Circuit refused to

much it is needed. The whole concept here is at best a morass with which this Board has no special expertise to deal. Furthermore, it is beside the point. To take an example, an independently wealthy lay professor would not be excluded from a unit simply because he or she did not "need" the income or had no interest in a pay raise.

Id., 94 L.R.R.M. at 1003 n.6.

⁴³ Indeed, the Board's analysis concerning the insignificance of the vow of poverty with regard to the unit's community of interests seems to be supported by the assertions of commentators that economic interests do not play a substantial role in faculty organization in the first place. See Kahn, *supra* note 1, at 76.

⁴⁴ See 558 F.2d at 1120-21, 95 L.R.R.M. at 3356 (quoting 227 N.L.R.B. No. 33, 94 L.R.R.M. at 1003 n.7).

⁴⁵ 558 F.2d at 1121, 95 L.R.R.M. at 3357.

⁴⁶ See text at note 8 *supra*.

⁴⁷ The court asserted that *Niagara* conflicted with the Board's earlier ruling in *D'Youville College*, 225 N.L.R.B. 792, 92 L.R.R.M. 1578 (1976), where the Grey Nuns on the faculty returned part of their salaries to their employer. 558 F.2d at 1121, 95 L.R.R.M. at 3357. See note 54 *infra*. This reading of *D'Youville* seems incorrect, however. In *D'Youville*, the Board deemed the salary issue inconsequential only because all the parties (lay faculty and employer) agreed that the nuns shared a sufficient community of interest to be included in the same unit with the lay faculty. See 225 N.L.R.B. at 792, 92 L.R.R.M. at 1579.

⁴⁸ 558 F.2d at 1121-22, 95 L.R.R.M. at 3358. The *Niagara* court concluded that the terms and conditions of employment were practically identical for both lay and religious faculty members. 558 F.2d at 1121, 95 L.R.R.M. at 3357-58. Religious faculty were not paid "substantially less." Cf. *Nazareth Regional High School v. NLRB*, 549 F.2d 873, 879 n.3, 94 L.R.R.M. 2897, 2900 n.3 (2d Cir. 1977) (religious faculty paid "substantially less" than lay faculty). Differences in fringe benefits were therefore insufficient to separate the religious from the lay faculty.

⁴⁹ See note 42 *supra*.

⁵⁰ The court discounted the assertion that because of their vow of poverty, the Franciscans were less interested in their salaries and thus unable to share interests with

differentiate between religious and lay faculty members simply because religious faculty members had taken a vow of poverty. The issue in *St. Francis*, as in *Niagara*, was instead whether the return of part of the salaries by the monastery to the college was sufficient to negate a community of interest between lay and religious faculty. The Third Circuit deemed the return of the salaries a gift, not an obligation, and found no basis for excluding the Franciscans from the bargaining unit.⁵¹

The second issue facing the courts in *Niagara* and *St. Francis* was the religious faculty's alleged identity of interest with the employer-college. Adopting different approaches to the issue, both circuit courts found no identity of interest between the employer and the religious faculty. The court in *Niagara* approached this issue by focusing on the ownership and operation of the university. Since the Vincentians neither owned nor operated Niagara,⁵² the court rejected the Board's reliance on *Seton Hill*, where the religious order did own and operate the college,⁵³ as proving an identity of interest between the religious faculty and Niagara. Rather, the court found the issue controlled by the Board's more recent decision in *D'Youville College*.⁵⁴ In *D'Youville*, the college was a corporation whose governing powers were vested in a board of trustees of whom no more than one-third could be members of religious orders.⁵⁵ In light of this corporate structure, the Board in *D'Youville* found no

the lay faculty. In fact, the court noted that the Franciscans *did* have an interest in the size of their salaries. 562 F.2d at 254, 96 L.R.R.M. at 2139-40 (testimony from hearings to the effect that the Franciscans were interested in bringing in additional money to the Province and, consequently, to the religious community).

⁵¹ *Id.* at 255, 96 L.R.R.M. at 2140. The Board asserted that since the religious faculty had no right to prevent the return of their salary to the college (usually amounting to 50% of the salary), this scheme was the equivalent of paying the religious faculty half of the salary paid to the lay faculty. The Board argued that this substantial difference in salary justified exclusion from the bargaining unit. *Id.* at 255 n.14, 96 L.R.R.M. at 2140 n.14; see *Nazareth Regional High School v. NLRB*, 549 F.2d 873, 879 n.3, 94 L.R.R.M. 2897, 2900 n.3 (2d Cir. 1977).

In his concurring opinion in *St. Francis*, 562 F.2d at 255, 96 L.R.R.M. at 2141, Judge Rosen found the issue concerning the Franciscans' interest in wages to be easily decided. "[A]ny exclusion of employees from a bargaining unit which rests on the Board's estimate of the employees' subjective interest in salary is per se unreasonable." *Id.* at 257, 96 L.R.R.M. at 2142.

⁵² Niagara University held legal title to the grounds and buildings; also the Vincentians could constitute no more than one-third of the university's governing body. See text at note 16 *supra*.

The court also noted disapprovingly the Board's opinion in *Niagara II* which several times referred to the Eastern Vincentians as *operating* the university. See *id.*, 94 L.R.R.M. at 1001, 1002. The court found this assertion by the Board unsupported by the evidence and contrary to the findings of the Regional Director concerning the operation of Niagara. 558 F.2d at 1119 n.2, 95 L.R.R.M. at 3356 n.2.

⁵³ See *Seton Hill*, 201 N.L.R.B. 1026, 82 L.R.R.M. 1434 (1973). For discussion of *Seton Hill*, see text at notes 5-10 *supra*.

⁵⁴ 225 N.L.R.B. 792, 92 L.R.R.M. 1578 (1976). *D'Youville College* was founded by the Order of Grey Nuns of the Sacred Heart. This clarification decision involved the unit placement of four professors who were members of the Order of Grey Nuns. *Id.*

⁵⁵ *Id.* at 792, 92 L.R.R.M. at 1578-79. The corporation owned the employer's buildings and administered the affairs of the college. *Id.*

basis for holding that religious faculty members were affiliated with the employer in any manner except in their teaching capacity.⁵⁶ Adopting the Board's approach in *D'Youville*, the *Niagara* court looked to the composition of the governing board of the university. Because of the limited presence of Vincentians on the board of trustees,⁵⁷ the court found no identity of interest between the religious faculty and the employer.

The *St. Francis* court approached the identity of interest issue differently than did the *Niagara* court. The Third Circuit focused on the Board's assertion that the "special and complex relationship" between the Franciscan faculty and the college would create a conflict of loyalties for the Franciscan faculty members if they were also aligned with the faculty bargaining unit.⁵⁸ The court first summarily dismissed the argument that because of the "family resemblance" among Franciscans, they should be excluded from the faculty bargaining unit just as relatives of management are excluded from other bargaining units.⁵⁹ The court also rejected the Board's assertion that the close fraternal and religious ties of all Franciscans created an overlapping relationship between the Franciscan faculty and the administration and trustees of the

⁵⁶ *Id.*, 92 L.R.R.M. at 1579. In *D'Youville*, all parties were satisfied as to the nuns' community of interest with the lay faculty and agreed to include the religious faculty in the unit with the lay faculty. *Id.* See note 47 *supra*.

⁵⁷ See text at note 16 *supra*.

⁵⁸ The faculty are assumed to have an adversarial relationship to the college as an employer. 562 F.2d at 252-53, 96 L.R.R.M. at 2138-39.

⁵⁹ See *NLRB v. Caravelle Wood Prods. Inc.*, 504 F.2d 1181, 1188-89, 87 L.R.R.M. 2579, 2584 (7th Cir. 1974) (relatives of stockholders/owners lacked sufficient "community of interest" with the other employees).

The court in *St. Francis* dismissed the issue by merely noting that the Franciscans were not blood relatives of each other. 562 F.2d at 253, 96 L.R.R.M. at 2139. Despite the court's curt rejection of this argument, however, the Board's analogy to a "family resemblance" among Franciscans is intriguing. The family resemblance issue stems from 29 U.S.C. §§ 152(3) and 159(b). Certainly the case of the religious faculty member does not fit within the exclusion of § 152(3); there is literally no "parent" or "spouse" relationship in the order. *Cf.* *NLRB v. Sexton*, 203 F.2d 940, 32 L.R.R.M. 2105 (6th Cir. 1953) (*per curiam*) (exclusion of nephew denied). However, § 159(b) gives the Board discretion in determining the bargaining unit. Relying on this section, courts have excluded relations falling beyond the § 152(3) exclusion from bargaining units because of their "special status." See *Cherrin Corp. v. NLRB*, 349 F.2d 1001, 1004, 59 L.R.R.M. 3016, 3018 (6th Cir. 1965), *cert. denied*, 382 U.S. 981 (1966). *Cf.* *Caravelle Wood Prods. Inc.*, 504 F.2d at 1186, 87 L.R.R.M. at 2583 (interaction between § 152(3) and § 159(b)). In *St. Francis*, the evidence does not show that the Franciscans were accorded "special status" in their employment. Consequently, on strict statutory and case law analysis, the Board's hypothesis does not work. However, other factors indicate that, taken as a whole, the Board's analogy may have some validity. For example, the fact that the college president—a Franciscan—resides at the same monastery as the religious faculty seems to be of some importance. *Cf.* *Parisoff Drive-In Mkt., Inc.*, 201 N.L.R.B. 813, 814, 82 L.R.R.M. 1342, 1343 (1973) (relevant whether employees lived at home with management personnel). Nevertheless, the court's acceptance of the "family resemblance" analogy would require a broad interpretation of the National Labor Relations Act. See generally Reply Brief for NLRB at 6-7, *NLRB v. St. Francis College*, 562 F.2d 246, 96 L.R.R.M. 2134 (3d Cir. 1977).

college.⁶⁰ The court was unwilling to accept this assertion without any objective evidence in the record for support. Because of the Board's inability to produce such evidence, the court labeled the idea of a conflict of loyalties as "mere speculation" and dismissed the claim.⁶¹

The decisions of the courts of appeals in *Niagara* and *St. Francis* raise two issues: first, whether the Board is moving away from its position in *Seton Hill* regarding what is required to establish a community of interest between religious and lay faculty members; second, the role that an asserted "special relationship" between members of a religious order and a school's administration should play in faculty unit determinations. The first issue arises from intimations by both the Second and Third Circuits that the Board has shifted its analysis in the religious faculty cases.⁶² In this regard, both courts pointed to the Board's decision in *Niagara II*. In *Niagara II*, the Board dismissed the relevance of vows of obedience and poverty to whether a community of interest exists between religious and lay faculty.⁶³ It is submitted, however, that the decision in *Niagara II* is not inconsistent with prior Board rulings. Prior to *Niagara II*, the Board had been consistently troubled by the return of part of a religious teacher's salary to the employing college. While it is true that in *Seton Hill* the Board mentioned the religious faculty members' vow of poverty in concluding that a community of interest did not exist between the religious and lay faculty, the Board also mentioned the fact that the members of the controlling order were under a contractual obligation to return a portion of their salary to the college.⁶⁴ Moreover, it should be noted that in *Seton Hill*, the parties had included in the bargaining unit a nun and two priests from other orders.⁶⁵ Because these faculty were not members of the controlling order—and therefore did not return money to the college—the Board apparently had no objection to their inclusion in the unit. In *D'Youville*,⁶⁶ the Board expressed apprehension about a salary-return system, but this was overcome by the agreement of all parties that the religious faculty shared a community of interest with the lay faculty.⁶⁷ It is thus arguable that, prior to

⁶⁰ 562 F.2d at 253, 96 L.R.R.M. at 2139.

⁶¹ *Id.* at 253 n.11, 96 L.R.R.M. at 2139 n.11. Judge Rosenn, in his concurring opinion, again noted the absence of objective evidence to establish this "special and complex relationship" between the Franciscan faculty and the college. *Id.* at 257, 96 L.R.R.M. at 2142. Had such evidence established the nature of such a relationship, Judge Rosenn speculated, there might have existed a valid basis for exclusion. *Id.* Judge Rosenn emphasized, however, that the complex area of religious ties and commitments required more than unsupported assertions and assumptions by the Board in this case. Still, he noted, in conclusion, that there remained the possibility of a case in which religious faculty members could be excluded from a faculty bargaining unit. *Id.*, 96 L.R.R.M. at 2143.

⁶² See *St. Francis*, 562 F.2d at 252, 96 L.R.R.M. at 2138; *Niagara*, 558 F.2d at 1121, 95 L.R.R.M. at 3357.

⁶³ See text and notes 14-15, 40-44 *supra*.

⁶⁴ See text at note 10 *supra*.

⁶⁵ 201 N.L.R.B. at 1026, 82 L.R.R.M. at 1434.

⁶⁶ See note 47 *supra*.

⁶⁷ In *D'Youville*, the Board gave considerable weight to the decision of the lay faculty to include the nuns. 225 N.L.R.B. at 792-93, 92 L.R.R.M. at 1579. On the

Niagara II, the Board's disapprobation of the inclusion of religious faculty in a bargaining unit depended not on whether religious faculty members had taken a vow of poverty, but on whether they in fact returned a portion of their salary to the employer-college. In *Niagara II*, the religious faculty which the Board included in the bargaining unit disbursed their salaries to institutions other than Niagara University.⁶⁸ Therefore, the inclusion of those religious faculty in the bargaining unit is consistent with prior Board decisions and does not indicate a shift in Board analysis.⁶⁹

The second issue presented by these cases—concerning the role of an alleged "special relationship" between religious faculty and a college—was not addressed in *Niagara* because the secular control of the university's administration made such analysis unnecessary. However, the court in *St. Francis* faced this issue of identity of commitment between employer and employee. The identity of commitment is best characterized as a general allegiance among the members of the order; as a close group, the members of the order are presumed always to ally themselves because of their religious ties.⁷⁰ Though difficult to pinpoint, both the majority⁷¹ and concurring⁷² opinions in *St. Francis* acknowledged the existence of a "special and complex relationship." The lack of objective evidence supporting its existence was the determinative factor in the *St. Francis* court's failure to predicate exclusion of religious faculty on this relationship.

It is submitted that regardless of the existence of any identity of commitment between the religious faculty and a college, the religious faculty should be included in the bargaining unit. If a college is a distinct private entity, incorporated under state law, and is not a religious corporation,⁷³ there is no identity of commitment between the members of the order on the faculty and the college per se. Rather, this identity exists between the religious faculty and those of the religious order who administer the college. Therefore, the critical question focuses on the effect of the common commitment of members of the

other hand, in both *St. Francis* and *Niagara* the lay faculty wished to exclude the religious members from the bargaining unit. While the court in *St. Francis* did not address the issue, the court in *Niagara* held that the lay faculty's desire to exclude the religious faculty was an insufficient reason to exclude the Vincentians. 558 F.2d at 1121, 95 L.R.R.M. at 3358.

⁶⁸ 227 N.L.R.B. No. 33, 94 L.R.R.M. at 1002.

⁶⁹ It should also be noted that the Board's grouping in bargaining units of religious and lay faculty has evolved on a case-by-case basis; the Board claims "no policy of exclusion of religious faculty in every instance." Brief for NLRB at 7, *NLRB v. St. Francis College*, 562 F.2d 246, 96 L.R.R.M. 2134 (3d Cir. 1977); see Brief for NLRB at 7, *Niagara Univ. v. NLRB*, 558 F.2d 1116, 95 L.R.R.M. 3354 (2d Cir. 1977).

⁷⁰ 562 F.2d at 253 n.11, 96 L.R.R.M. at 2139 n.11.

⁷¹ See *id.* at 253, 96 L.R.R.M. at 2138.

⁷² See *id.* at 257, 96 L.R.R.M. at 2142 (Rosenn, J., concurring).

⁷³ See, e.g., T. DONOVAN, *THE STATUS OF THE CHURCH IN AMERICAN CIVIL LAW AND CANON LAW* 119 (1966) (Doctoral dissertation).

Note, however, testimony of a member of the Franciscan order, reprinted in the Board's reply brief in *St. Francis*: "[T]he years of tradition certainly haven't broken down simply because of the legal separation of the Province and the College." Reply Brief for NLRB at 5.

religious order, whether faculty or administration, on the functioning and goals of the college.

The commitment of a religious order to a college seems to emphasize academic freedom and religious cooperation, rather than control.⁷⁴ The order's commitment thus entails avoidance of inappropriate control and supervision which would diminish academic excellence. The members of the religious order, whether on the faculty or the administration, share this commitment to educational freedom. Similar educational interests are shared by the lay faculty. Thus, it seems that members of the lay faculty and the members of the religious order—whether faculty or administration—share a common identity of interests and commitment in regard to the role of both the teaching professional and the college. In the college setting therefore, the "special relationship" between the members of the religious order does not necessarily separate the interests of the religious faculty from those of the lay faculty.

In conclusion, the circuit courts' decisions in *Niagara* and *St. Francis* to include religious faculty in faculty bargaining units seem correct. The incorporation of the university as an independent institution has moved the school further away from the notion that the church governs the operation of the school. Meanwhile, the educational goals of both lay and religious have moved closer and formed a community of interests. The Board must acknowledge these trends if its groupings of bargaining units are properly to recognize a community of interests among college faculty. The Board, in its future unit determinations of college faculty, should follow the guide of the courts of appeals and include in the unit faculty who are also members of the college's founding religious order.

2. Hospital Employees

a. *Maintenance Employees*—During this Survey year, in *Long Island College Hospital v. NLRB (LICH)*,¹ *St. Vincent's Hospital v. NLRB*,² and *NLRB v. West Suburban Hospital*,³ three courts of appeals focused on the appropriateness of Board certifications of separate maintenance units in hospitals. In both *St.*

⁷⁴ As one commentator noted:

Infringements on the freedom of college and university faculty to teach the results of their study and research would destroy the opportunity for the college to make its contribution to the church. Freedom from outside constraints is the very breath of life for a college and university. . . . If the integrity and freedom of the academy is attacked, undermined by "an academic law of the church," the church will be the first to suffer.

College and University Department, National Catholic Educ. Ass'n, *Relations of American Catholic Colleges and Universities with the Church* (April 1976), reprinted in 74 CATHOLIC MIND 51, 62 (Oct. 1976).

¹ 566 F.2d 833, 96 L.R.R.M. 3119 (2d Cir. 1977).

² 567 F.2d 588, 97 L.R.R.M. 2119 (3d Cir. 1977).

³ 570 F.2d 213, 97 L.R.R.M. 2929 (7th Cir. 1978).

Vincent's and *West Suburban*, the circuit courts, finding the separate units inappropriate, denied enforcement of the Board's bargaining orders.⁴ In *LICH*, the court also denied enforcement of the Board's order, but remanded the case to the Board for reevaluation of the appropriateness of the unit.⁵ In each case the court noted the inconsistency and general disarray of Board decisions in this area.⁶ Yet, despite the decisions of these circuit courts, the problem of the appropriateness of hospital maintenance units remains unresolved because of the Board's refusal to adopt a clear standard of decision-making in this area. *LICH*, *St. Vincent's*, and *West Suburban* are therefore significant because they highlight the problems created by the Board's inconsistent policy regarding separate maintenance units in health care facilities.

Section 9(b) of the National Labor Relations Act⁷ authorizes the Board to designate an appropriate unit of employees for the purposes of collective bargaining. In making such determinations, the Board traditionally has considered whether employees in the proposed unit share a community of interest.⁸ Using the community of interest criteria in situations where a large number of employees were performing different functions or were employing different skills, the Board has found that a separate unit of maintenance employees was an appropriate bargaining unit.⁹ The Board's discretion in making unit determinations, as accorded in section 9(b), is limited, however. The Board's determination will be reversed if its decision "oversteps the law."¹⁰

In 1974, Congress enacted the health care amendments to the NLRA.¹¹ Although the 1974 amendments did not create special rules with respect to unit determinations for hospital employees, the legislative history of the amendments indicates much congressional concern with the appropriateness¹²

⁴ *St. Vincent's*, 567 F.2d at 593, 97 L.R.R.M. at 2123; *West Suburban*, 570 F.2d at 216, 97 L.R.R.M. at 2932.

⁵ 566 F.2d at 846, 96 L.R.R.M. at 3128.

⁶ See text and notes 34, 47-49 *infra*.

⁷ 29 U.S.C. § 159(b) (1976). The section provides in part:

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by the [Act], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof

⁸ See *McLean Hosp.*, 234 N.L.R.B. No. 54, 97 L.R.R.M. 1322, 1323 (Jan. 25, 1978). Included in the community of interests are: mutuality of interest in wages, benefits and working conditions; commonality of skills and supervision; frequency of contact with other employees; lack of interchange and functional integration; and area practice and patterns of bargaining. *Id.*

⁹ *American Cyanamid Co.*, 131 N.L.R.B. 909, 910, 48 L.R.R.M. 1152, 1152 (1961). The Board held "that maintenance employees are readily identifiable as a group whose similarity of function and skills create a community of interest such as would warrant separate representation." *Id.*

¹⁰ *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947); see *Chemical Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 171-72 (1971).

¹¹ Act of July 26, 1974, Pub. L. 93-360, §§ 1(a)-(e), 88 Stat. 395 (codified at 29 U.S.C. §§ 152(2), 152(14), 158(d), 158(g) (1976)).

¹² See *Memorial Hosp. of Roxborough v. NLRB*, 545 F.2d 351, 360, 93 L.R.R.M. 2571, 2577 (2d Cir. 1976).

and the proliferation of bargaining units in the health care industry.¹³ Consequently, a court reviewing a Board unit determination must consider whether the Board's action has overstepped congressional intent with respect to bargaining units in the health care industry.¹⁴

As first proposed by Senator Taft in S. 2292, the 1974 health care amendments would have placed a statutory limit of four bargaining units in health care institutions.¹⁵ This approach was not adopted is S. 3203 which ultimately became the law.¹⁶ However, the Senate committee which considered the bill addressed the problem with language directed toward the Board:

Due consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry. In this connection, the Committee notes with approval the recent Board decisions in *Four Seasons Nursing Center*, 208 NLRB No. 50, 85 LRRM 1093 (1974), and *Woodland Park Hospital*, 205 NLRB No. 144, 84 LRRM 1075 (1973), as well as the trend toward broader units enunciated in *Extendicare of West Virginia*, 203 NLRB No. 170, 83 LRRM 1242 (1973).¹

1. By our reference to *Extendicare*, we do not necessarily approve of all of the holdings of that decision.¹⁷

Despite this language, the comments of Senator Williams, the chairman of the committee and sponsor of the legislation, clearly indicate that the Board is to continue to utilize its own discretion and expertise in making unit determina-

¹³ See, e.g., S. REP. NO. 766, 93d Cong., 2d Sess. 5, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 3946, 3950; H.R. REP. NO. 1051, 93d Cong., 2d Sess. 6-7 (1974).

¹⁴ See *Memorial Hosp. of Roxborough v. NLRB*, 545 F.2d 351, 361, 93 L.R.R.M. 2571, 2578 (2d Cir. 1976).

¹⁵ See 120 CONG. REC. 12942 (1974). The appropriate units would have consisted of: professional employees, technical employees, clerical employees, and service and maintenance employees. *Id.*

¹⁶ Senator Taft approved of the allowance of Board flexibility in unit determination cases, but repeatedly emphasized the need to reduce and limit the number of bargaining units in health care institutions. Senator Taft noted: "I cannot stress enough, however, the importance of great caution being exercised by the Board in reviewing unit cases in this area. Unwarranted unit fragmentation leading to jurisdictional disputes and work stoppages must be prevented." 120 CONG. REC. 12944 (1974).

¹⁷ S. REP. NO. 988, 93d Cong., 2d Sess. 5, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 3946, 3950.

While this legislative history indicates approval of the Board decisions in *Woodland Park* and *Four Seasons*, these two cases are easily distinguishable from the maintenance unit cases discussed in this note. In *Woodland Park*, the Board affirmed the Regional Director's finding of a single unit of all hospital employees and rejected the claim that x-ray technicians had a separate community of interests from other technical employees. 205 N.L.R.B. 888, 889, 84 L.R.R.M. 1075, 1077 (1973). In *Four Seasons*, a unit of two maintenance employees—out of a total number of 143 employees in the center—was held inappropriate because the maintenance employees performed mainly cleaning duties. 208 N.L.R.B. 403, 403, 85 L.R.R.M. 1093, 1093-94 (1974).

tions.¹⁸ Additionally, in explaining the Senate report, Congressman Thompson noted that the committee did not intend to preclude the Board from continuing to determine the traditional craft and departmental units, such as stationary engineers, in the health care field.¹⁹ Thus, congressional language suggests a policy of non-proliferation, but does not go so far as to

The reference to the Board's decision in *Extendicare* has been deemed "somewhat obscure" and not dispositive of the maintenance unit issue. See *LICH*, 566 F.2d at 844 n.4, 96 L.R.R.M. at 3126 n.4.

¹⁸ Senator Williams noted:

While the committee clearly intends that the Board give due consideration to its admonition to avoid undue proliferation of units in the health care industry, it did not within this framework intend to preclude the Board acting in the public interest from exercising its specialized experience and expert knowledge in determining appropriate bargaining units. 120 CONG. REC. 22575 (1974) (citation omitted).

¹⁹ 120 CONG. REC. 22948 (1974). The Third Circuit in *St. Vincent's* placed very little emphasis on the remarks of Senator Williams and Congressman Thompson. See 567 F.2d at 591 n.3, 97 L.R.R.M. at 2121 n.3.

It has been argued that the remarks of Senator Williams and Congressman Thompson are not dispositive of the legislative intent behind the 1974 amendment. See King, *Legislative Review: Is Congressional Intent Being Realized—Or Are Subsequent Changes Needed?* in LABOR RELATIONS LAW PROBLEMS IN HOSPITALS AND THE HEALTH CARE INDUSTRY 159-60 (A. Knapp ed. 1977) [hereinafter cited as HEALTH CARE PROBLEMS]; Emmanuel, *Hospital Bargaining Unit Decisions* in HEALTH CARE PROBLEMS 202-03. These authors have noted that the comments of Williams and Thompson are "post-passage" legislative history, and under the standards of judicial review set forth in the Regional Rail Reorganization Act Cases, 419 U.S. 102, 132 (1974), should not be accorded any weight in determining legislative intent. In the *Rail Reorganization Cases*, the Supreme Court indicated that "post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before [a statute's] passage." *Id.* Congressman Thompson made his remarks on July 22, 1974, 120 CONG. REC. 22948, a date subsequent to original passage of the amendment by the House of Representatives (May 30, 1974) and the House's final approval of the Conference Report (July 11, 1974). Senator Williams made his statement on July 10, 1974, 120 CONG. REC. 22575, sixty-four days after the Senate's original passage of the amendment, and on the same day as the Senate's approval of the Conference Report. See generally [1974] U.S. CODE CONG. & AD. NEWS 3946.

However, it is submitted that the remarks of Williams and Thompson should not be so easily discounted. The language of the Supreme Court in the *Rail Reorganization Cases* is not precisely on point in this instance. In that case, the Supreme Court dismissed statements by Congressmen made more than five months after the enactment of the statute at issue. 419 U.S. at 109, 132. As authority, the Supreme Court cited its earlier dismissal of congressional comments in a prior case where remarks had been made eleven years after the legislation in question had been passed. *Id.* at 132 (citing *United States v. Mine Workers of America*, 330 U.S. 258, 282 (1947)). The chronological legislative history of the 1974 amendment, however, shows that the remarks of both Williams and Thompson were made *before* the legislation was signed into law by the President, see 120 CONG. REC. 25802 (1974), and *before* the statute became effective. See note 11, *supra*. Moreover, the legislators made their remarks *before* the Senate voted to approve the Conference Report. 120 CONG. REC. 22583 (1974). Senator Williams made the remarks in issue to express his "views on certain issues raised . . . , in light of the bill's language, its report and the explanation by its managers." 120 CONG. REC. 22575 (1974).

usurp the Board's authority to make its own expert determination. Still, the policy against undue proliferation "does constitute a Congressionally prescribed factor to guide the Board in the exercise of its discretion."²⁰ Consequently, in considering the appropriateness of separate bargaining units for hospital maintenance employees, the Board and the courts have had to reconcile traditional unit standards with Congress' indicated concerns regarding proliferation of hospital units.

Since the adoption of the 1974 amendments, the Board has followed an inconsistent path in determining the appropriateness of maintenance-only units.²¹ An explanation for the "disarray" of Board opinions lies in the serious divergence of opinion among Board members as to the propriety of separate units.²² The differing views as to the application of traditional craft unit criteria in the context of the health care field have caused Board members to reach divergent factual and legal conclusions in many cases.²³ Members Murphy and Fanning consistently have found maintenance units appropriate upon the showing of a separate community of interests. These members emphasize the application of traditional Board standards under which the existence of a separate community of interests requires the establishment of a separate bargaining unit to represent those interests.²⁴ Member Penello has enunciated a rigid standard for finding a separate craft maintenance unit appropriate. Under this standard, a maintenance unit is appropriate when, viewed in light of the traditional unit determination criteria, its establishment does not conflict with the congressional language against proliferation of bar-

²⁰ See *Memorial Hosp. of Roxborough v. NLRB*, 545 F.2d 351, 361, 93 L.R.R.M. 2571, 2578 (2d Cir. 1976).

²¹ The Board has *rejected* maintenance-only units in: *Peter Bent Brigham Hosp.*, 231 N.L.R.B. No. 132, 96 L.R.R.M. 1546, 1548-49 (Aug. 31, 1977); *Northeastern Hosp.*, 230 N.L.R.B. No. 162, 95 L.R.R.M. 1465, 1466 (July 21, 1977); *St. Joseph Hosp.*, 224 N.L.R.B. 270, 272, 92 L.R.R.M. 1209, 1211 (1976); *Riverside Methodist Hosp.*, 223 N.L.R.B. 1084, 1087, 92 L.R.R.M. 1033, 1036 (1976); *Jewish Hosp. of Cincinnati*, 223 N.L.R.B. 614, 616-17, 91 L.R.R.M. 1499, 1504-05 (1976); *Shriners Hosps.*, 217 N.L.R.B. 806, 808, 89 L.R.R.M. 1076, 1080 (1975). The Board has *approved* the separate unit in: *McLean Hosp.*, 234 N.L.R.B. No. 54, 97 L.R.R.M. 1323, 1325 (Jan. 25, 1978); *Hebrew Rehabilitation Center for the Aged*, 230 N.L.R.B. No. 35, 95 L.R.R.M. 1279, 1281 (June 17, 1977); *Sinai Hosp. of Detroit*, 226 N.L.R.B. 425, 426, 93 L.R.R.M. 1269, 1270 (1976); *Eskaton Am. River Healthcare Center*, 225 N.L.R.B. 755, 757, 92 L.R.R.M. 1569, 1571 (1976); *St. Francis Hosp.-Medical Center*, 223 N.L.R.B. 1451, 1455, 92 L.R.R.M. 1172, 1177 (1976).

²² See *LICH*, 566 F.2d at 843, 96 L.R.R.M. at 3126.

²³ See, e.g., *Riverside Methodist Hosp.*, 223 N.L.R.B. 1084, 92 L.R.R.M. 1033 (1976). In this case, the majority's opinion emphasized that the maintenance workers performed work of a routine and uncomplicated nature. *Id.* at 1087, 92 L.R.R.M. at 1036. In contrast, the dissenting opinion of Chairman Murphy and Member Fanning emphasized that the functions and skills of the maintenance workers set them apart from other workers. See *id.* at 1088-89, 92 L.R.R.M. at 1038-39.

²⁴ See, e.g., *Eskaton Am. River Healthcare Center*, 225 N.L.R.B. 755, 756, 92 L.R.R.M. 1569, 1571 (1976); *St. Vincent's Hosp.*, 223 N.L.R.B. 638, 639, 91 L.R.R.M. 1513, 1513 (1976) (concurring opinion of Chairman Murphy).

gaining units in the health care industry.²⁵ Former Member Walther shared much the same view as Member Penello.²⁶ Member Jenkins, however, has not aligned himself on any "side" of the maintenance unit issue.²⁷ It is unclear at this time into which "camp" Member Truesdale will fall. Because of this division of opinions, Board decisions can be "predicted" by viewing the composition of the panel hearing the case. For example, a three-member panel consisting of Chairman Fanning and Members Murphy and Jenkins virtually assures approval of the maintenance unit.²⁸

In *LICH*, the first of the *Survey* year decisions concerning separate hospital maintenance units, the Second Circuit examined the propriety of the Board's adoption of a thirteen-year old certification of a separate maintenance unit by the New York State Labor Relations Board (SLRB) at Long Island College Hospital.²⁹ The circuit court held that the NLRB could not adopt the SLRB's certification as its own, but rather, must make an independent determination of unit appropriateness.³⁰ The Board could not accord "comity" to the state labor board's unit determination because there was a significant difference between state and federal law; the former compelled recognition of a craft unit while the latter did not. Thus, while the SLRB, under New York law, had to recognize a separate bargaining unit of maintenance employees, the NLRB was under no such compulsion.³¹ The court con-

²⁵ Member Penello set forth his standard in his concurring opinion in *St. Vincent's Hosp.*, 223 N.L.R.B. 638, 639-40, 91 L.R.R.M. 1513, 1513-14 (1976). The unit in *St. Vincent's* satisfied Member Penello's criteria. In other cases, this standard has not been met. *See, e.g.*, *Northeastern Hosp.*, 230 N.L.R.B. No. 162, 95 L.R.R.M. 1465, 1466 n.8 (July 21, 1977).

²⁶ *See, e.g.*, *St. Vincent's Hosp.*, 223 N.L.R.B. 638, 640, 91 L.R.R.M. 1513, 1514-15 (1976).

²⁷ *Compare Shriners Hosps.*, 217 N.L.R.B. 806, 809, 89 L.R.R.M. 1076, 1080 (1975) (concurring in result rejecting a separate maintenance unit, but not in rationale) with *Eskaton Am. River Healthcare Center*, 225 N.L.R.B. 755, 756, 92 L.R.R.M. 1569, 1571 (1976) (concurring in result granting a separate bargaining unit).

²⁸ *See* note 23 *infra*.

²⁹ *Long Island College Hosp. v. NLRB*, 566 F.2d 833, 96 L.R.R.M. 3119 (2d Cir. 1977). In 1964 the New York State Labor Relations Board (SLRB) certified a single unit of maintenance employees at LICH. 27 S.L.R.B. 405 (1964). LICH refused to bargain, and extended litigation, resulting in unfair labor practices being sustained against LICH, followed. LICH entered into negotiations for a brief time, but then discontinued bargaining since it maintained that the unit was inappropriate. Meanwhile, the health care amendments of 1974 had been enacted and the union filed an unfair labor practice charge with the Regional Director of the NLRB. An Administrative Law Judge, finding the SLRB's certification both appropriate and valid, recommended a bargaining order and a broad cease and desist order. A three member panel of the NLRB adopted the ALJ's recommendations. *See* 228 N.L.R.B. 83, 94 L.R.R.M. 1438 (1977). For a detailed account of the procedural history of the LICH dispute see 566 F.2d at 835-38, 96 L.R.R.M. at 3120-21.

³⁰ 566 F.2d at 845, 96 L.R.R.M. at 3128.

³¹ Section 705(2) of the New York Labor Relations Law provides:

The board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization, to collective bargaining and otherwise to effectuate the policies of this article, the unit appropriate for the purposes of collective bargaining shall be the employer

cluded that the NLRB, in making its unit determination, had to be free from the state policy mandating the designation of a separate craft unit.³²

A new Board determination was necessary in *LICH* because the Second Circuit was unable to determine how the Board *would have* decided the case free from the state ruling. Counsel for the Board argued that the Board would have reached the same result had it determined the proper bargaining unit without reference to the SLRB opinion.³³ In rejecting this argument, the court pointed to the disarray of Board decisions on the subject of separate hospital maintenance units and specifically noted the confusion resulting from the divergence of opinions on this issue among individual Board members.³⁴ Because of the Board's lack of a clear, established policy on the maintenance unit issue, the court refused to predict how the Board *would* interpret federal law in the instant case. As background to its discussion of the maintenance unit issue, the *LICH* court set forth the legislative history of the 1974 amendments.³⁵ The court attempted to explicate the various approaches taken by Board members in reconciling the congressional admonitions against proliferation of bargaining units in hospitals with the notion of a separate community of interest for hospital maintenance workers.³⁶ In remanding the case to the Board for a new determination of the appropriate bargaining unit, the Second Circuit noted that it was permissible for the Board to designate separate maintenance units.³⁷ Thus, the court implied that it would not overturn a

unit, multiple employer unit, craft unit, plant unit, or any other unit; provided, however, that in any case where the majority of employees of a particular craft, or in the case of a nonprofitmaking hospital or residential care center *where the majority of employees of a particular profession or craft, shall so decide the board shall designate such profession or craft, as a unit appropriate for the purpose of collective bargaining.*

N.Y. LAB. LAW § 705(2) (McKinney 1977) (emphasis added). This section is unlike the second proviso of section 9(b) of the NLRA which provides that the Board shall not (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation

29 U.S.C. § 159(b)(2) (1976). Under the New York law the majority of a craft may mandate a separate unit; the NLRA grants no such right to members of a craft unit nor is the NLRB compelled to recognize a craft unit.

³² 566 F.2d at 843, 96 L.R.R.M. at 3126.

³³ *Id.* In spite of the court's rejection of this point, the Board counsel's position seems correct. When the *LICH* case came before the Board, the three member panel deciding the case consisted of then-Chairman Murphy and Members Fanning and Jenkins. 228 N.L.R.B. 83, 94 L.R.R.M. 1438 (1977). This trio of Board members consistently have found separate maintenance units appropriate. *See, e.g.,* McLean Hosp., 234 N.L.R.B. No. 54, 97 L.R.R.M. 1323, 1325 (Jan. 25, 1978); Eskaton Am. River Healthcare Center, 225 N.L.R.B. 755, 757, 92 L.R.R.M. 1569, 1571 (1976); Sinai Hosp. of Detroit, 226 N.L.R.B. 425, 426, 93 L.R.R.M. 1269, 1270 (1976). *See text and notes 23-28 supra.*

³⁴ 566 F.2d at 843, 96 L.R.R.M. at 3126.

³⁵ *Id.* at 838-39, 96 L.R.R.M. at 3121-23.

³⁶ *See id.* at 843-44, 96 L.R.R.M. at 3126-27.

³⁷ *Id.* at 844 & n.4, 96 L.R.R.M. at 3126 & n.4. Here the court agreed with the language of the Board in *Jewish Hosp. of Cincinnati*, 223 N.L.R.B. 614, 616, 91

subsequent Board approval of a LICH maintenance unit if the Board found, independent of the SLRB determination, that such a unit possessed a sufficiently separate community of interest.

The Third Circuit, in *St. Vincent's*,³⁸ set aside a Board order which certified a group of four boiler operators as an appropriate bargaining unit.³⁹ In a somewhat similar factual situation in *West Suburban*,⁴⁰ the Seventh Circuit found that the Board certification⁴¹ of a twenty-one member maintenance unit violated the congressional directive of preventing proliferation of collective bargaining units in the health care field.⁴² Both courts followed similar paths of analysis in citing much of the legislative history of the 1974 amendments which stressed non-proliferation of bargaining units.⁴³ Considering these expressions of congressional policy, the circuit courts reasoned that Board unit determinations could not properly be made solely on the basis of traditional factors and standards. Rather, the courts concluded, because ordinary circumstances do not exist in the health care industry, traditional criteria must be weighed in light of the unique integration of operations performed at the hospital.⁴⁴ Both courts concluded that the Board's decision to allow a separate maintenance unit was incorrect.

L.R.R.M. at 1499, 1504 (1976), where the Board noted that Congress never specifically precluded the NLRB from certifying separate maintenance units.

³⁸ *St. Vincent's Hosp. v. NLRB*, 567 F.2d 588, 97 L.R.R.M. 2119 (3d Cir. 1977).

³⁹ See *St. Vincent's Hosp.*, 223 N.L.R.B. 638, 91 L.R.R.M. 1513 (1976). The majority opinion of the Board emphasized that the boiler operators performed a function intrinsically different from what other employees do, have very little interchange with other employees, and are licensed. *Id.* at 638, 91 L.R.R.M. at 1513. In her concurring opinion, Chairman Murphy noted that she would continue to find appropriate a traditional powerhouse or maintenance unit in a hospital where such a unit is sought. *Id.* at 638-39, 91 L.R.R.M. at 1513. Member Penello, concurring in the result, spelled out a rigid standard for approving maintenance units in health care facilities. This standard was met in *St. Vincent's* because the boiler operators were all licensed craftsmen engaged in a traditional craft work which was performed in a separate and distinct location from other employees. *Id.* at 639-40, 91 L.R.R.M. at 1513-14. Member Walther indicated his agreement with the reasoning of Member Penello's concurring opinion. *Id.* at 640, 91 L.R.R.M. at 1514-15.

⁴⁰ *NLRB v. West Suburban Hosp.*, 570 F.2d 213, 97 L.R.R.M. 2929 (7th Cir. 1978).

⁴¹ *West Suburban Hosp.*, 224 N.L.R.B. 1349, 92 L.R.R.M. 1369 (1976). The Board found that a separate maintenance unit, rather than a unit of all non-professional employees, was appropriate. *Id.* at 1351, 92 L.R.R.M. at 1371. The majority opinion by Chairman Murphy and Members Fanning and Jenkins claimed that it was taking into account traditional unit criteria as well as the congressional admonition against proliferation of units in considering the appropriateness of the unit. *Id.* at 1349, 92 L.R.R.M. at 1369. The Seventh Circuit characterized the Board majority's claim that it heeded congressional intent as "mere lip-service mention." 570 F.2d at 216, 97 L.R.R.M. at 2931. Members Penello and Walther dissented from the majority in *West Suburban*, 224 N.L.R.B. at 1351, 92 L.R.R.M. at 1371, based on their analysis of the factual situation in light of the standards enunciated in their separate opinions in *St. Vincent's*, 223 N.L.R.B. 638, 639-40, 91 L.R.R.M. 1513, 1513-15; see note 39 *supra*.

⁴² 570 F.2d at 216, 97 L.R.R.M. at 2931-32.

⁴³ See *St. Vincent's*, 567 F.2d at 590-91, 97 L.R.R.M. at 2120-22; *West Suburban*, 570 F.2d at 214-15, 97 L.R.R.M. at 2930-31.

⁴⁴ *St. Vincent's*, 567 F.2d at 592, 97 L.R.R.M. at 2122; *West Suburban*, 570 F.2d at 215, 97 L.R.R.M. at 2931 (citing *St. Vincent's*, 567 F.2d at 592, 97 L.R.R.M. at 2122).

The *St. Vincent's* court suggested that the Board should employ a balancing test—weighing the public interest in preventing union fragmentation in health care facilities against traditional craft unit indicies—in deciding whether to allow separate maintenance units. Noting that the Board had not considered the public interest in preventing the proliferation of hospital bargaining units before it certified the separate maintenance unit in this case, the court refused to enforce the Board's order.⁴⁵ Similarly, the *West Suburban* court found that the Board had failed to give "due consideration" to preventing the proliferation of bargaining units.⁴⁶ The court alluded, as had the courts in *St. Vincent's*⁴⁷ and *LICH*,⁴⁸ to the inconsistency of the Board opinions in this area.⁴⁹ To alleviate this "disarray" of decisions, the court suggested "[f]ixing a course with guidance from the congressional directive of preventing proliferation of collective bargaining units in the health care field . . ."⁵⁰ Thus, the Seventh Circuit seemed to favor a standard whereby separate maintenance units would infrequently be allowed in hospitals.

The three *Survey* year decisions highlighted the circuit courts' dissatisfaction with the Board's maintenance unit decisions. In all three cases, the courts emphasized the need to consider the legislative history of the health care amendments in determining the appropriateness of the bargaining unit. The courts also stressed the need for standards for unit determinations by which the Board would be able to interpret properly and consistently the legislative history and the community of interest of maintenance workers. Nevertheless, a proper reconciliation of the legislative history and the divergent views of individual Board members is not easy. A balance must be struck between the desire to have a fixed rule to guide Board determinations and the need to allow the Board flexibility in its discretion as mandated in section 9(b). Despite suggestions by the court in *West Suburban* that a standard of non-proliferation should apply,⁵¹ Congress evidently intended that the Board should retain

On this point both courts cited at length from the Board's decision in *Shriners Hosps.*, 217 N.L.R.B. 806, 808, 89 L.R.R.M. 1076, 1079-80 (1975).

⁴⁵ 567 F.2d at 592-93, 97 L.R.R.M. at 2122-23. The language in the Third Circuit's opinion regarding the issue of certification of a separate maintenance unit is somewhat confusing. While the thrust of the opinion seems directed to the conclusion that separate maintenance units are *never* appropriate, the decision also infers that the Board erred only in failing to take into account the congressional admonitions against proliferation of bargaining units. Although Member Penello discussed this latter, balancing process in a concurring opinion, 223 N.L.R.B. 638, 639-40, 91 L.R.R.M. 1513, 1513-14 (1976), the court only briefly acknowledged Member Penello's opinion and seems to have accorded it little weight. See 567 F.2d at 589, 97 L.R.R.M. at 2120. By thus discounting Member Penello's opinion, the court leaves in doubt the weight accorded to a future Board determination based upon a balancing test which would take into account indications of legislative intent.

⁴⁶ 570 F.2d at 216, 97 L.R.R.M. at 2932.

⁴⁷ 567 F.2d at 592 n.6, 97 L.R.R.M. at 2123 n.6.

⁴⁸ 566 F.2d at 843, 96 L.R.R.M. at 3126.

⁴⁹ 570 F.2d at 216, 97 L.R.R.M. at 2932.

⁵⁰ *Id.*

⁵¹ *Id.* See note 45 *supra*.

some discretion in the unit determination area.⁵² The Board's power to grant separate maintenance units has been acknowledged by the entire Board.⁵³ Yet, the nature of the health care facility does create special problems because all the employees of the hospital are, to some extent, involved in "patient care."⁵⁴ Fragmentation of bargaining units would increase the possibility of strikes potentially disruptive of patient care.⁵⁵

It is submitted that the most effective and plausible solution to the Board's "disarray" is the balancing test set forth in *St. Vincent's* by Member Penello.⁵⁶ This balancing test considers the characteristics of the craft unit in each case, but also adequately heeds the danger posed by fragmentation of bargaining units in the health care industry. The entire Board should direct its decision-making along the lines of this balancing test and clarify the status of the hospital maintenance unit.

If the Board does not enunciate a uniform policy or standard, an attempt by the courts to impose a standard of decision-making upon the Board will not necessarily prevent Board members from expressing their individual ideas. The Board members' adherence to their individual views on the appropriateness of separate hospital maintenance bargaining units remains unshaken after the courts' attempts in *St. Vincent's*, *West Suburban* and *LICH* to suggest standards. One need only look at the Board decision to certify a separate maintenance unit in *McLean Hospital*,⁵⁷ filed after the issuance of the *LICH* and *St. Vincent's* opinions, to find that the Board and its members are continuing to follow their own individual standards to determine unit appropriateness.

b. *Housestaff*—In 1976, in *Cedars-Sinai Medical Center*,⁵⁸ the NLRB held that hospital "housestaff"—medical residents and clinical fellows associated with hospitals—were engaged primarily in graduate educational training, and

⁵² See text and notes 18-20 *supra*.

⁵³ *Jewish Hosp. of Cincinnati*, 223 N.L.R.B. 614, 616, 91 L.R.R.M. 1499, 1504 (1976) (separate maintenance unit denied).

⁵⁴ See *Mount Airy Psychiatric Center*, 217 N.L.R.B. 802, 802, 89 L.R.R.M. 1067, 1068 (1975).

⁵⁵ One further consideration noted by former Member Walther regarding the separate maintenance unit issue should be mentioned. An Equal Employment Opportunity Commission survey of hospital personnel in 1974 showed that the percentage of blacks in hospital service jobs is more than double the percentage of blacks in craft jobs. Minorities filled 16.8% of hospital maintenance positions and 34.3% of service positions. Member Walther suggested that the certification of a separate maintenance unit insulates an exclusive seniority and hiring hall arrangement, thus frustrating minority employees' attempts to gain admission to or to transfer into the primarily white maintenance departments. Consequently, the Board, by granting separate maintenance units, may be unconsciously perpetuating racial discrimination in hospital hiring. This issue has never been faced squarely by the Board, however. See Walther, *The Course of Charted and Uncharted Waters in HEALTH CARE PROBLEMS*, *supra* note 19, at 71.

⁵⁶ See text and note 25 *supra*.

⁵⁷ 234 N.L.R.B. No. 54, 97 L.R.R.M. 1323, 1325 (Jan. 25, 1978).

⁵⁸ 223 N.L.R.B. 251, 91 L.R.R.M. 1398 (1976).

thus were students rather than employees within the scope of the NLRA.⁵⁹ Consequently, the Board refused to certify a prospective bargaining unit of housestaff. Decisions following *Cedars-Sinai*⁶⁰ confirmed that the Board was establishing a policy that collective bargaining rights would not be extended to housestaff. This policy withstood three attacks by the Committee of Interns and Residents (CIR) during this past *Survey* year.

In the first attack, the CIR sought reconsideration of the *Cedars-Sinai* policy in *St. Clare's Hospital*.⁶¹ The Board, however, refused to renounce its position. It reemphasized that *Cedars-Sinai* was not a decision about the health care industry, but primarily a decision about students.⁶² The Board contrasted at length the educational process with the collective bargaining process and concluded that collective bargaining should not be applied to what is fundamentally an educational relationship.⁶³ Chairman Fanning, a dissenter in the *Cedars-Sinai* decision, issued a lengthy dissent in *St. Clare's*⁶⁴ in which he criticized both *Cedars-Sinai* and the majority's "student-employee" analysis. Chairman Fanning was particularly critical of some confusing language in the majority's opinion to the effect that housestaff, while not "employees" under the NLRA, are not beyond the reach of national labor regulation; rather, the extension of bargaining rights to housestaff is contrary to national labor policy.⁶⁵ Chairman Fanning found it anomalous that the Board could claim that it lacked subject matter jurisdiction over housestaff since they were not employees, yet, at the same time, claim jurisdiction to deny housestaff coverage under the Act.⁶⁶

Like the CIR's first attempt in *St. Clare's*, the CIR's second attempt to gain recognition as a labor organization proved unsuccessful. In *NLRB v. Committee of Interns and Residents*,⁶⁷ the CIR filed an election petition with the New York State Labor Relations Board. In the ensuing litigation, the NLRB unsuccessfully moved to enjoin such an election in federal district court.⁶⁸ Pointing to the language of *Cedars-Sinai* and its progeny, the district judge reasoned that because housestaff were not "employees" under the NLRA, the NLRB had no jurisdiction at all in this matter.⁶⁹ Since state labor relations boards are free to regulate in areas where the NLRB has no jurisdiction, the state and the

⁵⁹ *Id.* at 254, 91 L.R.R.M. at 1401. For a complete discussion of the *Cedars-Sinai* decision, see 1975-1976 *Annual Survey of Labor Relations and Employment Discrimination Law*, 17 B.C. IND. & COM. L. REV. 1041, 1105 (1976).

