LABOR RELATIONS LAW

I. REPRESENTATIONAL AND ORGANIZATIONAL ACTIVITY

A. *Specific Evidence Required To Overturn A National Labor Relations Board Election*: NLRB v. IDAB, Inc.[1]

It is a well-settled rule under federal labor law that a union representation election may be set aside for improper acts not attributable directly to a union only if those acts disrupted the voting procedure or destroyed the atmosphere necessary to the exercise of a free choice in the voting.[2] In a 1981 case, for example, the Fifth Circuit set aside an election where two former employees wore "Vote Teamsters" signs on their hats and an enlarged reproduction of the ballot with an "X" marked in the "Yes" box pinned to their shirts during the voting process.[3] Because these former employees stood near the line of voters and repeatedly urged the employees to vote for the union, the court concluded, the required atmosphere of free choice was not present.[4]

A party objecting to an election has the burden of presenting specific evidence that the election results do not reflect the unimpeded choice of the employees.[5] In another 1981 Fifth Circuit case, the court ruled that a simple showing of misconduct was not sufficient to overturn an election.[6] The court held that the employer must present specific evidence showing that the actions interfered with the employees' exercise of free choice to such an extent that the results of the election were materially affected.[7]

The National Labor Relations Board (Board) is responsible for making factual determinations of labor disputes brought before it.[8] Although the Board's findings may be appealed to a federal court, the Federal court is bound by the Board's factual determinations if substantial evidence in the record supports these determinations.[9] Where the evidence is conflicting and the Board's decision rests on credibility choices, the Board's credibility choices also bind federal courts unless the choices are inherently unreasonable.[10] A court, moreover, is not compelled to respect credibility choices that are based on inadequate reasons or upon no reasons at all.[11]

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[1] 770 F.2d 991, 120 L.R.R.M. 2329 (11th Cir. 1985).

[2] *See, e.g.*, NLRB v. Carroll Contracting & Ready-Mix, Inc., 636 F.2d 111, 113, 106 L.R.R.M. 2491, 2493 (5th Cir. 1981); NLRB v. Claxton Mfg., 613 F.2d 1364, 1371, 103 L.R.R.M. 2980, 2986 (5th Cir. 1980).

[3] *Carroll*, 636 F.2d at 112–13, 106 L.R.R.M. at 2493.

[4] *Id.* at 113, 106 L.R.R.M. at 2493.

[5] Certainteed Corp. v. NLRB, 714 F.2d 1042, 1060, 114 L.R.R.M. 2541, 2554–55 (11th Cir. 1983).

[6] NLRB v. Gulf States Canners, Inc., 634 F.2d 215, 216, 106 L.R.R.M. 2270, 2271 (5th Cir. Unit A), *cert. denied*, 452 U.S. 906, 107 L.R.R.M. 2504 (1981) (union offered to purchase gasoline for employees who transported other workers to the union meetings).

[7] *Id.*

[8] *IDAB*, 770 F.2d at 996, 120 L.R.R.M. at 2332.

[9] 29 U.S.C. § 160(e) (1982). The relevant language of 29 U.S.C. § 160(e) states, "[t]he findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." *See also* Universal Camera Corp. v. NLRB, 340 U.S. 474, 487–88, 27 L.R.R.M. 2373, 2378–79 (1951) (court cited language of 29 U.S.C. § 160(e)).

[10] *See* Mead Corp. v. NLRB, 697 F.2d 1013, 1022, 112 L.R.R.M. 2797, 2803 (11th Cir. 1983).

[11] *See* ONA Corp. v. NLRB, 729 F.2d 713, 719, 115 L.R.R.M. 3665, 3668–69 (11th Cir. 1984)

During the *Survey* year, in *NLRB v. IDAB, Inc.*,[12] the United States Court of Appeals for the Eleventh Circuit held that limited findings of threats and violence, considered cumulatively with limited findings of objectionable electioneering on the part of union representatives, did not warrant setting aside a representation election. *IDAB* reaffirms the principle that a party objecting to a representation election bears a heavy burden of presenting detailed reasons why the election should be invalidated.[13] Consequently, *IDAB* reaffirms that an employer must offer specific evidence of acts that disrupt the voting procedures or destroy the proper atmosphere that allows employees to exercise their freedom of choice in the election.

In *IDAB*, the Board petitioned the Eleventh Circuit for enforcement of a Board order directing IDAB Inc. (the Company) to recognize and bargain with the International Association of Machinists and Aerospace Workers (the Union).[14] In November of 1979, the Board had conducted an election among the Company's employees.[15] After the election, which favored adopting the Union, the Company filed timely objections, claiming that the Union had denied employees free choice in the election because of improper electioneering and threats and acts of violence.[16] Subsequently, the Board conducted an ex parte investigation of the matter and concluded that the Company's objections were without merit.[17]

To secure judicial review of the Union's alleged improper acts, the Company refused to bargain with the Union.[18] As a result, the Union brought an unfair labor practice charge against the Company alleging that the Company had violated two sections of the National Labor Relations Act (the Act) by refusing to recognize and bargain with the Union.[19] The Board granted the Union's motion for summary judgment and ordered the Company to bargain with the Union.[20] The Company sought review of the Board's order in the Fifth Circuit.[21] The Fifth Circuit ruled that the Company was entitled to an evidentiary hearing on its allegations of Union misconduct, and thus the Board's order should not be enforced.[22] Accordingly, the matter was remanded for a hearing.[23]

(The *ONA* court cited NLRB v. Moore Business Forms, 574 F.2d 835, 844, where the court had refused to uphold an administrative law judge's finding because it was based on an "invalid reason of law.").

[12] 770 F.2d 991, 1000–01, 120 L.R.R.M. 2329, 2336 (11th Cir. 1985).

[13] *Id.* at 998–1001, 120 L.R.R.M. at 2334–36.

[14] *Id.* at 992–93, 120 L.R.R.M. at 2329.

[15] *Id.* at 993, 120 L.R.R.M. at 2329.

[16] *Id.* at 993, 120 L.R.R.M. at 2329–30.

[17] *Id.* at 993, 120 L.R.R.M. at 2330.

[18] *Id.*

[19] *Id.* The Union alleged that the Company had violated Section 8(a)(1) and (5) of the Act, 29 U.S.C. § 158(a)(1) and (5). *Id.* Section 158(a)(1) states, "It shall be an unfair labor practice for an employer — (1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 157 of this title;" and § 158 (a)(5) states, "It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

[20] *IDAB*, 770 F.2d at 993, 120 L.R.R.M. at 2330.

[21] *Id.* As a result of the split of the Fifth Circuit into the Fifth and Eleventh Circuits, the present *IDAB* case was decided ultimately in the Eleventh Circuit.

[22] *Id.*

[23] *Id.* (citing EDS-IDAB, Inc. v. NLRB, 666 F.2d 971, 109 L.R.R.M. 2653 (5th Cir. Unit B 1982)). At the time of the Union election, the Company's name was EDS-IDAB, Inc. The name was changed subsequently to IDAB, Inc. *IDAB*, 770 F.2d at 992 n.1, 120 L.R.R.M. at 2329 n.1.

A hearing was held before an administrative law judge (ALJ) in July and September of 1982.[24] At the hearing, the Company alleged that the Union had established an organizing committee consisting of employees Victor Ugarte, Al Gonzales, Louis Jorge, and Francisco Rodriguez.[25] The Company stated that shortly before the election Rodriguez threatened pro-Company employee Contreras with a gun.[26] In addition, the Company asserted, Jorge punched Contreras in the eye.[27] Moreover, the Company alleged that Jorge twice threatened to damage employee Leon's car if Leon did not vote for the Union.[28] During the campaign, the tires of pro-Company employees were vandalized.[29] Rumors of violence or threats of violence by pro-Union employees were circulated widely.[30]

The Company further alleged that on the day of the election, numerous incidents of improper electioneering took place.[31] According to the Company, a pro-Union employee, Gonzales, wore a two-inch button saying "Vote Yes For IAM" on his lapel during the election procedure.[32] The Company also asserted that Jorge, another pro-Union employee, wore overalls with a Union patch on both the front and back.[33] After Jorge voted, the Company alleged, he stayed near the voting place, positioning himself so that employees going to vote would have to pass him.[34]

After hearing conflicting testimony on each of the alleged incidents, the ALJ discounted most of the Company's allegations.[35] The ALJ decided that the alleged gun incident never took place, and that the black eye was caused accidentally.[36] In addition, the ALJ discounted the allegations of threats and violence.[37] The ALJ concluded that at most the evidence of pre-election events showed that Jorge may have made joking references about damage to pro-Company employee Leon's car, that Gonzales may have joked with pro-Company employee Freyre in a slightly threatening manner, and that a pro-Company employee may have found a spike in his tire without knowing the source.[38] The ALJ further found that even if these events did take place, they did not warrant setting aside the election.[39]

Regarding the improper electioneering charges, the ALJ found that pro-Union employees, after casting their ballots, did not position themselves outside the voting area

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[24] *Id.* at 993, 120 L.R.R.M. at 2330.

[25] *Id.*

[26] *Id.* at 994; 120 L.R.R.M. at 2330. Contreras said that Rodriguez told him that if he did not vote for the Union, he knew "what to expect." *Id.*

[27] *Id.*

[28] *Id.* According to the Company, two other employees also were threatened. *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* In addition, the Company stated that the Union organizer, Tony Klinkas, remained in the parking lot where employees going to vote would have to walk near him. *Id.*

[35] *Id.*

[36] *Id.* at 994, 120 L.R.R.M. at 2331.

[37] *Id.* The recipients of the alleged threats either denied being threatened or did not testify. *Id.* Others stated that they did not take the threats seriously. *Id.* Rumors regarding alleged threats or acts of violence were not circulated until after the election. *Id.*

[38] *Id.*

[39] *Id.*

while the employees were voting.[40] Moreover, the ALJ concluded that neither Jorge's overall patches nor Gonzales' union button required setting aside the election.[41]

In sum, the ALJ determined that the Company's objections were without merit and suggested that the Board reaffirm its earlier order.[42] Although the Company objected, the Board affirmed the ALJ's decision and ordered the Company to bargain with the Union and desist from interfering with the employees' expression of their statutory rights.[43] The Board then petitioned the Eleventh Circuit for enforcement of its order.[44]

Finding that the Company's claims were without merit, the Eleventh Circuit enforced the Board's order in full.[45] The *IDAB* court began by stating that the Board's factual determinations were binding if substantial evidence in the record considered as a whole supported these determinations.[46] Where the evidence was conflicting and the Board's ruling rested on choices of credibility, the court noted that the Board's factual determinations bound the court unless they were inherently unreasonable.[47] The court stated that the ALJ's assessment of the testimony was neither unreasonable nor contradictory and was supported by adequate reasons.[48] Because the Board accepted most of the factual determinations of the ALJ, and the Board's factual findings were entitled to deference,[49] the court accepted the major findings of the ALJ.[50]

Moreover, the court stated that it was not necessary to discuss each of the ALJ's factual findings in detail.[51] A review of these findings, the court emphasized, indicated that the findings were specific and based upon substantial evidence from the record, and therefore, the court would not disturb the findings.[52] According to the court, because the Board's factual findings adopted from the ALJ were entitled to deference, the court would consider only whether these findings warranted overturning the election results.[53] Therefore, the court stated, it was necessary to determine if damage to an employee's tires and several joking threats to employees merited invalidating the election.[54]

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[40] *Id.* at 995, 120 L.R.R.M. at 2331.

[41] *Id.*

[42] *Id.* at 993, 120 L.R.R.M. at 2330.

[43] *Id.* The Board also ordered the Company to post copies of an appropriate remedial notice. *Id.*

[44] *Id.*

[45] *Id.* In a separate opinion, Judge Thomas of the Eleventh Circuit specially concurred with the majority's decision. *Id.* at 1001, 120 L.R.R.M. at 2336 (Thomas, J. concurring). First, Judge Thomas stated that the Board's order should be enforced because the record contained the necessary requirements to be upheld. *Id.* Although the record did not mandate a ruling that the ALJ's and the Board's findings were "inherently unreasonable or self contradictory," Judge Thomas did not question these findings. *Id.* Judge Thomas noted, however, that it was extraordinary that all of the credibility decisions were made against pro-Company employees. *Id.*

[46] *Id.* at 996, 120 L.R.R.M. at 2332 (citing Universal Camera Corp. v. NLRB, 340 U.S. 474, 488, 27 L.R.R.M. 2373, 2379 (1951)).

[47] *Id.* (citing Mead Corp. v. NLRB, 697 F.2d 1013, 1022, 112 L.R.R.M. 2797, 2803 (11th Cir. 1983)).

[48] *Id.* at 997, 120 L.R.R.M. at 2333.

[49] *Id.* at 998, 120 L.R.R.M. at 2333. The court did not state why the Board's findings were entitled to deference, although this author presumes that they are entitled to it by their statutory authority. *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.* at 998, 120 L.R.R.M. at 2333–34.

[54] *Id.* at 998, 120 L.R.R.M. at 2334.

The conditions surrounding a representation election, the Eleventh Circuit noted, must allow employees to make a free and uncoerced decision regarding their choice of a bargaining representative.[55] The court then outlined a three-part test to assess whether there was an atmosphere of fear and coercion that deprived the employees of this choice: first, whether the evidence established fear in the minds of the voters; second, whether that fear affected their votes; and finally whether, had it not been for the fear, the results of the election might have been different.[56] The court further stated that an election performed under the Board's procedures had a presumption of validity.[57]

Applying this test to the Board's findings, the court first analyzed whether the joking threats deprived the employees of free choice.[58] The court, based on the ruling of the ALJ, concluded that isolated, joking remarks not shown to have caused a change in an employee's vote are insufficient to set aside an election.[59] The decisive factor, the court noted, is whether the alleged acts produced such an atmosphere of tension and coercion that the employees effectively were precluded from voting freely, and not whether improprieties occurred.[60] Similarly, the court held, anonymous damage to a pro-Company employee's tires was not enough to warrant a new election.[61] The court reasoned that setting aside an election due to anonymous acts would encourage protagonists to create incidents anonymously and then use them to upset elections.[62] Thus, the court concluded that the Board was justified in finding that the few acts of joking threats and anonymous property damage did not affect the employees' free choice.[63]

The court next discussed the improper electioneering issue, stating that the ALJ's detailed findings should be accepted on this matter as well.[64] The court noted that the only possible improper electioneering the ALJ uncovered was that Gonzales, a pro-Union employee, wore a Union button during the election and that another pro-Union employee wore two Union emblems on his overalls and stood outside the election area for a short period after voting.[65] Because substantial evidence supported the Board's

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[55] *Id.* (citing In re General Shoe Corp., 77 N.L.R.B. 124, 126, 21 L.R.R.M. 1337, 1340 (1948)). The court adopted the standard enumerated by the Board in *In re General Shoe*. *Id.*

[56] *IDAB*, 770 F.2d at 998, 120 L.R.R.M. at 2334 (quoting Certainteed Corp. v. NLRB, 714 F.2d 1042, 1060, 114 L.R.R.M. 2541, 2554 (11th Cir. 1983)). The party objecting to the election must present evidence that the results did not reflect the free choice of the employees. *Id.* (citing *Certainteed Corp.*, 714 F.2d at 1060, 114 L.R.R.M. at 2554–55).

[57] *Id.* (citing NLRB v. Zelrich, 344 F.2d 1011, 1015, 59 L.R.R.M. 2225, 2228 (5th Cir. 1965)).

[58] *Id.* at 998, 120 L.R.R.M. at 2334.

[59] *Id.*

[60] *Id.* (citing NLRB v. White Knight Mfg. Co., 474 F.2d 1064, 1067, 82 L.R.R.M. 2762, 2763 (5th Cir. 1973)).

[61] *Id.* The *IDAB* court quoted Bush Hog, Inc. v. NLRB, 420 F.2d 1266, 1269, 73 L.R.R.M. 2066, 2068 (5th Cir. 1969):

> We think it is clear that conduct not attributable to the opposing party cannot be relied upon to set aside an election. The only exception to this general principle, not applicable here, is where coercive and disruptive conduct or other action is so aggravated that a free expression of choice of representation is impossible. Any other rule would invite third parties or one of the protagonists who doubted the election outcome to anonymously create incidents and then attempt to use them to set aside the election.

IDAB, 770 F.2d at 999, 120 L.R.R.M. at 2334.

[62] *IDAB*, 770 F.2d at 999, 120 L.R.R.M. at 2334.

[63] *Id.*

[64] *Id.* at 999, 120 L.R.R.M. at 2335.

[65] *Id.*

credibility determinations of the ALJ's findings, the court stated that it would not interfere with these findings.[66]

The earlier opinion of the Fifth Circuit in this case,[67] the court noted, set the appropriate standards for a charge of improper electioneering.[68] According to the Eleventh Circuit *IDAB* court, an election would be set aside if representatives of any party to an election engaged in "prolonged" conversations with voters waiting to cast their ballots, regardless of the content of such conversations.[69] Where such conduct was not performed by one of the parties' agents, the *IDAB* court continued, then such conduct would warrant setting aside the election only if the acts either destroyed the atmosphere necessary for unimpeded voting or disrupted the voting procedure.[70]

The *IDAB* court concluded that an employee wearing a Union button and another wearing two Union patches and standing outside the voting area for approximately ten minutes did not constitute objectionable electioneering sufficient to invalidate an election.[71] The *IDAB* court then distinguished the Fifth Circuit's ruling in the 1981 case of *Carroll Contracting & Ready Mix Inc.*[72] Unlike the employees in *Carroll*, the *IDAB* court noted, Jorge was not standing outside of the polling place during the election for an extended period of time.[73] In addition, unlike the employees in *Carroll*, Jorge did not urge voters to vote for the union.[74] The *IDAB* court also stated that Gonzales' wearing of the button was not sufficient to invalidate the election.[75] None of these actions, the court concluded, either individually or cumulatively, merited invalidating the election on the grounds of improper electioneering.[76]

IDAB reaffirms the principle that a Board-sanctioned union election should not be set aside unless the alleged improper acts disrupted the voting procedure or destroyed

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[66] *Id.*

[67] EDS-IDAB, Inc. v. NLRB, 666 F.2d 971, 109 L.R.R.M. 2653 (5th Cir. Unit B 1982). See *supra* notes 14–23 and accompanying text for the procedural history of this case.

[68] *IDAB*, 770 F.2d at 999, 120 L.R.R.M. at 2335.

[69] *Id.* at 999–1000, 120 L.R.R.M. at 2335 (citing NLRB v. Carroll Contracting & Ready–Mix, Inc., 636 F.2d 111, 113, 106 L.R.R.M. 2491, 2493 (5th Cir. 1981)).

[70] *Id.* at 1000, 120 L.R.R.M. at 2335. Moreover, the *IDAB* court explained that the purpose of these standards was to safeguard the employees' free choice in the final minutes before casting their votes. *Id.* (citing Michem, Inc., 170 N.L.R.B. 362, 362, 67 L.R.R.M. 1395, 1395 (1968)).

[71] *Id.* at 1000, 120 L.R.R.M. at 2335. The court held that Jorge was not acting as a "human billboard." *Id.*

[72] 636 F.2d 111, 106 L.R.R.M. 2491 (5th Cir. 1981). In *Carroll*, the *IDAB* court noted, an election was set aside where two former Carroll employees wore "Vote Teamster" signs on their hats, and an enlarged picture of the ballot with an "X" marked in the "Yes" box pinned to their shirts. *Id.* (citing *Carroll*, 636 F.2d at 112–13, 106 L.R.R.M. at 2493). The *IDAB* court further explained that Carroll employees also stood in the parking lot where the employees were in line to vote. *Id.* As the employees passed them, the *IDAB* court stated, the two former employees urged them to vote for the Union and pointed to the "Yes" box on their shirts. *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.* The court held that it would follow the reasoning of the Fifth Circuit, which had considered the *IDAB* case previously. *Id.* at 1000–01, 120 L.R.R.M. at 2336. The Fifth Circuit, the *IDAB* court noted, stressed that the findings of alleged threats of violence should be considered cumulatively with the limited findings of threats and violence. *Id.* at 1000, 120 L.R.R.M. at 2336. This accumulation of findings, the court concluded, could not justify an invalidation of the election. *Id.* at 1001, 120 L.R.R.M. at 2336.

the atmosphere necessary to the exercise of a free choice in the election.[77] The *IDAB* decision is the most recent ruling to hold that conditions existing during the campaign must allow employees to have a free choice in choosing their bargaining representative.[78] *IDAB*, moreover, reaffirms the well-established rule that a party objecting to an election must present specific evidence to overcome the presumption of validity that is granted to an election governed by the Board.[79]

The *IDAB* court properly analyzed the alleged acts of threats and violence and the alleged acts of objectionable electioneering together, according to the three-part test, to determine that the "atmosphere of free choice" standard was not met.[80] The court was correct in following this test because the test focuses on whether the threats and violence caused any change in the employees' votes. This causation standard ensures that an election will be set aside only when the alleged acts have a real effect on the election. Thus, this standard aids the court in disregarding frivolous complaints of threats and acts of violence. Because there were only minimal findings of joking threats to employees prior to the election in this case, the *IDAB* court correctly reasoned that the standard was not met and that the employees' free choice in this election was unaffected.[81]

Similarly, the *IDAB* court properly used the standard pertaining to objectionable electioneering.[82] Under this approach, an election will be set aside where a party's adherents engage in "prolonged" conversation with voters waiting to cast their votes or the adherents perform acts immediately before votes are cast that destroy the atmosphere of free choice.[83] This standard appropriately mandates that the last few moments before voting should be the voters' own.[84] This approach, moreover, insures that no party gains a last minute edge over the other, yet at the same time "deprives neither party of any important access to the ear of the voter."[85] Because the findings of objectionable electioneering in this case were minimal, the *IDAB* court correctly ruled that these acts did not affect the employees' free choice.[86] As the *IDAB* court further held, even the accumulation of findings under both standards did not show that the atmosphere of free choice was affected adversely.[87]

The *IDAB* court also used the proper standard in reviewing the Board's findings. The court noted that the Board's factual findings were binding on its decision, and

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[77] *See* NLRB v. Carroll Contracting & Ready-Mix, Inc., 636 F.2d 111, 113, 106 L.R.R.M. 2491, 2493 (5th Cir. 1981); NLRB v. Claxton Mfg. Co., 613 F.2d 1364, 1371, 103 L.R.R.M. 2980, 2986 (5th Cir. 1980).

[78] *IDAB*, 770 F.2d at 998, 120 L.R.R.M. at 2334.

[79] *Id.*; *see* NLRB v. Zelrich, 344 F.2d 1011, 1015, 59 L.R.R.M. 2225, 2228 (5th Cir. 1965).

[80] *IDAB*, 770 F.2d at 998, 120 L.R.R.M. at 2334. This test determines: (1) whether the evidence establishes fear in the minds of the voters; (2) whether that fear affected their votes; and (3) whether, had it not been for the fear, the results of the election might have been different. *Id.*; *see also* Certainteed Corp. v. NLRB, 714 F.2d 1042, 1060, 114 L.R.R.M. 2541, 2554 (11th Cir. 1983); Daylight Grocery Co. v. NLRB, 678 F.2d 905, 909, 110 L.R.R.M. 2915, 2917 (11th Cir. 1982); NLRB v. Tampa Crown Distributors, 272 F.2d 470, 473, 45 L.R.R.M. 2109, 2111 (5th Cir. 1959).

[81] *IDAB*, 770 F.2d at 999, 120 L.R.R.M. at 2334.

[82] *Id.* at 999–1000, 120 L.R.R.M. at 2335.

[83] *Id.*

[84] *See* NLRB v. Carroll Contracting & Ready–Mix, Inc., 636 F.2d 111, 113, 106 L.R.R.M. 2491, 2493 (5th Cir. 1981).

[85] *Michem, Inc.*, 170 NLRB 362, 67 L.R.R.M. 1395.

[86] *IDAB*, 770 F.2d at 1000, 120 L.R.R.M. at 2335.

[87] *Id.* at 1001, 120 L.R.R.M. at 2336.

moreover, the Board's findings were binding even where the evidence was conflicting and the Board's determinations rested on reasonable credibility choices.[88] The Board's statutorily granted province is to safeguard its elections from improper conduct, thus, the Board properly should be given the discretion to determine the facts of a disputed election.[89] Because the Board possesses expertise in conducting elections, the courts should defer to the Board's resolution of representation matters.[90] This deference properly is reflected, as the *IDAB* court noted, in the presumption that an election, conducted under the Board's specific procedures and safeguards, reflects the true desires of the employees.[91] Thus, the court was correct in respecting both the Board's fact and credibility determinations as well as holding that the election, sanctioned by the Board, possessed a presumption of validity.

In sum, the *IDAB* decision does not present any new standards for a labor lawyer to follow. Instead, the case maintains several well-established standards and applies these standards to a new set of facts. *IDAB* reaffirms that an election will only be set aside if specific evidence is presented that proves that the atmosphere of free choice was destroyed.[92] In determining that free choice was not affected adversely in this case, the court correctly employed two well-established standards involving threats and acts of violence and objectionable electioneering.[93] Moreover, the *IDAB* decision reiterates that a party objecting to an election has the burden of presenting specific evidence that the election results do not reflect the unimpeded choice of the employees. Finally, *IDAB* reaffirms that a Board's credibility determinations are binding upon a court unless they are inherently unreasonable or self-contradictory. Although *IDAB* simply reaffirms well-recognized standards, it is significant in that it illustrates, through its facts, when a court will not set aside a Board-sanctioned union election.

II. Unfair Labor Practices

A. *Employer Unfair Practices*

1. **The Successor Employer's Duty to Bargain — The Substantial and Representative Complement*: NLRB v. Fall River Dyeing & Finishing[1]

Under sections 8(a)(5) and (1) of the National Labor Relations Act (the Act),[2] it is an unfair labor practice for an employer to refuse to recognize and bargain with the

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[88] *Id.* at 996, 120 L.R.R.M. at 2332.

[89] *See* Bush Hog, Inc. v. NLRB, 420 F.2d 1266, 1269, 73 L.R.R.M. 2066, 2067 (5th Cir. 1969).

[90] *See, e.g.*, Certainteed Corp. v. NLRB, 714 F.2d 1042, 1047, 114 L.R.R.M. 2541, 2544 (11th Cir. 1983); *see also* Daylight Grocery Co. v. NLRB, 678 F.2d 905, 908–09, 110 L.R.R.M. 2915, 2917 (11th Cir. 1982).

[91] *IDAB*, 770 F.2d at 998, 120 L.R.R.M. at 2334.

[92] *Id.* at 998–1001, 120 L.R.R.M. at 2334–36; *see also Certainteed Corp.*, 714 F.2d at 1060, 114 L.R.R.M. at 2554–55.

[93] See *supra* notes 55–56, 69 and accompanying text discussing the appropriate standard.

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[1] 775 F.2d 425, 120 L.R.R.M. 2825 (1st Cir. 1985), *cert. granted*, 106 S. Ct. 2243 (1986).

[2] National Labor Relations Act, § 8(a)(5), § 8(a)(1), 29 U.S.C. § 158(a)(5), § 158(a)(1) (1982).

representatives of its employees.[3] In the event of a transfer of the ownership of a business, this obligation to bargain shifts to the acquiring company,[4] provided that the new employer is the "successor" of the prior employer. Once successorship is established, the critical issue involves determining when the successor's duty to bargain arises.[5]

It is well-established that a new employer becomes the "successor" if the essential nature of the enterprise remains unchanged and the new firm employs a majority of the predecessor company's employees.[6] A finding of successorship depends on a variety of factors,[7] but the critical inquiry is whether there have been changes in operation that have altered significantly the employees' working conditions or the employment relationship, thus altering the employees' expectations and needs regarding representation.[8]

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[3] Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title." 29 U.S.C. § 158(a)(5) (1982). Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title." *Id.* § 158(a)(1).

[4] NLRB v. Band-Age, Inc., 534 F.2d 1, 3, 92 L.R.R.M. 2001, 2003 (1st Cir.), *cert. denied*, 429 U.S. 921, 93 L.R.R.M. 2570 (1976). The Supreme Court held in NLRB v. Burns International Security Services, Inc., 406 U.S. 272, 80 L.R.R.M. 2225 (1972), that a mere change in company ownership or of employer does not affect the National Labor Relations Board (the Board) certification of the employees' bargaining unit, provided that a majority of the new firm's employees were employed by the preceding employer. *Id.* at 279, 80 L.R.R.M. at 2227. The successor employer's duty to bargain with the incumbent union is founded upon the mandate of section 8(a)(5) of the Act, *see supra* note 3, and section 9(a) of the Act, which provides that an employer must bargain with "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes," 29 U.S.C. § 159(a) (1982), as well as on the "rule that a mere change in ownership does not destroy the presumption of continuing employee support for a certified union." *Fall River Dyeing*, 775 F.2d at 429, 120 L.R.R.M. at 2828. The presumption of continuing employee support for a certified union upon a change in ownership is based upon the rationale that "a mere change in ownership, without an essential change in working conditions, would not be likely to change *employee* attitudes toward representation." Premium Foods, Inc. v. NLRB, 709 F.2d 623, 627, 113 L.R.R.M. 3261, 3263 (9th Cir. 1983) (emphasis in original).

[5] *Fall River Dyeing*, 775 F.2d at 430, 120 L.R.R.M. at 2829.

[6] *Id.* at 429, 120 L.R.R.M. at 2828. *See also Premium Foods*, 709 F.2d at 627, 113 L.R.R.M. at 3263 ("A new employer who conducts essentially the same business as the former employer, and who hires former employees of his predecessor as a majority of his work force is considered a successor employer"); NLRB v. Hudson River Aggregates, 639 F.2d 865, 869, 106 L.R.R.M. 2313, 2315 (2d Cir. 1981) ("Relevant factors in determining whether a new employer is a successor, for purposes of bargaining obligations, include whether the new employer is using the same supervisory personnel, equipment, and facilities as its predecessor, whether it is producing the same goods, and whether there is a substantial identity in the work force before and after the change in ownership"); NLRB v. Band-Age, Inc., 534 F.2d 1, 3, 92 L.R.R.M. 2001, 2003 (1st Cir. 1976) ("The central question in a successorship case is whether there has been 'a change of ownership not affecting the essential nature of the enterprise'") (quoting Tom-A-Hawk Transit, Inc. v. NLRB, 419 F.2d 1025, 1026–27, 70 L.R.R.M. 1111 (7th Cir. 1969)).

[7] Among the various factors which the Board considers in determining whether the acquiring employer is a successor are "the percentage of employees who were employed by the previous employer, the extent to which their former supervisors have been retained, the identity of skills used and functions performed by the employees, the continuation of the business in the same physical facility with the same or similar equipment, the continuity of products sold or services rendered, and the identity of the customers." *Fall River Dyeing*, 775 F.2d at 429, 120 L.R.R.M. at 2828.

[8] *Id.* While significant changes in the scope of the new employer's business are relevant, changes

Unless a "'substantial and material alteration in the employing enterprise'" has occurred, the acquiring company is deemed to be the predecessor's successor with the attendant bargaining obligation.[9]

In *NLRB v. Burns International Security Services*,[10] the United States Supreme Court suggested in dictum that a determination of the successor's obligation to bargain may need to be postponed until the successor has hired a "full complement" of employees. The delay, the Supreme Court reasoned, may be necessary because until a full complement has been hired, it may not be evident that the bargaining representative represents a majority of employees in the bargaining unit.[11]

During the *Survey* year, the United States Court of Appeals for the First Circuit, in *NLRB v. Fall River Dyeing & Finishing*,[12] addressed two issues regarding the bargaining obligation of a successor employer. First, the court addressed when a successor employer's obligation to bargain with the incumbent union arises.[13] The court held that if a successor's obligation to bargain cannot be determined at the time of the transfer, the bargaining obligation arises when the successor has hired a "substantial and representative complement" of employees.[14] Second, the court addressed the propriety of the "continuing demand" doctrine in the successorship context.[15] Under the doctrine, when a union's request for bargaining has been rejected unconditionally by the employer, the demand is deemed continuing and the union is not required to renew the request later, even if the employer's bargaining obligation was not mature at the time of the original request.[16] The court held that the continuing demand doctrine can be applied in the

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alone do not defeat successorship status of the new business. *Id.* Similarly, the First Circuit held that a hiatus between the cessation of operations by the predecessor company and the commencement of operations by the acquiring company might be considered a factor but would not be dispositive of the issue. *Id.* A hiatus cannot preclude a successorship finding, the court noted, because where there is a hiatus, the successorship determination focuses on employee expectations of rehire during the transition period, particularly where the interim period is concomitant to the change in management and does not represent "a break in the continuity of the employing industry." *Id.*

[9] *Id.* (quoting NLRB v. Boston Needham Indus. Cleaning Co., 526 F.2d 74, 77, 90 L.R.R.M. 3058, 3059 (1st Cir. 1975)).

[10] 406 U.S. 272, 295, 80 L.R.R.M. 2225, 2234 (1972) ("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 as required by § 9(a) of the Act").

In *Burns*, the Supreme Court held that where the bargaining unit did not change and a recently certified bargaining agent represented most of the employees hired by the new employer, the Board had implemented correctly the express mandates of §§ 8(a)(5) and 9(a) of the Act by ordering the new employer, Burns, to bargain with the incumbent union. *Burns*, 406 U.S. at 281, 80 L.R.R.M. at 2228.

[11] *Id.* at 295, 80 L.R.R.M. at 2234.

[12] 775 F.2d 425, 430–33, 120 L.R.R.M. 2825, 2829–31 (1st Cir. 1985).

[13] *Id.* at 430–31, 120 L.R.R.M. at 2829–30.

[14] *Id.* at 430–31, 120 L.R.R.M. at 2829.

[15] *Id.* at 432–33, 120 L.R.R.M. at 2830–31.

[16] *See id.* at 432, 120 L.R.R.M. at 2830. The Board has applied the continuing demand doctrine in cases where a union's request was made before the union had a majority and the request was not renewed upon gaining a majority. *Id.* at 432 & n.32, 120 L.R.R.M. at 2830 & n.32. The rule has been applied also where an employer, defending against an unfair labor practice, asserts that the charge is barred by the Act's statute of limitations because the union neglected to renew the demand within six months of the filing of the charge. *Id.* at 432 & nn.33–34, 120 L.R.R.M. at 2830 & nn.33–34.

successorship context.[17] The First Circuit Court of Appeals' decision in *Fall River Dyeing* grants the employees of a successor employer heightened bargaining rights by imposing a duty to bargain on the successor employer once a substantial and representative complement, rather than a full complement, of employees has been hired.

