

TITLE VII: COMPLAINT AND ENFORCEMENT PROCEDURES AND RELIEF AND REMEDIES

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I. INTRODUCTION

The most significant feature of the Title VII¹ enforcement scheme is that it lodges the formal power of adjudication exclusively in the courts,² rather than giving quasi-judicial power to an administrative agency. This is true even though the Equal Employment Opportunity Commission (hereinafter Commission) is firmly connected with one of the two sets of procedures established by the statute for enforcement of its prohibitions against employment discrimination. The procedure involving the Commission is described in section 706, supplemented by the Commission's rules and regulations.³ It begins when a charge is filed with the Commission, either by a person claiming to be aggrieved or by a member of the Commission. The Commission then attempts to eliminate the discriminatory practice by conciliation and persuasion. If this attempt fails the Commission's formal role ends. The next step is a court action, brought not by the Commission but by the aggrieved person. The second system of enforcement also involves a court action, in this case a "pattern or practice" suit instituted by the Attorney General under section 707. In addition, the Attorney General may seek to intervene in an enforcement action commenced by an aggrieved person under section 706 if the Attorney General "certifies that the case is of general public importance."⁴

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¹ 78 Stat. 241, 42 U.S.C. § 2000e (1964) [hereinafter cited by section only].

² Under section 706(f), federal district courts are given jurisdiction over Title VII actions. This eliminates the amount in controversy requirement which would be applicable under the general federal question jurisdiction statute 62 Stat. 930 (1948), as amended, 28 U.S.C. § 1331 (1964). Nothing is said as to whether federal courts may exercise pendent jurisdiction over related state actions (e.g., an action under a state FEP law), although the statute does say that Congress has not occupied the field. Civil Rights Act of 1964, § 1104, 78 Stat. 268, 42 U.S.C. § 2000h-4 (1964). No guidance is given as to whether state courts may exercise jurisdiction over Title VII actions, but it might follow that they can, by analogy to cases holding that state courts may exercise jurisdiction over certain suits for violation of collective bargaining agreements under Section 301(a) of the National Labor Relations Act, *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962); but that they must apply federal substantive law in doing so, *Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95 (1962).

³ The Commission has issued Procedural Regulations, to be included as Chapter XIV to 29 C.F.R. 30 Fed. Reg. 8407 (1965).

⁴ § 706(e).

Although neither system involves quasi-judicial adjudication, the non-judicial branch of government is significantly involved in each. Consequently, it seems somewhat inaccurate to epitomize the Title VII enforcement philosophy as one which involves the enforcement of "individual rights," in contrast to other federal regulatory systems which are said to enforce "public rights." The "private right" approach has been discussed by some writers⁵ and by at least one court.⁶ The present writer's position will be mentioned again in the conclusion, but first there will be a discussion of some of the problems of enforcement procedure and remedies under the statute.

II. PROBLEMS OF ENFORCEMENT PROCEDURE

The statute's enforcement procedures present so many opportunities for comment that it is difficult to choose either the subjects for comment or the depth with which to treat them. A number of problems will be mentioned and a few commented upon at greater length, but the depth of treatment will not be exhaustive nor the breadth encyclopedic. There is no concentrated coverage of Attorney General's pattern or practice suits, although reference to them does appear from time to time.

Many of the detailed problems of statutory interpretation involve section 706, which specifies in great detail the Commission-to-court enforcement process which culminates in an individual claimant's court action. One very interesting problem is whether an individual's court action to enforce his substantive right to be free from employment discrimination, granted by section 703, must follow the procedures set out in section 706. The answer affects this basic question: What is the nature of the system created by Congress to enforce Title VII? What are the respective roles of individuals, the Attorney General, the Commission, and the courts?

A. *Proceedings Before Commission as Prerequisite to Court Action*

A threshold problem of enforcement procedure is whether it is mandatory that a complaint alleging employment discrimination be lodged with the Commission before an individual may commence court proceedings to enforce his rights under the statute.⁷ The answer is

⁵ See e.g., Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 Brooklyn L. Rev. 62 (1964); Comment, 32 U. Chi. L. Rev. 430 (1965). Each of these was published prior to the Supreme Court's decision in *International Union, UAW v. Scofield*, 382 U.S. 205 (1965), discussed *infra* note 108.

⁶ *Hall v. Werthan Bag Corp.*, 61 L.R.R.M. 2458 (M.D. Tenn. 1966).

⁷ Apparently no complaint need be filed with the Commission as a prerequisite to an Attorney General's pattern or practice suit. No mention of such a requirement is made by § 707 and, according to then Senator Humphrey's remarks during Senate debates, no such requirement is imposed. 110 Cong. Rec. 12724 (1964). For discussion of the significance to be accorded Senator Humphrey's statements, see note 9 *infra* and

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unclear. In part, the uncertainty is created by the language of section 706(e), which reads as follows:

If within thirty days after a charge is filed with the Commission or within thirty days after the expiration of any period of reference . . . , the Commission has been unable to obtain voluntary compliance with this title, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge. . . .

The statute does not explicitly say that an individual may not sue unless a complaint has first been lodged with the Commission. Its language is permissive rather than prohibitive: an action may be brought after a charge has been filed with the Commission and voluntary compliance has not been secured. A literal interpretation of the language would not require a complaint to be filed with the Commission first. However, the overall structure of section 706, with its provisions for bringing complaints before the Commission, its narrow time limits, its provisions for state deference, and its rather detailed specification of an unusual enforcement process, may perhaps be taken to indicate that all the procedures required therein are to be followed in connection with any enforcement action brought by an individual. This of course would include a requirement that a charge be filed with the Commission before the individual commences court action.

Considerable doubt is cast upon the foregoing conclusion by the following remarks of then Senator Humphrey, floor manager for the bill in the Senate, during Senate debates: "The individual may proceed [to the courts] in his own right at any time. He may take his complaint to the Commission, he may bypass the Commission, or he may go directly to court."⁸ Other interpretive remarks of Senator Humphrey have been relied on by the Supreme Court to ascertain the meaning of Title II of the Civil Rights Act of 1964,⁹ so his interpretations of the bill while guiding its passage in the Senate are of special import.¹⁰

accompanying text. For a discussion of this problem in the context of a class action, see note 10 *infra*.

⁸ 110 Cong. Rec. 14188 (1964).

⁹ See *Hamm v. City of Rock Hill*, 379 U.S. 306, 311 (1964).

¹⁰ A recent case provides an interesting solution by holding that a Title VII action may be brought on behalf of a class of plaintiffs who had not been named as individuals in complaints before the Commission, but only insofar as a general injunction was sought to prohibit the employer from maintaining discriminatory employment practices. *Hall v. Werthan Bag Corp.*, *supra* note 6. The court noted that the Commission had already attempted to deal with the general practices of segregation allegedly followed by the respondent as a consequence of a complaint filed by an individual who was also a named party in the class action. "[T]herefore," says the court, "the purpose of the

To justify an individual's bypass of the Commission it may be argued that he can sue directly under section 703, which prohibits employment discrimination, and that the enforcement scheme established by section 706, involving conciliatory activities by the Commission, applies only when the complaining individual elects to use the good offices of the Commission to assist him in handling his claim. Until the courts have resolved the problem, prospective litigants should make sure that a timely charge is filed with the Commission before court proceedings are instituted.

B. Timeliness in Filing Charges with Commission

Determining whether a charge is timely may in some circumstances have to await judicial clarification of section 706(d), which provides that a charge made to the Commission

shall be filed within ninety days after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b), such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier. . . .

(Subsection (b) of section 706, referred to in the foregoing quotation, requires an aggrieved person to commence proceedings before certain types of state or local FEP agencies prior to filing a charge with the Federal Commission.) It would appear from the quoted language that the normal ninety-day period may sometimes be reduced, rather than extended, when state or local enforcement proceedings have been commenced by the aggrieved individual. Apparently this would happen when the individual receives notice of the termination of state or local proceedings less than sixty days after the unlawful employment practice occurred. This follows from the requirement that charges be filed with the Federal Commission within thirty days after the individual receives notice of termination of the state or local proceedings. If a complainant finds himself in a situation where the basic ninety-

requirement of resort to the Commission has already been served." *Id.* at 2460. But insofar as the class action sought back pay or reinstatement for members of the class of plaintiffs on whose behalf complaints had not been filed with the Commission, "the purpose of the other administrative remedies requirement" has not been satisfied, "for the Commission has not attempted conciliation in regard to rectifying any alleged injuries which" such claimants claim to have suffered. *Ibid.* There is no indication in the opinion that Senator Humphrey's remarks were called to the court's attention.

day period has not expired but where he seems to be barred from filing charges because the thirty-day period has run, he should make every effort to see that a member of the Commission files a charge, since the statute seems to indicate that a Commissioner's charge may (indeed must) be filed within the ninety-day period, without regard to the commencement of state or local enforcement proceedings.¹¹