⁶⁰ See, e.g., *Kansas City Gen. Hosp. (Kansas City II)*, 225 N.L.R.B. No. 14A, 93 L.R.R.M. 1362, 1364 (Nov. 8, 1976).

⁶¹ 229 N.L.R.B. 1000, 95 L.R.R.M. 1180 (1977).

⁶² *Id.* at 1000, 95 L.R.R.M. at 1181.

⁶³ *Id.* at 1004, 95 L.R.R.M. at 1185.

⁶⁴ *Id.* at 1005, 95 L.R.R.M. at 1186.

⁶⁵ *Id.* at 1003-04, 95 L.R.R.M. at 1184-85.

⁶⁶ *Id.* at 1005 n.38, 95 L.R.R.M. at 1187 n.38 (Fanning, Chairman, dissenting).

⁶⁷ 566 F.2d 810, 96 L.R.R.M. 2343 (2d Cir. 1977).

⁶⁸ *NLRB v. Committee of Interns and Residents*, 426 F. Supp. 438, 94 L.R.R.M. 2739 (S.D.N.Y. 1977).

⁶⁹ *Id.* at 442, 449, 94 L.R.R.M. at 2742, 2747.

state labor board properly exercised jurisdiction over housestaff.⁷⁰ Thus, the district court judge denied the NLRB's request for an injunction.⁷¹

The Second Circuit reversed the holding of the district court. It reasoned that the exclusion of housestaff from "employee" status was part of the national labor policy.⁷² Thus, as the Board in *St. Clare's* noted, housestaff are not beyond the reach of the NLRB and the Board has not ceded jurisdiction over them simply because it did not extend bargaining rights to housestaff. The circuit court held, therefore, that preemption prevented the CIR from circumventing this national policy by proceeding through the state labor relations board.⁷³ The Second Circuit was careful to note that it was not passing on the wisdom of the *Cedars-Sinai* decision.⁷⁴ Nevertheless, the CIR again met with defeat.

The third attack by the CIR on the *Cedars-Sinai* decision ultimately failed as well. The CIR instituted suit in federal district court to vacate the NLRB's dismissal of a representation petition, and to order the board to assume jurisdiction over housestaff. The district court in *Physicians National House Staff Association v. Murphy*⁷⁵ held that it lacked jurisdiction to hear the case. It noted that under the NLRA district court review of a Board order is very limited unless an unfair labor practice is asserted.⁷⁶ In the instant case, the challenged NLRB order was a purely representational matter.⁷⁷ Consequently, review was precluded absent the presence of exceptional circumstances which would warrant the district court's assuming jurisdiction to review the Board decision.⁷⁸ The district court in *House Staff* found that such exceptional circumstances did not exist in this case.⁷⁹ Thus, the court held that the status of housestaff was primarily a factual determination left to the discretion of the Board since there existed no statutory mandate that housestaff members be treated as employees under the NLRA.⁸⁰

Thus, the three attempts by the CIR to overturn the *Cedars-Sinai* decision—reconsideration of the decision by the Board, state labor board certification of the CIR, and federal district court review of the Board's orders—all failed. It appears that the CIR will remain unable to secure judicial review of *Cedars-Sinai* as long as it is denied "labor organization" status.⁸¹

⁷⁰ *Id.* at 453, 94 L.R.R.M. at 2751.

⁷¹ *Id.*

⁷² 566 F.2d at 815-16, 96 L.R.R.M. at 2346.

⁷³ *Id.*

⁷⁴ *Id.* at 816, 96 L.R.R.M. at 2347.

⁷⁵ 443 F. Supp. 806, 811, 97 L.R.R.M. 2444, 2447 (D.D.C. 1978).

⁷⁶ *Id.* at 808, 97 L.R.R.M. at 2445.

⁷⁷ *Id.*

⁷⁸ *Id.* Such "extraordinary circumstances" exist either when the NLRB order was in excess of the Board's delegated power or when the case presented a public question of national importance. *See id.* at 809, 97 L.R.R.M. at 2446.

⁷⁹ 443 F. Supp. at 810-11, 97 L.R.R.M. at 2447.

⁸⁰ *Id.* at 811, 97 L.R.R.M. at 2447.

⁸¹ Since, by definition, a "labor organization" is composed of those deemed to be "employees" under the Act, *see* 29 U.S.C. § 152(5) (1976), the denial of employee status to the interns and residents necessarily prevents their "union" from being consi-

since only a "labor organization" may commit an unfair labor practice or assert that such a practice has been committed against it, and thereby obtain court review of the decision. The limits on district court review indicate that *Cedars-Sinai*, though much criticized,⁸² will remain as Board and national labor policy.

Nevertheless the CIR may meet with success through an entirely different avenue. Congress is presently considering legislation requiring recognition of housestaff and overruling *Cedars-Sinai*. A recent bill, introduced in the House of Representatives,⁸³ would modify section 2(12)(b) of the NLRA⁸⁴ and would include medical interns and residents within the definition of professional employees covered by the Act. If passed, approximately 60,000 interns and residents will enjoy the sought-after collective bargaining rights.⁸⁵

III. UNFAIR LABOR PRACTICES

A. Employer Unfair Labor Practices

1. Successor Employers: Pacific Hide & Fur

In *NLRB v. Burns International Security Services, Inc.*,¹ the Supreme Court held that a successor employer must bargain with the representative of his predecessor's employees if a majority of the successor's workforce consists of holdover employees.² In the six years since *Burns*, the Board and the courts have struggled to interpret that case. They have focused in particular upon the following statement by the *Burns* Court:

Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms. In other situations, however, it may not be clear *until the successor employer has hired his full complement of employees* that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit ³

dered a "labor organization." See 1975-1976 *Annual Survey of Labor Relations and Employment Discrimination Law*, 17 B.C. IND. & COM. L. REV. 1041, 1114 (1976).

⁸² For criticism of *Cedars-Sinai* see Gordon, *Hospital Housestaff Collective Bargaining*, 1 EMPLOYEE REL. L. J. 418 (1976); Thompson, *The View From the House of Representatives in HEALTH CARE PROBLEMS*, *supra* note 19, at 141.

⁸³ H.R. 2222, 95th Cong., 1st Sess., 123 CONG. REC. H482 (daily ed. Jan. 19, 1977).

⁸⁴ 29 U.S.C. § 152(12)(b) (1976).

⁸⁵ See 97 LAB. REL. REP. (BNA) 165 (Feb. 27, 1978). The bill was reported to the House on March 16, 1978. H.R. REP. NO. 980, 95th Cong., 2d Sess. (1978).

¹ 406 U.S. 272 (1972). See generally 1972-1973 *Annual Survey of Labor Relations and Employment Discrimination Law*, 14 B.C. IND. & COM. L. REV. 1209 (1973).

² 406 U.S. at 281.

³ *Id.* at 294-95 (1972) (emphasis added).

During this *Survey* year, the United States Court of Appeals for the Ninth Circuit, in *Pacific Hide & Fur Depot, Inc. v. NLRB*,⁴ grappled with the meaning and application of the phrase "full complement of employees." The Ninth Circuit is the first court to consider this question.⁵ The court concluded that "full complement of employees" refers to the workforce needed to maintain the successor employer's desired production level, regardless of the size of the successor's workforce when it begins production or when the union demands recognition.⁶

The successorship issue in *Pacific Hide & Fur* arose in a situation similar to many others involving successor employers. Cahen Trading Company (Cahen), a processor of fresh hides, employed between twelve and eighteen employees.⁷ For over twenty years, Cahen had recognized and bargained with the Amalgamated Meat Cutters and Butcher Workmen (the union). In March, 1975, Pacific Hide & Fur Depot, Inc. (Pacific) acquired Cahen⁸ and hired seven of Cahen's employees.⁹ Pacific subsequently hired three additional employees, none of whom had worked previously for Cahen.¹⁰ On April 17, when the union demanded recognition, a majority of Pacific's employees were former Cahen employees. Pacific refused the union's demand.¹¹ Over the next several weeks, Pacific hired additional employees, none of whom had worked for Cahen, until Pacific's workforce reached nineteen—seven former Cahen employees and twelve new employees.¹² Thus, by the time Pacific had hired what it considered as its "full complement of employees," former Cahen employees no longer composed a majority of the workforce. Nevertheless, the Administrative Law Judge held, and the NLRB agreed, that Pacific was under an obligation to bargain with the union.¹³ On review, the Ninth Circuit set aside the NLRB's decision.¹⁴

⁴ 553 F.2d 609, 95 L.R.R.M. 2467 (9th Cir. 1977).

⁵ *Id.* at 612, 95 L.R.R.M. at 2469.

⁶ *Id.* at 614, 95 L.R.R.M. at 2471.

⁷ *Id.* at 610, 95 L.R.R.M. at 2468.

⁸ *Id.* Pacific purchased Cahen's tangible personal property. A corporation related to Pacific purchased Cahen's real property and leased it to Pacific. *Id.*

⁹ *Id.* at 610-11, 95 L.R.R.M. at 2468.

¹⁰ *Id.* at 611, 95 L.R.R.M. at 2468.

¹¹ *Id.* The last collective bargaining agreement between the union and Cahen contained no provision making it binding upon Cahen's successors or assigns, or referring to the possibility of a sale or liquidation of Cahen. *Id.*

¹² *Id.* There was no contention that Pacific's hiring practices were motivated by antiunion bias. *Id.*

¹³ *Pacific Hide & Fur Depot, Inc.*, 223 N.L.R.B. 1029, 92 L.R.R.M. 1063 (1976). An earlier Board decision, *Spruce Up Corp.*, 209 N.L.R.B. 194, 85 L.R.R.M. 1426 (1974), suggested the position the Board took in *Pacific Hide & Fur*. In *Spruce Up*, the successor employer initially hired more new employees than former employees of the predecessor. Within several weeks, however, subsequent hiring of some of the predecessor's employees resulted in the holdover employees constituting a majority of the unit. *Id.* at 194, 85 L.R.R.M. at 1427. The Board held that the successor was under an obligation to bargain with the prior union and stated in dictum:

[W]e would find that at such time as the hiring engaged in by the successor results in a reestablishment of a majority in the preexisting unit there arises a presumption of continuing majority status. If, after that point has been

The Ninth Circuit began its inquiry into whether Pacific, as Cahen's successor, had a duty to bargain with the union by reviewing established successorship law. The court noted that the first test of a duty to bargain with a prior union is whether the successor continues to conduct the same business as its predecessor so far as the work of the employees in the unit are concerned.¹⁵ If the successor's business is not essentially the same as that of the predecessor, no duty to bargain arises.¹⁶ However, if the successor's business

reached, new facts and circumstances arise which under our usual tests would provide the Employer with objective evidence casting doubt on the continuance of the majority status, he might be justified in putting the Union to the test of demonstrating its majority through a Board election or otherwise.

Id. at 196, 85 L.R.R.M. at 1429 (emphasis added).

¹⁴ 553 F.2d at 614, 95 L.R.R.M. at 2471 (9th Cir. 1977).

¹⁵ *Id.* at 611, 95 L.R.R.M. at 2468. See *NLRB v. Band-Age, Inc.*, 534 F.2d 1, 3, 92 L.R.R.M. 2001, 2003 (1st Cir. 1976); *NLRB v. Daneker Clock Co.*, 516 F.2d 315, 316, 89 L.R.R.M. 2325, 2326 (4th Cir. 1975) (per curiam); *NLRB v. Zayre Corp.*, 424 F.2d 1159, 1162, 74 L.R.R.M. 2084, 2087 (5th Cir. 1970); *Tom-A-Hawk Transit, Inc. v. NLRB*, 419 F.2d 1025, 1026-27, 73 L.R.R.M. 2020, 2020 (7th Cir. 1969). Factors considered in determining whether a change in ownership has affected the essential nature of the enterprise include: the operational structure of the business (product lines and departmental organization), *NLRB v. Zayre Corp.*, 424 F.2d at 1162, 74 L.R.R.M. at 2087, employee-job identity, *id.*, number of employees and size of operation, *id.*; but cf. *NLRB v. Band-Age, Inc.*, 534 F.2d at 6, 92 L.R.R.M. at 2003 (diminution in size of predecessor's operations after the take-over does not preclude finding of successorship), continuity of operations, *id.* at 5, 92 L.R.R.M. at 2005; but cf. *NLRB v. Daneker Clock Co.*, 516 F.2d at 316, 89 L.R.R.M. at 2326 (8 month hiatus between the operations of the old and new employers does not preclude finding of successorship), and the "totality of circumstances," *Howard Johnson Co. v. Hotel and Restaurant Employees and Bartenders*, 417 U.S. 249, 256 (1974); *NLRB v. Band-Age, Inc.*, 543 F.2d at 3, 92 L.R.R.M. at 2003.

The Supreme Court has implied that the successor's business must be essentially the same as that of the predecessor's before courts can require a successor to bargain with the union; otherwise, the bargaining unit which the union represents may not be appropriate. Cf. *NLRB v. Burns Int'l Security Servs., Inc.*, 406 U.S. 272, 280 (1972) (similarity between the successor's and predecessor's operations was important factor in ascertaining the continued appropriateness of the bargaining unit and, thus, the successor's duty to bargain with the union). In other words, for the Supreme Court, the ultimate consideration is whether the bargaining unit remains appropriate after the take-over; whether the successor's business is essentially the same as that of the predecessor is a factor in determining the continued appropriateness of the bargaining unit. At least one other court, however, takes the opposite view. It contends that the ultimate consideration is whether the successor's business is essentially the same as that of the predecessor; whether the bargaining unit remains appropriate after the successor takes over is merely a factor in determining the sameness of the business. See *NLRB v. Band-Age, Inc.*, 534 F.2d at 3, 92 L.R.R.M. at 2003 (1st Cir. 1976). The Board appears to be confused. See, e.g., *Spruce Up Corp.*, 209 N.L.R.B. 194, 196, 85 L.R.R.M. 1426, 1428-29 (1974); see note 13 *supra*.

¹⁶ See *NLRB v. Band-Age, Inc.*, 534 F.2d 1, 3, 92 L.R.R.M. 2001, 2003 (1st Cir. 1976); *NLRB v. Daneker Clock Co.*, 516 F.2d 315, 316, 89 L.R.R.M. 2325, 2326 (4th Cir. 1975) (per curiam); *NLRB v. Zayre Corp.*, 424 F.2d 1159, 1162, 74 L.R.R.M. 2084, 2087 (5th Cir. 1970) (pre-*Burns* decision).

is essentially the same as that of the predecessor, then the court must decide if the second test of successorship—whether there is an identity between the predecessor's and the successor's workforce—is met.¹⁷ Generally, if a majority of the successor's employees are not former employees of the predecessor, the successor has no duty to bargain with the union.¹⁸ If, however, a majority of the successor's employees are former employees of the predecessor, the successor has a duty to bargain with the union.¹⁹

Although the Ninth Circuit easily determined that Pacific satisfied the first test of successorship, since Pacific conducted essentially the same business as Cahen,²⁰ the court found it less clear that Pacific met the second test. While the majority of Pacific's employees were former Cahen employees when Pacific began its operations and when the union first demanded recognition, because of subsequent hiring the majority of Pacific's employees were not former Cahen employees by the time Pacific reached what it considered to be its full workforce. The question facing the court, therefore, was *when* should the court examine the composition of the workforce to ascertain whether Pacific had a duty to bargain with the union.²¹

Although the court did not specify the precise date on which it was appropriate to examine the composition of Pacific's workforce,²² it adopted the suggestion in the Supreme Court's decision of *Burns* that a court should consider the composition of a successor's workforce once the successor has hired its "full complement of employees."²³ According to the Ninth Circuit, the determination of when an employer has hired a "full complement of

¹⁷ See *NLRB v. Burns Int'l Security Servs., Inc.*, 406 U.S. 272, 279 (1972); *Nazareth Regional High School v. NLRB*, 549 F.2d 873, 879, 94 L.R.R.M. 2897, 2900 (2d Cir. 1977).

¹⁸ *Howard Johnson Co. v. Hotel and Restaurant Employees and Bartenders*, 417 U.S. 249, 264-65 (1974); see *NLRB v. Burns Int'l Security Servs., Inc.*, 406 U.S. 272, 281 (1972); cf. *NLRB v. John Stepp's Friendly Ford, Inc.*, 338 F.2d 833, 836, 57 L.R.R.M. 2442, 2442 (9th Cir. 1964) (pre-*Burns* decision).

It is possible that a majority of the successor's employees will not be former employees of the predecessor since a successor employer need not hire the predecessor's employees absent an agreement to do so. *Howard Johnson Co. v. Hotel and Restaurant Employees and Bartenders*, 417 U.S. at 261; *NLRB v. Burns Int'l Security Servs., Inc.*, 406 U.S. at 272-73 n.5. However, it is an unfair labor practice to refuse to hire employees solely because of their affiliation with a union. *Id.*; *Pacific Hide & Fur Depot, Inc. v. NLRB*, 553 F.2d at 611, 95 L.R.R.M. at 2468.

¹⁹ *NLRB v. Burns Int'l Security Servs., Inc.*, 406 U.S. 272, 278, 281 (1972). This rule is based on the assumption that the holdover majority continues to desire union representation. *Id.* See *NLRB v. Band-Age, Inc.*, 534 F.2d 1, 4, 92 L.R.R.M. 2001, 2004 (1st Cir. 1976); *Spruce Up Corp.*, 209 N.L.R.B. 194, 196, 85 L.R.R.M. 1426, 1429 (1974).

²⁰ 553 F.2d at 611, 95 L.R.R.M. at 2468.

²¹ *Id.* at 612, 95 L.R.R.M. at 2469.

²² *Id.* at 614 n.3, 95 L.R.R.M. at 2471 n.3.

²³ *Id.* at 612 & n.2, 95 L.R.R.M. at 2469 & n.2. Although, as the court in *Pacific Hide & Fur* notes, the "full complement" sentence in *Burns* is dictum, the court gives weight to this language because it "appears to be a carefully formulated standard." *Id.*

employees" cannot be made "by the application of a mathematical formula but only by considering the facts of each case . . ." ²⁴ The important facts in *Pacific Hide & Fur* included Pacific's method of operation and the level of output which Pacific could maintain.²⁵ Based on these facts, the court concluded that Pacific reached its "full complement of employees" at a time after former Cahen employees ceased to command a majority of the unit.²⁶ Consequently, the court held that Pacific had no duty to bargain with the union.²⁷

Although the Ninth Circuit did not elaborate on its reasoning in *Pacific Hide & Fur*, it is submitted that the decision is correct given the policy underlying sections 7²⁸ and 9(a)²⁹ of the National Labor Relations Act. Section 7 provides, in pertinent part, that "[e]mployees shall have the right . . . to bargain collectively through representatives of their own choosing . . ."³⁰ Section 7, by implication, also protects employees from being forced to accept a bargaining representative whom they did not select.³¹ Section 9(a) qualifies this right by providing that a union chosen by a *majority* of the employees in a bargaining unit shall represent *all* employees of the unit, including those who did not vote for the union.³² Thus, a tension runs throughout representation cases between the "majority rule" established in section 9(a) and the employees' right not to be forced to accept a union that they did not choose. In cases involving successor employers, this tension is particularly apparent because, as the court in *Pacific Hide & Fur* observed, "any decision regarding the employer's duty to bargain with the union affects the new employer, the old employees whom he has hired, and the new employees who were not previously represented by the union. The rights of all three must be considered."³³ Thus, when faced with a decision involving a successor employer,

²⁴ *Id.* at 613, 95 L.R.R.M. at 2470.

²⁵ *Id.* at 614 n.3, 95 L.R.R.M. at 2471 n.3.

²⁶ *Id.*

²⁷ *Id.* at 614, 95 L.R.R.M. at 2471. The court rejected the Administrative Law Judge's contention that if a successor employer can wait until it has hired what it considers to be a full complement of employees before determining whether the union enjoys majority support in the new unit, the successor can postpone bargaining with the union and, thus, "escape" its obligation. *Id.*, 95 L.R.R.M. at 2470. The court concluded that the Administrative Law Judge's decision simply begged the question by presupposing the existence of an obligation to bargain. The real question, the court stated, is whether the obligation exists at all. *Id.*

The fears implicit in the Administrative Law Judge's opinion—that employers will try to avoid successorship obligations by over-hiring to dilute the percentage of the predecessor's employees in the work force, or that employers will delay hiring a full complement of employees to postpone their obligation to bargain with the union—are unfounded. An employer who engages in either conduct would be subject to unfair labor practice charges under § 8(a)(1), 29 U.S.C. § 158(a)(1) (1976) (making it an unfair labor practice for an employer to restrain employees in the exercise of their § 7 rights), and § 8(a)(5), 29 U.S.C. § 158(a)(5) (1976) (making it an unfair labor practice for an employer to refuse to bargain with its employees' bargaining representative).

²⁸ 29 U.S.C. § 157 (1976).

²⁹ 29 U.S.C. § 159(a) (1976).

³⁰ 29 U.S.C. § 157 (1976).

³¹ *Id.*

³² 29 U.S.C. § 159(a) (1976).

³³ 553 F.2d at 612, 95 L.R.R.M. at 2469.

the court must respect not only the section 9(a) rights of the predecessor's employees to be represented by their chosen representative, but also the section 7 rights of the new employees not to be forced to accept a representative whom they did not choose.

Moreover, when faced with a successorship situation, the court must consider that the purpose of section 7 is to allow employees to choose a bargaining representative primarily "for the purpose of collective bargaining" with the employer.³⁴ As the court in *Pacific Hide & Fur* implicitly recognized, it is irrelevant that the union did enjoy majority support among Pacific's employees at one point; it is important, however, that the union did not enjoy majority support among Pacific's employees by the time bargaining would have begun. Thus, the court correctly balanced the section 7 rights of the new employees against those of the former Cahen employees and protected the right of the majority to choose their own bargaining representative.³⁵

B. Union Unfair Labor Practices

1. *Recognitional Picketing*: Iron Workers; Teamsters Local 344

a. *Picketing To Enforce Prehire Agreement*—Section 8(b)(7)(C) of the National Labor Relations Act makes it an unfair labor practice for a noncertified union to picket an employer, where an object of the picketing is to obtain employer recognition, unless the union files an election petition within 30 days after the start of picketing.¹ In enacting section 8(b)(7)(C) as part of the

³⁴ 29 U.S.C. § 157 (1976).

³⁵ Furthermore, *Pacific Hide & Fur's* holding that the court will not look at the composition of a successor's workforce to see if it has a duty to bargain with a union until the successor has hired its "full complement of employees," parallels the rule regarding the timing of representation elections where the employer is planning an expansion of its workforce. This latter rule is aptly stated in *K-P Hydraulics Co.*, 219 N.L.R.B. 138, 89 L.R.R.M. 1601 (1975):

Normally, where a finding is made that the requested unit is expanding in size and/or changing its basic character to such an extent that the present complement of employees is not substantial and representative in relation to that projected for the reasonably foreseeable future, the Board does not direct an election . . . but dismisses the petition as untimely filed.

Id. at 138, 89 L.R.R.M. at 1601. *Accord*, *World So. Corp.*, 215 N.L.R.B. 287, 287, 87 L.R.R.M. 1633, 1633-34 (1974) (regional director erred in directing election where employer planned to expand workforce from 297 to 455 within 3 months); *Millbrook, Inc.*, 204 N.L.R.B. 1148, 1149, 83 L.R.R.M. 1482, 1483 (1973) (election deferred until seasonal fruit processing business was at its peak production level).

¹ 29 U.S.C. § 158(b)(7)(C) (1976). Section 8(b)(7)(C) provides in pertinent part:

(b) It shall be an unfair labor practice for a labor organization or its agents—

....
(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organiza-

Labor-Management Reporting and Disclosure Act of 1959,² Congress sought to preserve majority choice of bargaining representatives. Section 8(b)(7)(C) safeguards majority choice by preventing unions from engaging in "top down" organizing campaigns whereby unions use "economic weapons to force recognition from an employer regardless of the wishes of his employees."³ At the same time Congress enacted section 8(b)(7)(C), it also enacted section 8(f).⁴ Section 8(f) makes it lawful for employers and unions in the construction industry to enter into prehire agreements⁵ despite lack of majority status.⁶ Congress passed section 8(f) because it perceived structural aspects of

tion as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative unless such labor organization is currently certified as the representative of such employees:

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing . . . : *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof; *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

² Pub. L. No. 86-257, § 704(c), 73 Stat. 544 (1959).

³ *Connell Constr. Co. v. Plumbers Local 100*, 421 U.S. 616, 632 (1975).

⁴ Pub. L. No. 86-257, § 705(a), 73 Stat. 545 (1959).

⁵ A prehire agreement is generally negotiated between a building and trades employer and a building and trades union prior to the start of a construction project. Therefore, when the agreement is executed, none or very few of the workers in the bargaining unit have been hired.

⁶ 29 U.S.C. § 158(f) (1976). Section 8(f) provides:

(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires

the construction industry which require relaxation of the rule that only unions having majority status may negotiate employment agreements.⁷

The legislative objectives of sections 8(b)(7)(C) and 8(f) conflict when a minority union pickets a construction industry employer to enforce a lawful prehire agreement. During the *Survey* year, the Supreme Court, in *NLRB v. Local 103, Iron Workers*,⁸ resolved this conflict between sections 8(b)(7)(C) and 8(f) by upholding the National Labor Relations Board's decision in *Iron Workers, Local 103*,⁹ that picketing by a minority union to enforce a valid section 8(f) agreement violates section 8(b)(7)(C).¹⁰ In condemning such picketing as an unfair labor practice, *Iron Workers* overrules sub silentio a prior Board decision, *Building and Construction Trades Council (Sullivan Electric Co.)*.¹¹

In *Iron Workers*, the employer, Higdon Construction Company, and the union, Local 103 of the International Association of Bridge, Structural & Ornamental Iron Workers, AFL-CIO, executed a lawful prehire agreement without a union security clause.¹² To avoid adhering to the terms of this agreement and to employ nonunion labor on certain projects, Higdon Construction organized a separate corporation, Higdon Contracting Company, to operate these projects.¹³ Local 103 never attained majority status, nor did it petition the Board for representational elections at any of the Higdon Contracting sites.¹⁴ However, Local 103 picketed the disputed sites for over thirty days, claiming Higdon Construction had violated its agreement.¹⁵ In

the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

⁷ S. REP. NO. 187, 86th Cong., 1st Sess. (1959), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 451-52 (1959) [hereinafter cited as LEGISLATIVE HISTORY].

⁸ 434 U.S. 335 (1978).

⁹ 216 N.L.R.B. 45, 88 L.R.R.M. 1067 (1975).

¹⁰ *Id.* 434 U.S. at 350.

¹¹ 146 N.L.R.B. 1086, 56 L.R.R.M. 1010 (1964). For further discussion of *Sullivan Electric* see note 63 *infra*.

¹² 216 N.L.R.B. at 45, 88 L.R.R.M. at 1067 (1975). A union security clause requires every employee hired to join the union within a specified period of time, usually seven days in the construction industry. If the employee does not comply, the union may have him removed from his job. 29 U.S.C. §§ 158 (a)(3), (f) (1976).

¹³ 216 N.L.R.B. at 45 & n.2, 88 L.R.R.M. at 1067-68 & n.2. The Board found Higdon Contracting to be an alter ego of Higdon Construction and, therefore, subject to the prehire agreement signed by Higdon Construction if the agreement was enforceable. *Id.* at 46, 88 L.R.R.M. at 1069.

¹⁴ *Id.* at 45-46, 88 L.R.R.M. at 1067-68.

¹⁵ *Id.* at 45, 88 L.R.R.M. at 1068.

response, Higdon Contracting filed an unfair labor practice charge alleging violation of 8(b)(7)(C).¹⁶

In concluding that the union's picketing was illegal, the Board stressed the limitations of section 8(f)'s exception to the principle of majority representation. It noted that prehire agreements are not enforceable through section 8(a)(5) proceedings.¹⁷ Rather, a union must attain majority status at a particular project after employees for that project have been hired.¹⁸ Until that time, the contract is voidable by either party.¹⁹ Extending these principles to Local 103's actions, the Board observed that it would be anomalous to allow the union to picket to enforce an agreement it could not enforce by obtaining a section 8(a)(5) bargaining order.²⁰ Since the union's picketing was aimed at enforcing a voidable contract, the Board found that the picketing was for recognitional purposes. Thus, the Board concluded that Local 103 violated section 8(b)(7)(C) of the Act by picketing at Higdon Contracting's nonunion projects.²¹

The United States Court of Appeals for the District of Columbia summarily reversed the Board's decision,²² adhering to its position in a former case²³ that section 8(f) agreements are not voidable before a union demonstrates majority status.²⁴ Consequently, the circuit court refused to enforce the Board's order against Local 103²⁵ and instead held that Higdon violated section 8(a)(5) when it refused to bargain with Local 103.²⁶

On certiorari, the Supreme Court reinstated the Board's decision that picketing by a minority union to enforce a prehire contract is an unfair labor practice in violation of section 8(b)(7)(C).²⁷ In so doing, the Supreme Court first examined the reasoning behind the Board's decision. The Court determined that "the Board's position is rooted in the generally prevailing statutory policy that a union should not purport to act as the collective-bargaining agent for all unit employees, and may not be recognized as such, unless it is the voice of the majority of employees in the unit."²⁸ While acknowledging

¹⁶ *Id.* at 47, 88 L.R.R.M. at 1069.

¹⁷ See *R.J. Smith Constr. Co.*, 191 N.L.R.B. 693, 693, 695, 77 L.R.R.M. 1493, 1494, 1496 (1971), *enforcement denied sub nom.* Local 150, Int'l Union of Operating Eng'rs v. NLRB, 480 F.2d 1186, 83 L.R.R.M. 2706 (D.C. Cir. 1973) (union without majority status unsuccessfully charged employer with § 8(a)(5) unfair labor practice for violation of a § 8(f) prehire agreement).

¹⁸ 216 N.L.R.B. at 46 & n.5, 88 L.R.R.M. at 1068-69 & n.5.

¹⁹ *Id.* at 46, 88 L.R.R.M. at 1069.

²⁰ *Id.*

²¹ *Id.*

²² Local 103, Int'l Ass'n of Iron Workers v. NLRB, 535 F.2d 87, 90, 91 L.R.R.M. 2986, 2988-89 (D.C. Cir. 1976).

²³ Local 150, Int'l Union of Operating Eng'rs v. NLRB, 480 F.2d 1186, 83 L.R.R.M. 2706 (D.C. Cir. 1973), *rev'g* *R.J. Smith Constr. Co.*, 191 N.L.R.B. 693, 77 L.R.R.M. 1493 (1971).

²⁴ 535 F.2d at 90, 91 L.R.R.M. at 2989.

²⁵ *Id.*

²⁶ *Id.*

²⁷ 434 U.S. at 350.

²⁸ *Id.* at 344 (citing *International Ladies' Garment Workers Union v. NLRB*, 366 U.S. 731, 737 (1961)).

that section 8(f) is an exception to the rule against execution of a contract with a minority union, the Court pointed out that the exception is limited. Specifically, the Court noted that, unlike a collective bargaining agreement, a prehire contract is not a bar to an election petition to test a union's majority status.²⁹ This limitation on section 8(f) had previously led the Board to conclude in *R.J. Smith Construction Co.*³⁰ that an employer's refusal to abide by a section 8(f) prehire contract does not constitute an unfair labor practice under section 8(a)(5) unless the union can demonstrate its majority status.³¹ The Supreme Court reasoned that the Board had applied this same limited view of section 8(f) in deciding *Iron Workers*.³² In the Board's view, a construction employer can challenge a picketing union's majority status by filing a section 8(b)(7)(C) charge and will prevail unless the union has majority support.³³ The Supreme Court determined that "[n]othing in the language or purposes of either § 8(f) or § 8(b)(7) forecloses this application of the statute."³⁴

Addressing the proper standard for reviewing Board decisions, the Supreme Court noted that Congress entrusted the Board with the responsibility of striking the proper balance between sections of the Act in order to effectuate national labor policy.³⁵ Thus, when a court is called upon to review a Board decision, the scope of review is limited to the question whether the Board's interpretation is reasonable in light of the purpose of the Act and consistent with relevant legislative history.³⁶ The court cannot disturb the Board's interpretation simply because the court does not consider the Board's interpretation to be the best one possible.³⁷ Turning to the case at hand, the Court concluded that the Board's reconciliation of sections 8(f) and 8(b)(7)(C), although not the only possible interpretation, was a fair construction and therefore entitled to deference.³⁸ The Court acknowledged that the Board's decision in *Iron Workers* might be inconsistent with prior Board precedent,³⁹ but remarked that an agency is entitled to change its mind.⁴⁰ When an

²⁹ 434 U.S. at 345. Section 8(f) contains a proviso which declares that a § 8(f) prehire contract "shall not be a bar to a petition filed pursuant to section [9(c)] or [9(e)]." 29 U.S.C. § 158(f) (1976).

³⁰ 91 N.L.R.B. 693, 77 L.R.R.M. 1493 (1971).

³¹ *Id.* at 695, 77 L.R.R.M. at 1496.

³² 434 U.S. at 346.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 350.

³⁶ *Id.* at 346. See notes 43-44 *infra*.

³⁷ *Id.* at 350.

³⁸ *Id.*

³⁹ *Id.* at 350-51. The Court referred to *Oilfield Maintenance Co.*, 142 N.L.R.B. 1384, 53 L.R.R.M. 1235 (1963), which involved a charge brought under §§ 8(a)(1) and 8(a)(2) against an employer based on the employer's repudiation of its prehire agreement with the union. *Id.* at 1385-86, 53 L.R.R.M. at 1236-37. In that case, the Board found that a valid § 8(f) contract bound the employer with the union until the termination date although the union had not demonstrated its majority status. *Id.* at 1387, 53 L.R.R.M. at 1238.

⁴⁰ 434 U.S. at 351.

agency does alter its position, a court's function is still only one of review; it does not consider the issue *de novo*.⁴¹

The Supreme Court's decision in *Iron Workers* reveals the Court's expanding policy of allowing the Board substantial discretion in its interpretation of the National Labor Relations Act.⁴² In the past, the Court has deferred to the Board's expertise when the Board's interpretation is consistent with congressional intent.⁴³ Conversely, the Court has refused to defer when the Board's decision is inconsistent with the legislative history and purpose of the Act.⁴⁴ It is submitted that the Court should not have deferred to the Board in this case because the Board's decision conflicts with the policies embodied in the National Labor Relations Act.

The strongest indication that section 8(f) was intended to be a broad exception to the rule of majority choice is found in the report by the Senate Committee on Labor and Public Welfare. This report states that "[r]epresentation elections in a large segment of the [construction] industry are not feasible to demonstrate such majority status due to the short periods of actual employment by specific employers."⁴⁵ The report also asserts that the bill's supporters were not concerned with the union's majority status under a prehire agreement because "[i]f the employer relies upon this pool of skilled craftsmen, members of the union, there is no doubt under these circumstances that the union will in fact represent a majority of the employees eventually hired."⁴⁶ Thus, the Senate committee report refutes the Board's present posture that the Act cannot countenance enforcement of a prehire agreement where the union lacks majority status.

There is other legislative history which also undercuts the Board's narrow view of section 8(f). Proponents of section 8(f) in the House of Representa-

⁴¹ *Id.*

⁴² See, e.g., *Bayside Enterprises, Inc. v. NLRB*, 429 U.S. 298 (1977); *NLRB v. Pipefitters Local 638 (Enterprise Ass'n)*, 429 U.S. 507 (1977).

⁴³ The applicable standard is set forth in *Gray v. Powell*, 314 U.S. 402, 411-13 (1941). *Gray* applied a two-tiered test for reviewing an agency's interpretation and application of the statute which it administers. A court first must question whether the agency is acting within the broad area entrusted to it by Congress. *Id.* at 413. This question in turn involves two distinct inquiries: whether the agency correctly perceives the parameters of the statutory term it is applying in light of the underlying rationale of the statutory scheme; and, whether the area is one in which Congress intended the agency to fill the interstices left by broad or vague statutory language. Nathanson, *Administrative Discretion in the Interpretation of Statutes*, 3 VAND. L. REV. 470, 473-75 (1950). If both branches of this first question have been answered affirmatively, the court then examines whether there is a rational basis for the agency's application of a statutory standard to a particular factual situation. 314 U.S. at 413. See Note, *Secondary Boycotts—NLRB Right-to-Control Analysis of Work-Preservation Disputes*; Enterprise Association, 1976-1977 *Annual Survey of Labor Relations and Employment Discrimination Law*, 18 B.C. IND. & COM. L. REV. 1047, 1057 (1977).

⁴⁴ See, e.g., *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 498, 500 (1960) (Court refused to uphold Board's interpretation because the interpretation fell outside policies delineated by the NLRA).

⁴⁵ S. REP. NO. 187, 86th Cong., 1st Sess. (1959), reprinted in I LEGISLATIVE HISTORY, *supra* note 7, at 424.

⁴⁶ S. REP. NO. 187, 86th Cong., 1st Sess. (1959), reprinted in I LEGISLATIVE HISTORY, *supra* note 7, at 424.

tives explained that they rejected a requirement of union certification by a majority of construction employees because the NLRB would be swamped with jurisdictional disputes if unions had to conduct representational elections for every project.⁴⁷ And while opponents of section 8(f), such as Senator Goldwater, objected to the provision because it eliminated the requirement of majority support for a union which obtained a prehire agreement,⁴⁸ their objections were not heeded. Moreover, attempts to narrow section 8(f)'s exception to the usual rule of majority choice of bargaining representatives were unsuccessful. For example, Senator Dirksen's proposal to require that the employer have at least a bargaining history with the union before a prehire agreement could be valid⁴⁹ was rejected by the committee.⁵⁰ Thus, this legislative history further refutes the Board's contention that section 8(f) is a narrow exception to the concept of majority choice of bargaining representatives.

The legislative history of section 8(f) also does not support the Board's assertion that picketing to enforce a prehire agreement is prohibited. Although there is language in the legislative record indicating congressional concern that employers should not be forced to *sign* a prehire agreement,⁵¹ there is nothing in the legislative history suggesting that, once an employer voluntarily signs a prehire agreement, the employer cannot be forced to *abide* by the agreement. Congress recognized that section 8(f) would serve little purpose if unions could not enforce prehire agreements in the same manner as other collective bargaining agreements. Representative Thompson, who served on the Conference Committee,⁵² expressly stated that while section 8(f) was not intended to coerce entry into a prehire agreement, it nevertheless did not operate to deny the right of a union to strike or picket to compel compliance with a prehire agreement.⁵³ Congress intended no such exercise in futility as to provide for a contract with a union which has minority status but to permit an employer to abrogate that contract because of the union's minority status.⁵⁴ By denying a minority union the right to strike to enforce a prehire agreement, the Board's decision in *Iron Workers* frustrates Congress'

⁴⁷ 105 CONG. REC. 15542 (1959), *reprinted in* II LEGISLATIVE HISTORY, *supra* note 7, at 1578 (speech of Rep. Rayburn submitted by Rep. Thompson).

⁴⁸ 105 CONG. REC. 7633 (1959), *reprinted in* II LEGISLATIVE HISTORY, *supra* note 7, at 1273.

⁴⁹ 105 CONG. REC. 6414 (1959), *reprinted in* II LEGISLATIVE HISTORY, *supra* note 7, at 1074.

⁵⁰ 105 CONG. REC. 6415-16 (1959), *reprinted in* II LEGISLATIVE HISTORY, *supra* note 7, at 1075.

⁵¹ Senator Kennedy stated in the debate over § 8(f) that the section did not "authorize a labor organization to strike, picket, or otherwise coerce an employer to *sign* a prehire agreement where the majority status of the union had not been established." 105 CONG. REC. 18128 (1959), *reprinted in* II LEGISLATIVE HISTORY, *supra* note 7, at 1715 (emphasis added).

⁵² The Conference Committee adopted the provision of the Senate bill which permitted prehire agreements in the construction industry. H.R. REP. NO. 1147, 86th Cong., 1st Sess. (1959), *reprinted in* I LEGISLATIVE HISTORY, *supra* note 7, at 946.

⁵³ 105 CONG. REC. 18134 (1959), *reprinted in* II LEGISLATIVE HISTORY, *supra* note 7, at 1721.

⁵⁴ *Local 150, Int'l Union of Operating Eng'rs v. NLRB*, 480 F.2d 1186, 1190, 83 L.R.R.M. 2706, 2709 (D.C. Cir. 1973).

intent to legitimate prehire contracts because it allows employers to repudiate them at will.⁵⁵

The frustration of congressional intent in *Iron Workers* resulted from the Board's disregard for the usual principles of statutory interpretation. When the Board interprets a statute, it should not concentrate on isolated sections; rather, "consideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions."⁵⁶ In *Iron Workers*, the Board overemphasized the sections of the Act which call for representation of the employees by a majority agent and thereby lost sight of the Act's overall purpose of promoting industrial peace and stability.⁵⁷ This objective of industrial stability was particularly apparent in the enactment of section 8(f). The reasons given for allowing prehire contracts—the necessity for employers to know labor costs in order to estimate accurately for bids, and the employer's need for a supply of skilled craftsmen ready for quick referral⁵⁸—indicate a congressional concern for insuring a stable labor supply. The Board's reconciliation of section 8(f) and section 8(b)(7)(C), however, ignores this important policy.

Since the Board's decision in *Iron Workers* goes against the weight of legislative history and the overall purpose of the Act, the Supreme Court's deference to the Board's interpretation is questionable. Moreover, another reason exists for questioning the propriety of the Supreme Court's decision to uphold the Board's holding: the Board's failure to account for contrary precedent. Contrary precedent existed in an earlier decision, *Building and Construction Trade Council (Sullivan Electric Co.)*,⁵⁹ which held that section 8(b)(7)(C) does not proscribe picketing to enforce a prehire agreement.⁶⁰ It is an elementary tenet of administrative law that an agency must either adhere to its own precedents or explain any departure from them.⁶¹ The Board did neither in *Iron Workers*. Nor did the Supreme Court's reasoning in *Iron Workers* adequately distinguish *Sullivan Electric* so as to make explanation by the Board unnecessary. The Supreme Court stated in *Iron Workers* that *Sullivan Electric* does not encompass a situation where the union has not been chosen as the representative of the majority.⁶² The Court's explanation, however, overlooked the fact that the union in *Sullivan Electric* did not represent the majority of employees at the disputed sites.⁶³

⁵⁵ *Id.*

⁵⁶ *Boys Markets, Inc. v. Retail Clerks Local 770*, 398 U.S. 235, 250 (1970).

⁵⁷ National Labor Relations Act, § 1, 29 U.S.C. § 151 (1976). *See, e.g.*, *Retail Clerks Local 128 v. Lion Dry Goods, Inc.*, 369 U.S. 17, 27 (1962).

⁵⁸ S. REP. NO. 187, 86th Cong., 1st Sess. (1959), reprinted in I LEGISLATIVE HISTORY, *supra* note 7, at 424; H. REP. NO. 741, 86th Cong., 1st Sess. (1959), reprinted in I LEGISLATIVE HISTORY, *supra* note 7, at 777.

⁵⁹ 146 N.L.R.B. 1086, 56 L.R.R.M. 1010 (1964).

⁶⁰ *Id.* at 1087, 56 L.R.R.M. at 1011.

⁶¹ *UAW v. NLRB*, 459 F.2d 1329, 1341, 79 L.R.R.M. 2332, 2340 (D.C. Cir. 1972).

⁶² 434 U.S. at 343-44.

⁶³ The union in *Sullivan Electric* was picketing the employer's project sites to enforce a § 8(f) prehire agreement. 146 N.L.R.B. at 1091, 56 L.R.R.M. at 1011. The company filed a complaint alleging a union violation of section 8(b)(7)(C). *Id.* at 1087,

It is submitted that the Supreme Court should not have dismissed so lightly prior, nonconforming Board precedent. The Court's affirmance in *Iron Workers* is particularly distressing considering that the Board's position on this issue has vacillated. To promote predictability and consistency within the law, an agency should explain thoroughly any new interpretation. Failure to do so constitutes an abuse of discretion and presents inadequate information to a reviewing court.⁶⁴

Regardless of the correctness of *Iron Workers*, the decision will have an important impact on construction industry unions. The Board's decision permits employers to engage in activities which would be unfair labor practices in any other labor contract situation. For example, an employer can refuse to bargain with the union, refuse to hire through the union hiring hall, and then unilaterally repudiate the contract because the union, due to the employer's own action, has not attained majority status.⁶⁵ In addition, *Iron Workers* leaves unclear whether a union security clause will adequately protect the enforceability of a prehire agreement. Even with such a clause, it appears that an employer can repudiate a prehire agreement prior to the start of a project because the employer has not hired any workers and, therefore, the union cannot have majority status at that time.⁶⁶ Nevertheless, with a security clause, the union will have a presumption of majority status where the employer has not repudiated the agreement within seven days of hiring for the project.⁶⁷ Without a union security clause, a union must obtain Board certification of its majority status or demonstrate its majority status in some other way in order to hold the employer to the terms of its prehire agreement.⁶⁸ It therefore appears that the Board's decision in *Iron Workers* will result in union insistence on security clauses in every prehire agreement.

b. *Picketing After Board Determination Not To Hold Election*—During the Survey year, the United States Court of Appeals for the Seventh Circuit, in

56 L.R.R.M. at 1010. Upon discovering this, the union's counsel wrote a letter to Sullivan Electric Company complaining that the company was in violation of the agreements because its employees at the jobsites in question had not been hired through the union hall and had not joined the appropriate union as required by the union security clause. *Id.* at 1090-91, 56 L.R.R.M. at 1011.

⁶⁴ DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES, § 17.07-4 (1976).

⁶⁵ This danger was articulated by Judge Winter in the *R.J. Smith* appeal. Local 150, Int'l Union of Operating Eng'rs v. NLRB, 480 F.2d 1186, 1190, 83 L.R.R.M. 2706, 2709 (D.C. Cir. 1973).

⁶⁶ See Local 103, Iron Workers, 216 N.L.R.B. 45, 46, 88 L.R.R.M. 1067, 1068-69 (1975).

An agreement with the employer to cover each new project may solve a union's problems. However, this awkward arrangement will be impossible for unions to comply with on smaller, limited projects. The impracticality of holding elections for each small building project will result in union members taking jobs without the benefit of union agreements since they cannot afford to let these jobs to nonunion workers.

⁶⁷ 216 N.L.R.B. at 46 & n.5, 88 L.R.R.M. at 1068-69 & n.5.

⁶⁸ *Id.* See *R.J. Smith Const. Co.*, 191 N.L.R.B. at 695 & n.5, 77 L.R.R.M. at 1496 & n.5.

Teamsters Local 344 v. NLRB (Purolator),¹ upheld the Board's position that recognition picketing by a noncertifiable union after a Board decision not to conduct an election is an unfair labor practice in violation of section 8(b)(7)(C) of the National Labor Relations Act.² In *Purolator*, the employer, Purolator Security, Inc., employed guards to provide armored car services to customers in the Milwaukee area.³ The Teamsters notified Purolator that they had collected signed union authorization cards from a majority of its employees. When Purolator refused to bargain with the union, the Teamsters filed an election petition with the Board.⁴

The NLRB Regional Director dismissed the election petition on the ground that the Teamsters union admits both guards and nonguards to membership.⁵ The Regional Director relied on section 9(b)(3) of the Act,⁶ which precludes the Board from certifying a union as the representative of employees in a bargaining unit of guards if the union also admits nonguards to membership.⁷ After dismissal of its election petition, the union picketed the premises of Purolator. The next day, the Regional Director filed a complaint alleging that the union's picketing constituted an unfair labor practice in violation of section 8(b)(7)(C) of the Act.⁸ A three-member panel of the

¹ 568 F.2d 12, 97 L.R.R.M. 2111 (1978).

² 29 U.S.C. § 158(b)(7)(C) (1976). Section 8(b)(7)(C) provides in pertinent part:

(b) It shall be an unfair labor practice for a labor organization or its agents—

....
(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative unless such labor organization is currently certified as the representative of such employees;

....
(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing

....
³ 568 F.2d at 13, 97 L.R.R.M. at 2113.

⁴ *Id.* at 14, 97 L.R.R.M. at 2113.

⁵ *Id.*

⁶ 29 U.S.C. § 159(b)(3) (1976). Section 9(b)(3) provides:

The Board shall decide in each case . . . the unit appropriate for the purposes of collective bargaining . . . : *Provided*, That the Board shall not . . . (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

⁷ 568 F.2d at 14, 97 L.R.R.M. at 2113.

⁸ *Id.*

Board, with one member dissenting, concluded that the union's picketing was indeed an unfair labor practice.⁹

On appeal to the Seventh Circuit, the Teamsters argued that its picketing did not violate section 8(b)(7)(C).¹⁰ The circuit court, although noting that section 8(b)(7)(C) does not expressly forbid such picketing, concluded that this section allows recognitional picketing only as a prelude to an election.¹¹ Therefore, section 8(b)(7)(C) does not allow recognitional picketing when the Board has already denied an election petition.¹² The court reasoned that the policies underlying section 8(b)(7)(C) support its conclusion that recognitional picketing by a noncertifiable union is prohibited. First, the court pointed to the strong public policy favoring the orderly settlement of labor disputes. Allowing unlimited picketing, the court concluded, would negate rather than promote this policy.¹³ Second, the circuit court noted that Congress, in enacting section 8(b)(7)(C), intended to prevent organizational campaigns in which unions use economic weapons to force recognition from an employer regardless of the wishes of the majority of his employees.¹⁴ The Seventh Circuit reasoned that although a majority of employees in the present case wished to

⁹ Teamsters Local 344, 288 N.L.R.B. 1379, 95 L.R.R.M. 1568 (1977) (Members Penello and Walther; Chairman Murphy dissenting).

¹⁰ 568 F.2d at 17, 97 L.R.R.M. at 2116. The union also contended that, despite the Board's statutory inability to certify the union as a bargaining representative, the Board should have conducted an election and certified the arithmetic results. *Id.* at 16, 97 L.R.R.M. at 2115. The Seventh Circuit acknowledged that the Board does have apparent authority to conduct such an election. The Board has exercised this authority when an outside union sought to usurp a union which was ineligible for certification under § 9(b)(3). *Id.* at 17, 97 L.R.R.M. at 2115 (citing *Burns Int'l Detective Agency, Inc.*, 138 N.L.R.B. 449, 51 L.R.R.M. 1067 (1962) and *Rock-Hills-Uris, Inc. v. McLeod*, 236 F. Supp. 395, 398, 58 L.R.R.M. 2107, 2109, *aff'd per curiam*, 344 F.2d 697, 59 L.R.R.M. 2064 (2d Cir. 1965)). The court noted, however, that the decision whether to hold such an election is a matter of discretion with the Board. Where, as in *Purolator*, an election would entail a heavy expense to both the Board and the employer, the court decided that the Board's refusal to hold an election was not an abuse of discretion. 568 F.2d at 17, 97 L.R.R.M. at 2116.