For more than thirty years prior to 1982, Sterlingwale Corporation operated a plant in Fall River, Massachusetts, engaged primarily in dyeing and finishing textiles.[18] Since 1968, the United Textile Workers of America, AFL-CIO, Local 292 (the Union) represented the employees of Sterlingwale.[19] In early 1982, Sterlingwale ceased normal production operations and began liquidating the company.[20] The collective bargaining agreement with the Union was allowed to expire on April 1, 1982.[21] In July 1982, Fall River Dyeing and Finishing (the Company) acquired Sterlingwale's equipment and leased a portion of the Sterlingwale plant.[22]

The Company began hiring employees on September 20, 1982.[23] Following a short start-up stage, the employees began to perform much of the same work they had done previously for Sterlingwale.[24] All of the operations were conducted in Steringwale's production building using the same machinery and the same basic process.[25] The Company, however, did commission work only, whereas Sterlingwale had done both commission work and converting work.[26] The Company's initial production goal was a one-shift operation with fifty-five to sixty employees.[27] Depending on the level of business, the Company intended to expand into a two-shift operation by April of 1983.[28]

On October 19, 1982, the Union demanded that the Company recognize it as its employees' collective bargaining agent.[29] The Company, engaged in start-up operations, properly refused this demand.[30] By November of 1982, however, employees had been hired in virtually all job classifications.[31] By the middle of January 1983 the first shift was in full operation, a second shift had begun,[32] and the Company had hired at least fifty percent (fifty-five employees) of the workforce it was to employ by April.[33] These employees fell within the majority of existing job classifications.[34] Approximately thirty-

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[17] *Id.* at 432–33, 120 L.R.R.M. at 2830–31.

[18] *Id.* at 427, 120 L.R.R.M. at 2826.

[19] *Id.* at 434, 120 L.R.R.M. at 2832 (Torruella, J., dissenting).

[20] *Id.* at 427, 120 L.R.R.M. at 2827.

[21] *Id.* at 435, 120 L.R.R.M. at 2832 (Torruella, J., dissenting).

[22] *Id.* at 427–28, 120 L.R.R.M. at 2827.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.* "Converting" means that the company buys unfinished fabrics for its own account, dyes and finishes them, and offers the fabric for sale to apparel manufacturers. *Id.* at 427, 120 L.R.R.M. at 2826. In "commission finishing" the company dyes and finishes fabrics owned by other customers to the customers' specifications. *Id.* at 427, 120 L.R.R.M. at 2827. In 1981, sixty to seventy percent of Sterlingwale's volume of business was converting and the balance was commission finishing. *Id.*

[27] *Id.* at 428, 120 L.R.R.M. at 2827.

[28] *Id.*

[29] *Id.*

[30] *Id.* The Board found that at the time of the Union's request, the Company still was engaged in start-up operations and did not have a representative complement of employees. *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

six of the fifty-five employees hired by mid-January were former Sterlingwale employees.[35] Eight of the Company's twelve supervisors were former Sterlingwale supervisors and three of the remaining four were former employees of Sterlingwale.[36] Furthermore, former customers of Sterlingwale accounted for over half of the Company's dollar volume of business.[37]

The Union filed an unfair labor practice charge with the National Labor Relations Board (the Board) in November 1982, claiming that the Company had violated sections 8(a)(5) and (1) of the Act.[38] After an administrative hearing, a majority of the Board adopted the decision of the administrative law judge.[39]

The Board found that the Company was a successor employer to Sterlingwale and that as of January 15, 1983, the Company had employed a representative complement of employees.[40] Further, the Board found that the Union's request for recognition and bargaining constituted a continuing demand and that the Company's refusal to recognize and bargain with the Union once the successorship obligation ripened violated sections 8(a)(5) and (1) of the Act.[41] The First Circuit Court of Appeals enforced the Board's order.[42]

The First Circuit Court of Appeals, agreeing with the Board's finding of successorship,[43] addressed the question of when the successor's bargaining obligation

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[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.* at 435, 120 L.R.R.M. at 2833 (Torruella, J., dissenting).

[39] *Id.* at 436, 120 L.R.R.M. at 2833 (Torruella, J., dissenting).

[40] *Id.* at 428, 120 L.R.R.M. at 2827.

[41] *Id.* at 428, 120 L.R.R.M. at 2827–28.

[42] *Id.* at 427, 434, 120 L.R.R.M. at 2826, 2832.

[43] *Id.* at 430, 120 L.R.R.M. at 2829. The First Circuit court noted that although the Company operated exclusively as a commission dyer and finisher and did not continue the converter work performed by Sterlingwale, the nature of the employees' responsibilities remained the same because both types of work involved essentially the same production process. *Id.* Any management and operational changes resulting from the switch to a strictly commission operation, according to the court, related only indirectly to the interests of the employees. *Id.* In addition, the court found that the reduction in the number of shifts and in the number of supervisors could represent a mere reduction in the size and scope of the operation and not an essential change in the enterprise. *Id.* The majority noted that because a determination of successorship depends upon the precise facts involved, a reviewing court must enforce the Board's order if the Board's findings are supported by substantial evidence based upon the totality of the circumstances. *Id.* at 430, 120 L.R.R.M. at 2828–29.

Judge Torruella dissented from the majority opinion and found no factual support for the initial finding of successorship. *Id.* at 438–39, 120 L.R.R.M. at 2835–36 (Torruella, J., dissenting). The judge stated that there was no continuity between the operations of Sterlingwale and the Company, given the liquidation of Sterlingwale and the separate legal status of the Company. *Id.* at 439, 120 L.R.R.M. at 2836 (Torruella, J., dissenting). Furthermore, Judge Torruella noted that the Company had purchased Sterlingwale's land and equipment on the open market, had not acquired any trade names, good will, or other assets from Sterlingwale, and had not assumed Sterlingwale's liabilities. *Id.* The judge noted that there was no transfer of Sterlingwale employees or personnel and that although the Company ultimately employed former employees of Sterlingwale, these employees were hired on the open market through advertisement and at least seven months after Sterlingwale had terminated their employment. *Id.* Similarly, Judge Torruella noted that there was no transfer of customer lists or customers between Sterlingwale and the Company, but that former Sterlingwale customers who became Company customers were acquired, presumably, on the open market. *Id.* Finally, Judge Torruella found that the nature of the Company's

arises.[44] The court noted that in the usual situation the bargaining obligation arises at the time of transfer of the company or when operations commence.[45] The court acknowledged, however, that in some instances it might be appropriate to delay imposing the bargaining obligation on the successor company.[46] The court noted that the dictum in *Burns* suggested that to ensure that the bargaining representative represented a majority of employees in the bargaining unit, the successor's obligation to bargain might have to be postponed until the successor had hired a "full complement" of employees.[47]

The First Circuit court stated, however, that the "full complement" principle did not mean that the employer's workforce could not be examined until operations had reached full capacity or until all hiring had been completed.[48] Instead, the court stated, determining when the bargaining obligation arose required balancing competing interests.[49] According to the court, the objective of maximum employee participation in the selection of the bargaining agent must be balanced against the goal of achieving employee representation as early as possible.[50]

The First Circuit court held that the successor employer has an obligation to bargain once a "substantial and representative complement" of employees has been hired.[51] The

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business (commission work) was different from Sterlingwale's work (converter and commission work), and that the resulting changes — a smaller manufacturing plant, less employees, less work shifts, longer working hours — were substantial. *Id.* Based upon these circumstances, Judge Torruella could not find any continuity of operations between Sterlingwale and the Company to justify a finding of successorship. *Id.*

[44] *Id.* at 430–31, 120 L.R.R.M. at 2829–30.

[45] *Id.* at 430, 120 L.R.R.M. at 2829.

[46] *Id.* The court noted that it might be appropriate to delay making the bargaining obligation determination where, for example, an employer is rebuilding a collapsed business or is operating at a significantly reduced capacity. *Id.*

[47] *Id.* (citing *Burns*, 406 U.S. at 295, 80 L.R.R.M. at 2234). See *supra* notes 11–12 and accompanying text for a discussion of *Burns*.

[48] *Fall River Dyeing*, 775 F.2d at 430, 120 L.R.R.M. at 2829. *See also* NLRB v. Jeffries Lithograph, 752 F.2d 459, 464, 118 L.R.R.M. 2681, 2685 (9th Cir. 1985) ("Ideally, to fix a date for determining majority status, the Board would wait until the new employer has hired its 'full complement' of workers. (citation omitted) But the federal labor policy favoring early representation and the exigencies of our economy do not permit the Board to wait until an uncertain future date when the employer can claim that it has hired every needed employee. (citation omitted) Therefore, we permit the Board to make a successorship determination when the new employer has achieved a 'substantial and representative' complement of workers. (citation omitted)"); *Premium Foods*, 709 F.2d at 628, 113 L.R.R.M. at 3264 ("The 'full complement' standard attempts to define *when* the makeup of the controlling majority is to be determined. (citation omitted) The count need not be delayed until the employer has completed the hiring of all employees in the bargaining unit.") (emphasis in original).

[49] *Fall River Dyeing*, 775 F.2d at 430–31, 120 L.R.R.M. at 2829.

[50] *Id. See also Premium Foods*, 709 F.2d at 628, 113 L.R.R.M. at 3264 (the "determination of whether a 'full complement' exists involves striking a balance between the objective of allowing the maximum number of employees a voice in selecting their bargaining representative and the goal of assuring that the employees have representation as quickly as possible"); *Hudson River Aggregates*, 639 F.2d at 870–71, 106 L.R.R.M. at 2316–17 (the Board must "balance the objective of selection of a bargaining representative by the maximum number of employees with the objective of employee representation as early as possible"); NLRB v. Pre-Engineered Bldg. Prods., 603 F.2d 134, 136, 101 L.R.R.M. 3021, 3022 (10th Cir. 1979) (the "process of identifying a full complement thus involves balancing the objective of insuring maximum employee participation in the selection of a bargaining agent against the goal of permitting employees to be represented as quickly as possible").

[51] *Fall River Dyeing*, 775 F.2d at 431, 120 L.R.R.M. at 2829–30. The court rejected the Com-

court observed that this standard embodies both concerns of the "full complement" concept, namely, early representation and maximum participation.[52] To determine whether a substantial and representative complement existed at a given date, the First Circuit court focused on whether the job classifications for the operation were "filled or substantially filled" and whether the operation was in "normal or substantially normal production."[53] The court also considered the size of the complement on that date, the employer's expectation as to when a substantially larger complement would be hired, and the relative certainty of the forecasted expansion.[54]

Applying these factors, the First Circuit court upheld the Board's finding that the Company had employed a substantial and representative complement of its workforce by mid-January.[55] By this time, the court noted, the job classifications for all operations were substantially filled[56] and the production level was substantially normal.[57] Thus, with a substantial and representative complement of the workforce in place, the Company's obligation to bargain was mature.

The court next addressed the continuing demand rule in the successorship context.[58] The court noted that it is presumed in successorship cases that the union has majority

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pany's contention that the Board's substantial and representative complement standard varies from the standards of the Ninth and Tenth Circuit courts. *Id.* The First Circuit court pointed out that since the Ninth Circuit's decision in *Pacific Hide & Fur Depot, Inc. v. NLRB*, 553 F.2d 609, 614, 95 L.R.R.M. 2467, 2471 (9th Cir. 1977), where the court had implied in dictum that strict adherence to the "full complement" standard was proper, the Ninth Circuit, in *Jeffries Lithograph* and *Premium Foods*, had made clear "its acceptance of the 'substantial and representative complement' standard as an appropriate means of satisfying the interests recognized in *Burns*." *Fall River Dyeing*, 775 F.2d at 431, 120 L.R.R.M. at 2829–30. Similarly, the First Circuit court noted, the Tenth Circuit, in *Pre-Engineered Building Products* "rejected a rigid interpretation of the 'full complement' standard that would postpone the obligation to bargain until the employer achieved its ultimate objectives and acknowledged the necessity of balancing the objectives of early representation and maximum employee participation." *Id.* at 431, 120 L.R.R.M. at 2830.

[52] *Id.* at 431, 120 L.R.R.M. at 2829. *See also Premium Foods*, 709 F.2d at 628, 113 L.R.R.M. at 3264 (the "'substantial and representative' standard embodies the balance between early representation and maximum participation that lies at the heart of the 'full complement' concept").

[53] *Fall River Dyeing*, 775 F.2d at 431 & n.29, 120 L.R.R.M. at 2830 & n.29. *See also Jeffries Lithogragh*, 752 F.2d at 467, 118 L.R.R.M. at 2688; *Premium Foods*, 709 F.2d at 628, 113 L.R.R.M. at 3264. The First Circuit applied the criteria used by the Board to determine whether a substantial and representative complement of employees existed at a given date. *Fall River Dyeing*, 775 F.2d at 431 & n.29, 120 L.R.R.M. at 2830 & n.29.

[54] *Fall River Dyeing*, 775 F.2d at 431, 120 L.R.R.M. at 2830. *See also Jeffries Lithograph*, 752 F.2d at 467–68, 118 L.R.R.M. at 2688; *Premium Foods*, 709 F.2d at 628, 113 L.R.R.M. at 3264. The Board also considers these factors in its inquiry. *Fall River Dyeing*, 775 F.2d at 431, 120 L.R.R.M. at 2830.

[55] *Fall River Dyeing*, 775 F.2d at 431, 120 L.R.R.M. at 2830.

[56] *Id.* at 431–32, 120 L.R.R.M. at 2830. In concluding that the job classifications were substantially filled by mid-January, the court relied upon the fact that by this time, the Company "had hired employees in virtually all job classifications, had hired at least fifty percent of those it would ultimately employ in the majority of those classifications," and had employed a majority of the total number of employees it would hire ultimately. *Id.* In addition, the court noted that the Company did not employ workers with new skills subsequent to mid-January. *Id.* at 432, 120 L.R.R.M. at 2830.

[57] *Id.* In finding that the Company had reached substantially normal production by mid-January, the court relied upon the fact that by that time, the first shift was in full operation and a second shift had begun. *Id.*

[58] *Id.* at 432–33, 120 L.R.R.M. at 2830–31. In approving the continuing demand doctrine, the First Circuit rejected the Company's argument that the Third Circuit's rejection of the concept, in

status,[59] and that only the failure to hire a substantial and representative complement of workers postpones the employer's duty to bargain.[60] The court reasoned, therefore, that application of the continuing demand rule was practical because the employer, and not the union, was in a better position to determine whether a substantial and representative complement had been hired.[61] In addition, the court recognized that it is common for the union to make bargaining demands before the bargaining obligation actually arises because unions often lack precise information concerning when a change in ownership will take place and what plans, if any, the new management has for expanding or modifying the enterprise.[62] In light of the relative positions of the employer and the union, the court concluded, the continuing demand doctrine in the successorship context is practical and does not impose an unfair burden on the employer.[63]

Under the continuing demand rule, therefore, the First Circuit court held that the Union was not required to renew its demand for bargaining.[64] Instead, the court stated, the Company had an obligation to respond to the request once a substantial and representative complement of the workforce had been hired.[65] The First Circuit court enforced the Board's order to commence bargaining.[66]

Hedstrom Co. v. NLRB, 558 F.2d 1137, 1146–47, 95 L.R.R.M. 3069, 3076–77 (3rd Cir. 1977), *cert. denied*, 450 U.S. 996, 106 L.R.R.M. 2817 (1981), controlled the case at bar. *Id.* In *Hedstrom*, which did not involve a successor enterprise, the union's initial demand was made before the union had majority support. *Hedstrom*, 558 F.2d at 1147–48, 95 L.R.R.M. at 3077; *see Fall River Dyeing*, 775 F.2d at 432, 120 L.R.R.M. at 2830. The *Fall River Dyeing* court noted that the Third Circuit, in rejecting the continuing demand rule, reasoned that to recognize the demand as continuing would force employers "to tread the fine line" between violating § 8(a)(2) of the Act, 29 U.S.C. § 158(a)(2), which prohibits recognizing a minority union, and violating § 8(a)(5) of the Act, *id.* § 158(a)(5), which requires employers to bargain with the majority union. *Fall River Dyeing*, 775 F.2d at 432, 120 L.R.R.M. at 2830 (quoting *Hedstrom*, 558 F.2d at 1148, 95 L.R.R.M. at 3077). The First Circuit pointed out that if the continuing demand rule had been applied in *Hedstrom*, then the employer's duty to bargain would have arisen when the union reached majority status. *Fall River Dyeing* at 432, 120 L.R.R.M. at 2830–31. Application of the rule, therefore, the court noted, would require an employer to monitor the union's status so as to avoid violating section 8(a)(5) of the Act. *Id.* at 432, 120 L.R.R.M. at 2831. The First Circuit court reasoned that in the successorship situation, because it is presumed that the union has majority status, the continuing demand concept does not present the risks identified as unfair by the *Hedstrom* court. *Id.*

[59] *See supra* note 4.

[60] *Id.*

[61] *Id.* at 432–33, 120 L.R.R.M. at 2831.

[62] *Id.* at 433, 120 L.R.R.M. at 2831.

[63] *Id.* at 432–33, 120 L.R.R.M. at 2831. The court noted that there were no other cases where successors claimed that because the initial demand was not renewed, the Board could not find a § 8(a)(5) violation. *Id.* at 433, 120 L.R.R.M. at 2831.

[64] *Id.*

[65] *Id.* at 427, 432–33, 120 L.R.R.M. at 2826, 2830–31. In addition, the court upheld the administrative law judge's rejection of two petitions disclaiming employee support for the union that were signed on April 29, 1983, three days before the commencement of the unfair labor practice hearings. *Id.* at 433, 120 L.R.R.M. at 2831. The First Circuit court agreed with the administrative law judge, who concluded that given the date of the petitions (after the time the Company became obligated to bargain with the Union and failed to do so), the petitions could not justify the Company's refusal to bargain on January 15. *Id.* The court noted that "once it has been determined that an employer has unlawfully withheld recognition of an employees' bargaining representative, the employer cannot demand against a remedial bargaining by pointing to an intervening loss of employee support for the union when such loss of support is a foreseeable consequence of the employer's unfair labor practice." *Id.*

[66] *Id.* at 434, 120 L.R.R.M. at 2832.

Judge Torruella dissented from the majority opinion,[67] stating that the Board's "substantial and representative complement" rule contravened the "full complement" rule enunciated by the Supreme Court in *Burns*.[68] Judge Torruella noted that the Sterlingwale employees had not expressed their union preference for many years, that the labor contract had expired, and that there was a hiatus following the liquidation of Sterlingwale and the start-up of the Company.[69] Based on these facts, Judge Torruella classified this case as precisely one of the "other situations" referred to by the Court in *Burns*,[70] that is, where the successor's duty to bargain may not be evident until a full complement of employees has been hired.[71] Applying the "full complement" standard in this situation, according to Judge Torruella, would satisfy the requirement of section 9(a) of the Act,[72] which provides for the selection of the employees' collective bargaining representative by a majority of the employees.[73] To provide for bargaining with less than a "full complement" of employees, Judge Torruella argued, deprived employees of their right to participate in the election of the bargaining representative.[74]

In addition, Judge Torruella stated that there was no rational basis to uphold the continuing demand rule in this case.[75] Arguing that the Company had a good faith basis for doubting the continued majority support for the Union based upon the Board's concession that the Company did not have a duty to bargain at the time the request was made, Judge Torruella stated that the mere running of one shift at full capacity could not trigger a duty to bargain.[76] He stated further that if an employer's compliance with a demand would subject the employer to charges of violating section 8(a)(2) of the Act,[77] that demand should be classified as "illegal."[78] Judge Torruella suggested that subjecting an illegal demand to the continuing demand rule would permit the imposition of a union on employees.[79]

The First Circuit court's endorsement in *NLRB v. Fall River Dyeing & Finishing* of the "substantial and representative complement" standard represents an appropriate balancing of competing interests. The Board applies this same standard in non-successor cases where a particular bargaining unit of employees is expanding and the time for the original election of a bargaining representative must be fixed.[80] In both situations, that is, where a business is under new management or where existing management plans to expand operations, it would postpone unduly the employees' right to representation and collective bargaining if the employer were entitled to delay recognition until the very

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[67] *Id.* at 434–41, 120 L.R.R.M. at 2832–37 (Torruella, J., dissenting).

[68] *Id.* at 436, 120 L.R.R.M. at 2834 (Torruella, J., dissenting). Judge Torruella stated that "[t]he Board's contention that the 'full complement' requirement in *Burns* constitutes mere dicta which it is cavalierly free to disregard, is hardly an approach that this court should be eager to follow." *Id.* at 438, 120 L.R.R.M. at 2835 (Torruella, J., dissenting).

[69] *Id.* at 437, 120 L.R.R.M. at 2834 (Torruella, J., dissenting).

[70] *Burns*, 406 U.S. at 272, 80 L.R.R.M. at 2234.

[71] *Fall River Dyeing*, 775 F.2d at 437, 120 L.R.R.M. at 2834 (Torruella, J., dissenting).

[72] 29 U.S.C. § 159(a) (1982). See *supra* note 4 for the text of § 9(a) of the Act.

[73] *Fall River Dyeing*, 775 F.2d at 437, 120 L.R.R.M. at 2834 (Torruella, J., dissenting).

[74] *Id.* at 437–38, 120 L.R.R.M. at 2834–35 (Torruella, J., dissenting).

[75] *Id.* at 440, 120 L.R.R.M. at 2836–37 (Torruella, J., dissenting).

[76] *Id.*

[77] 29 U.S.C. § 158(a)(2) prohibits the recognition of a minority union. *Id.*

[78] *Fall River Dyeing*, 775 F.2d at 440, 120 L.R.R.M. at 2836–37 (Torruella, J., dissenting).

[79] *Id.*

[80] *See Premium Foods*, 709 F.2d at 628, 113 L.R.R.M. at 3264.

last employee was hired, perhaps months or years later.[81] While Judge Torruella's concern for the right of each employee to participate in the selection of the bargaining representative is valid, given the presumption of the union's majority status in successorship cases, this interest cannot outweigh the competing interest to engage in collective bargaining as soon as possible. By adopting the "substantial and representative complement" standard the First Circuit court ensures both that a maximum number of employees participate in the selection of a bargaining agent and that collective bargaining begins as early as possible.[82]

Practical considerations favor applying the continuing demand doctrine in the successorship context. Once the union has filed a demand, the employer is on notice of the employees' request for recognition and collective bargaining.[83] To require the union to renew its request serves no practical purpose from either the employer's or the employees' point of view.[84] Judge Torruella's concern that application of the continuing demand rule in the successorship context would allow imposition of a union upon the employees is unwarranted because the successor employer's duty to bargain with the incumbent union itself is based on the presumption of continuing employee support for the certified union.[85]

In light of the increase in takeover and buy-out activity in the 1980s, applying the "substantial and representative complement" standard and the continuing demand rule in the successorship context provides employees, often placed in precarious situations, with enhanced bargaining rights. Once a demand for recognition and bargaining has been made, the responsibility to initiate collective bargaining shifts to the successor employer.[86] This requires the employer to monitor the growth of the bargaining unit relative to the anticipated total number of employees that will comprise that unit.[87] To place this responsibility on the employer is appropriate because the employer necessarily is in a better position to determine when there is a substantial and representative complement of employees.[88]

In sum, the First Circuit court's decision in *Fall River Dyeing* provides employees in a successorship situation with heightened bargaining rights. The court held that a successor employer has an obligation to bargain with the incumbent union once a "substantial and representative complement" of employees has been hired. In addition, the court

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[81] *See* Clement-Blythe, 182 N.L.R.B. 502, 502 (1970) ("[i]t would unduly frustrate existing employees' choice to delay selection of a bargaining representative for months or years until the very last employee is on board. Conversely, it would be pointless to hold an election for very few employees when in a relatively short period the employee complement is expected to multiply many times"), *enf'd*, NLRB v. Clement-Blythe Companies, 77 L.R.R.M. 2373 (4th Cir. 1971).

[82] *Fall River Dyeing*, 775 F.2d at 430–31, 120 L.R.R.M. at 2829. In practice, requiring the successor employer to begin collective bargaining before a full complement of employees has been hired may not shorten the time within which collective bargaining commences. The acquiring company may still refuse the union's demand to bargain by asserting that it is not a successor employer. Because the determination of successorship turns "on the precise facts involved," *id.* at 430, 120 L.R.R.M. at 2828–29, this will involve at the very least an administrative hearing during which time bargaining will be further postponed.

[83] *See id.* at 433, 120 L.R.R.M. at 2831.

[84] *See id.*

[85] See *supra* note 4 and accompanying text for a discussion of the successor's duty to bargain.

[86] *See Fall River Dyeing*, 775 F.2d at 432–33, 120 L.R.R.M. at 2830–31.

[87] *See id.* at 432, 120 L.R.R.M. at 2831.

[88] *See id.* at 432–33, 120 L.R.R.M. at 2831.

held that when a union has made a demand for collective bargaining that the employer has rejected, that demand is deemed continuous, and the union is not required to renew the request for recognition and bargaining. Thus, the First Circuit court's decision properly requires a successor employer to inform the union of the status of its hiring goals and to commence bargaining as early as possible.

2. **Employees' Right to Post Potentially Inflammatory Union Literature in the Workplace Under Section 7 of the NLRA*: Southwestern Bell Telephone Co.[1]

Section 7 of the National Labor Relations Act (the Act) guarantees employees the right to form, join, or assist labor organizations, and the right to engage in concerted activities in furtherance of their mutual interests.[2] While the use of an employer's bulletin board for union purposes is not a generally protected activity under section 7, once an employer provides such bulletin board space to a union, the union's use of the board takes on the protection of the Act.[3] Thus, once it permits use of its bulletin board for union purposes, an employer generally may not remove notices or discriminate against employees who post notices that the employer finds distasteful.[4] Such conduct by an employer constitutes unfair labor practices violative of section 8(a)(1) of the Act,[5] absent "special circumstances" justifying compromise of employee section 7 rights.[6]

Determination of what constitutes special circumstances justifying an employer's ban on otherwise protected activity in the workplace has received extensive treatment by

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[1] 276 N.L.R.B. No. 110, 120 L.R.R.M. 1145 (1985). The decision of Wagman, Administrative Law Judge (A.L.J.), which was adopted in full by a majority of the National Labor Relations Board in *Southwestern Bell*, *id.* at 2, 120 L.R.R.M. at 1146, is not reported at 120 L.R.R.M. 1145. Thus, only the Board's summary affirmance of Wagman, A.L.J. and the dissenting opinion of Board Chairman Dotson appear at 120 L.R.R.M. 1145.

[2] 29 U.S.C. § 157 (1982). Section 7 of the National Labor Relations Act reserves to employees the right to engage in concerted activity for their mutual aid or benefit:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for . . . other mutual aid or protection . . . .

Id.

[3] *See* Southwestern Bell Tel. Co., 276 N.L.R.B. No. 110 at 6 (opinion of Wagman, A.L.J.). *See also* Container Corp. of America, 244 N.L.R.B. 318, 321 n.2, 102 L.R.R.M. 1162, 1162 (1979); Nugent Service, Inc., 207 N.L.R.B. 158, 161, 84 L.R.R.M. 1510, 1510 (1973); Tempco Mfg. Co., 177 N.L.R.B. 336, 342 n.20, 348, 73 L.R.R.M. 1122, 1123 (1969).

[4] *Southwestern Bell*, 276 N.L.R.B. No. 110 at 6 (opinion of Wagman, A.L.J.). *See also* cases cited in *supra* note 3.

[5] 29 U.S.C. § 158(a)(1) (1982). Section 8(a)(1) of the Act makes it an unfair labor practice for employers to interfere with the rights granted employees under section 7, or to take any employment action which either encourages or discourages membership in a labor organization:

> (a) It shall be an unfair labor practice for an employer —
> (1) to interfere with, restrain, or coerce employees in the excercise of the rights guaranteed in section 7.

Id.

[6] *See* Republic Aviation Corp. v. NLRB, 324 U.S. 793, 797–98, 16 L.R.R.M. 620, 624 (1945); Caterpillar Tractor Co., 230 F.2d 357, 358–59, 37 L.R.R.M. 2619, 2620 (7th Cir. 1956); Midstate Telephone Corp., 262 N.L.R.B. 1291, 1292, 110 L.R.R.M. 1533, 1534 (1982); Southwestern Bell Tel. Co., 200 N.L.R.B. 667, 671, 82 L.R.R.M. 1247, 1248–49 (1972); United Aircraft Corp., 134 N.L.R.B. 1632, 1634–35, 49 L.R.R.M. 1384, 1385–86 (1961).

both the National Labor Relations Board (the Board) and by the federal courts.[7] In *Republic Aviation Corp. v. NLRB*,[8] decided in 1945, the Supreme Court first announced that employers have an undisputed right to maintain discipline in their establishments, and that this right may limit employees' exercise of their rights (guaranteed) under section 7. Thus, courts have held that where objective evidence supports an employer's belief that a ban on otherwise protected activity is necessary to maintain decorum and discipline among its employees,[9] to avoid animosity and divisiveness among employees,[10] to avert violence,[11] or to prevent interruption of efficient production,[12] "special circumstances" exist justifying an employer's interference with its employees' section 7 rights.

Where union literature or slogans are likely to spread discord or bitterness among employees[13] or between employees and their supervisors,[14] are likely to precipitate a disruption of discipline,[15] or contain a message that is provocative or inflammatory on its face,[16] an employer may remove or ban the inflammatory material. Whether removal of the posted material is justified is assessed in light of the relevant surrounding circumstances to determine the reasonableness of the employer's apprehensions.[17] It is well established, however, that special circumstances justifying management's response may

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[7] Indeed, as the Supreme Court noted in *Republic Aviation*, 324 U.S. at 798, 16 L.R.R.M. at 622–23, the Act leaves to the Board the work of applying the Act's general prohibitions to "infinite combinations of events." Thus, the Court recognized, it is the province of the Board and its reviewing courts to define the circumstances where employees' rights to organize for mutual aid may not be infringed, and to identify those circumstances where an employer may interfere legitimately with employees' section 7 rights to organize. *Id.*

[8] *Republic Aviation*, 324 U.S. at 797–98, 16 L.R.R.M. at 622. The need to balance the competing interests of employees to self-organization and of employers to maintain discipline that the Court announced in *Republic Aviation* continues to the present as the standard by which courts determine "special circumstances." As the Court noted in *Republic Aviation*, its task was to work out:

> an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act [29 U.S.C. § § 151 et. seq.] and the equally undisputed right of employers to maintain discipline in their establishments. Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society.

Id.

[9] *See, e.g.*, Maryland Drydock Co. v. NLRB, 183 F.2d 538, 540–41, 26 L.R.R.M. 2450, 2451 (4th Cir. 1950); *Midstate*, 262 N.L.R.B. at 1292, 110 L.R.R.M. at 1534.

[10] *See, e.g.*, R.H. Macy & Co. v. NLRB, 462 F.2d 364, 369, 80 L.R.R.M. 2673, 2677 (5th Cir. 1972); *United Aircraft*, 134 N.L.R.B. at 1634, 49 L.R.R.M. at 1385.

[11] *See, e.g.*, Boeing Airplane Co. v. NLRB, 217 F.2d 369, 374–75 (9th Cir. 1954) (ban on wearing of union buttons was legitimate to avoid a "highly explosive" rival union situation). *See also United Aircraft*, 134 N.L.R.B. at 1639 n.7, 49 L.R.R.M. at 1386 n.7.

[12] *See, e.g., Caterpillar*, 230 F.2d at 358–59, 37 L.R.R.M. at 2621; *Nugent Service*, 207 N.L.R.B. at 161, 84 L.R.R.M. at 1510; *Southwestern Bell*, 200 N.L.R.B. at 670, 82 L.R.R.M. at 1249.

[13] *Southwestern Bell*, 200 N.L.R.B. at 670, 82 L.R.R.M. at 1248.

[14] *Id. See also Maryland Drydock*, 183 F.2d at 540, 26 L.R.R.M. at 2451; *Southwestern Bell*, 276 N.L.R.B. No. 110 at 6 (opinion of Wagman, A.L.J.).

[15] *Macy*, 462 F.2d at 369, 80 L.R.R.M. at 2677; *Caterpillar*, 230 F.2d at 359, 37 L.R.R.M. at 2621; *Maryland Drydock*, 183 F.2d at 540, 26 L.R.R.M. at 2451.

[16] See cases cited *supra* note 14. *See also Southwestern Bell*, 200 N.L.R.B. at 670, 82 L.R.R.M. at 1248.

[17] *See Republic Aviation*, 324 U.S. at 797–98, 16 L.R.R.M. at 624; *United Aircraft*, 134 N.L.R.B. at 1634, 49 L.R.R.M. at 1385–86.

exist even though there has been no actual confrontation, breakdown of discipline or interruption of production.[18] An employer may take preventative action to head off the deleterious consequences that the posting reasonably might produce under the circumstances.[19] Absent a showing that the offending material is likely to create labor disturbances or break down employee discipline, however, an employer has not proved special circumstances permitting interference with employee section 7 rights,[20] and thus, removal of the offending material constitutes an unfair labor practice in violation of section 8.[21]

During the *Survey* year, the Board ruled that an employer violated section 8(a)(1) of the Act by removing Jack London's "Definition of a Scab" from union bulletin boards and prohibiting employees from reposting the commentary.[22] In *Southwestern Bell Telephone Co.*,[23] the Board held that although "Definition of a Scab" was on its face inflammatory and provocative and management feared the material would cause animosity among employees, the employer was not justified in banning the posting of "Definition of a Scab". Although cases of unlawful interference with employee rights under section 7 of the Act necessarily are dependent upon the facts presented in each individual case, *Southwestern Bell* signals a stricter interpretation by the Board of what situations constitute special circumstances allowing an employer to infringe upon employees' section 7 rights.

In *Southwestern Bell*, the Communications Workers of America, Local 12222 (the Union) charged that Southwestern Bell Telephone Company's (the Company) actions in removing Jack London's "Definition of a Scab" from the Union's bulletin boards, directing employees to remove it from the bulletin boards, and threatening employees with disciplinary action for distributing, posting, and reposting "Definition of a Scab" on union bulletin boards located on company premises violated section 8(a)(1) of the Act.[24] All of these acts occurred four days after the conclusion of the Union's three-week strike against the Company in August, 1983.[25] During the strike, a substantial number of employees at the Company's facilities in Houston, Texas continued to work behind the Union's picket line.[26]

On September 1 and 2, 1983, the Union distributed to its stewards for posting on its bulletin boards at the Company's facilities the commentary by Jack London entitled

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[18] VEPCO v. NLRB, 703 F.2d 79, 83, 112 L.R.R.M. 3099, 3103 (4th Cir. 1983); NLRB v. Harrah's Club, 337 F.2d 177, 180, 57 L.R.R.M. 2198, 2201 (9th Cir. 1964); *Caterpillar*, 230 F.2d at 359, 37 L.R.R.M. at 2621; *Southwestern Bell*, 200 N.L.R.B. at 671, 82 L.R.R.M. at 1249; *United Aircraft*, 134 N.L.R.B. at 1635, 49 L.R.R.M. at 1385.

[19] *Macy*, 462 F.2d at 371, 80 L.R.R.M. at 2678; *Maryland Drydock*, 183 F.2d at 541, 26 L.R.R.M. at 2452–53; *Southwestern Bell*, 276 N.L.R.B. No. 110 at 7, 120 L.R.R.M. at 1247 (Dotson, Chairman, dissenting).