Another problem of timeliness under section 706(d) can arise when the individual has commenced state or local enforcement proceedings under section 706(b), but it turns out that the state or local enforcement system was not of the type described in section 706(b). Does this mean that his basic ninety-day period for filing a charge with the Commission may not be extended? While respondents can be expected to argue that the ninety-day period is not extended in such circumstances, such a conclusion probably is not warranted by the language of the statute, which provides for modification of the ninety-day period "in case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b). . . ." The *procedure* set out in subsection (b) is simply the commencement of state or local proceedings. The description therein of kinds of state or local FEP laws is not part of the procedure followed by the person aggrieved, but rather an indication of when the procedure must be followed. If section 706(d) had been intended to impose upon the individual the risk of misinterpreting the nature of the state or local FEP laws, it would seem that the language just quoted would have read "in the case of an unlawful employment practice with respect to which the person aggrieved *is required to follow* the procedure set out in subsection (b). . . ." The suggestion that there may be difficulty in determining which state or local FEP laws come within the definitions of section 706(b) has not been manufactured. The Commission appears to have encountered difficulty in this regard, and has made some decisions of arguable validity.¹²

C. *Timeliness in Commencing Court Actions*

Litigants also face problems of timeliness in commencement of court actions. The most significant practical problem is probably the shortness of the period—thirty days: hardly enough time for a claimant to locate and retain an attorney and for the attorney to com-

¹¹ Section 706(d) states that when the person aggrieved has commenced state or local enforcement proceedings, a charge shall be filed with the Commission "*by the person aggrieved* within two hundred and ten days. . . ." (Emphasis added.) No reference is made in this connection to the filing of a charge by a Commissioner.

¹² The Commission has apparently decided, at least informally, that the criminal remedies provided by certain state FEP laws are not of the type contemplated by §§ 706(b), (c) of Title VII, even though those sections refer only to "criminal proceedings" without specifying a particular type of criminal proceeding.

mence an action, especially an unfamiliar action under a new statute. Besides the shortness of the period there are problems of statutory interpretation concerning when the thirty-day period begins. The pertinent statutory language is set out in the accompanying footnote.¹³ One problem is whether the thirty-day period begins when the Commission gives notice or when notice is received. This perennial problem in notice statutes is so obvious and common that the draftsmen are subject to severe criticism for failing to solve it. No suggestions will be made here for its solution, other than to note that claimants should be sure to file their actions at a time which avoids the problem.

A second problem is whether the thirty days begins to run at the end of the period given to the Commission to act or at the time of notice from the Commission. (For simplicity, the discussion of this problem assumes that the first problem noted above is resolved by saying that the pertinent date is when the Commission *gives* notice.) The problem can be focused on more sharply by considering the following excerpt from the statutory language which, for illustrative purposes, mentions only one of the various periods given to the Commission to act:

If within thirty days after a charge is filed with the Commission . . . , the Commission has been unable to obtain voluntary compliance with this title, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought. . . .¹⁴

The solution is easy if notice is given exactly thirty days after the charge is filed. The thirty-day period for filing suit starts then. But what if the date of the Commission's notice is either less than or more than thirty days after the charge is filed with the Commission? Does "thereafter" refer to the date of the Commission's notice or to the expiration of the thirty-day period which began when the charge was filed with the Commission? From the grammatical structure it would seem to refer to the date of the Commission's notice. However, if the Commission's notice is late, respondents can be expected to argue that they have a right to have enforcement suits commenced within thirty days after the period provided for action by the Commission (thirty days in the example under consideration). Similarly, when the Com-

¹³ "If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) (except that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this title, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent. . . ." § 706(e).

¹⁴ *Ibid.*

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mission gives early notice, claimants can be expected to argue (when necessary) that they have the right to withhold commencement of their actions until thirty days after the period provided for action by the Commission. Until the courts resolve the problem claimants would be well advised to commence their actions at a time which satisfies all of the alternative interpretations whenever possible.

D. *Economic Burdens on Private Litigants; Attorney's Fees*

One of the difficulties of committing an important part of the process of implementing social reform legislation to private individuals is their inability to finance the implementation activities. Maintenance of court actions is the step in the enforcement process which Title VII has committed to individuals. The Commission's conciliation services and other implementation activities are of course financed by the Government. But court action itself can be maintained at government expense only when it is brought by the Attorney General as a pattern or practice suit, and a portion of the expense may be borne by the Government if the Attorney General elects to intervene in the individual's action. Unfortunately, even though the provision for pattern or practice suits has been in effect for one year longer than the other enforcement provisions of Title VII, the first suit of this kind does not appear to have been commenced until the early part of 1966.¹⁵ Besides relieving private individuals of the costs of litigation, such actions may contribute to the implementation process by enforcing the statute in situations where individuals are unwilling to sue, as, for example, when they fear personal reprisal. Pattern or practice actions can also be used to prevent activities which may not be subject to suit by individuals, such as organized campaigns to encourage or coerce noncompliance with the statute.

The statute eases the economic burdens on private persons who conduct enforcement litigation by allowing a court to do the following: (1) Appoint an attorney for the complainant;¹⁶ (2) authorize commencement of the action "without payment of fees, costs, or security";¹⁷ and (3) award an attorney's fee to the complainant if he prevails.¹⁸

The attorney's fee provision may well provide a key to the development of widespread grass roots enforcement activity. If attorneys can expect a reasonable fee they obviously will gain motivation to take

¹⁵ For announcement of the first suit, see 61 Lab. Rel. Rep. 102 (1966). Section 707, which authorizes pattern or practice suits, took immediate effect upon enactment of the Civil Rights Act on July 2, 1964 (§ 716(b)), whereas most of Title VII did not become effective until one year later (§ 716(a)).

¹⁶ § 706(e).

¹⁷ Ibid.

¹⁸ § 706(k).

a Title VII case. Attorneys furnished by civil rights organizations (who probably will conduct the bulk of Title VII litigation, especially in the South)¹⁹ should be able to anticipate that they will be compensated as liberally as other attorneys.

Recent experience with awards of attorney's fees in federal courts tends to indicate that at least some courts will be liberal both in their willingness to make awards and in the amounts of their awards. In cases under the Landrum-Griffin Act²⁰ some awards have been quite liberal.²¹ It is not suggested that the substantive basis for attorney's fee awards under Title VII is the same as under the Landrum-Griffin Act: the statutory provisions are different in phrasing and theory,²² and insofar as the Landrum-Griffin cases go beyond the express authorization of the statute they do so on a theory which is not applicable to all Title VII actions.²³ Perhaps the liberality of some of the courts will extend to Title VII.

The Landrum-Griffin experience is especially pertinent to Title VII in that both statutes deal with employment relations, but cases which award attorney's fees to successful plaintiffs in school desegregation litigation are also pertinent because they parallel the civil rights aspect of Title VII. Perhaps the leading case requiring an award of attorney's fees in a school desegregation case is Judge Sobeloff's decision in *Bell v. School Bd.*²⁴ Unfortunately, plaintiffs seeking attorney's fees have encountered tough sledding in subsequent cases,²⁵ and Judge Sobeloff himself was forced to dissent in *Bradley v. School Bd.* on the ground that an award of a seventy-five dollar attorney's fee was "egregiously inadequate."²⁶ In the light of *Bradley* it is perhaps unwise

¹⁹ Most claims presented to the Commission so far have been the result of efforts of the NAACP Legal Defense and Educational Fund, Inc., whose enforcement campaign has been directed to states in the South.

²⁰ 73 Stat. 519 (1959), 29 U.S.C. § 401 (1964).

²¹ E.g., in one case attorney's fees of \$38,000 were awarded even though the highest verdict which could have been awarded in the case was \$24,921.41. *Highway Truck Drivers v. Cohen*, 54 L.R.R.M. 2194 (E.D. Pa. 1963).

²² The Landrum-Griffin Act § 501(b), 73 Stat. 536 (1959), 29 U.S.C. § 501(b) (1964), states that in certain actions by a union member to recover a fund belonging to the union, "the trial judge may allot a reasonable part of the recovery . . . to pay the fees of counsel prosecuting the suit at the instance of the member. . . ." (Some courts have gone beyond this authorization. See cases cited note 23 infra.) Section 706(k) of Title VII provides that 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. . . ." Section 431(c) of the Landrum-Griffin Act authorizes an award of attorney's fees to a union member-plaintiff in an action to compel disclosure of certain information.

²³ Compare, e.g., *Bakery Workers v. Ratner*, 335 F.2d 691 (D.C. Cir. 1964), with *McCraw v. United Ass'n of Journeymen and Apprentices of the Plumbing Industry*, 341 F.2d 705 (6th Cir. 1965).

²⁴ 321 F.2d 494 (4th Cir. 1963), 77 Harv. L. Rev. 1135 (1964).

²⁵ See, e.g., *Rogers v. Paul*, 345 F.2d 117 (8th Cir. 1965); *Brown v. County School Bd.*, 234 F. Supp. 808 (W.D. Va. 1964).