¹¹ The court of appeals easily dismissed the union's contention that *Purolator's* driver-guards were not covered by § 9(b)(3). The court noted that since 1953 the Board has considered driver-guards of armored trucks as guards within the meaning of § 9(b)(3). 568 F.2d at 15, 97 L.R.R.M. at 2114. *See* *Armored Motor Serv. Co.*, 106 N.L.R.B. 1139, 32 L.R.R.M. 1628 (1953), *overruling*, *Brinks, Inc.*, 77 N.L.R.B. 1182, 22 L.R.R.M. 1133 (1948); *Drivers Local 639*, 211 N.L.R.B. 687, 86 L.R.R.M. 1396 (1974); *Drivers Local 71*, 212 N.L.R.B. 1240, 91 L.R.R.M. 1109, *enforced*, 553 F.2d 1368, 94 L.R.R.M. 3167 (D.C. Cir. 1977). The Seventh Circuit determined that Congress enacted § 9(b)(3) out of concern for divided loyalties among employees who are given the sensitive task of protecting the employer's property. In the court's view, the Board's decision that driver-guards are subject to the problem of divided loyalties and, thus, covered by § 9(b)(3) was a reasonable one. 568 F.2d at 16, 97 L.R.R.M. at 2115.

¹² 568 F.2d at 18, 97 L.R.R.M. at 2116. The Seventh Circuit's decision is consistent with the District of Columbia Circuit's decision in *Drivers Local 71 v. NLRB*, 553 F.2d 1368, 1374-77, 94 L.R.R.M. 3167, 3170-72 (D.C. Cir. 1977).

¹³ 568 F.2d at 18, 97 L.R.R.M. at 2117.

¹⁴ *Id.* *See also* *Connell Constr. Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 632 (1975).

be represented by the union, the court could not blind itself "to the possibility that some other union seeking to organize guards in the future might attempt to force itself on an employer and its employees" ¹⁵ The court concluded, therefore, that the Board was correct in holding that the union's picketing of Purolator constituted an unfair labor practice in violation of section 8(b)(7)(C). ¹⁶

By prohibiting noncertifiable unions from picketing to obtain employer recognition, the Seventh Circuit's decision in *Purolator* reduces the chances that a union representing both guards and nonguards will secure employer recognition. After *Purolator*, an integrated union will be guilty of an unfair labor practice if it continues to picket after the Board refuses to order an election. It remains unclear, however, whether a noncertifiable union commits an unfair labor practice by picketing *before* the Board officially refuses to order an election. The only clear course open to nonguard unions to secure employer recognition is a request for voluntary recognition based on either signed authorization cards from a majority of the employees or a privately conducted election.

2. *Hospital Picketing*: Laborers' Local 1057; District 1199, RWDSU

Section 8(g) of the National Labor Relations Act,¹ enacted in 1974 as part of the health care amendments to the Act,² requires that a ten day notice be filed by "[a] labor organization . . . engaging in any strike, picketing or other concerted refusal to work at any health care institution" ³ Two separate issues regarding the scope of section 8(g) were the subject of *Survey* year decisions. In *Laborers' Local 1057 v. NLRB (Mercy Hospital of Laredo)*,⁴ the District of Columbia Circuit addressed the issue whether the provisions of section 8(g) apply to picketing on hospital premises by non-hospital employees. In *District 1199, RWDSU (United Hospitals)*,⁵ the National Labor Relations Board dealt with the issue as to what activities constitute picketing within the meaning of section 8(g). Since section 8(g) does not speak clearly to either of these issues, both the District of Columbia Circuit in *Mercy Hospital of Laredo* and the National Labor Relations Board in *United Hospitals* were required to ascertain congressional intent in order to interpret section 8(g). The approaches taken by these two bodies reflect differing perceptions as to the scope of section 8(g) and its proper relationship to the other provisions of the NLRA.

¹⁵ 568 F.2d at 19, 97 L.R.R.M. at 2117.

¹⁶ *Id.*

¹ 29 U.S.C. § 158(g) (1976).

² Act of July 26, 1974, Pub. L. No. 93-360, §§ 1(a)-(c), 88 Stat. 395 (1976) (codified at 29 U.S.C. §§ 152(2), 152(14), 158(d), 158(g) (1976)).

³ 29 U.S.C. § 158(g) (1976). Section 8(g) provides in pertinent part: "A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention"

⁴ *Laborer's Local 1057 v. NLRB*, 567 F.2d 1006, 1007, 96 L.R.R.M. 3160, 3160-61 (D.C. Cir. 1977).

⁵ 232 N.L.R.B. No. 67, 96 L.R.R.M. 1404 (Sept. 28, 1977).

a. *Picketing by Non-Health Care Employees*—The District of Columbia Circuit in *Mercy Hospital of Laredo* considered two cases involving nearly identical factual situations and similar disputes. In both cases, local unions representing non-health care construction workers set up reserved gate picketing on hospital premises.⁶ Neither union gave the ten day notice to the hospital or the Federal Mediation and Conciliation Service (FMCS) as detailed in section 8(g).⁷ In unfair labor practice proceedings brought by the non-health care contractors,⁸ the Board held⁹ that the locals had violated section 8(g) by picketing at the hospital jobsites without giving the required notice.¹⁰ The Board found section 8(g) applicable to all strikes and picketing conducted on the premises of a health care institution even when hospital employees and patient care are unaffected.¹¹ The unions petitioned the circuit court for review and the Board applied for enforcement of its order.¹²

⁶ One case involved picketing by the plumbers union against a non-union subcontractor which was engaged in the remodeling and expansion of Martin Memorial Hospital in Stuart, Florida. The picketing took place at the subcontractor's reserved gate and the union's signs indicated that the dispute was only with the subcontractor and not with the hospital or prime contractor. No hospital employees were required to use the reserved gate to enter the hospital nor were any required to cross the picket line. Hospital employees did not honor the picket line and hospital services were not disrupted. Employees of the prime contractor and other subcontractors, however, occasionally honored the picket line. Plumbers Local 630 (*Lein-Steenberg*), 219 N.L.R.B. 837, 838, 89 L.R.R.M. 1770, 1771 (1975) [hereinafter cited as *Lein-Steenberg*].

The other case, involving the laborers union, concerned recognition picketing of a general contractor which was engaged in expansion and renovation projects at the Mercy Hospital of Laredo. Though the picketing of the general contractor took place on hospital premises, no hospital employees ceased work and the picketing had no adverse impact on patient care. Laborers' Local 1057 (*Mercy Hosp. of Laredo*), 219 N.L.R.B. 846, 847, 89 L.R.R.M. 1777, 1778 (1975) [hereinafter cited as *Mercy Hosp. of Laredo*]. Although the union alleged that the general contractor selected a reserved gate adjacent to the hospital's emergency room in order to entangle the hospital in the dispute, *id.* at 848, 89 L.R.R.M. at 1778-79 (dissenting opinion of Members Fanning and Jenkins), this allegation was immaterial to the circuit court's decision. 567 F.2d at 1008 n.7, 96 L.R.R.M. at 3161 n.7.

⁷ 567 F.2d at 1008, 96 L.R.R.M. at 3161.

⁸ In *Mercy Hosp. of Laredo*, the hospital also filed a charge. *Id.* at 1008 n.8, 96 L.R.R.M. at 3161 n.8.

⁹ The Board decided *Mercy Hosp. of Laredo* and *Lein-Steenberg* by identical 3-2 votes.

¹⁰ *Lein-Steenberg*, 219 N.L.R.B. 837, 840, 89 L.R.R.M. 1770, 1771 (1975); *Mercy Hosp. of Laredo*, 219 N.L.R.B. 846, 847, 89 L.R.R.M. 1777, 1778 (1975).

¹¹ *Id.* In *Mercy Hosp. of Laredo*, the Board adopted its earlier findings in *Lein-Steenberg*. *Id.* For a discussion of the Board's decisions in *Lein-Steenberg* and *Mercy Hosp. of Laredo*, see 1975-1976 *Annual Survey of Labor Relations and Employment Discrimination Law*, 17 B.C. IND. & COM. L. REV. 1041, 1068 (1976).

¹² 567 F.2d at 1008, 96 L.R.R.M. at 3162. After oral argument of these cases, but prior to the court's decision, the Court of Appeals for the Seventh Circuit decided *NLRB v. Electrical Workers Local 388*, 548 F.2d 704, 94 L.R.R.M. 2536 (7th Cir.), *cert. denied*, 434 U.S. 837 (1977), in which the interpretation of 8(g) in a situation similar to that in *Mercy Hosp. of Laredo* was at issue. The Seventh Circuit held that 8(g) notice was required only when the proposed labor activity was planned "on behalf of employees of the institution" and not when union activity was conducted by non-health care employees. *Id.* at 711, 94 L.R.R.M. at 2542.

The court of appeals reversed the Board's decision in *Mercy Hospital of Laredo*, and held that the picketing by non-health care employees did not fall within the scope of section 8(g).¹³ In reaching this result, the court initially faced two questions concerning the scope of section 8(g): first, whether Congress intended the statute's reference to "a labor organization" to include all labor organizations or just those representing health care employees;¹⁴ second, whether Congress, in referring to activities "at any health care institution," intended the preposition "at" to denote merely the location of the picketing, or rather, to indicate that some relationship must exist between the health care institution and the employees involved in the labor dispute.¹⁵ Because the phrasing of the statute was ambiguous, and because of an absence of legislative discussion as to the impact of section 8(g) on non-health care employees, the circuit court found it necessary to reconstruct "how the legislature would have decided the specific issue if it had been specifically addressed by the legislature."¹⁶ The court scrutinized the legislative history of section 8(g) and the 1974 amendments to ascertain some indication of congressional intent regarding the application of section 8(g) to non-health care employees.¹⁷ The court, however, found only legislative silence.¹⁸ Clearly the purpose of the ten day notice provision of section 8(g) was to insure continuity of health care to patients and the community.¹⁹ Nevertheless, the court reasoned that Congress, by enacting section 8(g), "could not have intended to intercept every conceivable threat to uninterrupted patient care."²⁰

In interpreting section 8(g) to pertain only to labor activity of hospital employees, the circuit court found three factors influential. First, the court noted that section 8(g) must be read in light of section 13 of the NLRA²¹ which commands that doubts or ambiguities in the statute be resolved to safeguard the right to strike.²² The court determined that the right to strike

¹³ 567 F.2d at 1009, 96 L.R.R.M. at 3162.

¹⁴ *Id.*

¹⁵ *Id.* See also *NLRB v. Electrical Workers Local 388*, 548 F.2d 704, 707-08, 94 L.R.R.M. 2536, 2539 (7th Cir. 1977).

¹⁶ 567 F.2d at 1010, 96 L.R.R.M. at 3163. See Thompson, *The View From the House of Representatives*, in *LABOR RELATIONS LAW PROBLEMS IN HOSPITALS AND THE HEALTH CARE INDUSTRY* 142 (A. Knapp ed. 1977) [hereinafter cited as *HEALTH CARE PROBLEMS*].

¹⁷ 567 F.2d at 1010-15, 96 L.R.R.M. at 3163-67.

¹⁸ *Id.* at 1012, 96 L.R.R.M. at 3165.

¹⁹ *Id.* at 1010, 96 L.R.R.M. at 3163. See also S. REP. NO. 766, 93d Cong., 2d Sess. 3, reprinted in [1974] U.S. CODE CONG. & AD. NEWS, 3946, 3949.

²⁰ 567 F.2d at 1012, 96 L.R.R.M. at 3164. The Board had asserted that strikes by employees of a hospital subcontractor, such as a food service, could imperil the well-being of patients. The unions countered by pointing out that life-endangering strikes by subcontractors, such as suppliers of blood or drugs, were most likely to take place off hospital premises. See *id.* at 1011-12, 96 L.R.R.M. at 3164.

²¹ 29 U.S.C. § 163 (1976). Section 13 provides: "Nothing in this [Act], except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

²² See 567 F.2d at 1013, 96 L.R.R.M. at 3165. As the Supreme Court has noted, "[section] 13 declares a rule of construction which cautions against an expansive reading of that section which would adversely affect the right to strike, unless the

must be given a generous interpretation within the scope of the Act.²³ Second, the court observed that the reason for the lack of legislative comment on the effect of section 8(g) vis-a-vis non-health care employees was simply that Congress never intended the section to apply to such employees.²⁴ In fact, the court noted, most congressional discussion of section 8(g) was tied to references to health care employees.²⁵ In this regard, the court found significant the Senate report's statement that section 8(g) "generally prohibits a labor organization from striking or picketing a health care institution without first giving 10 days' notice."²⁶ The use of "a" rather than the preposition "at" seemed to indicate that Congress did not intend a locational interpretation of section 8(g); rather, Congress required a *relationship* between the pickets or strikers and the health care institution.²⁷ Third, the court noted the relationship between section 8(g) and other provisions of the NLRA.²⁸ Specifically, the court looked to section 8(d) which describes the duties of the Federal Mediation and Conciliation Service after notice is given under section 8(g).²⁹ Under section 8(d), the FMCS has no power to require meetings between disputing parties unless "employees of a health care institution" are involved.³⁰ Section 8(g)'s requirement of notice to the FMCS makes sense, the court reasoned, only if the provisions of the section are directed solely at health care employees.³¹ Thus, the court concluded that section 13's protection of the right to strike, the absence of legislative comment on the effect of

congressional purpose to give it that meaning persuasively appears either from the structure or history of the statute." *NLRB v. Drivers Local 639*, 362 U.S. 274, 282 (1960), *quoted in Mercy Hosp. of Laredo*, 567 F.2d at 1013, 96 L.R.R.M. at 3165.

²³ 567 F.2d at 1013, & n.43, 96 L.R.R.M. at 3165, & n.43; *see NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 234-35 (1963).

²⁴ 567 F.2d at 1014, 96 L.R.R.M. at 3166.

²⁵ *Id.*

²⁶ *Id.* (quoting S. REP. NO. 766, 93d Cong., 2d Sess. 3, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 3946, 3949 (emphasis added)). It might also be noted that the Conference Report spoke in terms directed at "employees of all health care institutions." *See CONF. REP. NO. 988*, 93d Cong., 2d Sess. 1, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 3959, 3959.

²⁷ *See* 567 F.2d at 1014, 96 L.R.R.M. at 3166.

²⁸ *Id.* at 1014-15, 96 L.R.R.M. at 3166-67.

²⁹ 29 U.S.C. § 158(d) (1976). Section 8(d) provides in pertinent part:

Whenever collective bargaining involves *employees of a health care institution*, the provisions of this subsection shall be modified as follows:

....
(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

Id. (emphasis added).

³⁰ *See N.L.R.B. v. Electrical Workers Local 388*, 548 F.2d 704, 711, 94 L.R.R.M. 2536, 2542 (7th Cir. 1977).

³¹ 567 F.2d at 1015, 96 L.R.R.M. at 3167.

section 8(g) on non-health care employees, and the limitation of the FMCS's jurisdiction to disputes involving employees of health care institutions reinforced its conclusion that Congress did not intend the notice provisions of section 8(g) to extend to employees of other than health care institutions.

It is submitted that the District of Columbia Circuit's interpretation of section 8(g) as inapplicable to non-health care employees is correct. The Board's decisions in the two cases reviewed in *Mercy Hospital of Laredo* had been criticized by commentators as inaccurate interpretations of section 8(g).³² Moreover, the congressional authors of section 8(g) themselves had indicated that the Board did not accurately follow legislative intent.³³ One further consideration reinforces the correctness of the court's decision. Under the provisions of section 8(d),³⁴ an employee who engages in a strike in violation of section 8(g) loses his status as an employee under the Act and consequently loses his protection under sections 8, 9 and 10 of the Act. An employee may thus become ineligible to vote in a Board election.³⁵ It would be a particularly harsh result for an employee to lose his "employee status" because of the union's failure to give notice in an evidently unclear situation.

To date, the District of Columbia Circuit and the Seventh Circuit are the only federal courts to address the issue of the relation of section 8(g) to non-health care employees. In *NLRB v. Electrical Workers Local 388*,³⁶ cited approvingly by the court in *Mercy Hospital of Laredo*,³⁷ the Seventh Circuit also interpreted section 8(g) as inapplicable to non-health care employees.³⁸ The decision of the District of Columbia Circuit in *Mercy Hospital of Laredo*, following in the tracks of the Seventh Circuit's opinion in *Electrical Workers*, enunciates a sound interpretation of section 8(g) in accord with both the national labor policy and the purpose of the health care amendments of 1974. It is hoped that other courts and the Board will follow the lead of these two courts in future decisions concerning section 8(g).

³² See, e.g., D'Alba, *Health Care Decisions of the National Labor Relations Board Since the 1974 Health Care Amendments to the National Labor Relations Act* in *HEALTH CARE PROBLEMS*, *supra* note 16, at 49; 1975-1976 *Annual Survey of Labor Relations and Employment Discrimination Law*, 17 B.C. IND. & COM. L. REV. 1041, 1076; *contra*, King, *Legislative Review: Is Congressional Intent Being Realized—Or Are Significant Changes Needed?* in *HEALTH CARE PROBLEMS*, *supra* note 16, at 161-62.

³³ 121 CONG. REC. 37448 (1975) (remarks of Sen. Williams) ("This interpretation is entirely incorrect since it was not the intention of the 1974 amendments to change the law with respect to the relationship between employers who were previously covered by the act and their employees and unions representing or seeking to represent those employees.") 121 CONG. REC. 37449 (1975) (remarks of Sen. Taft); Thompson, *The View From the House of Representatives* in *HEALTH CARE PROBLEMS*, *supra* note 16, at 142. Note, however, that little judicial weight may be ascribed to the post-passage remarks of legislators. See, e.g., *United States v. Price*, 361 U.S. 304, 313 (1960); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 348-49 (1963).

³⁴ 29 U.S.C. § 158(d) (1976).

³⁵ See *Casey & Glass, Inc.*, 219 N.L.R.B. 698, 698, 89 L.R.R.M. 1779, 1779 (1975). In *Casey & Glass*, the employees lost their jobs and the right to reinstatement. See D'Alba, *supra* note 32, at 49.

³⁶ 548 F.2d 704, 94 L.R.R.M. 2536 (7th Cir.), *cert. denied*, 434 U.S. 837 (1977).

³⁷ 567 F.2d at 1009, 96 L.R.R.M. at 3162.

³⁸ 548 F.2d at 711, 94 L.R.R.M. at 2542.

b. *Picketing Within the Ambit of Section 8(g)*—Further scrutiny of section 8(g) was undertaken by the Board in *District 1199, RWDSU (United Hospitals)*.³⁹ Here, the Board had to discern whether a union's activity constituted "picketing" within the scope of section 8(g). The dispute in *United Hospitals* arose when approximately twenty-five Newark Hospital employees, members of the respondent union,⁴⁰ walked in front of the hospital's main entrance carrying placards indicating the union's contract dispute with the hospital.⁴¹ The employees participated during off-shift hours. During the two and one-half hour demonstration, the employees neither blocked access to the hospital nor requested persons not to enter the hospital.⁴² The union gave no notice of this demonstration to Newark Hospital or FMCS.⁴³ The union contended that its activity was merely informational and should be characterized as handbilling instead of picketing; thus, it argued that the activity did not fall within the purview of section 8(g).⁴⁴ The Board, however, held that the union's activity was, in fact, picketing and, as such, proscribed by section 8(g) even though it did not disrupt the operation of the hospital.⁴⁵

The Board majority⁴⁶ emphasized several factors in reaching its conclusion that the union's activity did constitute picketing within the meaning of section 8(g). First, the Board considered the language of section 8(g) which prohibits "any strike, picketing or other concerted refusal to work" without proper notice.⁴⁷ The Board read the word "any" as modifying the word "picketing" and thus implied that section 8(g) prohibited, in the absence of timely notice, all picketing regardless of whether stoppage or disruption of work resulted.⁴⁸ The Board next examined section 8(g) in light of the overall purposes of the health care amendments.⁴⁹ By providing a mechanism for advanced notice of any attempted strike or picketing, the 1974 amendments in general, and section 8(g) in particular, were designed to minimize the disruption of patient care caused by a labor dispute.⁵⁰ In the Board's view, the very act of picketing regardless of whether it actually disrupted delivery of health care services provided the *potential* for disruption of the delivery of such services.⁵¹ Thus, there was ample need for prior notice of any picketing

³⁹ 232 N.L.R.B. No. 67, 96 L.R.R.M. 1404 (Sept. 28, 1977).

⁴⁰ The union was the certified representative for Newark Hospital's technical and professional employees. *Id.*, 96 L.R.R.M. at 1405.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* The Board initially found that because of the physical patrolling of the area the activity differed substantially from handbilling. The key issue thus became whether *this* picketing violated section 8(g).

⁴⁶ The Board majority, in this 3-1 decision, consisted of Chairman Fanning and Members Penello and Murphy.

⁴⁷ 29 U.S.C. § 158(g) (1976) (emphasis added). See note 3 *supra*.

⁴⁸ 232 N.L.R.B. No. 67, 96 L.R.R.M. at 1405-06 & n.8.

⁴⁹ *Id.*

⁵⁰ See S. REP. NO. 766, 93d Cong., 2d Sess. 3, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 3946, 3949; see text and note 19 *supra*.

⁵¹ 232 N.L.R.B. No. 67, 96 L.R.R.M. at 1406.

on hospital premises. Finally, the Board found that section 8(g)'s requirement of a ten day notice was not an unconstitutional restraint on the protected freedom of speech. First amendment rights, the Board noted, must be balanced against other public interests.⁵² The Board determined that the public interest in uninterrupted health care justified the restraint of speech resulting from the ten day notice imposed by section 8(g). Still, the Board was careful to note that its holding did "not constitute a ban on all picketing per se, but rather a ban on all picketing which unjustifiably occurs in the absence of a 10-day written notice."⁵³

The *United Hospitals* case presented the Board with a difficult problem of statutory interpretation. In resolving this problem, the majority followed Board precedent in subscribing to a literal interpretation of section 8(g).⁵⁴ Such an interpretation finds some support in the underlying purpose of section 8(g) to prevent disruption of health care services. If the Board were to establish a policy whereby some forms of picketing were allowed without notice while other forms of picketing were not, the Board would be put in the position of having to review each case to determine whether the picketing in question posed the potential for disruption of services. Certainly, if Congress in enacting section 8(g) intended to minimize disruption of health care services in the event of a labor dispute, it could not have envisioned an after-the-fact review of individual labor activities.

It is submitted, however, that the Board's literal interpretation of section 8(g) is excessively restrictive of health care employees' right of expression. The fundamental right of employees to participate in peaceful expression as a

⁵² *Id.*

⁵³ *Id.*

⁵⁴ See e.g., District 1199, RWDSU (First Healthcare Corp.), 222 N.L.R.B. 212, 212, 91 L.R.R.M. 1097, 1098 (1976), *enforcement denied*, No. 76-4073 (2d Cir. Nov. 23, 1976) (unpublished).

In *First Healthcare Corp.*, the Board concluded that a union which did not represent hospital employees violated section 8(g) when four of its officers joined a properly noticed picket line in front of the hospital since the union had not given its own ten day notice. 222 N.L.R.B. at 213, 91 L.R.R.M. at 1098. The Board followed a literal interpretation of section 8(g) in finding a violation of the statute. In the Board's opinion, the mandatory language of the section required advance notice of *any* picketing regardless of its character. *Id.* at 212, 91 L.R.R.M. at 1098. On petition for enforcement, the Second Circuit, without reaching the merits of the case, denied the Board's petition on the grounds that the activity involved was *de minimis*. No. 76-4073 (2d Cir. Nov. 23, 1976) (unpublished). Implicit in the circuit court's opinion was a realization that the picketing involved "had no impact whatsoever on the institution" and that a finding of a § 8(g) violation would not further the policy of minimizing disruption of the hospital embodied in the statute. Fanning, *Board Decisions and Directions: Nuances of Yet Uncharted Waters in HEALTH CARE PROBLEMS*, *supra* note 16, at 62.

It is difficult to reconcile the ultimate result of *First Healthcare Corp.* with the majority opinion in *United Hospitals*. Certainly the activity at issue in *United Hospitals* could be seen as "*de minimis*" as the activity in *First Healthcare Corp.*: the peaceful picketing in question lasted for two and one-half hours, only one more hour than the sympathy picketing in *First Healthcare Corp.* and had no impact on the hospital's operation. By proscribing all union activity on hospital premises regardless of whether it disrupts the delivery of health care services, the Board has not given ample weight to the right of health care employees to engage in modes of peaceful picketing.

form of labor activity, as specifically echoed in section 13 of the Act, has long been preserved by the courts and the NLRB. Thus, it is suggested that the better view of section 8(g) is taken by Member Jenkins in his dissenting opinion in *United Hospitals*.⁵⁵ The thrust of Member Jenkins' dissent was that the notice provisions of section 8(g) were not applicable in light of the employees' right to engage in peaceful picketing.⁵⁶ Member Jenkins argued that the majority's interpretation of section 8(g) ran contrary to judicially established rules of statutory construction which warn against restrictions on legitimate labor activity.⁵⁷ In his view, section 13 of the Act mandated a reading of section 8(g) to allow peaceful picketing.⁵⁸ Thus, Member Jenkins concluded that the majority's ban on peaceful picketing constituted an impermissible restraint on free speech.

The Board's literal reading of section 8(g) in *United Hospitals* is consistent with its decision in *Mercy Hospital of Laredo*, where the Board read section 8(g) to prohibit "any strike or picketing at the premises of a health care institution . . . [constituting] sufficient potential for disruption of medical care . . .".⁵⁹ As shown by the decision of the District of Columbia Circuit in *Mercy Hospital of Laredo*, however, the circuit courts will be critical of the Board's failure to consider the employees' right to engage in peaceful activities. The District of Columbia Circuit rejected the Board's broad proscription of labor activities and emphasized that section 8(g) must be read in light of the provisions of the

⁵⁵ 232 N.L.R.B. No. 67, 96 L.R.R.M. at 1407.

⁵⁶ *Id.*, 96 L.R.R.M. at 1408. In his dissent, Member Jenkins first characterized the picketing involved in this case as purely "informational picketing", and thus, outside the scope of § 8(g). *Id.*, 96 L.R.R.M. at 1407-08; see also 29 U.S.C. § 158(b)(7)(C) (1976). Further, Member Jenkins found from his reading of the legislative history that § 8(g) was directed at the *disruptive impact* of picketing rather than picketing per se. 232 N.L.R.B. No. 67, 96 L.R.R.M. at 1408; see note 50 *supra*. Purely informational picketing, in Member Jenkins' view, did not pose a threat to the continuity of health care. Additionally, Member Jenkins pointed to the legislative characterization of § 8(g) as the "10-day strike notice provision" as indicative of an intent to prevent work stoppages or interruptions rather than peaceful picketing. 232 N.L.R.B. No. 67, 96 L.R.R.M. at 1408.

⁵⁷ 232 N.L.R.B. No. 67, 96 L.R.R.M. at 1408.

⁵⁸ See text and notes 21-23 *supra*. Member Jenkins found support for his position in the language of the Supreme Court in *NLRB v. Fruit Packers Local 760 (Tree Fruits)*, 377 U.S. 58 (1964). In *Tree Fruits*, the Court noted:

Throughout the history of federal regulation of labor relations, Congress has consistently refused to prohibit peaceful picketing except when it is used as a means to achieve specific ends which experience has shown are undesirable. . . . We . . . have not ascribed to Congress a purpose to outlaw peaceful picketing unless "there is the clearest indication in the legislative history," that Congress intended to do so as regards the particular ends of the picketing under review. Both the congressional policy and our adherence to this principle of interpretation reflect concern that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment.

Id. at 62-63 (citations omitted).

⁵⁹ *Lein-Steenberg*, 219 N.L.R.B. 837, 840, 89 L.R.R.M. 1770, 1773 (1975) (emphasis in original).

entire Act which protect employee expression in labor activity. It is hoped that the Board will follow the direction charted by the District of Columbia Circuit in its future interpretations of section 8(g), and accord greater weight to the protected nature of employee activity at hospitals.

3. *Common Situs Picketing in Disregard of Reserved Gate: Allied Concrete*

Section 8(b)(4) of the National Labor Relations Act¹ prohibits unions from conducting secondary boycotts. Specifically, a union commits an unfair labor practice under section 8(b)(4) when it uses direct pressure—strikes, picketing, threats, coercion, or restraint—for the purpose of inducing a neutral, secondary employer to discontinue dealing with a primary employer with whom the union has a labor dispute.² In order to establish a violation of the “secondary boycott” ban of section 8(b)(4), it must be shown that a union deliberately engaged in a strike, picketing, or similar activity to accomplish a prohibited secondary objective.³ Thus, a union may lawfully engage in primary activity if it does not intentionally create economic hardships for a neutral employer, even though its primary activity incidentally inflicts such economic hardships.⁴

The Board’s task of applying the distinction embodied in section 8(b)(4) between the permissible incidental effects of primary activity on neutral employers and impermissible secondary activity has proven particularly troublesome in cases involving “common situs” picketing—picketing at a location where both primary and secondary employers are engaged in business.

¹ 29 U.S.C. § 158(b)(4) (1976).

² *Id.* Section 8(b)(4) provides in relevant part:

It shall be an unfair labor practice for a labor organization or its agents—
(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

....
(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing

³ See *General Teamster Local 126 (Ready Mixed Concrete, Inc.)*, 200 N.L.R.B. 253, 254, 81 L.R.R.M. 1461, 1464 (1972).

⁴ The proviso to § 8(b)(4)(ii)(B), see note 2 *supra*, was added by the Landrum-Griffin Act of 1959 to clarify any existing doubt as to the continued legality

During the Survey Year, in *Teamsters Local 83 (Allied Concrete)*,⁵ the Board confronted a common situs picketing situation in which a union chose not to picket at a reserved gate established for the exclusive use of the primary employer's employees, and instead picketed at a construction site occupied jointly by the primary and secondary employer.⁶ A divided Board⁷ held that the union's ambulatory common situs picketing in disregard of the primary employer's reserved gate did not constitute an unfair labor practice within the purview of section 8(b)(4).⁸

The controversy in *Allied Concrete* started when Allied Concrete, Inc. and its drivers, represented by Teamsters Local 83, failed to reach a collective bargaining agreement.⁹ As a supplier of ready-mix concrete, Allied had subcontracted with Ashton Company, Inc. to furnish concrete for the construction of a highway overpass.¹⁰ Following the parties' failure to reach a contract, the Teamsters called a strike.¹¹ In response, Allied erected signs on roads leading to the job site, designating one entrance as a reserved gate for Allied's employees and suppliers, and two entrances for Ashton and all other contractors.¹² In addition, Allied notified the union of its establishment of the designated entrances.¹³ On two separate occasions thereafter, when Allied attempted to deliver concrete to the project, vehicles containing picketers accompanied Allied's truck from the terminal to the construction site, entered the project area through the reserved gate designated for Allied's employees, continued to the actual work site, and began picketing Allied's truck.¹⁴ Honoring the Teamsters' picket line, the neutral Ashton employees walked off the job.¹⁵ In an attempt to eliminate the work stoppages arising from the repeated picketing, Ashton cancelled its contract with Allied.¹⁶

Allied Concrete then filed unfair labor practice charges with the Board alleging that, by picketing at the actual work site instead of at the reserved gate, the union violated section 8(b)(4) of the Act.¹⁷ Because section 8(b)(4) proscribes only secondary picketing, the Board focused on the question whether the union's conduct constituted primary or secondary activity. The Board turned to its guidelines for identifying primary and secondary picketing outlined in *Sailors' Union of the Pacific (Moore Dry Dock)*.¹⁸ Under the

of primary activity. *National Woodwork Mfrs. Assoc. v. NLRB*, 386 U.S. 612, 632-33 & nn.20 & 21 (1967).

⁵ 231 N.L.R.B. No. 181, 96 L.R.R.M. 1165 (Aug. 31, 1977).

⁶ *Id.*, 96 L.R.R.M. at 1166.

⁷ Chairman Fanning and Members Murphy and Jenkins were in the majority, *id.*, with Members Penello and Walther dissenting. *Id.*, 96 L.R.R.M. at 1168.

⁸ *Id.*

⁹ *Id.*, 96 L.R.R.M. at 1166.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*, 96 L.R.R.M. at 1168 (Members Penello and Walther, dissenting).

¹⁷ *Id.*, 96 L.R.R.M. at 1166.

¹⁸ 92 N.L.R.B. 547, 27 L.R.R.M. 1108 (1950).

Moore Dry Dock test, common situs picketing is *presumptively lawful*¹⁹ if it is strictly limited to those times when the situs of the dispute is located on the secondary employer's premises,²⁰ occurs only when the primary employer is engaged in its normal business at the situs,²¹ is conducted reasonably close to the location of the situs,²² and is conducted in a manner which clearly discloses that the dispute is with the primary employer.²³ There was no dispute that the union's picketing in *Allied Concrete* met these four criteria and, therefore, was *presumptively lawful*.²⁴ A question arose, however, whether the union's decision to picket at the pour site, rather than at the reserved gate, revealed an intent to enmesh a secondary employer in the union's dispute with *Allied*,²⁵ and thus overcame the presumption of lawfulness.

In assessing the lawfulness of the union's picketing, the *Allied Concrete* Board concluded that its prior decision in *Teamsters Local 807 (Schultz Refrigerated Service, Inc.)*²⁶ was dispositive.²⁷ In *Schultz*, the Board held that since the situs of a transportation company's business is not restricted to its terminal, but rather, extends to the locations of its customers, picketing around the company's trucks during customer pickups and deliveries constitutes lawful

¹⁹ *Id.* at 549, 27 L.R.R.M. at 1110. Picketing in bare compliance with the *Moore Dry Dock* requirements is not lawful per se. See *T.W. Helgesen, Inc. v. Bridge Workers Local 498*, 548 F.2d 175, 181, 94 L.R.R.M. 2254, 2258 (7th Cir. 1977); *Ramey Constr. Co. v. Local 544, Painters*, 472 F.2d 1127, 1132, 82 L.R.R.M. 2442, 2444 (5th Cir. 1973); *NLRB v. Northern Cal. Dist. Council of Hod Carriers*, 389 F.2d 721, 725, 67 L.R.R.M. 2502, 2504 (9th Cir. 1968); *General Teamsters Local 126 (Ready Mixed Concrete, Inc.)*, 200 N.L.R.B. 253, 254-55, 81 L.R.R.M. 1461, 1465 (1972); *International Bhd. of Electrical Workers Local 861 (Plauche Electric, Inc.)*, 135 N.L.R.B. 250, 255, 49 L.R.R.M. 1446, 1449 (1962). Rather, satisfaction of these criteria creates a presumption that the union has not exceeded the permissible bounds of primary action by seeking to enmesh a secondary employer in its dispute with the primary employer. *Ramey Constr. Co. v. Local 544, Painters*, 472 F.2d at 1132, 82 L.R.R.M. at 2444; *Vassar Constr., Inc. v. Teamsters Local 445*, 436 F. Supp. 1084, 1088 n.3, 96 L.R.R.M. 2043, 2045-46 n.3 (S.D.N.Y. 1977); *NLRB v. Northern Cal. Dist. Council of Hod Carriers*, 389 F.2d at 725, 67 L.R.R.M. at 2504. Accordingly, a union's common situs picketing in compliance with the *Moore Dry Dock* standards may constitute an unfair labor practice under § 8(b)(4) if direct evidence reveals an unlawful secondary objective. *General Teamsters Local 126 (Ready Mixed Concrete, Inc.)*, 200 N.L.R.B. at 254-55, 81 L.R.R.M. at 1465.

²⁰ *Moore Dry Dock*, 92 N.L.R.B. at 549, 27 L.R.R.M. at 1110.

²¹ *Id.*

²² *Id.*

²³ *Id.* These criteria were designed to ensure that the appeal of the picketing is directed only to employees of the primary employer. *General Teamsters Local 126 (Ready Mixed Concrete, Inc.)*, 200 N.L.R.B. 253, 254, 81 L.R.R.M. 1461, 1464 (1972).

²⁴ 231 N.L.R.B. No. 181, 96 L.R.R.M. at 1166.

²⁵ *Id.*

²⁶ 87 N.L.R.B. 502, 25 L.R.R.M. 1122 (1949). *Schultz* involved a terminal-based transportation business operated primarily through a fleet of commercial trucks. *Id.* at 506, 25 L.R.R.M. at 1124. During a strike by *Schultz* employees, picketers accompanied *Schultz*' delivery trucks to various locations where pickups and deliveries were made. *Id.* at 503, 25 L.R.R.M. at 1123. At each pickup and delivery point, the striking employees picketed only "between the headlights" of the *Schultz* trucks. *Id.*

²⁷ 231 N.L.R.B. No. 181, 96 L.R.R.M. at 1167.

primary activity.²⁸ Applying the rationale enunciated in *Schultz* to the situation in *Allied Concrete*, the Board noted that Allied conducted business both at its dispatch terminal and at the pour sites where it delivered concrete.²⁹ Thus, the Board concluded, Local 83 possessed the right to publicize its dispute with Allied by picketing "between the headlights" of Allied's trucks at the construction site.³⁰

In the Board's view, the mere fact that the primary employer in the case at hand had established a reserved gate did not serve to distinguish the case from *Schultz* and, therefore, did not preclude primary ambulatory picketing at the construction site.³¹ The Board stressed that lawful primary picketing does not become unlawful simply because alternative locations exist at which the picketing may be conducted "out of sight or hearing of, or having other effects on, neutral employees."³² Consequently, the Board rejected the contention that the union's decision to picket at the pour site, rather than at the reserved gate, demonstrated an intent to enmesh a secondary employer in the union's dispute and thereby rebutted the presumption of lawfulness.³³

²⁸ 87 N.L.R.B. at 506-09, 25 L.R.R.M. at 1124-26. The *Schultz* Board noted that such ambulatory picketing was the only effective manner by which the union could exert direct pressure on the primary employer. *Id.* at 506, 25 L.R.R.M. at 1124. As long as the striking employees confined their picketing at the neutral employer's premises to "between the headlights" of the *Schultz* trucks, the Board concluded that the union could effectively communicate its dispute with *Schultz* to the public while the neutral employers were free from interference in the conduct of their business. *Id.* at 506-07, 25 L.R.R.M. at 1124-25.

²⁹ 231 N.L.R.B. No. 181, 96 L.R.R.M. at 1167.

³⁰ *Id.*

³¹ *Id.* The dissenters in *Allied Concrete* distinguished *Schultz* by noting that no reserved gate system or other alternative picketing location had been established at the premises of any of the neutral employers involved in that case. *Id.*, 96 L.R.R.M. at 1170 (Members Penello and Walther, dissenting). Hence, the dissent concluded, *Schultz* does not support the proposition that under all circumstances it is lawful for a union to picket a primary employer's trucks on the neutral employer's premises if such picketing is conducted "between the headlights." *Id.*

³² *Id.*, 96 L.R.R.M. at 1167. The Board majority considered it unimportant that neutral employees walked off the job as a result of the Teamsters' picket line. *Id.* The Board concluded that the union's objective in picketing, if otherwise lawful, is not rendered unlawful merely because neutral employees elect to respect the picket line. *Id.*

In further support of its holding, the Board attached considerable significance to Allied's initiative in establishing the reserved gates. *Id.*, 96 L.R.R.M. at 1168. The Board noted that Allied's action enabled it to make all decisions relating to the placement and wording of the reserved gate signs. The majority found such action on the part of Allied relevant since sections 8(b)(4)(i) and 8(b)(4)(ii)(B) were intended to protect the rights of neutral employers and were not intended to be used as a tool "for the aid and convenience of primary employers." *Id.*

³³ *Id.* Members Penello and Walther argued in dissent that under the circumstances, the union could not ignore with legal impunity the primary employer's reserved gate and proceed onto the actual worksite in order to picket "between the headlights." *Id.*, 96 L.R.R.M. at 1169. The dissent noted that the *Moore Dry Dock* criteria are evidentiary in nature and are to be utilized only in the absence of direct evidence as to the underlying intent of the union. *Id.*, 96 L.R.R.M. at 1168. Where

The significance of the decision in *Allied Concrete* lies with the Board's refusal to infer a proscribed secondary objective from a union's decision to picket at a construction site rather than at a primary employer's reserved gate. The Board's announcement that the presumptive validity of common situs picketing in compliance with the *Moore Dry Dock* criteria is not rebutted merely because alternative locations exist at which the impact of such picketing upon neutral employees could be minimized,³⁴ serves to eliminate the concept of the primary employer's reserved gate as the exclusive site for lawful common situs picketing. Thus, a union may now engage in common situs picketing either at the primary employer's reserved gate or at the construction site itself. Without question, the Board's decision adds a potent weapon to the arsenal of union strategies.

IV. LMRDA—UNION OFFICIAL'S FREEDOM OF SPEECH

During the *Survey* year, two circuit court cases considered the extent to which the Labor-Management Reporting and Disclosure Act (LMRDA) protects union officials' right of free speech and right to engage in intraunion

other evidence reveals an unlawful secondary objective, compliance with the *Moore Dry Dock* requirements does not establish the lawfulness of the picketing. *Id.* According to the dissent, an unlawful secondary objective exists if a union's picketing can be conducted in a manner which minimizes the impact on neutral employers with no substantial impairment of the effectiveness of the picketing with regard to the primary employer. *Id.*, 96 L.R.R.M. at 1169 (quoting *Wire Service Guild Local 222*, 218 N.L.R.B. 1234, 1238, 89 L.R.R.M. 1397, 1402 (1975) (Members Penello and Kennedy, dissenting)). The dissent reasoned that the union's unwillingness to confine its picketing to the reserved gate was prima facie evidence of the union's unlawful intent to enmesh a neutral employer in a labor dispute with a primary employer. *Id.* Thus, the dissenters concluded, the Teamsters' ambulatory picketing of Allied's trucks violated the secondary boycott provisions of the Act. *Id.*, 96 L.R.R.M. at 1170.

The dissent did not contend, however, that a union is universally precluded from ambulatory picketing on a neutral employer's premises inside a gate reserved for the primary employer's employees. *Id.*, 96 L.R.R.M. at 1169. Rather, the dissent concluded that such picketing is prohibited only where the union could have effectively communicated to the public its dispute with the primary employer without enmeshing the neutral employer. *Id.*

It is submitted that the dissent's conclusion incorrectly turned upon the incidental effect of the ambulatory picketing on neutral employees. Dissenting Members Penello and Walther divined the picketing union's intent from the effect of the picketing upon the neutral employees. *Id.* They gave no consideration to the question whether the neutral employees responded to the incidental pressures of a sister union's primary picket line or to direct pressures intended to induce their support. In so doing, they ignored the Supreme Court's admonition in the common situs context: "Picketing which induces secondary employees to respect a picket line is not the equivalent of picketing which has the object of inducing those employees to engage in concerted conduct against their employer in order to force him to refuse to deal with the struck employer." *Local 761, Int'l Union of Electrical Workers v. NLRB*, 366 U.S. 667, 673-74 (1961).

³⁴ 231 N.L.R.B. No. 131, 96 L.R.R.M. at 1167.

political activity.¹ Both cases involved the dismissal of elected union officials who had expressed opposition to policies formulated by higher union officials. The Fourth Circuit, in *Bradford v. Textile Workers Local 1093*,² held that the union's action violated section 101(a)(2)³ of the LMRDA;⁴ the Second Circuit, in *Newman v. Local 1101, Communications Workers*,⁵ held that it did not.⁶

The key statutory provision in both *Bradford* and *Newman*, section 101(a)(2) of the LMRDA, is part of "the labor bill of rights." Section 101(a)(2) guarantees every union member the right to express views, arguments, or opinions, although the union may adopt reasonable rules as to the responsibility of every member toward the organization, and may prohibit member interference with the union's performance of legal or contractual obligations.⁷ Like the Bill of Rights in the United States Constitution, after which section 101(a)(2) was modeled,⁸ its broad, sweeping language has created numerous judicial headaches. Moreover, because the section was introduced by Senator McClellan as a floor amendment, the legislative history is sparse and unrevealing.⁹ Senator McClellan made one remark, however, that is pertinent to the issue of the extent to which section 101(a)(2) protects union officials' right of free speech and right to engage in intraunion political activity. In recommending the adoption of the amendment, he stated that one of the findings of a 1959 research report was that union officers had "squatters rights" and union members could not challenge these incumbents without risking disci-

¹ *Bradford v. Textile Workers Local 1093*, 563 F.2d 1138, 96 L.R.R.M. 2690 (4th Cir. 1977); *Newman v. Local 1101, Communications Workers*, 570 F.2d 439, 97 L.R.R.M. 2606 (2d Cir. 1978).

² 563 F.2d 1138, 96 L.R.R.M. 2690 (4th Cir. 1977).

³ § 101(a)(2), 29 U.S.C. § 411(a)(2) (1976), provides in relevant part:

Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings; *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

The rights contained in § 101(a)(2) are protected by § 609 of the LMRDA, 29 U.S.C. § 529 (1976), which provides:

It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this chapter.

⁴ 563 F.2d at 1140, 1142, 96 L.R.R.M. at 2692, 2693.

⁵ 570 F.2d 439, 97 L.R.R.M. 2606 (2d Cir. 1978).

⁶ *Id.* at 442, 97 L.R.R.M. at 2607.

⁷ See note 3 *supra*.

⁸ 105 CONG. REC. 6478, 86th Cong., 1st Sess. (1959) (remarks of Sen. McClellan).

⁹ 105 CONG. REC. 6475, 86th Cong., 1st Sess. (1959).

pline or expulsion. According to Senator McClellan, the amendment was intended to cure abuses of that sort.¹⁰

Bradford, the first case attempting interpretation of section 101(a)(2) during the *Survey* year, involved an elected union committeeman who criticized members of the executive board of the local.¹¹ He vigorously opposed the local's president and worked actively for his ouster in the upcoming election.¹² The executive board, at a hearing held without notice to Bradford, suspended him from office.¹³ Bradford then commenced an action against the union in federal district court, and the jury returned a verdict in his favor.¹⁴

On appeal, the Fourth Circuit upheld the district court's judgment in favor of Bradford. The circuit court reasoned that a union member does not forfeit the free speech rights guaranteed him by section 101(a)(2) of the LMRDA when he accepts elective office in the union.¹⁵ Pointing to the union's concession that Bradford's activity was "perfectly permissible,"¹⁶ and to evidence that the executive board of the union was openly hostile toward the plaintiff,¹⁷ the court concluded that Bradford's exercise of his free speech rights was one, if not the primary, reason behind his removal from office.¹⁸ Therefore, the Fourth Circuit concluded that the union's removal of Bradford was invalid.

In *Newman*, the Second Circuit considered a similar case involving the removal of a union official from his elected union position.¹⁹ Newman was a job steward elected by members of the local.²⁰ While serving as job steward, Newman worked vigorously for democratization of the local, thereby opposing its highest officials.²¹ He published leaflets critical of the local's leadership and policies, and was outspoken on these matters at union meetings.²² Newman advocated lunch hour rallies during the five months immediately preceding the termination of the existing contract and mobilized opposition to any management proposals inconsistent with his own position.²³ He also called for a strike to show support for his proposals.²⁴ Newman was subsequently removed from office by the executive committee of the local.²⁵

¹⁰ 105 CONG. REC. 6478, 86th Cong., 1st Sess. (1959) (remarks of Sen. McClellan).

¹¹ 563 F.2d at 1139, 96 L.R.R.M. at 2691.

¹² *Id.* at 1143, 96 L.R.R.M. at 2694.

¹³ *Id.* at 1139-40, 96 L.R.R.M. at 2691. No reason was given for Bradford's suspension.

¹⁴ *Id.* at 1140, 96 L.R.R.M. at 2691.

¹⁵ *Id.*, 96 L.R.R.M. at 2692.

¹⁶ *Id.* at 1143, 96 L.R.R.M. at 2694.

¹⁷ *Id.*

¹⁸ *Id.*, 96 L.R.R.M. at 2694-95.

¹⁹ 570 F.2d at 441-43, 97 L.R.R.M. at 2607-08.

²⁰ *Id.* at 443, 97 L.R.R.M. at 2608.

²¹ *Id.*

²² *Id.*, 97 L.R.R.M. at 2608-09.

²³ *Id.*, 97 L.R.R.M. at 2608.

²⁴ *Id.* at 446, 97 L.R.R.M. at 2611.

²⁵ *Id.* at 443, 97 L.R.R.M. at 2608.

The Second Circuit in *Newman* noted that the union steward's manual described a principal function of the job as the explanation and implementation of union policies and programs so that workers understand and cooperate with these policies.²⁶ The court inquired "whether a member's opposition to the union's programs or policies may be reasonably viewed as precluding him from acting effectively as its representative."²⁷ The court then balanced this consideration against the question "whether his removal from his official position would tend to prevent him or others from exercising their rights as members under Title I of LMRDA."²⁸ The court placed the burden on the plaintiff to establish the chilling effect on his free speech rights by clear and convincing proof.²⁹ Since, in the court's view, *Newman* failed to meet this burden, it concluded that *Newman's* removal was justified. The court emphasized that *Newman's* conduct precluded him from functioning effectively as an agent of the local and also that, under all the circumstances, neither the purpose nor the effect of his removal was to inhibit his free speech as a union member.³⁰ The court did not consider, however, whether *Newman's* removal had a chilling effect on other members' free speech, even though the balancing test set forth specifically called for consideration of this factor.³¹

While the results in *Bradford* and *Newman* appear to conflict, they can be harmonized. Under the standard of review set out in *Newman*,³² if the plaintiff can prove that his dismissal or demotion from union office was in retaliation for his exercise of free speech rights protected under section 101(a)(2), he will prevail.³³ However, if his conduct precludes the effective perfor-

²⁶ *Id.* at 446, 97 L.R.R.M. at 2611.

²⁷ *Id.* at 445, 97 L.R.R.M. at 2610.

²⁸ *Id.*

²⁹ *Id.* at 445-46, 97 L.R.R.M. at 2610-11.

³⁰ *Id.* at 448, 97 L.R.R.M. at 2611-13.

³¹ See text at note 27 *supra*.

³² In a case decided prior to the *Survey* year, the Ninth Circuit employed the same standard used by the Second Circuit in *Newman*. *Cooke v. Orange Belt Dist. Council of Painters*, 529 F.2d 815, 819, 91 L.R.R.M. 2349, 2352 (9th Cir. 1976). *Cooke* involved a charge under § 101(a)(2) of the LMRDA, 29 U.S.C. § 411(a)(2) (1976), for wrongfully transferring a business representative's job to a desert location 167 miles from his home after the plaintiff had supported the loser for the union position of executive-secretary. 529 F.2d at 817-18, 91 L.R.R.M. at 2351-52. The court noted suggestions by commentators that removal or transfer of union officials who have manifested a policy of disagreement with, or personal disloyalty to, high-level officials may be necessary to maintain the effectiveness of the union. *Id.* at 819 n.1, 91 L.R.R.M. at 2351 n.1. After citing the proviso to § 101(a)(2), the *Cooke* court concluded that the complaining official bears the burden of demonstrating that the action was retaliatory and unrelated to a legitimate desire of the high-level official to structure job assignments in order to manage the union in accordance with his election mandate. 529 F.2d at 819-20, 91 L.R.R.M. at 2352.