[20] *See Caterpillar*, 230 F.2d at 359, 37 L.R.R.M. at 2621; *Midstate*, 262 N.L.R.B. at 1292, 110 L.R.R.M. at 1534; Portage Plastics Co., 163 N.L.R.B. 753, 759, 64 L.R.R.M. 1484, 1485 (1967).

[21] *See VEPCO*, 703 F.2d at 83, 112 L.R.R.M. at 3103; *Midstate*, 262 N.L.R.B. at 1292, 110 L.R.R.M. at 1534; *Portage Plastics*, 163 N.L.R.B. at 759, 64 L.R.R.M. at 1485–86.

[22] *Southwestern Bell*, 276 N.L.R.B. No. 110 at 7 (opinion of Wagman, A.L.J.).

[23] *See id.* at 2–6 (opinion of Wagman, A.L.J.). The Company also argued that its apprehensions were justified because the material was posted on bulletin boards only four days after the conclusion of a three week strike, during which many employees continued to work behind the Union picket line. *Id.* at 4–5 n.1, 120 L.R.R.M. at 1146–47 (Dotson, Chairman, dissenting).

[24] *Id.* at 1 (opinion of Wagman, A.L.J.).

[25] *Id.* at 2–3 (opinion of Wagman, A.L.J.).

[26] *Id.* at 3 (opinion of Wagman, A.L.J.).

"Definition of a Scab."[27] Copies of "Definition of a Scab," along with another article praising the strikers and criticizing those who had worked behind the picket line, were posted immediately on Union bulletin boards throughout the Company's facilities.[28] Prior to September 1, no Company supervisor ever had restricted the posting of materials on the Union's bulletin boards, nor had any company supervisor ever removed anything from the Union boards.[29]

During the afternoon of September 2, Company supervisors noticed employees reading the posted article, and were alerted by employees that there was an article on the bulletin board that was causing animosity among the clerks.[30] In response to the inflammatory nature of the London commentary and the animosity among employees the Company felt it was creating, Company supervisors both removed and ordered the removal of "Definition of a Scab" from the bulletin boards and forbade Union stewards from reposting the commentary.[31] When Union stewards refused to remove the commentary and persisted in reposting copies of the commentary, the stewards were warned of suspension and threatened with disciplinary action.[32] Ultimately, all copies of "Definition of a Scab" were removed from the Union bulletin boards.[33]

The Union contended that the Company's removal of "Definition of a Scab" from Union bulletin boards and threatening of employees with punishment if they posted or reposted London's commentary violated section 8(a)(1) of the Act.[34] The Company

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[27] *Id.* The commentary reads as follows:

> DEFINITION OF A SCAB
>
> After God had finished the rattlesnake, the toad, and the vampire, he had some awful substance left with which he made a SCAB. A SCAB is a two-legged animal with a corkscrew soul, a water-logged brain, and a combination backbone made of jelly and glue. Where others have hearts, he carries a tumor of rotten principles.
>
> When a SCAB comes down the street men turn their backs and angels weep in Heaven, and the devil shuts the gates of Hell to keep him out. No man has the right to SCAB, so long as there is a pool of water deep enough to drown his body in, or a rope long enough to hang his carcass with. Judas Iscariot was a gentleman . . . compared with a SCAB; for betraying his master, he had the character to hang himself — - a SCAB hasn't.
>
> Essau sold his birthright for a mess of pottage. Judas Iscariot sold his Saviour for thirty pieces of silver. Benedict Arnold sold his country for a promise of a commission in the British Army. The modern strikebreaker sells his birthright, his country, his wife, his children and his fellow men for an unfulfilled promise from his employer, trust or corporation.
>
> Essau was a traitor to himself. Judas Iscariot was a traitor to his God. Benedict Arnold was a traitor to his country.
>
> A strikebreaker is a traitor to himself, a traitor to his God, a traitor to his country, a traitor to his family and a traitor to his class.
>
> THERE IS NOTHING LOWER THAN A SCAB.

Id. at 3, 120 L.R.R.M. at 1145 (opinion of Wagman, A.L.J.).

[28] *Id.* at 3–5 (opinion of Wagman, A.L.J.).

[29] *Id.* at 4 (opinion of Wagman, A.L.J.).

[30] *Id.* at 6–7 n.1, 120 L.R.R.M. at 1146–47 n.1 (Dotson, Chairman, dissenting). Company supervisors also testified that the commentary caused "an unusual stir" among employees. *Id.* at 7 n.1, 120 L.R.R.M. at 1147 n.1 (Dotson, Chairman, dissenting).

[31] *Id.* at 4–5 (opinion of Wagman, A.L.J.).

[32] *Id.*

[33] *Id.* at 5 (opinion of Wagman, A.L.J.).

[34] *Id.*

denied that removal of the commentary violated the Act because, the Company contended, the posting of Jack London's pejorative commentary had disrupted the discipline of its employees.[35] Thus, the Company argued, the postings were beyond the protection of sections 7 and 8(a)(1) of the Act.[36]

On September 30, 1985, a three-member panel of the Board summarily affirmed Administrative Law Judge Wagman's decision holding that the Southwestern Bell Telephone Company violated the rights guaranteed its employees under section 7 of the Act.[37] The majority of the panel adopted the Judge's rulings, findings, and conclusions in toto and adopted his recommended order directing the Company to cease and desist from its ban on "Definition of a Scab."[38] Chairman Dotson, the third member of the reviewing panel, filed an opinion dissenting from the panel's decision, contending that he would have reversed the Administrative Law Judge's findings, and dismissed the employees' complaint.[39]

Judge Wagman first noted that the posting of "Definition of a Scab" was protected activity under section 7.[40] The Judge stated that the Union's purpose in posting the commentary was to criticize colleagues that the Union perceived as having been disloyal to the Union by working behind the Union's picket line during the strike.[41] The Judge found, however, that the Union's legitimate interest in strengthening employee support and cohesion for future economic strikes also motivated the Union.[42] Finally, the Judge noted, because the Company had never imposed any limitations on the Union's use of its bulletin boards prior to the appearance of "Definition of a Scab," the posting of this article was protected activity under section 7 of the Act, which the Company could not oppose absent a showing by management that the posting of the commentary was likely to disrupt employee discipline in its plant.[43]

In his analysis, Judge Wagman recognized that an employer may request lawfully that employees remove offending slogans from the workplace in the interest of maintaining discipline and harmonious relations among workers and management.[44] The Judge held that in order to justify such a request, however, an employer must put forth evidence showing that the written message was likely to precipitate a disruption of discipline.[45] In this case, the Judge held, the Company did not meet its burden of proving special circumstances justifying its ban on the posting of "Definition of a Scab."[46]

The Judge next distinguished an earlier case involving the same parties.[47] In the 1972 case of *Southwestern Bell Telephone Co.*,[48] the Board found that the wearing of sweatshirts by employees bearing the slogan "Ma Bell is a Cheap Mother" was unpro-

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[35] *Id.*
[36] *Id.*
[37] *Id.* at 1 (opinion of Wagman, A.L.J.).
[38] *Id.* at 2 (opinion of Wagman, A.L.J.).
[39] *Id.* at 4–8 (Dotson, Chairman, dissenting).
[40] *Id.* at 6 (opinion of Wagman, A.L.J.).
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.* at 6–7 (opinion of Wagman, A.L.J.).
[47] *Id.* at 6 (opinion of Wagman, A.L.J.).
[48] 200 N.L.R.B. 667, 670, 82 L.R.R.M. 1247, 1248 (1972).

tected activity because it was an insult directed at management. Further, the Board found in that case that because the slogan was susceptible to derisive and profane construction and would be in view constantly, the Company was justified in banning the sweatshirts as a reasonable precaution against discord and bitterness between employees and management, and to assure decorum and discipline in the plant.[49] The instant case, Judge Wagman ruled, did not warrant the same result, however, because the controversial language was not worn on shirts but merely displayed on bulletin boards.[50] Furthermore, because the derisive language was not directed at the Company or its management, it was not likely to cause discord or bitterness between employees and their supervisors.[51] Thus, the Judge found, the circumstances that persuaded the Board to permit the Company's ban in the earlier *Southwestern Bell* case were not present in this case.[52]

Finally, the Judge considered the Supreme Court's 1974 decision of *Letter Carriers v. Austin*,[53] a libel case in which the Court held that the use of the term "scab" in labor disputes is entitled to the protection of section 7 of the Act. The *Austin* Court specifically held that "the use of Jack London's 'Definition of a Scab' in labor disputes and union recruitment efforts is permissable under federal law."[54] Thus, the Judge concluded, the Union's use of Jack London's "Definition of a Scab" in this case was protected activity under section 7 and the Company's ban on its posting constituted an unlawful interference with employee rights in violation of section 8(a)(1).[55] Judge Wagman then issued an order directing the Company to cease and desist from its ban on "Definition of a Scab," and from taking any other actions inconsistent with employees' section 7 rights to post "Definition of a Scab."[56]

Chairman Dotson, dissenting to the Board's affirmation of the Administative Law Judge's decision, agreed with the Company's argument that under the circumstances, banning "Definition of a Scab" was not an unfair labor practice.[57] Reasoning that it is common sense that the posting of "Definition of a Scab" would provoke confrontations between striking and non-striking employees and prolong ill-will between the two groups, the Chairman found that special circumstances existed justifying the employer's actions.[58] In support of his conclusion, the Chairman cited the testimony of Company supervisors,

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[49] *Id.*

[50] *Southwestern Bell*, 276 N.L.R.B. No. 110 at 6 (opinion of Wagman, A.L.J.).

[51] *Id.*

[52] *Id.*

[53] 418 U.S. 264, 283, 86 L.R.R.M. 2740, 2746 (1974).

[54] *Id.* at 285–86, 86 L.R.R.M. at 2747–48.

[55] *Southwestern Bell*, 276 N.L.R.B. No. 110 at 7 (opinion of Wagman, A.L.J.). As correctly pointed out by Chairman Dotson in his dissent, however, Judge Wagman's reliance on *Letter Carriers v. Austin* was misplaced. The Court's discussion of "Definition of a Scab" in that case concerned only whether it was actionable as defamation under the theory that it was a falsehood uttered knowingly or in reckless disregard of the truth. *See* 418 U.S. at 282–83, 86 L.R.R.M. at 2746–47. The Court's holding in *Letter Carriers* that "Definition of a Scab" is not per se unprotected because of its scurrilous content has no bearing on whether the vituperative commentary was likely to disrupt efficient production or discipline. Thus, nothing in *Letter Carriers* precluded the Board from finding that the posting of "Definition of a Scab" in the workplace posed a threat to production and order and thereby justified preventative action by management. *Southwestern Bell*, 276 N.L.R.B. No. 110 at 7 n.1 (Dotson, Chairman, dissenting).

[56] *Id.* at 7–8 (opinion of Wagman, A.L.J.).

[57] *Id.* at 4, 120 L.R.R.M. at 1146 (Dotson, Chairman, dissenting).

[58] *Id.* at 6, 120 L.R.R.M. at 1147 (Dotson, Chairman, dissenting).

who had presided over the removal of "Definition of a Scab" from the bulletin boards, that they had been alerted to the controversial posting by employee complaints, and that they had noticed that the commentary had caused an unusual controversy among employees.[59] In summary, the Chairman concluded that the provocative and inflammatory nature of the Jack London commentary, when considered in view of the strained employee relations that existed at the conclusion of a recent strike in which a substantial number of employees crossed the Union's picket line, constituted special circumstances justifying the Company's removal of the commentary.[60] Because an employer is under no compulsion to wait until a breakdown of discipline or an actual confrontation already has occurred to take measures to maintain discipline, Chairman Dotson noted, the Company presented sufficient evidence to justify prohibiting "Definition of a Scab."[61]

The Board's decision in *Southwestern Bell* adopted a stricter standard under which an employer can justify banning otherwise protected activity in the workplace than the standard that had been used in the past.[62] The opinion lends greater deference to the right of employees to express themselves in the workplace, while heightening the burden of proof upon employers to show special circumstances justifying prohibition of objectionable expressions in the workplace. In *Southwestern Bell*, the Board held that because "Definition of a Scab" merely was displayed on bulletin boards, and was not a direct insult to the Company or its management, no special circumstances existed to justify management's response. Thus, the Board narrowed the range of circumstances under which an employer's interference with employee activities is permitted to maintain discipline and promote harmony in the workplace.[63] In adopting this stricter standard, the Board has indicated an increased willingness to second-guess the judgment of management in reacting to labor incidents.

Many of the cases Board Chairman Dotson relied upon in his dissent illustrate the departure from precedent that the Board has taken in its new restrictive approach to

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[59] *Id.* at 6–7, 120 L.R.R.M. at 1147 (Dotson, Chairman, dissenting).

[60] *Id.* at 8, 120 L.R.R.M. at 1147 (Dotson, Chairman, dissenting).

[61] *Id.* at 7, 120 L.R.R.M. at 1147 (Dotson, Chairman, dissenting) (citing *VEPCO*, 703 F.2d at 83, 112 L.R.R.M. at 3103; *Macy*, 462 F.2d at 371, 80 L.R.R.M. at 2678; *Caterpillar Tractor*, 230 F.2d at 359, 37 L.R.R.M. at 2621; *Maryland Drydock*, 183 F.2d at 541, 26 L.R.R.M. at 2453; *Southwestern Bell*, 200 N.L.R.B. at 671, 82 L.R.R.M. at 2678).

[62] *See e.g.*, *Macy*, 462 F.2d at 368–69, 80 L.R.R.M. at 2667 (provocative nature of union campaign button and atmosphere of tension between pro- and anti-union factions substantiated management's fear that the button was likely to cause conflict among employees); *Caterpillar*, 230 F.2d 358–59, 37 L.R.R.M. at 2621 (employer had right to prohibit wearing of union badges bearing the legend "Don't be a Scab" because the controversial buttons could have a "disruptive influence" on work and discipline); *Southwestern Bell*, 200 N.L.R.B. at 670, 82 L.R.R.M. at 1249 (employer justified in banning sweatshirts bearing provocative slogan "Ma Bell is a Cheap Mother" as a legitimate precaution against discord and bitterness between employees and management and to assure decorum and discipline in the plant); *United Aircraft*, 134 N.L.R.B. at 1634–35, 49 L.R.R.M. at 1385–86 (employer legitimately prohibited employees from wearing "Club 9" pins, signifying that wearer had observed the full length of a nine-week strike, because the circumstances of the strike rendered entirely reasonable the employer's apprehension that the pins would promote disorder and engender further divisiveness between strikers and non-strikers). *See also Macy*, 462 F.2d at 371, 80 L.R.R.M. at 2678 (no requirement that an employer wait for an actual confrontation or breakdown of discipline to occur before "special circumstances" are found, but rather, management may act to avert the threat of disruption); *Maryland Drydock*, 183 F.2d at 539, 26 L.R.R.M. at 2451 (distribution of literature on company premises that has a necessary tendency to disrupt discipline in the plant is unprotected).

[63] *See Southwestern Bell*, 276 N.L.R.B. No. 110 at 6–7 (opinion of Wagman, A.L.J.).

analyzing management's "special circumstances" justification.[64] In *United Aircraft Corp.*,[65] a factually similar case, an employer banned the wearing of a "Club 9" pin which signified that the wearer had stayed away from work for the entire nine weeks of a recent strike in which two-thirds of the employees eventually crossed the picket line. In that case, the Board held that the employer's ban on the pins did not violate section 8(a)(1) because the circumstances of the strike rendered entirely reasonable the employer's apprehension of plant disorder resulting from wearing the "Club 9" pins.[66] Similarly, in *Caterpillar Tractor Co.*,[67] the Seventh Circuit held that an employer's ban on union "Don't be a Scab" buttons was justified, because the buttons inherently carried with them a likelihood of disturbing efficient operation of the employer's business. The court in *Caterpillar* also found that the "inescapable connotation of opprobriousness and vileness" carried by the term "scab" served to further legitimize the employer's concern that the buttons could breakdown discipline.[68]

Moreover, the Fifth Circuit in *R.H. Macy & Co. v. NLRB*[69] and the Fourth Circuit in *VEPCO v. NLRB*[70] held that employers did not violate section 8 of the Act in prohibiting employees from wearing controversial union buttons during working hours. In both cases, the courts reasoned that the employers' ban on the potentially provocative union buttons was justified because in each case there was a possibility that a conflict might erupt unless the buttons were prohibited.[71] In reaching this conclusion, both courts recognized that it was immaterial that no actual controversy had erupted yet at the time of the bans.[72]

Although these cases appear to be closely analagous to the situation faced by the Board in *Southwestern Bell*, the majority opinion improperly fails to take notice of them. While the majority in *Southwestern Bell* recognized the right of employers to maintain discipline in their establishments,[73] the Board was unwilling to embrace the deferential attitude towards management's judgment that prevailed in earlier decisions.[74] Indeed,

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[64] *See id.* at 4–8 (Dotson, Chairman, dissenting).

[65] 134 N.L.R.B. 1632, 1634–35, 49 L.R.R.M. 1384, 1385 (1961).

[66] *Id.* at 1634–35, 49 L.R.R.M. at 1385–86. The circumstances included bitter conflict and animosity between striking and non-striking employees during and following settlement of a nine-week strike. There was also evidence of an altercation between a striker and a non-striker, and of strike lists and vituperative letters being circulated showing animosity toward strikers. *Id.*

[67] 230 F.2d 357, 358–59, 37 L.R.R.M. 2619, 2621 (7th Cir. 1956).

[68] *Id.*

[69] 462 F.2d 364, 371, 80 L.R.R.M. 2673, 2679 (5th Cir. 1972).

[70] 703 F.2d 79, 82–83, 112 L.R.R.M. 3099, 3104 (4th Cir. 1983).

[71] *VEPCO*, 703 F.2d at 83, 112 L.R.R.M. at 3102; *Macy*, 462 F.2d at 370–71, 80 L.R.R.M. at 2675–77.

[72] *VEPCO*, 703 F.2d at 83, 112 L.R.R.M. at 3102; *Macy*, 462 F.2d at 371, 80 L.R.R.M. at 2678 (citing with approval *Harrah's Club*, 337 F.2d at 180, 57 L.R.R.M. at 2200–01). In *Harrah's Club* the Ninth Circuit held that:

> [an employer] should not be required to wait until it receives complaints or suffers a decline in business to prove special circumstances. Businessmen are required to anticipate such occurrences and avoid them if they wish to remain in business. This is a valid exercise of business judgment, and it is not the province of the Board or of this court to substitute its judgment for that of management so long as the exercise is reasonable and does not interfere with a protected purpose.

337 F.2d at 180, 57 L.R.R.M. at 2200–01.

[73] *Southwestern Bell*, 276 N.L.R.B. No. 110 at 6 (opinion of Wagman, A.L.J.).

[74] *See supra* cases cited at note 72 and accompanying text.

while the Board and courts in earlier decisions were hesitant to substitute their judgment for that of management,[75] with *Southwestern Bell* the Board has adopted a more active role in scrutinizing management's proferred justifications for banning employee activities protected under section 7 of the Act.

Previous decisions have recognized that it is highly unlikely that a tribunal could substitute successfully its judgment in hindsight for that of management, who witnessed the unfolding of the events that moved it to action and understood the atmosphere in which the incident occurred.[76] The Board in *Southwestern Bell*, however, took no heed of these policies underlying deference to management's judgment. In disregarding these factors, the Board has embarked on a dangerous policy of actively second-guessing the judgment of management in light of the Board's distance from, and management's proximity to, the situation. In the wake of *Southwestern Bell*, employees' mere public posting and display of controversial written materials that do not insult management directly will not constitute special circumstances justifying management's response.

Despite management's concerns that the posted materials were provocative and inflammatory, and that they were likely to precipitate a disruption of discipline and efficiency among plant employees, the Board in *Southwestern Bell* held that management's apprehensions were unwarranted.[77] Thus, the Board's decision in *Southwestern Bell* signals an increased willingness of the Board to substitute its judgment for that of management in reviewing the circumstances giving rise to claims of unfair labor practices under section 8(a)(1) of the Act. After *Southwestern Bell*, an employer's argument that its interference with employee activities protected under section 7 is privileged by "special circumstances" will likely come under greater scrutiny. Thus, *Southwestern Bell* signals a reduced deference by the Board to management's apprehensions of labor disturbances resulting from controversial employee activities, and a greater willingness by the Board to second-guess management's response to provocative labor activities. The decision, in effect, adopts a stricter standard than prior cases of what situations constitute special circumstances that allow employers to interfere with employee's rights protected under section 7 of the Act.

3. **Employer Restrictions on Union Stickers*: Malta Construction Company and International Union of Operating Engineers, Local 926[1]

Under section 7 of the National Labor Relations Act (the Act), employees have the right to organize and join a labor union and to engage in appropriate union activities.[2] Section 8 of the Act prohibits employers from interfering with the exercise of these

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[75] *See, e.g., VEPCO*, 703 F.2d at 83, 112 L.R.R.M. at 3102; *Macy*, 462 F.2d at 371, 80 L.R.R.M. at 2678; *Harrah's Club*, 337 F.2d at 180, 57 L.R.R.M. at 2200–01.

[76] *See, e.g., Harrah's Club*, 337 F.2d at 180, 57 L.R.R.M. at 2200–01.

[77] *Id.*

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[1] 276 N.L.R.B. No. 171 (Oct. 22, 1985), 120 L.R.R.M. 1209 (1985).

[2] 29 U.S.C. § 157 (1982) provides in part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

rights.[3] These rights guaranteed by the Act, however, are not unlimited and often must yield to competing considerations, such as the employer's right to maintain a safe and productive work place.[4]

In *Republic Aviation v. NLRB*,[5] the Supreme Court approved the National Labor Relations Board's (the Board) conclusion that employees have the right under the Act to wear union insignia. Although the practice of wearing union insignia at work is well-established as a reasonable and legitimate form of union activity, employers may limit the display of union buttons, stickers and labels in special circumstances to ensure safety or maintain production or discipline.[6] Employer restrictions on the right to wear union insignia is presumed invalid, however, unless the employer establishes a legitimate safety concern or other special circumstances justifying a dress code policy.[7]

During the *Survey* year, the National Labor Relations Board ruled on the subject of union insignia in the work place in *Malta Construction Company and the International Union of Operating Engineers, Local 926*.[8] In *Malta*, the Board found that the employer's discharge of an employee for refusing to remove union insignia from a company issued hard hat violated section 8(a)(3) of the Act.[9] The Board held that the employer failed to establish any special circumstances based on a legitimate business purpose justifying the prohibition of the employee's right to place union labels on the hard hat.[10] Further, the Board disagreed with the administrative law judge's ruling that an employer may prohibit using company property for union or private purposes simply because it is company property.[11] Instead, the Board will permit certain company property, such as safety hats, to be used for union purposes unless special circumstances justify prohibiting its use.[12] *Malta* is significant because it applies a balancing test to weigh the company's property rights against the employer's right to engage in union activity such as the placement of union insignia on company-owned property. Moreover, *Malta* requires the employer to prove with specific evidence, not mere allegations, that special circumstances justify prohibiting the wearing of union insignia.

The case involves John Lambert, employed as a crane operator for the Malta Construction Company.[13] During the course of his employment, Lambert placed union stickers on both his personal and company issued hard hats and on his crane.[14] Upon noticing the stickers, his supervisor Fleeman demanded that Lambert remove the stickers

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[3] 29 U.S.C. § 158 (1982) provides in part:

> (a) It shall be an unfair labor practice for an employer-
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

[4] Republic Aviation v. NLRB, 324 U.S. 793, 798, 16 L.R.R.M. 620, 625 (1944).

[5] *Id.* at 802 n.7, 803, 16 L.R.R.M. at 629 n.7.

[6] *See, e.g.*, The Kendall Company, 267 N.L.R.B. 963, 965, 114 L.R.R.M. 1156, 1158 (1983) (because employees worked around machinery that had a series of protruding levers and gears the dress code policy prohibiting all nonwork-related items to prevent entanglement was justified).

[7] *Id.*

[8] 276 N.L.R.B. No. 171 (Oct. 22, 1985), 120 L.R.R.M. 1209 (1985).

[9] *Id.*, slip op. at 5, 120 L.R.R.M. at 1210.

[10] *Id.*

[11] *Id.* at 2, 120 L.R.R.M. at 1209.

[12] *Id.* at 3, 120 L.R.R.M. at 1209.

[13] *Id.* at 2, 120 L.R.R.M. at 1209.

[14] *Id.*

from the crane and the company-owned hard hat.[15] Although Malta allowed employees to attach union insignia to their personal attire, the company had a policy against the marking of company property with anything other than the Malta logo.[16] In response to the request, Lambert removed the union stickers from the crane, but not from his company hard hat.[17] The next day, Lambert twice refused to remove the union labels from his company hard hat as instructed.[18] During the second confrontation, Fleeman advised Lambert that if he did not remove the insignia, he would be fired.[19] Lambert still refused, and thereafter was terminated for failure to follow instructions.[20]

In response to Lambert's discharge the International Union of Operating Engineers, Local 926, filed charges against Malta alleging several unfair labor practices.[21] An administrative law judge heard the case, ruling that Malta could deny the use of company property because no employee had the right to use company property for personal ends.[22] According to the judge, as long as the employer does not discriminate between union and other personal uses of property, that employer is free to deny the use of company equipment for union purposes.[23] Because there was no disparate treatment in this case between union and private uses of company property, the judge concluded that Lambert's discharge did not violate the Act.[24]

The Board, with one member dissenting, overturned the administrative law judge's decision on appeal, ruling that an employer is not free under the Act to prohibit the use of company property for union purposes.[25] Rather, the Board found that Lambert had the right to wear a union label on his hard hat even though the hard hat was provided by the company.[26] The Board concluded that the employer must prove that special circumstances justify the curtailment of Lambert's right to display a union insignia on his company hard hat.[27]

In determining that Malta may not limit an employee's right to wear union emblems merely because the emblems appeared on company property, the Board rejected Malta's contentions that the prohibition was justified nonetheless because it was based on several legitimate business reasons.[28] Malta's first justification was that union stickers obstructed

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[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] Id.

[21] Malta Construction Company and International Union of Operating Engineers, Local 926, Case No. JD-(ATL)-58-54 (Aug. 16, 1984) (besides Lambert's claims, the charges included the alleged illegal discharge of another employee for repeated absences).

[22] *Malta*, 276 N.L.R.B. No. 171, slip op. at 2, 120 L.R.R.M. at 1209.

[23] *Malta Constr.*, Case No. JD-(ATL)-58-54, slip op. at 17.

[24] *See id.*

[25] *See Malta*, 276 N.L.R.B. No. 171, slip op. at 5, 120 L.R.R.M. at 1209. In his dissent, Board member Dotson agreed with the majority's balancing but declared that he would have reached a different result under this test. *Id.* at 5, 120 L.R.R.M. at 1210 (Dotson, J., dissenting). Unlike the majority, the dissent stressed the alternative opportunities available to the employees that afforded an equally acceptable means for expressing union allegiance. *Id.* Indeed, posited the dissent, when Lambert was asked to remove the stickers, he was wearing a union T-shirt to which the supervisor did not object. *Id.*

[26] *See id.* at 2, 120 L.R.R.M. at 1210.

[27] *Id.*

[28] *See id.* at 5, 120 L.R.R.M. at 1210.

the view of the bright orange-colored hat.[29] According to Malta, this obstruction would prevent its supervisors from being able to pick out its employees from among the several employee groups working on the construction site.[30] Also, the company asserted that a deteriorated view of the hats would impair truck operators' ability to spot and avoid those employees who were working around their equipment.[31] In evaluating these contentions, the Board considered the testimony of Malta employees concerning visibility of the labeled hats on the outdoor site. Based on this testimony, the Board concluded that the employer failed to prove that a complete ban on stickers was necessary to insure a proper view of the safety hats.[32]

As a second justification the employer argued that if it allowed employees to attach union labels to hard hats, all sorts of different stickers would be placed on the hats, including some vulgar stickers.[33] These obscene stickers would reflect poorly on the company when the employees came into contact with the general public as representatives of Malta; when for example, an employee is called upon to direct traffic around the construction area.[34] The Board rejected this argument because no evidence substantiated these claims.[35] Although Malta also referred to the "defacing" of company property, no evidence was introduced on this issue.[36] Because the employer could not prove any special circumstances justifying the prohibition of union stickers, the Board reversed the judge's dismissal of Lambert's claims.[37]

In its opinion, the Board distinguished the facts of this case from two other cases where the employers had established successfully that the prohibitions on marking hard hats were based on legitimate safety concerns.[38] In *Standard Oil of California*,[39] an employer at an oil refinery offered two reasons why only the company hallmark was permitted to be placed on hard hats. First, the company wanted to be able to distinguish its own employees from other independent contractors at the plant in order to restrict both groups to their appropriate areas of work.[40] Second, the company staffed its own fire fighting force which needed to be able to identify company employees who were qualified to assist in certain emergency tasks.[41] The Board in *Standard Oil* found these safety considerations sufficient to support the prohibition. The Board in *Malta*, however,

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[29] *Id.* at 4, 120 L.R.R.M. at 1209.

[30] *Id.*

[31] *Id.*

[32] *Id.* at 4, 120 L.R.R.M. at 1210. Lambert's supervisor testified that Lambert wore only two stickers which did not obscure the orange color:

> Q: And did not (the stickers) obscure your view of the orange?
> A: Well, I'm sure it obscured some of the orange.
> Q: But could you still see the orange?
> A: Oh, yes . . .

Id.

[33] *Id.* at 4, 120 L.R.R.M. at 1210.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.* at 5, 120 L.R.R.M. at 1210.

[38] *See id.* at 3 n.4, 120 L.R.R.M. at 1209 n.3.

[39] 168 N.L.R.B. 153, 66 L.R.R.M. 1276 (1967).

[40] *Id.* at 154, 66 L.R.R.M. at 1257.

[41] *Id.* at 155, 66 L.R.R.M. at 1257.

distinguished this earlier ruling because *Standard Oil*, unlike *Malta*, involved a potentially hazardous job site calling for complex safety procedures.[42]

The Board also upheld a company policy prohibiting labels on hard hats in *Andrews Wire Corporation*.[43] In that case, the employer provided bright lustre aluminum hats so that the employees could be seen in the dimly lit steel mill.[44] The employer asserted that if the employees were permitted to attach labels of less bright material to their hats, the visibility of the hats would decrease and the safety of the workers would be jeopardized.[45] The Board agreed that the prohibition was a valid safety measure.[46] In comparison to *Andrews*, which involved a dimly lit indoor work area, the Board noted that *Malta* involved outdoor work during the daytime.[47] Under these facts, the Board in *Malta* held that the employer failed to establish that labels would obscure the orange-colored hats to such an extent as to place the workers' safety at risk.[48] Thus, the Board found that the working conditions in *Andrews* and *Standard Oil* involved safety considerations that were absent in the present case.

The *Malta* decision is consistent with previous Board rulings that have allowed employees to wear union insignia during work absent special circumstances.[49] Further, the *Malta* decision is significant because the Board refused to distinguish between insignia placed on company property in contrast to personal property. In this respect, this case can be analogized to Board decisions involving the solicitation of union membership on company grounds where the employees' right to engage in union activity may limit the employer's control over its property.[50] The *Malta* decision also is significant because the Board refused to accept the employer's mere allegations of a legitimate business purpose to justify prohibiting the wearing of insignia and instead required the employer to establish the special circumstances with specific evidence.

Until *Malta*, the Board had not addressed the question of whether employees had the right to place union insignia on company-owned property.[51] In the earlier cases involving the right of employees to wear union insignia, the sole question was whether business reasons justified the limitation on wearing the insignia. In *Andrews*, for example, although the hard hats in question were company issued, the Board analyzed the issue from the perspective of whether there were any special justifying circumstances and did not address the issue of the employer's property rights.[52] In *Malta*, however, the Board expressly rejected the administrative law judge's distinction between personal and com-

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[42] *Malta*, 276 N.L.R.B. No. 171, slip op. at 3 n.4, 120 L.R.R.M. at 1209 n.3.

[43] 189 N.L.R.B. 108, 76 L.R.R.M. 1568 (1971).

[44] *Id.* at 110, 76 L.R.R.M. at 1569.

[45] *Id.* at 112, 76 L.R.R.M. at 1570.

[46] *Id.*

[47] *See Malta*, 276 N.L.R.B. No. 171, slip op. at 4, 120 L.R.R.M. at 1210.

[48] *Id.* at 5, 120 L.R.R.M. at 1210.

[49] *See, e.g., Republic Aviation*, 324 U.S. at 802 n.7, 16 L.R.R.M. at 629 n.7; *Kendall Co.*, 267 N.L.R.B. at 965, 114 L.R.R.M. at 1158.

[50] See *infra* notes 55–58 and accompanying text discussing the union solicitation cases.

[51] Several cases have confronted the issue of an employee's right to display union insignia at the workplace without addressing an employee's right to place union labels on company-issued property. *See e.g., Kendall Co.*, 267 N.L.R.B. at 965, 114 L.R.R.M. at 1158; Fabri-Tek, Inc. v. NLRB, 352 F.2d 577, 60 L.R.R.M. 2736 (6th Cir. 1965); Power Equipment Co. v. NLRB, 313 F.2d 438, 52 L.R.R.M. 2459 (6th Cir. 1963).

[52] *See Andrews Wire*, 189 N.L.R.B. at 109, 76 L.R.R.M. at 1569.

pany-owned property.[53] Instead, the Board correctly recognized that the issue involved weighing the company's property rights against the employee's right to engage in union activity.

In cases involving union solicitation on company grounds, the Board has applied a similar balancing test to weigh the company's property rights against the employee's rights to engage in union activity.[54] The Board may allow some interference of the employer's property rights where it is necessary to enable employees to exercise their rights of self-organization.[55] Indeed, the Supreme Court has noted in these cases that "inconvenience, or even some dislocation of property rights may be necessary in order to safeguard [employee] rights."[56] Accordingly, under the appropriate circumstances, employers may not prohibit unions from soliciting support on company property.

In contrast, in other cases the Board may weigh the balance in favor of the employer's property rights. For example, in *NLRB v. Payless Cashway Lumber Inc.*,[57] the employer threatened to discharge any person who placed union stickers on the adding machines or on the walls of the warehouse during a union election. In that case, the Board noted that the right of employees to engage in union activities on the employer's premises did not include the right to place stickers on the employer's walls and property. Thus, both in situations involving union solicitation on company grounds and in situations involving the placement of union insignia on company property, the Board will weigh the company's property rights against the employee's right to engage in union activity. In *Malta*, the Board correctly favored the employee's rights because the company failed to prove any special circumstances justifying a restriction on the employee's right to engage in union activity.

A second notable aspect of the *Malta* case was the burden of proof that the Board imposed on the employer before special employment conditions could justify restricting an employee's right to display union insignia. In *Malta*, the Board rejected the two reasons proffered by the construction company as not supported by the evidence.[58] The employer had argued that union labels would lead to other unappealing slogans that would reflect poorly on the company.[59] The employer, however, failed to prove its tenuous contention that union labels would affect its public image. The Board also refused to accept the company's safety justifications, although they were somewhat more plausible than the non-safety justifications. The Board, however, distinguished the safety justifications in *Malta* from other cases in which similar justifications have been held valid. One case involved a poorly lit indoor working area and the other involved an extremely dangerous work place, requiring complex safety procedures; the construction

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[53] *Malta*, 276 N.L.R.B. No. 171, slip op. at 5, 120 L.R.R.M. at 1210.