²⁶ 345 F.2d 310, 324 (4th Cir. 1965) (dissenting opinion).

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to place much emphasis on cases which indicate that attorney's fees should be awarded under the *Bell* doctrine.²⁷ The tendency of the later cases is to limit awards to situations described (perhaps unfortunately) in *Bell* in connection with its holding that the trial court erred in failing to award attorney's fees. The opinion noted the defendants'

long continued pattern of evasion and obstruction which included not only the defendants' unyielding refusal to take any initiative . . . , but their interposing a variety of administrative obstacles to thwart the valid wishes of the plaintiffs for a desegregated education.²⁸

A number of federal statutes provide for the award of attorney's fees in civil cases.²⁹ Heavy reliance on the form of expression used in the statutes has caused one annotator to formulate principles of statutory interpretation which would lead to undesirable results if applied to Title VII.³⁰ The annotation in question divides the federal attorney's fee statutes into two classes. It concludes that one class of statutes, those which say that attorney's fees "shall" be awarded to the plaintiff if he prevails, seek "to encourage the bringing of suits or to discourage defenses against such actions."³¹ The second class of statutes, those which say the court "may" award an attorney's fee to the prevailing party, whether plaintiff or defendant, "seem to manifest a congressional intent to discourage the bringing of unmeritorious suits or the raising of unmeritorious defenses."³² No authority is cited for this latter proposition.

²⁷ E.g., *Buckner v. County School Bd.*, 332 F.2d 452 (4th Cir. 1964) (Sobeloff, C.J.); *Pettaway v. County School Bd.* 230 F. Supp. 480, 487 (E.D. Va. 1964).

²⁸ *Bell v. School Bd.*, supra note 24, at 500. Note that the quoted language can be used very easily to justify awards of attorney's fees in Title VII cases, where patterns of evasion, obstruction and refusal will frequently exist.

²⁹ Such statutes were collected and discussed in Annot., 8 L. Ed. 2d 894, 915 (1963). Pertinent statutes not mentioned include Landrum-Griffin Act § 501(b), 73 Stat. 536 (1959), 29 U.S.C. § 501(b) (1964).

³⁰ Annot., supra note 29. The annotation was published before Title VII was enacted, and the discussion here is directed to the principles it states, not to its analysis of Title VII.

³¹ *Ibid.*, citing *Hutchinson v. William C. Barry, Inc.*, 50 F. Supp. 292 (D. Mass. 1943). The annotation lists the following statutory sections as falling into this class: 42 Stat. 165 (1921), 7 U.S.C. § 210(f) (1964) (Packers and Stockyards Act); 46 Stat. 534 (1930), as amended, 7 U.S.C. § 499g(b) (1964) (Perishable Agricultural Commodities Act); 38 Stat. 731 (1914), 15 U.S.C. § 15 (1964) (anti-trust cases); 52 Stat. 1062 (1938), as amended, 29 U.S.C. § 206 (1964) (Fair Labor Standards Act); 44 Stat. 578 (1926), as amended, 45 U.S.C. § 153(p) (1964) (Railway Labor Act); 49 Stat. 2014 (1936), as amended, 46 U.S.C. § 1228 (1964) (Merchant Marine Act); 48 Stat. 1072, 47 U.S.C. §§ 206, 207 (1964) (Communications Act of 1934); 24 Stat. 382 (1887), 54 Stat. 940 (1940), as amended, 49 U.S.C. §§ 8, 16(c), 908(b), (d) (1964) (Interstate Commerce Act).

³² Annot., supra note 29. The annotation lists the following statutory sections as falling into this class: 48 Stat. 82 (1933), 15 U.S.C. § 77k(e) (1964) (Securities Act of

Even though the Title VII provision is of the "may be awarded to the prevailing party" variety, it should be interpreted to encourage suits by complainants, not to discourage them. Attorney's fees should be awarded to successful complainants routinely, almost as a matter of course. Such awards should not be frustrated by the fact that certain other statutes say attorney's fees "shall" be awarded to a successful plaintiff. Of the eight statutory systems cited by the annotation as falling into the "shall" class, four involve suits against respondents who have not complied with prior administrative orders directed against them.³³ Two have provisions for a penal award of attorney's fees in connection with an award of treble³⁴ or double³⁵ damages. Both situations justify a mandatory award of attorney's fees to the successful complainant in all cases. In one, the respondent has already been ordered to do something by administrative decision. In the other, he is guilty of such heinous misconduct as to justify double or treble damages. Neither is applicable to Title VII actions. The purpose of an award of attorney's fees under Title VII is to make it feasible for the complainant to enforce his rights, not to penalize the respondent.³⁶

While a preliminary review of the statutes which say attorney's fees "may" be awarded does not permit a blanket statement that they have always been applied to favor claimants, it has, for example, been stated that under the Copyright Act "counsel fees are more frequently awarded in favor of successful plaintiffs."³⁷ In addition to a discretionary award of attorney's fees, the Copyright Act provides for a mandatory award of "full costs."³⁸ It would therefore appear that the

1933); 53 Stat. 1176 (1933), 15 U.S.C. § 77www(a) (1964) (Trusts Indenture Act); 48 Stat. 889, 897 (1934), 15 U.S.C. §§ 78i(e), r(a) (1964) (Securities Exchange Act); 61 Stat. 665 (1947), 17 U.S.C. § 116 (1964) (Copyright Act); 66 Stat. 813 (1952), 35 U.S.C. § 285 (1964) (Patent Act. An earlier, somewhat different, version is found in 29 Stat. 694 (1897), as amended, 35 U.S.C. § 70 (1964)); 72 Stat. 1214 (1958), 38 U.S.C. § 1822(b) (1964) (Servicemen's Readjustment Act). The annotation would presumably include § 501(b) of the Landrum-Griffin Act, 73 Stat. 536 (1959), 29 U.S.C. § 501(b) (1964), in this category. Section 431(c) of the Landrum-Griffin Act, 73 Stat. 524 (1959), 29 U.S.C. § 431(c) (1964), would seem to fall somewhere in between the annotator's two classes.

³³ Railway Labor Act, Packers & Stockyards Act, and Perishable Agricultural Commodities Act. The fourth, the Interstate Commerce Act, has certain provisions which fall into this category, 24 Stat. 384 (1897), 54 Stat. 940 (1940), as amended, 49 U.S.C. §§ 16(2), 908(e) (1964), and others which do not, 24 Stat. 382 (1887), 54 Stat. 940 (1940), as amended, 49 U.S.C. §§ 8, 908(b) (1964).

³⁴ Act of June 29, 1940, 54 Stat. 690.

³⁵ Fair Labor Standards Act, 52 Stat. 1069 (1938), 29 U.S.C. § 216(b) (1964).

³⁶ This point is elaborated upon *infra*, p. 506.

³⁷ Kaplan & Brown, *Cases on Copyright, Unfair Competition, and Other Topics Bearing on the Protection of Literary, Musical and Artistic Works* 408 (1960). The awards are authorized by 61 Stat. 665 (1947), 17 U.S.C. § 116 (1964).

³⁸ 61 Stat. 665 (1947), 17 U.S.C. § 116 (1964). The costs provisions apparently are intended to be applied in favor of the prevailing party. For a discussion of costs provisions, see *Nimmers*, Copyright § 16, at 701. The statutory provision takes the

attorney's fee provisions were intended merely to supplement the costs provisions in appropriate cases, a conclusion which is reinforced by the fact that the attorney's fee and costs provisions are in the same section of the statute. Attorney's fees under Title VII should therefore be awarded more liberally than under the Copyright Act, since under Title VII they do not merely supplement a mandatory costs relief provision.

The Patent Act (another "may" statute) if anything confirms the proposition that Title VII attorney's fees should be liberally awarded, since the Patent Act expressly limits the award of attorney fees to the prevailing party to "exceptional cases."³⁹ The Securities Act limits the award to cases where "the court believes the suit or defense to have been without merit. . . ."⁴⁰ The Servicemen's Readjustment Act may not be distinguished on such grounds, but it is unusual in that under certain circumstances the veteran's action may be prosecuted by "the Attorney General, in the name of the Government of the United States . . . in which event one-third of any recovery in said action shall be paid over to the veteran and two-thirds thereof shall be paid into the Treasury of the United States."⁴¹

All of the federal attorney's fee statutes have not been discussed, but a search for the meaning of the Title VII provisions in the language and application of other statutes is to a great extent bound to be sterile and unprofitable. A better guide is the underlying policy of Title VII. Its attorney's fee provisions should be interpreted in a way which will further Title VII's purpose, which is to prevent employment discrimination which significantly affects commerce. The statute creates an enforcement scheme which requires individual complainants to conduct their own enforcement litigation, in contrast to other federal statutes providing remedies to employees and would-be employees.⁴² If the

award of costs "out of the operation of Rule 54(d) of the Federal Rules of Civil Procedure which permits judicial discretion in the awarding of costs." Howell, Copyright Law 178 (rev. ed. 1962).