The standard used in *Cooke* and *Newman* was first suggested for application to the union officer discipline problem in *Beaird & Player, Free Speech and the Landrum-Griffin Act*, 25 ALA. L. REV. 577, 605 (1973).

³³ See, e.g., *Miller v. Holden*, 535 F.2d 912 (5th Cir. 1976); *Gabauer v. Woodcock*, 520 F.2d 1084, 89 L.R.R.M. 2961 (8th Cir. 1975), *cert. denied*, 423 U.S. 1061 (1976); *Schoenfeld v. Penza*, 477 F.2d 899, 83 L.R.R.M. 2020 (2d Cir. 1973); *Retail*

mance of his function as a union officer or interferes with the operation of the union as an institution, these factors are balanced against the encroachment upon the official's free speech rights.³⁴ In so balancing, the presumption appears to be heavily in favor of the union.³⁵

Using the *Newman* standard, *Newman* and *Bradford* can be harmonized. In *Newman*, the court was convinced that Newman's conduct amounted to insubordination, thus undermining the policies of union management and the best interests of the union as a whole.³⁶ The court found that Newman's conduct precluded his function as the union's agent.³⁷ Moreover, the court determined that, despite his removal from office, Newman continued to exercise vigorously his free speech rights.³⁸ Therefore, the balance in *Newman* weighed heavily in the union's favor.³⁹ In *Bradford*, on the other hand, the union conceded that Bradford's exercise of his free speech rights was within permissible limits.⁴⁰ Moreover, there does not appear to have been any accusation that Bradford's conduct had impaired his ability to function in his official capacity. The Fourth Circuit thus concluded that the union's motivation for removing him from office was sheer retaliation.⁴¹ Consequently,

Clerks Local 648 v. Retail Clerks International, 299 F. Supp. 1012, 70 L.R.R.M. 3366 (D.D.C. 1969); Grand Lodge of Int'l Ass'n of Machinists v. King, 335 F.2d 340, 37 L.R.R.M. 2639 (9th Cir.) cert. denied, 379 U.S. 920 (1964); Salzhandler v. Caputo, 316 F.2d 445, 52 L.R.R.M. 2908 (2d Cir.), cert. denied, 375 U.S. 946 (1963).

³⁴ *Newman*, 570 F.2d at 445-46, 97 L.R.R.M. at 2610-11 (2d Cir. 1978). See also *Cooke v. Orange Belt Dist. Council of Painters*, 529 F.2d 815, 91 L.R.R.M. 2349 (9th Cir. 1976); *Gabauer v. Woodcock*, 520 F.2d 1084, 89 L.R.R.M. 2961 (8th Cir. 1975), cert. denied, 423 U.S. 1061 (1976); *Sewell v. Grand Lodge of Int'l Ass'n of Machinists*, 445 F.2d 545, 77 L.R.R.M. 2916 (5th Cir. 1971). But see *Sheridan v. United Bhd. of Carpenters*, 306 F.2d 152, 50 L.R.R.M. 2637 (3d Cir. 1962).

³⁵ Some courts have also made a determination whether the dismissed officer was essentially a lieutenant to a higher union official. These courts reason that a higher official is entitled to choose the person who occupies a subordinate position, or at least to demand a high degree of loyalty. See *Wambles v. International Bhd. of Teamsters*, 488 F.2d 888, 890, 85 L.R.R.M. 2328, 2329 (5th Cir. 1974); *Cooke v. Orange Belt Dist. Council of Painters*, 529 F.2d 815, 819 n.1, 91 L.R.R.M. 2349, 2351 n.1 (9th Cir. 1976). See also *Beaird & Player, Free Speech and the Landrum-Griffin Act*, 25 ALA. L. REV. 577, 587 (1973); *Kroner, Title I of the LMRDA: Some Problems of Legal Method and Mythology*, 43 N.Y.U. L. REV. 280, 293-95 (1968).

³⁶ 570 F.2d at 443, 449, 97 L.R.R.M. at 2608, 2613. It should be noted that the only indication the *Newman* court gave regarding the required degree of interference with the union is that the conduct of the official, in the view of the local's elected officers, is not in the best interest of the membership as a whole. This standard seems singularly weak considering free speech rights are at stake. However, since the decision rested upon a finding that Newman's activities precluded his functioning as a job steward, the court's discussion of the degree of interference required is merely dicta.

³⁷ *Id.* at 447, 97 L.R.R.M. at 2612.

³⁸ *Id.* at 448, 97 L.R.R.M. at 2613.

³⁹ However, the court neglected to analyze the possibility that Newman's removal would have a chilling effect upon other members' or officials' exercise of free speech rights. See text at note 31 *supra*. As the test specifically called for this analysis, *id.* at 445, 97 L.R.R.M. at 2610, its absence constitutes a major oversight in the decision's reasoning.

⁴⁰ 563 F.2d at 1143, 96 L.R.R.M. at 2694.

⁴¹ *Id.*, 96 L.R.R.M. at 2694-95.

there was no need for the *Bradford* court to apply a balancing test, and, despite the seeming discrepancy between *Bradford* and *Newman*, nothing in *Bradford* suggests that the Fourth Circuit has repudiated either the balancing test or the principles behind it.

The standard of review espoused by the Second Circuit in *Newman* may be a reaction to criticism of the earliest decisions involving union officials dismissed for exercise of their free speech rights.⁴² In these decisions, the courts held that union officials were protected against removal for exercise of their free speech rights, without considering whether the union officials' conduct had impeded their function or undermined the effectiveness of the union as an institution. The critics protested that such decisions ignored the importance of loyalty to the smooth functioning of top union management, and suggested that a union be allowed to dismiss officials who disagree with high level policy when those officials occupy key confidential or decision influencing positions.⁴³

The *Newman* standard may result in a serious chilling of union officials' free speech rights. Under the *Newman* standard, officials in subordinate elected or appointed positions and those in policy-making roles risk removal from office when they speak out against the incumbent union management. If they are demoted or removed from office and seek reinstatement, they bear a heavy burden of proving that their own interest in free expression outweighs the union's interest in effective operation. This burden undermines the purpose of the statute which was to define the rights of union members as they are defined in the Bill of Rights of the United States Constitution.⁴⁴

I. PROCEDURAL DEVELOPMENTS

A. Continuing Title VII Violation as Basis for EEOC Charge: *United Air Lines, Inc. v. Evans*

Section 706(e)¹ of Title VII requires discriminatees to file charges with the EEOC within a specified number of days from the date of an alleged Title

⁴² E.g., *Grand Lodge of Int'l Ass'n of Machinists v. King*, 335 F.2d 340, 56 L.R.R.M. 2639 (9th Cir.), cert. denied, 379 U.S. 920 (1964); *Salzhandler v. Caputo*, 316 F.2d 445, 52 L.R.R.M. 2909 (2d Cir.), cert. denied, 375 U.S. 946 (1963). *King* held simply that successful candidates do not have the right to discharge appointed officials because they expressed support for opponents. 335 F.2d at 346, 56 L.R.R.M. at 2642-43. *Salzhandler* held that an elected official cannot be stripped of his office even for libelously accusing the union president of thievery. 316 F.2d at 451, 52 L.R.R.M. at 2912.

⁴³ See Beaird & Player, *Free Speech and the Landrum-Griffin Act*, 25 ALA. L. REV. 577, 585-87, 605 (1973); Kroner, *Title I of the LMRDA: Some Problems of Legal Method and Mythology*, 43 N.Y.U. L. REV. 280, 293-95 (1968).

⁴⁴ See discussion in text at notes 8-10 *supra*.

¹ 42 U.S.C. § 2000e-5(e) (1976). Prior to the 1972 amendments to Title VII, the timely filing requirements now contained in § 706(e) were contained in § 706(d), Civil Rights Act of 1964, Pub. L. No. 88-352, title VII, § 706(d), 78 Stat. 259 (1964). Section 706(d) was renumbered as § 706(e) following the 1972 amendments. Equal

VII violation² as a jurisdictional prerequisite to bringing suit in federal court.³ In the case of an isolated violation, failure to file an EEOC charge within the specified period results in the dismissal of any suit based upon that violation. In the case of a continuing Title VII violation, by contrast, an EEOC charge is timely at any time during the continuation of the discriminatory practice, and, after its cessation, if filed within the time period specified by section 706(e).⁴

During the *Survey* year, the Supreme Court held in *United Air Lines, Inc. v. Evans*⁵ that a refusal to credit a rehired employee—whose original discharge was discriminatory—with seniority for prior service does not constitute a present, continuing violation of Title VII.⁶ The respondent in *Evans* had been employed by United Air Lines (United) as a stewardess from November, 1966 until February, 1968, when she involuntarily resigned under United's "no-marriage" policy.⁷ This policy required female, but not male, flight attendants to resign immediately upon marriage, or face termination.⁸ Although several other female flight attendants successfully challenged the "no-marriage" policy as a violation of Title VII,⁹ respondent Evans failed to file a charge of discrimination with the EEOC at the time of her 1968 resignation.¹⁰ On February 16, 1972, United rehired Evans as a flight attendant.¹¹ For seniority purposes, however, she was treated as though she had no prior

Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4(e), 86 Stat. 103 (1972). This chapter will consistently refer to the timely filing requirements as § 706(e).

² Prior to the 1972 amendments, Title VII required charges to be filed with the EEOC within 90 days of an alleged violation. Civil Rights Act of 1964, Pub. L. No. 88-352, title VII, § 706(d), 78 Stat. 259 (1964). The 1972 amendments extended this time limit to 180 days. 42 U.S.C. § 2000e-5(e) (1976).

³ See, e.g., *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974); *Choate v. Caterpillar Co.*, 402 F.2d 357, 359, 1 FEP Cas. 431, 433 (7th Cir. 1968).

⁴ E.g., *Rich v. Martin Marietta Corp.*, 552 F.2d 333, 348 & n.14, 11 FEP Cas. 211, 223, 223 & n.14 (10th Cir. 1975). Legislative history indicates that Congress intended to recognize continuing violations under the 1972 amendments. 118 Cong. Rec. 7167 (1972) (Section by Section Analysis of Senate Bill 2515 submitted to the Senate on March 6, 1972); *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 561 (1977) (Marshall, J., dissenting).

⁵ 431 U.S. 553 (1977).

⁶ *Id.* at 558.

⁷ *Evans v. United Air Lines, Inc.*, 534 F.2d 1247, 1247, 12 FEP Cas. 1105, 1105 (7th Cir. 1976).

⁸ *Id.*

⁹ United's "no-marriage" policy was successfully challenged in *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 3 FEP Cas. 621 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971), and in *Romasanta v. United Air Lines, Inc.*, 537 F.2d 915, 13 FEP Cas. 1437 (7th Cir. 1976), *aff'd sub nom. United Air Lines, Inc. v. McDonald*, 432 U.S. 385 (1977).

¹⁰ 534 F.2d at 1248, 12 FEP Cas. at 1105. United, by November 7, 1968 letter agreement with a collective bargaining agent, agreed to drop its "no-marriage" rule and to reinstate flight attendants who had been terminated under the rule and who had filed charges. Evans did not qualify for reinstatement under this agreement because of her failure to file a prior charge of discrimination with the EEOC or under collective bargaining procedures. *Id.* at 1248 n.2, 12 FEP Cas. at 1105 n.2.

¹¹ *Id.* at 1248, 12 FEP Cas. at 1105.

service with United.¹² In February of 1973, Evans filed charges with the EEOC asserting that United's refusal to credit her with seniority perpetuated the adverse effects of her original discriminatory termination, thereby resulting in a current and continuing violation of Title VII.¹³ Subsequently, Evans filed a Title VII suit in federal district court seeking seniority credit for her previous service and a back pay award representing the loss in salary and benefits attributable to her lower seniority.¹⁴ Since the time period within which Evans could have filed a timely EEOC charge based on her original discharge had passed,¹⁵ her allegation of a continuing violation was necessary to meet the jurisdictional filing requirements of section 706(e).¹⁶

In support of her continuing violation theory, Evans maintained that although United's present seniority policy was facially neutral as to sex, it nevertheless violated Title VII by perpetuating the effects of her prior discriminatory resignation.¹⁷ Accordingly, Evans argued, the current operation of United's facially neutral seniority policy constituted a current and continuing unlawful employment practice such that an EEOC charge filed at any time during the continuation of the policy would be timely.¹⁸ United countered with the assertion that its only violation of Title VII took place upon Evans' original termination.¹⁹ Any disadvantage now accruing to Evans was related to the 1968 termination, with the result that her suit was time-barred under section 706(e).²⁰

The district court rejected Evans' continuing violation theory, concluding that Evans' failure to file a charge within 90 days of her 1968 resignation caused her complaint to be time-barred.²¹ The United States Court of Ap-

¹² 431 U.S. at 555. United used two seniority rolls with regard to flight attendants. "Company" or "system" seniority accrued from the date of hire. "Stewardess" or "pay" seniority accrued from the completion of flight attendant training. One or both types of seniority determined a flight attendant's wages, the duration and timing of vacations, rights to retention in the event of layoffs and to re-employment thereafter, and rights to preferential selection of flight assignments. *Id.* at 555 n.5. In addition, United's seniority policy credited only continuous time-in-service. Thus any employee, male or female, who resigned or was terminated and subsequently rehired received no seniority credit for prior service. *Id.* at 557.

¹³ 543 F.2d at 1247, 12 FEP Cas. at 1105.

¹⁴ *Id.*

¹⁵ Evans could have filed a timely charge within 90 days of her involuntary resignation in February, 1968. As a result of her failure to do so, a claim based upon her termination was time-barred when she ultimately filed with the EEOC in 1973.

¹⁶ Evans conceded that her charge would be untimely and that the jurisdictional prerequisites of Title VII would not be fulfilled unless her theory of a continuing violation was valid. 534 F.2d at 1249, 12 FEP Cas. at 1106.

¹⁷ *Id.* at 1248-49, 12 FEP Cas. at 1106.

¹⁸ *Id.* at 1248, 12 FEP Cas. at 1106.

¹⁹ *Id.* at 1249, 12 FEP Cas. at 1106.

²⁰ *Id.*

²¹ 12 FEP Cas. 287, 288 (N.D. Ill. 1975). In dismissing Evans' claim of a continuing violation, the district court stated:

Plaintiff, however, has not been suffering from any "continuing" violation. She is seeking to have this court merely reinstate her November, 1966 seniority date which was lost solely by reason of her February, 1968 resig-

peals for the Seventh Circuit unanimously reversed.²² The circuit court considered United's argument that no present Title VII violation existed to be based, "*sub silentio*," on the exception from the Act's definition of unlawful employment practices for certain bona fide seniority systems contained in section 703(h).²³ In determining whether United's seniority policies qualified under section 703(h), the circuit court turned to *Franks v. Bowman Transportation Co.*,²⁴ the Supreme Court's then most recent decision addressing the scope of section 703(h).²⁵ In *Franks*, the Supreme Court held that section 703(h) does not proscribe awards of retroactive seniority to remedy the effects of employment discrimination occurring after the effective date of Title VII.²⁶ The Supreme Court's opinion in *Franks* contained broad language stating that

the thrust of [section 703(h)] is directed toward defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act.²⁷

Relying on this broad language, the circuit court read *Franks* to hold that section 703(h) was intended to protect only those facially neutral seniority systems which perpetuated the effects of discrimination occurring *prior* to the effective date of Title VII.²⁸ Since Evans contended that United's facially neutral seniority system perpetuated the effects of *post*-Act discrimination,²⁹ the court held that United's seniority policy was not a bona fide system under

nation. The fact that that resignation was the result of an unlawful employment practice is irrelevant for purposes of these proceedings because plaintiff lost her opportunity to redress that grievance when she failed to file a charge within ninety days of February, 1968. United's subsequent employment of plaintiff cannot operate to resuscitate such a time-barred claim.

Id. at 288.

²² 534 F.2d 1247, 1251, 12 FEP Cas. 1105, 1108 (7th Cir. 1976). A divided panel of the court of appeals originally affirmed the district court's decision. 12 FEP Cas. 288 (7th Cir. 1976) (*per curiam*). After the Supreme Court's decision in *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976), the same panel granted Evans' petition for rehearing and reversed. 534 F.2d at 1251, 12 FEP Cas. at 1108.

²³ 534 F.2d at 1249, 12 FEP Cas. at 1106. Section 703(h), 42 U.S.C. § 2000e-2(h) (1976) provides:

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to a bona fide seniority . . . system

²⁴ 424 U.S. 747 (1976).

²⁵ *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977), a more recent case addressing the scope of section 703(h), was decided on the same day as *Evans*. See text at notes 50-58 *infra*.

²⁶ 424 U.S. at 757-62.

²⁷ *Id.* at 763.

²⁸ 534 F.2d at 1249-51, 12 FEP Cas. at 1107.

²⁹ *Id.* at 1250-51, 12 FEP Cas. at 1107-08.

section 703(h), and consequently that the policy violated Title VII.³⁰ As a result, the present operation of United's seniority policy constituted a continuing Title VII violation. Evans' EEOC charge, having been filed during the pendency of the alleged discrimination, therefore was not time-barred.³¹

The Supreme Court, in a seven to two decision,³² reversed and held that in the absence of proof that a seniority system is not bona fide, an employer does not commit a present and continuing Title VII violation by refusing to credit a rehired employee—whose original discharge was discriminatory—with seniority for prior service.³³ The Court acknowledged the accuracy of Evans' contention that United's seniority system gave present effect to a past act of discrimination.³⁴ The dispositive question for the Court, however, was whether the present operation of United's seniority plan violated Title VII, not whether any disadvantage remained from a past Title VII violation.³⁵ The Court concluded that since United's seniority policy was facially neutral in its treatment of existing male and female employees and of male and female employees with prior service, the operation of the seniority system did not constitute a present and continuing violation of Title VII.³⁶ Since Evans had failed to file a timely EEOC charge concerning her 1968 termination, the Court reasoned that discriminatory discharge had no continuing legal significance.³⁷ A discriminatory act, not made the basis of a timely charge, becomes, in the eyes of the Court, analogous to pre-Act discrimination for the purpose of determining its present day effects.³⁸ Accordingly, Evans' failure to file an EEOC charge at the time United forced her resignation rendered United's unlawful act—Evans' resignation—and the consequences of that act—her subsequently reduced pay and benefits—the legal equivalent of a discriminatory act occurring before the passage of Title VII.³⁹

In reaching its decision that United's failure to credit Evans with prior seniority did not constitute a continuing Title VII violation, the Supreme Court distinguished its earlier decision in *Franks v. Bowman Transportation Co.*⁴⁰ *Franks*, the Court observed, addressed only the question whether section 703(h) barred an award of retroactive seniority after a Title VII violation had been found,⁴¹ not questions of the timeliness of EEOC charges or the existence of violations.⁴² Evans failed to show that United's seniority policy presently violated Title VII.⁴³ Without a present violation—a violation other

³⁰ *Id.* at 1251, 12 FEP Cas. at 1108.

³¹ *Id.*

³² Justice Stevens wrote the opinion of the Court. Justice Marshall, joined by Justice Brennan, dissented. 431 U.S. at 560.

³³ *Id.* at 557-58.

³⁴ *Id.* at 558.

³⁵ *Id.*

³⁶ *Id.* at 557-58.

³⁷ *Id.* at 558.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ 424 U.S. 747 (1976).

⁴¹ 431 U.S. at 558-59. See text at notes 24-28 *supra*.

⁴² 431 U.S. at 559.

⁴³ *Id.* at 559 & n.13.

than her original termination—no continuing violation existed. Consequently, the Court reasoned, Evans' claim was time-barred by her failure to file an EEOC charge in 1968, and her complaint against United properly dismissed.⁴⁴ The Court concluded by noting that acceptance of Evans' claim of a continuing violation would permit the substitution of a claim for seniority credit whenever an otherwise valid charge was time-barred.⁴⁵ The Court was unwilling to grant such present legal significance to time-barred claims.⁴⁶

It is submitted that the Court reached a fair result in refusing to accept Evans' theory of a continuing violation. As the *Evans* Court suggested,⁴⁷ allowing complainants to base timely EEOC charges upon an allegation that the continuing impact of a discriminatory act constitutes an independent Title VII violation would substitute a continuing violation claim whenever a charge based upon the discriminatory act itself is time-barred. If a discriminatory act is considered to continue for as long as some lingering impact remains, every post-Act violation would provide the basis for a timely continuing violation charge.⁴⁸ Such a result would appear contrary to the time limitation set out in section 706(e).⁴⁹

The Court's handling of the procedural question raised in *Evans*—the viability of basing a claim of continuing Title VII violation upon the operation of seniority systems—mirrors the Court's decision the same day in *International Brotherhood of Teamsters v. United States*.⁵⁰ In *Teamsters*, the Court was faced with a Title VII challenge to a facially neutral seniority system which allegedly prolonged the effects of post-Act and pre-Act hiring discrimination.⁵¹ As to victims of post-Act discrimination, the *Teamsters* Court held that

⁴⁴ *Id.* at 557.

⁴⁵ *Id.* at 560.

⁴⁶ In dissent, Justice Marshall, joined by Justice Brennan, argued that absent section 703(h), the operation of United's seniority system indisputably would constitute an unlawful employment practice by virtue of "awarding the choicest jobs to those possessing a credential married women were unlawfully prevented from acquiring: continuous tenure . . ." 431 U.S. at 560-61. He argued, as he had in *Teamsters*, 431 U.S. 324, 377-94 (1977) (Marshall, J., concurring in part and dissenting in part), that section 703(h) does not protect seniority systems that perpetuate post-Act discrimination. 431 U.S. at 561, 562 n.2. In addition, Justice Marshall would have accepted Evans' theory of the continuing nature of United's violation, arguing that in such instances a discriminatee's charge would be timely at any time up until 180 days after the alleged continuing violation ceased. *Id.* at 561-62.

⁴⁷ 431 U.S. at 560.

⁴⁸ *Id.* Evans' case illustrates the potential for extended lingering effects. Not only did she wait five years to act upon United's alleged discriminatory requirement that she resign, but she failed to file charges until one year after United's allegedly discriminatory recomputation of her seniority status. *Id.* at 557 n.9.

⁴⁹ See notes 1 and 2 *supra*.

⁵⁰ 431 U.S. 324 (1977). *Teamsters* and *Evans* both were decided on May 31, 1977.

⁵¹ *Teamsters*, 431 U.S. at 347-48. *Teamsters* involved two alleged violations of Title VII. First, the Government alleged a pattern and practice of racially discriminatory hiring, assignment and promotion policies. *Id.* at 329. Second, the Government argued that the present seniority system perpetuated the effects of pre- and post-Act discrimination and as such could never be bona fide under § 703(h). *Id.* The *Teamsters*

under *Franks* such discriminatees could obtain full retroactive seniority relief as a remedy for the discriminatory hiring practices without attacking the legality of the seniority system itself.⁵² As to victims of pre-Act discrimination,⁵³ the *Teamsters* Court held that the availability of seniority relief depended upon whether the seniority system itself violated Title VII.⁵⁴ In determining whether section 703(h) protected this "otherwise bona fide seniority system" from a direct challenge by pre-Act discriminatees, the Court reviewed the legislative history of section 703(h)⁵⁵ and concluded that "an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination."⁵⁶

The *Evans* Court, by characterizing a past discriminatory act not made the subject of a timely charge as the "legal equivalent" of pre-Act discrimination,⁵⁷ brought *Evans*' claim of a continuing violation squarely within the parameters of *Teamsters*. The operation of United's neutral seniority system, despite its perpetuation of prior post-Act discrimination, would not constitute a present Title VII violation under the *Teamsters* holding. Since the operation of United's system was not a present continuing Title VII violation, *Evans*' original discharge in 1968 was the only violation capable of sustaining a timely charge under the requirements of section 706(e).

Under *Teamsters* and *Evans*, the operation of a facially neutral seniority system, which perpetuates the effect of a pre-Act or a time-barred post-Act discriminatory employment practice, no longer constitutes a violation of Title VII. Since an EEOC charge must be based upon a present violation, a charge based solely upon the continuing operation of such a neutral seniority system, despite the system's perpetuation of prior discrimination, will no longer fulfill the timely filing requirements of section 706(e).⁵⁸

Court sustained the lower courts' findings of an unlawful pattern and practice of racial discrimination. *Id.* at 342-43. The Court, however, found the seniority system to be bona fide under § 703(h) and reversed the lower courts' finding that the system violated Title VII. *Id.* at 355-56.

⁵² *Id.* at 347-48 & n.30. Nevertheless, the *Teamsters* Court, relying on *Evans*, appeared to uphold the legality of the seniority system even though it perpetuated the effects of post-Act discrimination. *Id.* at 358 n.30. The Court characterized *Evans* as holding "that the operation of a seniority system is not unlawful under Title VII even though it perpetuates post-Act discrimination that has not been the subject of a timely charge by the discriminatee." *Id.* In *Teamsters*, the Court took *Evans* one step further and indicated that the mere fact that a seniority system perpetuates post-Act discrimination, without more, does not violate Title VII. Specifically, the Court noted that § 703(h) "immunizes all bona fide seniority systems, and does not distinguish between the perpetuation of pre- and post-Act discrimination." *Id.*

⁵³ *Id.* at 348.

⁵⁴ *Id.* at 353-54.

⁵⁵ *Id.* at 350-52. See 110 CONG. REC. 7207, 7213, 7217 (1964).

⁵⁶ 431 U.S. at 353-54.

⁵⁷ 431 U.S. at 558.

⁵⁸ Cf. *Clark v. Olinkraft, Inc.*, 556 F.2d 1219, 1222-23, 15 FEP Cas. 374, 375-76 (5th Cir. 1977), cert. denied, 46 U.S.L.W. 3518 (1978) (distinguishing *Evans*, and holding that a present and continuing Title VII violation, as opposed to claim based on the continuing effects of a past violation, sustains a timely charge).

*B. Necessity for Individual EEOC Charge — Retroactivity of
Extended 180-Day Filing Limit: Inda v. United Airlines, Inc.*

In order to bring suit in federal district court under Title VII, a victim of employment discrimination must fulfill two statutory requirements.¹ First, under the 1972 amendment extending the time limit for filing with the EEOC,² a discriminatee must file a charge with the EEOC within 180 days of the alleged Title VII violation in accordance with section 706(e).³ Second, a discriminatee must obtain a right to sue letter from the EEOC upon the unsuccessful completion of conciliation negotiations by the Commission, in accordance with section 706(f).⁴ Two aspects of compliance with these requirements for filing suit under Title VII arose before the United States Court of Appeals for the Ninth Circuit this Survey year in *Inda v. United Air Lines, Inc.*⁵ The circuit court held that the 1972 amendment extending from 90 to 180 days the time within which to file an EEOC charge under section 706(e),⁶ was meant to apply to any claim pending with the EEOC on the amendment's effective date,⁷ regardless of whether the claim alleged viola-

¹ *E.g.*, *Alexander v. Gardner-Denver*, 415 U.S. 36, 47 (1974) (compliance with the procedural requirements of Title VII is a jurisdictional prerequisite to sustain a civil suit).

² Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4(e), 86 Stat. 103 (1972).

³ 42 U.S.C. § 2000e-5(e) (1976). This section provides, in pertinent part, that "[a] charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . ." *Id.*

⁴ 42 U.S.C. § 2000e-5(f) (1976). This section provides, in pertinent part: If a charge filed with the Commission . . . is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge . . . the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving the government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved

⁵ 565 F.2d 554, 16 FEP Cas. 251 (9th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3676 (1978).

⁶ 42 U.S.C. § 2000e-5(e) (1976). Prior to the 1972 amendments to Title VII, the timely filing requirements now contained in § 706(e) were contained in § 706(d), Civil Rights Act of 1964, Pub. L. No. 88-352, title VII, § 706(d), 78 Stat. 259 (1964). Section 706(d) was renumbered as § 706(e) following the 1972 amendments. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4(e), 86 Stat. 103 (1972). This chapter will consistently refer to the timely filing requirements as § 706(e).

Prior to the 1972 amendments, Title VII required charges to be filed with the EEOC within 90 days of an alleged violation. Civil Rights Act of 1964, Pub. L. No. 88-352, title VII, § 706(d), 78 Stat. 259 (1964). The 1972 amendments extended this time limit to 180 days. 42 U.S.C. § 2000e-5(e) (1976).

⁷ The effective date of the 1972 amendment extending the time period for filing EEOC charges was March 24, 1972. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 14, 86 Stat. 113. (1972).

tions occurring more than 180 days before the effective date or, within 180 days of that date.⁸ The court also held that the time limit within which an individual employee must file an EEOC charge—a prerequisite to bringing a Title VII suit—is not tolled by the timely filing of separate charges by fellow employees, even if the charges are based upon similar events.⁹

The plaintiff in *Inda* alleged that United Air Lines (United) had violated Title VII by requiring her resignation from a position as a flight attendant on June 15, 1968 because of her marriage plans.¹⁰ When United later dropped this "no-marriage" policy on November 7, 1968,¹¹ Inda requested and was denied reinstatement on November 14, 1968.¹² On November 18, 1968, Inda filed a complaint with the EEOC.¹³ At that time, Title VII required an aggrieved person to file a charge with the EEOC within 90 days of the alleged violation.¹⁴ Although Inda had filed within four days of United's refusal to reinstate her, she had not filed within 90 days of her forced resignation. Accordingly, in the subsequently filed civil suit, United contended that Inda's claims were time-barred.¹⁵ The district court considered Inda's forced resignation and the denial of reinstatement to be separate violations of Title VII.¹⁶ Since Inda had filed with the EEOC four days after United's denial of reinstatement, the district court found her charge to have been filed within the requisite 90 days,¹⁷ and denied United's motion to dismiss the complaint as time-barred.¹⁸

On appeal, the Ninth Circuit disapproved the district court's characterization of the refusal to reinstate as a separate Title VII violation.¹⁹ In so doing, the circuit court relied upon its earlier decision in *Collins v. United Air Lines, Inc.*,²⁰ which held that a denial of reinstatement does not give rise to a Title VII violation separate from the original discharge.²¹ The court next

⁸ 565 F.2d at 560-61, 16 FEP Cas. at 255-56.

⁹ *Id.* at 558-59, 16 FEP Cas. at 254-55.

¹⁰ *Id.* at 556, 16 FEP Cas. at 253. Inda was told by United supervisors that as a consequence of her marriage plans she would be fired and that fired personnel were not rehired. Those who resigned, she was assured, would have preference in being rehired if United dropped its "no-marriage" rule. *Id.* at 557 & n.1, 16 FEP Cas. at 253 & n.1.

¹¹ United, by a November 7, 1968 letter agreement with a collective bargaining agent, agreed to drop its "no-marriage" rule and to reinstate those flight attendants who had been terminated under the rule and who had filed charges or grievances. Since Inda had resigned voluntarily and had failed to file charges, she did not qualify for reinstatement under the agreement. 565 F.2d at 557-58 & n.2, 16 FEP Cas. at 253 & n.2.

¹² 405 F. Supp. 426, 429, 13 FEP Cas. 1229, 1231 (N.D. Cal. 1975).

¹³ 565 F.2d at 558, 16 FEP Cas. at 253.

¹⁴ See note 6 *supra*.

¹⁵ 565 F.2d at 557, 16 FEP Cas. at 253.

¹⁶ 405 F. Supp. at 433, 13 FEP Cas. at 1235.

¹⁷ *Id.*

¹⁸ 565 F.2d at 556-57, 16 FEP Cas. at 252-53. There is no published opinion with regard to the denial of United's motion to dismiss.

¹⁹ *Id.* at 561, 16 FEP Cas. at 256-57.

²⁰ 514 F.2d 594, 10 FEP Cas. 728 (9th Cir. 1975).

²¹ *Id.* at 596-97, 10 FEP Cas. at 730.

considered and rebutted arguments that the filing requirements of section 706(e) could be tolled or waived. The plaintiff, joined by the EEOC as *amicus curiae*, maintained that her EEOC charge was timely because other United employees already had filed timely charges with the EEOC challenging the same "no-marriage" policy.²² The charges of these employees,²³ she argued, "made the filing of additional complaints by other aggrieved United stewardesses unnecessary and redundant."²⁴ Inda relied upon the case of *Albemarle Paper Co. v. Moody*,²⁵ in which the Supreme Court held that back pay could be awarded under Title VII on a class basis to unnamed plaintiffs who had not themselves filed charges with the EEOC.²⁶ *Albemarle*, the plaintiff maintained, supported either an argument that if a charge based on the same violation already had been filed a discriminatee need not file a charge with the EEOC to obtain a right to sue on her own behalf, or an argument that the time within which an EEOC charge must be filed is tolled by the filing of a similar charge by another party.²⁷

The court emphatically declared that neither of the premises advocated by the plaintiff rationally followed from *Albemarle*.²⁸ It noted that *Albemarle* held only that once the class representative complied with EEOC procedural requirements, compliance by individual class members was not a prerequisite to obtaining Title VII relief on a class basis.²⁹ The plaintiff sought a right to sue, not class membership. The court reasoned that nothing in *Albemarle* or in the legislative history of Title VII suggested that a right to sue letter would be available to persons who had not conformed to the EEOC filing requirements contained in section 706(e).³⁰ Likewise, the court observed that the plaintiff's second argument—that the filing of one EEOC charge tolls the statutory time period for other victims of the same discrimination—did not follow from *Albemarle*.³¹ *Albemarle*, according to the circuit court, addressed only the question whether an individual must file an EEOC charge in order to enjoy class membership, not the question whether the filing limitations of section 706(e) can be tolled.³²

²² 565 F.2d at 558, 16 FEP Cas. at 254.

²³ Mary Sprogis filed a charge with the EEOC in August, 1966 and successfully challenged United's "no-marriage" policy. *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1196, 3 FEP Cas. 621, 624 (7th Cir.) ("no-marriage" rule for flight attendants discriminated on the basis of sex in violation of Title VII and not justified as a bona fide occupational qualification), *cert. denied*, 404 U.S. 991 (1971). Carol Romasanta filed with the EEOC in 1967 and successfully intervened in a suit finding the "no-marriage" policy violative of Title VII. *Romasanta v. United Air Lines, Inc.*, 537 F.2d 915, 917, 13 FEP Cas. 1437, 1438 (7th Cir. 1976), *aff'd sub nom. United Air Lines, Inc. v. McDonald*, 432 U.S. 385 (1977).

²⁴ 565 F.2d at 558, 16 FEP Cas. at 254.

²⁵ 422 U.S. 405 (1975).

²⁶ *Id.* at 414 n.8.

²⁷ 565 F.2d at 558, 16 FEP Cas. at 254.

²⁸ *Id.*

²⁹ *Id.* (citing *Albemarle*, 422 U.S. at 414).

³⁰ 565 F.2d at 558, 16 FEP Cas. at 254.

³¹ *Id.* at 558-59, 16 FEP Cas. at 254.

³² *Id.* at 558, 16 FEP Cas. at 254.

The circuit court, in dismissing the plaintiff's analysis, acknowledged that some Title VII cases supported the notion that the filing of an EEOC charge by one employee would toll the statutory filing period for other victims of the same discriminatory practice until the EEOC had completed its efforts to obtain voluntary compliance, and had either issued a right to sue letter or dismissed the charge.³³ The court observed that these Title VII cases often relied upon an analogy to *American Pipe & Construction Co. v. Utah*,³⁴ a Supreme Court decision holding a class action brought for an anti-trust violation tolls the statute of limitations for all class members until class certification is denied,³⁵ to support their tolling analysis.³⁶ The *Inda* court particularly noted, however, that no analogous administrative proceedings preceded the suit in *American Pipe*.³⁷ The theory of *American Pipe* was that the filing of a class action notifies defendants both of the substantive claims and "of the number and generic identities of the potential plaintiffs who may participate in the judgment."³⁸ In contrast, the *Inda* court reasoned, an employee who files an individual administrative charge with the EEOC might never bring a class action.³⁹ Consequently, unlike the filing of a class action suit, the filing of an individual EEOC charge does not adequately inform an employer of the substance and number of claims potentially present in an adverse action.⁴⁰ The *Inda* court thus held that unless an EEOC charge was brought on behalf of a class of discriminatees—such as when charges are brought by EEOC Commissioners under section 706(f)(1)⁴¹—the plaintiff could not allege that Title VII filing requirements had been fulfilled. As a result, the 90 day filing requirement had not been eliminated or tolled by the filing of individual EEOC charges by other United employees.⁴²

The rejection of *Inda*'s tolling arguments did not end the court's consideration of the timeliness of her EEOC charge.⁴³ The court noted that under the 1972 amendments to Title VII, the 90 day filing period had been extended to 180 days for those charges pending with the EEOC on the effective date of the amendment, and for all charges filed thereafter.⁴⁴ *Inda*'s EEOC

³³ The circuit court cited *United States v. Georgia Power Co.*, 474 F.2d 906, 925, 5 FEP Cas. 587, 600-01 (5th Cir. 1973), as an example of such a case.

³⁴ 414 U.S. 538 (1974).

³⁵ 565 F.2d at 559, 16 FEP Cas. at 254-55 (citing *American Pipe*, 414 U.S. at 561).

³⁶ 565 F.2d at 559, 16 FEP Cas. at 254.

³⁷ *Id.*, 16 FEP Cas. at 254-55.

³⁸ *Id.*, 16 FEP Cas. at 255 (citing *American Pipe*, 414 U.S. at 555).

³⁹ 565 F.2d at 559, 16 FEP Cas. at 255.

⁴⁰ *Id.*

⁴¹ 42 U.S.C. § 2000e-5(f)(1) (1976).

⁴² 565 F.2d at 559, 16 FEP Cas. at 255.

⁴³ *Id.* at 560, 16 FEP Cas. at 255.

⁴⁴ Section 14 of the 1972 amendments made § 706(e) applicable to all charges pending with the EEOC on the effective date of the amendments, March 24, 1972, and to all charges filed thereafter. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 14, 86 Stat. 113 (1972).

charge had been filed within 180 days of her resignation in 1968.⁴⁵ This fact raised the question whether Inda's charge was pending before the EEOC on the effective date of the amendment. The *Inda* court reasoned that if final action had not been taken on Inda's claim by March 24, 1972, the effective date of the amendment extending the filing limits,⁴⁶ her charge "was pending in the sense in which that term is commonly used"⁴⁷ even though the violation alleged took place more than 180 days before that date. Without reference to the amendment's legislative history, the court attributed this "common" meaning to the term pending and concluded that Inda's charge was still pending before the EEOC on the effective date of the 1972 amendment.⁴⁸ As a result, the charge was considered to be timely despite her failure to file within the applicable period and the district court's judgment in her favor was sustained.⁴⁹

The *Inda* court's holding that the timely filing requirements contained in section 706(e) of Title VII are not waived or tolled for individuals seeking a right to sue on their own behalf by the filing of charges by others is correct for several reasons. First, nothing in the legislative history of section 706(e) indicates that the timely filing requirement should be waived under ordinary circumstances for those seeking a right to sue on their own behalf.⁵⁰ Second, allowing non-filing discriminatees to join in a class action suit where the class representative has filed a timely EEOC charge, as in *Albemarle*,⁵¹ is not analogous to allowing non-filing discriminatees to sue individually. Class membership does not permit non-filing individuals to represent the class or to commence suit on their own behalf.⁵² If the class fails to be certified or is decertified,⁵³ the timely filing of the former class representative does not waive the filing requirements of section 706(e) for those discriminatees who wish to sue on their own behalf. This result comports with Title VII's policy

⁴⁵ Inda resigned from service as a flight attendant on June 15, 1968. She filed charges with the EEOC on November 18, 1968. See text at notes 10-14 *supra*.

⁴⁶ See note 7 *supra*.

⁴⁷ 565 F.2d at 561, 16 FEP Cas. at 256.

⁴⁸ *Accord*, *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 358-64 (1977); *Cunningham v. Litton Indus.*, 413 F.2d 887, 890, 1 FEP Cas. 861, 862 (9th Cir. 1969).

⁴⁹ 565 F.2d at 563, 16 FEP Cas. at 256.

⁵⁰ 118 CONG. REC. 7167 (1972) (Section by Section Analysis of the Equal Employment Opportunity Act of 1972, § 706(e)). Although the legislative history indicates approval of court decisions which have shown an inclination to interpret the filing time limits to give aggrieved persons the maximum benefit of the law, particularly when the lateness of filing is due to government inadvertence, delay or error, the history in no way advocates waiver of such filing requirements. *Id.*

⁵¹ 422 U.S. at 414 n.8. *Accord*, *Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239, 246, 9 FEP Cas. 211, 215 (3d Cir.) (class representative in class action may represent all persons who could have filed charges with the EEOC as of the date of the representative's filing), *cert. denied*, 421 U.S. 1011 (1975).

⁵² See *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 720, 2 FEP Cas. 121, 126 (7th Cir. 1969); *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 498, 1 FEP Cas. 328, 329 (5th Cir. 1968).

⁵³ FED. R. CIV. P. 23(b). See, e.g., *United Air Lines, Inc. v. McDonald*, 432 U.S. 385, 389-90 (1977) (class decertified for lack of numerosity).

of attempting settlement of employment discrimination disputes before the initiation of private civil suits.⁵⁴ Once a class action has begun, EEOC conciliation efforts concerning individual charges filed by the class representative have ended. At this point, no procedural or conciliatory purpose is served by requiring each potential class member to file EEOC charges.⁵⁵ In contrast, allowing the timely charge of one employee to waive the procedural requirements for other employees who seek the right to bring separate suits effectively circumvents the conciliation policy of Title VII and encourages aggrieved parties to substitute private suits for EEOC statutory procedures and remedies. This result plainly is contrary to the legislative intent behind Title VII.⁵⁶ Accordingly, the *Inda* court properly disapproved plaintiff's arguments that section 706(e)'s filing requirements might be waived or tolled.

The *Inda* court's disapproval of these arguments is correct for an additional reason. As the court noted, the filing of an individual EEOC charge does not provide an employer with the same information as the filing of a class action suit.⁵⁷ While an individual charge filed with the EEOC may implicate a uniform company-wide policy,⁵⁸ the individual charge, unlike the class action, does not notify the employer of the imminence of a suit potentially involving many plaintiffs, substantial judgments, and practical consequences extending far beyond the defense of a single suit.⁵⁹ Consequently, if the *Inda* court had accepted the plaintiff's argument that a tolling of section 706(e)'s requirements results from the filing of similar charges by other individual employees, an important avenue by which an employer could be informed of additional claims and by which the EEOC could mount conciliation attempts would be impeded.

The circuit court also correctly held that the 180 day limitation period applies to all claims pending before the EEOC on the effective date of the 1972 amendment, regardless of whether the alleged violation occurred within 180 days of that date.⁶⁰ The retroactivity of the amendment extending the filing period for EEOC charges from 90 to 180 days was addressed previously in *International Union of Electrical Workers v. Robbins & Myers, Inc.*,⁶¹ where the

⁵⁴ *Bowe v. Colgate-Palmolive Co.*, 416 F.2d at 719, 2 FEP Cas. at 126-27; *Oatis v. Crown Zellerbach Corp.*, 398 F.2d at 498-99, 1 FEP Cas. at 329. See also 118 CONG. REC. 7167 (1972).

⁵⁵ *Bowe v. Colgate-Palmolive Co.*, 416 F.2d at 720-21, 2 FEP Cas. at 126-27; *Miller v. International Paper Co.*, 408 F.2d 283, 284-85, 1 FEP Cas. 647, 648 (5th Cir. 1969); *Oatis v. Crown Zellerbach Corp.*, 398 F.2d at 498, 1 FEP Cas. at 329.

⁵⁶ See H.R. REP. NO. 238, 92d Cong., 2d Sess., reprinted in [1972] U.S. CODE CONG. & AD. NEWS 2136, 2143-45.

⁵⁷ 565 F.2d at 559, 16 FEP Cas. at 254.

⁵⁸ United's "no-marriage" policy was certainly an example of such a uniform company-wide policy. *United Air Lines, Inc. v. McDonald*, 432 U.S. 385, 393 n.13.

⁵⁹ 42 U.S.C. § 2000e-5(e) (1976) provides only that notice of each individual charge filed shall be served upon the employer against whom such a charge is made, within 10 days of the filing.

⁶⁰ Accord, *Crook v. Penn Cent. Transp. Co.*, 427 F. Supp. 956, 958-59, 14 FEP Cas. 1349, 1396 (N.D. Ill. 1977); *Dickerson v. United States Steel Co.*, 439 F. Supp. 55, 63 n.11, 15 FEP Cas. 752, 766 n.11 (E.D. Pa. 1977).

⁶¹ 429 U.S. 229 (1976).

Supreme Court held that Congress intended the 180 day limitations period to apply to charges pending with the EEOC at the time of the amendment, but alleging violation within 180 days of the amendment's effective date.⁶² The Ninth Circuit in *Inda* responded to a question unresolved by the Supreme Court in *Electrical Workers*—whether the extended 180 day limitations period applied to pending EEOC charges alleging violations more than 180 days before the effective date of 1972 amendments.⁶³

The text of the 1972 amendments supports the Ninth Circuit's interpretation of their retroactivity. Section 14 of the 1972 Act provided that "[t]he amendments made by this Act to section 706 of the Civil Rights Act shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act and all charges filed thereafter."⁶⁴ Congress, while aware of the expanded limitations period, did not limit the sweeping language of section 14.⁶⁵ Indeed, the language of section 14 affirmatively suggests an intention to encompass claims of discriminatory conduct that occurred before passage of the 1972 Act, as long as the Commission retained jurisdiction over such claims. Moreover, nothing in the legislative history of section 14 indicates that Congress intended to distinguish between pending claims alleging violation within 180 days of March 24, 1972 and pending claims alleging violation more than 180 days before March 24, 1972. Accordingly, the *Inda* court correctly concluded that the pendency of an EEOC charge on March 24;

⁶² 429 U.S. at 243.

⁶³ 429 U.S. at 243 & n.17. The Court in *Electrical Workers* specifically limited its holding to the facts of the case before it. There, the plaintiff, Dortha Guy, had filed charges with the EEOC on February 10, 1972, alleging a violation of Title VII which had occurred 108 days previously on October 25, 1971. *Id.* at 231-32. She alleged that the expanded 180 days limitations period provided on March 24, 1972 by the 1972 amendments should apply to make her charge timely, "as the occurrence she was complaining of took place within 180 days of the enactment of the 1972 amendments." *Id.* at 241. On that limited basis the Court agreed with Guy and held her charge to be timely filed, stating:

Accordingly, we need not decide whether the enlarged limitation period also redounds to the benefit of persons who filed a charge more than 90, but less than 180 days from the date of alleged "occurrence," where the 180 days had run prior to March 24, 1972.

Id. at 243 & n.17.

⁶⁴ Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 14, 86 Stat. 113 (1972). Congress had originally provided that the amendments to § 706 would not apply to charges filed prior to the effective date of the 1972 amendments. H.R. 1746, 92d Cong., 2d Sess., § 10 (1972); S. 2515, 92d Cong., 2d Sess., § 13 (1972); For the text of these proposed amendments see *Proposed Amendments to Title VII of the Civil Rights Act of 1964: Hearings on S. 2515 Before the Senate Committee on Labor & Public Welfare*, 92d Cong., 2d Sess. 409 (1972), reprinted in *LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972*, at 58,409 (1972). *Davis v. Valley Distrib. Co.*, 522 F.2d 827, 831, 10 FEP Cas. 1473, 1474 (9th Cir. 1975); *EEOC v. Kimberly-Clark Corp.*, 511 F.2d 1352, 1355, 10 FEP Cas. 38, 41 (6th Cir. 1975); *Koger v. Ball*, 497 F.2d 702, 708, 7 FEP Cas. 1111, 1114-15 (4th Cir. 1974).

⁶⁵ 118 CONG. REC. 4816 (1972).

⁶⁶ United's petition for certiorari to review the court's interpretation of the retroactivity of the 1972 amendments was denied. 46 U.S.L.W. 3676 (1978).

1972—filed within 180 days of the alleged Title VII violation—is sufficient for the charge to retroactively qualify as timely under the extended limitations of the 1972 Act.⁶⁸

*C. Determination of the Relevant Labor Market
in Pattern or Practice Suits*

To establish a *prima facie* "pattern or practice" case under Title VII,¹ the EEOC must demonstrate that the defendant, whether employer or union, has consistently treated minorities less favorably than others, and that such disparate treatment has been racially motivated.² Proof of discriminatory motive, therefore, is critical in a pattern or practice case. In order to establish discriminatory motive, the EEOC usually introduces two types of evidence: (1) direct evidence of motive, such as individual instances of discrimination,³ and (2) circumstantial evidence of motive, such as statistics showing the degree of disparate treatment.⁴ These statistics demonstrate disparate treatment through a comparison of the percentage of minorities in the employer's or union's work force with the percentage of qualified minority workers in the relevant labor market.⁵ The Supreme Court considers such statistical work force comparisons to be an important source of proof in an employment discrimination case, and has stated that "[w]here gross statistical disparities can be shown, they alone may in a proper case constitute *prima facie* proof of a pattern or practice of discrimination."⁶

¹ Section 707(a) of the Civil Rights Act of 1964 authorized the United States Attorney General to institute civil proceedings whenever he had "reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of" discrimination in violation of Title VII. Civil Rights Act of 1964, Pub. L. No. 88-352, title VII, § 707(a), 78 Stat. 261 (1964). Section 707 was amended in 1972 to give the EEOC rather than the Attorney General the authority to institute pattern or practice suits. 42 U.S.C. § 2000e-6(c) (1976).

² *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 (1977). In *Teamsters*, the Supreme Court stated that the Government in a pattern or practice case must "prove more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts. It [has] to establish by a preponderance of the evidence that racial discrimination was the [defendant's] standard operating procedure—the regular rather than the unusual practice." *Id.*

³ See, e.g., *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 338 (1977). In *Teamsters*, the Government "bolstered its statistical evidence with the testimony of individuals who recounted over 40 specific instances of discrimination." *Id.*

⁴ See, e.g., *Hazelwood School Dist. v. United States*, 433 U.S. 299, 305 (1977); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 337-38 (1977). For a more in-depth analysis of *Hazelwood* see Edwards, *The Coming of Age of the Burger Court: Labor Law Decisions of the Supreme Court During the 1976 Term*, 19 B.C. L. REV. 1, 9 (1977); Note, *The Role of Statistical Evidence in Title VII Cases*, 19 B.C. L. REV. 881 (1978). For a more in depth discussion of *Teamsters*, see Edwards, *supra*, at 5; this Survey at 169.

⁵ *Id.*

⁶ *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977). The Supreme Court stated in *International Bhd. of Teamsters v. United States*, 431 U.S.

Since the Supreme Court attaches high probative value to statistical work force comparisons in establishing employment discrimination, it is important to understand the considerations which underlie the selection of the relevant labor market. The term "relevant labor market" refers to a geographic area whose population make-up a court deems relevant for purposes of comparison to an employer's or union's work force.⁷ The relevant labor market generally corresponds to the geographic areas from which employees or union members have been drawn in the past,⁸ but other considerations may dictate that such a labor market is not relevant.⁹ Once a specific geographic area has

324 (1977), that statistical work force comparisons are probative of discriminatory motive because

it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. Evidence of longstanding and gross disparity between the composition of a work force and that of the general population thus may be significant even though . . . Title VII imposes no requirement that a work force mirror the general population.