[54] *See, e.g., Republic Aviation*, 324 U.S. at 803, 16 L.R.R.M. at 630.

[55] *See id.* at 802 n.8, 16 L.R.R.M. at 628 n.8. *Cf.* TRW, Inc., TRW Michigan Division v. NLRB, 393 F.2d 771, 773 (4th Cir. 1968). In *TRW, Inc.*, although citing *Republic Aviation* with approval, the Fourth Circuit formulated its test somewhat differently: "a rule prohibiting union solicitation, even during working hours, will not be upheld if 'it is adopted for a discriminatory purpose. . . .'" *Id.* Applying this test, the court found that a company rule which prohibited solicitation during working hours with the exception of a few "special" organizations was not for the purpose of discrimination against the union, and thus did not constitute an unfair labor practice. *Id.* at 773.

[56] *See Republic Aviation*, 324 U.S. at 802 n.8, 16 L.R.R.M. at 628 n.8.

[57] 508 F.2d 24, 26, 88 L.R.R.M. 2067, 2068 (8th Cir. 1974).

[58] *Malta*, 276 N.L.R.B. No. 171, slip op. at 4–5, 120 L.R.R.M. at 1209–10.

[59] *Id.* at 4, 120 L.R.R.M. at 1210.

site in *Malta* involved neither of these concerns. The Board's inquiry into the special circumstances proffered in *Malta* suggests that the Board requires specific supporting evidence to justify a limitation, rather than merely accepting the employer's allegations.

In sum, the *Malta* decision is significant because it allows employees, absent some business justification, to wear union insignia on certain items of company property. This ruling is in accordance with other cases where union activity involves the use of company property, namely union solicitation on company grounds. In light of the case law on solicitation, the *Malta* decision is consistent with the balancing of both employee and employer rights under the Act.

Malta also is consistent with case law requiring the employer to prove, and not merely allege, special circumstances that justify prohibiting union insignia on hard hats. Although the employees had the opportunity to display the union symbol in other contexts, and there was no finding of discrimination against union logos, the Board steadfastly adhered to the rule that the only limitation on the employee's right to display union insignia should be special circumstances inherent in the business. Accordingly, the Board correctly refused to uphold the prohibition in *Malta* where the employer failed to prove that special circumstances existed that justified limiting the employees' rights.

B. *Union Unfair Practices*

1. **Employees' Right to Resign*: Pattern Makers' League of North America v. NLRB[1]

Under section 8(b)(1)(A) of the National Labor Relations Act (the Act),[2] it is an unfair labor practice for a labor organization to restrain or coerce employees in the exercise of their rights guaranteed in section 7.[3] Section 7 of the Act provides that employees have the right to participate in activities conducted by labor organizations as well as the right to refrain from any or all union activities.[4] In 1947, Congress amended section 8(b)(1)(A) to provide that this section does not impair the right of a labor

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[1] 105 S. Ct. 3064, 119 L.R.R.M. 2928 (1985).

[2] 29 U.S.C. § 158(b)(1)(A) (1982).

[3] *Id.* The full text of section 8(b)(1)(A) provides:

> It shall be an unfair labor practice for a labor organization or its agents — (1) to restrain or coerce (A) employees in the exercise of their rights guaranteed in [section 7] of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . .
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> *Id.*

[4] 29 U.S.C. § 157 (1982). The full text of section 7 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section [8](a)(3) of this title.
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> *Id.*

organization to adopt rules with respect to the acquisition or retention of membership in the organization.[5]

Individuals have contended that certain union disciplinary measures, such as fines, expulsions, and court proceedings, violate section 8(b)(1)(A) of the Act.[6] In determining whether these union disciplinary practices violate section 8(b)(1)(A), both the National Labor Relations Board (NLRB or Board) and the Supreme Court have attempted to reconcile an individual's right under section 7 to refrain from union activity against a union's need to police the organization's internal operation.[7] The Board and the Court have focused on the 1947 amendment and have concluded that the amendment granted unions the right to proscribe fines and penalties that promote legitimate union interests.[8] In *NLRB v. Allis-Chalmers Manufacturing Co.*,[9] the Supreme Court found that Congress did not intend to interfere with the internal affairs or organization of unions, and therefore, union fines imposed on members did not violate section 7 of the Act. Later, in *Scofield v. NLRB*,[10] the Supreme Court adopted a three-part test to determine whether an internal union rule is reasonable. Under the *Scofield* test, unions may enforce rules that (1) reflect a legitimate union interest, (2) do not impair a policy that Congress has embedded in labor laws, and (3) are enforced reasonably against union members.[11]

Using this analysis, the Board and the Court have held that fines and other penalties imposed upon union members for crossing union picket lines during a strike do not violate section 8(b)(1)(A) of the Act because such disciplinary measures promote the union's legitimate interest in preserving unity during a strike.[12] The Supreme Court has held, however, that a union may not impose a fine on an individual who is not a member of the union.[13]

Lower federal courts have addressed the specific issue of whether a union that restricts a member's right to resign violates section 8(b)(1)(A) of the Act. The United States Court of Appeals for the Seventh Circuit has held that a union may not restrict a member's right to resign, reasoning that such a restriction frustrates the overriding policy of labor law that allows employees to be free to choose whether to engage in concerted activities.[14] The United States Court of Appeals for the Ninth Circuit, however,

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[5] *See* 29 U.S.C. § 158(b)(1)(A) (1982). Congress intended section 8(b)(1)(A) to prevent unions from using the same type of physical and economic threats to coerce individuals to participate in union activities that had been used by employers to prevent unionization prior to the passage of the Act. R. GORMAN, BASIC TEXT ON LABOR LAW 677 (1976). The addition of the proviso in 1947 through the Taft-Hartley Act apparently reflected Congress's intention not to interfere with the "internal" operation of unions. *Id.*

[6] *E.g.*, Scofield v. NLRB, 394 U.S. 423, 436, 70 L.R.R.M. 3105, 3107 (1969); NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 195, 65 L.R.R.M. 2449, 2457 (1967). *See generally* R. GORMAN, *supra* note 5, at 677–94.

[7] R. GORMAN, *supra* note 5, at 677–78. *See, e.g., Allis-Chalmers Mfg. Co.*, 388 U.S. at 195, 65 L.R.R.M. at 2457.

[8] *Allis-Chalmers Mfg. Co.*, 388 U.S. at 178, 184, 65 L.R.R.M. at 2450, 2452.

[9] 388 U.S. at 195, 65 L.R.R.M. at 2457.

[10] 394 U.S. at 430, 70 L.R.R.M. at 3108.

[11] *Id.*

[12] *Allis-Chalmers Mfg. Co.*, 388 U.S. at 195, 65 L.R.R.M. at 2452. *See generally* R. GORMAN, *supra* note 5, at 677–80.

[13] NLRB v. Granite State Joint Bd., Textile Workers of Am., Local 1029, 409 U.S. 213, 217, 81 L.R.R.M. 2853, 2854–55 (1972).

[14] Pattern Makers' League of N. Am. v. NLRB, 724 F.2d 57, 60, 115 L.R.R.M. 2264, 2267 (7th Cir. 1983), *aff'd*, 105 S. Ct. 3064, 119 L.R.R.M. 2928 (1985).

has held that a union may restrict a member's right to resign.[15] In *Machinists Local 1327, International Association of Machinists and Aerospace Workers v. NLRB*[16] (*Dalamo Victor II*), the Ninth Circuit applied the three-part test articulated in *Scofield* for determining when a union disciplinary rule is reasonable. The court held that a union rule against resignations within 14 days of a strike or lockout met all three elements of the *Scofield* test, and, therefore, the rule was upheld.[17]

During the *Survey* year, the Supreme Court, resolving the conflict between the Seventh Circuit and the Ninth Circuit, held that section 8(b)(1)(A) of the Act prohibits a union from placing restrictions on a union member's right to resign.[18] In *Pattern Makers' League of North America v. NLRB*[19] (*Pattern Makers*), the Court, in a five to four decision,[20] declared that a union rule which prohibited resignations during a strike or when a strike appeared imminent violated the congressional policy of voluntary unionism that is implicit in section 8(a)(3). The Court, therefore, held that this union rule violated section 8(b)(1)(A) of the Act.[21] Consequently, after the Court's decision in *Pattern Makers*, a union member may avoid union fines by tendering his or her resignation before acting in a manner inconsistent with the union's rules and regulations.

The Pattern Makers' League of North America (the League), the defendant in *Pattern Makers*, is a national labor union made up of local associations.[22] In May 1976, the League amended its constitution to provide that "[n]o resignation or withdrawal from an Association, or from the League, shall be accepted during a strike or lockout, or at a time when a strike or lockout appears imminent."[23] The local associations ratified the amendment in August of 1976, and the amendment became effective in October of 1976.[24] The express purpose of the amendment, known as league law 13, was to end "a regular pattern of strike breaking by employers."[25]

In 1977, after a collective bargaining agreement expired, two local associations went on strike against several affiliated manufacturing companies.[26] During the strike, 11

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[15] Machinists Local 1327, International Assoc. of Machinists and Aerospace Workers v. NLRB (Dalamo Victor II), 725 F.2d 1212, 1218, 115 L.R.R.M. 2972, 2977 (9th Cir. 1984). In *Dalamo Victor II*, the court of appeals denied enforcement of a Board order that stated that fines against union members who had tendered their resignations during a strike in violation of the union's constitution violated section 8(b)(1)(A). *Id.*

[16] *Id.* at 1217–18, 115 L.R.R.M. at 2975–77.

[17] *Id.* at 1217, 115 L.R.R.M. at 2975.

[18] Pattern Makers' League of N. Am. v. NLRB, 105 S. Ct. 3064, 3076, 119 L.R.R.M. 2928, 2937 (1985).

[19] *Id.* at 3071, 119 L.R.R.M. at 2934.

[20] Justice Powell wrote the majority opinion. *Id.* at 3066, 119 L.R.R.M. at 2929. Justice Powell was joined by Chief Justice Burger and Justices White, Rehnquist, and O'Connor. *Id.* Justice White also filed a concurring opinion. *Id.* at 3076, 119 L.R.R.M. at 2937 (White, J., concurring). Justice Blackmun wrote a dissenting opinion which Justices Brennan and Marshall joined. *Id.* at 3077, 119 L.R.R.M. at 2938 (Blackmun, J., dissenting). Justice Stevens also wrote a separate dissenting opinion. *Id.* at 3085, 119 L.R.R.M. at 2944 (Stevens, J., dissenting).

[21] *Id.* at 3076, 119 L.R.R.M. at 2937.

[22] *Id.* at 3066, 119 L.R.R.M. at 2930.

[23] *Id.*

[24] Pattern Makers' League of N. Am. v. NLRB, 265 N.L.R.B. 1332, 1332, 112 L.R.R.M. 1116, 1116 (1982), *enforced*, 724 F.2d 57, 115 L.R.R.M. 2264 (7th Cir. 1983), *aff'd*, 105 S. Ct. 3064, 119 L.R.R.M. 2928 (1985).

[25] *Id.*

[26] *Pattern Makers*, 105 S. Ct at 3066, 119 L.R.R.M. at 2930.

union members submitted their resignations to the League and returned to work.[27] The League expelled the first member who returned to work.[28] The League notified the ten other members, however, that their resignations violated league law 13, and therefore the League would not accept their resignations.[29] Additionally, the local associations fined the ten members an amount approximately equal to the wages the members had earned during the strike.[30] The companies that employed the union members filed charges with the Board claiming that the League's levy of fines against the employees who had resigned from the League violated section 8(b)(1)(A) of the Act.[31] The Board held in favor of the employers and the United States Court of Appeals for the Seventh Circuit enforced the Board's order.[32] The League appealed to the United States Supreme Court which affirmed the judgment of the court of appeals enforcing the Board's order.[33] The Court held that section 8(b)(1)(A) prohibits a union from restricting a member's ability to resign from the union even though the union's constitution explicitly restricted such resignations.[34]

In *Pattern Makers*, after noting that because the Board had "special competence" in the field of labor relations, the Court would uphold the Board's construction of section 8(b)(1)(A) as long as the Board's interpretation of the section was "reasonable," the Court examined the Board's conclusions with respect to section 8(b)(1)(A) of the Act.[35] The Court found that the decision in *Allis-Chalmers Manufacturing Co.*, in which the Court held that a union may impose fines on union members, nevertheless supported the Board's conclusion that league law 13 violates section 8(b)(1)(A) of the Act.[36] The *Pattern Makers* Court restated its conclusion that Congress had intended to preserve a union's ability to control the union's internal affairs when Congress passed the Taft-Hartley Act in 1947.[37] The Court, however, reasoned that Congress' intent to preserve a union's ability to control the union's internal affairs did not suggest an intent to authorize a union to restrict the right to resign.[38] The Court emphasized that in 1947, when Congress passed the Taft-Hartley Act, restrictions on a union member's ability to resign were

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[27] *Id.*

[28] Pattern Makers' League of North America v. NLRB, 724 F.2d 57, 58, 115 L.R.R.M. 2264, 2265 (7th Cir. 1983), *aff'd*, 105 S. Ct. 3064, 119 L.R.R.M. 2928 (1985).

[29] *Pattern Makers*, 105 S. Ct at 3066, 119 L.R.R.M. at 2930.

[30] *Id.*

[31] *Id.* at 3066–67, 119 L.R.R.M. at 2930.

[32] *Id.* at 3067, 119 L.R.R.M. at 2930. In *Pattern Makers*, the Board ordered the union to refrain from enforcing league law 13 and to rescind the fines levied against the employees for their post-resignation activity. *Pattern Makers' League of N. Am.*, 265 N.L.R.B. at 1334–35, 112 L.R.R.M. at 1117. The United States Court of Appeals for the Seventh Circuit enforced the Board's order stating that "because League Law 13 completely suspends an employee's right to choose not to be a union member, and thus no longer subject to union discipline, it frustrates the overriding policy of labor law that employees be free to choose whether to engage in concerted activities." *Pattern Makers' League of N. Am.*, 724 F.2d at 60, 115 L.R.R.M. at 2266.

[33] *Pattern Makers*, 105 S. Ct at 3076, 119 L.R.R.M. at 2937.

[34] *Id.*

[35] *Id.* at 3068, 119 L.R.R.M. at 2931.

[36] *Id.* at 3068, 119 L.R.R.M. at 2931–32. In *Allis-Chalmers Mfg. Co.*, the Court, relying on its interpretation of congressional intent, held that fines could be imposed by unions without violating section 7. 388 U.S. at 192, 65 L.R.R.M. at 2455.

[37] *Pattern Makers*, 105 S. Ct at 3069, 119 L.R.R.M. at 2932.

[38] *Id.*

extremely uncommon.[39] Accordingly, the Court concluded that league law 13 was not an internal rule, and therefore, Congress did not intend to exempt the League's restriction on a member's right to resign from the prohibition of section 8(b)(1)(A).[40]

According to the Court, the language and reasoning from two additional Supreme Court opinions also supported the Board's conclusion that league law 13 violated section 8(b)(1)(A).[41] The Court noted that in *Scofield* the Court had upheld union imposed ceilings on the amount employees doing piecework could earn in a single day.[42] The union rule at issue in *Scofield* did not "restrain or coerce" employees in violation of section 8(b)(1)(A), according to the *Pattern Makers* Court, because union employees were free to leave the union and escape from the rule.[43] The *Pattern Makers* Court emphasized language from *Scofield* that indicated that employees who were subject to the union rule had "'chosen to become *and remain* union members.'"[44]

The Court also pointed to its decision in *NLRB v. Granite State Joint Board, Textile Workers Union of America, Local 1029*[45] in support of the Board's conclusion.[46] In *Granite State Joint Board, Textile Workers Union of America, Local 1029*, the Court held that it was an unfair labor practice and thus a violation of section 8(b)(1)(A) for a union to fine employees who had resigned from the union and returned to work during a strike.[47] The *Pattern Makers* Court concluded that the presence of a provision in the union's constitution prohibiting union members from resigning during a strike impermissibly curtailed the vitality of section 7 of the Act.[48] Thus, according to the *Pattern Makers* Court, league law 13 impaired a policy that Congress has embedded in the labor laws, thereby violating section 8(b)(1)(A) of the Act.[49]

Next, the Court reviewed the Board's decision in view of the language of section 8(b)(1)(A).[50] According to the Court, section 8(b)(1)(A) allows unions to enforce only those rules that "'impai[r] no policy Congress has embedded in the labor laws . . . .'"[51] Furthermore, the Court stated, section 8(a)(3) "effectively eliminated compulsory union membership by outlawing the closed shop."[52] Accordingly, the Court concluded that the

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[39] *Id.*

[40] *Id.*

[41] *Id.* at 3069–70, 119 L.R.R.M. at 2932.

[42] *Id.*

[43] *Id.* at 3070, 119 L.R.R.M. at 2932 (quoting *Scofield*, 394 U.S. at 430, 70 L.R.R.M. at 3108).

[44] *Id.* (quoting *Scofield*, 394 U.S. at 435, 70 L.R.R.M. at 3109) (emphasis added by *Pattern Makers* Court).

[45] 409 U.S. 213, 81 L.R.R.M. 2853 (1972).

[46] *Pattern Makers*, 105 S. Ct at 3070, 119 L.R.R.M. at 2932.

[47] 409 U.S. at 217–18, 81 L.R.R.M. at 2854–55. In *Granite State Joint Bd., Textile Workers Union of America, Local 1029* there was no specific union rule prohibiting union members from resigning during a strike. *Id.* at 217, 81 L.R.R.M. at 2854.

[48] *Pattern Makers*, 105 S. Ct. at 3070, 119 L.R.R.M. at 2932.

[49] *See id.*

[50] *Id.* at 3070–71, 119 L.R.R.M. at 2933.

[51] *Id.* at 3071, 119 L.R.R.M. at 2933 (quoting *Scofield*, 394 U.S. at 430, 70 L.R.R.M. at 3108).

[52] *Id.* at 3071, 119 L.R.R.M. at 2933. Section 8(b)(1)(A) does not preclude a union from entering into a security agreement with the employer under which all employees must become union members. *See* 29 U.S.C. § 157 (1982). The only aspect of union membership that can be required, however, is the payment of union dues. *Pattern Makers*, 105 S. Ct. at 3071 n.16, 119 L.R.R.M. at 2933 n.16. *See also* Radio Officers of the Commercial Tel. Union v. NLRB, 347 U.S. 17, 41, 33 L.R.R.M. 2417, 2431 (1954).

Board was justified in finding that union restrictions on the right to resign are inconsistent with the policy of voluntary unionism implicit in section 8(a)(3).[53]

After determining that the Board's construction of section 8(b)(1)(A) was reasonable, the Court addressed and rejected three arguments advanced by the League. The League contended that the 1947 amendment to section 8(b)(1)(A) expressly allowed unions the right to restrict their members' right to resign.[54] Finding that the amendment does not allow the union to restrict a member's right to resign, the Court reasoned that neither the Court nor the Board previously had interpreted the amendment as allowing unions to make rules restricting the right to resign.[55] The League also argued that the legislative history of the 1947 amendments to the Act demonstrated that Congress did not intend to preserve a union member's right to resign.[56] The League asserted that because Congress had not adopted a provision in the house draft of the amendment which provided expressly that union members have a right to resign, this indicated that Congress did not intend to create such a right to resign.[57] The Court rejected this interpretation of the legislative history of the amendment, reasoning that the provision may have been eliminated because Congress thought it was unnecessary.[58]

The League also contended that unions should be permitted to restrict their members' right to resign because other voluntary organizations are allowed to do so under the common law.[59] Relying on *NLRB v. Industrial Union of Marine & Shipbuilding Workers of America*,[60] the Court determined that union rules may violate section 8(b)(1)(A) even though such rules would be valid under common law.[61] Thus, the Court determined that the Board's conclusion that league law 13 violated section 8(b)(1)(A) of the Act was reasonable even though the union rule may be consistent with common law principles.[62]

In the final part of its opinion, the Court stressed that if the Board's construction of the Act is reasonable, a court should not reject the Board's decision merely because the court might prefer another view of the statute.[63] The Court emphasized that the Board previously had held that it was an unfair labor practice for unions to impose fines on employees who have resigned, even where the union's constitution purports to make such resignations invalid.[64] Finally, the Court noted that invariably it had deferred to the Board's decisions concerning whether union fines "coerced or restrained" employees.[65] The Court, therefore, upheld the Board's determination that league law 13 violated section 8(b)(1)(A) of the Act.

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[53] *Pattern Makers*, 105 S. Ct. at 3071, 119 L.R.R.M. at 2933.

[54] *Id.* at 3072, 119 L.R.R.M. at 2934.

[55] *Id.*

[56] *Id.* at 3073, 119 L.R.R.M. at 2935.

[57] *Id.*

[58] *Id.*

[59] *Id.* at 3074, 119 L.R.R.M. at 2936.

[60] 391 U.S. 418, 68 L.R.R.M. 2257 (1968). In *Industrial Union of Marine & Shipbuilding Workers of America*, the Court held that a union member need not resort to all remedies and appeals within the union before turning to the courts, even though under common law principles, associations can require their members to exhaust all internal remedies. *Id.* at 428, 68 L.R.R.M. at 2260.

[61] *Pattern Makers*, 105 S. Ct. at 3074, 119 L.R.R.M. at 2936.

[62] *See id.*

[63] *Id.* at 3075, 119 L.R.R.M. at 2936.

[64] *Id.* at 3076, 119 L.R.R.M. at 2936–37.

[65] *Id.* at 3075, 119 L.R.R.M. at 2936. Justice White wrote a concurring opinion in which he joined the majority and stressed the importance of deference to the Board's interpretations of the

Justice Blackmun wrote a lengthy dissent in *Pattern Makers*, contending that league law 13 did not violate section 8(b)(1)(A).[66] Although agreeing with the majority's conclusion that internal union rules differ from union rules which seek to coerce an employee, Justice Blackmun concluded that league law 13 was an internal rule and thus, not subject to Board regulation.[67] The dissent stressed the importance of the ability of a union to discipline its members.[68] According to Justice Blackmun, the union must be able to enforce internal rules to preserve both the union's status as a bargaining representative and the right of the members to act collectively.[69] Focusing on the legislative history of the Act, Justice Blackmun concluded that Congress explicitly had rejected the majority's interpretation of the Act.[70] Emphasizing that the Senate rejected the provision in the house bill which would have granted members the right to resign at will, Justice Blackmun asserted that the majority's treatment of the Act's legislative history was "both inaccurate and inadequate."[71] According to Justice Blackmun, the Senate rejected the house version because the Senate refused to impose conditions on the contractual relationship between a union and its members, including a rule giving members the right to resign at will.[72] Justice Blackmun reasoned that because Congress enacted the senate version of the Act, which did not provide a right to resign, the legislative history of the Act indicated that Congress did not intend to prohibit union restrictions on members' right to resign.[73]

The dissent also criticized the majority's conclusion that the right to resign is inconsistent with Congress' policy of voluntary unionism implicit in section 8(b)(1)(A).[74] Justice Blackmun argued that the policy of voluntary unionism only prohibits union rules that affect the employment rights of the union's members.[75] Justice Blackmun concluded that the enforcement of obligations knowingly accepted by union members, such as restrictions concerning resignations from the union, are not inconsistent with the Act.[76]

Justice Blackmun also disagreed with the Court's suggestion that common law does not apply to union rules.[77] The dissent found that a union may restrict a member's right to resign under common law principles because, according to Justice Blackmun, such a

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Act. *Id.* at 3076–77, 119 L.R.R.M. at 2937–38 (White, J., concurring). Justice White indicated that "the Board ha[d] adopted a sensible construction of the imprecise language of §§ 7 and 8 that is not negated by the legislative history of the Act." *Id.* at 3076, 119 L.R.R.M. at 2937 (White, J., concurring). The Justice also stated that section 8(b)(1)(A) could be interpreted as allowing restrictions on union members' right to resign. *Id.* at 3077, 119 L.R.R.M. at 2937 (White, J., concurring). Finally, had the Board accepted the League's interpretation of the Act, Justice White indicated that he would have granted "its view appropriate deference." *Id.* at 3077, 119 L.R.R.M. at 2937–38 (White, J., concurring).

[66] *Id.* at 3077–85, 119 L.R.R.M. at 2938–44 (Blackmun, J., dissenting). Justice Blackmun was joined by Justice Brennan and Justice Marshall. *Id.* at 3077, 119 L.R.R.M. at 2938 (Blackmun, J., dissenting).

[67] *Id.* at 3078, 119 L.R.R.M. at 2939 (Blackmun, J., dissenting).

[68] *Id.* at 3077, 119 L.R.R.M. at 2938 (Blackmun, J., dissenting).

[69] *Id.*

[70] *Id.* at 3079, 119 L.R.R.M. at 2939 (Blackmun, J., dissenting).

[71] *Id.* at 3080, 119 L.R.R.M. at 2940 (Blackmun, J., dissenting).

[72] *Id.*

[73] *Id.*

[74] *Id.* at 3081, 119 L.R.R.M. at 2941 (Blackmun, J., dissenting).

[75] *Id.*

[76] *Id.*

[77] *Id.* at 3082, 119 L.R.R.M. at 2942 (Blackmun, J., dissenting).

restriction furthers a basic purpose for the formation of the union.[78] Additionally, Justice Blackmun reasoned that such a rule restricting a member's right to resign is consistent with the federal labor policy goal of encouraging voluntary unionism based upon majority rule.[79] League law 13 enhanced the union's ability to retain union solidarity during a strike, according to the dissent, and thereby improved the employees' ability to act collectively and to engage in collective bargaining.[80]

Finally, Justice Blackmun examined the nature of the employee's relationship with the union and the importance of union solidarity during a strike.[81] Justice Blackmun noted that an employee's decision to join the union is voluntary, and that union members are aware of their obligation under the union's constitution not to resign during a strike.[82] Highlighting the importance of union solidarity during a strike, Justice Blackmun stated that enforcement of the member's promise not to resign is not a limitation of a right created by the Act.[83] Rather, according to Justice Blackmun, enforcement of the members' promise not to resign is a vindication of the members' right to act collectively and to engage in collective bargaining.[84] Reasoning that the Court's decision in *Pattern Makers* allows individual members to violate their contractual agreements with the union, Justice Blackmun concluded that the Court's decision debilitates the right of all members to take collective action.[85]

The Supreme Court's decision in *Pattern Makers* finally resolves the conflict between the circuit courts concerning the question whether union rules restricting a member's right to resign violate section 8(b)(1)(A) of the Act. In resolving this conflict, the Court adopted the Seventh Circuit's approach.[86] Thus, the *Pattern Makers* Court held that section 8(b)(1)(A) of the Act prohibits a union from imposing fines against employees who resign from the union during a strike, even where the union's constitution expressly prohibits resignations during a strike.[87]

The *Pattern Makers* Court properly deferred to the Board's conclusion that league law 13 violated section 8(b)(1)(A) of the Act. As the Court noted, it is well established that due to the special competence of the Board in the field of labor relations, the Court should defer to the Board's conclusions unless such conclusions are unreasonable.[88] The Board's conclusion that a union could not place an absolute restriction on a union member's right to resign, even where the prohibition against resignations is stated expressly in the union's constitution, was reasonable.

League law 13 unconditionally restricted the union member's right to resign once a strike had begun or appeared imminent.[89] In *Pattern Makers*, the Board focused on its

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[78] *Id.*

[79] *Id.* at 3083, 119 L.R.R.M. at 2943 (Blackmun, J., dissenting).

[80] *Id.*

[81] *Id.*

[82] *Id.* at 3083, 119 L.R.R.M. at 2942 (Blackmun, J., dissenting).

[83] *Id.*

[84] *Id.*

[85] *Id.* at 3085, 119 L.R.R.M. at 2944 (Blackmun, J., dissenting). Justice Stevens also dissented. *Id.* (Stevens, J., dissenting). Justice Stevens wrote a one paragraph dissent in which he concluded that the legislative history of the Taft-Hartley Act of 1947 "coupled with the plain language in the proviso to § 8(b)(1)(A)" indicated that section 7 did not protect the right to resign. *Id.*

[86] *Id.* at 3076, 119 L.R.R.M. at 2937.

[87] *Id.*

[88] *See, e.g.*, NLRB v. Weigarten, Inc., 420 U.S. 251, 266–67, 88 L.R.R.M. 2689, 2694–95 (1975).

[89] See *supra* text accompanying note 23 for the language of league law 13.

prior decision, *Machinists Local 1327, International Association of Machinists and Aerospace Workers (Dalamo Victor I)*,[90] to conclude that league law 13 violated section 8(b)(1)(A) of the Act.[91] In *Dalamo Victor I*, the Board had held that a union rule prohibiting all resignations during a strike violated section 8(b)(1)(A) because it unreasonably restricted an employee's right to refrain from participating in concerted activities.[92] The *Dalamo Victor I* Board balanced the union member's right to resign against the legitimate interest of the union, and the majority of its membership that supported the strike, in maintaining its ability to engage effectively in collective bargaining.[93] The Board concluded that a union rule which prohibits all resignations after a strike has begun was unreasonable.[94] The Board noted, however, that a rule which restricts a union member's right to resign for a period of 30 days after tendering the resignation would be reasonable.[95]

The Board's approach adopted in *Dalamo Victor I* and followed by the Board in *Pattern Makers* was appropriate. Under that approach, the Board balanced the competing interests of a union member's right to resign and the union's right to discipline its members. In the 1967 case of *Allis-Chalmers Manufacturing Co.*, the Supreme Court established that the section 7 right to refrain from union activity was not absolute.[96] In that case, the Court also indicated that a fundamental part of the nation's federal labor policy is the power of the union to protect its status as an effective collective bargaining agent.[97] As Justice Blackmun's dissent in *Pattern Makers* demonstrates, the ability of union members to resign during a strike erodes the union's ability to engage in collective bargaining.[98] In light of these conflicting statutory and policy interests, the Board's decision in *Dalamo Victor I* to adopt a balancing approach and to establish the thirty-day rule was justified.

Although the *Pattern Makers* Court properly upheld the Board's conclusion that league law 13 violated section 8(b)(1)(A), the Court's suggestion that *any* restriction on a union member's right to resign is unsound in view of the union's need for solidarity in order to bargain collectively.[99] In dicta, the Court noted with approval the Board's recent decision in *International Association of Machinists and Aerospace Workers, Local Lodge 1414 and Neufeld Porsche-Audi, Inc., (Neufeld Porsche-Audi)*.[100] In *Neufeld Porsche-Audi*, the Board concluded that any restriction on a union member's right to resign violates section 8(b)(1)(A) of the Act.[101] Also, the Board expressly rejected the thirty-day standard adopted in *Dalamo Victor I*.[102] The Board thus rejected the balancing approach adopted in *Dalamo Victor I* and concluded that all restrictions on a union member's right to resign

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[90] 263 N.L.R.B. 984, 111 L.R.R.M. 1115 (1982).

[91] *Pattern Makers' League of North America*, 265 N.L.R.B. at 1333, 112 L.R.R.M. at 1334.

[92] 263 N.L.R.B. at 987, 111 L.R.R.M. at 1119.

[93] *Id.* at 986, 111 L.R.R.M. at 1118.

[94] *Id.* at 987, 111 L.R.R.M. at 1118.

[95] *Id.*

[96] *See Allis-Chalmers Mfg. Co.*, 388 U.S. at 183, 65 L.R.R.M. at 2452.

[97] *Id.* at 181, 65 L.R.R.M. at 2451.

[98] See *supra* text accompanying note 28.

[99] 105 S. Ct. at 3077, 119 L.R.R.M. at 2938 (Blackmun, J., dissenting). In dissent Justice Blackmun noted "the Court appears to adopt the NLRB's rule that the enforcement of any promise, no matter how limited and no matter how reasonable, violates the breaching worker's right to refrain from concerted activity." *Id.*

[100] 270 N.L.R.B. 1330, 116 L.R.R.M. 1257 (1984).

[101] *Id.* at 1336, 116 L.R.R.M. at 1265.

[102] *Id.* at 1335, 116 L.R.R.M. at 1261.

violated the second prong of the *Scofield* test.[103] The Board also reasoned that such union restrictions violated the third prong of the *Scofield* test as well because under the union rules members would not be free to "leave the union and escape from these rules."[104]

The Board's conclusion in *Neufeld Porsche-Audi*, that the union's interest in reasonably restricting resignations is always subordinate to the statutory rights of employees, is inconsistent with the Supreme Court's decision in *Allis-Chalmers Manufacturing Co.* As noted above, the Court in *Allis-Chalmers Manufacturing Co.* adopted a balancing approach under which a union member's right to refrain from concerted activities is not absolute. Accordingly, employee interests should not always prevail but should be balanced with union interests. Under the Board's approach in *Neufeld Porsche-Audi*, however, all union rules restricting a member's right to resign, no matter how limited or reasonable, violate section 8(b)(1)(A) of the Act.[105] Thus, the dicta from the Court's opinion in *Pattern Makers* should not be followed by lower courts.

The Court in *Pattern Makers* upheld a Board order which struck down fines imposed by a union on members who had resigned in violation of the union's constitution.[106] The Court and the Board concluded that such fines constituted an unfair labor practice under section 8(b)(1)(A) of the Act.[107] The Court's approval of the Board's order was justified because the Board had balanced conflicting policies of the labor law in a manner consistent with the Court's holding in *Allis Chalmers Manufacturing Co.* The Court's opinion; however, seems to adopt the Board's more recent position that any restriction on a union member's right to resign violates section 8(b)(1)(A) of the Act. The Court's willingness to defer to the Board's position in *Neufeld Porsche-Audi* is not justified, however, because a prohibition against all union rules which restrict a member's right to resign would upset the balance of power between labor and management by threatening the worker's right to strike effectively.

2. **Use of On-Going Sex Discrimination by Union Officials to Satisfy RICO "Pattern" Requirement*: Hunt v. Weatherbee[1]

Congress enacted the Racketeer Influenced and Corrupt Organizations Act (RICO)[2] in 1970 to fight organized crime.[3] The RICO provisions authorize both criminal[4] and civil[5] suits against any person who uses money derived from a pattern of racketeering activity to invest in an enterprise, who gains control of an enterprise through a pattern of racketeering activity, or who conducts an enterprise through a pattern of racketeering activity.[6] "Racketeering activity" is defined broadly in RICO as any of a number of acts

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[103] *Id.* at 1334, 116 L.R.R.M. at 1261.

[104] *Id.*

[105] *See Neufeld Porsche-Audi*, 270 N.L.R.B. at 1333, 116 L.R.R.M. at 1261.

[106] *Pattern Makers*, 105 S. Ct. at 3081, 119 L.R.R.M. at 2937.

[107] *Id.* at 3069–70, 119 L.R.R.M. at 2932–33.