³⁹ 66 Stat. 813 (1952), 35 U.S.C. § 285 (1964).

⁴⁰ 48 Stat. 82 (1933), 15 U.S.C. § 77k(g) (1964). But several other statutory provisions in the area of securities regulation may not be so distinguished. Cf. 48 Stat. 889, 897 (1934), 15 U.S.C. §§ 78i(e), r(a) (1964). Another provision, 53 Stat. 1176 (1939), 15 U.S.C. § 77www(a) (1964), says the discretionary award of attorney's fees should be made with "due regard to the merits and good faith of the suit or defense."

⁴¹ 72 Stat. 1214 (1958), 38 U.S.C. § 1822(b) (1964).

⁴² E.g., under the NLRA, the NLRB can bear practically all the cost of enforcement, from investigation through administrative adjudication to court enforcement proceedings; the veterans' re-employment statutes are administered in part analogously to Title VII in that the Government (through the Department of Labor) represents the veteran in an effort to settle his claim, but if adjudication is necessary the U.S. Attorney can represent the veteran in his court enforcement action; under the wage-hour laws the Department of Labor not only represents the claimant in settlement negotiations, but the Secretary of Labor can initiate court enforcement action; under the Landrum-Griffin Act, 73 Stat. 519 (1959) (codified in scattered sections of 29 U.S.C.), the Secretary of

system of private enforcement is to be viable there must be a source of funds to pay the complainant's attorney's fee, and an attorney who is asked to take a Title VII case should be able to anticipate that a fee will be awarded almost as a matter of course if the complainant is successful. The system of individual enforcement was the result of a conscious, explicit rejection of a system of administrative enforcement,⁴³ and liberal awards of attorney's fees to successful complainants are necessary if the system is to work as intended.

The traditional American policy against awards of attorney's fees⁴⁴ does not require a restrictive application of the Title VII provisions. On the contrary, since the traditional policy is so ingrained and widely known, the statute can only be regarded as a deliberate departure from the traditional policy. Hence, as is said of remedial statutes generally, the attorney's fee provision should be liberally construed and applied.

The statute's provision for awards of attorney's fees to the prevailing "party" does not mean they should be made to prevailing respondents as liberally as to prevailing claimants. One of the primary purposes of Title VII is to benefit minority groups (for the overall betterment of all persons to be sure), and Congress was fully apprised of the economically depressed condition of most minority groups when Title VII was under consideration.⁴⁵ Persons of low income obviously cannot afford to pay attorneys, and it would seem that the attorney's fee provisions are a reflection of Congress's concern with the low income of minority groups. The statutory provisions authorizing waiver of claimants' costs and fees⁴⁶ corroborates the assertion that Congress was concerned with easing the economic burdens which otherwise would be borne by the litigating claimant. Statements in the legislative history directly support the argument that it is the claimant who is to be benefited by the attorney's fee provisions.⁴⁷ Awards to respondents should be limited to unusual situations, such as defense against clearly fraudulent claims.

Labor conducts court actions to enforce some of the statute's provisions, the individual does so with other provisions, and both the Secretary and the individual can enforce still other provisions.

⁴³ This is shown by the fact that provisions for administrative adjudication were included in and then dropped from the bill during its legislative history. See e.g., Vaas, *Title VII: Legislative History*, *supra* p. 431.

⁴⁴ See, e.g., *Ritter v. Ritter*, 381 Ill. 549, 46 N.E.2d 41 (1943).

⁴⁵ See, e.g., Hearings on H.R. 8998 & 8999 Before the General Subcommittee on Labor of the House Committee on Education and Labor, 89th Cong., 1st Sess. 133, 139 (1965).

⁴⁶ § 706(e).

⁴⁷ Senator Humphrey stated during Senate debates that the attorney's fee provision is designed "to make it easier for a plaintiff of limited means to bring a meritorious suit." 110 Cong. Rec. 12724 (1964). For comments on the significance to be attached to Senator Humphrey's statements, see note 9 *supra* and accompanying text.

E. Jury Trial

The statute says nothing about jury trial in ordinary enforcement litigation, although it does cover the subject in connection with contempt proceedings.⁴⁸ The absence of express statutory guidance throws the problem into the maze of decisions dealing with the right to jury trial in federal courts. The issues are too complex to explore completely in this article, but a few preliminary thoughts will be presented in the hope that they may assist in unraveling this difficult problem. The Constitution's reference in article III, section 2, to the existence of judicial power "in Law and Equity" has produced comments on the extent of Congress's power to extend or contract the right to jury trial in areas within the traditional cognizance of law and equity,⁴⁹ but most discussion of the constitutional aspects of the question centers around the seventh amendment, which guarantees the right to jury trial in most common-law actions.

One approach to the problem involves comparison of the newly created statutory right with traditional common-law rights. The right to jury trial is said to be preserved when the new statutory right is found to be essentially "legal" in nature. The solution is thus sought by an inquiry into the "nature of the right." Applying this approach to Title VII, one might conclude that there is no right to jury trial, since the claimant's right to be free from employment discrimination was not a right found at common law, nor is it analogous to a common-law right. As will be pointed out below, in the writer's opinion this is probably neither the correct approach to use nor the correct answer, although litigants who want a jury trial and who face a judicial intention to use this approach should look further into the common-law actions to see if they can find a parallel.

*NLRB v. Jones & Laughlin Steel Corp.*⁵⁰ should not be interpreted to hold that no constitutional right to jury trial exists under Title VII. The case held that the seventh amendment did not require a jury trial in an unfair labor practice proceeding under the National Labor Relations Act. In rejecting the argument that a decision of the NLRB ordering reinstatement of and payment of back wages to employees who had been discriminatorily discharged was invalid because it amounted to a money judgment and hence was triable to a jury as a common law action, the Court said that the case

⁴⁸ The Civil Rights Act of 1964, § 1101, 78 Stat. 268, 42 U.S.C. § 2000h (1964), expressly grants a right to jury trial in criminal contempt proceedings and preserves the right of the court to conduct civil contempt proceedings without a jury "to secure compliance with or to prevent obstruction of, as distinguished from punishment for violations of, any lawful writ, process, order, rule, decree, or command of the court. . . ."

⁴⁹ See, e.g., 5 Moore, Federal Practice ¶¶ 38.08[1], .11[4] (2d ed. 1964).

⁵⁰ 301 U.S. 1 (1937).

is not a suit at common law or in the nature of such a suit. It is a statutory proceeding. Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement. The contention under the Seventh Amendment is without merit.⁵¹

It is submitted that the Court held there was no right to jury trial because the proceedings were before an administrative tribunal rather than a court. The underlying policy is the need to uphold the process of administrative adjudication and to allow administrative tribunals to issue orders for payment of money. When the adjudicative decision is to be rendered by a court, as it is under Title VII, *Jones & Laughlin* would have no applicability.

In the writer's opinion the solution to the problem of jury trial in court litigation of newly created statutory rights is to be found in an examination of the nature of the *proceedings* rather than the nature of the *right*, and it is submitted that this is precisely the approach taken by the Supreme Court in *Jones & Laughlin*. In that case the proceedings were not of the common-law type; they were not even judicial proceedings, but quasi-judicial. When the proceedings are judicial the question is whether they are equitable or legal in nature. If legal there is a right to jury trial. If equitable there is not. The main clue to the nature of the proceedings is the character of the remedy which is sought. Thus, in a Title VII case, if the complainant seeks back pay there would be a right of jury trial, since the remedy is in the nature of a common-law money judgment. If he seeks an order that he be employed or reinstated in his job, there is no right of jury trial because the remedy is equitable, an injunction.

The difficulty with the foregoing analysis is that complainants in many Title VII cases will seek both legal and equitable remedies, *e.g.*, reinstatement plus back pay. Decisions on equitable matters, such as whether an injunction will issue, and if so the terms of the injunction, of course cannot be made by a jury. The question is whether the judge in his resolution of the equitable issues may also resolve the legal issues. Support for such a practice will undoubtedly be sought in the tradition whereby courts of equity award damages as an incident to the award of equitable relief, *e.g.*, damages for delay in performance of a contract as an incident to specific performance of the contract. Whether the constitutional right to jury trial may be lost as to legal issues where they are characterized as incidental to equitable issues is open to conjecture.⁵² Some courts will be inclined to say that it can be,

⁵¹ *Id.* at 48-49.

⁵² Compare *id.* at 48, with *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 470 (1962).