Id. at 340 n.20.

⁷ *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308 (1977).

⁸ *EEOC v. International Union of Operating Engineers Locals 14 & 15*, 553 F.2d 251, 254, 14 FEP Cas. 870, 872 (2d Cir. 1977); *United States v. Hazelwood School Dist.*, 534 F.2d 805, 811 n.7, 12 FEP Cas. 1161, 1166 n.7 (8th Cir. 1976).

⁹ *See, e.g., Hazelwood School Dist. v. United States*, 433 U.S. 299, 311-12 (1977). *Hazelwood* was a pattern or practice suit brought by the United States Attorney General charging the suburban St. Louis school district with discrimination in the hiring of teachers. *Id.* at 301. The Eighth Circuit in *Hazelwood* based the relevant labor market on the area from which the Hazelwood School District drew its employees, and on this basis, included the nearby city of St. Louis. *United States v. Hazelwood School Dist.*, 534 F.2d 805, 811 n.7, 12 FEP Cas. 1161, 1166 n.7 (8th Cir. 1976).

On certiorari to the Supreme Court, the Hazelwood School District contended that even though the city of St. Louis was within the geographic area from which it drew teachers, that city should not be included in the relevant labor market because the St. Louis School District had a policy of maintaining a 50% minority teaching staff. 433 U.S. at 310-11. Therefore, Hazelwood argued, the inclusion of St. Louis in the relevant labor market distorted the statistical work force comparison, and the relevant labor market should include only the suburbs in which the Hazelwood School District was located. *Id.* The Supreme Court did not resolve this issue, but instead remanded the case of the district court to determine which market provided the most accurate basis for comparison with Hazelwood's teaching staff. *Id.* at 311-12. The Supreme Court listed five factors to aid the lower court in making its determination:

- (1) whether the racially based hiring policies of the St. Louis City School District were in effect as far back as 1970, the year in which the census figures were taken;
- (2) to what extent those policies have changed the racial composition of that district's teaching staff from what it would otherwise have been;
- (3) to what extent St. Louis' recruitment policies have diverted to the city teachers who might otherwise have applied to Hazelwood;
- (4) to what extent Negro teachers employed by the city would prefer employment in other districts such as Hazelwood; and
- (5) what the experience in other school districts in St. Louis County indicates about the validity of excluding the City School District from the relevant labor market.

been selected, the court uses census and other data to determine the percentage of qualified minority workers in the relevant labor market. This percentage is then compared to the percentage of minority workers in the employer's or union's work force in order to demonstrate disparate treatment of minorities. A more minority intensive labor market results in a more disparate statistical work force comparison. Accordingly, a court is more likely to find that the statistical comparison buttresses, or even establishes, the EEOC's pattern or practice case.

The selection of the relevant labor market assumes an even more important role after the court makes a finding of discrimination. Once a Title VII violation has been established, the court uses the percentage of qualified minority workers in the relevant labor market to set a remedial hiring goal designed to compensate minority workers for the effects of past disparate treatment.¹⁰ Thus, the selection of a more minority intensive area as the relevant labor market not only makes a finding of discrimination more probable, but also may result in the imposition of a more severe judgment against an employer or union.

In most Title VII cases, the selection of the relevant labor market is of little importance because the racial composition of an employer's or union's work force is glaringly deficient regardless of the labor market to which it is compared.¹¹ However, in those Title VII cases where a disparity in racial composition is not readily apparent, the selection of the relevant labor market assumes crucial importance. In those cases, a finding of discrimination hinges on which labor market is chosen for purposes of comparison to the employer's or union's work force.¹² This *Survey* year, the United States Court of Appeals for the Second Circuit was presented with such a case in *EEOC v. International Union of Operating Engineers, Locals 14 & 15*.¹³ In *Local 14 & 15*, the EEOC alleged that Local 15 of the International Union of Operating Engineers (Local 15) engaged in a pattern or practice of discrimination against minorities in recruiting new members.¹⁴ The district court found that only

Hazelwood is thus an example of a case in which the area from which an employer drew its employees did not necessarily constitute the relevant labor market.

¹⁰ See, e.g., *EEOC v. Local 638*, 401 F. Supp. 467, 492-93, 12 FEP Cas. 712, 732-33 (S.D.N.Y. 1975).

¹¹ See, e.g., *Boston Chapter, NAACP, Inc. v. Beecher*, 504 F.2d 1017, 1020 n.4, 8 FEP Cas. 855, 858 n.4 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *United States v. International Union of Elevator Constructors, Local 5*, 538 F.2d 1012, 1016, 13 FEP Cas. 81, 85 (3d Cir. 1976).

¹² See, e.g., *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977); *EEOC v. International Union of Operating Engineers, Locals 14 & 15*, 553 F.2d 251, 14 FEP Cas. 870 (2d Cir. 1977).

¹³ 553 F.2d 251, 14 FEP Cas. 870 (2d Cir. 1977).

¹⁴ *Id.* at 253, 14 FEP Cas. at 871. Both Locals 14 and 15 of the International Union of Operating Engineers were defendants in *Locals 14 & 15*. However, because the finding of liability on the part of Local 14 was not contingent on which labor market was selected for comparison to the racial composition of its membership, *id.* at 256, 14 FEP Cas. at 873, this discussion will focus only on the Title VII claims against Local 15.

6.5% of Local 15's membership were minorities,¹⁵ and further determined that the union's jurisdiction, New York City, was the relevant labor market.¹⁶ Finding that 36.4% of the qualified union candidates in this labor market were minorities,¹⁷ the district court held that the disparity between 36.4% and 6.5% established a *prima facie* Title VII violation.¹⁸

Local 15 appealed the district court's finding of discrimination to the Second Circuit on two grounds. First, Local 15 claimed that the union's New York City jurisdiction was not the relevant labor market because a significant number of its members resided outside the city.¹⁹ Local 15 argued that if the relevant labor market was expanded to include the area in which union members actually resided, minorities would constitute only 16.2% of the qualified union candidates as opposed to 36.4%.²⁰ Second, Local 15 challenged the district court's failure to consider the increase in the union's minority membership since the effective date of Title VII.²¹ Local 15 contended that although minorities made up only 6.5% of its present membership, approximately 20% of union members recruited since Title VII's effective date had been minorities.²² Since minorities constituted 20% of members recruited after Title VII became effective, and since this recruiting took place in a relevant labor market with a minority population of only 16.2%, the union argued that the district court's finding of discrimination had no statistical basis.²³

The Second Circuit agreed with Local 15 on both grounds. As to which geographic area constituted the relevant labor market, the court reasoned that

[w]here a union draws its membership almost entirely from within its geographic jurisdiction, it may be convenient to accept this area as the source of its labor pool. . . . However, where a significant number of union members come from outside the union's geographic jurisdiction, the court must widen its sights; the appropriate reference area then should be that region from which the union draws its members.²⁴

Because Local 15 drew a significant number of its members from outside New York City, the court indicated that the relevant labor market was not limited to the union's geographic jurisdiction.²⁵ Nevertheless, on the basis of the union's own calculation that minorities constituted only 16.2% of the relevant labor market, the court concluded that the disparity between 16.2% and the

¹⁵ 415 F. Supp. 1155, 1163, 12 FEP Cas. 1671, 1678 (S.D.N.Y. 1976).

¹⁶ *Id.* at 1170-71, 12 FEP Cas. at 1684-85.

¹⁷ *Id.* at 1164, 12 FEP Cas. at 1678.

¹⁸ *Id.* at 1170, 12 FEP Cas. at 1684.

¹⁹ 553 F.2d 251, 254, 14 FEP Cas. at 870, 871-72 (2d Cir. 1977).

²⁰ *Id.* at 254, 14 FEP Cas. at 872.

²¹ *Id.* at 254-55, 14 FEP Cas. at 872.

²² *Id.* Title VII became effective on July 2, 1965. 42 U.S.C. § 2000e (1976).

²³ *Id.*

²⁴ *Id.* at 254, 14 FEP Cas. at 872.

²⁵ *Id.*

union's 6.5% minority membership, without more, was still sufficient to create an inference of discrimination.²⁶

The Second Circuit also agreed with the union's second ground of appeal—that the district court had erred in failing to consider the increase in the union's minority membership since the effective date of Title VII.²⁷ The court held that the relevant statistic was not the percentage of minorities in the union's present membership, but the percentage of minorities recruited since Title VII became effective.²⁸ If the union's calculation that minorities constituted 20% of members recruited since Title VII became effective was correct, the court concluded that no statistically supported inference of discrimination could exist because the union had recruited a greater percentage of minority members since the effective date of Title VII than resided in the relevant labor market.²⁹ Accordingly, the court reversed the district court finding of discrimination, and remanded the case for further fact findings on the validity of the union's calculation.³⁰

In *Local 14 & 15*, the Second Circuit held that the relevant labor market should be based on the geographic area from which a union draws its members when a significant number of union members come from areas outside the union's jurisdiction.³¹ Shortly after *Local 14 & 15*, the Second Circuit was presented with a second pattern or practice case against a union raising the issue whether the same considerations underlie the selection of the relevant labor market when it is used to set a remedial membership goal as when it is used to establish a prima facie case of discrimination. This case, *EEOC v. Local 638*,³² was a pattern or practice suit brought against Local 28 of the Sheet Metal Workers' International Association (Local 28), a union whose geographic jurisdiction is New York City.³³ On the basis of direct evidence of discriminatory practices, the district court determined that Local 28 had discriminated against minorities in recruiting new members.³⁴ Since the district

²⁶ *Id.*

²⁷ *Id.* at 255, 14 FEP Cas. at 872.

²⁸ *Id.* Shortly thereafter, the Supreme Court also held that liability under Title VII can attach only for hiring practices after the effective date of Title VII. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 360 (1977).

²⁹ *Id.*

³⁰ *Id.* at 355, 14 FEP Cas. at 873.

³¹ *Id.* at 254, 14 FEP Cas. at 872.

³² 565 F.2d 31, 15 FEP Cas. 1618 (2d Cir. 1977). This case represents the second challenge by the union to an affirmative action plan fashioned by the district court after it determined that the union had discriminated. The report of the first appeal by the union from the district court's finding of liability and first affirmative action plan can be found at 532 F.2d 821, 12 FEP Cas. 755 (2d Cir. 1976). The district court's findings and conclusions of law are reported at 401 F. Supp. 467, 12 FEP Cas. 712 (S.D.N.Y. 1975); the district court's first affirmative action plan is reported at 421 F. Supp. 603, 12 FEP Cas. 742 (S.D.N.Y. 1975).

³³ 401 F. Supp. 467, 470, 12 FEP Cas. 712, 714-15 (S.D.N.Y. 1975). This case was originally part of a larger action against four unions of which Local 28 was one. Separate trials were ordered for each union. *Id.*

³⁴ *Id.* at 487, 12 FEP Cas. at 728.

court relied on direct evidence of discrimination, unlike the court in *Local 14 & 15*, the selection of a relevant labor market for statistical work force comparisons was unnecessary to establish a Title VII violation. The court, however, did select a relevant labor market in fashioning a remedial membership goal to counteract the union's discriminatory practices.³⁵ The district court based the remedial membership goal on the percentage of minorities in the union's New York City jurisdiction,³⁶ and justified the selection of the union's jurisdiction as the relevant labor market for determining the scope of the remedy by noting that

[t]he purpose of setting a remedial goal is to place eligible non-whites in the position they would have enjoyed had there been no discrimination. . . . The best available measure of that . . . is the percentage of non-whites in the relevant labor force existing today within New York City.³⁷

In selecting the union's New York City jurisdiction as the relevant labor market for determining the remedial membership goal, the district court did not consider whether union members in fact resided outside the city. The court's failure to do so was significant because, as in *Local 14 & 15*, the percentage of minorities in the suburban population was significantly lower than in the New York City population. Accordingly, if the remedial goal had been based on the suburban population, the number of minority union members to be recruited under the court's plan would have been lower. In contrast, when the court fashioned an affirmative action program to implement the remedial goal, it did consider whether union members resided outside New York City.³⁸ The district court noted that many of the union's members actually resided in areas outside the union's New York City jurisdiction,³⁹ and therefore permitted the union to draw new members from those areas in carrying out the affirmative action program.⁴⁰

On appeal to the Second Circuit, the union attacked the district court's selection of the union's New York City jurisdiction as the relevant labor market for determining the remedial membership goal.⁴¹ The union argued that if the district court was justified in permitting the union to draw new members from areas outside its jurisdiction to implement the remedial membership goal, then the court had erred in selecting the union's jurisdiction as the relevant labor market to calculate the scope of the remedial goal.⁴² The inclusion of areas outside the union's jurisdiction, in which present union members resided, the union maintained, would have resulted in a lower remedial membership goal.⁴³ The court of appeals rejected the union's contention that

³⁵ *Id.* at 488, 12 FEP Cas. at 729.

³⁶ *Id.*

³⁷ *Id.*

³⁸ 421 F. Supp. 603, 618, 12 FEP Cas. 742, 744 (S.D.N.Y. 1975).

³⁹ *Id.*

⁴⁰ *Id.* at 608-09, 12 FEP Cas. at 747-48.

⁴¹ 565 F.2d 31, 35-36, 14 FEP Cas. 1618, 1622 (2d Cir. 1977).

⁴² *Id.*

⁴³ *Id.*

the relevant labor market should have included areas outside the union's jurisdiction, and upheld the district court ruling.⁴⁴ While the court acknowledged its recent holding in *Local 14 & 15* that "where a significant number of union members come from outside the union's geographic jurisdiction, . . . the appropriate reference area then should be that region from which the union draws its members,"⁴⁵ the court distinguished *Local 14 & 15* as involving the use of statistics to find discrimination, not to set a remedial goal.⁴⁶ The court further attempted to distinguish *Local 14 & 15* by noting that a significant number of union members in that case resided outside the union's jurisdiction, while only an insignificant number of Local 638's members resided outside the union's jurisdiction.⁴⁷ Thus, the court did not find determinative the district court's earlier finding that many of the union's members resided outside New York City. However, the circuit court did indicate that if the evidence had shown that a significant number of union members resided outside New York City, a redefinition of the labor market used to fashion the remedial goal might have been necessary.⁴⁸

The dissenting opinion in *Local 638* rejected the majority's suggestion that distinction may exist between the relevant labor market used to find discrimination and that used to set a remedial goal.⁴⁹ In so doing, the dissent found unpersuasive the majority's characterization of *Local 14 & 15* as precedent only for the use of statistics to find discrimination, and reasoned that *Local 14 & 15* was direct authority for the proposition that the relevant labor market for all purposes must be based on the geographic area in which the union members actually reside.⁵⁰ Pointing to the district court's finding that many of the present union members actually resided outside New York City, the dissent in *Local 638* concluded that the district court had erred in looking solely to the union's jurisdiction in setting the remedial goal.⁵¹ In addition, the dissent maintained that any inconsistency between the labor market used to find discrimination and that used to set remedial goals would be contrary to the well established Title VII principle that the remedy must fit the wrong.⁵² The dissent chided the majority for ignoring this principle, and characterized it as holding, in effect, that "once [a district court] has made a finding of discrimination, [it] is free to select a hiring goal on an arbitrary basis, or no basis at all."⁵³

⁴⁴ *Id.*

⁴⁵ *Id.* at 36, 15 FEP Cas. at 1622 (quoting EEOC v. International Union of Operating Engineers, Locals 14 & 15, 553 F.2d 251, 254, 14 FEP Cas. 870, 872 (2d Cir. 1977)).

⁴⁶ 565 F.2d at 36, 15 FEP Cas. at 1622.

⁴⁷ *Id.*

⁴⁸ *Id.* at 36 & n.7, 15 FEP Cas. at 1623 & n.7.

⁴⁹ *Id.* at 40-41, 15 FEP Cas. at 1626 (Meskill, J., dissenting).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 41-42, 15 FEP Cas. at 1627. See *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418-19 (1975); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 762-70 (1976).

⁵³ 565 F.2d at 41-42, 15 FEP Cas. at 1627.

The dissent is correct in concluding that any distinction between the relevant labor market used to find discrimination and that used to set remedial goals is contrary to Title VII. As the Supreme Court explained in *Albermarle Paper Co. v. Moody*,⁵⁴

[t]he general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed.⁵⁵

Under the principle set out in *Albermarle*, the labor market used to set a remedial goal must be the same as the labor market used to find discrimination. Otherwise, a district court could, after finding discrimination, choose to punish a union by setting a remedial goal based on a minority intensive labor market. Not only is such inconsistency between labor markets used to find discrimination and to set remedial goals contrary to established Title VII principles, but it also introduces unnecessary confusion to a developing area of Title VII law. Therefore, it is submitted that the same considerations must underlie the selection of the relevant labor market in an EEOC pattern or practice suit whether the relevant labor market is used to find discrimination or to set remedial goals.

D. *Role of Intent in Establishing a Prima Facie*
Case: *Nashville Gas Co. v. Satty*

In 1976 the Supreme Court, by a sharply divided vote, ruled in *General Electric Co. v. Gilbert*¹ that the exclusion of pregnancy from a private employer's disability insurance program does not constitute sex discrimination in violation of Title VII.² Perhaps the most disturbing element of the decision, for both the concurring and dissenting members of the Court, was the suggestion in Justice Rehnquist's majority opinion that the standard of proof previously used in Title VII cases—whereby plaintiffs can establish a prima facie case by demonstrating that an employment policy has a disparate impact on a protected class—would be replaced by the more stringent standard of proof applicable in equal protection cases—under which plaintiffs must prove a discriminatory intent in addition to a disparate impact.³ Two decisions by

⁵⁴ 422 U.S. 405 (1975).

⁵⁵ *Id.* at 418-19.

¹ 429 U.S. 125 (1976).

² *Id.* at 145-46. 42 U.S.C. §§ 2000e-1 to 2000e-17 (1976).

³ 429 U.S. at 146 (Blackmun, J., concurring); *id.* at 160-61 (Stevens, J., dissenting); *id.* at 153-55 (Brennan, J., dissenting). Justice Marshall joined in Justice Brennan's dissenting opinion. In a concurring opinion, Justice Stewart stated that he did not read the Court's opinion as questioning the significance of the disparate impact theory in Title VII cases. *Id.* at 146 (Stewart, J., concurring). See text at notes 31-37 *infra*.

the Supreme Court during the *Survey* year, *Dothard v. Rawlinson*⁴ and *Nashville Gas Co. v. Satty*,⁵ indicate that although Justice Rehnquist's intimation as to the requirement of proof of discriminatory intent under Title VII does not presently enjoy the support of a majority of the Court, the reasoning of his *Gilbert* opinion continues to threaten the viability of the disparate impact theory under Title VII.

Prior to *Gilbert*, the Supreme Court held in *Washington v. Davis*⁶ that proof of discriminatory intent is necessary to establish a prima facie case of discrimination under the equal protection clause of the fourteenth amendment.⁷ The Court specifically noted in *Davis*, however, that the constitutional requirement of intent does not extend to Title VII cases and that plaintiffs proceeding thereunder may instead "focus solely on the [sexually] differential impact of the challenged hiring or promotion practices."⁸ Accordingly, the Court reiterated that under the disparate impact theory announced in *Griggs v. Duke Power Co.*,⁹ a prima facie case of discrimination may be established under Title VII by proof that a facially neutral employment policy has a significantly disparate impact on a protected class.¹⁰ Once a significantly disparate impact is established, the Title VII defendant may rebut the plaintiff's case only by proving that the challenged employment policy is justified on the basis of business necessity.¹¹

The possibility that the disparate impact theory articulated in *Griggs* might soon be replaced by the requirement that Title VII plaintiffs demonstrate not only a disparate impact but also a discriminatory intent was raised in *Gilbert* due to the method of analysis adopted by Justice Rehnquist. In examining the plaintiff's claim that exclusion of pregnancy from the employer's disability insurance program constituted illegal sex discrimination, Justice Rehnquist first considered which subsection of section 703(a),¹² the

⁴ 433 U.S. 321 (1977).

⁵ 434 U.S. 136 (1977).

⁶ 426 U.S. 229 (1976).

⁷ *Id.* at 238-39, 247-48.

⁸ *Id.* See also *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 422 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). Although proof of discriminatory intent is not an essential element of the disparate impact theory under Title VII, it is relevant in Title VII cases premised on the claim that an employer engaged in acts of purposeful discrimination in violation of the statute. However, even in such cases, the Court has ruled that discriminatory intent may be inferred from the circumstances surrounding the act in question. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

⁹ 401 U.S. 424 (1971) (educational and testing requirements which have a disparate impact on black job applicants violate Title VII absent proof of job-relatedness).

¹⁰ 426 U.S. at 238-39. See *Griggs*, 401 U.S. at 430-32.

¹¹ *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); *Griggs*, 401 U.S. 424, 431-32 (1971). If the defendant establishes that a business necessity justifies the employment policy in question, the plaintiff may then attempt to prove that the policy is a mere pretext designed to effect an invidious discrimination against the plaintiff. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973).

¹² 42 U.S.C. § 2000e-2(a)(1), (2) (1976).

general antidiscrimination provision of Title VII, encompassed the plaintiff's claim.¹³ Section 703(a)(1) declares it to be an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex" ¹⁴ Section 703(a)(2) declares it to be an unlawful employment practice for an employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex" ¹⁵ Since the disability insurance program in *Gilbert* was essentially compensatory in nature, and since section 703(a)(1) expressly prohibits discrimination with respect to compensation, Justice Rehnquist determined that the legality of the program was to be determined according to the standards established under section 703(a)(1).¹⁶

Having determined that section 703(a)(1) was the appropriate section under which to analyze the disability insurance program, Justice Rehnquist next examined the standards governing the finding of a Title VII violation.¹⁷ In this regard, Justice Rehnquist noted that Congress nowhere defined "discrimination" in Title VII and concluded that it was therefore appropriate to look to fourteenth amendment decisions which "afford an existing body of law analyzing and discussing that term in a legal context not wholly dissimilar to the concerns which Congress manifested in enacting Title VII."¹⁸ From this existing body of law, Justice Rehnquist drew upon the Court's decision in *Geduldig v. Aiello*.¹⁹ In *Geduldig*, the Court ruled that the exclusion of pregnancy from the otherwise inclusive coverage of a disability insurance program does not violate the equal protection clause of the fourteenth amendment because such a program does not discriminate on the basis of sex.²⁰ The exclusion of pregnancy does not constitute sex-based discrimination, the *Geduldig* Court reasoned, because "[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not."²¹ Accordingly, the *Geduldig* Court found the disability insurance program to be merely underinclusive, creating a distinction not between men and women but between "pregnant women and nonpregnant persons."²² Applying the constitutional analysis of *Geduldig* to the Title VII claim in *Gilbert*, the Supreme Court concluded that the exclusion of pregnancy from General Electric's disability program did not violate Title

¹³ 429 U.S. at 133.

¹⁴ 42 U.S.C. § 2000e-2(a)(1) (1976).

¹⁵ 42 U.S.C. § 2000e-2(a)(2) (1976).

¹⁶ 429 U.S. at 138-40.

¹⁷ *Id.* at 133.

¹⁸ *Id.*

¹⁹ 417 U.S. 484 (1974).

²⁰ *Id.* at 496-97 & n.20.

²¹ *Id.* at 496-97.

²² *Id.* at 496 n.20.

VII since, as in *Geduldig*, the program discriminated on the basis of pregnancy rather than on the basis of sex.²³

Although application of *Geduldig*'s constitutional analysis mandated a finding that the exclusion of pregnancy from General Electric's disability insurance program did not constitute sex-based discrimination, Justice Rehnquist recognized that the Court's decision in *Griggs* required consideration whether the program nevertheless had a discriminatory effect on women in violation of Title VII.²⁴ Justice Rehnquist noted in this regard that *Griggs* was decided under section 703(a)(2) which, unlike section 703(a)(1), does not contain the word "discriminate."²⁵ Justice Rehnquist then implied that proof of discriminatory intent is required under section 703(a)(1), although not under section 703(a)(2), and thus that the disparate impact theory is unavailable under section 703(a)(1).²⁶ This question whether the disparate impact theory is available under section 703(a)(1) was not answered in *Gilbert*, however, since the Court ruled that the plaintiff failed to prove the disability insurance program was in fact worth more to men than to women, and therefore had a disparate impact in violation of the *Griggs* standard.²⁷ Since the disability insurance program neither classified employees on the basis of sex nor had a disparate impact on female employees, the Court determined that no Title VII violation had been established.²⁸

Justice Rehnquist's reliance in *Gilbert* on the constitutional analysis of *Geduldig* to define sex discrimination under Title VII raised the question whether in a future case the Court might also require proof of discriminatory intent in Title VII cases, thereby vitiating the disparate impact theory announced in *Griggs*. The *Gilbert* Court's willingness to apply the fourteenth amendment definition of discrimination to a Title VII claim was, however, only the first indication in Justice Rehnquist's opinion that the requirement of discriminatory intent would be incorporated into Title VII. The *Gilbert* Court's interpretation of Title VII itself also cast doubt on the continued validity of the disparate impact theory, at least with respect to section 703(a)(1). Prior to *Gilbert*, courts applied the same standard of proof regardless of whether the Title VII claim arose under section 703(a)(1) or section 703(a)(2).²⁹ Indeed, courts seldom identified one subsection or the other as

²³ 429 U.S. at 145-46.

²⁴ *Id.* at 136-37.

²⁵ *Id.* at 137. For text of § 703(a)(1), (2), see text at notes 14-15 *supra*.

²⁶ 429 U.S. at 137.

²⁷ *Id.* at 138-39.

²⁸ *Id.* at 145-46.

²⁹ Different standards of proof are, however, applied by the courts depending on whether the Title VII plaintiff proceeds under a disparate impact theory or under a purposeful discrimination theory. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). Compare *Griggs*, 401 U.S. 424 (1971) (disparate impact) with *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (purposeful discrimination). While certain policies are more appropriately challenged under one theory or the other, this choice is entirely unrelated to which subsection of § 703(a) encompasses the claim.

providing the basis for its decision.³⁰ In *Gilbert*, however, Justice Rehnquist suggested that a different standard of proof applies depending on whether a claim of discrimination is encompassed by section 703(a)(1) or by section 703(a)(2).

Although Justice Rehnquist's opinion in *Gilbert* seriously questioned the future of the disparate impact theory under Title VII, his reference to the requirement of intent as an essential element of a prima facie case under section 703(a)(1) was not joined by a majority of the Court. Only three members, Chief Justice Burger, and Justices White and Powell, joined Justice Rehnquist's opinion in its entirety.³¹ Justice Stewart concurred in the judgment of the Court, but wrote separately to state that he did not read the opinion as questioning either the validity of *Griggs* or the importance of discriminatory impact in Title VII cases.³² Justice Blackmun wrote separately and dissented from any implication in the opinion that discriminatory impact may never be a controlling factor in a Title VII case or that *Griggs* is no longer good law.³³ In separate dissenting opinions, Justice Brennan, joined by Justice Marshall, and Justice Stevens both stated their disagreement with the Court's use of constitutional analysis in a Title VII case.³⁴ Justice Brennan also expressed the view that "[n]otwithstanding unexplained and inexplicable implications to the contrary,"³⁵ it is well established that disparate impact establishes a prima facie case under either section 703(a)(1) or section 703(a)(2).³⁶ Although Justice Stevens objected to the Court's use of constitutional analysis, he did not specifically address the issue whether disparate impact is sufficient to establish a prima facie case under section 703(a)(1) since he was of the opinion that the disability insurance program discriminated on the basis of sex and therefore should have been found per se violative of Title VII.³⁷ Thus, while Justice Rehnquist's *Gilbert* opinion seriously threatened the future of the disparate impact theory, it is not clear that Justice Rehnquist would ever receive support from a majority of the Court.

The spectre raised in *Gilbert* by Justice Rehnquist that discriminatory intent might be an essential element of proof under section 703(a)(1) did not immediately reappear in the Court's Title VII opinions. In *Dothard v. Rawlin-*

³⁰ See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 328-31 & n.10 (1977); *Yuhas v. Libby-Owens-Ford Co.*, 562 F.2d 496, 496, 16 FEP Cas. 891, 891 (7th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978); *Jacobs v. Martin Sweets Co.*, 550 F.2d 364, 370, 14 FEP Cas. 687, 691 (6th Cir.), *cert. denied*, 431 U.S. 917 (1977); *Rowe v. General Motors Corp.*, 457 F.2d 348, 350, 4 FEP Cas. 445, 446 (5th Cir. 1972); *Jones v. Lee Way Motor Freight, Inc.*, 431 F.2d 245, 248, 250, 2 FEP Cas. 895, 897, 899 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971).

³¹ It is not clear, however, that these three Justices would vote affirmatively on the express question whether discriminatory intent is an essential element of proof in a Title VII case. See *Nashville Gas Co. v. Satty*, 434 U.S. 136, 152 n.6 (1977) (Powell, J., concurring).

³² 429 U.S. at 146 (Stewart, J., concurring).

³³ *Id.* (Blackmun, J., concurring in part).

³⁴ *Id.* at 153 n.6 (Brennan, J., dissenting); *id.* at 160-61 (Stevens, J., dissenting).

³⁵ *Id.* at 153 (Brennan, J., dissenting).

³⁶ *Id.* at 153-55 (Brennan, J., dissenting).

³⁷ *Id.* at 160-62 (Stevens, J., dissenting).

son,³⁸ a case decided subsequent to *Gilbert*, the Court expressly reaffirmed the validity of the disparate impact theory.³⁹ The plaintiff in *Dothard* contended that Alabama's statutory minimum height and weight requirements for employment as a state correctional counselor violated Title VII because they had a disparate impact on female applicants.⁴⁰ Writing for the Court, Justice Stewart expressly recognized that discriminatory intent is not an essential element of a prima facie case under Title VII, stating that "a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern."⁴¹ Without distinguishing between the subsections of section 703(a), the Court found the statistical evidence introduced by the plaintiff sufficient to establish a prima facie case under the disparate impact theory,⁴² and concurred in the district court's ruling that the state failed to satisfy its burden of proving job-relatedness.⁴³ Consequently, the Court held that the height and weight requirements violated Title VII.⁴⁴

The Supreme Court's decision in *Dothard* is significant in two respects. First, it is noteworthy that the opinion makes no reference to the particular subsection of section 703(a) under which the plaintiff's claim most appropriately fits.⁴⁵ It therefore appears that Justice Stewart considers the disparate impact theory equally applicable under both sections 703(a)(1) and 703(a)(2).⁴⁶ Second, the absence of disagreement with Justice Stewart's invocation of the disparate impact theory is significant because it may indicate that

³⁸ 433 U.S. 321 (1977).

³⁹ *Id.* at 328-29.

⁴⁰ *Id.* at 324. The plaintiff also challenged Alabama's Administrative Regulation 204 establishing gender-based criteria for assigning correctional counselors to maximum security prisons in contact positions. *Id.* at 325. The Court found that the regulation explicitly discriminates against women on the basis of their sex by excluding women from approximately 75% of the jobs in the state correctional system. *Id.* at 332 & n.16. The Court, however, upheld the defendant's claim that sex was a bona fide occupational requirement under § 703(e) of Title VII, 42 U.S.C. § 2000e-2(e) (1976). *Id.* at 336-37. The Court determined that the "employee's very womanhood" would render her unable to effectively perform her duties in the violent environment of Alabama prisons. *Id.* at 336.

⁴¹ *Id.* at 329. Justice Stewart made no distinction between subsections (1) and (2) of § 703(a) as regards the availability of the disparate impact theory to Title VII plaintiffs. *Id.* Indeed, nowhere in Justice Stewart's opinion is one subsection or the other of § 703(a) noted as providing the basis for the plaintiff's case. *But see id.* at 338 (Rehnquist, J., concurring) (agreeing that plaintiff established a prima facie case under § 703(a)(2)).

⁴² *Id.* at 330.

⁴³ *Id.* at 332. For a discussion of the use of statistics in *Dothard* see Note, *The Role of Statistical Evidence in Title VII Cases*, 19 B.C. L. REV. 881 (1978).

⁴⁴ 433 U.S. at 332. Justice White dissented on the ground that the statistical evidence presented by the plaintiff was insufficient to establish a prima facie case. *Id.* at 347-49 (White, J., dissenting).

⁴⁵ *Id.* at 323.

⁴⁶ See also *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

Justice Rehnquist is singularly responsible for mounting the challenge to the disparate impact theory.⁴⁷

Justice Rehnquist's suggestion that discriminatory intent is an essential element of a prima facie case under section 703(a)(1) reappeared this *Survey* year when Justice Rehnquist wrote the opinion of the Court in *Nashville Gas Co. v. Satty*.⁴⁸ In *Satty*, the Court considered whether two separate employment policies discriminated against women in violation of Title VII.⁴⁹ One of the challenged employment policies required pregnant women to take a mandatory maternity leave without accumulated sick pay.⁵⁰ The other policy provided that women returning to work from a maternity leave had to bid competitively for positions without the benefit of their accumulated job seniority.⁵¹ *Satty* is significant because Justice Rehnquist chose to analyze the two challenged employment policies under the two different subsections of section 703(a),⁵² and because he suggested again that all challenges to employment policies under section 703(a)(1) must be accompanied by proof of discriminatory intent.⁵³ Although, as in *Gilbert*, Justice Rehnquist did not find it necessary to decide this issue,⁵⁴ his *Satty* opinion represents yet another attack on the continued viability of the disparate impact theory under section 703(a)(1).

The *Satty* Court first considered the plaintiff's challenge to the seniority retention policy.⁵⁵ Under this policy, an employee's seniority was suspended during the period of her mandatory maternity leave.⁵⁶ Employees returning from maternity leave were not automatically reinstated but, rather, had to bid competitively for a permanent position without the benefit of their accumulated seniority.⁵⁷ If an employee did secure a permanent position subsequent to her maternity leave she regained her accumulated seniority for the purposes of vacation and pension rights, but not for the purposes of future job bidding.⁵⁸ In the plaintiff's case, the seniority retention policy operated to prevent her return to the company's workforce.⁵⁹

Justice Rehnquist first determined that, as in *Geduldig* and *Gilbert*, the company's decision not to treat pregnancy as a disease or disability for the purpose of seniority retention was facially neutral since the policy classified on

⁴⁷ Although none of the Justices disagreed with Justice Stewart's analysis of the disparate impact theory, Justice Rehnquist, in a concurring opinion, stated his agreement with the conclusion that the plaintiff had established a prima facie case under § 703(a)(2). 433 U.S. at 338 (Rehnquist, J., concurring).

⁴⁸ 434 U.S. 136 (1977).

⁴⁹ *Id.* at 138.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 139-40, 144-45.

⁵³ *Id.* at 144-45.

⁵⁴ *Id.*

⁵⁵ *Id.* at 138-43.

⁵⁶ *Id.* at 138-39.

⁵⁷ *Id.* at 139.

⁵⁸ *Id.*

⁵⁹ *Id.*

the basis of pregnancy and not sex.⁶⁰ The Court, nevertheless, recognized that employment policies "neutral on their face but having a discriminatory effect may run afoul of § 703(a)(2)."⁶¹ Thus, Justice Rehnquist expressly condoned the use of the disparate impact test under section 703(a)(2). Justice Rehnquist further determined that section 703(a)(2) was the proper section under which to analyze the seniority policy because, according to the language of section 703(a)(2), it operated to "deprive [employees] of employment opportunities" and to "adversely affect [their] status as an employee."⁶² The seniority policy operated in this fashion, the Court reasoned, because a female employee could be permanently relegated to lower paying and less desirable positions as the result of her loss of seniority upon taking a mandatory maternity leave.⁶³

Having determined that section 703(a)(2) was the proper section under which to analyze the seniority policy, the Supreme Court proceeded to examine whether the facially neutral policy had a discriminatory effect.⁶⁴ In so doing, the Court distinguished its earlier decision in *Gilbert* by way of a burden and benefit analysis.⁶⁵ The *Satty* Court viewed the disability program in *Gilbert* as being merely underinclusive, involving only a decision not to extend the additional benefit of insurance coverage to pregnant employees.⁶⁶ So understood, the disability policy did not burden women and therefore had no disparate impact on them in violation of section 703(a)(1).⁶⁷ By comparison, the Court considered the effect of the seniority retention policy in *Satty* to be the imposition on women of a substantial burden that men did not have to suffer.⁶⁸ The Court determined that "[t]he distinction between benefits and burdens is more than one of semantics."⁶⁹ Thus, whereas employees could be denied additional benefits for pregnancy under an otherwise inclusive disability program consistent with the provisions of section 703(a)(1), the *Satty* Court read section 703(a)(2) as prohibiting employers from burdening female employees in ways which deprive them of employment opportunities.⁷⁰ The

⁶⁰ *Id.* at 140. Chief Justice Burger and Justices Stewart, White and Blackmun joined in Justice Rehnquist's opinion. Justice Powell, with whom Justices Brennan and Marshall joined, concurred in the result, but wrote separately to state his view that, on remand, the district court should determine whether the compensation package offered by the employer was worth more to men than to women. *Id.* at 151 (Powell, J., concurring). Justice Stevens also concurred in a separate opinion stating what he considered to be a pragmatic reconciliation of *Gilbert* and *Satty*. *Id.* at 153 (Stevens, J., concurring).

⁶¹ *Id.* at 141.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 141-42.

⁶⁶ *Id.*

⁶⁷ *Id.* at 142.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* As noted by Justice Stevens in his concurring opinion in *Satty*, the Court's burden and benefit analysis is illusory since the characterization is, in fact, a matter of semantics. *Id.* at 154 & n.4. Thus, in both *Gilbert* and *Satty*, denying women

Court's finding that the seniority policy burdened women but not men, necessarily determined that the policy had a disparate impact on women. This disparate impact violated section 703(a)(2) unless shown to be job-related.⁷¹ Since the defendant had offered no proof of job-relatedness to justify its seniority retention policy, the Court concluded that there had been a Title VII violation.⁷²

The *Satty* Court next considered the legality of the defendant's sick pay policy.⁷³ Under the terms of this policy, employees absent from work for any reason other than pregnancy were entitled to receive sick pay.⁷⁴ Pregnant employees, however, were denied sick pay benefits during their mandatory maternity leave.⁷⁵ The Court premised its analysis of the sick pay policy on its finding that the policy was legally indistinguishable from the disability insurance program upheld in *Gilbert*.⁷⁶ Accordingly, the company's sick pay policy discriminated on the basis of pregnancy and not sex, and was facially neutral.⁷⁷

Upon concluding that the employer's sick pay policy was facially neutral, the Supreme Court examined whether the policy nevertheless had a discriminatory effect on women in violation of Title VII.⁷⁸ The Court first determined that section 703(a)(2) was not the proper section under which to analyze the employer's sick pay policy since

it is difficult to perceive how the exclusion of pregnancy from a disability insurance plan or sick leave compensation program 'deprives an individual of employment opportunities' or 'otherwise adversely affects his status as an employee' in violation of § 703(a)(2). The direct effect of the exclusion is merely a loss of income for the period the employee is not at work; such an exclusion has no direct effect upon either employment opportunities or job status.⁷⁹

The Court therefore concluded that section 703(a)(1), the section under which *Gilbert* was decided, was the appropriate section under which to test the validity of the sick pay policy.⁸⁰ At this point in his analysis, Justice Rehnquist

disability or sick pay benefits for pregnancy while extending benefits to men for sex specific conditions imposes a burden on women which men need not bear. Similarly, if insurance coverage for pregnancy is desired, women must bear the burden of its additional cost whereas men need not seek independent coverage for any disability which they may suffer. Although the denial of accumulated seniority in *Satty* may present a more serious instance of employment discrimination than did the denial of sick pay or disability payments, a difference in degree does not distinguish a burden from a benefit.

⁷¹ *Id.* at 143.

⁷² *Id.*

⁷³ *Id.* at 143-46.

⁷⁴ *Id.* at 138.

⁷⁵ *Id.* at 143.

⁷⁶ *Id.*

⁷⁷ *Id.* at 143-44.

⁷⁸ *Id.* at 144-45.

⁷⁹ *Id.*

⁸⁰ *Id.* at 145.

again questioned the continued viability of the disparate impact test under section 703(a)(1).⁸¹ Justice Rehnquist did not resolve this issue, however, since as in *Gilbert* the plaintiff had failed to prove that the denial of sick pay benefits had a discriminatory effect on women.⁸² Accordingly, Justice

⁸¹ *Id.* at 144.

⁸² *Id.* at 145. While the plaintiff in *Satty* failed to establish a prima facie case under Title VII through proof of disparate impact, the Court stated that the plaintiff was not necessarily precluded from proving that the sick leave policy was a mere pretext designed to discriminate against women. *Id.* With respect to proof of pretext, the Court stated that the discrimination inherent in the seniority retention policy might be relevant to the inquiry. *Id.* Since the district court had made no findings on the question of pretext, the Court vacated the decision of the Sixth Circuit and remanded the case to the district court for a determination whether the plaintiff had adequately preserved the right to proceed on a theory of pretext. *Id.* at 146.

Despite the remand ordered in *Satty* on the issue of pretext with regard to the sick leave policy, it is unclear whether the plaintiff will succeed in proving a Title VII violation on this theory. In *Gilbert*, the Court ignored General Electric's long history of sex discrimination, see 429 U.S. at 150 (Brennan, J. dissenting), and confined its analysis on the question of pretext to the risks covered by the plan. 434 U.S. at 136. Since the Court considered pregnancy to be "significantly different from the typical covered disease or disability," the exclusion of pregnancy from the disability plan was not seen as an attempt to accomplish an invidious discrimination against women. *Id.* Under this analysis, there could be no finding of pretext in *Satty* since the sick pay policy was found to be legally indistinguishable from that in *Gilbert*. If the district court considers the other discriminatory practices by the employer relevant in determining whether the sick leave plan is pretextual, as was suggested by the *Satty* Court, the plaintiff might succeed in proving a Title VII violation. However, in light of the Court's more explicit treatment of the pretext issue in *Gilbert*, it is unclear how much weight the district court will actually accord the *Satty* Court's recognition of the potential relevance of other discriminatory practices by the employer. Indeed, prior to *Satty*, lower federal courts had almost unanimously ruled that *Gilbert* precludes proof of a Title VII violation in the areas of disability insurance and sick pay programs. See, e.g., *Women in City Gov't United v. City of New York*, 563 F.2d 537, 15 FEP Cas. 1358 (2d Cir. 1977) (disability insurance and sick pay); *EEOC v. Children's Hospital of Pittsburgh*, 566 F.2d 222, 14 FEP Cas. 1821 (3d Cir. 1977), cert. denied, 434 U.S. 1009 (1978) (sick pay); *Hutchinson v. Lake Oswego School Dist.*, 519 F.2d 961, 11 FEP Cas. 161 (9th Cir. 1975), vacated and remanded for reconsideration in light of *Gilbert*, 429 U.S. 1033 (1977), vacated and remanded with instructions to dismiss, 558 F.2d 1037, 15 FEP Cas. 1370 (9th Cir. 1977) (sick pay); *McCarthy v. Burkholder*, 15 FEP Cas. 682 (D. Kan. 1977) (sick pay); *Tawney v. Board of Educ. of Boone*, 426 F. Supp. 528 (S.D. W. Va. 1977) (sick pay); *Madrid v. Board of Educ. of Gilroy*, 429 F. Supp. 816, 14 FEP Cas. 816 (N.D. Cal. 1977) (sick pay); *Harriss v. Pan Am. World Airways, Inc.*, 437 F. Supp. 413, 15 FEP Cas. 1663 (N.D. Cal. 1977) (sick pay; disability insurance). But see *Guse v. J.C. Penney Co., Inc.*, 562 F.2d 6, 15 FEP Cas. 484 (7th Cir. 1977) (*Gilbert* allows proof of disparate impact with respect to disability insurance and sick pay but plaintiff cannot raise that claim for the first time on appeal); *Love v. Waukesha Joint School Dist.*, 560 F.2d 285, 15 FEP Cas. 1128 (7th Cir. 1977) (if sick pay for pregnancy is not an "additional cost" there is no rational basis for exclusion from policy); *Liss v. School Dist. of Ladue*, 548 F.2d 751, 14 FEP Cas. 771 (8th Cir. 1977) (mutuality of included risks not present in sick leave policy for personal illness, proof of pretext therefore not precluded by *Gilbert*). It seems probable that in light of these decisions, few women will be able to successfully challenge the exclusion of pregnancy from disability insurance and sick leave plans.

Rehnquist's opinion in *Satty* once again raised without deciding the question whether discriminatory intent is an essential element of a prima facie case under section 703(a)(1).

It is submitted that the distinction drawn by Justice Rehnquist in *Satty* between sections 703(a)(1) and 703(a)(2) is illusory. Although the language of the two sections does support Justice Rehnquist's conclusion that the sick pay policy at issue in *Satty* was encompassed by section 703(a)(1), whereas the seniority retention policy fell within the ambit of section 703(a)(2),⁸³ the language of the two sections does not support Justice Rehnquist's suggestion that different standards of proof govern each section. It is true that section 703(a)(1) contains the word "discriminate" and that section 703(a)(2) does not.⁸⁴ However, as Justice Stevens stressed in his concurring opinion in *Satty*, "[t]his [difference] is not significant since a violation of § 703(a)(2) occurs when a facially neutral policy has a 'discriminatory effect.'"⁸⁵ It thus appears that the language of the statute affords no rational basis for applying different standards of proof under sections 703(a)(1) and 703(a)(2).⁸⁶ Nor does the difference between employment policies which compensate, and therefore fit under section 703(a)(1), and employment policies which affect job opportunities and job status, and thus fit under section 703(a)(2), provide any rational basis for applying different standards of proof under each subsection of section 703(a).

Although neither the language of section 703(a) nor the nature of the employment policies challenged support Justice Rehnquist's suggestion that discriminatory intent is an essential element of proof under section 703(a)(1), the reappearance of this proposition in *Satty* cannot be ignored. However, since six members of the Court indicated in either *Satty* or *Gilbert* that they disagreed with his challenge to the disparate impact theory,⁸⁷ it seems unlikely that a majority of the Supreme Court would ever join Justice Rehnquist on this point.

II. DISCRIMINATION IN EMPLOYMENT BENEFITS

A. Seniority Systems: Teamsters

This Survey year, the Supreme Court, in *International Brotherhood of Teamsters v. United States*,¹ considered the applicability of Title VII² to senior-

⁸³ For text of §§ 703(a)(1), (2), see text at notes 14-15 *supra*.

⁸⁴ *Id.*

⁸⁵ 434 U.S. at 154 n.4 (Stevens, J., concurring).

⁸⁶ See *Harriss v. Pan Am. World Airways, Inc.*, 437 F.Supp. 413, 429 n.26, 15 FEP Cas. 1663, 1676 n.26 (N.D. Cal. 1977) (no distinction between subsections (1) and (2) of § 703(a)).

⁸⁷ See *Satty*, 434 U.S. at 151 (Powell, J., concurring); *Gilbert*, 429 U.S. at 146 (Stewart, J., concurring); *id.* at 146 (Blackmun, J., concurring); *id.* at 160-62 (Stevens, J., dissenting); *id.* at 153-55 (Brennan, J., dissenting). Justice Marshall joined Justice Brennan's dissenting opinion in *Gilbert*.

¹ 431 U.S. 324 (1977).

² The Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e-1 to 2000e-17 (1976).

ity systems which perpetuate the effects of past discrimination in hiring. Since seniority rights are earned either on the basis of length of service with an employer (plant seniority) or in a particular department (departmental seniority), they provide an objective means for granting transfers and promotions, and for establishing an order during lay-offs and re-calls.³ Difficulties arise, however, when prior discriminatory hiring practices by an employer leave minorities with less seniority than they might otherwise have earned. At each promotion or lay-off, the effects of the prior discrimination are felt by individual discriminatees, and serious economic hardships may result.⁴

Prior to *Teamsters*, the Supreme Court noted the discriminatory impact of seniority systems which perpetuate the effects of an employer's past hiring practices in *Franks v. Bowman Transportation Co.*⁵ In *Franks*, individuals who had been the victims of hiring discrimination sought an award of seniority dating back to the original discrimination.⁶ The employer claimed that section 703(h) of Title VII bars such an award of retroactive seniority. Section 703(h) provides that

it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.⁷

The *Franks* Court found no indication that section 703(h) was intended by Congress to preclude an award of retroactive seniority once post-Act discrimination has been proved.⁸ The Court stated that section 703(h) is only "directed toward defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act."⁹ Relying upon the broad make-whole objectives of Title VII, the Court concluded that an award of retroactive seniority was necessary in order to place individuals who had been the victims of post-Act discrimination in their rightful positions.¹⁰ *Franks* was thus limited to the

³ See generally Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532 (1962).

⁴ See generally Poplin, *Fair Employment in a Depressed Economy: The Layoff Problem*, 23 U.C.L.A. L. REV. 177 (1975); Comment, *Last Hired, First Fired, Seniority Layoffs, and Title VII: Questions of Liability and Remedy*, 11 COLUM. J. LAW & SOC. PROB. 343, 343-46 (1975); Blumrosen, *Seniority and Equal Employment Opportunity: A Glimmer of Hope*, 23 RUTGERS L. REV. 268 (1969); Cooper & Sobel, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598 (1969).

⁵ 424 U.S. 747 (1976). For a discussion of *Franks*, see 1975-1976 *Annual Survey of Labor Relations and Employment Discrimination Law*, 17 B.C. IND. & COM. L. REV. 1041, 1140 (1976).

⁶ 424 U.S. at 758.

⁷ 42 U.S.C. § 2000e-2(h) (1976).

⁸ 424 U.S. at 762-63.

⁹ *Id.* at 762.

¹⁰ *Id.* at 767-68.

remedial aspects of the Act, and the Supreme Court did not consider the question whether section 703(h) immunizes from Title VII liability seniority systems which perpetuate the effects of past discrimination.

The question left open in *Franks* regarding the substantive reach of section 703(h) was specifically addressed by the Court in *Teamsters*.¹¹ *Teamsters* arose as a pattern or practice suit initiated by the Government on behalf of all black and Spanish-surnamed incumbent employees of T.I.M.E.-D.C., Inc. (TIME), a nationwide common carrier of motor freight.¹² Members of the affected class encompassed two distinct groups: the first included those hired prior to July 2, 1965, the effective date of Title VII (pre-Act victims of discrimination); the second encompassed those hired after that date (post-Act victims of discrimination). The Government's complaint alleged two separate grounds for imposing liability under Title VII. First, the Government maintained that TIME had engaged in a pattern or practice of systematically hiring minorities for the lower paying, less prestigious position of city driver.¹³ Second, the Government challenged the seniority system established by the collective bargaining agreement between TIME and the Teamsters union on the ground that it effectively precluded minorities in city-driver positions from transferring to higher paying, more prestigious jobs as line drivers.¹⁴

The structure of the seniority system challenged by the Government in *Teamsters* is similar to those used throughout the trucking industry.¹⁵ An employee's right to compete against fellow employees for particular trucking runs, for protection from lay-offs, and for re-call to work after lay-offs is determined by departmental seniority.¹⁶ A transfer from a city-driver department to a line-driver department results in the loss of all departmental seniority.¹⁷ By contrast, noncompetitive benefits such as vacation time are determined by the length of time an employee has worked in a particular plant. This plant seniority is not affected by transfers between departments.¹⁸

The Government conceded that the departmental seniority system was neutral on its face and applied equally to minority and nonminority employees. Nevertheless, the Government challenged the system since it operated as a deterrent to transfers out of city-driving positions and thereby continued the effects of prior discrimination in hiring for line-driver positions.¹⁹

¹¹ 431 U.S. at 346-47.