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[1] 626 F. Supp. 1097, 39 FEP Cases 1469, 121 L.R.R.M. 2408 (D. Mass. 1986).

[2] 18 U.S.C. §§ 1961–68 (1982).

[3] Russello v. United States, 464 U.S. 16, 26 (1983).

[4] 18 U.S.C. § 1963 (1982).

[5] *Id.* § 1964.

[6] 18 U.S.C. § 1962(a)–(c). "'[E]nterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (1982).

for which one may be charged under state law and punished by imprisonment for more than one year or indicted under certain provisions of title 18 of the United States Code.[7] A pattern of such activity is not established under RICO unless at least two acts of racketeering activity (predicate acts) are committed within a ten year period.[8] While the statute requires at least two acts to have been committed, however, the legislative history suggests that two acts may not be sufficient to form a pattern of racketeering.[9] Rather, to form such a pattern, circumstances should be present that indicate that the two acts were not isolated incidents of racketeering.[10]

Civil remedies under RICO provide that any "person injured in his business or property by reason of a violation of Section 1962 . . . may sue therefore" in federal district court and may recover treble damages.[11] Because RICO does not define what is an injury to "business or property," lower courts have been split on whether a plaintiff must allege an injury to his or her competitive position in the marketplace to allege an injury to business or property.[12] A divided Supreme Court discussed this issue in the 1985 case of *Sedima, S.P.R.L. v. Imrex Co.*,[13] in which the five member majority stated that RICO should be construed broadly to provide compensation for all business injuries flowing from the commission of the predicate acts. Although the *Sedima* Court noted

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[7] *Id.* § 1961(1). The full text of § 1961(1) states that:

"racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States . . . .

Id.

[8] 18 U.S.C. § 1961(5) (1982).

[9] *See generally* Sedima, S.P.R.L. v. Imrex Co., 105 S. Ct. 3275, 3285 n.14 (1985).

[10] *Id.*

[11] 18 U.S.C. § 1964(c) (1982).

[12] *Compare* North Barrington Dev. v. Fanslow, 547 F. Supp. 207, 210–11 (N.D. Ill. 1980) (plaintiff must allege competitive injury) *with* Barker v. Underwriters at Lloyd's London, 564 F. Supp. 352, 358 (E.D. Mich. 1983) (no injury to competitive or commercial interests required).

[13] 105 S. Ct. 3275, 3286 & n.15 (1985).

that compensable injuries are not limited to competitive injuries,[14] the Court did not define precisely what constitutes an injury to business or property within the meaning of RICO.

During the *Survey* year, in *Hunt v. Weatherbee*,[15] the United States District Court for the District of Massachusetts addressed the question of whether a cause of action was stated under RICO where the plaintiff's alleged injury consisted of loss of employment and the defendant-union's activities allegedly were comprised of two predicate racketeering acts linked through a pattern of sexual harassment and discrimination. The court held, inter alia, that loss of employment is an injury to business or property within the meaning of § 1964(c) and thus may form the basis of a civil RICO claim.[16] The court further held that the two racketeering acts linked by a pattern of sexual harassment and discrimination could be considered a pattern of racketeering activity within the meaning of the RICO provisions.[17] *Hunt v. Weatherbee* is significant because, in ruling that the alleged sexual harassment and discrimination satisfied RICO's pattern requirement, the *Weatherbee* court implicitly held for the first time that the pattern engaged in by a RICO defendant need not be one which evidences a continuity of racketeering activity as defined in § 1961(1). This holding is difficult to reconcile with the plain meaning of the RICO statute, and exemplifies the difficulty that lower courts have encountered in developing a meaningful definition of the term "pattern."

The plaintiff in *Weatherbee*, Rosa Elizabeth Hunt, was a certified journeyman carpenter and a member in good standing of Local 40 of the United Brotherhood of Carpenters and Joiners of America.[18] During her four year apprenticeship program which began in 1980, Local 40 was responsible for obtaining employment for Hunt.[19] Hunt alleged that from September, 1981 to June, 1983, she was subjected to numerous acts of sex discrimination and harassment while employed by the Perini Corporation.[20] Hunt alleged that although she complained to Local 40's business agent, Weatherbee, concerning this harassment, Weatherbee condoned the harassment and refused to take action to stop it.[21]

Hunt further alleged that while on the job in November 1981, she was the victim of an assault and battery by a fellow carpenter.[22] Hunt filed a criminal complaint, but subsequently withdrew it, alleging that the union leaders, including Weatherbee and the assistant business agent Bryant, coerced and intimidated her into withdrawing the complaint.[23] They accused Hunt of being responsible for the attack and expressed sexually discriminatory animus towards her.[24]

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[14] *Id.* at 3286 n.15. But see *id.* at 3297–3304 (Marshall, J., dissenting) for the reasoning of four members of the Court that a RICO plaintiff should be required to show a competitive injury.

[15] 626 F. Supp. 1097, 1099–1100, 39 FEP Cases 1469, 1470–71, 121 L.R.R.M. 2408, 2409–10 (D. Mass. 1986).

[16] *Id.* at 1101, 39 FEP Cases at 1471, 121 L.R.R.M. at 2411. For the court's other holdings see *infra* note 65.

[17] *Id.* at 1104, 39 FEP Cases at 1474, 121 L.R.R.M. at 2413.

[18] *Id.* at 1099, 39 FEP Cases at 1470, 121 L.R.R.M. at 2409.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.* Bryant was the Financial Secretary and Assistant Business Agent of Local 40. *Id.*

[24] *Id.*

Three years later, in March of 1984, Hunt worked for Ceco Corporation at a project in Cambridge, Massachusetts.[25] Hunt alleged that during this time she was subjected to various acts of sexual harassment and discrimination by Mark Dirksmeir, the contractor's (Turner Construction) general superintendant.[26] Furthermore, Hunt alleged that in late March Joe Shaw, Local 40's shop steward, attempted to coerce her into buying raffle tickets for the union's political action fund.[27] Shaw allegedly threatened to injure Hunt and made sexually discriminatory statements to her.[28] Hunt alleged that she feared she would lose her employment and be harmed physically, and thus, she contacted Weatherbee for protection.[29] Weatherbee refused to act.[30] When Hunt returned to work the following day Shaw again threatened her with physical injury.[31] Hunt then left the worksite and never returned to work as a Local 40 carpenter.[32]

Hunt proceeded to file suit in the United States District Court for the District of Massachusetts against Weatherbee, Bryant, Shaw, Dirksmeir, and Turner Construction.[33] Hunt alleged injury under both RICO and §§ 1985(2), 1985(3), and 1986 of the Civil Rights Acts of 1871.[34] Weatherbee, Bryant and Shaw filed a motion to dismiss the federal claims for failure to state a claim upon which relief can be granted.[35] The court denied the defendants' motion.[36]

Examining Hunt's RICO claims, the court first ruled that Hunt's alleged loss of employment was an injury compensable under § 1964(c) of the RICO statute.[37] Because the Clayton Act had served as the model for § 1964(c), the court looked to Section 4 of the Clayton Act to interpret the "business or property" language of § 1964(c).[38] The court noted that federal courts often have concluded that loss of employment is an injury to business or property under the Clayton Act.[39] Because the court found no compelling reason to apply a different rule in this case, the court held that Hunt properly alleged an injury under § 1964(c).[40]

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[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.* at 1099, 39 FEP Cases at 1470, 121 L.R.R.M. at 2409–10.

[34] *Id.* at 1098, 39 FEP Cases at 1470, 121 L.R.R.M. at 2409. Hunt also brought pendent state civil rights claims. *Id.* See *infra* note 58 for a summary of Hunt's Civil Rights Act claims.

[35] *Id.* The defendants also moved to dismiss the state claims for lack of subject matter jurisdiction. *Id.*

[36] *Id.*

[37] *Id.* at 1101, 39 FEP Cases at 1471, 121 L.R.R.M. at 2411. This section provides a remedy for anyone "injured in his business or property." 18 U.S.C. § 1964(c) (1982).

[38] *Id.* at 1100–01, 39 FEP Cases at 1471, 121 L.R.R.M. at 2410. See *infra* note 61 for the pertinent language of the Clayton Act.

[39] *Id.* at 1101, 39 FEP Cases at 1471, 121 L.R.R.M. at 2410 (citing McNulty v. Borden, Inc., 474 F. Supp. 1111, 1116 (E.D. Pa. 1979); Quinonez v. National Ass'n of Sec. Dealers, 540 F.2d 824, 829–30 (5th Cir. 1976)).

[40] *Id.* at 1101, 39 FEP Cases at 1471, 121 L.R.R.M. at 2410–11. The court also noted that while Hunt did not allege that the defendants were involved in organized crime, or that she had suffered a "racketeering injury," the Supreme Court in *Sedima* made clear that such allegations are not necessary to state a RICO claim. *Id.* at 1101, 39 FEP Cases at 1471–72, 121 L.R.R.M. at 2411.

The court then examined Hunt's allegations of racketeering activity by the defendants and held that Hunt had alleged adequately a "pattern of racketeering activity."[41] The court concluded that Hunt's allegations, that she was coerced to withdraw her criminal complaint[42] and that union leaders tried to force her to buy raffle tickets,[43] satisfied RICO's requirement of two predicate racketeering acts. The court disagreed with Weatherbee and Bryant's argument that because there was no nexus between the union and the coercion relating to the criminal complaint, there was no pattern of racketeering activity by the union within the meaning of § 1962(c) of RICO.[44] The court stated that there is a sufficient nexus between the enterprise and the offenses if the defendant is able to commit the predicate offense only by virtue of his or her position in the enterprise or his or her involvement in or control over its affairs, or if the predicate offenses are related to the activities of the enterprise.[45] The court reasoned that, in this case, the defendants' threats were credible only because of their positions of power in the union.[46] The court also reasoned that it could infer that Weatherbee and Bryant discriminated against female members, such as Hunt, to quell dissention and maintain the status quo.[47] The court, therefore, concluded that a nexus could be inferred between the union and Hunt's allegation that she was coerced to withdraw her criminal complaint, thus establishing a predicate activity under RICO.[48]

Furthermore, although Shaw, rather than Weatherbee and Bryant, carried out the alleged extortionate sale of raffle tickets, the court reasoned that Hunt's allegations could be sufficient to show that Shaw was acting within the scope of his authority and that Weatherbee and Bryant had sanctioned Shaw's extortionate acts.[49] The court, therefore, concluded that Weatherbee and Bryant might be indictable or chargeable for Shaw's act of extortion.[50] Consequently, the court ruled that Hunt sufficiently alleged two racketeering acts by Weatherbee and Bryant.[51]

Finally, the court addressed the question of whether these two alleged racketeering acts could be said to constitute a "pattern of racketeering activity" within the meaning of § 1961(5) of RICO.[52] The court stated that the United States Supreme Court has not defined the term "pattern."[53] The *Weatherbee* court noted, however, that the Supreme Court had emphasized in *Sedima* that two isolated acts of racketeering normally do not

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[41] *Id.* at 1104, 39 FEP Cases at 1474, 121 L.R.R.M. at 2413.

[42] Hunt alleged that this action was extortion under MASS. GEN. L. ch. 265, § 25 (1984), as well as obstruction of a criminal investigation indictable under 18 U.S.C. § 1510(a) (1982). *Id.* at 1101, 39 FEP Cases at 1472, 121 L.R.R.M. at 2411.

[43] Hunt alleged that this act was extortion under MASS. GEN. L. ch. 265, § 25 (1984), as well as indictable under the Hobbs Act, 18 U.S.C. § 1951 (1982). *Id.*

[44] *Id.* at 1102, 39 FEP Cases at 1472, 121 L.R.R.M. at 2411.

[45] *Id.* (citing United States v. LeRoy, 687 F.2d 610, 617 (2d Cir. 1982), *cert. denied*, 459 U.S. 1174 (1983)).

[46] *Id.* at 1102, 39 FEP Cases at 1472, 121 L.R.R.M. at 2411.

[47] *Id.* at 1102, 39 FEP Cases at 1473, 121 L.R.R.M. at 2412.

[48] *Id.* at 1103, 39 FEP Cases at 1473, 121 L.R.R.M. at 2412.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *See id.* at 1103–04, 39 FEP Cases at 1474, 121 L.R.R.M. at 2413. See *supra* text accompanying note 9 for the definition of racketeering activity.

[53] 626 F. Supp. at 1104, 39 FEP Cases at 1474, 121 L.R.R.M. at 2413.

constitute a pattern.[54] The court also noted that the legislative history of RICO states that "[t]he infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is the factor of *continuity plus relationship* which combines to produce a pattern."[55]

The *Weatherbee* court concluded that although Hunt alleged only two racketeering acts, her allegations might be sufficient to demonstrate a pattern of racketeering activity.[56] The court reasoned that, because Hunt alleged that the predicate acts were only two examples of a pattern of sexual harassment, discrimination and violation of contractual rights, and because Hunt included specific allegations that Weatherbee and Bryant knowingly encouraged sexual discrimination, Hunt's allegations might be sufficient to constitute a pattern of racketeering activity.[57] The court, thus, denied the defendants' motion to dismiss Hunt's RICO claims.[58]

In view of the Supreme Court's decision in *Sedima*, it is likely that future courts will follow the *Weatherbee* court in holding that loss of employment may constitute an injury to "business or property" under the RICO statute. *Sedima* made clear that RICO should be read broadly and that courts should not read limitations into RICO that are not stated in the statute.[59] Furthermore, in its review of the legislative history of § 1964(c) in *Sedima*, the Supreme Court explained that § 1964(c) was patterned directly after Section 4 of the Clayton Act and was intended to provide a civil remedy similar to that available in the antitrust laws.[60] The almost identical wording of § 1964(c) and Section 4 of the Clayton Act[61] also suggests that Congress intended the two provisions to be interpreted

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[54] 626 F. Supp. at 1103–04, 39 FEP Cases at 1474, 121 L.R.R.M. at 2413 (citing *Sedima*, 105 S. Ct. at 3285 n.14).

[55] *Id.* at 1104, 39 FEP Cases at 1474, 121 L.R.R.M. at 2413 (citing *Sedima*, 105 S. Ct. at 3285 n.14) (emphasis in original).

[56] *Id.*

[57] *Id.*

[58] *Id.* Hunt also brought four claims under the Civil Rights Act of 1871, 42 U.S.C. §§ 1985 and 1986 (1982). 626 F. Supp. at 1104, 39 FEP Cases at 1474, 121 L.R.R.M. at 2413. Hunt first alleged that Weatherbee and Bryant "obstructed justice in state court by coercing her to withdraw her criminal complaint" in violation of § 1985(2). *Id.* Hunt also alleged that Bryant and Shaw's attempt to extort money from her with sexually discriminatory animus deprived her of the equal protection of the law in violation of § 1985(3). *Id.* Hunt next alleged that Bryant and Shaw's alleged extortionate acts intimidated her in the free exercise of her political views by impeding her right to support candidates in federal elections in violation of § 1985(3). *Id.* at 1104–05, 39 FEP Cases at 1474, 121 L.R.R.M. at 2413–14. Finally, Hunt alleged that Weatherbee violated § 1986 when, with knowledge of the illegal acts committed against Hunt, he refused to take action to protect her. *Id.* at 1108, 39 FEP Cases at 1477, 121 L.R.R.M. at 2416. The court held that Hunt's allegations were sufficient to state claims upon which relief could be granted, and thus the court denied the defendants' motion to dismiss Hunt's civil rights claims. *Id.* Examination of these claims is beyond the scope of this chapter.

[59] *See Sedima*, 105 S. Ct. at 3286–87.

[60] *Id.* at 3280–81.

[61] Section 4 of the Clayton Act provides:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (1982). See *supra* text accompanying note 11 for the text of 18 U.S.C. § 1964(c).

similarly.[62] The *Weatherbee* court was correct, therefore, in looking to the Clayton Act for guidance in interpreting whether loss of employment is an injury to business or property under § 1964(c). Because federal courts have held that loss of employment in an antitrust context is an injury to business,[63] the *Weatherbee* court was on firm ground in ruling that Hunt alleged an injury under § 1964(c) of RICO. Future courts likely will follow this reasoning and allow those who have lost their employment due to a pattern of racketeering activity to bring suit under RICO.

The *Weatherbee* court was considerably less convincing in holding that Hunt alleged a pattern of racketeering activity on the part of Weatherbee and Bryant. While Hunt alleged the minimum two predicate acts required by § 1961(5),[64] two isolated acts, without more, do not form a pattern, as the court itself acknowledged.[65] Rather, the legislative history of RICO suggests that an element of continuity is necessary for separate acts to form the requisite pattern. Because § 1962 requires a pattern of *racketeering activity* on the part of RICO defendants, logically the link that connects two individual racketeering acts to form a pattern should evidence some continuity of racketeering acts as defined in RICO. The *Weatherbee* court stated that Hunt had alleged two individual racketeering acts.[66] The court then held that these acts formed a pattern of racketeering activity simply because the acts were allegedly part of a prolonged pattern and practice of sexual harassment, discrimination, and violation of contractual rights.[67]

The *Weatherbee* court's reasoning in finding such a pattern of racketeering activity is unsound. Sexual harassment, sexual discrimination, and violation of contractual rights are not racketeering activities as defined in § 1961(1) of RICO.[68] Although such acts of sexually based animus may indeed form a link between the predicate acts alleged by Hunt, this link is not one that evidences any continuity of racketeering activity by Weatherbee and Bryant. In other words, even if sexual discrimination and harassment motivated both racketeering acts alleged by Hunt, this does not suggest that the incidents were other than isolated acts of racketeering. The *Weatherbee* court concluded incorrectly that a pattern of sexual harassment and discrimination encompassing two predicate racketeering acts "may be sufficient to demonstrate a pattern of *racketeering activity*."[69]

In summary, the *Weatherbee* court's reasoning in finding that Hunt alleged a pattern of racketeering activity is difficult to support. Although Hunt alleged the two racketeering acts required by § 1961(5), the link between the acts which the court found to satisfy RICO's "pattern" requirement was one of sexually discriminatory animus. Because this link does not suggest any continuity of racketeering activity as such, the *Weatherbee* court should not have held that Hunt alleged a pattern of racketeering activity. The *Weatherbee* court's conclusion that loss of employment may be compensable under § 1964(c) as an injury to "business or property," however, is justified by the legislative history of RICO

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[62] *See* Parnon, *RICO Damages: Look to the Clayton Act, Not the Predicate Act*, 21 CAL. W.L. REV. 348, 350–51 (1985).

[63] *See, e.g.*, Quinonez v. National Ass'n of Sec. Dealers, 540 F.2d 824, 830 (5th Cir. 1976); Tugboat, Inc. v. Mobile Towing Co., 534 F.2d 1172, 1176 (5th Cir. 1976).

[64] 626 F. Supp. at 1103, 39 FEP Cases at 1473, 121 L.R.R.M. at 2412.

[65] *Id.* at 1103–04, 39 FEP Cases at 1474, 121 L.R.R.M. at 2413 (citing *Sedima*, 105 S. Ct. at 3285 n.14).

[66] *Id.* at 1103, 39 FEP Cases at 1473, 121 L.R.R.M. at 2412.

[67] *Id.* at 1104, 39 FEP Cases at 1474, 121 L.R.R.M. at 2413.

[68] See *supra* note 7 for the language of 18 U.S.C. § 1961(1).

[69] *See* 626 F. Supp. at 1104, 39 FEP Cases at 1474, 121 L.R.R.M. at 2413.

and the Supreme Court's statements that RICO should be interpreted broadly. In view of the increasing number of civil RICO suits filed in recent years, the *Weatherbee* case well may be the first of many cases in which persons who lose employment as a result of racketeering activity are permitted to recover treble damages by filing suit under the RICO statute.

III. CONSTITUTIONAL DECISIONS

A. *First Amendment*

1. **Union Activism and the Employee's First Amendment Right of Association — May the Government Employer Discriminate*: Wilton v. Mayor and City Council of Baltimore[1]

The first amendment of the United States Constitution guarantees an individual's right to freedom of expression and freedom of association.[2] Public employees, however, only partly enjoy that guarantee. The first amendment rights of public employees have been limited in cases where courts have found that the limitation is necessary to protect a substantial and legitimate state interest.[3] Specifically, the United States Supreme Court has recognized that government employers have the power to restrict certain employees' first amendment right of association as a means of promoting the efficiency of public services.[4]

Judicial review of a public employer's restriction of an employee's constitutional rights traditionally has entailed weighing the state's interest in efficient services against the individual's interest in freedom of speech and association.[5] Where an employee acts in pursuit of a private objective, an employer's public policy generally overrides the employee's rights.[6] In contrast, where the employee's action relates to a matter of public concern, the employee would be more likely to succeed.[7] Thus, government employers'

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[1] 772 F.2d 88, 120 L.R.R.M. 2439 (4th Cir. 1985).

[2] U.S. CONST. amend I.

[3] *See, e.g.*, Connick v. Myers, 461 U.S. 138, 151 (1983); Keyeshian v. Board of Regents, 385 U.S. 589, 605–06 (1967).

[4] York County Fire Fighters v. County of York, 589 F.2d 775, 777, 100 L.R.R.M. 2154, 2156 (4th Cir. 1978) (a locality "may validly prohibit supervisory personnel in the fire department from belonging to a union in which rank and file fire fighters of the department are members.").

[5] 589 F.2d 775, 100 L.R.R.M. 2154 (4th Cir. 1978)(quoting York County Fire Fighters v. County of York, 589 F.2d 775, 778, 100 L.R.R.M. 2154, 2156 (4th Cir. 1978).

[6] *See, e.g.*, Connick v. Myers, 461 U.S. 138 (1983). In *Connick*, the Court found that no matter of public concern was implicated where an employee in a district attorney's office complained about office policies. *Id.* at 147. Therefore, the Court deferred to the government official's discretion in managing the office. *Id.*

[7] *See, e.g.*, Pickering v. Board of Educ., 391 U.S. 563 (1968). In *Pickering*, a teacher was dismissed for writing and publishing in a newspaper a letter that criticized the school's budget allocations and failure to inform taxpayers of the true reasons why additional tax revenues were sought for the schools. *Id.* at 566. The Court found the allegations in the letter did not disrupt school operations, *id.* at 569–70, were not harmful to individuals or the school generally, *id.* at 572, and addressed issues of public concern. *Id.* at 572. The Court held that the administration's interest in limiting the teacher's opportunity to contribute to public debate was not significantly greater, in the current circumstances, than its interest in limiting a similar contribution by any member of the general public. *Id.* at 573.

discretion to promote substantial and legitimate state interests generally survives an employee's claim of infringement of first amendment constitutional rights. Among the first amendment rights which courts have permitted government employers to restrict is the employee's right to unionize.[8]

The focus on the promotion of the public interest over the individual rights of government employees generally, and the right to unionize specifically, is illustrated in the Fourth Circuit decision of *York County Fire Fighters Association v. County of York*.[9] The *York* court, confronting a public employee's challenge to his employer's restriction of his association with a union, held that the first amendment right may be limited where the limitation is necessary to protect a substantial and legitimate state interest.[10] In contrast with prior cases, which balanced individual and state interests, *York* represented a one-sided review of the substantiality and legitimacy of the state interest.

During the *Survey* year, in *Wilton v. Mayor and City Council of Baltimore*,[11] the Fourth Circuit Court of Appeals followed the *York* precedent. The *Wilton* court held that the government employer, a state correctional institution, was permitted to consider an employee's union activities in deciding whether to grant a promotion to a supervisory position.[12] The court found that the government employer must have broad discretion to manage its internal affairs because the government has a substantial interest in the operation of its jails.[13] Although the court embarked on a traditional balancing test, once it determined that the state had a "substantial and legitimate" interest at stake, the court subordinated the individual's rights to the state's interest.[14]

In *Wilton*, public employees charged their employer with violating their first amendment rights by denying them promotions due to their involvement in union activities.[15] The plaintiffs, Timothy Wilton and Alfred Sullivan, were correctional officers at the Baltimore City jail. In January 1980, both plaintiffs appeared before a jail promotion board to be considered for promotion to lieutenant.[16] At that time, the plaintiffs had been active members of the American Federation of State, County and Municipal Employees (the union), which represented all jail employees, for approximately ten years.[17] As prominent union members, the plaintiffs were widely known as activists, earlier having led a controversial jail strike.[18]

At the plaintiffs' interview with the promotion board, an interviewer asked the plaintiffs "if they felt that they could serve effectively in the supervisory role of a lieutenant while continuing to remain active in union affairs."[19] Plaintiffs responded that

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[8] *See, e.g.*, York County Fire Fighters v. County of York, 589 F.2d 775, 777, 100 L.R.R.M. 2154, 2156 (4th Cir. 1978); Elk Grove Firefighters v. Willis, 400 F. Supp. 1097, 1100, 90 L.R.R.M. 2447, 2449 (N.D. Ill. 1975), *aff'd without opinion*, 539 F.2d 714, 93 L.R.R.M. 2019 (7th Cir. 1976).

[9] 589 F.2d 775, 100 L.R.R.M. 2154 (4th Cir. 1978).

[10] *Id.* at 777, 100 L.R.R.M. at 2155.

[11] 772 F.2d 88, 120 L.R.R.M. 2439 (4th Cir. 1985).

[12] *Id.* at 92, 120 L.R.R.M. at 2441.

[13] *Id.* at 91, 120 L.R.R.M. at 2441.

[14] *Id.*

[15] *Id.* at 89, 120 L.R.R.M. at 2439.

[16] *Id.*

[17] *Id.* Wilton joined the correctional staff in 1969; Sullivan joined in 1972. Both were always prominent members of the union. *Id.*

[18] *Id.*

[19] *Id.* at 89, 120 L.R.R.M. at 2440. The employer's valid concern where a management candidate belongs to a union is that the employee's loyalty will be split between the union of which he or she

they had done so as captains and could continue to do so as lieutenants.[20] After learning that the promotion board did not recommend them highly, the plaintiffs complained to the director of personnel and the jail warden that the interview had been tainted by an improper anti-union inquiry.[21] Although a second board was ordered to prepare new recommendations, the second board included three members who had sat on the first seven-member board.[22] Once again the promotion board gave the plaintiffs poor recommendations and neither was promoted.[23]

The plaintiffs brought action under 42 U.S.C. § 1983 against the jail warden and the directors of personnel and administrative services.[24] The plaintiffs contended that the defendants' consideration of their union activities in making the promotion decision violated their first amendment rights.[25] The board members and the warden contended that the reports were honest evaluations of the plaintiffs' qualifications.[26] The plaintiffs introduced their long and varied experience, their outstanding records as corrections officers, and their very high scores on the civil service examination as evidence that they were rejected due to their union affiliation, not due to their qualifications.[27] The plaintiffs

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is a member, and the employer he or she ultimately may represent in labor disputes with the union. *See York*, 589 F.2d at 778, 100 L.R.R.M. at 2156. In *York*, the Fourth Circuit upheld a county board resolution that, as applied, precluded supervisors from belonging to unions representing rank and file employees. *Id.* at 778, 100 L.R.R.M. at 2155. Furthermore, section 14(a) of the Labor Management Relations Act provides that non-public employers need not recognize supervisors belonging to unions. 29 U.S.C. § 164(a) (1982). One court has noted that "this provision, added by the Taft-Hartley Amendments of 1947, reflects a strong congressional judgment that supervisor membership in unions is inimical to efficiency." Elk Grove Firefighters v. Willis, 400 F. Supp. 1097, 1100, 90 L.R.R.M. 2447, 2449 (N.D. Ill. 1975), *aff'd without opinion*, 539 F.2d 714, 93 L.R.R.M. 2019 (7th Cir. 1976). *Elk Grove* extended this reasoning to public employers. *Id.* at 1101, 90 L.R.R.M. at 2449–50.

[20] *Wilton*, 772 F.2d at 89, 120 L.R.R.M. at 2440. Four days prior to this interview, the union of jail employees underwent a structural change. *Id.* at 89 n.2, 120 L.R.R.M. at 2440 n.2. Previously, lieutenants belonged to the same union as all junior levels of jail personnel, while captains and superior officers belonged to a managerial and professional society. *Id.* Under the reorganization, lieutenants would be represented by the Classified Municipal Employees' Association, and thus the conflict in this situation that concerned the employer would dissolve. The interview proceeding, however, apparently did not reflect any awareness of this change. *Id.* at 89–90 & n.2, 120 L.R.R.M. at 2440 & n.2. The court found the case to rest upon the "actual assumptions and motivations" of the defendants, not the status of the union. *Id.* at 89 n.2, 120 L.R.R.M. 2440 n.2.

[21] *Id.* at 90, 120 L.R.R.M. at 2440.

[22] *Id.*

[23] *Id.* The directors of personnel and administrative services sat on both the first and second boards and consistently gave the plaintiffs poor recommendations. *Id.*

[24] *Id.* at 89, 120 L.R.R.M. at 2439. Plaintiffs originally brought their action against the directors of personnel and administrative services, the warden, the five remaining members of the Baltimore City Jail Board, two deputy wardens, the Mayor of Baltimore, and the City Council. *Id.* at 89 n.1., 120 L.R.R.M. 2439 n.1. The lower court's rulings effectively dismissed all defendants except the directors and the warden. These rulings were not appealed. *Id.*

The *Wilton* court noted that plaintiffs could have brought suit under labor legislation provisions (citing Carter v. Kurzejeski, 706 F.2d 855 (8th Cir. 1983) (additional citations omitted), but recognized the propriety of their § 1983 claim pursuant to 28 U.S.C. § 1343 jurisdiction for cases of local government employers interfering with employees' union activities (citing McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968); American Federation of State, County and Municipal Employees, AFL-CIO v. Woodward, 406 F.2d 137 (8th Cir. 1969).

[25] *Id.* at 89, 120 L.R.R.M. at 2439.

[26] *Id.* at 90, 120 L.R.R.M. at 2440.

[27] *Id.*

introduced further evidence that as union representatives, they were adversaries of two of the management personnel who sat on both evaluation boards and gave both men low marks.[28] Plaintiff Sullivan also alleged that the warden stated to him that "you are not doing anything wrong except your union involvement."[29]

The United States District Court for the District of Maryland found that the employer violated the plaintiffs' constitutional right to freedom of association.[30] The court granted the plaintiffs compensatory and punitive damages.[31] The jail officials appealed the decision.[32] In considering the defendants' appeal, the Court of Appeals for the Fourth Circuit found that although the plaintiffs established that their promotion was denied due to their union activity, there was no first amendment violation.[33] The Fourth Circuit, therefore, reversed the district court's holding.[34]

The Fourth Circuit noted that while the relationship of the first amendment to the organizational activities of public employees is an unsettled area of law,[35] the facts in *Wilton* fell clearly within a settled subsection of that law.[36] The court analogized the facts in *Wilton* to *York*, where a locality prohibited supervisory personnel in the fire department from belonging to the same union as the rank and file firefighters.[37] The *York* court held that the first amendment right to associate may be limited in pursuit of a substantial and legitimate state interest.[38]

The *Wilton* court also analogized the limitation on public employees' constitutional right of association to the established limitation on a public employee's first amendment right to speak on matters of public concern.[39] The issue in both cases, the court reasoned, was balancing the interests of a citizen with the obligations of an efficient worker.[40] The court considered the importance of efficient administration in jails, citing numerous imperfections in the system affecting detainees and employees, and concluded that the

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[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.* Plaintiff Sullivan alleged that the jail warden promised to promote the plaintiffs before a lawsuit filed by them could serve any purpose. *Id.* The plaintiffs sued in May 1980, and were promoted in May 1981. *Id.* The court action continued for backpay, retroactive seniority, and miscellaneous damages. *Id.* The district court entered judgment for each plaintiff in the amount of $525 in compensatory damages from the warden and $325 in punitive damages from the directors of personnel and administrative services, both of whom had given the plaintiffs unsatisfactory recommendations. *Id.* at 89, 120 L.R.R.M. at 2439.

[32] *Id.* at 89, 120 L.R.R.M. at 2439. The trial court dismissed all defendants except the warden and the two directors; the plaintiffs did not appeal these rulings. *Id.* at 89 n.1, 120 L.R.R.M. at 2439 n.1.

[33] *Id.* at 90, 120 L.R.R.M. at 2440.

[34] *Id.* at 89, 120 L.R.R.M. at 2439.

[35] *Id.* at 90, 120 L.R.R.M. at 2440. *See generally Labor Law — The Exclusivity Principle in the Public Employment Sector and First Amendment Rights*, 23 N.Y.L. SCH. L. REV. 132 (1977). No clear line has been drawn between those workers generally guaranteed a right to unionize and workers in supervisory positions who have been validly denied that right. *Id.*

[36] *Wilton*, 772 F.2d at 90–91, 120 L.R.R.M. at 2440 (citing English v. Powell, 592 F.2d 727, 733 (4th Cir. 1979)).

[37] *Id.* at 91, 120 L.R.R.M. at 2441 (quoting *York*, 589 F.2d at 777, 100 L.R.R.M. at 2155 (4th Cir. 1978)).

[38] *York*, 589 F.2d at 778, 100 L.R.R.M. at 2156.

[39] *Wilton*, 772 F.2d at 91, 120 L.R.R.M. at 2441 (citing Connick v. Myers, 461 U.S. 138 (1983)). See *supra* note 6 for a discussion of *Connick*.

[40] *Wilton*, 772 F.2d at 91, 120 L.R.R.M. at 2441.

government possesses a legitimate interest in proper discipline within jails and requires broad discretion to manage its personnel and internal affairs.[41]

Because the facts of *Wilton* and *York* are similar in many respects, it was reasonable for the *Wilton* court to apply the analysis developed in *York* to the case before it. The cases have some fundamental differences, however, and the *Wilton* court's failure to compensate for these differences may have created an inadvertent extension of *York*.

The *York* decision authorized a government employer to consider whether union activity might hinder an employee supervisor in performing his managerial duties.[42] *York* held that government employers could prevent firefighters in supervisory positions from belonging to a union of rank and file firefighters and could deny these firefighters promotions unless they left that union.[43] The *Wilton* holding is fundamentally different.

The *Wilton* decision authorizes a government employer to deny an employee a promotion due to prior union activity.[44] The *Wilton* court considered one general question as ruling both *York* and *Wilton:* whether government employers may consider employees' potentially conflicting alliances — to management and to the union — when making promotion decisions.[45] The court's conclusion indicated its belief that *York* answered this question.[46] It appears, however, that the *Wilton* court overlooked a subtle but critical distinction between the issues presented in each case.

In *Wilton* the court had to determine whether a government employer may consider an employee's past union activities in making promotion decisions. This is distinct from the *York* issue, where the court had to determine whether a government employer may consider an employee's present and expected future involvement in union activities.[47] At the outset of its analysis, the *Wilton* court compared the facts before it to *York*.[48] To the extent that the plaintiffs in *Wilton* were denied promotion due to their present and future involvement in a union representing junior levels of jail personnel, the analogy to *York* is appropriate. To the extent that the plaintiffs were denied promotion because of their past union involvement, however, this case presents a significantly different issue.[49]

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[41] *Id.* (citing Connick v. Myers, 461 U.S. 138, 151 (1983)).