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and may characterize a claimant's action for hiring, reinstatement, or other injunctive relief as "equitable," and hold that back wages may be awarded by the judge as an incident to his award of equitable relief. An argument in support of this approach is suggested below.⁵³

Claimants' advocates will of course recognize that a right to a jury trial may be no boon to a claimant, since both parties may insist upon jury trial when the issues are triable to a jury.⁵⁴ To put it mildly, many claimants will feel that southern jurors will be more inclined to favor defendants than claimants who belong to minority groups. As a matter of tactics, claimants' attorneys may therefore wish to frame their complaints to make it appear that they seek primarily injunctive relief, with damages as an incident thereto.⁵⁵

This writer believes that the law requires an approach which preserves the right to jury trial on legal issues when the case has both legal and equitable aspects. Characterizing a proceeding as "equitable" to justify an "incidental" award of damages may have been valid when proceedings at law and in equity were conducted in separate courts or on separate sides of the court, since it eliminated the need to conduct two lawsuits.⁵⁶ But since the merger of law and equity by the Federal Rules of Civil Procedure, this situation no longer obtains in the federal courts. To illustrate, in a Title VII action for hiring and unpaid wages, the judge should decide whether an injunction should issue requiring the hiring of the claimant, and the jury should decide whether damages should be awarded and if so their amount. This does not completely solve the problem because some issues will be common to the legal and equitable aspects of the case. Thus, neither damages nor an injunction can be awarded unless the factual issue of discrimination is resolved in favor of the claimant. Such a common issue should be tried by the jury to protect the right to jury trial.

This approach may be illustrated by a recent Fourth Circuit deci-

⁵³ See p. 514 *infra*.

⁵⁴ E.g., *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962). See Fed. R. Civ. P. 38(b).

⁵⁵ *Dairy Queen, Inc. v. Wood*, *supra* note 54, discussed in text and in note 56 *infra*, would seem to indicate that such an effort will be likely to fail as a method of eliminating the right to jury trial.

⁵⁶ *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), indicates that under the merged law and equity procedure of the Federal Rules, jury trial on questions which affect the legal issues is feasible (and required) to a greater extent than under the practice prior to merger. "Thus, the justification for equity's deciding legal issues once it obtains jurisdiction, and refusing to dismiss a case, merely because subsequently a legal remedy becomes available, must be re-evaluated in the light of the liberal joinder provisions of the Federal Rules which allow legal and equitable causes to be brought and resolved in one civil action." *Id.* at 509. Compare *Dairy Queen, Inc. v. Wood*, *supra* note 54, at 471, where it was said (in discussing *Scott v. Neely*, 140 U.S. 106 (1891)) that even the convenience of one trial did not justify joinder of legal and equitable claims under federal practice prior to the merger of law and equity.

sion.⁵⁷ A union member sued the union under the Landrum-Griffin Act for damages and restoration to membership. The court held that the union member had a right to jury trial on the issues connected with the claim for damages, including factual issues which were common to both the legal and equitable aspects of the case. (The injunction for restoration to membership was equitable, damages were legal.) The court said that, "Where issues underlying equitable and legal causes of action have been exactly the same, the Supreme Court has been careful to preserve a litigant's right to jury trial on the factual issues, even where a stronger basis was presented for equitable than for legal relief."⁵⁸ In so holding the Fourth Circuit expressly declined to follow a contrary decision of the Sixth Circuit.⁵⁹ The Fourth Circuit's holding seems clearly preferable in view of the Supreme Court's *Dairy Queen, Inc. v. Wood* decision, in which it was made explicitly clear that the right to jury trial on legal issues is not to be lost except "under the most imperative circumstances" by the court's prior resolution of the equitable issues involved in the case.⁶⁰

Most of the cases dealing with trial of federal statutory actions recognize that equitable issues are to be tried by the court and legal issues by the jury. Thus, under the Fair Labor Standards Act an action by an employee for back wages carries a right to jury trial,⁶¹ while a suit by the Secretary of Labor to enjoin the employer from refusing to pay back wages is equitable and triable by the judge.⁶² Similarly, when a veteran seeks to enforce his re-employment rights there is a right to jury trial when he seeks damages for lost wages,⁶³ but not if he seeks a court order requiring the defendant to re-employ him.⁶⁴ Professor Moore has collected many cases under various statutes illustrating the point.⁶⁵ Decisions allowing prior trial of equitable issues and consequent elimination of the right to jury trial on common legal issues should not be followed in view of *Dairy Queen*.

⁵⁷ *Simmons v. Avisco, Local 713, Textile Workers*, 350 F.2d 1012 (4th Cir. 1965).

⁵⁸ *Id.* at 1018.

⁵⁹ *McCraw v. United Ass'n of Journeymen and Apprentices of the Plumbing Industry*, *supra* note 23.

⁶⁰ *Dairy Queen, Inc. v. Wood*, *supra* note 54, at 472. See also *Beacon Theatres, Inc. v. Westover*, *supra* note 56.

⁶¹ *Olearchick v. American Steel Foundries*, 73 F. Supp. 273 (W.D. Pa. 1947).

⁶² *Wirtz v. Jones*, 340 F.2d 901 (5th Cir. 1965). The distinction between an action for back wages and a suit to enjoin continued refusal to pay back wages is of course a thin one. Title VII claimants who wish to avoid giving the respondent a right to jury trial may wish to frame their complaints to seek such an injunction. The practice has express statutory authorization under the Fair Labor Standards Act, 52 Stat. 1069 (1938), 29 U.S.C. § 217 (1964), which it lacks under Title VII.

⁶³ *Steffen v. Farmers Elevator Serv. Co.*, 109 F. Supp. 16 (N.D. Iowa 1952).

⁶⁴ *Strelitz v. Surrey Classics, Inc.*, 7 F.R.D. 101 (S.D.N.Y. 1946).

⁶⁵ 5 Moore, Federal Practice ¶ 38.11[7] (2d ed. 1964).

F. *Class Actions*

Can a class action be brought on behalf of a group of plaintiffs? If so it would seem to fall within the so-called "spurious" class suit provisions of Rule 23(a)(3) of the Federal Rules of Civil Procedure. If proposals of the Advisory Committee on Civil Rules of the Judicial Conference of the United States for revision of the federal class action rule are adopted, they may significantly affect the answer to this question.⁶⁶ One difficulty with permitting class actions is the likelihood that many questions will arise in the course of suit which affect only one member of the class. This was part of the rationale of a New York job discrimination case which held that an action on behalf of a class of Negroes could not be maintained.⁶⁷ In this connection the court noted that the various alleged wrongs were subject to separate defenses against various members of the suing class. Another reason for the decision was the fact that the various members of the suing class should each have been allowed to exercise his right to select the forum in which to pursue his remedy. New York law allowed claimants to seek relief not only in a civil damage action but also before the New York Commission for Human Rights. This second reason could apply in a federal action if the discrimination in question were covered by a state or local FEP law. A similar application could be made if the matter were subject to other types of federal administrative action, such as proceedings before the NLRB or before various agencies which administer the programs prohibiting discrimination under federal contracts.⁶⁸

If claimants desire to bring an action on behalf of a class of plaintiffs they would do well to make it clear in the pleadings and at every possible stage of the litigation that the only remedy sought on behalf of members of the class who were not joined as individual plaintiffs is an order prohibiting future employment discrimination against them. No order of hiring, reinstatement, back pay, or the like should be sought on their behalf, since most of the questions peculiar to individual situations would become pertinent only if such affirmative remedies were sought on their behalf. Such a technique would of course not

⁶⁶ The Supreme Court adopted revisions of the class suit rules on February 28, 1966, to take effect on July 1, 1966. 249 F. Supp. 145, 150-51.

⁶⁷ *Gaynor v. Rockefeller*, 15 N.Y.2d 120, 256 N.Y.S.2d 584, 204 N.E.2d 627 (1965).

⁶⁸ In *Hall v. Werthan Bag Corp.*, 61 L.R.R.M. 2458 (M.D. Tenn. 1966), the court permitted a class action to be brought under Title VII on behalf of Negro employees for the purpose of enjoining future discrimination, but refused to allow the class action to resolve specific complaints of discrimination against particular claimants. However, this decision is to a certain extent inconsistent with the suggestion that the availability of an administrative remedy which might have been pursued by members of the class of plaintiffs will render a class action inappropriate. For a discussion of the limited extent to which the case permitted the class action to be maintained, see note 10 *supra*.

affect the "other administrative relief" argument suggested by the New York case discussed in the preceding paragraph.

G. Joinder of Defendants

As the discussion of remedies elsewhere in this article makes clear,⁶⁹ it is likely that an individual claimant may obtain a remedy which adversely affects the rights of persons other than the party against whom a claim is primarily directed. Must such third persons be joined as parties to the action? For example, if a Negro seeks a job given to a white person as a result of a discriminatory refusal to hire the Negro, must the white person be joined as a party to the enforcement action in addition to the employer? The gloss on Rule 19, Federal Rules of Civil Procedure, is of course pertinent if the action is in a federal court.⁷⁰ One can make strong arguments that employees whose rights would be affected by a Title VII action not only must be joined, but also that they are "indispensable" rather than "necessary" parties. This might follow, for example, from the holding that in an action by the State of Texas against the Interstate Commerce Commission to have the ICC's rulings on wages declared unconstitutional, employees who were operating under the rulings were indispensable parties.⁷¹ It is difficult to overcome the argument that the interests of an employee whose job may be given to another as a result of a lawsuit are so significantly affected by the litigation that his joinder in the action ought to be required as a necessary, if not indispensable, step. (A related question is whether such employees should be permitted to intervene.) Respondents in many parts of the country can certainly be expected to argue that such employees should be made parties, since it transforms the posture of the action from *individual v. employer* to *individual v. individual*, often *Negro individual v. white individual*, both competing for the same job.