¹² *Id.* at 328.

¹³ *Id.* at 329.

¹⁴ *Id.* at 329-30. City drivers generally earn substantially less per year than do line drivers. Line drivers also have the advantage of not being required to load and unload their trucks, as are city drivers. *Id.* at 369 n.55. City drivers, however, have regular working hours and are able to spend more time at home and with family. *Id.*

¹⁵ *Id.* at 356 & n.42.

¹⁶ *Id.* at 343-44.

¹⁷ *Id.* at 344. This policy explains why it is more common for line driver vacancies to be filled by new employees off the street than by city drivers already in TIME's employ. *United States v. T.I.M.E.-D.C., Inc.*, 517 F.2d 299, 305, 11 FEP Cas. 66, 69 (5th Cir. 1975).

¹⁸ 431 U.S. at 343.

¹⁹ *Id.* at 346.

The Government therefore sought an injunction to allow individual discriminatees to transfer to line-driver positions with retroactive seniority.²⁰ Both the district court²¹ and the Fifth Circuit²² held that TIME had engaged in a pattern or practice of discrimination in hiring line drivers. Both courts also found the departmental seniority system unlawful since it perpetuated the effects of TIME's unlawful hiring practices.²³

On certiorari, the Supreme Court reversed the judgments of the district court and the court of appeals.²⁴ While agreeing that the Government had established a pattern or practice of hiring discrimination by the company,²⁵ the Court nevertheless refused to strike down the seniority system as violative of Title VII.²⁶ The Court held that section 703(h) immunizes all bona fide seniority systems which are not intentionally discriminatory, regardless of the adverse impact that such systems may have on minorities.²⁷ As to those employees who were the victims of post-Act discrimination, the Court reasoned that, since they had already established a Title VII violation in the company's hiring practices, they were entitled to retroactive seniority under *Franks* and thus need not attack the validity of the seniority system itself.²⁸ As to victims of pre-Act discrimination, the Court agreed that the seniority system perpetuated the effects of TIME's discriminatory hiring practices. The Court noted that any seniority system which deters transfers between departments will necessarily have a disparate impact on minorities who have been precluded from working in the more desirable departments.²⁹ Even if the minority employee is willing to sacrifice all earned seniority to transfer to a line-driver position, he will nevertheless remain junior to employees with less plant seniority who were hired as line drivers before him.³⁰ The Court con-

²⁰ *Id.* at 330.

²¹ *United States v. T.I.M.E.-D.C., Inc.*, 6 FEP Cas. 690 (N.D. Tex. 1972).

²² *United States v. T.I.M.E.-D.C., Inc.*, 517 F.2d 299, 11 FEP Cas. 66 (5th Cir. 1975).

²³ *United States v. T.I.M.E.-D.C., Inc.*, 6 FEP Cas. 690, 694 (N.D. Tex. 1972); 517 F.2d 299, 315, 11 FEP Cas. 66, 77 (5th Cir. 1975). The two courts differed, however, as to the appropriate remedy. The district court had permitted only those members of the class of minority city drivers who could produce sufficient evidence that they were actually victims of discrimination to transfer with full retroactive seniority. 6 FEP Cas. at 694-95. The court of appeals declined to place this burden of proving individual harm on class members and instead held that all class members were presumptively entitled to retroactive seniority. 517 F.2d at 321, 11 FEP Cas. at 82.

²⁴ 431 U.S. at 356.

²⁵ *Id.* at 337. The *Teamsters* Court broadly endorsed the use of statistics to establish a prima facie pattern or practice case under Title VII. *Id.* at 334-43. For in-depth discussion of the use of statistics in pattern or practice cases, see Note, *The Role of Statistical Evidence in Title VII Cases*, 19 B.C. L. REV. 881 (1978).

²⁶ 431 U.S. at 352-54.

²⁷ *Id.*

²⁸ *Id.* at 347-48. The Court added that, in any event, the seniority system was lawful with respect to victims of post-Act discrimination. *Id.* at 348 n.30.

²⁹ *Id.* at 349-50.

³⁰ *Id.* See generally Gould, *Seniority and the Black Worker: Reflections on Quarles and Its Implications*, 47 TEX. L. REV. 1039 (1969); Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 HARV. L. REV. 1260 (1967).

cluded that, absent section 703(h), the seniority system would clearly violate Title VII because of its disparate impact on minorities.³¹

Despite the obviously discriminatory impact of TIME's seniority system, the *Teamsters* Court determined that Congress deliberately chose to insulate such systems from the coverage of Title VII.³² The Court based its conclusion on both the language of section 703(h) and the legislative history of Title VII. Section 703(h) states that it is not an unlawful employment practice to treat employees differently pursuant to a "bona fide" seniority system.³³ The *Teamsters* Court defined the term "bona fide" broadly to include any seniority system which is neutral on its face and which does not have its "genesis in racial discrimination."³⁴ The Court thus rejected the Government's contention that the term "bona fide" definitionally excludes any seniority system maintained by an employer who has a history of discriminatory hiring practices. The Court determined that such an interpretation is a "perversion of congressional purpose."³⁵ Instead, the Court interpreted the bona fide seniority system exemption contained in section 703(h) to apply so long as a seniority system affects minority and nonminority employees equally and is negotiated in a nondiscriminatory atmosphere.³⁶ A seniority system meeting these requirements is bona fide regardless of any disparate impact resulting from its operation.

The *Teamsters* Court again focused on the technical operation of the seniority system rather than on its impact in construing the proviso to section 703(h) proscribing differences in terms or conditions of employment arising from an intention to discriminate. The Government argued that this proviso excluded the seniority system from the immunity of section 703(h) because of TIME's prior discrimination.³⁷ The Court held, however, that the seniority system itself, rather than the employer's conduct, must be discriminatory and that no liability ensues because the system merely perpetuates the effects of the employer's prior unlawful activity.³⁸ Since the Government conceded that the seniority system was facially neutral and that there was no present intent to discriminate against the minority employees of TIME, the Court concluded that section 703(h) clearly immunized the seniority system.³⁹

The Court found support in the legislative history of Title VII for its construction of section 703(h) as a broad exemption for seniority systems.⁴⁰

³¹ 431 U.S. at 349. In *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971), the Court stated that "practices, procedures or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." See also *General Electric Co. v. Gilbert*, 429 U.S. 125, 137 (1976); *Washington v. Davis*, 426 U.S. 229, 246-47 (1976).

³² 431 U.S. at 350.

³³ See text at note 7 *supra*.

³⁴ 431 U.S. at 355-56.

³⁵ *Id.* at 353.

³⁶ *Id.* at 355-56.

³⁷ *Id.* at 353 n.38.

³⁸ *Id.*

³⁹ *Id.* at 356.

⁴⁰ *Id.* at 352. Section 703(h) was enacted during cloture and thus there is very little legislative history. See *Vaas, Title VII: Legislative History*, 7 B.C. IND. & COM. L. REV. 431, 449 (1966); 110 CONG. REC. 13327 (1964).

Although the relevant legislative history was limited to two memorandums interpreting Title VII before section 703(h) had been introduced,⁴¹ the Court found that they supported a conclusion that Congress, by adding section 703(h), intended to immunize seniority systems such as the one maintained in *Teamsters*.⁴² These memorandums, the Court determined, indicated a clear legislative intent not to provide seniority relief to minority employees who had been denied jobs prior to the effective date of Title VII and thus had less plant seniority than they otherwise would have had.⁴³ While recognizing that the legislative materials did not discuss specifically the situation in *Teamsters*—incumbent employees who were victims of pre-Act discrimination seeking to transfer within a departmental seniority system—the Court held that there is no rational basis for distinguishing the claims of incumbent employees from those who were denied jobs entirely.⁴⁴ The Court thus concluded that the legislative intent was to include both plant and departmental seniority systems within the section 703(h) exemption.⁴⁵

Justice Marshall filed a dissenting opinion in which he strongly disagreed with the Court's interpretation of section 703(h) and the insulation of seniority systems from Title VII liability.⁴⁶ Justice Marshall maintained that an exemption from a broad, remedial statute such as Title VII should be construed narrowly and, "[u]nless a seniority system that perpetuates discrimination falls plainly and unmistakably within [the] terms and spirit of § 703(h), the system should be deemed unprotected."⁴⁷ He argued that, whatever the significance of section 703(h), its application to seniority systems which perpetuate past discrimination is far from "plainly and unmistakably clear."⁴⁸

Justice Marshall based his claim that section 703(h) does not plainly apply to seniority systems which perpetuate past discrimination on two grounds. First, the proviso to section 703(h) states that only those differences in the privileges of employment which are not the result of a prior intention to discriminate are exempted.⁴⁹ In this case, Justice Marshall reasoned, the differ-

⁴¹ One memorandum was submitted by the Justice Department, the other by Senators Clark and Case. These memorandums are recorded at 110 CONG. REC. 7207 (1964).

⁴² 431 U.S. at 352-55.

⁴³ *Id.* at 354-55.

⁴⁴ *Id.*

⁴⁵ *Id.* Regarding the appropriate remedy, the Court stated that only those employees who suffered post-Act discrimination were entitled to relief, and that "no person may be given retroactive seniority to a date earlier than the effective date of the Act." *Id.* at 356-57. Furthermore, the Court disagreed with the Fifth Circuit's conclusion that all minority city drivers, whether or not they actually had applied for a line-driver position, were entitled to retroactive seniority. See note 23 *supra*. Instead, the Court held that a minority city driver must either demonstrate that he actually applied for a line-driver position after the effective date of the Act, 431 U.S. at 362, or that he was deterred from applying for a line-driver job by the employer's discriminatory practices. *Id.* at 368.

⁴⁶ *Id.* at 377 (Marshall, J., dissenting).

⁴⁷ *Id.* at 381 (quoting *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945)).

⁴⁸ 431 U.S. at 381.

⁴⁹ See text at note 7 *supra*.

ences in seniority were "precisely the result of prior, intentional discrimination in assigning jobs."⁵⁰ Therefore, the company's seniority system fell squarely within the literal terms of the proviso to section 703(h). Second, Justice Marshall found no explicit statements in the legislative history of Title VII which warrant a different construction of the proviso.⁵¹ Justice Marshall noted that the interpretive memorandums relied on by the majority had been prepared many weeks before section 703(h) was introduced, and thus did not discuss the meaning of the proviso.⁵² Furthermore, neither of the memorandums specifically considered the problem of seniority systems which perpetuate discrimination.⁵³ Thus, Justice Marshall concluded, neither the language of section 703(h) nor the legislative history of Title VII explicitly supports the majority's conclusion that seniority systems which perpetuate past discrimination are exempted by section 703(h).⁵⁴

Even assuming that the case at hand could be decided by less than explicit indications of congressional intent, Justice Marshall still found the legislative history of Title VII unsupportive of a desire to immunize seniority systems which perpetuate past discrimination.⁵⁵ As to victims of post-Act discrimination, Justice Marshall found section 703(h) irrelevant. In his view, the legislative history showed congressional concern only for those seniority rights existing at the time Title VII became effective, and, therefore, section 703(h) extends no protection to seniority systems which perpetuate post-Act discrimination.⁵⁶ As to victims of pre-Act discrimination, however, Justice Marshall recognized that the legislative history provides stronger support for upholding seniority systems which perpetuate such discrimination.⁵⁷ Nevertheless, he asserted, Congress intended to immunize only limited forms of perpetuation. Justice Marshall determined that Congress passed section 703(h) because it

did not want minority group members who were hired after the effective date of the Act to be given super-seniority simply because they were members of minority groups, nor did it want the use of seniority to be invalidated whenever it had a disparate impact on newly hired minority employees. These are the evils—and the only evils—that the opponents of Title VII raised ⁵⁸

Finding no indication that Congress intended to go further and validate departmental seniority systems which perpetuate pre-Act discrimination, Justice Marshall concluded that the company's seniority system was not within the coverage of section 703(h).⁵⁹ To hold otherwise, Justice Marshall cautioned,

⁵⁰ 431 U.S. at 382.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 383.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 384.

⁵⁷ *Id.* at 385.

⁵⁸ *Id.* at 385-86.

⁵⁹ *Id.* at 388-90.

would result in freezing "an entire generation of Negro employees into discriminatory patterns that existed before the Act."⁶⁰

Justice Marshall also found the exclusion of departmental seniority systems from the scope of section 703(h) consistent with the opinion of the EEOC.⁶¹ In a long line of cases, the Commission consistently had held that departmental seniority systems violate Title VII where there has been a history of pre-Act discrimination on the part of the employer.⁶² Justice Marshall believed that the EEOC position is entitled to great deference and that it should be upheld unless clearly erroneous.⁶³ Finding no indication in the majority opinion that the EEOC's position was indeed clearly erroneous, Justice Marshall would have upheld it.⁶⁴

The critical question in *Teamsters* was whether there should be a distinction between plant and departmental seniority systems which perpetuate prior discrimination. For both the majority and the dissent, the resolution of this question was founded on the "interpretation" of legislative silence. The inherent uncertainties of such an endeavor are, by themselves, sufficient to cast doubt on the Court's assertion that section 703(h) was clearly applicable.⁶⁵ Since there was such limited support for the majority decision, Justice Marshall was at least correct in expanding the inquiry beyond the mere language and legislative history of the Act.

The legislative history of Title VII dealt almost exclusively with the effect on minorities of a plant seniority system requiring employees last hired to be first fired. Congress recognized that such a seniority system would have a disproportionate impact on minorities in the event of an economic downturn, since the dictates of Title VII would make many minorities the last hired.⁶⁶ Nevertheless, by enacting section 703(h), Congress apparently chose to permit the maintenance of plant seniority systems. Although a plant seniority system perpetuates the effects of an employer's pre-Act practices, there are reasons why Congress might have desired to protect such systems from the general dictates of the Act. Immunization of plant seniority systems would maintain the existing seniority rights of incumbent employees without any devastating effects upon newly hired minorities. As Justice Marshall pointed out in his

⁶⁰ *Id.* at 390.

⁶¹ *Id.* at 390-91.

⁶² *E.g.*, [1976] EMPL. PRAC. GUIDE (CCH) ¶¶ 6481, 6448, 6441, 6440, 6399, 6395, 6382; Empl. Prac. Dec. ¶¶ 6373, 6370, 6366, 6365, 6355, 6334, 6313, 6272, 6223 (1973).

⁶³ 431 U.S. at 391.

⁶⁴ *Id.* Justice Marshall also relied upon the 1972 amendments to Title VII to support his contention that section 703(h) does not immunize seniority systems such as the one in *Teamsters*. While Congress in 1972 did not expressly deal with the problem of seniority systems which perpetuate the effects of past discrimination, Justice Marshall discerned several indications of congressional approval for lower court decisions finding such seniority systems violative of Title VII. *Id.* at 391-94.

⁶⁵ *Id.* at 352.

⁶⁶ 110 CONG. REC. 7207 (1964). See generally Cooper & Sobel, *supra* note 4, at 1611-14; Comment, *supra* note 4, at 370; Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 516, 1 FEP Cas. 260, 269 (E.D. Va. 1968).

dissent, although the denial of constructive seniority to newly hired minorities "will prevent them from assuming the position they would have occupied but for the pre-Act discrimination, it will not deter them from moving into higher paying jobs."⁶⁷ By immunizing plant seniority systems, therefore, Congress could avoid disrupting the entire work force without precluding discriminatees from eventually taking their rightful place.⁶⁸ Such a balance between the competing interests of incumbent employees and newly hired minorities is absent in the immunization of departmental seniority systems. For the individual unlawfully assigned to an inferior department, the passage of time only exacerbates the effects of that initial assignment. As competitive seniority in the inferior department increases, the sacrifice when transferring out becomes much greater, until the point is eventually reached where the loss of seniority far outweighs the benefits of higher pay and prestige.⁶⁹ This "lock in" effect of departmental seniority systems is absent in plant seniority systems and was not specifically considered by Congress before the enactment of section 703(h). It seems unlikely, however, that Congress would consider an employee who is locked into an inferior position to be better off than one initially denied any job, but later hired into a more desirable position.

It seems clear that a more extensive analysis of the dynamics of departmental seniority systems by the *Teamsters* Court would have resulted in an entirely different view of the scope of section 703(h). The Court, instead of examining the operation of departmental seniority systems to determine whether they are sufficiently similar to the "last hired-first fired" provisions of the plant seniority systems within the contemplation of Congress, simply held that those who received some job are better off than those who were denied any job and then were hired after Title VII became effective.⁷⁰ As discussed above, this conclusion is not borne out when the actual operation of a departmental system is considered. Thus, while the *Teamsters* Court is probably correct in holding that section 703(h) immunizes certain seniority systems which perpetuate past discrimination, it does not follow that Congress intended to protect the departmental seniority system at issue in *Teamsters*.

Prior to *Teamsters*, a long line of lower court decisions had overturned departmental seniority systems which tended to lock minorities into discriminatory job assignments.⁷¹ The leading case in this line, *Quarles v. Philip*

⁶⁷ *Id.* at 387 n.14 (Marshall, J., dissenting).

⁶⁸ The "rightful place" approach to Title VII remedies arose from a law review Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 HARV. L. REV. 1260 (1967), and was relied upon heavily by the courts in *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505, 510, 1 FEP Cas. 260, 265 (E.D. Va. 1968) and *Local 189, Papermakers v. United States*, 416 F.2d 980, 983, 1 FEP Cas. 875, 876 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). The Harvard Note stated that the rightful place approach would require that minorities be permitted to transfer between departments with full seniority carryover. 80 HARV. L. REV. at 1268.

⁶⁹ See 431 U.S. at 344-45.

⁷⁰ *Id.* at 355.

⁷¹ E.g., *Patterson v. American Tobacco Co.*, 535 F.2d 257, 13 FEP Cas. 1808 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976); *Sabala v. Western Gillette, Inc.*, 516 F.2d 1251, 11 FEP Cas. 98 (5th Cir. 1975), *vacated and remanded sub nom. Teamsters Local*

Morris, Inc.,⁷² took a broad approach—focusing on the discriminatory impact of a departmental seniority system—as opposed to the narrow approach taken by the *Teamsters* Court—concentrating instead on the bona fides of a system's operation. The *Quarles* decision received the unanimous support of all the courts of appeals which had occasion to consider the problem of seniority systems that perpetuate the effects of past discrimination.⁷³

Recent cases involving departmental seniority systems reveal the drastic turnabout which the lower courts have taken since *Teamsters*.⁷⁴ The pre-Act practices of the employer and the perpetuating effects of the seniority system have become irrelevant. Instead, courts are considering the neutrality of the system's terms and the atmosphere in which it was negotiated. For example, in *Swint v. Pullman-Standard*,⁷⁵ the *Teamsters* guidelines were followed in testing the bona fides of a departmental seniority system. The factors considered by the court were whether the seniority system was maintained free of racial purpose, was neutral in form, applied equally to all, was consistent with industry practice, and was generally rational.⁷⁶ Thus, it appears that the lower courts have recognized the clear implication of the *Teamsters* decision—that section 703(h) is a very broad exemption for seniority systems and that plaintiffs bear a heavy burden in having such systems overturned.

B. Pension Benefits: *Manhart*

Employee pension plans traditionally have either required females to make higher contributions than males for equivalent benefits upon retirement or, if exacting equal contributions from both sexes, returned lower benefits to female retirees.¹ The justification for this disparate treatment of men and women is that women as a class live an average of five years longer than men.² Disparate contribution or benefit levels, therefore, reflect the addi-

988 v. Sabala, 431 U.S. 951 (1977); *Rodriguez v. East Texas Motor Freight*, 505 F.2d 40, 8 FEP Cas. 1246 (5th Cir. 1974), *vacated and remanded*, 431 U.S. 395 (1977); *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 3 FEP Cas. 589 (2d Cir. 1971); *Robinson v. Lorillard Corp.*, 444 F.2d 791, 3 FEP Cas. 653 (4th Cir. 1971); *Bing v. Roadway Express, Inc.*, 444 F.2d 687, 3 FEP Cas. 616 (5th Cir. 1971). The *Teamsters* Court dismissed these cases in a single footnote. 431 U.S. at 346 n.28.

⁷² 279 F. Supp. 505, 1 FEP Cas. 260 (E.D. Va. 1968). The seniority system in *Quarles* was similar to that in *Teamsters*, but the collective bargaining agreement expressly limited the number of blacks who would be entitled to transfer to two every six months. 279 F. Supp. at 513, 1 FEP Cas. at 267.

⁷³ See cases cited at 431 U.S. 378 n.2 (Marshall, J., dissenting).

⁷⁴ *Myers v. Gilman Paper Corp.*, 544 F.2d 837, 15 FEP Cas. 680 (5th Cir. 1977); *Chrapliwy v. Uniroyal, Inc.*, 15 FEP Cas. 822 (N.D. Ind. 1977); *Crocker v. Boeing Co.*, 437 F. Supp. 1138, 15 FEP Cas. 165 (E.D. Pa. 1977); *Swint v. Pullman-Standard*, 15 FEP Cas. 144 (N.D. Ala. 1977).

⁷⁵ 15 FEP Cas. 144 (N.D. Ala. 1977).

⁷⁶ *Id.* at 147.

¹ Gold, *Equality of Opportunity in Retirement Funds*, 9 LOY. L.A.L. REV. 596, 596-97 (1976).

² *Id.* at 597 n.5. This statistic is derived from sex-segregated actuarial tables. *Id.*

tional cost of providing pension benefits to female employees.³ Population statistics demonstrate, however, that only sixteen percent of female retirees in fact live longer than males.⁴ Thus, although most women do not live longer than men, as a class they have been forced to support that small percentage of women who outlive the majority of both male and female employees.

The legality of employee pension plans which treat women differently from men is governed by both Title VII of the Civil Rights Act of 1964⁵ and the Equal Pay Act of 1963.⁶ Employee pension plans potentially violate Title VII's prohibition against sex discrimination if they either require women to make higher contributions than men or provide women with lower benefits upon retirement. While the Equal Pay Act similarly prohibits the payment of different wages to male and female employees,⁷ the Act contains an exception permitting wage discrimination when it is based on a "factor other than sex."⁸ This exception was expressly incorporated into the original statutory scheme of Title VII in 1964 by the Bennett Amendment.⁹ The purpose of the Bennett Amendment was to ensure that employment practices which are legal under the Equal Pay Act because they are based on factors other than sex are also permissible under Title VII.¹⁰ Thus, although it may be discriminatory for a pension plan to use sex-segregated actuarial tables in computing contribution or benefit levels, the plan may be immunized from Title VII liability if this practice can be justified as based on a factor other than sex.

This Survey year, the Supreme Court, in *City of Los Angeles, Department of Water and Power v. Manhart*,¹¹ held that an employee pension plan which requires females to make higher contributions than males, while providing equal retirement benefits to both sexes, violates Title VII.¹² The *Manhart* Court emphasized that an employment practice which discriminates against individuals, although based on statistically valid generalizations about the class to which the individuals belong, nevertheless violates Title VII.¹³ In determining that the employee pension plan was discriminatory, the Court relied ex-

³ *Id.* at 597.

⁴ *Id.* at 619.

⁵ 42 U.S.C. §§ 2000e-1 to 2000e-17 (1976).

⁶ The Equal Pay Act of 1963 amended § 6 of the Fair Labor Standards Act of 1938, 29 U.S.C. § 206 (1976), by adding subsection (d), 29 U.S.C. § 206(d) (1976).

⁷ 29 U.S.C. § 206(d)(1) (1976).

⁸ *Id.*

⁹ 42 U.S.C. § 2000e-2(h) (1976). The Bennett Amendment provides in relevant part that:

It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29.

¹⁰ See 110 CONG. REC. 13663-64 (1964).

¹¹ 98 S. Ct. 1370 (1978).

¹² *Id.* at 1377-80.

¹³ *Id.* at 1375.

clusively on the language and purpose of Title VII,¹⁴ and thus did not engage in equal protection analysis as it had done previously in *General Electric Co. v. Gilbert*.¹⁵ Although the *Manhart* Court determined that the employee pension plan violated Title VII, it overturned the district court's backpay award as inappropriate.¹⁶ The Court thus refused to give retroactive effect to its holding that the use of sex-segregated actuarial tables to calculate contributions to a pension plan violates Title VII. Nevertheless, *Manhart* does apply prospectively and may be extended to invalidate other uses of sex-segregated actuarial tables in the employment context.¹⁷

The suit in *Manhart* was instituted on behalf of all current and former female employees of the City of Los Angeles Department of Water and Power, alleging that the higher pension plan contributions exacted from females constituted unlawful sex discrimination under Title VII.¹⁸ Pursuant to the Department's mandatory pension plan, contributions were deducted from the employees' paychecks and matched 110% by the Department.¹⁹ Since the Department used sex-segregated actuarial tables to calculate employee contributions, women were required to contribute approximately fifteen percent more than similarly situated men, and therefore received lower take-home pay.²⁰ The monthly benefits received by male and female employees upon retirement were, however, equal.²¹ The plaintiffs sought an injunction against the continued use of separate actuarial tables and backpay amounting to the difference between their contributions and those made by male employees.²²

Both the United States District Court for the Southern District of California²³ and the United States Court of Appeals for the Ninth Circuit²⁴ ruled that the Department's use of separate actuarial tables for men and women constituted sex discrimination in violation of Title VII.²⁵ The Ninth Circuit reasoned that Title VII prohibits the attribution of group characteris-

¹⁴ See text at notes 36-40 *infra*.

¹⁵ 429 U.S. 125 (1976). For a discussion of the *Gilbert* decision, see 1976-1977 *Annual Survey of Labor Relations and Employment Discrimination Law*, 18 B.C. IND. & COM. L. REV. 1045, 1118-34 (1977).

¹⁶ See text at notes 66-73 *infra*.

¹⁷ See text at notes 93-96 *infra*.

¹⁸ 98 S. Ct. at 1373-74.

¹⁹ *Id.* at 1374 & n.4.

²⁰ *Id.* at 1374. The impact on female employees is illustrated by the case of one woman who paid over \$5,000 more to the fund than a similarly situated male. *Id.* at 1374 n.5.

²¹ *Id.* at 1373.

²² *Id.* at 1374. The remedy requested extended only up to January 1, 1975 when the Department amended its plan by requiring equal contributions. *Id.*

²³ 13 FEP Cas. 1622 (C.D. Cal. 1975). The district court had earlier granted the plaintiff's motion for a preliminary injunction. 387 F. Supp. 980, 10 FEP Cas. 101 (C.D. Cal. 1975).

²⁴ 553 F.2d 581, 13 FEP Cas. 1625 (9th Cir. 1976), *rehearing denied*, 553 F.2d 592, 14 FEP Cas. 1233 (9th Cir. 1977).

²⁵ 553 F.2d at 590-91, 13 FEP Cas. at 1632.

tics such as longevity, even if proven by statistics, to individual group members.²⁶ The circuit court further held that the Equal Pay Act exception sanctioning wage discrimination based on factors other than sex was not applicable because sex was the only factor considered by the Department in establishing the different rates of contribution.²⁷ Since the Department presented no valid defense for the use of sex-segregated actuarial tables, the Ninth Circuit affirmed the injunctive and backpay relief awarded by the district court.²⁸ The circuit court rendered this decision, however, prior to the Supreme Court's decision in *General Electric Co. v. Gilbert*.²⁹ Following *Gilbert*, the Department requested a rehearing to consider the applicability of the holding and reasoning of that case to the pension plan in *Manhart*. The Ninth Circuit denied the petition for rehearing, concluding that *Gilbert* was distinguishable and did not require reversal of its earlier decision.³⁰ The Supreme Court subsequently granted the Department's petition for a writ of certiorari.³¹

In an opinion by Justice Stevens, the Supreme Court endorsed the circuit court's Title VII analysis but concluded that the award of backpay was in error.³² The Court first addressed the question whether the pension plan discriminated on the basis of sex. The critical determination, the Court postulated, is "whether the existence or nonexistence of 'discrimination' is to be determined by comparison of class characteristics or individual characteristics."³³ If the former, then there was no discrimination since the plan treated gender groups equally. Members of each group made contributions sufficient to provide benefits for the retirement period projected by sex-segregated actuarial tables.³⁴ If, on the other hand, discrimination is determined on the basis of individual characteristics, then there was discrimination since the plan treated individual men and women unequally. A female employee made larger contributions than her male counterpart although it was unlikely that she would actually outlive him.³⁵

In resolving the question whether individuals or classes must be compared, the Supreme Court first consulted the language of Title VII. Section 703(a)(1) of Title VII prohibits employment discrimination against "any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex" ³⁶ Finding that section's focus on the individual unambiguous, the Court held that individuals, rather than classes, must be compared even where a generalization about a

²⁶ *Id.* at 586, 13 FEP Cas. at 1629.

²⁷ *Id.* at 588, 13 FEP Cas. at 1630.

²⁸ *Id.* at 592, 13 FEP Cas. at 1634.

²⁹ 429 U.S. 125 (1976).

³⁰ 553 F.2d 592, 14 FEP Cas. 1233 (9th Cir. 1977).

³¹ 98 S. Ct. at 1383.

³² *Id.* at 1374. The Court vacated the circuit court's judgment and remanded the case for further proceedings. *Id.* at 1383.

³³ *Id.* at 1375.

³⁴ *Id.*

³⁵ *Id.*

³⁶ 42 U.S.C. § 2000e-2(a)(1) (1976) (emphasis added).

class is statistically valid.³⁷ The Court found further support for its holding in the policy underlying Title VII, which the Court characterized as "fairness to individuals rather than fairness to classes."³⁸ In addition, the *Manhart* Court found no indication that Congress had intended a special definition of discrimination in the context of employee pension plans.³⁹ Since the Department's pension plan required individual women to contribute more for equal benefits than similarly situated men, the Court ruled that the plan discriminated against women in violation of Title VII.⁴⁰

While concluding that the Department's plan discriminated against women, the Court recognized that such discrimination nevertheless may be immunized by the Equal Pay Act.⁴¹ As incorporated into Title VII by the Bennett Amendment, the Equal Pay Act required the *Manhart* Court to determine whether the Department's practice of calculating contribution rates using sex-segregated actuarial tables was based on a factor other than sex.⁴² In so doing, the Court rejected the Department's argument that longevity, rather than sex, was the classifying factor, pointing out that no characteristics other than sex were taken into account in calculating the fifteen percent differential in contribution rates between men and women.⁴³ The Court thus ruled that the actuarial distinction contained in the Department's pension plan was based entirely on sex.⁴⁴

The *Manhart* Court was similarly unpersuaded by the Department's argument that the legislative history of the Bennett Amendment controlled the application of the Equal Pay Act to pension plans.⁴⁵ The Department relied primarily upon the assertion of Senator Humphrey, a sponsor of Title VII, that pension plans which distinguish between employees on the basis of sex would not violate Title VII because of the Bennett Amendment.⁴⁶ Senator

³⁷ 98 S. Ct. at 1375.

³⁸ *Id.* at 1376.

³⁹ *Id.* In so ruling, the Court maintained that defining discrimination under Title VII by reference to the effect on individuals did not conflict with the insurance practice of generalizing about group characteristics to define risk pools. *Id.* In support of this contention, the Court noted that insurance traditionally involves the subsidization of poor risks by better risks, and that "nothing more than habit makes one 'subsidy' seem less fair than [another]." *Id.* The Court thus concluded that it was not unfair to require men as well as women to subsidize the small percentage of women who outlive most men and women.

⁴⁰ *Id.* at 1377.

⁴¹ 29 U.S.C. § 206(d)(1) (1976).

⁴² 98 S. Ct. at 1377.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 1378. For text of the Bennett Amendment, see note 9 *supra*.

⁴⁶ 98 S. Ct. at 1378. The legislative history reports the following exchange between Senators Randolph and Humphrey:

MR. RANDOLPH. Am I correct, I ask the Senator from Minnesota, in assuming that similar differences of treatment in industrial benefit plans, including earlier retirement options for women, may continue in operation under this bill, if it becomes law?

MR. HUMPHREY. Yes. That point was made unmistakably clear earlier

Humphrey apparently concluded that the Equal Pay Act already exempted such plans from liability. Since the Bennett Amendment incorporated the Equal Pay Act into Title VII, Senator Humphrey felt that such plans would likewise be unaffected by Title VII.⁴⁷ The Court discounted Senator Humphrey's statement on the grounds that it was an isolated interpretation of the Equal Pay Act one year subsequent to its enactment and that it conflicted with the express language of the Equal Pay Act.⁴⁸ Since the different contribution rates in *Manhart* were based exclusively on sex, and since the remarks of one senator could not alter the statutory provision, the *Manhart* Court ruled that the Equal Pay Act exception was unavailable to the Department as a defense for its program.

Having concluded that the language and purpose of Title VII required a finding of sex discrimination and that the Equal Pay Act exception for factors other than sex did not apply, the Supreme Court considered whether its recent decision in *General Electric Co. v. Gilbert*⁴⁹ nevertheless required the conclusion that the pension plan did not violate Title VII.⁵⁰ In *Gilbert*, the Court concluded that the exclusion of pregnancy from an employer's disability insurance plan does not, on its face, constitute sex discrimination in violation of Title VII.⁵¹ In so deciding, the *Gilbert* Court relied heavily on the constitutional analysis of *Geduldig v. Aiello*,⁵² an equal protection case which held that a pregnancy classification identical to the one in *Gilbert* was not based on sex and, therefore, was not violative of the fourteenth amendment.⁵³ The *Manhart* Court distinguished *Gilbert* on the ground that the benefit plans involved in each case created significantly different classifications.⁵⁴ While the disability plan in *Gilbert* distinguished between pregnant and nonpregnant persons, the pension plan in *Manhart* distinguished between men and women.⁵⁵ As the *Manhart* Court stated: "[o]n its face, this plan discriminates on the basis of sex whereas the General Electric plan discriminated on the basis of a special physical disability."⁵⁶ Since the Department's pension plan was facially dis-

today by the adoption of the Bennett amendment; so there can be no doubt about it.

110 CONG. REC. 13663-64 (1964).

⁴⁷ See *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1173 n.37 (1971).

⁴⁸ 98 S. Ct. at 1378. Chief Justice Burger argued in dissent that the majority offered little explanation for discounting Senator Humphrey's comment that Title VII would not affect the use of separate actuarial tables in pension plans. *Id.* at 1385. It is submitted, however, that the majority's adherence to the language of the statute rather than to an isolated comment on the effect of the Equal Pay Act was correct. See *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1173 n.37 (1971) (commenting that "Senator Humphrey's interpretation is quite puzzling").

⁴⁹ 429 U.S. 125 (1976).

⁵⁰ 98 S. Ct. at 1378.

⁵¹ 429 U.S. at 136-38.

⁵² 417 U.S. 484 (1974).

⁵³ *Id.* at 496-97 & n.20.

⁵⁴ 98 S. Ct. at 1379.

⁵⁵ *Id.*

⁵⁶ *Id.*

criminary whereas the disability plan in *Gilbert* was not, the *Manhart* Court found *Gilbert* factually distinguishable.⁵⁷

The Supreme Court next considered the Department's contention that its pension plan, although facially discriminatory, was legitimate since the plan did not have a discriminatory effect on women as a class. The Department relied on the *Gilbert* Court's conclusion that a plan which actually provides more benefits to women as a class than to men has no discriminatory effect on women.⁵⁸ The *Manhart* Court again distinguished *Gilbert*, noting that it was necessary in *Gilbert* to inquire into the effect of the disability plan on women as a class only because the challenged plan was not facially discriminatory.⁵⁹ In contrast, since the pension plan in *Manhart* was discriminatory on its face, the Court found it unnecessary to determine whether the challenged pension plan had a discriminatory effect on the class as a whole.⁶⁰ Thus, the Court refused to extend *Gilbert* to hold that a pension plan which is facially discriminatory satisfies the demands of Title VII if it has no discriminatory effect on women as a class.⁶¹ In so doing, the Court noted that the substance of the Department's argument was that "the prima facie showing of discrimination based on evidence of different contributions for the respective sexes is rebutted by its demonstration that there is a like difference in the cost of providing benefits for the respective classes."⁶² Since Title VII does not exempt from liability discriminatory employment practices which are based on a difference in the cost of serving men and women, the *Manhart* Court rejected the Department's argument.⁶³

The Court concluded its discussion of the validity of the Department's pension plan by commenting on the limits of its decision. Since Title VII and the Equal Pay Act apply only to the employment relationship,⁶⁴ the Court indicated that:

Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market. Nor does it call into question the insurance industry practice of considering the composition of an employer's work force in determining the probable cost of a retirement or death benefit plan.⁶⁵

Thus, in the Court's view, neither Title VII nor the holding in *Manhart* will alter certain insurance industry practices which ultimately affect employees but which are beyond the scope of the employment relationship and therefore are not governed by the statute.

⁵⁷ *Id.* at 1378-79.

⁵⁸ *Id.* at 1379.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 1378.

⁶² *Id.* at 1379.

⁶³ *Id.* at 1379-80.

⁶⁴ *Id.* at 1380 n.33.

⁶⁵ *Id.* at 1380.

Having articulated the limits of its decision, the *Manhart* Court next considered the propriety of the district court's award of monetary relief.⁶⁶ The district court's backpay award, as affirmed by the Ninth Circuit, would have reimbursed female employees for that portion of their pension plan contributions paid in violation of Title VII.⁶⁷ The effect of the judgment would have been to institute sex-neutral contribution rates retroactively. Although the Court recognized that its decision in *Albemarle Paper Co. v. Moody*⁶⁸ established a presumption in favor of awarding backpay in Title VII cases, it nevertheless vacated the award of backpay.⁶⁹ In so ruling, the Court balanced the equities in favor of the Department, asserting that the district court failed to accord sufficient weight to the uncertainty of the Department's position.⁷⁰ The Court stated that "[the Department] could reasonably have thought it unfair—or even illegal—to make male employees shoulder more than their 'actuarial share' of the pension burden."⁷¹ In addition, the Court noted that the backpay award would be inappropriate since it could adversely affect the financial position of existing pension funds⁷² and endanger the rights of other employees to pension benefits.⁷³ Thus, while the Supreme Court determined that the calculation of contributions to a pension plan based on separate actuarial tables for men and women violated Title VII, the Court denied an award of damages to remedy this violation.

The primary significance of the *Manhart* decision is the Court's focus on the explicit language of Title VII in determining whether the Department's pension plan violated the statute's antidiscrimination mandate. The language of section 703(a)(1) of Title VII firmly supports the Court's holding that treating individual employees differently because of their sex constitutes a discriminatory employment practice.⁷⁴ The Court's strict adherence to the language of Title VII is also evident in its refusal to hold that the absence of a discriminatory effect on women as a class negates a finding of facial discrimination. Since cost is not a defense under Title VII, the Court correctly rejected the Department's argument that the use of sex-segregated actuarial tables could be justified by a difference in the cost of providing retirement benefits to men and women. The *Manhart* Court thus recognized that Title VII imposes liability for practices which are discriminatory under section 703(a)(1) unless a statutory defense is available.

The *Manhart* Court's strict adherence to the language of Title VII provides a striking contrast to the *Gilbert* Court's reliance on the equal protection analysis of *Geduldig v. Aiello*⁷⁵ in deciding a Title VII claim. In *Geduldig*, the

⁶⁶ *Id.*

⁶⁷ 13 FEP Cas. 1622, 1624 (C.D. Cal. 1975).

⁶⁸ 422 U.S. 405 (1975).

⁶⁹ 98 S. Ct. at 1383.

⁷⁰ *Id.* at 1381.

⁷¹ *Id.* at 1381-82.

⁷² *Id.* at 1382-83.

⁷³ *Id.* at 1382.

⁷⁴ See text at note 36 *supra*.

⁷⁵ 417 U.S. 484 (1974).

Court concluded that the exclusion of pregnancy from an employer's disability insurance plan did not constitute a classification based on sex and, therefore, did not violate the fourteenth amendment.⁷⁶ Relying on *Geduldig*, the *Gilbert* Court ruled that an identical pregnancy exclusion from a disability insurance plan was not sex-related and, consequently, was not discrimination in violation of section 703(a)(1) of Title VII.⁷⁷ In *Manhart*, the pension plan's requirement that female employees make higher contributions than their male counterparts ostensibly constituted a longevity rather than a sex classification. In contrast to the *Gilbert* Court, however, the *Manhart* Court had no parallel equal protection case on which to rely in determining whether longevity or sex was the classifying factor since the Supreme Court has not considered the validity of a *Manhart*-type pension plan under the fourteenth amendment. *Geduldig* is the equal protection case most similar to *Manhart*, but *Manhart* is distinguishable from *Geduldig* because the pension plan specifically set higher contribution rates for women than for men whereas the disability insurance plan in *Geduldig* discriminated only against pregnant persons by excluding pregnancy disability from coverage.⁷⁸ In the absence of an equal protection case with facts similar to those of *Manhart*, the Court was free to analyze the case solely on the basis of Title VII law. Although *Gilbert* is part of Title VII law, its conclusion was not controlling in *Manhart* because the two cases are distinguishable in the same manner as are *Geduldig* and *Manhart*.⁷⁹

Although *Gilbert* was factually distinguishable from *Manhart*, the *Gilbert* Court's reliance on the reasoning of *Geduldig* suggested that equal protection analysis might have been appropriate in *Manhart*. Equal protection analysis would balance the overinclusiveness of a challenged classification against its purposes and practicality.⁸⁰ If the *Manhart* Court had employed this analysis, it might have concluded that the overinclusiveness of the contribution differential at issue was justified since there is no way to measure the risks associated with a pension plan on an individual basis and, therefore, that group estimates based on sex-segregated actuarial tables constitute the most practical alternative.⁸¹ The use of sex-segregated actuarial tables by pension plans

⁷⁶ *Id.* at 496-97 & n.20.

⁷⁷ 429 U.S. at 136-38.

⁷⁸ In *Manhart*, the differential in take-home pay provided striking evidence of the disparate treatment based solely on sex. 98 S. Ct. at 1375. *See also id.* at 1385 (Burger, C.J., concurring in part and dissenting in part).

⁷⁹ *See text at notes 49-57 supra.*

⁸⁰ *See, e.g., Reed v. Reed*, 404 U.S. 71, 75-77 (1971).

⁸¹ This constitutional argument was potentially applicable both in determining whether the pension plan was discriminatory under Title VII and in deciding whether the Equal Pay Act exception was available as a defense. The result would be the same regardless of the stage at which equal protection analysis is employed. The distinction is critical, however, as a procedural matter since the burden of proof would differ depending on whether the Court viewed the argument as part of the *prima facie* case or as a defense. Support for the latter interpretation is found in Chief Justice Burger's opinion in *Manhart* in which he agreed with the majority that the Department's pension plan was facially discriminatory but relied on equal protection analysis in concluding that the Equal Pay Act exception immunized the plan from liability. 98 S. Ct. at 1385 (Burger, C.J., concurring in part and dissenting in part).

would thus escape Title VII liability. However, the *Manhart* Court held that the provisions of Title VII and the Equal Pay Act must be applied literally and do not encompass a balancing test. The Court did not state explicitly that this constituted a rejection of the use of equal protection reasoning in a Title VII case. Nevertheless, the conspicuous absence of such an analysis suggests that, despite the *Gilbert* Court's reliance on *Geduldig*, the Supreme Court may be reluctant to incorporate the entire set of equal protection standards into Title VII. Therefore, *Manhart* provides support for the proposition that Title VII's antidiscrimination mandate is indeed independent from the equal protection balancing test.

While the *Manhart* Court carefully followed the language of Title VII in determining the legality of the pension plan, it departed from Title VII principles and prior case law in reviewing and vacating the district court's backpay award. Section 706(g) of Title VII provides that a remedy for past discrimination "may include . . . back pay . . . or any other equitable relief as the court deems appropriate."⁸² In *Albemarle Paper Co. v. Moody*,⁸³ the Supreme Court created a strong presumption in favor of awarding backpay to Title VII plaintiffs.⁸⁴ The *Albemarle* Court stated that "[g]iven a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."⁸⁵ The *Albemarle* Court also ruled that an award of backpay rests with the district court's discretion, to be reversed only upon a determination that the court abused its discretion or that its findings of fact were clearly erroneous.⁸⁶ The presumption in favor of backpay awards, as delineated in *Albemarle*, thus works to afford Title VII plaintiffs monetary relief in most cases.⁸⁷ Further, the stringent standards imposed to reverse the exercise of a district court's discretion in granting such an award limits the role of the appellate courts in this area.

Although the *Manhart* Court purported to adhere to the principles established in *Albemarle*,⁸⁸ it examined the facts relevant to the backpay issue without first ruling that the district court had either abused its discretion or made erroneous findings of fact.⁸⁹ Since it disregarded the broad discretion vested

⁸² 42 U.S.C. § 2000e-5(g) (1976).

⁸³ 422 U.S. 405 (1975).

⁸⁴ 98 S. Ct. at 1383.

⁸⁵ 422 U.S. at 421.

⁸⁶ *Id.* at 415-16, 424-25.

⁸⁷ See 1975-1976 *Annual Survey of Labor Relations and Employment Discrimination Law*, 17 B.C. IND. & COM. L. REV. 1041, 1139 (1976).

⁸⁸ 98 S. Ct. at 1380-81, 1383.

⁸⁹ *Id.* at 1386 (Marshall, J., concurring in part and dissenting in part). Justice Marshall noted that the majority did not

assert that any findings of the District Court were clearly erroneous, nor . . . [did] it conclude that there was any abuse of discretion. Instead, it state[d] merely that the District Court gave "insufficient attention" to certain factors in striking the equitable balance.

Id.

in the district court and exceeded the narrow scope of review appropriate on the backpay issue, the Court's inquiry was thus improper as a matter of procedure.⁹⁰ The Supreme Court actually assumed the role of a district court in weighing the equities anew and determining that retroactive monetary relief was inappropriate in view of the Department's good faith and the potential adverse affect on pension fund resources and innocent beneficiaries.⁹¹ Even if the *Manhart* Court was correct in reexamining these factual issues, its wholesale reversal of the backpay award was improper under *Albemarle*. Instead, the *Manhart* Court should have remanded the decision to the district court and directed it to reconsider the Department's claims that it acted in good faith and that a backpay award would have serious financial consequences.⁹²

The *Manhart* Court's treatment of the backpay issue raises the question whether the district courts must deny future requests for retroactive monetary relief outside the pension plan context of *Manhart* if the employer proves that the challenged employment policy was pursued in good faith and that a backpay award would adversely affect the interests of innocent beneficiaries.⁹³ If *Manhart* is so interpreted by the lower courts, the availability

⁹⁰ Neither the *Manhart* majority nor the separate opinions which agreed with the result on the backpay issue gave an explanation for the departure from this rule.

⁹¹ Even if one accepts, for the purposes of argument, that the Court properly reconsidered the award of backpay, its reasoning is inconsistent with previous decisions applying the *Albemarle* presumption. The *Manhart* Court maintained that the law was unsettled and that reasonable pension plan administrators could have acted as the Department did. However, this reasoning amounts to a finding of good faith without any inquiry into whether the Department actually attempted to ascertain the legality of the plan. See 98 S. Ct. at 2386-87 (Marshall, J., concurring in part and dissenting in part). In addition, there is persuasive authority for the proposition that the unsettled state of the law is no defense to a claim for backpay. *United States v. United States Steel Corp.*, 520 F.2d 1043, 1058-59, 11 FEP Cas. 553, 566 (5th Cir. 1975). Further, the *Manhart* Court's economic justifications for denying backpay were hypothetical since the solvency of the Department's plan was not threatened. 98 S. Ct. at 1387 (Marshall, J., concurring in part and dissenting in part). A similar argument of financial hardship was rejected as unfounded in *EEOC v. Steamfitters Local 638*, 542 F.2d 579, 586, 13 FEP Cas. 705, 709-10 (2d Cir. 1976), *cert. denied*, 430 U.S. 911 (1977). Finally, the *Manhart* Court's concern with the effect on other pension plan beneficiaries conflicts with its statement in *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 775 (1976), that "we find untenable the conclusion that this form of relief may be denied merely because the interests of other employees may thereby be affected."

⁹² See 98 S. Ct. at 1388 (Marshall, J., concurring in part and dissenting in part).

⁹³ Support for this interpretation of *Manhart* is found in the separate opinions in *Albemarle* and *Bowman* in which several Justices stressed the importance of good faith and protection of the rights of innocent employees. In *Albemarle*, Justices Rehnquist and Blackmun and Chief Justice Burger each stated that considerable weight should be accorded an employer's good faith in determining whether an award of backpay is appropriate. 422 U.S. at 444-45 (Rehnquist, J., concurring); *id.* at 448 (Blackmun, J., concurring); *id.* at 450-51 (Burger, C.J., concurring in part and dissenting in part). In *Bowman*, Chief Justice Burger and Justices Powell and Rehnquist expressed the view that Title VII remedies should not adversely affect innocent employees. 424 U.S. at 780-81 (Burger, C.J., concurring in part and dissenting in part); *id.* at 785-86 (Powell, J., concurring in part and dissenting in part). Justice Rehnquist joined in Justice Pow-

of backpay for Title VII plaintiffs will decrease significantly. As a result, the "make whole" philosophy of Title VII, as enunciated by the Court in *Albemarle*,⁹⁴ will be seriously undermined. The reasoning employed by the *Manhart* Court in denying backpay may be restricted, however, to the peculiar financial planning problems involved in pension plan administration. Under this interpretation, the *Manhart* decision would be limited to its facts, and district courts would not be required to accord decisive weight to a defendant's claims of good faith and financial hardship in Title VII cases outside the pension plan area. The *Manhart* Court's statement that it was not "qualifying the *Albemarle* presumption in favor of retroactive relief"⁹⁵ supports this interpretation since it suggests that the Court did not view its decision as redefining Title VII law on the backpay issue.⁹⁶

Subsequent to the Court's decision in *Manhart*, the Department of Labor proposed a change in its current interpretation of the Equal Pay Act. Under the current interpretation, the Labor Department holds that an employer can make unequal contributions for, or pay unequal benefits to, male and female employees.⁹⁷ Under the Department's proposed interpretation, however, an employer could not legally contribute different amounts to a pension fund on behalf of its male and female employees, nor could it pay different benefit levels to male and female retirees although their contribution rates were equal.⁹⁸ The adoption of this proposal would make the Labor Department's interpretation of the Equal Pay Act consistent with the Equal Employment Opportunity Commission's rulings under Title VII.⁹⁹ The two agencies would then be uniform in their prohibition of the use of sex-segregated actuarial tables in employee pension plans.