[42] *York*, 589 F.2d at 778, 100 L.R.R.M. at 2156.

[43] *Id.*

[44] *Wilton*, 772 F.2d at 89, 91, 120 L.R.R.M. at 2439, 2440–41.

[45] *Id.* at 92, 120 L.R.R.M. at 2441.

[46] The *Wilton* court concluded its opinion by stating that:

> In deciding that the applicants could not serve both masters [union and management], Lightfoot, Merritt and Fitzgerald [the jail directors] reached the same conclusion for Wilton and Sullivan that York County reached for its entire force. In both instances the government employer's attention to conflicting tugs of allegiance did not violate any constitutional rights that may be enjoyed by the employees.

Wilton, 772 F.2d at 92, 120 L.R.R.M. at 2441.

[47] The *Wilton* court framed the issue as whether the employer could consider *past* union activism, although the promotion board's question which formed the basis of the suit was whether the employees could be effective supervisors while *continuing* to remain active in union affairs. *Id.* at 89, 120 L.R.R.M. at 2439–40.

[48] *Wilton*, 772 F.2d at 91, 120 L.R.R.M. at 2440–41. For the facts and the court's reasoning in *York*, see text accompanying notes 36–37.

[49] The facts of *Wilton* reveal that the plaintiffs were leaders in a controversial jail strike. *Id.* at 89, 120 L.R.R.M. at 2439. It is reasonable to infer that management may have denied the plaintiffs promotions to penalize them for this behavior. Under the holding of the *Wilton* court, employers

The *York* court, emphasizing the importance of narrowly tailoring the first amendment infringement,[50] found that permitting supervisors to belong to a union representing junior employees could have a disruptive effect on future negotiations between management, whom the supervisors represent, and the union in which the supervisors are members.[51] The *Wilton* court, in contrast, found that the supervisors' past union activism could compromise their ability to supervise their former or fellow union members.[52] The holding of the *Wilton* court, therefore, is not a mere reiteration of *York*, but rather a reinterpretation of what constitutes a legitimate infringement of a public employee's first amendment right of association.

Where *York* limited the first amendment right infringement to precluding employees in supervisory positions from joining unions representing rank and file members of the trade, *Wilton* permits a government employer to deny promotions to employees because the employees were involved previously in union activities. The choice presented to employees in *York* was to change their union affiliation or to be denied a promotion.[53] *Wilton*, however, indicates that employees who take an active role in the union create a permanent barrier to their promotion. Whereas *York* requires a current and prospective change in an employee's union activity, *Wilton* constitutes a deterrent to an employee's ever being active in a union.

The *Wilton* infringement on public employees' first amendment right of association is indefensible. Although active union members might maintain a labor bias even after they become part of management, discrimination against any active union member violates the least restrictive requirement for justifying infringements on constitutional rights.[54] While the *York* court could rationally find it necessary to keep supervisors out of a union representing rank and file members, the *Wilton* court cannot rationally exclude all previously active union members from supervisory positions. Unless the court were to define "union activism," which it did not attempt to do, all members of the union may be prejudicing their chances of future promotion.

Furthermore, this decision could have a chilling effect on union activity. To the extent that those employees likely to be union organizers and leaders are the same employees likely to seek promotion to management positions within the employer's organization, the union may lose its leadership. Employees may be discouraged from taking any part in union affairs because they fear that union activism at any level may be a barrier to their promotion. The *Wilton* precedent, therefore, could have a chilling effect on union activity.

Employers may protect the integrity of their management by not promoting employees that exhibit undesirable qualities in their participation in union activities, without considering the level of the employees' activity in the union. For example, if the employer is aware that an employee became violent while supporting a strike, the employer would have reasonable grounds for believing that employee should not be part of management.

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could withhold promotions from their employees based on the employees' union activities as a way of inhibiting any employee involvement in the union.

[50] *York*, 589 F.2d at 778, 100 L.R.R.M. at 2156.

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *See id.* at 778, 100 L.R.R.M. at 2156 ("a first amendment right to associate may be validly limited where the limitation is necessary to a substantial and legitimate state interest . . . . [b]arring membership in such a union is the least restrictive way of achieving the objective . . .").

The fact that the employee participated in a strike, however, or even led the strike, in itself must not be held against the employee when the employer is making promotion decisions. This discretion permits the government employers to control their personnel where the state has a substantial and legitimate interest in the employer's ability to operate effectively, without unreasonably infringing on employees' first amendment right of association.

Wilton presents a situation where the first amendment rights of public employees are sacrificed in pursuit of the public interest. Unquestionably, a government employer must have discretion to ensure the efficient operation of essential public services, but the *Wilton* court failed to place a reasonable limit on that discretion. *Wilton* suggests that, in pursuit of a legitimate and substantial state interest, a government employer may deny promotions to employees who were once active in union affairs. This precedent goes too far and could unduly inhibit employees' engagement in union affairs.

B. *Fourth Amendment*

1. **The Constitutionality of Government Employee Drug Testing:* Turner v. Fraternal Order of Police[1]

Many employers concerned with the effects of drug usage on worker performance have implemented employee drug testing programs.[2] Employees who test positively for the presence of drugs in their systems may be subjected to disciplinary measures such as termination or, alternatively, enrollment in drug treatment programs.[3] The most common method of drug testing employers use is the Enzyme Multiplied Immunoassay Test (EMIT).[4] This test requires employees to provide their employer with a urine sample, which is then chemically analyzed for the presence of enzymes found in illegal narcotics.[5]

Employees have challenged government employers' drug testing programs on the grounds that these tests violate the fourth amendment prohibition against unreasonable searches and seizures.[6] Courts uniformly have found that requiring an individual to

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[1] 500 A.2d 1005, 120 L.R.R.M. 3294 (D.C. 1985).

[2] *Drug Testing: The Scene Is Set for a Dramatic Legal Collision Between the Rights of Employers and Workers*, Nat'l L.J., Apr. 7, 1986, at 1, col. 1 [hereinafter *Drug Testing*].

[3] *See* Harvey v. Chicago Transit Authority, No. 83–C9074, slip op. (N.D. Ill. July 9, 1984).

[4] *Drug Testing*, *supra* note 2, at 23, col. 1. The EMIT test is used primarily to detect the presence of chemicals which produce the intoxicating effect associated with the use of marijuana and hashish. *Turner*, 500 A.2d at 1006 n.2, 120 L.R.R.M. at 3294 n.2. The test can detect the presence of narcotics for a period of seven days or more after the narcotics have been used. *Id.* Chemists and medical personnel recently have questioned the reliability of the EMIT test in detecting the presence of drugs. *See* Boston Globe, April 9, 1986, at 9, col. 4.

[5] *Turner*, 500 A.2d at 1006 n.2, 120 L.R.R.M. at 3294 n.2.

[6] *See, e.g.*, Div. 241 Amalgamated Transit Union (AFL-CIO) v. Suscy, 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976); Jones v. Floretta Dukes McKenzie, 628 F. Supp. 1500, 121 L.R.R.M. 2901 (D.D.C. 1986); McDonell v. Hunter, 612 F. Supp. 1122 (S.D. Iowa 1985); Allen v. City of Marietta, 601 F. Supp. 482 (N.D. Geo. 1985).

The fourth amendment provides, in full:

> [T]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly

submit urine samples for drug analysis constitutes a "search and seizure" within the meaning of the fourth amendment.[7] To determine whether a search and seizure is reasonable under the fourth amendment, courts traditionally have conducted a balancing test, weighing the governmental interest in the particular procedure against the resulting intrusion into the individual's expectation of privacy.[8] In fourth amendment challenges to government employee drug testing programs, courts balance the government's interest in having drug-free employees against the intrusion into the individual's reasonable expectation of privacy caused by compelling the employee to submit his or her body fluids for analysis.[9]

During the *Survey* year, in *Turner v. Fraternal Order of Police*,[10] the District of Columbia Court of Appeals addressed the question of whether a "Special Order" of the District of Columbia Metropolitan Police Department implementing a drug testing program for its police officers violated the fourth amendment. The *Turner* court held that the Special Order, which required officers suspected of drug use to submit to urinalysis testing, did not on its face violate the fourth amendment.[11] In upholding the constitutionality of the Department's drug testing program, the court found that the clear public interest in a drug-free police force justified the intrusion resulting from requiring police officers to submit to urinalysis tests.[12]

The decision in *Turner* reflects a growing trend in the courts to uphold employee drug testing programs in the face of fourth amendment challenges.[13] The *Turner* decision, along with several other recent cases,[14] indicates that programs which compel employees to submit to drug testing upon an objective, reasonable suspicion of drug use are likely to withstand fourth amendment challenge. Moreover, these cases indicate that drug testing programs involving government employees with public safety responsibilities most likely will withstand fourth amendment challenges.

In *Turner v. Fraternal Order of Police*, Maurice Turner, Chief of Police of the District of Columbia Metropolitan Police Department (the Department), issued Special Order #83–21 to enforce the Department's policy against police officers' use of narcotics and controlled substances.[15] The Special Order provided that any Department official may order any member of the police force to submit to urinalysis testing upon suspicion of

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describing the place to be searched and the persons or things to be seized.
U.S. CONST. amend. IV.

[7] *Jones*, 628 F. Supp. at 1508, 121 L.R.R.M. at 2907; *McDonell*, 612 F. Supp. at 1127; *Allen*, 601 F. Supp. at 489. *See also* Schmerber v. California, 384 U.S. 757, 767 (1966) (compulsory administration of blood test deemed to be a "search and seizure").

[8] *See, e.g.*, Camara v. Municipal Court, 387 U.S. 523, 534–35 (1967).

[9] *See Div. 241*, 538 F.2d at 1267; *Allen*, 601 F. Supp. at 491.

[10] 500 A.2d 1005, 1006–07, 120 L.R.R.M. 3294, 3294–95 (D.C. 1985).

[11] *Id.* at 1009, 120 L.R.R.M. at 3297.

[12] *Id.*

[13] See *infra* notes 50–70 and accompanying text for a discussion of the trend among courts to uphold employee drug testing programs.

[14] Jones v. Floretta Dukes McKenzie, 628 F. Supp. 1500, 121 L.R.R.M. 2901 (D.D.C. 1986) (fourth amendment challenge to District of Columbia school system's drug testing program); McDonell v. Hunter, 612 F. Supp. 1122 (S.D. Iowa 1985) (fourth amendment challenge to drug testing policies of the Iowa Department of Corrections); Allen v. City of Marietta, 601 F. Supp. 482 (N.D. Geo. 1985) (fourth amendment challenge to urinalysis testing of employees of the city of Marietta Board of Lights and Water).

[15] *Turner*, 500 A.2d at 1006, 120 L.R.R.M. at 3294.

drug use.[16] The Order also provided that the finding of the presence of an illicit narcotic or controlled substance, or an officer's refusal to submit to such testing, would result in a proposal to terminate the officer from the Department.[17]

Officer Buie and the Fraternal Order of Police, Metropolitan Police Department Labor Committee filed a complaint seeking declaratory and injunctive relief in the Superior Court of the District of Columbia.[18] The plaintiffs also applied for a temporary restraining order and filed a motion for a preliminary injunction to enjoin enforcement of the Special Order.[19] The trial court issued the temporary restraining order and also prohibited the Department from promulgating any similiar orders pending a full hearing on the merits and resolution of the controversy.[20] After conducting a hearing, the trial court granted the preliminary injunction, holding that the Special Order was unconstitutional.[21] The trial court found that because the Special Order provided no guidelines for compelling an officer to submit to urinalysis testing, the testing might be ordered under such circumstances as to be unreasonable and therefore violative of the fourth and fifth amendments.[22]

Chief Turner and the District of Columbia appealed the trial court's decision to the District of Columbia Court of Appeals.[23] The appeals court reversed the trial court and remanded the case, concluding that the Special Order implementing the drug testing program was constitutional on its face.[24]

The court of appeals first noted that the trial court had not made factual findings as to the manner in which the Special Order had been applied to Officer Buie.[25] According to the appeals court, therefore, the constitutionality of the Special Order as it had been applied by the Department was not at issue in the appeal.[26] The court stated, however, that it would address the issue of the facial constitutionality of the Special Order.[27]

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[16] *Id.* at 1006 & n.1, 120 L.R.R.M. at 3294–95 & n.1. The Special Order also provided that members of the police force may be required to submit to urinalysis testing at the discretion of a member of the Board of Police and Fire Surgeons. *Id.* at 1006 & n.1, 120 L.R.R.M. at 3295 & n.1.

[17] *Id.* at 1006, 120 L.R.R.M. at 3295.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.* The trial court made no findings of fact in regard to the manner that the Special Order was applied to Officer Buie. *Id.*

[22] *Id.* at 1006–07, 120 L.R.R.M. at 3295. The fifth amendment issue was not addressed by the court of appeals.

[23] *Turner*, 500 A.2d at 1006, 120 L.R.R.M. at 3294.

[24] *Id.* at 1006, 120 L.R.R.M. at 3295.

[25] *Id.* at 1009, 120 L.R.R.M. at 3297.

[26] *Id.* at 1006, 120 L.R.R.M. at 3295.

[27] *Id.* The appeals court began its analysis by noting that appellate review of the grant or denial of injunctive relief ordinarily focuses on whether the trial court abused its discretion. *Id.* at 1007, 120 L.R.R.M. at 3295 (citing Stamenich v. Markovic, 462 A.2d 452, 456 (D.C. 1983)). The court stated, however, that where the trial court's action turns on a question of law, appellate review may reach the merits of the controversy. *Turner*, 500 A.2d at 1007, 120 L.R.R.M. at 3295 (citing Don't Tear It Down, Inc. v. District of Columbia, 395 A.2d 388, 391 (D.C. 1978); District of Columbia Unemployment Compensation Bd. v. Security Storage Co. of Wash., 365 A.2d 785, 787 (D.C. 1976), *cert. denied*, 431 U.S. 939 (1977)). The appeals court stated that because the present appeal involved a question of constitutional interpretation, it elected to review the case on the merits. *Turner*, 500 A.2d at 1007, 120 L.R.R.M. at 3295.

The court of appeals noted that the fourth amendment protects an individual's reasonable expectations of privacy from unreasonable intrusions by the state.[28] The court stated that in determining whether an individual has a reasonable expectation of privacy and whether a governmental intrusion is reasonable, courts generally have engaged in a balancing test that weighs the government's need to search and seize against the invasion that the search and seizure entails.[29] Thus, the court stated that it must determine whether police officers have a legitimate expectation of privacy in being free from urine testing and whether the Department's drug testing program was unnecessarily intrusive.[30]

The court first considered whether police officers have a reasonable expectation of privacy in being free from urinalysis testing.[31] The court stated that not all individuals enjoy the same expectation of privacy, and, hence, not all individuals enjoy the same degree of protection under the fourth amendment.[32] The court noted, for example, that a military person's expectation of privacy has been found to differ from that of a civilian because of conditions peculiar to the military.[33] In analogizing the police force to the military, the court stated that the police force is a "para-military organization" which deals with the general public in delicate and often dangerous situations.[34] Therefore, the court determined that police officers, like members of the military, sometimes may enjoy less expectation of privacy and thus less constitutional protections than ordinary citizens.[35]

The court next discussed the government's interest in conducting drug testing of police officers.[36] The court stated that the Metropolitan Police Department has a paramount interest in ensuring that police officers are fit to perform their duties in protecting the public.[37] Drug abuse, the court explained, can have an adverse effect upon the ability

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[28] *Id.* (citing United States v. Chadwick, 433 U.S. 1, 7 (1977)).

[29] *Turner*, 500 A.2d at 1007, 120 L.R.R.M. at 3295 (citing Camara v. Municipal Court, 387 U.S. 523, 534–35 (1967)).

[30] *Turner*, 500 A.2d at 1007, 120 L.R.R.M. at 3295.

[31] *Id.* at 1007–08, 120 L.R.R.M. at 3295–96.

[32] *Id.* at 1007–08, 120 L.R.R.M. at 3296.

[33] *Id.* at 1008, 120 L.R.R.M. at 3296. In Committee for G.I. Rights v. Callaway, 518 F.2d 466, 476 (D.C. Cir. 1975), the United States Court of Appeals for the District of Columbia addressed the issue of whether warrantless drug inspections conducted by the Army violated the fourth amendment. In finding the inspections reasonable and therefore constitutional, the court noted that because of the differences between military and civilian life, different constitutional standards apply to members of the military than those that apply to civilians. *Callaway*, 518 F.2d at 474. The court stated that the fundamental necessity for obedience in the military, and the consequential imposition of discipline, may result in procedures being deemed permissible within the military which would be unconstitutional outside of the military. *Id. See also* Murray v. Haldeman, 16 M.J. 74, 81 (C.M.A. 1983) (compulsory urinalysis pursuant to Navy policy found to be a reasonable seizure and not in violation of the fourth amendment).

[34] *Turner*, 500 A.2d at 1008, 120 L.R.R.M. at 3296.

[35] *Id.* The court also referred to Div. 241 Amalgamated Transit Union (AFL-CIO) v. Suscy, 538 F.2d 1264, 1267 (7th Cir. 1976), *cert. denied*, 429 U.S. 1029 (1976) for the proposition that not all individuals enjoy the same expectation of privacy. *Turner*, 500 A.2d at 1008, 120 L.R.R.M. at 3296. In *Div. 241*, the United States Court of Appeals for the Seventh Circuit found that bus drivers had no reasonable expectation of privacy regarding blood and urine tests for the detection of intoxicants and drugs. *Div. 241*, 538 F.2d at 1267. See *infra* notes 68–70 for a discussion of *Div. 241*.

[36] *Turner*, 500 A.2d at 1008, 120 L.R.R.M. at 3296.

[37] *Id.*

of police officers to perform their functions.[38] The court stated that the safety of the police officer, as well as the safety of the public, depends upon the officer's alertness.[39] Thus, the court reasoned, police officers' use of narcotics presented serious consequences and the public therefore had a strong interest in ensuring that the police force operates free of narcotics.[40]

After finding that the government's interest in testing police officers for narcotics use was paramount, the court concluded that the intrusiveness of the Department's drug testing program was permissible under the Constitution.[41] The court stated that under the terms of the Special Order, members of the force could be ordered to submit to a urinalysis only if they were "suspected of drug use."[42] The court interpreted the term "suspected" in the Special Order as requiring a reasonable, objective basis for suspecting an officer of illegal drug usage before the officer could be ordered to submit to a urinalysis.[43] The court construed the Special Order not as purporting to grant the Department authority to order testing on a purely subjective basis, but instead as granting the authority to test only upon reasonable suspicion that a urinalysis will produce evidence of illegal drug use.[44] Therefore, the court found that because of the clear public interest involved in ensuring that the police force operates drug-free, and because testing could be ordered only upon reasonable suspicion of drug usage, the intrusion resulting from the Department's drug testing program was justified.[45] Thus, the court held that the Special Order, on its face, did not violate the fourth amendment.[46]

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[38] *Id.*

[39] *Id.*

[40] *Id.* at 1008, 1009, 120 L.R.R.M. at 3296, 3297.

[41] *Id.* at 1008, 120 L.R.R.M. at 3296.

[42] *Id.*

[43] *Id.* at 1008–09, 120 L.R.R.M. at 3296.

[44] *Id.* at 1008–09, 120 L.R.R.M. at 3297. The court acknowledged that while reasonable suspicion may entail less suspicion than probable cause, it nevertheless was sufficient to allow urinalysis testing of police officers under the fourth amendment. *Id.* at 1009, 120 L.R.R.M. at 3296. The court also refused to require the department to obtain a search warrant in order to compel its police officers to submit to testing, because to do so, the court noted, would be to equate a police officer with an ordinary citizen. *Id.* at 1009, 120 L.R.R.M. at 3297. Furthermore, the court noted that requiring a search warrant might result in the evidence of drugs dissipating before a warrant could be obtained. *Id.* at 1009 n.8, 120 L.R.R.M. at 3297 n.8.

In addition, the court pointed out that the Special Order also granted the Department authority to compel officers to submit to drug testing at the "discretion" of a member of the Board of Police and Fire Surgeons. *Id.* at 1009 n.6, 120 L.R.R.M. at 3296 n.6. While the constitutionality of this provision of the Special Order was not before the court, the court noted that "the term 'discretion' should be construed as meaning an exercise of the professional judgment of the members of the Police and Fire Surgeons Board, reached as a result of observation or indication of a medical nature." *Id.*

[45] *Id.* at 1009, 120 L.R.R.M. at 3297.

[46] *Id.* In a concurring opinion, Judge Nebeker agreed with the majority's conclusion that the Special Order was not in violation of the fourth amendment. *Turner*, 500 A.2d at 1009, 120 L.R.R.M. at 3297 (Nebeker, J., concurring). He wrote separately, however, to express his view that since no reasonable expectation of privacy was present in this case, the Department's drug testing program did not implicate the fourth amendment. *Id.* at 1009, 1011, 120 L.R.R.M. at 3297, 3299 (Nebeker, J., concurring). Judge Nebeker stated that the Supreme Court, in *Smith v. Maryland*, 442 U.S. 735, 740–41 (1979), established a two-part test for determining whether a reasonable expectation of privacy exists in a given situation. *Turner*, 500 A.2d at 1010, 120 L.R.R.M. at 3298 (Nebeker, J., concurring). Judge Nebeker noted that the first part of the test was whether an individual had

The decision in *Turner* illustrates the growing trend among courts in upholding the constitutionality of governmental employee drug testing programs in the face of fourth amendment challenges. In balancing the competing governmental and individual interests involved, courts generally have found that the government's interest in ensuring that its employees perform their duties unencumbered by narcotics usage outweighs the intrusion caused by subjecting these employees to drug testing procedures.[47] Factors emerging from *Turner* and similiar cases provide a framework to predict the outcome of future fourth amendment challenges to employee drug testing programs. First, courts have found that the governmental interest in ensuring that its employees are drug-free is of paramount importance when the particular employee's duties invoke public safety concerns.[48] Thus, government employees who have duties that affect the public safety will face a difficult burden in convincing a court that an employee drug testing program is unreasonable and violates the fourth amendment. On the other hand, even where an important public safety interest is implicated, courts have required the presence of a reasonable, objective suspicion that an employee is using drugs before compelling that employee to submit to a drug testing procedure.[49] Therefore, fourth amendment challenges likely will have little success against programs that compel employees to undergo drug testing only where evidence exists that the employee is using drugs.

In finding that the police department's drug testing program was reasonable under the fourth amendment, the *Turner* court placed great emphasis on the fact that police officers perform a function which involves the protection of public safety.[50] Other courts have similiarly given great weight to the governmental interest in ensuring the safety of the public. For example, in *Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy*,[51] the Seventh Circuit Court of Appeals addressed a fourth amendment challenge to a Chicago Transit Authority regulation which required bus and train operators involved in a serious accident, or suspected of being under the influence of intoxicants or narcotics, to submit to blood or urinalysis testing. The Seventh Circuit found that the transit authority had a paramount interest in ensuring that bus and train operators are fit to

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exhibited an actual, subjective expectation of privacy. *Id.* (quoting Smith v. Maryland, 442 U.S. 735, 740 (1979)). The second part of the test, according to Judge Nebeker, was whether the individual's subjective expectation of privacy was something that society was prepared to recognize as being reasonable. *Id.* at 1010–11, 120 L.R.R.M. at 3298 (quoting Smith v. Maryland, 442 U.S. 735, 740–41 (1979)) (Nebeker, J., concurring).

Applying this two-part test, Judge Nebeker, after assuming that the Special Order interfered in some slight way with a police officer's subjective expectation of privacy in the act of urination, considered whether this subjective expectation of privacy was one that society was willing to recognize as reasonable. *Turner*, 500 A.2d at 1011, 120 L.R.R.M. at 3298 (Nebeker, J., concurring). He found that any interference with the officer's expectation of privacy would be minimal. *Id.* Judge Nebeker stated that the request to produce a urine sample was no different, and involved no greater invasion of privacy, than the act of providing a personal physician with urine samples as part of a routine physical examination. *Id.* Judge Nebeker thus found that the Special Order did not implicate a reasonable expectation of privacy and therefore did not violate the fourth amendment. *Id.*

[47] *See, e.g.*, *Turner*, 500 A.2d at 1007–09, 120 L.R.R.M. at 3295–97.

[48] *See* Div. 241 Amalgamated Transit Union (AFL–CIO) v. Suscy, 538 F.2d 1264, 1267 (7th Cir. 1976) *cert. denied*, 429 U.S. 1029 (1976). *See also* cases cited *infra* note 62.

[49] *See* Jones v. Floretta Dukes McKenzie, 628 F. Supp. 1500, 1508–09, 121 L.R.R.M. 2901, 2906–07 (D.D.C. 1986); McDonell v. Hunter, 612 F. Supp. 1122, 1130 (S.D. Iowa 1985).

[50] *See Turner*, 500 A.2d at 1008, 120 L.R.R.M. at 3296.

[51] 538 F.2d 1264, 1265–66 (7th Cir. 1976).

perform their duties.[52] The court ruled that this public interest outweighed any individual interest in refusing to disclose evidence of intoxification or drug abuse, and that the regulation therefore did not violate the fourth amendment.[53]

In addition to establishing that courts give great weight to governmental concerns for promoting public safety, recent decisions indicate that drug testing programs which compel employees to submit body fluids for testing only if there is a reasonable suspicion that the employee is using drugs, as opposed to programs which allow testing on a random basis, will likely be deemed reasonable for fourth amendment purposes. The *Turner* court found that the Special Order, on its face, did not purport to allow the police department to compel drug testing on a purely subjective basis, and thus was not unreasonable under the fourth amendment.[54] Other courts similiarly have found that employee drug testing programs which compel submission to urinalysis testing upon objective, particularized suspicion of drug use present reasonable intrusions under the fourth amendment. For example, in *McDonell v. Hunter*,[55] the Iowa District Court addressed a challenge to the drug testing policies of the Iowa Department of Corrections, which allowed department officials to compel employees to submit to blood, urine or breath tests. The court held that under the fourth amendment, the department could compel employees to submit blood, urine or breath specimens for drug testing only upon reasonable suspicion that the employee was then under the influence of drugs or alcohol.[56]

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[52] *Id.* at 1267.

[53] *Id.* Similarly, in *Allen v. City of Marietta*, 601 F. Supp. 482, 484–85 (N.D. Geo. 1985), the United States District Court for the Northern District of Georgia addressed a fourth amendment challenge to urinalysis testing administered to city electrical employees who worked around high voltage wires. In holding that the tests did not violate the fourth amendment, the district court found that the city had a right to conduct such tests for the purpose of determining whether employees were using drugs that could affect their ability to perform their hazardous duties safely. Allen, 601 F. Supp. at 491. *See also* McDonell v. Hunter, 612 F. Supp. 1122, 1128 (S.D. Iowa 1985) (in assessing fourth amendment challenge to searches of correctional facility employees, court found that preservation of security and order within the prison is a strong state interest); Committee for G.I. Rights v. Callaway, 518 F.2d 466, 476 (D.C. Cir. 1975) (in assessing validity of warrantless drug inspections in the military in the face of fourth amendment challenge, court found it significant that military forces are charged with protecting the nation and that drug use could have a debilitating effect on the ability to perform this mission).

[54] *Turner*, 500 A.2d at 1008, 1009, 120 L.R.R.M. at 3296, 3297.

[55] 612 F. Supp. 1122, 1125 (S.D. Iowa 1985).

[56] *Id.* at 1130. In Jones v. Floretta Dukes McKenzie, 628 F. Supp. 1500, 1501, 121 L.R.R.M. 2901, 2901 (D.D.C. 1986), the United States District Court for the District of Columbia addressed a fourth amendment challenge to a drug testing program implemented by a school system's transportation division. The program required all employees to undergo urinalysis testing for drug detection, regardless of any particularized suspicion of drug usage. *Id.* at 1503, 121 L.R.R.M. at 2902. The court held that as applied to an employee whose duties consisited primarily of assisting handicapped students in travelling to and from school by bus, the drug testing program violated rights secured by the fourth amendment. *Id.* at 1508–09, 121 L.R.R.M. at 2907. The court found that the intrusion which resulted from subjecting the employee to drug testing in the absence of any particularized suspicion that she was using drugs outweighed the governmental interest involved. *Id.* Although noting that public safety concerns might justify subjecting school bus drivers or mechanics to urinalysis testing without particularized suspicion of drug usage, the court recognized that such a program would be more intrusive than programs found permissible by other courts. *Id.*

See also Capua v. City of Plainfield, 55 U.S.L.W. 2170 (D.N.J. 1986) (city's urinalysis testing of

Therefore, based on recent court decisions, a fourth amendment challenge to an employee drug testing program which compels submission to urinalysis testing only upon reasonable suspicion that a particular employee is using drugs likely will have little chance of success. Programs which compel employees to submit to testing on a random basis or absent any particularized suspicion, however, will probably be vulnerable to fourth amendment attack.[57]

By requiring objective, reasonable suspicion of drug use before the government may compel an employee to submit to drug testing, the courts have struck a reasonable balance between the competing governmental and individual interests involved. First, by not requiring the government to obtain a warrant and satisfy the more rigorous standard of probable cause, the courts have shown due regard for the government's interest in ensuring that its employees, particularly those who perform functions invoking public safety concerns, remain drug free. At the same time, by prohibiting drug testing on a subjective or random basis, the courts have attempted to protect the employee's legitimate expectations of freedom from unwarranted governmental intrusion.

In conclusion, the District of Columbia Court of Appeals, in *Turner v. Fraternal Order of Police*, upheld; in the face of a fourth amendment challenge, an employee drug testing program implemented by the District of Columbia Metropolitan Police Department. In finding the drug testing program constitutional, the court reasoned that the governmental interest in ensuring a drug-free police force justified the intrusion that would result from compelling police officers to submit to urinalysis testing for the detection of drug use. The decision in *Turner* illustrates a growing trend among courts in finding government employee drug testing programs to be reasonable under the fourth amendment. *Turner* and several similiar cases provide a framework for analyzing the likelihood of successful fourth amendment challenges to such programs in the future. These cases indicate that in balancing the competing government and individual interests involved, courts will afford great weight to the government's interest in ensuring that employees who have duties which invoke concerns for public safety remain drug free. Further, the cases indicate that programs which compel such employees to submit to drug testing

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all firefighters without individualized suspicion of drug use constitutes an unreasonable search and seizure in violation of the fourth amendment); *Allen*, 601 F. Supp. at 484, 491 (drug testing, implemented after informant observed particular employees using drugs, found to be reasonable under fourth amendment); Patchogue-Medford Congress of Teachers v. Board of Educ. of the Patchogue-Medford Union Free School Dist., slip. op. (N.Y. App. Div. Aug. 11, 1986) ("reasonable suspicion standard is the appropriate basis for constitutionally compelling a public school teacher to submit to a urine test for the purposes of detecting the use of controlled substances"). *But see* Shoemaker v. Handel, 795 F.2d 1136, 1143 (3d Cir. 1986) (random urine testing of jockeys is not an unreasonable search and seizure and hence does not violate the fourth amendment).

[57] A recent decision of the United States Court of Appeals for the Third Circuit upheld the constitutionality of a New Jersey Racing Commission regulation which requires jockeys to submit to random urine testing. Shoemaker v. Handel, 795 F.2d 1136, 1143 (3d Cir. 1986) In *Shoemaker*, the Third Circuit stated that "New Jersey has a strong interest in assuring the public of the integrity of persons engaged in the horse racing industry." *Id.* at 1142. In addition, the court stated that jockeys enjoy less expectation of privacy by virtue of their voluntary choice to enter the pervasively-regulated horse racing industry. *Id.* Furthermore, the Third Circuit stated that because the selection of jockeys who will be tested is made by lottery, the regulation did not vest testing authorities with discretion as to who will be tested. *Id.* at 1143. Therefore, the *Shoemaker* court held that random urine testing of jockeys does not violate the fourth amendment. *Id.* The *Shoemaker* court, however, expressly limited its holding to voluntary participants in a highly-regulated industry. *Id.* at 1142 n.5.

only upon the basis of reasonable suspicion that a particular employee is using drugs, rather than upon a random basis, will likely be found reasonable under the fourth amendment.

IV. PREEMPTION

A. *Section 301 Preemption of State Law: Allis-Chalmers Corp. v. Lueck[1]

In response to increasing industrial unrest, Congress enacted the Wagner Act of 1935[2] to foster collective bargaining, and ultimately, industrial peace.[3] The Wagner Act, however, did not set forth which courts were to be assigned the task of resolving disputes under collective-bargaining agreements. Congress later determined that the goals of the Wagner Act were being frustrated because varying state laws made enforcement of the federal law impracticable.[4] Accordingly, in 1947, as part of the Taft-Hartley amendments, Congress enacted section 301 of the Labor Management Relations Act to rectify the enforceability problem.[5] Under section 301, promises under a labor contract are enforceable in federal courts without regard to the usual rules governing subject matter jurisdiction.[6] Although section 301 provides federal jurisdiction for collective-bargaining agreement disputes, the statute left unclear which laws were to be applied in resolving such disputes — independent federal substantive rules or conventional state contract law.[7]

In the 1957 decision of *Textile Workers Union of America v. Lincoln Mills of Alabama*,[8] the United States Supreme Court clarified the issue of which substantive law to apply to section 301 disputes. The *Lincoln Mills* case involved grievances between a union and an employer under a collective-bargaining agreement.[9] When the union requested arbitration of the grievances and the employer refused, the union sued in federal district court to compel arbitration.[10] Addressing the issue of what law to apply to the dispute, the Supreme Court held that the appropriate substantive law for section 301 suits is federal law that the courts were to fashion from the policies underlying national labor laws.[11] Subsequent to the *Lincoln Mills* decision, the Supreme Court has developed a body of

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[1] 105 S. Ct. 1904, 118 L.R.R.M. 3345 (1985).

[2] The Wagner Act of 1935, 29 U.S.C. §§ 151–166 (1982).

[3] *See* R. GORMAN, BASIC TEXT ON LABOR LAW, ch. XXIII, § 3 (1976).

[4] *Id.*

[5] *See* Labor Management Relations Act of 1947, § 301, 29 U.S.C. § 185(a) (1982).

[6] Section 301 of the Labor Management Relations Act of 1947 states, in pertinent part:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a) (1982).

[7] *See* R. GORMAN, *supra* note 3, at ch. XXIII, § 3.

[8] 353 U.S. 448, 456, 40 L.R.R.M. 2113, 2116 (1957).

[9] *Id.* at 449, 40 L.R.R.M. at 2113.