Some federal statutes involving court actions to secure employment rights have attempted to solve the joinder problem. For example, Section 9(d) of the Universal Military Training and Service Act provides that in a veteran's action to obtain his re-employment rights in a federal district court "only the employer shall be deemed a necessary party respondent to any such action."⁷² Title VII says nothing about the problem, so it will have to be resolved by the courts.

If joinder of other employees does occur, claimants may wish to support the contention that remedies may be awarded to alleviate the

⁶⁹ Text *infra* p. 516.

⁷⁰ Subsequent to the writing of this article, Rule 19 was amended, *supra* note 66, which may render some of the textual discussion irrelevant.

⁷¹ *Texas v. ICC*, 258 U.S. 158 (1921).

⁷² 62 Stat. 614 (1948), 50 U.S.C. § 459(d) (1964).

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economic burdens placed on white employees by a Title VII remedy.⁷³ The availability of remedies for white employees may favorably affect the posture of the case from the claimant's standpoint, since it would no longer be a pure case of *individual v. individual*. Claimants should consider this possibility before they urge that such remedies may not be afforded, a position they might instinctively tend to take because affording such special remedies to whites seems itself to be discriminatory.

III. REMEDIES

Title VII sets forth broad provisions for remedies. In an individual's enforcement action the court may "enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay. . . ."⁷⁴ In a pattern or practice suit the Attorney General may file a complaint "requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described."⁷⁵ No reference to reinstatement or hiring of employees or to back pay is made with respect to pattern or practice suits, and whether such relief could be granted in such an action is an open question which is complicated still further by doubt as to whether an aggrieved individual could intervene in the Attorney General's action.

The discussion of remedies is organized by classifying them as "law remedies" and "equitable remedies." Money damages was of course the basic remedy in an action at law, and under Title VII back pay falls into this category. Imaginative claimants' lawyers will of course explore the possibility of obtaining other types of money damages, such as compensation for mental suffering and distress as a result of employment discrimination. Damages other than back pay are not discussed in this article, however. In seeking damages in addition to back pay claimants should not limit themselves to Title VII. It has, for example, been suggested that various tort theories may permit recovery for employment discrimination.⁷⁶

Equitable remedies may of course be as varied as the cases which come before the courts, and it would be impossible at this time even to make a comprehensive list of the problems, let alone suggest their

⁷³ See p. 517 *infra*.

⁷⁴ § 706(g).

⁷⁵ § 707(a).

⁷⁶ Comment, 32 U. Chi. L. Rev. 430, 467 (1965).

solutions. A few problems are discussed in the hope that they will illustrate the nature of the task and of the questions which may come up.⁷⁷

The coverage in this topic has been divided between equitable and legal remedies as a convenient and familiar method of organization. By so doing, however, there is no intention to imply that the courts are necessarily foreclosed from treating Title VII proceedings as strictly equitable in nature. As pointed out immediately below, arguments can be made on both sides of this question.⁷⁸ Compensatory justice, which is in part at least an aspect of the problem of remedies, is discussed elsewhere in this symposium.⁷⁹ Cynics may of course characterize this article's suggestions for economic compensation to white workers who are affected by Title VII remedies⁸⁰ as compensatory justice in reverse, and to the extent that such a characterization is accurate, the problem is discussed here.

A. *Law Remedies: Back Pay*

It would seem that back pay ought to be awarded routinely, almost as a matter of absolute right, when the claimant proves he has suffered money damages (loss of income from employment) as a result of the respondent's unlawful employment practice. Should the court be allowed greater discretion with respect to the award of such damages than would be allowed in a traditional action at law? The problem is presented by the statutory provision that the court may order "reinstatement or hiring of employees, with or without back pay. . . ."⁸¹ Does "with or without" imply discretion? If so, on what basis is it to be exercised? The statutory implication of discretion must be offset against the traditional notion that (assuming back pay actions under Title VII are in the nature of actions at law) in actions at law damages are a matter of "right."

It may also be argued from the statutory language just quoted that back pay awards may be made only as an incident to equitable orders for reinstatement or hiring of employees. This would support the position that back pay should be awarded as a matter of discretion, in the manner of equity. This interpretation of the statute would mean, of course, that there is no such thing as an action for back pay under Title VII. It would mean an abandonment of the tradition that damages are the "usual" remedy afforded by the courts. An abandonment of this tradition should not be undertaken lightly. The "no action

⁷⁷ Attorney's fees, which in a broad sense are a kind of remedy, have been discussed *supra* pp. 501-06.

⁷⁸ Cf. text pp. 507-10 *supra*. The answer to this question affects such important matters as the right to jury trial.

⁷⁹ See Schmidt, Title VII: Coverage and Comments, p. 459 *supra*, X-REF.

⁸⁰ Text *infra* 516.

⁸¹ § 706(g).

for back pay alone" interpretation would also eliminate the possibility of awarding an economically significant remedy to complainants in a situation which may be expected to arise. Thus, an unemployed Negro who was discriminatorily refused a job but who, after some delay, found a second job which he preferred to keep, would have no remedy available which imposed a distinct economic benefit upon him personally. Damages for income lost while he was seeking the second job would give him such a remedy. It seems unlikely that the statute gives him no remedy in a situation of that sort.

The jury trial problem, treated elsewhere in this article,⁸² is significantly affected by the argument that the statute treats back pay awards as an incident to equitable relief. If the statute does so, the jury trial problem becomes a predominantly, if not entirely, constitutional question.

B. *Equitable Remedies*

1. *Scope of Injunction.*—What should be the scope of the basic equitable remedy, injunction, in Title VII cases? In its most limited form it would simply order the defendant not to discriminate against the claimant, and would make this prohibition more specific by referring to the particular problem involved in the case, *e.g.*, it would order the defendant to consider the claimant's application for employment without regard to the claimant's race, color, religion, sex, or national origin. In most situations the order should go beyond this and require affirmative remedial action as expressly authorized by the statute.⁸³

Insofar as the injunction orders the respondent not to engage in employment discrimination in the future, one problem of its scope concerns the persons who are to be protected by the order. Whom should the respondent be ordered to stop discriminating against? Just the individual plaintiff? All Negroes? Members of all minority groups protected by the statute? To reframe the problem, can the defendant be ordered not to discriminate against persons other than the individual plaintiff?⁸⁴ If so, an injunction which, for example, orders an end to employment discrimination against all Negroes would provide an alternative to a class action brought on behalf of a group of Negroes.⁸⁵ Indeed, such an injunction might be preferable to a class action from the standpoint of claimants because of the possibility that members of the class of plaintiffs may be bound by an adverse judicial decision, a result which would not obtain if the action were simply brought by an

⁸² *Supra* pp. 507-10.

⁸³ § 706(g) quoted in part *supra* text accompanying note 74.

⁸⁴ This problem is discussed in greater detail in Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 *Brooklyn L. Rev.* 62, 86-88 (1964).

⁸⁵ Class actions are discussed *supra*, pp. 511-12.

individual who seeks an injunction forbidding discrimination against a class.

2. *Effects on Other Employees.*—Claimants may seek certain remedies which affect the rights of other employees. This does not refer to the "right" of white employees not to have Negro coworkers or to have segregated cafeterias and restrooms. Such alleged "rights" are specifically negated by Title VII. The reference is rather to economic rights of particular white workers which are directly and immediately affected by a remedy sought by the claimant. For example, if the claimant seeks a court order which would require an employer to give the claimant a job which the employer had given to a white person after a discriminatory refusal to hire the claimant, the economic rights of the white job holder are directly and immediately affected. By describing such economic interests of the white workers as "rights" there is no intention to offend those who would prefer another term to describe the claims of the white workers. Persons who would prefer to describe them as "interests" or as something else are welcome to do so. The point is that the remedy will have a direct economic effect on the white worker—not on white workers in general, but on a particular person.

Nor is use of the term "right" intended to imply a question-begging inference that the white worker in the example has a right to the job and that the Negro claimant does not, and that the proposed remedy can therefore not be granted. The writer's opinion is quite the opposite. By expressly authorizing the remedies of hiring and reinstatement Title VII must contemplate that such rights of white workers may indeed be affected. Intentional discrimination is hard to prove, and that is exactly what must be proved if the court is to afford any remedy in an individual's enforcement action.⁸⁶ If the charge is discriminatory refusal to hire, it would seem that as a practical matter (if not as a matter of law) it will be necessary to prove that someone else was hired in place of the Negro. How else can one prove intentional discrimination if (as can be expected) the employer will not admit it? The remedy of hiring would thus be most appropriate where another person has already been given the job sought by the Negro. Therefore, the statute's reference to hiring must mean that the job rights of the other person may be affected by the court's remedy. "Hiring" must be taken to mean (at least in some cases) hiring into the specific job which the claimant was discriminatorily refused.