Although *Manhart* dealt with the use of sex-segregated actuarial tables in employee pension plans, its reasoning, as the Court specified, cannot be extended to other discriminatory insurance practices which occur outside employment relationships, and are thus beyond the scope of Title VII. Using the Court's own example, *Manhart* has no application to a plan under which an employer sets aside equal contributions and allows each retiree to purchase an annuity on the open market.¹⁰⁰ Although the Court did not specify the

ell's opinion. It thus appears that a majority of the *Manhart* Court may have been persuaded, at least with regard to pension plans, by the minority views expressed in *Albemarle* and *Bowman*.

⁹⁴ 422 U.S. at 421.

⁹⁵ 98 S. Ct. at 1383.

⁹⁶ The Court's discussion of backpay in *Bowman*, 424 U.S. at 774-78, also supports the continuing validity of *Albemarle*.

⁹⁷ 29 C.F.R. § 800.116(d) (1977).

⁹⁸ 43 Fed. Reg. 38,029, 38,030 (1978).

⁹⁹ The EEOC has invalidated a money purchase plan which utilized sex-segregated actuarial tables. EEOC Decision No. 74-118, 2 EMPL. PRAC. GUIDE (CCH) ¶ 6431 (1974). See also 29 C.F.R. § 1604.9(f) (1977).

Prior to the Department of Labor's recent proposal, its position conflicted with that of the EEOC when the challenged pension plan involved employer, rather than employee, contributions. See *EEOC v. Colby College*, 439 F. Supp. 631, 635-36, 15 FEP Cas. 1363, 1366-67 (D. Me. 1977). This conflict was not presented in *Manhart*. 439 F. Supp. at 638, 15 FEP Cas. at 1368-69.

¹⁰⁰ See text at note 65 *supra*.

exact nature of such a plan, its reference to the open market suggests that the employee would be dealing directly with insurance companies on an individual basis.¹⁰¹ Such an arrangement is admittedly beyond the purview of Title VII.¹⁰² The *Manhart* Court also noted that Title VII does not govern the insurance industry practice of taking the sex composition of a labor force into account in determining the cost of a retirement plan.¹⁰³ When a private insurance company engages in this practice, it is removed from the employment relationship, and the Court's conclusion is therefore correct.¹⁰⁴ The Court's comment about the inapplicability of *Manhart* to these insurance industry practices must be understood, therefore, as a caution against the view that Title VII can correct sex discrimination throughout the insurance industry.

III. RELIGIOUS DISCRIMINATION

Although employment discrimination based on religion has been proscribed by federal law since the enactment of Title VII in 1964,¹ prior to the

¹⁰¹ In discussing the limits of the majority's opinion, Chief Justice Burger similarly interpreted the Court's statement as applying to annuities purchased by an employee on the open market. 98 S. Ct. at 1385-86 (Burger, C.J., concurring in part and dissenting in part).

¹⁰² Nevertheless, this situation must be distinguished from an employer's "money purchase pension plan" in which the employer arranges with an insurance company to provide retirees with whatever level of benefits their equal contributions will buy. See Note, *Sex Discrimination and Sex-Based Mortality Tables*, 53 B.U. L. REV. 624, 632 (1973). Money purchase pension plans are governed by Title VII. The validity of money purchase plans which calculate benefits on the basis of separate actuarial tables has been considered to date by two district courts. Compare *EEOC v. Colby College*, 439 F. Supp. 631, 638, 15 FEP Cas. 1363, 1368-69 (D. Me. 1977) (money purchase annuity and life insurance plan valid under Title VII) with *Henderson v. Oregon*, 405 F. Supp. 1271, 1276, 11 FEP Cas. 1218, 1222 (D. Ore. 1975) (money purchase annuity plan violates Title VII). In accordance with the Labor Department's proposed interpretation of *Manhart* and the EEOC's position, such plans would be required to pay equal benefits to male and female employees. See 43 Fed. Reg. 38,029, 38,030 (1978); 29 C.F.R. § 1604.9(f) (1977).

¹⁰³ See text at note 65 *supra*.

¹⁰⁴ It is unclear whether a similar situation could arise within the employment context and thus be subject to Title VII. As the *Manhart* Court noted, "Title VII applies to 'any agent' of a covered employer, 42 U.S.C. § 2000e(b), and the Equal Pay Act applies to 'any person acting directly or indirectly in the interest of any employer in relation to any employee.' 29 U.S.C. § 203(d)." 98 S. Ct. at 1380 n.33. If the person or organization who determines the cost of a pension plan based on the sex composition of the work force fits one of these descriptions, the practice may be challenged under Title VII. However, the *Manhart* Court also stated that since Title VII and the Equal Pay Act protect individual employees, neither "makes it unlawful to determine the funding requirements for an establishment's benefit plan by considering the composition of the entire force." *Id.* at 1380 n.34. It is unclear whether this comment reflects the Court's position on the merits of a challenge to this practice or, in the alternative, whether it merely restates the limits of Title VII in reaching insurance industry practices beyond the employment relationship.

¹ 42 U.S.C. §§ 2000e-1 to 2000e-17 (1976). Section 703(a) of Title VII, 42 U.S.C. § 2000e-2(a) (1976), provides in pertinent part:

1972 amendments to Title VII, the Act itself did not define the term religion, nor did it indicate what acts would constitute employment discrimination based on religion. The task of definition was left instead to the Equal Employment Opportunity Commission (EEOC),² which in 1966,³ and again in 1967,⁴ issued guidelines dealing with the problem of religious discrimination. In particular, the 1967 guidelines required employers "to make *reasonable accommodations* to the religious needs of employees and prospective employees where such accommodations can be made without *undue hardship* on the conduct of the employer's business."⁵ The EEOC did not attempt, however, to define specifically the terms "reasonable accommodation" and "undue hardship."⁶ Rather, the Commission left further delineation of these terms to individual cases.⁷

In 1972, Congress incorporated the substance of the 1967 EEOC regulations into Title VII by adding section 701(j).⁸ Section 701 (j) defines religion as follows:

The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to *reasonably accommodate* to an employee's or prospective employee's religious observance or practice without *undue hardship* on the conduct of the employer's business.⁹

Like the prior EEOC guidelines, however, section 701(j) itself contained no guidance as to the degree of accommodation required of an employer. In addition, as before the 1972 amendments, the EEOC did not attempt to specifically define the terms "reasonable accommodation" and "undue hardship" through regulations.

Prior to this *Survey* year, the Supreme Court twice confronted the issue of the extent to which Title VII requires an employer to accommodate the re-

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion . . . ; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . religion

² 42 U.S.C. § 2000e-12 (1976).

³ 31 Fed. Reg. 8,370 (1966).

⁴ 32 Fed. Reg. 10,298 (1967). The 1967 guidelines are presently codified at 29 C.F.R. § 1605.1 (1978).

⁵ 29 C.F.R. § 1605.1(b) (1978) (emphasis added).

⁶ The Commission did note that "[s]uch undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer." *Id.*

⁷ *Id.* See note 10 *infra*.

⁸ Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103 (now codified at 42 U.S.C. § 2000e(j) (1976)).

⁹ *Id.* (emphasis added).

ligious practices of an employee. In each case, however, the Court was equally divided and therefore failed to decide the issue.¹⁰ During the *Survey* year, the Supreme Court, in *Trans World Airlines, Inc. v. Hardison*,¹¹ again faced the issue of the extent to which Title VII requires an employer to accommodate the religious practices of an employee. In *Hardison*, the Supreme Court held that, as defined by section 701(j), an employer's obligation to reasonably accommodate an employee's religious practices does not require an employer to violate the seniority provisions of a valid collective bargaining agreement.¹² Moreover, the Court ruled that any accommodation resulting in more than a *de minimis* cost to an employer constitutes undue hardship within the meaning of section 701(j).¹³ The Court's decision in *Hardison* raises serious doubts as to the continued viability of the religious accommodation mandate of section 701(j).

The plaintiff in *Hardison* was an employee of Trans World Airlines (TWA).¹⁴ After being employed by TWA for almost a year, the plaintiff joined the Worldwide Church of God,¹⁵ a religious sect requiring members to refrain from work on a Sabbath lasting from sunset on Friday until sunset on Saturday.¹⁶ Under the terms of the collective bargaining agreement which TWA maintained with the International Association of Machinists, all job and shift assignments were made on the basis of seniority.¹⁷ Due to his low seniority status, the plaintiff was unable to bid for a shift assignment allowing him to observe his Sabbath.¹⁸ When the plaintiff informed TWA of his religious beliefs, TWA attempted to accommodate the plaintiff by authorizing the union steward to seek a shift change for him.¹⁹ The union, however, was unwilling to breach the terms of the seniority system to accommodate the plaintiff.²⁰ In the face of the union's refusal to allow a shift change, TWA considered a proposal to allow the plaintiff to work a four day week.²¹ TWA

¹⁰ *Parker Seal Co. v. Cummins*, 429 U.S. 65 (1976) (per curiam); *Dewey v. Reynolds Metal Co.*, 402 U.S. 689 (1971) (per curiam).

The cases decided by the courts of appeals prior to *Hardison* were similarly inconclusive as to the degree of accommodation required of an employer. Compare *Williams v. Southern Union Gas Co.*, 529 F.2d 483, 12 FEP Cas. 5 (10th Cir. 1976) and *Reid v. Memphis Publishing Co.*, 521 F.2d 512, 11 FEP Cas. 129 (6th Cir. 1975), cert. denied, 429 U.S. 964 (1976) (cases finding no failure to accommodate) with *Draper v. United States Pipe and Foundry Co.*, 527 F.2d 515, 11 FEP Cas. 1106 (6th Cir. 1975) and *Riley v. Bendix Corp.*, 464 F.2d 1113, 4 FEP Cas. 951 (5th Cir. 1972) (cases finding failure to accommodate). See generally Note, *Religious Discrimination—The Reasonable Accommodation Rule*, 1975-1976 *Annual Survey of Labor Relations and Employment Discrimination Law*, 17 B.C. IND. & COM. L. REV. 1179, 1182-88 (1976).

¹¹ 432 U.S. 63 (1977).

¹² *Id.* at 79.

¹³ *Id.* at 84-85.

¹⁴ *Id.* at 66.

¹⁵ *Id.* at 67.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 68.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 68-69.

refused to adopt this proposal because it entailed either leaving the plaintiff's job open on weekends, moving an employee from another area with the result that the operation in that area would suffer, or paying overtime premiums for an extra employee to fill the plaintiff's job.²² TWA concluded that the increased cost and inefficiency inherent in this proposal rendered it unacceptable.²³ When an accommodation was not reached, the plaintiff refused to report for work on his Sabbath, and was discharged.²⁴

After his discharge, the plaintiff commenced a timely action in the United States District Court for the Western District of Missouri against both TWA and the union, claiming that their failure to accommodate him constituted religious discrimination in violation of Title VII.²⁵ In rejecting the plaintiff's contentions, the district court found that both TWA and the union had satisfactorily accommodated the plaintiff's religious practices and that any further accommodation constituted undue hardship.²⁶ On appeal, the United States Court of Appeals for the Eighth Circuit reversed the district court judgment in favor of TWA, finding that TWA had not satisfied its statutory duty to accommodate plaintiff's religious beliefs. The circuit court maintained that TWA could have accommodated the plaintiff without undue hardship in two different ways.²⁷ First, the court determined that TWA could have permitted plaintiff to work a four day week.²⁸ That this accommodation required either leaving the plaintiff's job open on weekends, shifting an employee from another location, or paying overtime premiums for an extra employee did not, in the court's opinion, constitute an undue hardship.²⁹ Second, the court of appeals found that TWA could have arranged a job swap for the plaintiff.³⁰ Since, as the circuit court read the record, TWA had not even pursued the possibility that the union would agree to such a job swap, the court did not reach the question whether requiring the employer to arrange such a swap, in violation of the collective bargaining agreement, was required by Title VII.³¹

The Supreme Court granted certiorari.³² In a seven to two decision,³³ the Court reversed the judgment of the Eighth Circuit,³⁴ and reinstated the

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 69.

²⁵ 375 F. Supp. 877, 879, 10 FEP Cas. 502, 503 (W.D. Mo. 1974).

²⁶ *Id.* at 883-84, 891, 10 FEP Cas. at 507, 511.

²⁷ 527 F.2d 33, 39-42, 11 FEP Cas. at 1121, 1125-27 (8th Cir. 1975). However, the Eighth Circuit affirmed the judgment in favor of the union, finding that the plaintiff had not directly attacked that judgment. *Id.* at 43, 11 FEP Cas. at 1128.

²⁸ *Id.* at 39-40, 11 FEP Cas. at 1125.

²⁹ *Id.* at 40-41, 11 FEP Cas. at 1126.

³⁰ *Id.* at 41-42, 11 FEP Cas. at 1126-27.

³¹ *Id.* at 42, 11 FEP Cas. at 1127.

³² 429 U.S. 958 (1976).

³³ Justice White wrote the opinion of the Court. Justice Marshall, joined by Justice Brennan, dissented. 432 U.S. at 85 (Marshall, J., dissenting).

³⁴ *Id.*

district court judgment for TWA. As to the Eighth Circuit's conclusion that TWA could have arranged a job swap without union approval, the Supreme Court held that the duty to accommodate imposed by section 701(j) did not require TWA to breach the terms of a seniority system established under a valid collective bargaining agreement.³⁵ As to the circuit court's assertion that TWA could have permitted the plaintiff to work a four day work week, the Court determined that this proposal involved costs to TWA "either in the form of lost efficiency in other jobs or higher wages."³⁶ In the Court's estimation, requiring TWA to bear this burden constituted more than a *de minimis* cost. Accordingly, the Court held "that each of the Court of Appeals' suggested alternatives would have been undue hardship within the meaning of the statute as construed by the EEOC guidelines."³⁷ Accepting the district court's finding that TWA had done all that it could to accommodate the plaintiff without either violating the collective bargaining agreement or incurring substantial costs,³⁸ the Court held that Title VII was not violated.³⁹

In holding that TWA need not violate the terms of a seniority system to accommodate Hardison, the Supreme Court relied primarily on section 703(a)(1) of Title VII.⁴⁰ Section 703(a)(1) provides that it is an unlawful employment practice for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion" ⁴¹ The Court observed that

[t]he emphasis of both the language and the legislative history of [section 703(a)(1)] is on eliminating discrimination in employment; similarly situated employees are not to be treated differently solely because they differ with respect to race, color, religion, sex, or national origin. This is true regardless of whether the discrimination is directed against majorities or minorities.⁴²

After noting the broad antidiscrimination purpose of section 703(a)(1), the Court proceeded to examine the seniority system at issue in *Hardison*.⁴³ That

³⁵ *Id.* at 79.

³⁶ *Id.* at 84.

³⁷ *Id.* at 77.

³⁸ *Id.* at 83 n.14.

³⁹ *Id.* at 77.

⁴⁰ *See id.* at 71-72, 79-81. The Court also supported its decision by reference to § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h) (1976). Section 703(h) insulates bona fide seniority systems from attack under Title VII absent proof of discriminatory intent. *Id.* Accepting the district court's finding that the seniority system was not imbued with discriminatory intent, the Supreme Court concluded that TWA was not required to make an exception to its seniority system in order to accommodate Hardison. 432 U.S. at 81-83.

⁴¹ 42 U.S.C. § 2000e-2(a)(1) (1976). Although § 701(j) is technically only a definition of "religion" for purposes of § 703(a)(1), it is in reality much broader than a definition, as it speaks affirmatively of the duty to make "reasonable accommodations" absent "undue hardship". See notes 8-9 *supra*.

⁴² 432 U.S. at 71.

⁴³ *Id.* at 76-84.

seniority system, the Court postulated, "represented a significant accommodation to the needs, both religious and secular, of *all* of TWA's employees."⁴⁴ The Court reasoned that if TWA nevertheless chose to circumvent the seniority system by ordering a more senior employee to replace Hardison on Saturdays, the senior employee would lose his shift preference at least in part because he was not a member of a religion observing a Saturday Sabbath.⁴⁵ The religious accommodation mandate of section 701(j) notwithstanding, the Court concluded that section 703(a)(1) does not condone such unequal treatment.⁴⁶ The Court stated that "[i]t would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preference of some employees . . . in order to accommodate or prefer the religious needs of others . . ."⁴⁷ Thus, the Court determined that TWA was not required to make an exception to its seniority system to accommodate Hardison.⁴⁸

In holding that TWA need not incur more than *de minimis* costs to accommodate Hardison, the Court again relied primarily on the antidiscrimination mandate of section 703(a)(1).⁴⁹ As to the proposal that TWA allow the plaintiff to work a four day week the Court reasoned that such an accommodation involved costs to TWA, "either in the form of lost efficiency in other jobs or higher wages."⁵⁰ Such costs, the Court concluded, are more than *de minimis* and constitute an "undue hardship" within the meaning of section 701(j).⁵¹ The Court maintained that

[l]ike abandonment of the seniority system, to require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve *unequal treatment of employees on the basis of their religion*. . . . While incurring extra costs to secure a replacement for Hardison might remove the necessity of compelling another employee to work involuntarily in Hardison's place, it would not change the fact that the *privilege of having Saturdays off would be allocated according to religious beliefs*.⁵²

From the above italicized language, it is apparent that the Court was troubled by the idea of granting preferential treatment to some employees on the basis of their religion. Thus, as in its consideration of the seniority system, the Court relied primarily on the antidiscrimination principle underlying section 703(a)(1) in deciding that anything more than *de minimis* cost constitutes undue hardship under section 701(j).

In *Hardison*, the Supreme Court discerned a conflict between the antidiscrimination command of section 703(a)(1) and the religious accommodation

⁴⁴ *Id.* at 78.

⁴⁵ *Id.* at 81.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 83.

⁴⁹ *See id.* at 84-85.

⁵⁰ *Id.* at 84.

⁵¹ *Id.*

⁵² *Id.* at 84-85 (emphasis added).

mandate of section 701(j). In reconciling this conflict, the Court contrasted the legislative history of section 703(a)(1) with that of the more recently enacted section 701(j). In the Court's opinion, the legislative history of section 703(a)(1) was ample and unambiguous,⁵³ while the history of section 701(j) was relatively meager and inconclusive.⁵⁴ "In the absence of clear statutory language or legislative history to the contrary,"⁵⁵ the Court was unwilling to construe section 701(j) "to require an employer to discriminate against some employees to enable others to observe their Sabbath."⁵⁶ The Court thus reconciled the conflict between sections 703(a)(1) and 701(j) by narrowly construing the religious accommodation mandate of section 701(j).

By narrowly construing the mandate of section 701(j), the Supreme Court has severely restricted an employer's obligation to accommodate the religious beliefs of employees. The religious accommodation mandate should continue to have some substance, however, so long as *Hardison* is narrowly limited to its immediate holding—that employers need not violate a valid seniority system or incur more than *de minimis* costs in accommodating an employee's religious practices. There are many more or less cost-free accommodations which an employer can use to allow an employee to observe his Sabbath without depriving other employees of their contractual rights.⁵⁷ For example, in *Hardison*, TWA could have paid overtime to a voluntary replacement and required Hardison to work overtime, when needed, at regular pay.⁵⁸ So long as employers are required to pursue such cost-free accommodations, the religious accommodation mandate of section 701(j) will have continued viability.

Nevertheless, the *Hardison* decision may be interpreted more broadly to sap section 701(j) of any remaining strength. This broad interpretation of section 701(j)'s requirement of reasonable accommodation flows from the *Hardison* Court's primary reliance on the antidiscrimination mandate of section 703(a)(1), and would construe *Hardison* to mean that all preferential treatment of employees, even though resulting in only a *de minimis* cost to an employer, is invalid under section 703(a)(1). According to this broad view of

⁵³ See *id.* at 71-72 & n.6, 81.

⁵⁴ See *id.* at 74-75 & n.9.

⁵⁵ *Id.* at 85.

⁵⁶ *Id.*

⁵⁷ In his dissenting opinion, Justice Marshall suggested several more or less cost-free accommodations available under the facts of *Hardison*. First, Justice Marshall contended that the company should have actively pursued the possibility that Hardison might have been accommodated by a simple trade of days or shifts. *Id.* at 94. Second, Justice Marshall suggested that TWA could have paid overtime to a voluntary replacement for Hardison on Saturdays and required Hardison to pick up the extra cost. *Id.* at 95. Finally, Justice Marshall postulated that TWA could have paid overtime to a voluntary replacement and required Hardison to work overtime when needed at regular pay. *Id.* Justice Marshall stated that none of these accommodations "would have deprived any other employee of rights under the contract or violated the seniority system in any way." *Id.* at 96.

⁵⁸ *Id.*

Hardison, employers may not grant preferential treatment to accommodate an employee's religious practices unless other employees receive compensating benefits. If such a broad interpretation of *Hardison* prevails in the courts, it will completely eliminate an employer's obligation to engage in any accommodation of his employee's religious beliefs.

The potential evisceration of the statutory mandate to reasonably accommodate employees' religious beliefs particularly troubled Justice Marshall. In his dissent from the majority's position in *Hardison*, Justice Marshall, joined by Justice Brennan, characterized the Court's decision as "a fatal blow to all efforts under Title VII to accommodate work requirements to religious practices."⁵⁹ The dissent rejected the Court's conclusion that accommodations which grant preferential treatment in favor of religious observers are contrary to the underlying principles of Title VII.⁶⁰ Accommodations, the dissent reasoned, are by definition preferential, and Congress passed section 701(j) in order to guarantee that employers grant such preferential treatment unless undue hardship would result.⁶¹ While the dissent did not question the Court's holding that an employer is not required to violate the terms of a seniority system to accommodate an employee, it took serious issue with the majority's conclusion that an employer was not obligated to incur more than *de minimis* costs to allow an employee to observe his Sabbath.⁶² In this regard, the dissent was particularly disturbed by the Court's refusal to recognize other possible accommodations which were almost cost-free.⁶³ By ignoring such cost-free accommodations, the dissent concluded, the Court had effectively nullified section 701(j).⁶⁴

A recent decision of the United States Court of Appeals for the Sixth Circuit appears to substantiate the *Hardison* dissent's apprehensions concerning the continued viability of section 701(j). In *Cummins v. Parker Seal Co.*,⁶⁵ a case which the Supreme Court remanded to the Sixth Circuit for a rehearing in light of *Hardison*,⁶⁶ the Sixth Circuit reversed its earlier decision finding a Title VII violation for failure to comply with section 701(j).⁶⁷ Prior to its decision in *Hardison*, the Supreme Court had affirmed, by an equally divided vote, the earlier judgment of the Sixth Circuit that certain steps taken by an employer failed to satisfy his duty to accommodate an employee's religious practices.⁶⁸ In granting a rehearing after *Hardison*, the Supreme Court vacated its earlier affirmance and remanded the case to the Sixth Circuit for reconsideration in light of *Hardison*.⁶⁹ On remand, the court of appeals re-

⁵⁹ *Id.* at 86.

⁶⁰ *Id.* at 86-89.

⁶¹ *Id.* at 87.

⁶² *Id.* at 92 n.6.

⁶³ *See id.* at 92 n.6, 92-96.

⁶⁴ *Id.* at 89.

⁶⁵ 561 F.2d 658, 15 FEP Cas. 1098 (6th Cir. 1977).

⁶⁶ 433 U.S. 903 (1977) (mem.).

⁶⁷ 561 F.2d 658, 15 FEP Cas. 1098 (6th Cir. 1977).

⁶⁸ 429 U.S. 65 (1976) (per curiam), *aff'g by an equally divided court* 516 F.2d 544, 10 FEP Cas. 974 (6th Cir. 1975).

⁶⁹ 433 U.S. 903 (1977) (mem.).

versed its earlier decision and held that the employer's efforts had satisfied the demands of section 701(j).⁷⁰ Although the Sixth Circuit did not publish an opinion indicating why it felt compelled by *Hardison* to reverse its prior decision, an examination of the facts of *Cummins* may shed some light on that court's view of *Hardison*.

The plaintiff in *Cummins* was employed as a department supervisor in the defendant's plant.⁷¹ In this capacity, he was required to work Monday through Saturday.⁷² After having worked for the defendant for many years, the plaintiff joined the Worldwide Church of God.⁷³ Informed that the plaintiff's religious practices prevented him from working on Saturday, the employer agreed to give the plaintiff Saturdays off. In the absence of a collective bargaining agreement or a negotiated seniority system, the employer appeared to be free to assign work as it saw fit, and accordingly, required supervisors from a neighboring department to cover both departments on Saturday.⁷⁴ The procedure of having one supervisor cover two departments had been used by the defendant for many years with no apparent problems.⁷⁵ In return for having Saturdays off, the plaintiff agreed to substitute for the other supervisors on weekdays.⁷⁶ Defendant accommodated the plaintiff in this fashion for over a year.⁷⁷ During that time, however, other supervisors complained about the plaintiff's preferential work schedule, and as a result of these complaints, the plaintiff was discharged.⁷⁸

The plaintiff brought a timely suit in United States District Court for the Eastern District of Kentucky, alleging that the defendant had failed to satisfy its statutory duty to accommodate the plaintiff's religious beliefs.⁷⁹ Finding that the defendant had made a reasonable accommodation and that any further attempt would have constituted undue hardship, the district court dismissed the plaintiff's suit.⁸⁰ On appeal, the Sixth Circuit, in its first decision in the case, found the evidence insufficient to support the district court's determination that continuing to allow the plaintiff Saturdays off would constitute undue hardship, and therefore reversed the district court's finding of reasonable accommodation as clearly erroneous.⁸¹ In support of its decision, the court of appeals emphasized that the employer had managed to operate with the system for more than a year.⁸² In addition, the court reasoned that "[t]he objections and complaints of fellow employees, in and of themselves, do

⁷⁰ 561 F.2d 658, 659, 15 FEP Cas. 1098, 1099 (6th Cir. 1977).

⁷¹ 516 F.2d 544, 545, 10 FEP Cas. 974, 975 (6th Cir. 1975).

⁷² *Id.*

⁷³ *Id.* It is interesting to note that this was the same religious sect involved in *Hardison*. See text at notes 15-16 *supra*.

⁷⁴ *Id.* at 548, 10 FEP Cas. at 977-78.

⁷⁵ *Id.* at 547-48, 10 FEP Cas. at 977-78.

⁷⁶ *Id.* at 548, 10 FEP Cas. at 977.

⁷⁷ *Id.* at 551, 10 FEP Cas. at 980.

⁷⁸ *Id.* at 545, 10 FEP Cas. 976.

⁷⁹ *Id.*, 10 FEP Cas. at 975.

⁸⁰ *Id.* at 545-46, 10 FEP Cas. at 976.

⁸¹ *Id.* at 550, 10 FEP Cas. at 979.

⁸² *Id.* at 551, 10 FEP Cas. at 980.

not constitute undue hardship in the conduct of an employer's business."⁸³ Furthermore, the circuit court concluded that the defendant could have alleviated the unrest of other supervisors by pursuing a more active course of accommodation.⁸⁴ For example, the court postulated, the employer might have reduced the tension by allowing the plaintiff to work longer hours on weekdays and Sundays, by reducing the plaintiff's pay commensurately with his shorter work week, or by taking pains to ensure that the plaintiff substituted for the other supervisors on an equitable basis rather than leaving the other supervisors to make demands on the plaintiff.⁸⁵

On its facts, it is arguable that the Sixth Circuit's original decision in *Cummins* could stand uncorrected under a narrow reading of *Hardison*. Since the employer in *Cummins* did not have to infringe the collective bargaining rights of other employees to accommodate the plaintiff, that portion of the *Hardison* decision holding that employers need not violate the terms of a valid seniority system is not controlling. Likewise, at least under a narrow reading of *Hardison*, the *Hardison* Court's holding that employers need not incur more than a *de minimis* cost has no application to *Cummins*. In contrast to *Hardison*, the system developed to accommodate the plaintiff in *Cummins* did not require that the plaintiff's job be left open on weekends, or that overtime be paid to another supervisor to fill the plaintiff's position.⁸⁶ On the contrary, the employer in *Cummins* had used the procedure whereby another supervisor would cover two departments in a supervisor's absence for many years.⁸⁷ This procedure did not result in extra expense, and the only possible adverse effect on the employer, apart from other employee's complaints, was the slight inefficiency which resulted from having one supervisor cover two departments.⁸⁸ Since the procedure had been employed for many years, a court reading *Hardison* narrowly would certainly label this inefficiency *de minimis*. Such a court would also find complaints from other employees not to constitute undue hardship, especially since, as the Sixth Circuit had earlier noted, these complaints could have been alleviated if the employer had taken a more active role in the accommodation.⁸⁹ Therefore, under a narrow view of the *Hardison* decision, it seems that *Hardison* was not controlling in *Cummins*.

Although the actual reasoning employed by the *Cummins* court is unavailable, it may be concluded that the Sixth Circuit decision resulted from a broad reading of *Hardison*. Under this broad view, courts would interpret *Hardison* to prohibit all preferential treatment of religious employees where there are no concomitant benefits to nonreligious employees. The particular accommodation rejected by the employer in *Cummins* allowed the plaintiff to observe his Sabbath while requiring all other employees to work on Saturday.

⁸³ *Id.* at 550, 10 FEP Cas. at 979.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 548, 10 FEP Cas. at 978.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 550, 10 FEP Cas. at 980.

Such preferential treatment, at least under a broad reading of *Hardison*, is prohibited. It remains to be seen whether other courts will follow the *Cummins* court in its inherently broad reading of *Hardison*.⁹⁰ If courts do adopt this interpretation, then Justice Marshall is correct in his estimation that section 701(j), once hailed by its proponent Senator Randolph as essential to prevent religious discrimination in employment,⁹¹ is now devoid of all substance.⁹²

IV. EEOC ENFORCEMENT POWERS

A. Statute of Limitations Applicable to EEOC Actions: Occidental Life

Since the 1972 amendments¹ to Title VII,² the Equal Employment Opportunity Commission has had the authority to institute suit in federal district court against private employers engaged in unlawful employment practices.³

⁹⁰ Since the Court handed down its decision in *Hardison*, several cases dealing with the accommodation issue in the particular context of Saturday Sabbatarians have been decided by the courts of appeals. It is interesting to note that the courts have decided all of these cases against the employee seeking accommodation. However, all of these cases appear to be reconcilable with a narrow reading of *Hardison*. *Rohr v. Western Elec. Co.*, 567 F.2d 829, 16 FEP Cas. 64 (8th Cir. 1977) (accommodation would have required employer to violate collective bargaining agreement); *Jordan v. North Carolina Nat'l Bank*, 565 F.2d 72, 15 FEP Cas. 1322 (4th Cir. 1977) (prospective employee demanded absolute guarantee of accommodation); *Chrysler Corp. v. Mann*, 561 F.2d 1282, 15 FEP Cas. 788 (8th Cir. 1977), *cert. denied*, 98 S. Ct. 778 (1978) (employee failed to seek accommodation through the existing system); *Huston v. Local 93, UAW*, 559 F.2d 477, 15 FEP Cas. 326 (8th Cir. 1977) (accommodation would have required union to violate collective bargaining agreement).

In the context of religious objection to payment of union dues, the Sixth Circuit recently held that subsections 8(a)(3) and (b)(2) of the Taft-Hartley Act, 29 U.S.C. §§ 158(a)(3), (b)(2) (1976), which permit a collective bargaining agreement to require union membership as a condition of employment but prevent discharge at the behest of a union for any reason other than failure to pay union dues, do not represent an accommodation to employees whose religious practices require them to refrain from joining unions and paying union dues. *McDaniel v. Essex Int'l Inc.*, 571 F.2d 338, 343, 16 FEP Cas. 904, 907 (6th Cir. 1978). The *McDaniel* court held that, subsections 8(a)(3) and (b)(2) notwithstanding, "the burden is on [the employer] to make an effort at accommodation and, if unsuccessful, to demonstrate that they were unable to reasonably accommodate the plaintiff's religious beliefs without undue hardship." *Id.* By requiring the employer to disregard the terms of a valid collective bargaining agreement, *McDaniel* would appear inconsistent with even a narrow reading of *Hardison*.

⁹¹ 118 CONG. REC. 705 (1972).

⁹² 432 U.S. at 87 (Marshall, J., dissenting).

¹ Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972).

² 42 U.S.C. §§ 2000e-1 to 2000e-17 (1976).

³ 42 U.S.C. § 2000e-5(f)(1) (1976) provides in part:

If within thirty days after a charge is filed with the Commission or within thirty days after the expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge.

This Survey year, in *Occidental Life Insurance Co. v. EEOC*,⁴ the Supreme Court considered what statute of limitations, if any, applies to the EEOC's power to bring such suits. In an opinion written by Justice Stewart, the Court held that neither the provisions of Title VII⁵ nor the applicable state statute of limitations imposes any time limitation on the EEOC's power to commence enforcement actions.⁶

The statute of limitations issue arose in *Occidental* when the EEOC instituted an enforcement action against Occidental Life Insurance Company, seeking both injunctive and back pay relief, three years and two months after an employee of the company had filed a charge of sex discrimination with the Commission.⁷ The district court granted the company's motion for summary judgment,⁸ holding that section 706(f)(1) of Title VII⁹ bars enforcement actions instituted more than 180 days after a charge has been filed with the EEOC.¹⁰ In the alternative, the district court found the action to be barred by the one year statute of limitations contained in the California Code of Civil Procedure.¹¹ The Court of Appeals for the Ninth Circuit reversed the district court's decision,¹² holding that section 706(f)(1) does not impose a limitation of 180 days on the EEOC's authority to bring suit,¹³ and further, that the action was not subject to any state limitations period.¹⁴ On certiorari,¹⁵ the Supreme Court affirmed the decision of the Ninth Circuit.¹⁶

⁴ 432 U.S. 355 (1977).

⁵ *Id.* at 366.

⁶ *Id.* at 372.

⁷ *Id.* at 357. Between December 27, 1970, the date Occidental's employee filed a charge with the Commission, and February 22, 1974, when the EEOC initiated the enforcement action, the EEOC had attempted to eliminate the discriminatory employment practices by means of conference, conciliation, and persuasion. *Id.* at 357-58.

⁸ *EEOC v. Occidental Life Ins. Co.*, 12 FEP Cas. 1298, 1299-1300 (M.D. Cal. 1974).

⁹ Section 706(f)(1), 42 U.S.C. § 2000e-5(f)(1) (1976), provides in pertinent part:

If a charge filed with the Commission . . . is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference . . . [from a state agency], whichever is later, the Commission has not filed a civil action under this section . . . , or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . , shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

¹⁰ 12 FEP Cas. at 1299.

¹¹ *Id.* See CAL. CIV. PROC. CODE § 340(3) (West 1978).

¹² *EEOC v. Occidental Life Ins. Co.*, 535 F.2d 533, 542, 12 FEP Cas. 1300, 1301 (9th Cir. 1976).

¹³ *Id.* at 536, 12 FEP Cas. at 1302.

¹⁴ *Id.* at 536-40, 12 FEP Cas. at 1302-05.

¹⁵ 429 U.S. 1022 (1976).

¹⁶ *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 373 (1977).

The Supreme Court, in concluding that Title VII itself contains no time period within which the EEOC must commence enforcement actions,¹⁷ observed that the only temporal restriction imposed on the EEOC is found in section 706(f)(1).¹⁸ Section 706(f)(1) provides that the EEOC must wait at least 30 days after a charge has been filed with the Commission before it may institute suit.¹⁹ Section 706(f)(1) also provides that a private individual who has filed a charge with the EEOC may commence a civil action in his own name if the EEOC has not brought suit within 180 days after the charge was filed.²⁰ The *Occidental* Court held, however, that neither section 706(f)(1) nor any other section of Title VII explicitly prescribes the maximum time within which the Commission may institute a civil action.²¹ Thus, the district court had erred when it interpreted section 706(f)(1) as prohibiting the Commission from bringing an enforcement suit more than 180 days after a charge has been filed.²²

The Supreme Court in *Occidental* construed section 706(f)(1) as merely providing complainants with a statutory alternative to the often time-consuming procedures of the EEOC, rather than imposing a 180 day limitation period upon the Commission's power to bring enforcement suits.²³ This alternative enforcement procedure, the Court observed, allows a complainant dissatisfied with the progress being made by the EEOC on his or her employment discrimination charge to elect to circumvent the EEOC procedures and seek relief through a private action in a district court.²⁴ The Court held that this latter view of section 706(f)(1), as opposed to the view adopted by the district court, is the natural, correct interpretation of the statute.²⁵ The Court further noted that its literal reading of section 706(f)(1) is supported by the statute's legislative history. This history, the Court concluded, reveals a strong congressional intent to protect the individual from being prejudiced by administrative delays, but contains no mention of a congressional desire to limit the time within which the EEOC may institute suit.²⁶

After concluding that Title VII imposes no time limitation on suits brought by the Commission, the Supreme Court considered whether EEOC enforcement actions are subject to the relevant state statute of limitations.²⁷

¹⁷ *Id.* at 366.

¹⁸ For the text of § 706(f)(1), see notes 3 and 9 *supra*.

¹⁹ See note 3 *supra*.

²⁰ See note 9 *supra*.

²¹ 432 U.S. at 360.

²² See text at note 10 *supra*.

²³ 432 U.S. at 361.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 366. The *Occidental* Court found further support for its interpretation of § 706(f)(1) in the Senate Committee report on the amendment. This report expressly stated that "the primary concern should be to protect the aggrieved person's option to seek a prompt remedy" and that the purpose of the 180 day provision was to "preserve . . . the private right of action by an aggrieved party." S. Rep. No. 415, 92d Cong., 1st Sess. 23 (1971).

²⁷ 432 U.S. at 366-72.

The Court acknowledged that, in situations where Congress fails to specify an express limitations period, it frequently has inferred a congressional intent to apply state statutes of limitations to federal causes of action.²⁸ Nevertheless, the mere absence of an express limitations period in a federal statute, the Court cautioned, does not mean that the Court must mechanically apply a state statute of limitations.²⁹ Noting that state legislatures do not devise their limitations periods with national interests in mind, the Court emphasized that it is the duty of the federal courts to assure that reference to state law will not interfere with the proper implementation of national policies.³⁰ Thus, state limitations periods will not be borrowed "if their application would be inconsistent with the underlying policies of the federal statute."³¹

In this light, the Supreme Court examined whether the policies underlying Title VII would be thwarted by application of state statutes of limitations. The Court observed that the 1972 amendments to Title VII, while providing the EEOC with the additional enforcement power of initiating civil actions in federal court, preserved the administrative functions of the Commission created by the 1964 Act.³² This additional power did not transform the EEOC into an agency whose exclusive responsibility is conducting litigation on behalf of private parties. Rather, the Court reasoned, the Commission must continue its original task of investigating unlawful employment practices and attempting to induce employers to comply with Title VII standards through methods of conciliation, persuasion, and, if necessary, litigation.³³ As a result, the Court determined that the Commission's administrative duties distinguish it from the normal private litigant against whom a state statute of limitations would properly run.³⁴

In view of the federal policy requiring the EEOC to attempt an administrative resolution of employment discrimination claims before instituting suit, the *Occidental* Court judged it inappropriate to rely on a state statute of limitations.³⁵ The "State's wisdom" in establishing a general limitations period could not, the Court reasoned, have taken into account the congressional policy that judicial action by the EEOC be delayed while the Commission seeks to end discrimination through administrative procedures.³⁶ In addition, the

²⁸ *Id.* at 367. The Court cited as examples: *Runyon v. McCrary*, 427 U.S. 160, 179-82 (1976); *United Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 703-04 (1966); *O'Sullivan v. Felix*, 233 U.S. 318, 322 (1914); *Chattanooga Foundry and Pipe Works v. City of Atlanta*, 203 U.S. 390, 397 (1906).

²⁹ 432 U.S. at 367.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 368.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* The Court noted that in some instances, state limitations periods would directly conflict with other time provisions contained in the Act. *Id.* at 369. The Court cited the California one-year statute of limitations as an example of this possible conflict. The Court noted that under CAL. LABOR CODE §§ 1410-1433 (West 1971), an aggrieved party may file a charge with the EEOC as late as 300 days after the discriminatory act. The EEOC may then take another 120 days to investigate the charge

Court concluded that the adoption of state limitations periods would be inconsistent with the congressional intent underlying the enactment of the 1972 amendments.³⁷ The Supreme Court observed that the legislative history of the amendments evinces Congress' "acute awareness of the enormous backlog of cases before the EEOC and the consequent delays" encountered by complainants.³⁸ The Court therefore determined that it would be unreasonable to suppose that Congress intended, under the 1972 amendments, to grant the Commission additional enforcement responsibilities and simultaneously to relegate its federal lawsuits to the "vagaries of diverse state limitations statutes."³⁹

The Supreme Court concluded its *Occidental* opinion by expressly rejecting the employer's contention that the absence of a specified time limitation on the bringing of an EEOC enforcement action will deprive defendants in such Title VII suits of "fundamental fairness or subject them to the surprise and prejudice that can result from the prosecution of stale claims."⁴⁰ The Court noted that Title VII defendants are alerted to the possibility of an enforcement suit within ten days after a charge is filed with the EEOC.⁴¹ This prompt notice, the Court reasoned, gives the defendant the opportunity to gather evidence in anticipation of a civil action.⁴² The Court further noted that during EEOC administrative proceedings, a potential defendant is kept abreast of the action's progress.⁴³ In view of these procedural safeguards, the Court concluded that the absence of any time restraints on an EEOC enforcement action does not unfairly prejudice Title VII defendants.⁴⁴

Justice Rehnquist, joined by Chief Justice Burger, filed a dissenting opinion in *Occidental*. While accepting the majority's conclusion that section

and make its determination of reasonable cause. 42 U.S.C. § 2000e-5(b) (1976). The Court observed that "even if the aggrieved party and the EEOC act within the 420-day period expressly authorized by the Act, the California [one-year] limitations period . . . would expire before the EEOC had an opportunity to begin any conciliation efforts, let alone bring a lawsuit." *Id.* at 369 n.23.

³⁷ *Id.* at 369-72.

³⁸ *Id.* at 369.

³⁹ *Id.* at 370-71.

⁴⁰ *Id.* at 372-73.

⁴¹ 42 U.S.C. §§ 2000e-5(b), (e) (1976).

⁴² 432 U.S. at 372.

⁴³ 29 C.F.R. § 1601.79b(b) (1978).

⁴⁴ 432 U.S. at 372. The Court further reasoned that if, despite these precautions, a defendant is significantly handicapped in making his defense because of substantial administrative delay by the Commission, federal courts retain the power to provide relief by restricting or denying back pay awards where appropriate. *Id.* at 373. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), where the Supreme Court observed that, in accordance with 42 U.S.C. § 2000e-5(g) (1976), "back pay is not an automatic or mandatory remedy; like all other remedies under the Act, it is one which the courts 'may' invoke." *Id.* at 415. The *Albemarle* Court reasoned that courts must exercise the power to limit back pay awards in light of the objectives of the Act, and that "back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Id.* at 422.

706(f)(1) imposes no limitation on the power of the EEOC to file suit in federal court,⁴⁵ the dissent took issue with the majority's determination that the EEOC's enforcement powers are not subject to the pertinent state limitations period.⁴⁶ Justice Rehnquist maintained that the majority's approach completely ignores a consistent line of Court opinions holding that, in the absence of an express federal limitations period, the applicable state limitations period should apply.⁴⁷ In particular, Justice Rehnquist contended that the only exception to the general rule of applying the relevant state statute has been for suits involving the United States in its sovereign capacity.⁴⁸ Justice Rehnquist argued that EEOC enforcement actions do not fall within this sovereign capacity exception.⁴⁹ According to Justice Rehnquist the primary consideration underlying the sovereign capacity exception is that the United States is suing to enforce its own rights.⁵⁰ While Justice Rehnquist conceded that the government might be interested in the vindication of rights protected under Title VII,⁵¹ this interest could not be equated with the interest of a sovereign suing to redress injury to its own rights.⁵² Instead, Justice Rehnquist argued, when the EEOC commences litigation, it seeks to vindicate a right which the original private complainant is entitled to vindicate himself. Accordingly, it is impossible to consider the EEOC as suing in its sovereign capacity.⁵³ In this situa-

⁴⁵ 432 U.S. at 373 (Rehnquist, J., dissenting).

⁴⁶ *Id.*

⁴⁷ *Id.* at 373-74. Such a policy of incorporating state statutes of limitations periods in the absence of federal ones, Justice Rehnquist explained, was applied by the Court "[a]s early as 1830, [when] this Court held that the state statute of limitations governs the timeliness of federal causes of action unless Congress has specifically provided otherwise." *Id.* at 375 (quoting *United Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 703-04 (1960)). Justice Rehnquist observed that this policy had recently been affirmed with respect to civil rights suits brought under 42 U.S.C. § 1981. *Runyon v. McCrary*, 427 U.S. 160, 180 (1976); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975). In Justice Rehnquist's view, the underlying policies of 42 U.S.C. § 1981 would presumably be of a magnitude comparable to those of Title VII, so that equal treatment should be accorded suits brought under both statutes. 432 U.S. at 377.

⁴⁸ 432 U.S. at 375.

⁴⁹ *Id.* at 381-83.

⁵⁰ *Id.* at 382. Justice Rehnquist relied, *inter alia*, on *United States v. Summerlin*, 310 U.S. 414, 416 (1940); *United States v. Bell Telephone Co.*, 167 U.S. 224, 264-65 (1897); *United States v. Des Moines Navigation and Ry. Co.*, 142 U.S. 510, 538-39 (1892); *United States v. Beebe*, 127 U.S. 338, 344 (1888); and *United States v. Nashville, Chattanooga & St. Louis Ry. Co.*, 118 U.S. 120, 125 (1886), which all note that state statutes of limitations are inapplicable to suits brought by the federal government in its sovereign capacity.

⁵¹ 432 U.S. at 382-83. *Cf.* *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 778 n.40 (1976) (noting that claims brought under Title VII vindicate a major public interest).

⁵² 432 U.S. at 383.

⁵³ *Id.* Justice Rehnquist argued that the fact a congressional policy is vindicated cannot be the test for whether a suit by a governmental agency constitutes an action in the government's sovereign capacity, since presumably the government vindicates some congressional policy whenever it sues. *Id.*

tion, Justice Rehnquist reasoned, the EEOC acts merely as a conduit for the recovery of damages—such as back pay—due an individual citizen.⁵⁴

Since the EEOC's enforcement action could not be considered a suit by the United States in its sovereign capacity, Justice Rehnquist concluded that there is no legitimate reason why the relevant state statute of limitations should not apply. The fact that a federal policy requires the EEOC to attempt to achieve its goals by voluntary compliance is not, in Justice Rehnquist's opinion, a sufficient reason to ignore a state statute of limitations.⁵⁵ In addition, Justice Rehnquist maintained that even though state legislatures do not devise their limitations periods with national interests in mind, courts have not hesitated to adopt state limitations periods in other instances where important federal policies were involved.⁵⁶ Thus, Justice Rehnquist would have found the EEOC's action subject to the appropriate state statute of limitations.⁵⁷

The *Occidental* Court's broad interpretation of EEOC powers and responsibilities resolved a difficult question concerning the scope of the authority granted to the Commission under the Equal Employment Opportunity Act of 1972. The two courts of appeals that had previously considered the question whether state statutes of limitation are applicable to EEOC enforcement actions had reached differing conclusions. In *EEOC v. Kimberly-Clark Corp.*,⁵⁸ the United States Court of Appeals for the Sixth Circuit found that state limitations periods are not applicable to EEOC enforcement actions.⁵⁹ Like the Supreme Court in *Occidental*, the *Kimberly-Clark* court reasoned that the 1972 amendments, by giving the EEOC authority to enforce Title VII standards through civil suits, were intended to afford as much protection as possible to aggrieved parties.⁶⁰ The policies underlying the amendments, the court determined, dictate that absent manifest congressional intent to apply state statutes of limitations, such state restrictions are inapplicable to the EEOC's power to commence litigation.⁶¹

In the second appellate decision to consider the statute of limitations issue prior to *Occidental*, *EEOC v. Griffin Wheel Co.*,⁶² the United States Court of Appeals for the Fifth Circuit predicated application of a state limitations period on the remedy being sought by the EEOC.⁶³ The court in *Griffin* held that when the EEOC seeks to *enjoin* a discriminatory practice proscribed by

⁵⁴ *Id.* Justice Rehnquist further indicated that his conclusion as to the private nature of EEOC enforcement actions was not affected by the nature of the remedy sought by the Commission. *Id.* Although injunctive relief may appear more publicly oriented than back pay awards, Justice Rehnquist nevertheless found that suits seeking injunctive relief compensate individuals for private harm suffered. *Id.*

⁵⁵ *Id.* at 379.

⁵⁶ *Id.* at 376-77.

⁵⁷ *Id.* at 384.

⁵⁸ 511 F.2d 1352, 10 FEP Cas. 38 (6th Cir. 1975).

⁵⁹ *Id.* at 1359, 10 FEP Cas. at 44.

⁶⁰ *Id.* at 1355, 10 FEP Cas. at 41.

⁶¹ *Id.* at 1359-60, 10 FEP Cas. at 45.

⁶² 511 F.2d 456, 10 FEP Cas. 531 (5th Cir. 1975).

⁶³ *Id.* at 459, 10 FEP Cas. at 533.

the United States Constitution and congressional enactments, the Commission is suing to enforce the interest of the United States as a sovereign,⁶⁴ and state statutes of limitations are inapplicable.⁶⁵ However, the Fifth Circuit in *Griffin* held that when the EEOC seeks a recovery of *back pay*, the Commission is suing to protect private rather than public interests. As a result, state limitations periods are applicable.⁶⁶ The Fifth Circuit's remedy-oriented approach differs from the approach taken by both the Sixth Circuit in *Kimberly-Clark* and the Supreme Court in *Occidental*. These two courts, by finding state statutes of limitations inapplicable to EEOC enforcement actions generally, necessarily made no distinction between the nature of the Commission's interest when enjoining a discriminatory employment practice and when obtaining a back pay award for an injured complainant.

In adopting the approach taken by the *Kimberly-Clark* court rather than the approach utilized by the *Griffin* court, the Supreme Court in *Occidental* removed a potentially prohibitive bar to numerous actions pending with the Commission. Two considerations support the majority's conclusion that state limitations periods cannot bar EEOC enforcement actions: first, the importance of the administrative role played by the Commission, and second, the public nature of the rights which the Commission seeks to vindicate in an enforcement action.

As to the first of these considerations, an examination of the legislative history of Title VII indicates that the result reached by the Court in *Occidental* is necessary to ensure the continued implementation of the procedures Congress considered most expedient in eliminating discriminatory employment practices. When Congress first enacted Title VII in 1964, it selected "[c]ooperation and voluntary compliance . . . as the preferred means for achieving" the goal of equal employment opportunity.⁶⁷ Through its 1972 amendments to Title VII, Congress intended to strengthen the EEOC's conciliatory role, while also giving it an additional enforcement task.⁶⁸ The legislative history of the 1972 amendments, while acknowledging widespread disillusionment with the voluntary approach previously employed,⁶⁹ indicates an intent that "recourse to the private lawsuit will be the exception and not the rule and that the vast majority of complaints will be handled through the offices of the EEOC or the Attorney General, as appropriate."⁷⁰ It is thus apparent that the EEOC's added enforcement authority is not intended to supplant the heavy reliance on conciliation as a preferred method to be used by the EEOC in eradicating employment discrimination.⁷¹

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

⁶⁸ *EEOC v. Kimberly-Clark Co.*, 511 F.2d 1352, 1357, 10 FEP Cas. 38, 42 (6th Cir. 1975).