[10] *Id.*

[11] *Id.* at 456, 40 L.R.R.M. at 2116.

federal common law to apply to section 301 suits that is considerably different from ordinary contract law.[12]

In divining this body of federal common law, the Supreme Court continuously has broadened the impact and scope of section 301.[13] In the seminal case of *Local 174, Teamsters v. Lucas Flour Co.*,[14] the Supreme Court first expressed the idea that in the interest of uniformity, federal principles for contract construction must apply to the interpretation of collective-bargaining agreements. In *Lucas Flour*, a union called an eight-day strike to protest the discharge of an employee.[15] The union also invoked the arbitration clause of the labor contract.[16] Although the contract had no express provision not to strike, the employer brought an action in state court for damages.[17] The state court, applying state law contract principles, found the strike violative of the contract.[18] Although the Supreme Court affirmed the judgment, the Court held that the state court erred by applying local rules of contract construction.[19] The Supreme Court found that federal rules of contract construction must apply to cases involving collective-bargaining agreements to carry out the policies underlying federal labor legislation.[20]

During the *Survey* year, the Supreme Court further broadened its reading of section 301, holding that section 301's preemptive effect extends beyond the breach of contract issue involved in *Lucas Flour*. In *Allis-Chalmers Corp. v. Lueck*,[21] the Supreme Court held that when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must be treated either as a section 301 claim or be dismissed as preempted by federal contract

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[12] *See* John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 548, 55 L.R.R.M. 2769, 2772 (1964) (successor company after a merger may not defend against arbitration by contending that the successor had never promised the union specifically it would arbitrate contract disputes); Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 104–06, 49 L.R.R.M. 2721, 2721–22 (1962) (federal labor policies warrant implying a promise by the union not to strike in protest of employer action that the contract subjects to arbitration); *Lincoln Mills*, 353 U.S. at 449–56, 40 L.R.R.M. at 2113–16 (promises to arbitrate may be specifically enforced). *But see* UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 701–05, 61 L.R.R.M. 2545, 2547–49 (1966) (Court held that it would not develop a single uniform period of limitations for actions brought under section 301).

[13] *See* Retail Clerks Int'l Ass'n Local Union Nos. 128 and 633 v. Lion Dry Goods, Inc., 369 U.S. 17, 28–29, 49 L.R.R.M. 2670, 2674–75 (1962) (broad interpretation of the persons covered by section 301); Smith v. Evening News Ass'n, 371 U.S. 195, 199–200, 51 L.R.R.M. 2646, 2648 (1962) (suits to vindicate individual employee rights arising from the collective-bargaining contracts are within jurisdiction of courts under section 301).

[14] 369 U.S. 95, 102, 49 L.R.R.M. 2717, 2720 (1962).

[15] *Id.* at 97, 49 L.R.R.M. at 2718.

[16] *Id.*

[17] *Id.*

[18] *Id.* at 97–98, 49 L.R.R.M. at 2718.

[19] *Id.* at 103, 49 L.R.R.M. at 2720–21.

[20] *Id.* The *Lucas Flour* Court noted that the subject matter of section 301 requires a uniform body of law. *Id.* The Court pointed out that the possibility that different meanings may be applied to specific terms of a contract under state and federal law inevitably would exert a disruptive influence upon both the negotiation and administration of collective-bargaining agreements. *Id.* Without certainty as to the applicable laws, the Supreme Court found that the need to formulate contract provisions in such a way as to have the same meaning under two or more bodies of law would make the negotiating process more difficult. *Id.* Moreover, the Court pointed out that once the collective bargain was made, the possibility of conflicting substantive interpretation would tend to stimulate and prolong disputes as to its interpretation. *Id.* at 103–04, 49 L.R.R.M. at 2721.

[21] 105 S. Ct. 1904, 1916, 118 L.R.R.M. 3345, 3352–53 (1985).

law. Under the rule established in *Lueck*, state tort claims that require judicial interpretation of the terms of a collective-bargaining agreement are controlled by the federal common law developed under section 301.[22]

The *Lueck* case involved a dispute between Roderick Lueck and his employer, Allis-Chalmers Corporation, regarding nonoccupational disability payments under a collective-bargaining agreement.[23] Lueck began working for Allis-Chalmers in February 1975 and was a member of Local 248 of the United Automobile and Agricultural Implement Workers of America.[24] Allis-Chalmers and Local 248 entered into a collective-bargaining agreement that provided for disability benefits for nonoccupational illnesses and injuries to all union employees.[25] A supplement letter of understanding between the union and Allis-Chalmers created a special three-part procedure for disability grievances.[26] The final step in this special procedure called for arbitration as outlined under the collective-bargaining agreement.[27]

In July 1981, Lueck suffered a nonoccupational back injury while carrying a pig at a friend's pig roast.[28] Lueck filed a claim with Aetna Life & Casualty Company, Allis-Chalmers' insurer.[29] Aetna approved the claim and issued benefits.[30] Lueck alleged, however, that Aetna periodically cut off his disability payments and would continue such payments only after Lueck had complied with Aetna's requests for doctor examinations and additional medical information.[31] Lueck further alleged that Allis-Chalmers repeatedly requested he be reexamined by physicians to a point where Lueck believed he was being harassed.[32]

Lueck never attempted to resolve his dispute through the grievance procedure, but instead filed suit against Allis-Chalmers and Aetna in Wisconsin state court.[33] At trial, the court ruled in favor of Allis-Chalmers and Aetna on their motions for summary judgment.[34] The trial court held that Lueck stated a claim under section 301, and in the

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[22] *Id.*

[23] *Id.* at 1907, 118 L.R.R.M. at 3346.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.* at 1907–08, 118 L.R.R.M. at 3346. The first step in resolving a grievance under this special procedure is to address a complaint to the Supervisor of Employee Relations. *Id.* at 1908, 118 L.R.R.M. at 3346. If the complaint is rejected or otherwise remains unresolved, the employee may bring the dispute before the Joint Plant Insurance Committee comprised of two union representatives and two employer representatives. *Id.* at 1907–08, 118 L.R.R.M. at 3346. If the Committee does not resolve the matter, the employee may bring the complaint to arbitration under the procedures established by the collective-bargaining agreement. *Id.* at 1908, 118 L.R.R.M. at 3346.

[28] *Id.*

[29] *Id.*

[30] *Id.* The benefits became effective on July 20, 1981, the day Lueck filed his claim with Aetna. *Id.*

[31] *Id.* at 1908, 118 L.R.R.M. at 3346–47. According to Lueck, Aetna would cut off payments when he failed to appear for doctors' appointments, or when he required hospitalization for unrelated reasons. *Id.*

[32] *Id.*

[33] *Id.* at 1908, 118 L.R.R.M. at 3347. Lueck alleged in his complaint that Allis-Chalmers and Aetna intentionally, contemptuously, and repeatedly failed to make payments. *Id.* Lueck further alleged that Allis-Chalmers and Aetna breached their duty to act in good faith and deal fairly with the disability claim. *Id.* Lueck sought both compensatory and punitive damages for debts, emotional distress, physical impairment, and pain and suffering. *Id.*

[34] *Id.*

alternative, even if Lueck stated a claim under state law, such a claim was preempted by federal labor law.[35]

On appeal to the Supreme Court of Wisconsin, that court reversed with one justice dissenting.[36] The Wisconsin Supreme Court held that the suit did not arise under section 301 and therefore should not have been dismissed for Lueck's failure to follow the grievance procedure.[37] Moreover, the Wisconsin Supreme Court held that Lueck properly stated a state-law tort claim of bad faith which is distinguishable from a breach of contract claim.[38] Under the Wisconsin Supreme Court's reasoning, the alleged tort claim was independent of a contract violation and thus could be decided in state court.[39] The United States Supreme Court granted certiorari to determine whether section 301 of the Labor Management Relations Act preempted a state-law tort action for bad faith delay in making disability payments due under a collective-bargaining agreement.[40]

In *Lueck*, the United States Supreme Court established that section 301's preemptive effect extends beyond suits for breach of contract and applies to tort claims that require interpretation of contract terms.[41] In reaching this conclusion, the Court first outlined the preemption standard regarding labor legislation.[42] The Court noted that Congress had never exercised its power to occupy the entire field of labor legislation, and thus the question of preemption turned on congressional intent.[43] The Supreme Court held that local regulation should be sustained unless it conflicts with federal law, frustrates the federal scheme, or the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the states.[44]

The determinative issue for the *Lueck* Court, therefore, was whether the Wisconsin tort law as applied would frustrate the federal labor-contract scheme established in section 301.[45] In discerning the scheme of section 301, the Court cited its earlier *Lincoln Mills* decision where the Court had found that Congress mandated federal courts to fashion a body of federal common law to be used in labor contract disputes.[46] Moreover, the *Lueck* Court relied upon its *Lucas Flour* decision to determine the preemptive effect

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[35] *Id.* at 1908–09, 118 L.R.R.M. at 3347. The Wisconsin Court of Appeals affirmed the judgment, holding that Aetna owed no duty to Lueck and that federal law preempted the claim against Allis-Chalmers. *Id.* at 1909, 118 L.R.R.M. at 3347.

[36] *Id. See* Lueck v. Aetna Life Ins. Co., 116 Wis. 2d 559, 342 N.W.2d 699 (1984), *rev'd sub nom.* Allis-Chalmers Corp. v. Lueck, 105 S. Ct. 1904, 118 L.R.R.M. 3345 (1985).

[37] *Lueck*, 105 S. Ct. at 1909, 118 L.R.R.M. at 3347.

[38] *Id.*

[39] *Id.* The Wisconsin Supreme Court also held that sections 8(a)(5) and (d) of the National Labor Relations Act did not preempt the state-law claim. *Id.* That court found that the administration of disability claim procedures under collective-bargaining agreements is only a peripheral concern of federal labor law. *Id.* Moreover, the court found that adjudication of bad faith insurance torts is of substantial significance to the state of Wisconsin. *Id.* Finally, the Wisconson court found that such adjudication would have no adverse impact on the effective administration of national labor policy. *Id.*

[40] *Id.* at 1909, 118 L.R.R.M. at 3347–48.

[41] *Id.* at 1916, 118 L.R.R.M. at 3352–53.

[42] *Id.* at 1909–10, 118 L.R.R.M. at 3348. Congress's power to preempt state law is derived from the Supremacy Clause. U.S. CONST., art. VI. For a thorough discussion of the preemption standard, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW, §§ 6–23 to 6–28 (1978).

[43] *Lueck*, 105 S. Ct. at 1910, 118 L.R.R.M. at 3348.

[44] *Id.*

[45] *Id.*

[46] *Id.* See *supra* text accompanying notes 8–12 for a discussion of the *Lincoln Mills* decision.

of section 301.[47] The Supreme Court noted that under its *Lucas Flour* decision, section 301 requires that federal labor law be paramount to state law so that precepts of federal labor policy are carried forth.[48] In *Lucas Flour*, the Supreme Court had found that in enacting section 301, Congress sought uniformity and certainty in defining the terms of collective bargaining agreements.[49] Thus, the *Lucas Flour* Court had concluded that a suit for an alleged violation of a provision of a collective-bargaining agreement must be brought under section 301.[50]

In light of the issues addressed in *Lucas Flour*, the *Lueck* Court reasoned that the preemptive effect of section 301 must go beyond suits alleging contract violations.[51] The Court found that if state law was determinative in suits involving the meaning of a contractual term or phrase, the congressional goal of uniformity in the interpretation of labor contracts would be impaired.[52] The Supreme Court also pointed out that in its earlier decision in *Bowen v. United States Postal Service*,[53] the Court had established that the evolving federal labor policies required that the evolving federal labor common law define relationships in a collective-bargaining agreement.

When the *Lueck* Court addressed the viability of Wisconsin's tort claim as applied to the facts of this case, it found that the state tort action for breach of good faith was intertwined inextricably with the terms of the labor contract.[54] Although the Wisconsin Supreme Court found that good faith behavior required by state insurance law was independent of the meaning of good faith within the labor contract,[55] the United States Supreme Court held that it is a matter of federal law whether there is an implied good faith obligation to make timely payments under a contract's terms.[56] The Supreme Court found that the extent of the duty owed ultimately depends upon the terms of the agreement between the parties.[57]

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[47] *Lueck*, 105 S. Ct. at 1910, 118 L.R.R.M. at 3348. See *supra* text accompanying notes 13–20 for a discussion of the *Lucas Flour* case.

[48] *Lueck*, 105 S. Ct. at 1910, 118 L.R.R.M. at 3348.

[49] 369 U.S. at 103–04, 49 L.R.R.M. at 2721. The *Lucas Flour* Court pointed out that the possibility of different results under state and federal law would have a disruptive influence on the negotiation and administration of collective-bargaining agreements. *Id.* at 103, 49 L.R.R.M. at 2721. Moreover, the Court noted that certainty was needed as to the applicable law so that the parties could determine what rights they had obtained or conceded. *Id.* Finally, the *Lucas Flour* Court found that the possibility of conflicting substantive interpretation would tend to stimulate and prolong disputes. *Id.* at 103–04, 49 L.R.R.M. at 2721.

[50] *Id.* at 103–04, 49 L.R.R.M. at 2720–21.

[51] *Lueck*, 105 S. Ct. at 1911, 118 L.R.R.M. at 3349.

[52] *Id.* See *supra* note 49 for a discussion of the *Lucas Flour* Court's reasoning regarding uniformity.

[53] 459 U.S. 212, 224–25, 112 L.R.R.M. 2281, 2286 (1983). The *Lueck* Court also noted, however, that section 301 did not preempt every dispute concerning employment under a collective-bargaining agreement. *Lueck*, 105 S. Ct. at 1911, 118 L.R.R.M. at 3349. The Court pointed out that section 301 says nothing about the substance of what private parties may agree to in labor contracts. *Id.* The Court also noted that section 301 does not give the parties the ability to contract for what is illegal under state law. *Id.* at 1912, 118 L.R.R.M. at 3349.

[54] *Id.* at 1912–15, 118 L.R.R.M. at 3348–52.

[55] 116 Wis. 2d at 565, 342 N.W.2d at 702.

[56] *Lueck*, 105 S. Ct. at 1913, 118 L.R.R.M. at 3350.

[57] *Id.* at 1914, 118 L.R.R.M. at 3351. In reaching this part of its decision, the Supreme Court cited prior Wisconsin case law holding that the tort claim intrinsically relates to the nature and existence of the contract. *Id.* In Anderson v. Continental Insurance Co., 85 Wis. 2d 675, 271 N.W.2d 368 (1978), the Wisconsin Supreme Court established that in a Wisconsin tort claim of an insured

Finally, the Supreme Court held that Congress intended section 301 to preempt this kind of derivative tort claim because preemption is the only result that definitely preserves the central role of arbitration in the system of industrial self-government.[58] The Court noted that the Wisconsin result would allow aggrieved parties to bring essentially the same suit in state court without first exhausting the established grievance procedure.[59] Furthermore, the *Lueck* Court pointed out that nearly every breach of contract can be stated in terms of a tort, thus bypassing the arbitrator's role in almost every breach case.[60] Relying on these policy concerns, the *Lueck* Court held that state tort claims which depend upon contractual interpretation upset the congressional mandate articulated by section 301 of the Labor Management Relations Act.[61]

In *Lueck*, the Supreme Court extended the rule established by *Lucas Flour* and held that federal labor law preempts those state tort claims which are inextricably dependent upon interpreting the terms of a collective-bargaining agreement.[62] This extension furthers the purposes underlying our federal labor legislation.[63] Moreover, the extension of section 301's preemptive effect was necessary to preserve the central role arbitration plays in our system of self-government.[64]

The rule established in *Lueck* provides interpretive certainty and uniformity essential to ensure the realization of federal labor policies.[65] If an aggrieved party was permitted to bring state tort claims under a collective-bargaining agreement, the possibility that different outcomes could occur under federal and state law would have a disruptive influence upon both negotiation and administration of collective-bargaining agreements.[66] Moreover, once a collective-bargaining agreement is formed, the possibility of conflicting interpretation of its terms in tort actions would tend to stimulate and prolong disputes.[67] Accordingly, the Supreme Court properly read section 301 as having a preemptive effect in order to forward federal labor policies.

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for bad faith refusal to make payments, the tort duty is derived from an implied covenant of good faith and fair dealing found in every contract. *Id.* at 689, 271 N.W.2d at 375–76. The *Lueck* Court found that because the right asserted not only derived from the contract, but was defined by the contractual obligation of good faith, any attempt to assess liability would involve contractual interpretation. 105 S. Ct. at 1914–15, 118 L.R.R.M. at 3351.

[58] *Id.* at 1915, 118 L.R.R.M. at 3352. *See* United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581, 46 L.R.R.M. 2416, 2419 (1960).

[59] *Lueck*, 105 S. Ct. at 1915, 118 L.R.R.M. at 3352. In *Lucas Flour*, the Supreme Court pointed out the need to preserve the effectiveness of arbitration. 369 U.S. at 105, 49 L.R.R.M. at 2721–22.

[60] *Lueck*, 105 S. Ct. at 1915, 118 L.R.R.M. at 3352.

[61] *Id.* at 1916, 118 L.R.R.M. at 3352–53.

[62] *Id.*

[63] *See id.* at 1911, 118 L.R.R.M. at 3349. The Supreme Court noted that the policies that animate section 301 of the Labor Management Relations Act include interpretive uniformity and certainty. *Id.*

[64] See *Warrior & Gulf Navigation*, 363 U.S. at 580–82, 46 L.R.R.M. at 2418–19 for a discussion of the role arbitration plays in our system of labor law.

[65] *See Lueck*, 105 S. Ct. at 1911, 118 L.R.R.M. at 3349.

[66] *See id.* In *Lucas Flour*, the Supreme Court held that federal law preempts state law regarding interpretation of a contract term because the possibility of conflicting results would disrupt the negotiation and administration of collective-bargaining agreements. 369 U.S. at 103, 49 L.R.R.M. at 2721. The *Lucas Flour* Court also noted that the process of negotiating an agreement would be made immeasurably more difficult by the necessity to formulate contract provisions to have the same meaning under both systems of law. *Id.*

[67] *See Lucas Flour*, 369 U.S. at 103, 49 L.R.R.M. at 2721.

The Supreme Court's decision in *Lueck* also helps preserve the important role arbitration plays in our system of self-government. The processing of disputes through the arbitration machinery is a vehicle through which the meaning of a collective-bargaining agreement can be discerned in accord with the variant needs and desires of the parties.[68] Judicial adjudication of the meaning of a collective-bargaining agreement is not afforded such latitude.[69] The Supreme Court's ruling that federal labor law preempts state tort claims grounded in contract disputes ensures that arbitration will remain the primary means for resolving employment disputes.[70]

Federal labor-contract law preemption of state-based claims is especially appropriate in tort actions. Most duties in the employment situation are couched in the terms of the collective-bargaining agreement. The collective-bargaining agreement determines the nature of employment relationships and hence the duties owed pursuant to those relationships. Because the source and extent of these duties are so interwoven with the terms of a collective-bargaining agreement, tort and contract claims arising from disputes under the agreement are inherently interrelated. Federal labor policy is premised upon the notion that arbitration is the favorable means for determining solutions to labor contract disputes. To allow a party to side-step the arbitration process by labeling a claim a tort would undermine this central aspect of our labor policy. As the Supreme Court noted in *Lueck*, almost every claim under an employment contract can be restated as a tort claim.[71] Accordingly, the rule established in *Lueck* is consistent with our federal labor policies and helps preserve the important role of arbitration in our system of industrial self-government.

In *Lueck*, the Supreme Court held that federal labor law preempts those state tort claims which depend upon the interpretation of terms of a collective-bargaining agreement. The *Lueck* decision provides interpretive certainty and preserves the central role of arbitration in labor disputes. The *Lueck* case establishes that disputes arising in the context of a collective-bargaining agreement will be heard in federal court and only after the grievance procedures provided for in the agreement have been exhausted.

B. **Jurisdiction Under the NLRA and the LMRA:* Lumber Production v. West Coast[1]

The National Labor Relations Act (the Act) protects the right of employees to organize and bargain collectively and prohibits employers from engaging in unfair labor practices.[2] Under sections 7 and 8 of the Act, it is an unfair labor practice for employers

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[68] *See Warrior & Gulf Navigation*, 363 U.S. at 581, 46 L.R.R.M. at 2419.

[69] *Id.* at 582, 46 L.R.R.M. at 2419. The Court in *Warrior & Gulf Navigation* noted that the ablest judge cannot be expected to bring the same competence to bear upon the determination of a grievance as can an informed arbitrator. *Id.*

[70] In order for an aggrieved party to bring a federal claim under section 301, such a party must first exhaust the grievance procedure established by the collective-bargaining agreement. *See Lueck*, 105 S. Ct. at 1915–16, 118 L.R.R.M. at 3352. The *Lueck* Court noted that a central tenet of federal labor-contract law under section 301 is that the arbitrator, not the court, has the responsibility to interpret the labor contract in the first instance. *Id.* at 1916, 118 L.R.R.M. at 3352.

[71] *Id.* at 1915, 118 L.R.R.M. at 3352.

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[1] 775 F.2d 1042, 120 L.R.R.M. 3097 (9th Cir. 1985).

[2] National Labor Relations Act §§ 7–8, 29 U.S.C. §§ 157–58 (1982).

to interfere with their employees' right to organize and bargain collectively, or to refuse to bargain collectively with the representatives of their employees.[3]

The Supreme Court has ruled that the National Labor Relations Board (the Board) has primary jurisdiction over suits alleging unfair labor practices under the Act.[4] The Court has held that if the alleged unfair practice is arguably subject to section 7 or 8 of the Act, then both state and federal courts must defer to the Board's jurisdiction.[5] Nevertheless, there are exceptions to this general rule of Board jurisdiction.[6] For example, section 301(a) of the Labor Management Relations Act (section 301(a)) gives United States district courts jurisdiction over suits for violations of contracts between employers and labor organizations in industries affecting interstate commerce.[7] In addition, state courts may assert jurisdiction over cases arguably covered by sections 7 and 8 of the Act if the activity at issue touches deeply rooted local interests or is only a peripheral concern of the Act.[8]

During the *Survey* year, in *Lumber Production Industrial Workers Local # 1054 v. West Coast Industrial Relations Association*,[9] the United States Court of Appeals for the Ninth Circuit addressed the issue of state and federal court jurisdiction over unfair labor practice actions in a suit involving an employer's use of labor consultants. The court held that the section 301(a) exception for suits alleging breach of contract is limited to suits for breach of existing contracts and does not allow a labor union to sue in federal or state court on the basis of an implied contract or on the basis of a prospective contractual relationship.[10] Moreover, the court stated that the increasing use of labor

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[3] *Id.* Section 7 reads as follows:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Id. § 7, 29 U.S.C. § 157 (1982). Section 8 reads in pertinent part:

> It shall be an unfair labor practice for an employer —
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Id. § 8, 29 U.S.C. § 158 (1982).

[4] *See* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 242–44, 43 L.R.R.M. 2838, 2840–41 (1959) (quoting Garner v. Teamsters Union, 346 U.S. 485, 490–91, 33 L.R.R.M. 2218, 2220–21 (1953)).

[5] *Garmon*, 359 U.S. at 245, 43 L.R.R.M. at 2842.

[6] *See* Labor Management Relations Act § 301(a), 29 U.S.C. § 185(a) (1982); Local 926, Int'l Union of Operating Eng'rs v. Jones, 460 U.S. 669, 676, 112 L.R.R.M. 3272, 3275 (1983).

[7] Labor Management Relations Act § 301(a), 29 U.S.C. § 185(a) (1982). Section 301(a) provides that:

> [s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

[8] *Jones*, 460 U.S. at 676, 112 L.R.R.M. at 3275.

[9] 775 F.2d 1042, 1044–45, 120 L.R.R.M. 3097, 3097–98 (9th Cir. 1985).

[10] *Id.* at 1046, 120 L.R.R.M. at 3099.

consultants does not warrant judicial expansion of jurisdiction under section 301(a).[11] The court also held that the Act preempts a claim based on state law if a crucial element of the state claim is identical to an element of an unfair labor practice claim that is covered by section 7 or 8 of the Act.[12] The court applied this formula even where a third party, rather than the employer, committed the unfair labor practice alleged in the state claim.[13] Finally, the court ruled that a claim of tortious interference with a contract is not so deeply rooted in local law that the state's interest overrides the Act's general policy of granting exclusive Board jurisdiction over unfair labor practice claims.[14] Thus, the Ninth Circuit's decision in *Lumber* makes it more difficult for a union to assert federal or state court jurisdiction over suits involving breach of contract between the union and the employer.

In *Lumber*, a union had represented employees of E.A. Nord Company for over twenty-five years.[15] During that time, Nord and the union had entered into collective bargaining agreements, the most recent of which had expired.[16] Negotiations to reach a new agreement were unsuccessful, and the union initiated a strike against Nord.[17]

The union filed an unfair labor practice claim with the Regional Director of the Board, alleging that Nord had bargained in bad faith, thus violating section 8 of the Act.[18] The Regional Director found insufficient evidence of bad faith to support the union's charge and dismissed the complaint.[19] The Board upheld the dismissal.[20]

After the dismissal of its claim, the union sued Nord's labor consultants in state court.[21] The union alleged that the consultants had induced Nord to use their services to frustrate the union's objectives and interfere with a prospective contractual relationship between the union and the employer.[22] The consultants removed the action to federal district court and then moved to dismiss, arguing that the Act preempted both state and federal court jurisdiction over the suit.[23] The district court ruled that the union's complaint stated a federal claim under section 301(a) for breach of a prospective contractual relationship and denied the consultants' motion to dismiss.[24] The consultants appealed, and the Court of Appeals for the Ninth Circuit reversed the district court's decision.[25]

The Ninth Circuit first examined the question of whether the union's complaint stated a federal claim under section 301(a).[26] Section 301(a) gives federal district courts

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[11] *Id.* at 1047, 120 L.R.R.M. at 3100.
[12] *Id.* at 1048, 120 L.R.R.M. at 3101.
[13] *See id.* at 1049, 120 L.R.R.M. at 3101.
[14] *Id.* at 1049, 120 L.R.R.M. at 3102.
[15] *Id.* at 1044, 120 L.R.R.M. at 3097–98.
[16] *Id.* at 1044, 120 L.R.R.M. at 3098.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.* at 1044–45, 120 L.R.R.M. at 3098. The union also alleged that the labor consultants encouraged employee dissatisfaction with the union and attempted to force a strike that would enable Nord to decertify the union and replace its existing workforce. *Id.* at 1045, 120 L.R.R.M. at 3098. The union sought damages in the amount of lost wages and fringe benefits and lost union dues. *Id.*
[23] *Id.* at 1045, 120 L.R.R.M. at 3098.
[24] *Id.*
[25] *Id.* at 1044, 120 L.R.R.M. at 3097.
[26] *Id.* at 1045, 120 L.R.R.M. at 3098.

jurisdiction over suits based on breach of contract between employers and labor organizations in industries affecting interstate commerce.[27] Although the contract between Nord and the union had expired, the union argued that it had an implied contract with Nord based on the twenty-five years of collective bargaining agreements with Nord.[28] The Ninth Circuit rejected the union's argument on this issue, holding that collective bargaining agreements expire according to their own terms and that there can be no implied contract right based on a past bargaining relationship.[29] The court reasoned that adopting the implied contract theory would compel an employer or union to agree to a proposal or to make a concession.[30] In this case, the court explained, finding that there was an implied contract would compel Nord to accept a collective bargaining agreement that would benefit the union.[31] The court stated that such compulsion would violate section 8(d) of the Act[32] as well as the Act's underlying policy of promoting free collective bargaining.[33]

Having found that no contract existed, the court next considered whether section 301(a) might still grant federal court jurisdiction when there is third-party interference with a prospective contractual relationship.[34] The Ninth Circuit held that section 301(a) jurisdiction does not extend to claims for breach of a prospective contractual relationship.[35] The court rejected the union's argument that section 301(a) should be construed broadly in response to the increased use of labor consultants who may encourage employers to engage in unfair labor practices.[36] The court expressed no opinion as to the legitimacy of the union's argument.[37] The court noted that the language of section 301(a) is limited to suits based on breach of contract and does not extend to a breach of a prospective contractual relationship.[38]

The Ninth Circuit next examined the union's contention that the district court had jurisdiction over the state law claim for tortious interference with a contractual relationship.[39] The court noted that generally the Board's jurisdiction preempts both state and federal court jurisdiction if the alleged unfair labor practices are arguably subject to

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[27] Labor Management Relations Act § 301(a), 29 U.S.C. § 185(a) (1982).

[28] *Lumber*, 775 F.2d at 1046, 120 L.R.R.M. at 3099.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.* Section 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d) (1982), states in pertinent part: .

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .

Id.

[33] *Lumber*, 775 F.2d at 1046, 120 L.R.R.M. at 3099.

[34] *Id.* at 1047, 120 L.R.R.M. at 3099.

[35] *Id.* at 1047, 120 L.R.R.M. at 3100.

[36] *Id.*

[37] *Id.* The court noted that if labor consultants pose a serious threat to the national labor policy, then the legislature, not the judiciary, is the appropriate branch to resolve this problem. *Id.*

[38] *Id.*

[39] *Id.*

section 7 or 8 of the Act.[40] The Ninth Circuit refined this general rule in accordance with the United States Supreme Court's holding in *Local 926, International Union of Operating Engineers v. Jones*.[41] In *Jones*, the Supreme Court held that a state law claim is preempted if the state claim and a claim under the Act are the same in a fundamental respect.[42] The Ninth Circuit interpreted *Jones* to mean that if a crucial element of a state claim is identical to an element of an unfair labor practice arguably covered by the Act, then the state claim is preempted.[43]

The union maintained that the state law claim against the consultants differed from the unfair labor practice claim against Nord because the consultants were third parties and had acted independently in inducing Nord to end the collective bargaining relationship with the union.[44] According to the union, this independent action constituted a tort separate from Nord's allegedly unfair labor practices.[45] The court rejected this argument.[46] The court noted that in order to decide whether the union had met its burden of proof as to causation on the state claim for tortious interference, the district court would have to examine the bargaining activity of Nord and the union.[47] The Board had considered this activity, however, when it rejected the union's unfair labor practice claim against Nord.[48] Because the bargaining activity of Nord and the union was an essential element of both the state law tort claim and the unfair labor practice claim dismissed by the Board, the court ruled that the state law tort claim was preempted.[49]

The Ninth Circuit also rejected the union's contention that the state's interest in preventing tortious interference with a contract justifies creating an exception to the general rule of primary Board jurisdiction of unfair labor practice claims.[50] The court observed that the United States Supreme Court ruled in *Jones* that state tortious interference actions are not so deeply rooted in local law as to warrant making such an exception.[51] Therefore, the Ninth Circuit held that the district court lacked jurisdiction under section 301(a) and that the Act preempted the union's state law claim.[52] Consequently, the Ninth Circuit reversed the district court and remanded the case for dismissal of the union's action against the labor consultants.[53]

The Ninth Circuit's decision in *Lumber* makes it more difficult for a union or employer to invoke the section 301(a) exception to the general rule of Board jurisdiction. *Lumber* establishes that employers and labor organizations cannot sue in federal or state court under section 301(a) of the Labor Management Relations Act on the basis of an implied contract or on the basis of breach of a prospective contractual relationship.[54] The *Lumber* court construed section 301(a) strictly in accordance with its terms and found

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[40] *Id.* at 1047–48, 120 L.R.R.M. at 3100 (citing *Garmon*, 359 U.S. at 245, 43 L.R.R.M. at 2842).
[41] *Id.* at 1048, 120 L.R.R.M. at 3101.
[42] *See Jones*, 460 U.S. at 682, 112 L.R.R.M. at 3278.
[43] *Lumber*, 775 F.2d at 1048, 120 L.R.R.M. at 3101.
[44] *Id.* at 1048–49, 120 L.R.R.M. at 3101.
[45] *Id.* at 1049, 120 L.R.R.M. at 3101.
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.* at 1049, 120 L.R.R.M. at 3102.
[51] *Id.* (citing *Jones*, 460 U.S. at 683, 112 L.R.R.M. at 3278).
[52] *Id.* at 1049, 120 L.R.R.M. at 3102.
[53] *Id.*
[54] *Id.* at 1046, 1047, 120 L.R.R.M. at 3099, 3100.

that a federal district court only has jurisdiction under section 301(a) if there is an existing contract between the employer and the union.

Lumber also makes it more difficult for unions or employers to pursue state law claims against third parties, such as consultants, for interfering with the bargaining process. Under *Lumber*, the Act preempts a union's or employer's state law claim if a crucial element of that claim is also an element of an unfair labor practice claim arguably subject to section 7 or 8 of the Act.[55] Bad faith bargaining is subject to section 8 of the Act.[56] Because claims against a consultant for tortious interference with a contract or a bargaining relationship must include the element of bad faith bargaining by the employer or union, such a state law claim always will be preempted. The aggrieved union, or employer, may have little recourse except to file a claim with the Board.

Although *Lumber* restricts federal and state court jurisdiction over unfair labor practice claims, the *Lumber* decision is consistent with settled labor policy. Congress has given primary jurisdiction over unfair labor practice claims to the Board in order that the Board may develop expertise in this area of law. Furthermore, Congress has provided only limited exceptions to Board jurisdiction. By declining to expand state and federal court jurisdiction, the *Lumber* court obeys these Congressional directives and defers to the Board's expertise.

V. LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT

A. **Extent of Disclosure Required Under Section 203 of the LMRDA*: Donovan v. Rose Law Firm[1]

Section 203 of the Labor-Management Reporting and Disclosure Act ("LMRDA")[2] regulates persuader activities, which are employer-sponsored activities performed by a third party to influence employees in the exercise of their rights to organize and bargain collectively.[3] One of the purposes of section 203 is to discourage persuader activities by exposing persuaders to public scrutiny.[4] Section 203(b) requires any person who agrees or arranges to perform persuader activities for an employer to file a report with the Secretary of Labor describing the agreement or arrangement within thirty days after entering into it.[5] In addition, section 203(b) requires the person to file with the Secretary

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[55] *Id.* at 1047, 120 L.R.R.M. at 3100.

[56] National Labor Relations Act, § 8, 29 U.S.C. § 158 (1982).

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[1] 768 F.2d 964, 119 L.R.R.M. (BNA) 3345 (8th Cir. 1985).

[2] § 203, 29 U.S.C. § 433 (1982).

[3] *Id.* § 203(b), 29 U.S.C. § 433(b); Price v. Wirtz, 412 F.2d 647, 647 n.2, 71 L.R.R.M. (BNA) 2354, 2354 n.2 (5th Cir. 1969).

[4] *Price*, 412 F.2d at 650, 71 L.R.R.M. at 2356.