The fact that certain remedies may affect the rights of white job holders can significantly influence the posture of the case. This would be especially true if, as suggested elsewhere in this article,⁸⁷ such job

⁸⁶ Section 706(g) authorizes the court to grant an appropriate remedy if it "finds that the respondent has intentionally engaged in an unlawful employment practice. . . ."

⁸⁷ Text *supra* p. 512.

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holders must be joined as parties to the action. Even if they need not be joined, the potential effect on their rights may be expected to influence psychologically a judge's willingness to afford the remedy and even to find the facts which would make any remedy appropriate. It may therefore be in the best interests of claimants to support suggestions which tend to alleviate the economic effects on other workers.

How may such alleviation be accomplished? The answer must depend upon the circumstances of particular cases, and the traditional flexibility of equity in fashioning remedies would be called into play. As an illustration, if it appears that there is a reasonable likelihood that an equivalent job will open up in the near future, both the white job holder and the Negro claimant could be given work. One of them could occupy the current opening and the other could be compensated for the time he was out of work awaiting the next opening. (The employer might prefer to put both to work immediately in such a situation.) If one is to wait, there is of course no reason to assume (as is sometimes done) that it must be the Negro who waits. A remedy of this kind may be justified on the ground that it is the employer who has committed the unlawful employment practice and that it is not unreasonable that he be required to protect the job interests of all who suffer from his unlawful conduct, including both job claimants.

The availability of such a judicial remedy is complicated by the fact that the job rights of the white worker may be subject to adjudication under an industrial grievance system, culminating perhaps in arbitration. The court would have to take account of such systems, possibly by indicating that the rights of the white job holder are to be determined under the grievance procedure, although jurisdiction could be retained to see that the result of the grievance process does not interfere with the court's decree. The problems are difficult and complicated, but if the courts are to participate in the resolution of industrial disputes, as required by Title VII, their participation must take cognizance of the other institutions involved in the process of industrial adjudication—whether grievance procedures, arbitration, NLRB proceedings, or what have you.

A major argument against fashioning a remedy which gives special economic protection to the displaced white workers is that it would be a violation of the prohibitions against racial discrimination imposed by Title VII. Would conferring such direct economic benefits constitute discrimination with respect to "compensation, terms, conditions, or privileges of employment" or would it "classify" employees on racial grounds, as forbidden by section 703(a)? Arguably so, but before such acts are forbidden by the section they must discriminate against an *individual* or deprive an *individual* of employment oppor-

tunities.⁸⁸ No individual would be discriminated against or deprived of employment opportunities by such a remedy, and therefore the anti-discrimination provisions of the statute do not necessarily forbid it.

3. *Discriminatory Seniority Practices.*—The most difficult problem of formulating a remedy for a discriminatory seniority system is to restructure the existing seniority rolls to eliminate the effects of past discriminatory practices. This is not to say that the other half of the problem, formulating rules for the nondiscriminatory operation of the system in the future, is easy. There may be situations where a remedy for past discrimination may be formulated without major difficulty, as for example when there are two seniority lists, one white and the other Negro, both based on date of original hiring by the employer. The restructured list would simply be a combination of the two pre-existing lists, with seniority based on date of original hire.

When the seniority system is more complicated, abolition of the effects of past discrimination is more difficult. Suppose, for example, that seniority is in part based upon job classification, and that workers in certain jobs have greater seniority than workers in other jobs, without regard to date of hire, and that workers in senior jobs can "bump" workers in junior jobs in case of layoff. Suppose further that the discriminatory practice was the assignment of Negroes to jobs with lesser seniority, but there are some whites in the predominantly Negro classifications and some Negroes in the predominantly white classifications. Suppose further that the hierarchy of job classifications for seniority purposes is arranged in order of the degree of skill required by the job, so that the end result is that workers in jobs requiring a higher level of skill have greater seniority. In a situation of that sort, not only would it be difficult to make a new seniority list which eliminates the effects of past discrimination, it would also be difficult to formulate principles for nondiscriminatory operation of the system in the future. Many questions would have to be answered in such an effort; for example, to what extent should protection be given to the employer's presumably legitimate interest in seeing that the most highly skilled workers are laid off last?

One problem with the entire concept that a reconstituted seniority list is an appropriate remedy for past discrimination under Title VII is that the "right" to be free from employment discrimination was not granted by Title VII until July 2, 1964. Is it proper to deprive white persons of seniority rights which vested prior to that date? One approach to this problem is to determine whether Title VII is retroactive.

⁸⁸ Section 703(a) makes it an unlawful employment practice for an employer to "discriminate against any *individual* . . ." or to "limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities. . . ." (Emphasis added.)

Interesting possibilities along this line are suggested by the Supreme Court's decision in *Hamm v. City of Rock Hill*⁸⁰ that state criminal convictions of civil rights workers for engaging in lunch counter sit-ins were abated by passage of Title II of the Civil Rights Act of 1964. The convictions had occurred before Title II was enacted, but they nonetheless were held to have abated as a consequence of the subsequent passage of the act. While seniority problems are obviously distinguishable, *Hamm* did in a sense give a certain retroactive effect to the Civil Rights Act. Its applicability to civil actions under Title VII, either by direct analogy or as an indication of the Supreme Court's probable attitude, is an open question, but one well worth exploring in an appropriate case.

Besides saying that Title VII is retroactive, claimants may argue that discrimination is illegal on the basis of substantive principles which were in effect before Title VII. These principles might derive, for example, from state or local FEP laws, from the duty of fair representation under the National Labor Relations Act,⁸⁰ or from various tort theories.⁹¹

The problem of providing economic relief to white workers whose economic interests are affected by a Title VII remedy was discussed elsewhere in this article.⁹² This affects seniority remedies because a white worker who ends up with less seniority as a result of a Title VII remedy has been affected economically. He may, for example, be laid off when he would have been kept on the job under the old seniority system. Aside from the problem of whether economic relief in any form would be appropriate in such a situation, the writer was at first inclined to say that no way existed to provide such protection. On reflection, however, it appeared that a measure of protection could be provided by a fund to compensate such workers for actual losses sustained by them as a result of the change in seniority. Thus, a worker who was laid off ten days earlier than he would have been under the old system could receive full or partial payment for loss of ten days' wages. The expense of maintaining such a fund could be imposed upon the employer because he was responsible for the discriminatory seniority system in the first place. Part of the cost could even be imposed on a union which shared responsibility for the discriminatory

⁸⁰ 379 U.S. 306 (1964).

⁹⁰ For a discussion of the duty of fair representation, see, e.g., Rosen, *The Law and Racial Discrimination in Employment*, 53 Calif. L. Rev. 729 (1965).

⁹¹ For a discussion of tort theories, see Douda, *Damages for Mental Suffering in Discrimination Cases*, 15 Clev.-Mar. L. Rev. 1 (1965); Comment, 32 U. Chi. L. Rev. 430 (1965). Cf. *Todd v. Joint Apprenticeship Council of Steel Workers*, 223 F. Supp. 12 (N.D. Ill. 1963), vacated as moot, 332 F.2d 243 (7th Cir. 1964), cert. denied, 380 U.S. 914 (1965).

⁹² Text *supra* p. 517.

system. Even if creation of such a fund is not an appropriate judicial remedy, it might be possible to create one by union-employer collective bargaining, or even for a union to finance one on its own initiative.

Any such fund would be open to questions of legality similar to those raised in the discussion of other forms of economic protection to white workers,⁹³ this time under section 703(c). The question is whether establishment of the fund would itself be discriminatory.

4. *Refusal to Furnish Job Application.*—Special problems of remedy arise when the act of discrimination is refusal to give an application form to a job candidate. Will the court simply order that the Negro applicant be permitted to fill out an application form, that it be considered along with other applications, or that the Negro be given a job now? A Washington case answered the question by upholding an order that the Negro be offered the next vacant job in the pertinent classification "provided she meets the standard qualifications of other applicants for employment, but without regard to race, color, creed or national origin. . . ."⁹⁴ The job for which the Negro had been refused an application had not been filled at the time the order was made, so the case does not solve the problem where a white worker has been given the job for which the Negro was refused an application. The vigorous dissent argued that the order approved by the majority was in itself discriminatory (against whites), and should have been formulated to permit the employer to hire "the best qualified person without any consideration to race, creed, color or national origin. . . ."⁹⁵ The majority gives a negative answer to another of the fundamental questions of remedy, whether an order to hire a Negro claimant into the next job opening unlawfully discriminates against qualified whites who might otherwise apply for and perhaps be given the job.⁹⁶

C. Remedies under Analogous Statutes

Guidance to the solution of problems of remedy under Title VII can be sought not only under state FEP laws, but also under other federal statutes.⁹⁷ There is a particularly large fund of experience under the National Labor Relations Act. That experience may be used for example to help decide whether it is permissible under Title VII to affect employed whites adversely in order to afford a remedy to a

⁹³ See pp. 517-18 *supra*.