⁶⁹ H.R. REP. NO. 328, 92d Cong., 2d Sess. 3, reprinted in [1972] U.S. CODE CONG. & AD. NEWS 2139.

⁷⁰ JOINT CONFERENCE COMMITTEE REPORT, Equal Employment Opportunity Act of 1972, 118 CONG. REC. 7168 (1972).

⁷¹ *Kimberly-Clark*, 511 F.2d at 1357, 10 FEP Cas. at 43. The March 8, 1972 Conference Report stated, "[o]nly if conciliation proves to be impossible do we expect

Since the purpose of the 1972 amendments was simply to provide a better administrative sanction to effectuate the still primary goal of conciliation, Congress required the Commission to refrain from commencing a civil action until it has discharged its administrative duties.⁷² It is unreasonable to presume that Congress, having intended "conference, conciliation, and persuasion" to be the primary goals of the Commission,⁷³ desired to impose state limitations periods, determined without regard to these goals, on the Commission's conciliation efforts. Such an approach often would require the Commission to terminate potentially fruitful conciliation efforts and to institute suit prematurely to insure that the statute of limitations did not deprive the EEOC of its principal sanction against discriminatory employers. In addition, the possibility of administrative delays barring enforcement suits could lead many complainants to seek vindication of their rights under the Act through suits brought in their individual capacity. Such recourse to private suits typifies a result Congress clearly was attempting to avoid in granting the Commission the power to commence its own suits.⁷⁴ In light of the policy giving preference to an administrative resolution of employment discrimination, the *Occidental* Court properly decided that it "is hardly appropriate to rely on the 'State's wisdom in setting a limit . . . on the prosecution'"⁷⁵ when the state "could not have taken into account the decision of Congress to delay judicial action while the EEOC performs its administrative responsibilities."⁷⁶

The public nature of the rights which the EEOC seeks to vindicate in an enforcement action is the second consideration supporting the Supreme Court's conclusion in *Occidental* that state statutes of limitations are inapplicable to EEOC enforcement suits. It is well-settled that state statutes of limitations do not apply to the United States when it is involved in a lawsuit in its sovereign capacity.⁷⁷ Previous cases have considered the United States to be acting in its sovereign capacity when it is either suing to enforce its own

the Commission to bring an action in federal district court to seek enforcement." 118 CONG. REC. 7583 (1972).

⁷² Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4(a), 86 Stat. 104, 42 U.S.C. § 2000e-5(f)(1) (1976). See note 9 *supra*.

⁷³ See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4(a), 86 Stat. 104 (now codified at 42 U.S.C. § 2000e-5(b) (1976)).

⁷⁴ Section 706(f)(1), 42 U.S.C. § 2000e-5(f)(1) (1976). See S. REP. NO. 415, 92nd Cong., 1st Sess. 17, reprinted in [1971] U.S. CODE CONG. & AD. NEWS 426.

⁷⁵ 432 U.S. at 368.

⁷⁶ *Id.* This conclusion is further supported by Congress' acute awareness of the enormous backlog of cases which the Commission already faced and the limited resources available to the Commission to deal with its caseload. See H.R. REP. NO. 238, 92nd Cong., 2nd Sess. 10, reprinted in [1971] U.S. CODE CONG. & AD. NEWS 2137, 2139, 2147.

⁷⁷ *United States v. Summerlin*, 310 U.S. 414, 416 (1940); *Board of County Comm'rs v. United States*, 308 U.S. 343, 351 (1939); *Guaranty Trust Co. v. United States*, 304 U.S. 126, 132 (1938); *Stanley v. Schwalby*, 147 U.S. 508, 514-15 (1893); *United States v. Beebe*, 127 U.S. 338, 344 (1888); *United States v. Nashville, Chattanooga & St. Louis Ry. Co.*, 118 U.S. 120, 125 (1886).

rights⁷⁸ or to vindicate what are characterized as public rights.⁷⁹ The question whether an EEOC enforcement action constitutes a suit vindicating public rights figured prominently in the Sixth Circuit's decision in *Kimberly-Clark* and in the Fifth Circuit's decision in *Griffin*. This question arose both in the context of injunctive relief, and in the context of back pay awards. Both courts of appeals concluded that the EEOC, at least when it seeks injunctive relief, is acting in its sovereign capacity to further a public interest⁸⁰ and, accordingly, that such injunctive suits are not subject to state statutes of limitations.⁸¹

Regarding the public nature of EEOC suits seeking injunctive relief, the decisions of the Fifth and Sixth Circuits are consistent with the conclusion of the Supreme Court in *Occidental*. The circuit courts in *Griffin* and *Kimberly-Clark*, however, differed as to the public or private nature of the interests served by back pay awards, as opposed to injunctive relief. The Fifth Circuit in *Griffin* held that insofar as an EEOC complaint seeks recovery of back pay, the relief sought is private, not public, in nature and is therefore subject to the state limitations period.⁸² The Sixth Circuit in *Kimberly-Clark*, however, did not distinguish between EEOC suits seeking back pay relief and those seeking injunctive relief. Instead, the *Kimberly-Clark* court held that the EEOC represents the public interest whenever it sues to enforce Title VII, and that, in the absence of congressional intent to apply state statutes of limitations, such restrictions do not apply to the EEOC.⁸³ Thus, only the Sixth Circuit decision in *Kimberly-Clark* is consistent with the Supreme Court's holding in *Occidental* that EEOC enforcement actions seeking the award of back pay are not subject to state statutes of limitations.

⁷⁸ E.g., *United States v. Summerlin*, 310 U.S. 414, 416 (1940) (Florida statute requiring claims against an estate to be filed within eight months from first publication of notice to creditors could not deprive the United States of right to enforce its claim under an assignment against the decedent's estate after the expiration of the eight month period).

⁷⁹ E.g., *Chesapeake & Del. Canal Co. v. United States*, 250 U.S. 123, 126 (1919) (when the United States acts to collect dividends declared on corporate shares owned by it, the suit is an assertion of its rights as a creditor, and since such dividends are public moneys applicable only to public purposes, state statutes of limitations do not apply).

⁸⁰ *Kimberly-Clark*, 511 F.2d at 1359, 10 FEP Cas. at 44; *Griffin*, 511 F.2d at 459, 10 FEP Cas. at 533.

⁸¹ The *Griffin* court noted that, in the context of injunctive relief, "the EEOC is seeking to enjoin practices contrary to public policy as prescribed in the United States Constitution and in enactments of Congress." 511 F.2d at 459, 10 FEP Cas. at 533. The Fifth Circuit therefore concluded that EEOC injunctive actions fall squarely within the rule that when a federal governmental agency is the plaintiff suing to enforce rights belonging to the sovereign, state statutes of limitations are inapplicable. *Id.*

In *Kimberly-Clark*, the Sixth Circuit reasoned that "[i]f its complaint is well-founded, [the EEOC] will be entitled to relief that will protect the interests of past, present, and future employees of Appellee, so that Appellant represents the interests of individuals not among the charging parties." 511 F.2d at 1359, 10 FEP Cas. at 44. The court further reasoned that the "eradication of discrimination by sex and race promotes public interests and transcends private interests. Each step along the road to equal employment takes us closer to the goal of a truly open society, confining individuals only within boundaries set by their own talents and determination." *Id.*

⁸² 511 F.2d at 459, 10 FEP Cas. at 533. See text at notes 62-66 *supra*.

⁸³ 511 F.2d at 1359, 10 FEP Cas. at 44. See text at notes 59-61 *supra*.

Two recent Supreme Court decisions, by emphasizing the public character of back pay relief, support the *Occidental* Court's conclusion that EEOC enforcement actions seeking back pay are also within the sovereign capacity exception to state statutes of limitations. In *Franks v. Bowman Transportation Co.*,⁸⁴ the Supreme Court expressly stated that a suit to enforce Title VII rights involves the "vindication of a major public interest."⁸⁵ The Court in *Franks* reasoned that one of the central purposes of Title VII is to make persons whole for injuries suffered on account of unlawful employment discrimination, and thus to restore the status quo that would have obtained but for the employer's wrongful act.⁸⁶ To effectuate this "make whole" objective, *Franks* observed that § 706(g) of Title VII⁸⁷ vests broad equitable discretion in the federal courts to order such affirmative action, including back pay relief, as may be appropriate.⁸⁸ The Court in *Franks* indicated, however, that while redress for individuals is a central purpose of Title VII, the goal of eliminating all discrimination based on sex, race, religion, or national origin should have the highest priority.⁸⁹ In light of this broader goal, *Franks* ruled that in a discrimination suit, a federal court has not merely the power but also the duty to render a judgment which will as far as possible eliminate the effects of past discrimination as well as bar discrimination in the future.⁹⁰ Back pay relief, while compensating individuals for past injuries, also may deter future discrimination and thereby effectuate the goal of eliminating discrimination in employment.

The Supreme Court's decision in *Albemarle Paper Co. v. Moody*,⁹¹ also supports the proposition that suits seeking back pay awards promote the public interest. The Court in *Albemarle* observed that the primary objective of Title VII was a prophylactic one—to achieve equality of employment opportunities and to remove barriers that operated in the past to favor an identifiable group of employees over other employee groups—and that back pay has an obvious connection with this purpose.⁹² The fact that private parties have a stake in the outcome of the lawsuit, the *Albemarle* Court concluded, does not deprive Title VII litigation of its public character.⁹³

While neither *Albemarle* nor *Franks* dealt specifically with the applicability of state statutes of limitations to EEOC enforcement actions seeking back pay, their emphasis on the important role served by back pay awards in achieving the objectives of Title VII legislation suggests that the majority's opinion in *Occidental* is correct. By not predicated the application of state statutes of limitations on a distinction between petitions for injunctive relief and petitions

⁸⁴ *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976).

⁸⁵ *Id.* at 778 n.40.

⁸⁶ *Id.* at 763.

⁸⁷ 42 U.S.C. § 2000e-5(g) (1976).

⁸⁸ 424 U.S. at 763.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ 422 U.S. 405 (1975).

⁹² *Id.* at 417-18.

⁹³ *Id.* at 418-19.

for back pay, the *Occidental* Court implicitly adopted the view, expressed in *Kimberly-Clark*, *Franks*, and *Albemarle*, that back pay awards vindicate the public interest. These cases indicate that back pay relief is merely one element in the overall scheme provided by Congress in enacting Title VII to facilitate the elimination of past discriminatory practices and the prevention of discrimination in the future. Viewing back pay in this light, it seems unreasonable to hold one element of an EEOC enforcement action subject to state limitations periods, while according the other elements immunity from such limitations. The *Occidental* majority's unified treatment of EEOC suits seeking either back pay or injunctive relief suggests that it has adopted this view.

The Supreme Court in *Occidental*, however, left open the question whether the public nature of an enforcement action brought by the Commission precludes a respondent from raising a defense of laches. While it appears that the inapplicability of state statutes of limitations to EEOC enforcement actions by reason of the public nature of the suit also precludes a laches defense,⁹⁴ the *Occidental* Court expressly noted that when a defendant in a Title VII enforcement action is significantly handicapped in making his defense because of an inordinate EEOC delay in filing the action, the federal courts do not lack the power to grant relief to the prejudiced defendant.⁹⁵ The *Occidental* Court reasoned that the same discretionary power which allows a trial court to restrict or deny back pay relief when a Title VII defendant is in fact prejudiced by a private plaintiff's conduct in a particular case can also be exercised where the EEOC is the plaintiff.⁹⁶ In the Court's opinion, however, the procedural protections of Title VII, including the prompt notice of the possibility of an enforcement suit and the policy of keeping potential defendants informed of the progress of the action during the pendency of EEOC administrative proceedings, ensure against the possibility that a Title VII defendant may be significantly handicapped because of delays on the part of the Commission.⁹⁷ Thus, the Court indicated that the standard to be applied in finding prejudice should be a stringent one. At a minimum, it would appear that to assert a successful laches defense, a defendant must establish an unreasonable delay on the part of the Commission, resulting in serious prejudice to the defendant.⁹⁸ This standard is consistent with the reasoning of *Occidental* that the administrative functions of the Commission merit special deference to the EEOC as a plaintiff, and that, in view of the public nature of the rights the Commission seeks to vindicate, the Commission's noncompliance with state time limitations will not defeat an enforcement action.

⁹⁴ The applicability of state statutes of limitations and the defense of laches have frequently been treated together. See, e.g., *United States v. Summerlin*, 310 U.S. 414, 416 (1940); *Board of County Comm'rs v. United States*, 308 U.S. 343, 351 (1939).

⁹⁵ 432 U.S. at 372-73.

⁹⁶ *Id.* at 373.

⁹⁷ *Id.* at 372-73.

⁹⁸ See *EEOC v. Exchange Security Bank*, 529 F.2d 1214, 1217, 11 FEP Cas. 764, 765 (5th Cir. 1976) (holding that mere delay by the EEOC does not allow defendant to assert successful laches defense; the defendant must show that he has been significantly prejudiced by the delay).

B. *Scope of EEOC Suits:*
EEOC v. Bailey Co.; EEOC v. General Electric Co.

Section 706(b) of Title VII¹ authorizes the Equal Employment Opportunity Commission to investigate charges of employment discrimination filed either by private parties or by members of the Commission itself. Where reasonable cause exists to establish that the charge of discrimination is true, the Commission will attempt to eliminate the alleged unlawful practice through an informal process of conference, conciliation and persuasion. If such efforts fail to produce an acceptable conciliation agreement with the employer, the EEOC is empowered to commence a civil action against the employer under section 706(f)(1) of the Act.²

While investigating a charge of discrimination filed by a private party, the Commission may discover discriminatory practices unrelated to those alleged by the private party. In such situations, if conciliation efforts prove unsuccessful and culminate in the initiation of a civil action by the EEOC, a federal court must determine whether the complaint filed by the Commission may include the additional discriminatory practices uncovered during a reasonable investigation, or whether a member of the Commission must first file a new and separate charge as a condition precedent to the EEOC's initiation of a civil action. The United States Court of Appeals for the Sixth Circuit addressed this procedural issue during the *Survey* year in *EEOC v. Bailey Co.*³ In *Bailey*, a white female employee initially filed a charge alleging sex discrimination in the company's promotion and salary practices.⁴ Although the EEOC found no reasonable cause to believe that the charging employee had been the victim of discrimination, it discovered evidence during its investigation which suggested that the company had refused to hire qualified applicants because of their religion.⁵ After conciliation efforts relating to these additional claims of discrimination—for which no new charge had been filed—proved unsuccessful, the Commission commenced a civil action in federal district court alleging religious discrimination in violation of Title VII.⁶ The

¹ 42 U.S.C. § 2000e-5(b) (1976). Section 706(b) provides in pertinent part: (b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge . . . on such employer . . . and shall make an investigation thereof. . . . If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.

² 42 U.S.C. § 2000e-5(f)(1) (1976). Section 706(f)(1), as amended in 1972, empowers the EEOC to seek compliance by means of a civil suit:

(f)(1) If . . . the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent . . . named in the charge.

³ 563 F.2d 439, 15 FEP Cas. 972 (6th Cir. 1977).

⁴ *Id.* at 442, 15 FEP Cas. at 973.

⁵ *Id.* at 442, 15 FEP Cas. at 974.

⁶ *Id.*

district court dismissed the complaint, finding that the discrimination complained of neither affected nor was directed at the white female employee.⁷ Because the private party was not a "person aggrieved" within the meaning of section 706(b), her original charge of sex discrimination was held insufficient to support the allegations of religious discrimination raised in the Commission's subsequent lawsuit.⁸

On appeal, the Sixth Circuit considered the issue whether a member of the Commission must file a new charge "when instances of discrimination, of a kind other than that raised by a charge filed by an individual party and unrelated to the individual party, come to the EEOC's attention during the course of an investigation of the private party's charge."⁹ The Sixth Circuit stated that the appropriate test is whether "the EEOC's complaint is 'limited to the scope of the EEOC investigation reasonably expected to grow out of the charge of discrimination.'"¹⁰ Applying this test, the court of appeals affirmed the district court's dismissal of the Commission's complaint.¹¹ Since the court concluded that the claim of religious discrimination was completely unrelated to the employee's original charge of sex discrimination,¹² the court held that a member of the Commission must file a separate charge regarding the newly discovered discrimination to ensure an independent application of the enforcement procedures set forth in section 706(b), prior to bringing a civil action pursuant to section 706(f)(1).¹³

⁷ *Id.* at 444, 15 FEP Cas. at 976.

⁸ *Id.*

⁹ *Id.* at 448, 15 FEP Cas. at 979.

¹⁰ *Id.* at 446, 15 FEP Cas. at 978, (quoting *Tipler v. du Pont Co.*, 443 F.2d 125, 131, 3 FEP Cas. 540, 544 (6th Cir. 1971)). This rule was first set forth in *King v. Georgia Power Co.*, 295 F. Supp. 943, 1 FEP Cas. 357 (N.D. Ga. 1968), where the court discussed the proper scope of a complaint filed under Title VII:

The correct rule is that the complaint in the civil action is confined to those issues the original complaint has standing to raise, but may properly encompass any such discrimination like or reasonably related to the allegations of the charge and growing out of such allegations during the pendency of the case before the Commission.

Id. at 947, 1 FEP Cas. at 360. The standard was rephrased in *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466, 2 FEP Cas. 788, 796 (5th Cir. 1970): "the 'scope' of the judicial complaint is limited to the 'scope' of the EEOC investigation which can reasonably be expected grow out of the charge of discrimination." With only slight variations, the rule established in these two Fifth Circuit cases has been adopted in other circuits. *Jenkins v. Blue Cross Mutual Hosp. Ins., Inc.*, 538 F.2d 164, 167, 13 FEP Cas. 52, 55 (7th Cir. 1976); *EEOC v. Hickey-Mitchell Co.*, 372 F. Supp. 1117, 1120-21, 7 FEP Cas. 134, 136 (E.D. Mo. 1973), *aff'd*, 507 F.2d 944, 8 FEP Cas. 1281 (8th Cir. 1974); *EEOC v. Occidental Life Ins. Co.*, 535 F.2d 533, 541, 12 FEP Cas. 1300, 1306 (9th Cir. 1976), *aff'd on other grounds*, 432 U.S. 355 (1977). See *Bailey*, 563 F.2d at 446, 15 FEP Cas. at 977.

¹¹ 563 F.2d at 446, 15 FEP Cas. at 977.

¹² *Id.* at 447, 15 FEP Cas. at 978.

¹³ *Id.* at 448, 15 FEP Cas. at 979. The employee in *Bailey* had amended her original charge to include allegations of racial discrimination against black females. *Id.* at 442, 15 FEP Cas. at 973-74. The EEOC complaint included a claim of racial discrimination, as well as a claim of religious discrimination. *Id.* However, the district court dismissed this portion of the EEOC's complaint because it found that the white

The *Bailey* court's analysis of the relationship between the scope of an individual's original charge of discrimination and the scope of a subsequent judicial complaint filed by the Commission reflects the approach taken by the majority of circuit courts which have considered the issue thus far.¹⁴ By limiting the scope of the civil action to the scope of the investigation reasonably related to the original charge of discrimination, this standard requires a member of the Commission to file a new charge to support a subsequent judicial complaint regarding a discriminatory practice unrelated to the original charge. There are several considerations supporting the majority rule as expressed by the Sixth Circuit in *Bailey*. First, the majority rule reflects the notion that a governmental agency must scrupulously observe its own procedures if it expects to receive deference to its actions from the courts.¹⁵ The requirement that a member of the Commission file a new charge to support a subsequent judicial complaint regarding a discriminatory practice unrelated to the original charge recognizes that the Title VII enforcement procedure is a unified scheme of sequential steps.¹⁶ Second, as the *Bailey* court noted, independent application of the provisions of section 706(b) to each unrelated type of discrimination uncovered ensures more focused individual investigations.¹⁷ Requiring focused though thorough investigations comports with the legislative intent to prevent EEOC investigations from becoming administrative fishing expeditions.¹⁸ In addition, a more focused investigation promotes the congressional intent that the elimination of discriminatory employment practices be accomplished through conciliation wherever possible.¹⁹ Third, by

female employee lacked standing to raise such claims of racial discrimination, and because the EEOC had failed to file a new and separate charge concerning such racial discrimination. *Id.* at 444, 15 FEP Cas. at 976. The Sixth Circuit reversed the district court's dismissal, holding that the white female employee did have standing to raise claims of racial discrimination based on the Supreme Court's decision in *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 208 (1972). *Id.* at 452-54, 15 FEP Cas. 983-85.

¹⁴ Based on their application of the rule set forth in *King v. Georgia Power Co.*, 295 F. Supp. 943, 947, 1 FEP Cas. 357, 360 (N.D. Ga. 1968), regarding the scope of a judicial complaint filed by the Commission, it would appear that the Fifth, Seventh and Eighth Circuits support the position of the Sixth Circuit in *Bailey*. See note 10 *supra*. *Contra*, EEOC v. General Electric Co., 532 F.2d 359, 366, 12 FEP Cas. 21, 25 (4th Cir. 1976); EEOC v. Occidental Life Ins. Co., 535 F.2d 533, 541, 12 FEP Cas. 1300, 1306 (9th Cir. 1976). *aff'd on other grounds*, 432 U.S. 355 (1977).

¹⁵ *United States v. Heffner*, 420 F.2d 809, 811 (4th Cir. 1969). See also EEOC v. General Electric Co., 532 F.2d 359, 379-80, 12 FEP Cas. 21, 37 (4th Cir. 1976) (Widener, J., dissenting); EEOC v. du Pont Co., 373 F. Supp. 1321, 1333, 7 FEP Cas. 759, 768 (D. Del. 1974). *aff'd*, 516 F.2d 1297, 10 FEP Cas. 916 (3d Cir. 1975); EEOC v. National Cash Register Co., 405 F. Supp. 562, 564-67, 14 FEP Cas. 1118, 1119-22 (N.D. Ga. 1975); EEOC v. Firestone Tire & Rubber Co., 366 F. Supp. 273, 278, 6 FEP Cas. 996, 1000 (D. Md. 1973).

¹⁶ EEOC v. du Pont Co., 373 F. Supp. 1321, 1333, 7 FEP Cas. 759, 768 (D. Del. 1974). *aff'd*, 516 F.2d 1297, 10 FEP Cas. 916 (3d Cir. 1975).

¹⁷ *Bailey*, 563 F.2d at 448, 15 FEP Cas. at 979.

¹⁸ *Graniteville Co. v. EEOC*, 438 F.2d 32, 42-43, 3 FEP Cas. 155, 162-63 (4th Cir. 1971); *Parliament House Motor Hotel v. EEOC*, 444 F.2d 1335, 1339, 3 FEP Cas. 663, 665 (5th Cir. 1971).

¹⁹ *Bailey*, 563 F.2d at 449, 15 FEP Cas. at 980.

providing an "integrated multi-step enforcement procedure"²⁰ that includes notice, investigation, reasonable cause determination and conciliation for each separate charge of discrimination prior to the filing of a lawsuit, Congress intended to incorporate due process safeguards into the statutory scheme of Title VII.²¹ The majority rule, by requiring strict compliance with the provisions of section 706(b) including the filing of a new charge by a member of the Commission, guarantees that the defendant employer will receive notice of each charge, as well as an opportunity to present evidence, refute the allegations, and engage in settlement discussions prior to a determination of reasonable cause.²² Finally, the majority rule recognizes that the enforcement procedures of Title VII address four distinct categories of employment discrimination, each of which may require independent application of all of the enforcement provisions of sections 706(b) and 706(f)(1).²³

The minority view is exemplified by *EEOC v. General Electric Co.*,²⁴ a case decided by the Fourth Circuit during the previous *Survey* year. In *General Electric*, the Fourth Circuit held that a charge of racial discrimination filed by two black males was sufficient to support a subsequent civil action brought by the Commission alleging sex discrimination against females in addition to racial discrimination without the filing of a new charge by a Commission member.²⁵ Accordingly, the Fourth Circuit departed from the majority rule which limits an EEOC complaint to the scope of the investigation *reasonably related to the original charge* and expanded the scope of an EEOC complaint to encompass *any discrimination discovered during a reasonable investigation* of a valid charge.²⁶

The Fourth Circuit cited three considerations in support of its decision in *General Electric*. First, it maintained that the defendant employer received sufficient notice of and adequate opportunity to respond to the unrelated allegations of discrimination through the reasonable cause determination and conciliation provisions of section 706(b).²⁷ Second, the court analogized to the established rule in federal civil cases to the effect that where there is no substantial prejudice to the parties, "issues arising out of evidence admitted into the record without objection" are to be considered as having been raised in

²⁰ *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977).

²¹ *Bailey*, 563 F.2d at 450, 15 FEP Cas. at 981.

²² See *EEOC v. General Electric Co.*, 532 F.2d at 378, 12 FEP Cas. at 36 (Widener, J., dissenting). See also *Patterson v. American Tobacco Co.*, 535 F.2d 257, 276, 12 FEP Cas. 314, 329 (4th Cir. 1976) (Widener, J., concurring and dissenting); *EEOC v. Western Elec. Co.*, 382 F. Supp. 787, 796-97, 800-01, 8 FEP Cas. 595, 602-03, 606 (D. Md. 1974).

²³ See *EEOC v. New York Times Broadcasting Serv., Inc.*, 364 F. Supp. 651, 654, 6 FEP Cas. 563, 565-66 (W.D. Tenn. 1973), *aff'd in part and rev'd in part on other grounds*, 542 F.2d 356, 13 FEP Cas. 813 (6th Cir. 1976).

²⁴ 532 F.2d 359, 12 FEP Cas. 21 (4th Cir. 1976).

²⁵ *Id.* at 362, 12 FEP Cas. at 22.

²⁶ *Id.* at 366, 12 FEP Cas. at 25.

²⁷ *Id.* at 364-66, 368-69, 12 FEP Cas. at 24-26, 28. See also *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 372-73 n.32 (1977).

the pleadings.²⁸ As in federal civil litigation, requiring a member of the Commission to file a new charge "would serve no purpose other than the creation of an additional procedural technicality"²⁹ which, in the court's view, would result in needless delay and inexcusable waste of valuable administrative resources.³⁰ Third, the court emphasized that, through the 1972 amendments to Title VII, Congress had authorized the Commission to bring civil actions to vindicate the public interest.³¹ In the Fourth Circuit's view, limiting the scope of the Commission's lawsuit to allegations related to those raised in the private party's original charge, or requiring the filing of a new charge by a member of the Commission, constituted an infringement upon the Commission's ability to represent the broader public interest and an unwarranted interference with the intent of Congress.³²

While the Sixth Circuit's position, as expressed in *Bailey*, has substantial support in other circuits, there is little support outside the Fourth Circuit for the expanded standard advocated in *General Electric*.³³ The basic difficulty with the Fourth Circuit's position is that it encourages an erroneous perception of the enforcement provisions of sections 706(b) and 706(f)(1) as "unrelated activities, rather than as sequential steps in a unified scheme for securing compliance with Title VII."³⁴ It is submitted, therefore, that the standard applied in the Sixth Circuit in *Bailey* represents an approach more consistent with the congressional intent underlying the enforcement mechanism of Title VII. Not only does it ensure that each charge of discrimination, whether filed by an individual or by a member of the Commission, will receive thorough and independent treatment, but it also exemplifies the legislative concern for fair and even-handed treatment of all parties involved in an enforcement proceeding.

V. REMEDIES—ATTORNEY'S FEES

Under the American common law rule, a prevailing party in federal litigation generally cannot recover attorney's fees absent certain exceptions such as when it is shown that the losing party proceeded in bad faith.¹ An express

²⁸ 532 F.2d at 366, 12 FEP Cas. at 26. See FED. R. CIV. P. 15(b); EEOC v. Raymond Metal Prod. Co., 530 F.2d 590, 596, 12 FEP Cas. 38, 41-42 (4th Cir. 1976).

²⁹ Love v. Pullman, 404 U.S. 522, 526-27 (1972), quoted in *General Electric*, 532 F.2d at 366, 12 FEP Cas. at 25.

³⁰ 532 F.2d at 365-66, 12 FEP Cas. at 25-26.

³¹ *Id.* at 373, 12 FEP Cas. at 32. See note 2 *supra*.

³² *Id.*

³³ See note 14 *supra*.

³⁴ EEOC v. du Pont Co., 373 F. Supp. 1321, 1333, 7 FEP Cas. 759, 768 (D. Del. 1974).

¹ *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247-57 (1975). The court of appeals in *Alyeska* had awarded attorney's fees to a prevailing federal litigant based on its equity powers and on the litigant's standing as a "private attorney general." 421 U.S. at 241. The Supreme Court reversed and, in the process, reviewed the development of the American rule against awarding attorney's fees absent certain exceptions. *Id.* at 247-64. In addition to express statutory exceptions, the *Alyeska* Court recognized exceptions where there is an enforceable contract, *id.* at 257; where attorney's fees become part of a fine levied for willful disobedience of a court order, *id.* at

statutory exception to the American rule is section 706(k) of Title VII, which provides federal district courts with discretion to award prevailing parties reasonable attorney's fees in employment discrimination suits.² During the *Survey* year, three significant decisions regarding the award of attorney's fees in Title VII suits were handed down. In *Christiansburg Garment Co. v. EEOC*,³ the Supreme Court considered the award of attorney's fees in the context of a Title VII suit against a private employer. The *Christiansburg* Court set forth the standard to guide district court discretion in awarding attorney's fees to prevailing private defendants under section 706(k).⁴

The remaining two *Survey* year decisions concerned the award of attorney's fees in the context of a Title VII suit against a public employer. The United States Court of Appeals for the District of Columbia Circuit, in *Parker v. Califano*,⁵ approved an award of attorney's fees to a federal employee plaintiff which included compensation for legal services rendered in administrative proceedings conducted prior to a suit in federal court.⁶ And, in *Copeland v. Martinez*,⁷ despite the express language of section 706(k) precluding agencies of the federal government from recovering attorney's fees, the United States District Court for the District of Columbia awarded attorney's fees to a prevailing federal agency under the "bad faith" exception to the American common law rule.⁸ This chapter will discuss the rationale and significance of the holding in each of these cases.

A. Award of Attorney's Fees to Prevailing Private
Defendants: *Christiansburg Garment Co. v. EEOC*

Although section 706(k) of Title VII allows a federal district court to exercise its discretion in awarding reasonable attorney's fees to the prevailing party in an employment discrimination action,⁹ the section does not distinguish between the standard for awards to prevailing plaintiffs and that for prevailing defendants. With regard to prevailing plaintiffs, the Supreme

258; under the "common benefit" rule which spreads the cost of litigation among those who benefit from it, *id.* at 257; in diversity actions where state law permits an award, *id.* at 259 n.31; and where the plaintiff has acted in "bad faith" in bringing suit, *id.* at 258-59.

² 42 U.S.C. § 2000e-5(k) (1976). Section 706(k) states:

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

³ 434 U.S. 412 (1978).

⁴ *Id.* at 421-22. The standard for awarding attorney's fees to prevailing Title VII plaintiffs was previously set forth in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975). See note 10 *infra*.

⁵ 561 F.2d 320, 18 FEP Cas. 391 (D.C. Cir. 1977).

⁶ *Id.* at 333, 18 FEP Cas. at 401.

⁷ 435 F. Supp. 1178, 15 FEP Cas. 453 (D.D.C. 1977).

⁸ *Id.* at 1181, 15 FEP Cas. at 456.

⁹ See note 2 *supra*.

Court has held that attorney's fees should be awarded "unless special circumstances would render such an award unjust."¹⁰ Two reasons are advanced to justify this standard. First, the Title VII plaintiff is considered a "private attorney general" empowered to bring a judicial action to enforce the federal policy against employment discrimination.¹¹ Second, the prevailing plaintiff is deemed entitled to compensation for the costs of legal services because such an award is made against a violator of federal law.¹² Absent special circumstances, therefore, a prevailing plaintiff will be awarded attorney's fees to encourage the vindication of rights granted by federal law, and to penalize those employers who violate such rights.

Prior to the Supreme Court's decision in *Christiansburg*, the circuit courts were in conflict over whether the standard which informed a district court's discretion in awarding attorney's fees to prevailing Title VII plaintiffs was equally applicable to prevailing Title VII defendants.¹³ The United States Court of Appeals for the Sixth Circuit, in *EEOC v. Bailey Co.*,¹⁴ declared that judicial adoption of a double standard for the award of attorney's fees to prevailing plaintiffs and defendants is impermissible.¹⁵ Establishing different standards for prevailing plaintiffs and defendants, the court reasoned, is a matter for Congress and not the courts.¹⁶ Accordingly, the *Bailey* court refused to hold that a more stringent standard was necessary for awarding attorney's fees to prevailing defendants.¹⁷ The Sixth Circuit's decision in *Bailey* expressly rejected¹⁸ the view of the Fourth Circuit in *EEOC v. Christiansburg Garment Co.*,¹⁹ which sanctioned an explicit double standard for awards to prevailing plaintiffs as opposed to prevailing defendants.²⁰ Asserting competing policy considerations found in the legislative history of section 706(k) as justification, the Fourth Circuit ruled that attorney's fees should be denied to a prevailing private Title VII defendant, absent a showing that the plaintiff proceeded in bad faith.²¹

¹⁰ *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). This standard was enunciated for actions brought under Title II of the Civil Rights Act of 1964. The Supreme Court later adopted the *Newman* standard for suits brought under Title VII in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975).

¹¹ *Carrion v. Yeshiva Univ.*, 535 F.2d 722, 727, 13 FEP Cas. 1521, 1525 (2d Cir. 1976); *See Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968).

¹² *Christiansburg*, 434 U.S. at 418.

¹³ *Compare EEOC v. Bailey Co.*, 563 F.2d 439, 456, 15 FEP Cas. 972, 986 (6th Cir. 1977) (no double standard) *with EEOC v. Christiansburg Garment Co.*, 550 F.2d 949, 951, 14 FEP Cas. 262, 263 (4th Cir. 1977); *Carrion v. Yeshiva Univ.*, 535 F.2d 722, 727, 13 FEP Cas. 1521, 1525 (2d Cir. 1976); *United States Steel Corp. v. United States*, 519 F.2d 359, 364, 10 FEP Cas. 1106, 1109 (3d Cir. 1975) (double standard).

¹⁴ 563 F.2d 439, 15 FEP Cas. 972 (6th Cir. 1977).

¹⁵ *Id.* at 456, 15 FEP Cas. at 986.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 455-56, 15 FEP Cas. at 985-86.

¹⁹ 550 F.2d 949, 14 FEP Cas. 262 (4th Cir. 1977).

²⁰ *Id.* at 951, 14 FEP Cas. at 263.

²¹ *Id.* at 951-52, 14 FEP Cas. at 263-64.

In view of the conflict among the circuit courts, the Supreme Court granted certiorari in the Fourth Circuit case.²² The Court approved the utilization of a double standard in *Christiansburg* by declaring that the intent of Congress, as gleaned from the rather sparse and ambiguous legislative history of section 706(k), justifies the use of a more stringent standard for the award of attorney's fees to prevailing defendants.²³ After examining the twofold purpose of section 706(k)—to encourage persons of limited means to bring meritorious suits and to discourage frivolous or groundless actions—the Court reasoned that strong equitable considerations exist in favor of the award of attorney's fees to plaintiffs which are not present for prevailing defendants.²⁴ Accordingly, the Court held that a prevailing private defendant should be awarded attorney's fees only where the district court finds that the plaintiff's claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it became so.²⁵

In upholding the Fourth Circuit's sanction of a double standard in the award of attorney's fees, the Supreme Court nevertheless rejected the Fourth Circuit's ruling that a finding of "bad faith" on the part of the plaintiff is required to justify an award to the prevailing defendant.²⁶ The Court noted that even absent a statute such as section 706(k), bad faith provides grounds for an award under the American common law rule.²⁷ Thus, the Court reasoned, it is apparent that in enacting section 706(k) Congress did not intend to limit the award of attorney's fees to a prevailing defendant to situations where the plaintiff instituted the action in bad faith.²⁸ The Court concluded, therefore, that a district court should award attorney's fees to a prevailing private defendant, even in the absence of bad faith, where the plaintiff's claim was frivolous, unreasonable, or groundless.²⁹

The *Christiansburg* decision is susceptible to criticism on two grounds. First, the Supreme Court has stated that "the circumstances under which attorney's fees are to be awarded and the range of discretion of the courts in making these awards are matters for Congress to determine."³⁰ Given this premise, it is questionable whether the Supreme Court's willingness to carve out a double standard for the award of attorney's fees can be justified by the rather sparse and ambiguous legislative history of section 706(k).³¹ Second, the standard set forth in *Christiansburg* may not reflect sufficient sensitivity to the interests of nondiscriminating employers. In view of the broad investigatory and enforcement powers of the EEOC which are available to prospective private plaintiffs and the prohibitive costs of defending a judicial action, pri-

²² 432 U.S. 905 (1977).

²³ 434 U.S. 412, 420-22 (1978).

²⁴ *Id.* at 418-19.

²⁵ *Id.* at 422.

²⁶ *Id.* at 421.

²⁷ *Id.* at 419.

²⁸ *Id.*

²⁹ *Id.* at 422.

³⁰ *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 261 (1975).

³¹ *Christiansburg*, 434 U.S. at 420.

vate employers—particularly small businessmen³²—are deserving of more protection when they prevail than the *Christiansburg* standard may permit.

The holding in *Christiansburg* nonetheless appears to be a reasonable compromise in view of the congressional intent in enacting section 706(k). In balancing the competing policies of encouraging legitimate claims and discouraging groundless suits, the Court correctly concluded that equity favors a less stringent standard for prevailing plaintiffs. Since Title VII is intended to protect individual employees against discriminatory conduct by employers, it is logical to expect that the interests of prevailing plaintiffs will receive a greater degree of consideration by the courts.

B. Award of Attorney's Fees in the Public Sector

1. Attorney's Fees Attendant to an Administrative Proceeding: *Parker v. Califano*

The 1972 amendments to the Civil Rights Act of 1964 made the provisions of Title VII applicable to employees of the federal government.³³ In contrast to an aggrieved employee in the private sector, whose EEOC complaint triggers the investigation and conciliation efforts of the Commission,³⁴ a federal employee must seek redress of his claim of unlawful discrimination through an elaborate administrative procedure unique to the public sector. As a statutory prerequisite to bringing a judicial action for enforcement, section 717 mandates that a federal employee first must attempt to resolve the claim within his own agency and, if unsuccessful, through an appeal to the Civil Service Commission.³⁵ Because the attorney's fees provisions of section 706(k) are applicable to federal employees by virtue of section 717(d),³⁶ the question arises whether the phrase "[i]n any action or proceeding" of section 706(k)³⁷ should be construed to allow the award of attorney's fees to a federal employee for legal expenses incurred in administrative proceedings related to a judicial action.

The United States Court of Appeals for the District of Columbia Circuit confronted this question in *Parker v. Califano*.³⁸ *Parker* involved allegations by a black female employee that race and sex discrimination existed in the promotional practices of the Office of Education (OE), a division of the United States Department of Health, Education and Welfare (HEW).³⁹ The employing agency investigated the charge, concluded that there was evidence of discrimination, and recommended immediate promotion of the complain-

³² See *Grubbs v. Butz*, 548 F.2d 973, 975 n.13, 13 FEP Cas. 245, 247 n.13 (D.C. Cir. 1976).

³³ Equal Employment Opportunity Act of 1972, Pub. L. No. 88-352, § 11(a), 86 Stat. 111 (codified at 42 U.S.C. § 2000e-16(a) (1976)).

³⁴ Section 706 of Title VII, 42 U.S.C. § 2000e-5 (1976).

³⁵ 42 U.S.C. § 2000e-16(c) (1976).

³⁶ 42 U.S.C. § 2000e-16(d) (1976).

³⁷ See note 2 *supra*.

³⁸ 561 F.2d 320, 18 FEP Cas. 391 (D.C. Cir. 1977).

³⁹ *Id.* at 321, 18 FEP Cas. at 392.

ant.⁴⁰ Despite this recommendation, HEW issued a final determination disregarding the OE report and disapproving any further remedial action.⁴¹ As a result, the employee filed suit in the federal district court.⁴² Two months later, however, HEW reversed its position and concluded that the plaintiff had been discriminated against and should be promoted retroactively.⁴³ The district court approved this settlement and, exercising its discretion under section 706(k), awarded attorney's fees to the prevailing plaintiff for both the administrative and judicial proceedings.⁴⁴

In affirming the district court's decision, the District of Columbia Circuit invoked rules of statutory interpretation to hold that, in a Title VII action brought by a federal employee, attorney's fees awarded pursuant to section 706(k) may include compensation for legal services rendered at both the administrative and the judicial levels.⁴⁵ Noting that Title VII requires a federal employee to utilize the administrative provisions of section 717 prior to seeking a judicial remedy,⁴⁶ the court of appeals construed the "in any action or proceeding under this subchapter" language of section 706(k) to mean that Congress did not intend to restrict the award of attorney's fees solely to judicial actions.⁴⁷ In support of this construction, the court observed that the word "proceeding" in section 706(k) cannot be interpreted to mean a judicial proceeding alone since it is used to refer to administrative proceedings in other parts of Title VII.⁴⁸ The court further noted that section 706(k) refers to "in any action or proceeding," while the attorney's fees provision of Title II simply states "in any action."⁴⁹ Lastly, the court emphasized that the inter-relatedness of the administrative and judicial provisions of section 717⁵⁰ and the legislative history of Title VII⁵¹ support an interpretation of section 706(k) as applying to both administrative and judicial proceedings.

The court of appeals found further support for its interpretation of section 706(k) in the structure and aims of the Title VII provisions governing public employees. Given the quasi-judicial nature of the required administrative proceedings, the court maintained that the services of an attorney are necessary to protect the interests of the claimant⁵² and to ensure efficient

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 322, 18 FEP Cas. at 392.

⁴⁴ *Id.*

⁴⁵ *Id.* at 322-29, 18 FEP Cas. at 393-98.

⁴⁶ *Id.* at 323, 18 FEP Cas. at 393 (quoting *Brown v. GSA*, 425 U.S. 820, 829 (1976)).

⁴⁷ *Id.* at 328-29, 18 FEP Cas. at 397-98.

⁴⁸ *Id.* at 327, 18 FEP Cas. at 396.

⁴⁹ *Id.* at 327-28, 18 FEP Cas. at 396-97.

⁵⁰ *Id.* at 328-29, 18 FEP Cas. at 397-98. *See also* *Brown v. GSA*, 425 U.S. 820, 829-33 (1976).

⁵¹ *See* 561 F.2d at 333-39, 18 FEP Cas. at 401-05 (an appendix to the opinion in which the court sets forth the relevant legislative history).

⁵² *Id.* at 332, 18 FEP Cas. at 400.

handling of any subsequent judicial proceeding.⁵³ More importantly, the court of appeals believed that an award of attorney's fees to a federal employee for both administrative and judicial proceedings promotes the legislative policy of employee enforcement of Title VII rights.⁵⁴

Although *Parker* dealt only with administrative proceedings related to a judicial action,⁵⁵ subsequent decisions have extended its scope to award attorney's fees to a party who prevails solely in administrative proceedings.⁵⁶ In *Smith v. Califano*,⁵⁷ the United States District Court for the District of Columbia held that the Civil Service Commission has the authority to award attorney's fees without court approval to a federal employee who prevails only in administrative proceedings.⁵⁸ Perhaps a more correct interpretation of *Parker* was rendered subsequently in *Noble v. Claytor*,⁵⁹ where the District of Columbia District Court held that a federal employee who succeeds only at the administrative level may petition a court for an award of attorney's fees since the employee remains aggrieved until such an award is made.⁶⁰ In so holding, the *Noble* court emphasized that the award of attorney's fees is committed to the discretion of the district court, not to the Civil Service Commission,⁶¹ and, to that extent, the court disagreed with the earlier decision in *Smith*.

2. Attorney's Fees Awarded to a Prevailing Agency Defendant: *Copeland v. Martinez*

The express language of section 706(k) of Title VII precludes the award of attorney's fees to the EEOC or to the United States.⁶² This statutory exclusion from the protection inherent in the award of attorney's fees may adversely affect federal agencies by denying them access to an effective mechanism for deterring groundless suits and for defraying the expense of defending against such suits. The United States District Court for the District of Columbia confronted this problem in *Copeland v. Martinez*,⁶³ where a black

⁵³ *Id.* at 333, 18 FEP Cas. at 401-02. See also *Johnson v. United States*, 554 F.2d 632, 633, 16 FEP Cas. 1732, 1733 (4th Cir. 1977).

⁵⁴ 561 F.2d at 329-31, 18 FEP Cas. at 398-99.

⁵⁵ *Id.* at 324, 18 FEP Cas. at 894. See *NAACP v. Bell*, 448 F. Supp. 1164, 1166 (D.D.C. 1978).

⁵⁶ *Smith v. Califano*, 446 F. Supp. 530, 533-34, 18 FEP Cas. 657, 659-60 (D.D.C. 1978) (district court approved award of attorney's fees by Civil Service Commission to plaintiff who prevailed solely in administrative proceedings); *Taylor v. Claytor*, 15 Empl. Prac. Dec. ¶ 7854 (D.D.C. 1977) (prevailing party in administrative proceedings allowed to bring judicial action solely to collect attorney's fees). But cf. *Fischer v. United States Dept. of Transp.*, 430 F. Supp. 1349, 1352, 18 FEP Cas. 665, 667 (D. Mass. 1977) (the term "proceeding" in § 706(k) does not include administrative proceedings, but refers only to actions in which the court participates).

⁵⁷ 446 F. Supp. 530, 18 FEP Cas. 657 (D.D.C. 1978).

⁵⁸ *Id.* at 533-34, 18 FEP Cas. at 659-60.

⁵⁹ 448 F. Supp. 1242 (D.D.C. 1978).

⁶⁰ *Id.* at 1247-48.

⁶¹ *Id.* at 1246, 1248.

⁶² See text of § 706(k) at note 2 *supra*.

⁶³ 435 F. Supp. 1178, 15 FEP Cas. 453 (D.D.C. 1977).

female employee brought suit against a federal agency alleging discriminatory promotion practices.⁶⁴ In its findings of fact, the district court observed that the plaintiff's claim not only lacked credible evidence to support a charge of race or sex discrimination, but also that the action was "the culmination of a long series of intentionally vindictive and abusive actions taken to harass her superiors."⁶⁵ Accordingly, the court dismissed the suit with judgment for the defendant, finding that maintenance of the action constituted bad faith and an intentional abuse of the judicial process.⁶⁶

In so holding, the district court recognized that section 706(k) of Title VII bars the award of attorney's fees to a public employer. Nonetheless, the court held that the plaintiff's allegations were sufficiently vexatious, malicious, and groundless as to fall within the common law "bad faith" exception to the American rule.⁶⁷ Examination of the legislative history of section 706(k) led the court to conclude that Congress had expressed no opinion regarding the award of attorney's fees to prevailing government agency defendants under the traditional common law exceptions.⁶⁸ Finding no explicit congressional action to the contrary, the district court awarded reasonable attorney's fees to the prevailing public defendant under the bad faith exception to the American rule.

The district court's award of attorney's fees in *Copeland* appears to be both correct and creative in terms of statutory analysis and the common law. Since statutory authorization is only one of the exceptions to the American rule for the award of attorney's fees⁶⁹ and since the legislative history of section 706(k) is silent as to the availability of other exceptions to the American rule for prevailing agency defendants,⁷⁰ it is reasonable to conclude that utilization of the bad faith exception does not conflict with congressional intent. Further, the use of common law grounds to award attorney's fees to federal employers is consistent with the trend in judicial decisions toward uniformity in applying the provisions of Title VII to the public and private sectors.⁷¹

⁶⁴ *Id.* at 1179, 15 FEP Cas. at 454. Plaintiff, an employee of the federal Office of Human Rights of the Community Services Administration, alleged that she had been denied promotion because of race and sex discrimination, and as reprisal for her previously having filed EEOC complaints. *Id.*

⁶⁵ 435 F. Supp. at 1179-81, 15 FEP Cas. at 454-56. The district court made thirty-one individual findings of fact, including: blacks comprised eighty percent of the staff, *id.* at 1179, 15 FEP Cas. at 454; twice as many females than males were on the staff, with mostly black females being promoted, *id.*; plaintiff used EEOC complaints and threats of complaints to harass her supervisor; plaintiff's witnesses were "completely incredible," *id.* at 1180, 15 FEP Cas. at 455; plaintiff was "intensely biased" against her supervisor, *id.*; and plaintiff's action was an "integral part of [her] vendetta" against her supervisor, *id.* at 1181, 15 FEP Cas. at 456.

⁶⁶ *Id.* at 1181, 15 FEP Cas. at 456.

⁶⁷ *Id.*

⁶⁸ *Id.* at 1181-82 n.3, 15 FEP Cas. at 456 n.3.

⁶⁹ See note 1 *supra*.

⁷⁰ *Copeland*, 435 F. Supp. at 1181-82 n.3, 15 FEP Cas. at 456 n.3; Grubbs v. Butz, 548 F.2d 973, 976 n.15, 13 FEP Cas. 245, 247 n.15 (D.C. Cir. 1976); Burgess v. Hampton, 73 F.R.D. 540, 543-44, 14 FEP Cas. 1646, 1648 (D.D.C. 1976).

⁷¹ E.g., Chandler v. Roudebush, 425 U.S. 840, 848, 864 (1976).

The ruling in *Copeland* is also in accord with the Supreme Court's decision in *Christiansburg*. The *Christiansburg* Court held that the standard for awarding attorney's fees to a prevailing private defendant under section 706(k) is to determine whether the plaintiff's action is frivolous, unreasonable, or groundless.⁷² The Court expressly stated that the plaintiff's conduct need not rise to the level of bad faith for the prevailing private defendant to recover attorney's fees.⁷³ Thus, even if one interprets the exclusion of federal agencies from the provisions of section 706(k) as constituting evidence of a congressional intent to provide public employers with less protection from groundless suits than private employers, the award in *Copeland*, under the more stringent common law bad faith exception, remains consistent with the spirit of any such congressional intent. Lastly, it cannot be seriously argued that Congress intended federal agencies to expend sizeable amounts of their limited financial resources defending against vexatious and malicious actions, with absolutely no opportunity to deter such suits or to recover the costs of defending against such bad faith actions through recovery of attorney's fees. Even the sparse and ambiguous legislative history of section 706(k) expressly states such concerns as the motivation for congressional authorization of the award of attorney's fees.⁷⁴

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⁷² 434 U.S. at 421.

⁷³ *Id.*

⁷⁴ See *Christiansburg*, 434 U.S. at 420; *Carrion v. Yeshiva Univ.*, 535 F.2d 722, 727 & n.8 (2d Cir. 1976).