⁹⁴ *Arnett v. Seattle Gen. Hosp.*, 65 Wash. 2d 22, 24, 395 P.2d 503, 504 (1964).

⁹⁵ *Id.* at 508, 510.

⁹⁶ The majority did not pass on the constitutionality of the order because that issue had not been raised below.

⁹⁷ Federal statutes in the labor relations area which present problems such as hiring, reinstatement, or back pay (all of which are available under Title VII) include, e.g., the National Labor Relations Act, the Railway Labor Act, the Landrum-Griffin Act, wage-hour laws, and various veterans' re-employment statutes.

Negro claimant. It has been held under the NLRA that unfair labor practice strikers are entitled to reinstatement in their jobs "irrespective of the effect that such reinstatement may have upon the tenure of new employees hired as replacements."⁹⁸ Such strikers must be given back their jobs and the replacements discharged so this may be done.⁹⁹ The position of strike replacements can be compared to that of whites who have been hired instead of Negroes. If the resulting analogy is followed it would indicate that under Title VII it is permissible to give a Negro a remedy which requires the displacement of a white worker from his job. The analogy is pressing because of two similarities between the NLRA and Title VII: (1) Both statutes give protection against discrimination;¹⁰⁰ and (2) the remedy provisions of Title VII were patterned on those of the NLRA.¹⁰¹ While the precedents under analogous statutes should not be blindly applied, they do provide bearings for passing through the uncharted territories of Title VII.

IV. CONCLUSION

The statute's failure to give the Commission power to issue quasi-judicial enforcement orders is a continuing subject of controversy. For example, the House Committee on Education and Labor, which was originally responsible for the bill which, after much amendment, became Title VII, has favorably reported a bill which would amend Title VII to give the Commission powers of administrative adjudication.¹⁰² Will Title VII work in its present form, without such provisions? This, of course, is a question of fundamental importance, since its answer is relevant to problems of broader import than enforcement of the federal policy against employment discrimination. This does not mean that employment discrimination is an insignificant aspect of race relations in our society, nor that the race relations problem itself is unimportant. Quite the contrary. The point is that the nature of the institutional structures which are vested with the

⁹⁸ *NLRB v. Thayer Co.*, 213 F.2d 748 (1st Cir.), cert denied, 348 U.S. 883 (1954).

⁹⁹ Forkosch, *Labor Law* § 522, at 816-17 (1965); Smith & Merrifield, *Cases and Materials on Labor Relations Law* 194 (1960).

¹⁰⁰ Section 8(a)(3) of the National Labor Relations Act, 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a)(3) (1964), makes it an unfair labor practice to encourage or discourage membership in a labor organization "by discrimination in regard to hire or tenure of employment or any term or condition of employment. . . ." The anti-discrimination provisions of Title VII are in § 703.

¹⁰¹ Section 706(g) of Title VII provides that the court may "order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay. . . ." Section 10(c) of the National Labor Relations Act, 49 Stat. 453 (1935), 29 U.S.C. § 160(c) (1964), provides that the NLRB can order the respondent "to take . . . affirmative action including reinstatement of employees with or without back pay. . . ."

¹⁰² H.R. 10065, 89th Cong., 1st Sess. (1965).

power to enforce laws raises questions which go to the very foundations upon which society's system of law enforcement rests.

Are the courts suitable institutions for the enforcement of laws, especially laws which are designed to effect basic rearrangements in *de facto* and *de jure* relationships in society? The modern tendency, which is especially though not exclusively found on the federal level, has been to give to administrative agencies rather than to courts the power to issue initial enforcement orders which have the character of adjudicative decision. This can only be taken as evidence of disaffection with the courts as effective institutions for the administration of laws of social reform. This, of course, means courts at the level of initial decision, since most administrative adjudications are subject to judicial review and since the appellate courts are proven instruments of self-generated social reform. If the efforts to give the Commission powers of administrative adjudication are not immediately successful, the record of the trial courts in enforcing Title VII may well prove to be a kind of institutional testing ground for the future role of courts at the trial level in the social reform process. If the courts fail in their task, the proponents of future reform laws can be expected to fight even harder for administrative adjudication. If the courts succeed, supporters of courts as prime institutions of formal adjudication will have something to point to when the question comes up again, as it inevitably will. Make no mistake about it. The enforcement system created by Title VII was a deliberate choice of court over administrative agency as the type of institution in which the adjudicative power should be vested. The legislative history, with its progressive withdrawal of the Commission from an adjudicative role, makes this abundantly clear.

At least one court¹⁰³ and some commentators¹⁰⁴ have approached the Title VII enforcement procedures by asking whether they reflect a statutory choice of a "private right" as distinguished from a "public right" as Title VII's basic premise. There is much merit in the suggestion that they do, and in analyzing Title VII on the basis of the resolution of this problem. The present writer has chosen not to approach the problem in this way, not only because others have already covered the subject, but because the *public right v. private right* formulation does not strike at the heart of the philosophical basis, if you will, of the Title VII enforcement process. The philosophical basis

¹⁰³ Hall v. Werthan Bag Corp., *supra* note 68; see discussion note 10 *supra*.

¹⁰⁴ See e.g., Berg, Equal Employment Opportunity Under the Civil Rights Act of 1964, 31 Brooklyn L. Rev. 62 (1964); Comment, 32 U. Chi. L. Rev. 430 (1965). Each of these was published prior to the Supreme Court's decision in *International Union, UAW v. Scofield*, 382 U.S. 205 (1965), discussed *infra* note 108.

is preference for court over administrative agency as an instrument in which to lodge adjudicative power.

Stress on the "private right" aspects of Title VII may lead to understatement of the significance of the Commission's role. The power to issue an adjudicative order is only one aspect of the enforcement process. The Commission wields enormous influence from its role as conciliator and implementer.¹⁰⁵ While it is still too early to say from the Commission's record how effective it will be, there is no reason to throw up hands in despair.¹⁰⁶ The adjudicative decision is only one kind of implementation. Voluntary observance of the requirements of the statute and settlement of disputes without adjudication are equally important. The Commission plays an important role in both. Not only does its conciliation activity promote settlement, but its other implementation activity will hopefully promote voluntary observance. Beyond its promotion of voluntary observance of the specific prohibitions of Title VII, the Commission can and should encourage positive efforts to make jobs equally available to all minority groups. It is attempting to do so now by promoting what it calls "affirmative action" by employers and others covered by the statute.¹⁰⁷ So even if the Title VII "right" is "private," much of the implementation activity is by a public body.¹⁰⁸

As with any new statute, Title VII leaves many questions unanswered. They are especially abundant in the procedural area because of the last minute creation of a new enforcement system for Title VII

¹⁰⁵ The Commission has attempted to enhance this influence by providing in its procedural regulations that "a charge filed by an aggrieved person may be withdrawn only with the consent of the Commission." Procedural Regulations of The Equal Employment Opportunity Commission § 1601.9, 30 Fed. Reg. 8408 (1965).

The foregoing regulation bears on the "public right" v. "private right" question, as does § 706(a) of Title VII, which says a member of the Commission may file a charge. This permits the Commission to conduct an investigation, and (after finding reasonable cause) attempt to conciliate the dispute.

¹⁰⁶ The statement in the text does not indicate the writer's rejection of the assertion that the Commission should be given quasi-judicial powers. No position on that question is taken in this article. But so long as the present procedures are in force it will be necessary to try to make them work.

¹⁰⁷ See, e.g., 60 Lab. Rel. Rep. 193 (1965) (remarks of Commission Chairman Franklin D. Roosevelt, Jr.).

¹⁰⁸ In *International Union, UAW v. Scofield*, supra note 104, at 217-21, the Supreme Court indicated that the National Labor Relations Act does not create a dichotomy between public and private rights, but rather blends the two. In doing so the Court refused to use the public right v. private right distinction as a guide to the resolution of the problem which it faced (whether to permit a charging party who was successful in proceedings before the NLRB to intervene in proceedings for judicial review of the Board decision in a circuit court) and (at least in the present writer's opinion) thereby cast doubt on the utility of this approach as a method of resolving difficult problems of procedure involved in administrative agency-court relationships. See *Hall v. Werthan Bag Corp.*, supra note 68, where the court adopted the *Scofield* approach without referring to that case.

as the basis for the so-called "leadership compromise" necessary to obtain Republican votes for Senate cloture over debate on the entire Civil Rights Act. Whether Title VII thereby became a sacrificial lamb for the benefit of the other titles remains to be seen. Once the wrinkles have been ironed out, Title VII may well (to mix the metaphor once again) turn out to be far from a dead letter.