[5] § 203(b), 29 U.S.C. § 433(b) (1982) provides:

> Every person who pursuant to any agreement or arrangement with an employer undertakes activities where an object thereof is, directly or indirectly —
>
> (1) to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing . . . shall file within thirty days after entering into such agreement or arrangement a report with the Secretary . . . containing . . . a detailed statement of the terms and conditions of such agreement or arrangement.

an annual report describing receipts and disbursements received in connection with labor relations services or advice rendered to an employer.[6] Section 203(c) of the LMRDA, however, provides that a person whose labor relations activities involve giving advice to an employer or representing the employer need not file a report describing his or her activities.[7]

Commentators have observed that under section 203 it is unclear whether a person who has agreed or arranged to perform persuader activities for one employer also must include in the annual report receipts or disbursements on behalf of other employers for whom the persuader has performed only non-persuader labor relations activities.[8] The language of section 203(b) indicates that once a person agrees or arranges to act as a persuader, his or her annual report must cover all labor relations activities that the person has performed for any employer.[9] On the other hand, section 203(c) appears to limit the disclosure requirements of section 203(b).[10]

The Labor Department has taken the position that once a person agrees or arranges to perform persuader activities for one employer, his or her annual report must include receipts or disbursements on behalf of every employer for whom he or she has performed any type of labor relations activity.[11] The United States Courts of Appeals for the Fourth, Fifth, Sixth, and Seventh Circuits support the Labor Department's position.[12] These courts have not interpreted section 203(c) as limiting the disclosure requirements that section 203(b) imposes on persuaders.[13] Instead, these courts have interpreted section 203(c) as a congressional attempt to make explicit the point implicit in section 203(b), namely, that people such as attorneys who merely advise or represent employers are not engaged in persuader activities, and hence are not required to file disclosure reports under section 203(b).[14]

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[6] *Id.*

[7] *Id.* § 203(c), U.S.C. § 433(c) (1982) provides:

> Nothing in this section shall be construed to require any employer or other person to file a report covering the services of such person by reason of his giving or agreeing to give advice to such employer or representing or agreeing to represent such employer . . . or engaging or agreeing to engage in collective bargaining on behalf of such employer . . . .

[8] Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 851, 891 (1960); Note, *Labor Law–Two Views of a Labor Relations Consultant's Duty to Report Under Section 203 of the LMRDA*, 65 MICH. L. REV. 752, 753–54 (1967) [hereinafter Michigan Note].

[9] Aaron, *supra* note 8, at 891; Michigan Note, *supra* note 8, at 753.

[10] Aaron, *supra* note 8, at 891; Michigan Note, *supra* note 8, at 753.

[11] Beaird, *Reporting Requirements for Employers and Labor Relations Consultants in the Labor-Management Reporting and Disclosure Act of 1959*, 53 GEO. L. J. 267, 312 (1965).

[12] Humphreys, Hutcheson and Moseley v. Donovan, 755 F.2d 1211, 118 L.R.R.M. (BNA) 2770 (6th Cir. 1985); Master Printers Ass'n v. Donovan, 699 F.2d 370, 112 L.R.R.M. (BNA) 2738 (7th Cir. 1983), *cert. denied*, 464 U.S. 892, 115 L.R.R.M. (BNA) 2248 (1984); Price v. Wirtz, 412 F.2d 647, 71 L.R.R.M. (BNA) 2354 (5th Cir. 1969); Douglas v. Wirtz, 353 F.2d 30, 60 L.R.R.M. (BNA) 2264 (4th Cir. 1965), *cert. denied*, 383 U.S. 909, 61 L.R.R.M. (BNA) 2376 (1966).

[13] *See Humphreys*, 755 F.2d at 1215–16, 118 L.R.R.M. at 2773; *Master Printers*, 699 F.2d at 371, 112 L.R.R.M. (BNA) at 2739 (affirming Donovan v. Master Printers Ass'n, 532 F. Supp. 1140, 1144, 109 L.R.R.M. 3215, 3218–19 (N.D. Ill. 1981)); *Price*, 412 F.2d at 649–50, 71 L.R.R.M. at 2356–57; *Douglas*, 353 F.2d at 32, 60 L.R.R.M. at 2266.

[14] *Humphreys*, 755 F.2d at 1215–16, 118 L.R.R.M. at 2773; *Price*, 412 F.2d at 650, 71 L.R.R.M. at 2356–57. *See Master Printers*, 699 F.2d at 371, 112 L.R.R.M. at 2739 (affirming *Master Printers*, 532 F. Supp. at 1145, 109 L.R.R.M. at 3219); *Douglas*, 353 F.2d at 33, 60 L.R.R.M. at 2266–67.

During the *Survey* year, in *Donovan v. Rose Law Firm*,[15] the Court of Appeals for the Eighth Circuit ruled that the annual report required under section 203(b) need not include receipts and disbursements relating to non-persuader labor relations activities performed for an employer unless the person filing the report also has agreed or arranged to perform persuader activities for that particular employer. In so ruling, the Eighth Circuit rejected the position of the Labor Department and the Fourth, Fifth, Sixth, and Seventh Circuits.[16] Thus, after *Rose Law Firm* the circuits are divided as to the type of labor relations activities that must be reported in the annual report required under section 203(b). One significant result of the decision may be to encourage persuader activities.

Rose Law Firm involved a union organizing drive by the United Brotherhood of Carpenters and Joiners of America at the Monark Boat Company plant.[17] Monark hired an attorney from the Rose Law Firm to persuade Monark employees not to join the union.[18] Monark was the only employer for whom the firm performed persuader activities.[19] Pursuant to the requirements of section 203(b), the firm filed a thirty day report describing its agreement to perform persuader activities for Monark, and also filed an annual report under section 203(b) describing receipts and disbursements relating to the work performed for Monark.[20] The annual report did not, however, include receipts and disbursements relating to non-persuader labor activities that the firm had performed for other employers.[21]

The Labor Department rejected the firm's annual report as incomplete because the report did not cover the firm's non-persuader labor relations activities performed for other employers.[22] When the firm refused to supply the missing information, the Labor Department sued to compel full disclosure.[23] The district court found for the Labor Department, and the firm appealed.[24]

On appeal, the firm presented three arguments supporting its contention that the annual report required under section 203(b) need only disclose non-persuader labor relations activities performed for an employer for whom the person filing the report has also agreed or arranged to perform persuader activities.[25] First, the firm argued that the legislative history of section 203 supported its interpretation of the disclosure provisions.[26] Next, the firm contended that the Labor Department's interpretation of the disclosure provisions would require disclosure of privileged attorney-client information.[27] Finally, the firm asserted that the Labor Department's interpretation violated the first and fourth amendment rights of the firm and the firm's clients.[28]

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[15] 768 F.2d 964, 975, 119 L.R.R.M. (BNA) 3345, 3352 (8th Cir. 1985).
[16] *Id.* at 973, 119 L.R.R.M. at 3351.
[17] *Id.* at 965, 119 L.R.R.M. at 3345.
[18] *Id.* at 975–76, 119 L.R.R.M. at 3353 (Bright, J., dissenting).
[19] *Id.* at 966, 119 L.R.R.M. at 3346.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*

The Eighth Circuit agreed with the firm's position that the section 203(b) annual report need not disclose non-persuader labor relations activities performed for an employer unless the person filing the report also has agreed or arranged to perform persuader activities for that employer.[29] Accordingly, the Eighth Circuit reversed the district court's decision.[30] The Eighth Circuit based its ruling on its interpretation of the legislative history of section 203, and did not reach the attorney-client privilege and first and fourth amendment issues raised by the firm.[31]

The Eighth Circuit's analysis of the legislative history of section 203 involved three steps. First, the court rejected the position of the Fourth, Fifth, Sixth, and Seventh Circuits that Congress intended section 203(c) merely to clarify, rather than limit, the disclosure requirements of section 203(b).[32] The Eighth Circuit noted that these courts based their position on the Senate report accompanying section 103(b) of the Kennedy-Ives Bill, a predecessor of the LMRDA that had never become law.[33] Section 103(b) contained in a single section much of the language found today in sections 203(b) and (c) of the LMRDA.[34] It required persons engaged in persuader activities to file annual disclosure reports, but exempted from the filing requirements persons whom the employer hired to advise or represent the employer.[35] The Senate report accompanying section 103(b) specifically stated that the exemption in section 103(b) for a person who advises or represents an employer was designed to make explicit a point already implicit in section 103(b), namely, that persons engaged solely in non-persuader activities need not file disclosure reports.[36]

The Eighth Circuit reasoned that the Senate report accompanying section 103(b) of the Kennedy-Ives Bill did not provide a legitimate basis for determining the effect that section 203(c) of the LMRDA has on section 203(b) of the LMRDA.[37] The court explained that although the language of the exemption in section 103(b) for a person who advises or represents an employer was similar to that in section 203(c), there were important differences between the two provisions.[38] Section 203(c), according to the court, contains additional limiting language.[39] This additional language, the court noted, suggests that while Congress intended the exemption in section 103(b) to make clear that persons engaged solely in non-persuader activities are not required to file disclosure reports,

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[29] *Id.*

[30] *Id.*

[31] *Id.* The court did note, however, that even if the legislative history of section 203 had been more ambiguous than the court found it to be, the court would have reached the same decision. *Id.* at 975, 119 L.R.R.M. at 3353. The court explained that with respect to the constitutional issues that the firm raised, the court could find no compelling governmental interest that would justify requiring a person who had performed persuader activities for one employer to disclose receipts and disbursements relating to employers for whom the person had performed no persuader activities. *Id.*

[32] *Id.* at 973, 119 L.R.R.M. at 3351.

[33] *See id.* at 971, 119 L.R.R.M. at 3349. Section 103(b) of the Kennedy-Ives Bill contained much of the language found in sections 203(b) and (c) of the LMRDA. *Id.* at 967, 119 L.R.R.M. at 3346.

[34] *Id.* at 970, 119 L.R.R.M. at 3349.

[35] *Id.* at 970–71, 119 L.R.R.M. at 3349.

[36] *Id.*

[37] *See id.* at 971, 119 L.R.R.M. at 3349.

[38] *Id.*

[39] *Id.*

Congress intended section 203(c) to limit the content of the annual disclosure report required under section 203(b).[40]

The court also considered the Senate report accompanying section 103(c) of the Kennedy-Ervin Bill, another predecessor of the LMRDA that had replaced the Kennedy-Ives Bill.[41] Section 103 (c) of the Kennedy-Ervin Bill contained much of the language found in section 203(c) of the LMRDA, including, the court observed, the limiting language of section 203(c) not found in section 103(b) of the Kennedy-Ives Bill.[42] The court found it significant that unlike the Senate report accompanying section 103(b) of the Kennedy-Ives Bill, the Senate report accompanying section 103(c) of the Kennedy-Ervin Bill failed to state that section 103(c) was designed to make it clear that persons engaged solely in non-persuader activities are not required to file disclosure reports.[43] Therefore, the court rejected the position of the Fourth, Fifth, Sixth, and Seventh Circuits, and concluded that the legislative history of the LMRDA did not indicate that Congress intended section 203(c) to clarify, rather than limit, the disclosure requirements of section 203(b).[44]

The court next considered the conference committee report on the LMRDA.[45] The court stated that the conference report was the most significant indication of congressional intent regarding the extent of disclosure required under section 203(b) because the conference report dealt with the final version of the LMRDA.[46] The court noted that the conference report referred to section 203(c) as a "broad exemption" from the section 203(b) reporting requirements.[47] By labeling section 203(c) a "broad exemption," the court asserted, Congress intended section 203(c) to limit, rather than merely clarify, the disclosure requirements of section 203(b).[48]

Finally, the court observed that the conference report described section 203 as requiring reports from any person who entered into an agreement or arrangement with an employer that the employer also was required to report.[49] The court explained that this was a deliberate congressional attempt to introduce an element of congruity into the reporting requirements of the LMRDA.[50] The court then noted that under section 203(a)(4), employers who merely request labor relations advice have no duty to file a disclosure report.[51] It was very unlikely, the court reasoned, that Congress intended

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[40] *Id.* Section 203(c) provides that "[n]othing in this section shall be construed to require any employer or other person to file a report covering the services of such person by reason of his giving or agreeing to give advice . . . ." § 203(c), 29 U.S.C. § 433(c) (1982). The court stated that the phrase "covering the services of such persons," which was not present in section 103(b) of the Kennedy-Ives Bill, indicated that section 203(c) refers to and limits the content of the section 203(b) annual report. *Rose Law Firm*, 768 F.2d at 971, 119 L.R.R.M. at 3349.

[41] *Rose Law Firm*, 768 F.2d at 971, 119 L.R.R.M. at 3349–50.

[42] *Id.*

[43] *See id.* at 972, 119 L.R.R.M. at 3350.

[44] *See id.* at 973, 119 L.R.R.M. at 3351.

[45] *Id.* After the Senate passed S. 1555 (the Kennedy-Ervin Bill), the House considered S. 1555, but passed its own bill instead. *Id.* at 972, 119 L.R.R.M. at 3351. The House then requested a conference with the Senate. *Id.* At conference, sections 103(b) and (c) of S. 1555 became sections 203(b) and (c) of the LMRDA. *Id.* at 967, 119 L.R.R.M. at 3346.

[46] *Id.* at 973–74, 119 L.R.R.M. at 3351–52.

[47] *Id.* at 974, 119 L.R.R.M. at 3352.

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

persons required to file reports under section 203(b) to include in those reports information which employers were not required to disclose.[52] Therefore, the court held that the annual report required under section 203(b) need not include receipts and disbursements relating to non-persuader labor relations activities performed for an employer unless the person filing the report also has agreed or arranged to perform persuader activities for that employer.[53]

The dissent in *Rose Law Firm* would have adopted the position of the Fourth, Fifth, Sixth, and Seventh Circuits that once a person agrees or arranges to perform persuader activities for an employer, the annual report which he or she must file pursuant to section 203(b) must include receipts and disbursements on behalf of every employer for whom he or she has performed any type of labor relations activity.[54] Quoting from the Fifth Circuit's opinion in *Price v. Wirtz*,[55] the dissent reasoned that the disclosure requirements of the LMRDA reflected Congress's belief that persuader activities, while not illegal, nevertheless are detrimental to good labor relations and to the public.[56] The dissent explained that Congress exposed persons engaged in such activities to "goldfish-bowl" publicity to minimize the deleterious effects of persuader activities.[57] The dissent also noted that because it is often difficult to distinguish persuader activities from non-persuader activities, Congress intended persons engaging in persuader activities to disclose all of their labor relations activities to prevent any concealment of persuader activities.[58] Thus, the dissent would have affirmed the district court's decision, which was in line with the decisions of the Fourth, Fifth, Sixth, and Seventh Circuits.[59]

Rose Law Firm is significant because the Eighth Circuit rejected the interpretation of sections 203(b) and (c) that four circuit courts and the Labor Department have adopted. Until *Rose Law Firm*, the law was settled that a person who agreed or arranged to perform persuader activities also had to disclose all of his or her non-persuader labor relations activities in the section 203(b) annual report. After *Rose Law Firm*, however, the extent of disclosure required under section 203(b) is no longer certain because the Eighth Circuit held that a person must disclose non-persuader labor relations activities performed for an employer only if he or she also has agreed to perform persuader activities for that employer.

One result of *Rose Law Firm* might be to encourage persuader activities. Persons such as attorneys may be more willing to engage in persuader activities if they do not have to disclose all of their labor relations activities as a result. As the dissent in *Rose Law Firm* pointed out, however, one of the reasons Congress included the disclosure provisions of section 203 in the LMRDA was to discourage persuader activities.[60] Thus, the Eighth Circuit's decision may conflict with one of the goals of the LMRDA.

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[52] *Id.* at 975, 119 L.R.R.M. at 3352.

[53] *Id.*

[54] *Id.* at 976, 119 L.R.R.M. at 3353–54 (Bright, J., dissenting).

[55] 412 F.2d 647, 71 L.R.R.M. (BNA) 2354 (5th Cir. 1969).

[56] *Rose Law Firm*, 768 F.2d at 976, 119 L.R.R.M. at 3353 (Bright, J., dissenting) (quoting *Price*, 412 F.2d at 650, 71 L.R.R.M. at 2356).

[57] *Id.*

[58] *Id.*

[59] *Id.* at 976, 119 L.R.R.M. at 3353–54 (Bright, J., dissenting).

[60] *Id.* at 976, 119 L.R.R.M. at 3353 (Bright, J., dissenting) (quoting *Price*, 412 F.2d at 650, 71 L.R.R.M. at 2356).

One problem in determining the extent of disclosure required under sections 203(b) and (c) is that the language and legislative history of these sections is ambiguous. Thus, the Eighth Circuit's interpretation is equally as plausible as the interpretation given these sections by the Labor Department and the Fourth, Fifth, Sixth, and Seventh Circuits. To resolve the split among the circuits and to eliminate the ambiguities in the language of section 203, Congress should amend section 203 to make clear the types of labor relations activities that a person required to file a section 203(b) annual report must disclose in that report.

In summary, in *Donovan v. Rose Law Firm*, the Eighth Circuit split with the Labor Department and the Fourth, Fifth, Sixth, and Seventh Circuits, ruling that the annual report required under section 203(b) of the LMRDA must include receipts and disbursements relating to non-persuader labor relations activities performed for an employer only if the person filing the report also has agreed or arranged to perform persuader activities for that employer. The Eighth Circuit based its ruling on its interpretation of the legislative history of section 203. *Rose Law Firm* is significant because it leaves the extent of disclosure required under section 203(b) uncertain. In addition, the decision may result in encouraging persuader activities.

EMPLOYMENT DISCRIMINATION LAW

I. PROCEDURAL DEVELOPMENTS

A. *The Separation of Liability and Remedy in Mixed Motive Title VII Actions*: Bibbs v. Block[1]

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against individuals in employment because of race, color, religion, sex, or national origin.[2] The central objectives of Title VII are to deter employer discrimination, compensate victims of discrimination, and vindicate a public interest in eliminating discrimination.[3] In a Title VII individual disparate treatment suit,[4] the plaintiff must establish that the adverse employment decision occurred "because of" unlawful considerations.[5] In a mixed-motive case, where both lawful and unlawful considerations apparently motivated the employer,[6] establishing that the employer made the adverse decision "because of" the unlawful consideration is problematic.[7]

Although the United States Supreme Court has not addressed directly the question of the proper standard of causation in mixed-motive cases, the Court has established some guidelines regarding the burden of proof in Title VII individual disparate treat-

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* By Anne E. Craige, Staff Member, BOSTON COLLEGE LAW REVIEW, with special thanks to Ann Milner, former Staff Member, who wrote a draft of this Chapter's background for the original Eighth Circuit's decision in *Bibbs v. Block*.

[1] 778 F.2d 1318, 39 FEP Cases 970 (8th Cir. 1985).

[2] Section 703(a), 42 U.S.C. § 2000e-2 (1982). The act provides in pertinent part:

> (a) 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 race, color, religion, sex, or national origin; or
>
> (2) 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 race, color, religion, sex, or national origin.

Id.

[3] Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292, 317, 323, (1982).

[4] "Disparate treatment" involves a situation in which the employer "simply treats some people less favorably than others because of their race, color, religion, sex, or national origin." *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 335–36 n.15, 14 FEP Cases 1514, 1519 n.15 (1977). In contrast, "disparate impact" involves "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Id.* Unlike a disparate treatment suit, a plaintiff in a disparate impact suit is not required to prove discriminatory motive. *See id.*

Individual disparate treatment suits are distinguishable further from Title VII class action disparate treatment suits. In this latter type of suit, liability and relief are generally tried separately. *See* Brodin, *supra* note 3, at 302–04.

[5] Brodin, *supra* note 3, at 292. *See* the text of 42 U.S.C. § 2000e–2(1), *supra* note 2.

[6] *Id.* at 293. For example, an employer might not promote a female employee both because she is not a good worker and because she is a woman.

[7] *Id.* In a mixed-motive situation, one commentator has noted that "[t]he question thus arises as to how large a part the discriminatory factor must play in the decision before a court should hold that the decision was made 'because of' a prohibited criterion." *Id.*

ment suits. In the 1973 case of *McDonnell Douglas Corp. v. Green*[8], the Supreme Court set forth a three stage model for proof of unlawful discriminatory treatment under Title VII. According to the *McDonnell Douglas* Court, the plaintiff first must establish a prima facie case of discrimination.[9] The Court found that once the plaintiff establishes a prima facie case, the burden of production in the second stage of a suit shifts to the defendant to advance a legitimate, nondiscriminatory reason for the employment decision.[10] If the defendant successfully articulates a legitimate reason for the employment decision,[11] then, explained the *McDonnell Douglas* Court, the plaintiff must be afforded a "fair opportunity" to demonstrate that the employer's articulated reason for the employment decision is not the true reason for the decision but is a pretext for discrimination.[12]

The Court has failed to establish, however, a clear standard of causation under the third stage of the model set forth in *McDonnell Douglas*. In the 1976 case of *McDonald v. Santa Fe Trail Transportation*[13], the Supreme Court noted that in proving pretext under the third stage of *McDonnell Douglas*, a plaintiff need not show that race was the sole reason for the employment decision but instead, is required to show "no more . . . than that race was a 'but for' cause." The *McDonald* Court failed to explain, however, what a plaintiff must show to satisfy the "but for" requirement of causation.[14] Five years later, in *Texas Dept. of Community Affairs v. Burdine*[15], the Court stated that to succeed at the third stage of the *McDonnell Douglas* framework the plaintiff either must persuade the court that "a discriminatory reason more likely motivated the employer" or that "the employer's proferred explanation is unworthy of credence." Since *McDonald* and *Burdine*,

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[8] 411 U.S. 792, 800–07, 5 FEP Cases 965, 968–71 (1973).

[9] *Id.* at 802, 5 FEP Cases at 969. In *McDonnell Douglas*, the Supreme Court stated that a plaintiff may establish a prima facie case of discrimination by showing:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; and (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802, 5 FEP Cases at 969.

The *McDonnell Douglas* Court noted, however, that this specification of proof for establishing a prima facie case of discrimination "is not necessarily applicable in every aspect" to every Title VII case because of different factual situations in Title VII cases. *Id.* at 802 n.13, 5 FEP Cases at 969 n.13.

[10] *Id.* at 802, 5 FEP Cases at 969.

[11] If the defendant-employer fails to articulate a legitimate reason for the employment decision to rebut the presumption raised by the plaintiff's prima facie case, a court enters a judgment for the plaintiff. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254, 25 FEP Cases 113, 116 (1981).

[12] *McDonnell Douglas*, 411 U.S. at 804, 5 FEP Cases at 970.

[13] 427 U.S. 273, 282 n.10, 12 FEP Cases 1577, 1582 n.10 (1976). In *McDonald*, two white employees claimed that their employer discriminated against them after their employer fired them for stealing from the company while the employer did not fire a black employee involved in the theft. *Id.* at 276, 12 FEP Cases at 1578.

[14] *See id.* at 282 n.10, 12 FEP cases at 1580 n.10. Professor Brodin notes that the "but-for" standard is "generally applied in actions involving negligent torts." Brodin, *supra* note 3, at 313. This rule of causation states that a "defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event, if the event would have occurred without it." *See also* W. KEETON, D. DOBBS, R. KEETON, D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 266 (5th ed. 1984).

[15] 450 U.S. 248, 256, 25 FEP Cases 113, 116 (1981).

the Supreme Court has not given further substance to the "but for" test, and thus the requirements remain unclear.

Lower federal courts have adopted different standards in construing the *McDonald* "but for" requirement of causation to prove pretext. For example, the First Circuit has construed the "but for" test strictly, requiring that a plaintiff show that the unlawful consideration was a determinative factor in the employment decision and that absent the unlawful consideration the employer would not have made the same employment decision.[16] Other courts of appeal have required only that a plaintiff show that the unlawful consideration was a significant or substantial factor in the employment decision.[17] According to still other appellate courts, the appropriate standard of causation merely requires proof that discrimination was a factor in the employment decision.[18] Thus lower federal courts, without guidance from the United States Supreme Court, have applied different standards of causation to mixed-motive cases under Title VII.

In addition, controversy arises as to the appropriate result if the employer shows that it would have arrived at the same decision even absent the unlawful consideration. Commentators and courts have suggested that the legislative history of Title VII supports three views. One view interprets Title VII as limiting the court's authority to find any liability if the employer's decision would have been the same absent impermissible considerations.[19] Such a view completely forecloses any relief to the plaintiff. A second view is that the court can find the employer liable for its use of impermissible considerations and yet subsequently limit the relief available to the plaintiff because the employee would have been in the same position absent the impermissible consideration.[20] A third interpretation of Title VII supports the view that once an impermissible factor has "in any way" influenced an employment decision, the employer is liable and the nondiscriminatory reasons that entered into the decision are irrelevant to either the question of liability or relief.[21]

During the *Survey* year, in *Bibbs v. Block*,[22] the Eighth Circuit directly addressed the issue of the proper standard of causation and relief to apply in a Title VII mixed-motive individual disparate treatment case. The Eighth Circuit in *Bibbs* held that under the third stage of the *McDonnell Douglas* framework, a plaintiff need only show that the unlawful consideration was a factor in the employer's decision not to promote the employee to establish the employer's liability.[23] In addition, the *Bibbs* court decided that

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[16] *See* Mack v. Cape Elizabeth School Bd., 553 F.2d 720, 722, 20 FEP Cases 1679, 1680 (1st Cir. 1977) (plaintiff must show that "but for" the impermissible factors she would have been re-employed).

[17] *See, e.g.*, Fadhl v. San Francisco, 741 F.2d 1163, 1166, 35 FEP Cases 1291, 1293 (9th Cir. 1984) (significant factor); Lincoln v. Board of Regents of the Univ. Sys. of Georgia, 697 F.2d 928, 938, 31 FEP Cases 22, 29 (11th Cir. 1983) (significant factor), *cert. denied*, 464 U.S. 826, 32 FEP Cases 1768 (1983); Baldwin v. Birmingham Bd. of Educ., 648 F.2d 950, 956, 25 FEP Cases 947, 952 (5th Cir. 1981) (significant factor); Whiting v. Jackson State Univ., 616 F.2d 116, 121, 22 FEP Cases 1296, 1298 (5th Cir.), *reh'g denied*, 622 F.2d 1043 (5th Cir. 1980) (significant or substantial factor).

[18] *See, e.g.*, Bibbs v. Block, 778 F.2d 1318, 1319, 39 FEP Cases 970, 971 (8th Cir. 1985); Toney v. Block, 705 F.2d 1364, 1372, 31 FEP Cases 995, 1002 (D.C. Cir. 1983) (Tamm, J., concurring).

[19] Brodin, *supra* note 3, at 298–99.

[20] *Id.*

[21] *Bibbs*, 778 F.2d at 1327–28, 39 FEP Cases at 978 (Lay, C.J., concurring).

[22] 778 F.2d 1318, 39 FEP Cases 970 (8th Cir. 1985).

[23] *Id.* at 1319, 39 FEP Cases at 971.

the proper approach to analyzing mixed-motive Title VII cases is to separate the issues of liability and remedy.[24] The court concluded that upon a finding that an impermissible consideration was a factor in the decision-making process, the plaintiff is entitled to some relief.[25] According to the Eighth Circuit, the case then progresses to a determination of the appropriate remedy.[26] The *Bibbs* court decided that the burden of production and persuasion at this next stage rests on the employer to prove by a preponderance of the evidence that it would have made the same decision absent the impermissible consideration.[27] The *Bibbs* court stated that if the employer can make this showing, then it can avoid an award to the plaintiff that includes reinstatement, back pay, or promotion.[28] The *Bibbs* court concluded, however, that the court still could award the plaintiff attorney's fees and injunctive and declaratory relief.[29]

In *Bibbs*, plaintiff Thomas Bibbs was an employee in the print shop of the Agricultural Stabilization and Conservation Service, a division of the Department of Agriculture.[30] Bibbs and six other individuals applied for a promotion to a supervisory position in the print shop.[31] Bibbs was the only black applicant.[32] A selection committee comprised of three white individuals reviewed all seven applications.[33] The committee interviewed each of the seven candidates and each committee member chose three candidates in order of preference.[34] Without agreeing on any criteria for selection, the committee members chose the same top three candidates, in the same order,. and subsequently selected a white candidate for the position.[35]

Bibbs brought suit under Title VII claiming that the employer's decision not to promote him was based unlawfully on race.[36] The United States District Court for the Western District of Mississippi did not find the employer liable and thus denied recovery.[37] The district court found that race was a discernible factor in the selection process but that the employer would not have selected Bibbs for the position even absent racial considerations.[38]

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[24] *Id.* at 1321, 39 FEP Cases at 973.

[25] *Id.* at 1323–24, 39 FEP Cases at 975.

[26] *Id.* at 1324, 39 FEP Cases at 975.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.* The district court found that one individual on the committee, Joseph Tresnak, was most familiar with the print shop and the print shop employees and was the dominant and "key figure" in making the selection. *Id.* The Eighth Circuit found this finding significant because witnesses had testified that Tresnak used "racial slurs." *Id.* at 1320, 39 FEP Cases at 972. Witnesses testified that Tresnak had characterized Bibbs as a "black militant" and referred to another black employee as "boy" and "nigger." *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.* at 1319, 39 FEP Cases at 971. Bibbs also alleged age discrimination, but the district court found against this claim. *Id.* at 1319 n.1, 39 FEP Cases at 971 n.1. An initial appeal affirmed this ruling, concluding that it was not clearly erroneous, and thus this issue was not before the Eighth Circuit en banc. *Id.* (citing Bibbs v. Block, 749 F.2d 508, 509, 36 FEP Cases 713, 713 (8th Cir. 1984) (*Bibbs I*), *vacated and remanded*, 778 F.2d 1318, 39 FEP Cases at 970 (8th Cir. 1985)).

[37] *Bibbs*, 778 F.2d at 1319, 39 FEP Cases at 971.

[38] *Id.* In determining that race was a discernible factor, the district court noted that the print

On appeal, a panel of the United States Court of Appeals for the Eighth Circuit reversed.[39] The panel concluded that the district court's finding that race was a discernible factor at the time of the decision was "inherently inconsistent" with its finding that the committee would have made the same decision absent racial considerations.[40] The panel thus vacated the judgment and remanded the case to the district court to enter judgment for Bibbs and consider an appropriate remedy "to make plaintiff whole."[41] Following the panel's decision, the employer petitioned the Eighth Circuit for a rehearing.[42]

The Eighth Circuit granted the petition for a rehearing en banc and thus automatically vacated the earlier panel decision.[43] The Eighth Circuit held that Bibbs had established that the defendant violated Title VII because Bibbs had shown that race was a discernible factor in the decision not to promote him.[44] Accordingly, the Eighth Circuit remanded for an entry of a declaratory judgment in favor of Bibbs and an injunction prohibiting the defendant from future discrimination against Bibbs on the basis of race.[45] In addition, the Eighth Circuit remanded for a determination of appropriate relief.[46] On the issue of retroactive promotion and back pay, the Eighth Circuit directed the district court to place the burden of persuasion and production on the defendant and make a new finding.[47] The Eighth Circuit instructed the district court that if found upon remand that the employer had shown by a preponderance of the evidence that it would not have promoted Bibbs even if his race had been disregarded, then the court could not order back pay and retroactive promotion.[48]

The *Bibbs* court prefaced its analysis of the appropriate standard of causation in a Title VII mixed-motive case with a discussion of the allocation of proof in a typical Title

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shop work force was integrated racially. *Id.* at 1320, 39 FEP Cases at 972. Although such a finding does not protect an employer from liability for intentional discrimination, the Eighth Circuit noted that statistics on integration of the work force "are relevant evidence, to be considered along with all other factors." *Id.* at 1320 n.3, 39 FEP Cases at 972 n.3. In addition, the court noted that Bibbs "had a history of disciplinary and interpersonal problems," was difficult to work with, and "caused irritation" among the staff. *Id.* at 1320, 39 FEP Cases at 972. The *Bibbs* court observed, however, that the trial court had found that the committee members were "not particularly credible, either in demeanor or in the substance of their testimony." *Id.* (citing *Bibbs I*, 749 F.2d at 510, 36 FEP Cases at 715). As the *Bibbs* court noted, the trial court had expressed particular concern with the members' lack of credibility, "given the subjective criteria considered by the committee." *Id.* The *Bibbs* court continued "[t]he trial court observed that a subjective procedure may provide a 'convenient screen for discriminatory decision making, and must be carefully scrutinized.'" *Id.* (quoting *Bibbs I*, 749 F.2d at 510, 36 FEP Cases at 715).

[39] *Id.* at 1319, 39 FEP Cases at 971.

[40] *Id.*

[41] *Id.*

[42] *Id.* The employer asked the Eighth Circuit to instruct the district court that upon remand the court could not order that relief include retroactive promotion and back pay because the trier of fact had found that the employer would not have promoted Bibbs in any event. *Id.* In the alternative, the employer asked for a rehearing en banc. *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.* at 1324, 39 FEP Cases at 975.

[46] *Id.* at 1319, 39 FEP Cases at 971–72.

[47] *Id.* at 1324–25, 39 FEP Cases at 976.

[48] *Id.* at 1325, 39 FEP Cases at 976.

VII case.[49] The *Bibbs* court noted that in a typical case both sides proceed on the premise that the employer had only one motive in making the adverse employment decision.[50] The *Bibbs* court stated that the plaintiff asserts that the employer's single motive is illegitimate (for example, race) and the employer contends that the single motive was legitimate (for example, inability to do the job).[51] In such a case, the *Bibbs* court noted, the plaintiff first must establish a prima facie case of discrimination.[52] The burden of production then shifts to the defendant to articulate a legitimate reason for the action.[53] According to the *Bibbs* court, if the defendant can articulate a legitimate reason, the burden shifts back to the plaintiff to persuade the trier of fact that the defendant's proferred reason is a pretext hiding the operative illegitimate motivation.[54] The *Bibbs* court commented that once the plaintiff successfully shows that the defendant's proferred reason is pretextual, the plaintiff has established liability and the remedy typically is reinstatement.[55] Thus, the *Bibbs* court concluded, motivation and causation are not and need not be separated in a typical Title VII case.[56]

The *Bibbs* court distinguished this typical single motive case from the *Bibbs* situation and found that in a mixed-motive Title VII case, the proper approach is to separate the issues of liability and remedy.[57] The *Bibbs* court found primary support for such an approach in the language of the statutory provisions of Title VII describing unlawful conduct.[58] The court noted that Section 703(a)(2)[59] includes within its definition of unlawful conduct actions which in any way "would deprive *or tend to deprive* any individual of employment *opportunities* . . . ."[60] The *Bibbs* court concluded from this language that the existence of an unlawful factor in the decision-making process itself, regardless of the ultimate employment decision, constituted a violation of the statute.[61] According to the *Bibbs* court, a discriminatory decision-making process which in effect requires blacks to meet a higher standard of job qualification tends to deprive an individual of employment opportunity.[62] Thus, as a threshold determination, the *Bibbs* court concluded that

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[49] *Id.* at 1320–21, 39 FEP Cases at 972–73 (discussing the "familiar" evidentiary framework of *McDonnell Douglas*, 411 U.S. 792, 5 FEP Cases 965 (1973)).

[50] *Id.* at 1320, 39 FEP Cases at 972.

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.* at 1320, 39 FEP Cases at 972–73.

[55] *Id.* at 1321, 39 FEP Cases at 973.

[56] *Id.*

[57] *Id.* The court noted that the district court had suggested this approach, citing Brodin, *supra* note 3, but left it to the Eighth Circuit to adopt the approach in light of its "novelty." *Bibbs*, 778 F.2d at 1321, 39 FEP Cases at 973.

[58] *Bibbs*, 778 F.2d at 1321, 39 FEP Cases at 973.

[59] See *supra* note 2 for the text of Section 703(a), 42 U.S.C. § 2000e–2(a) (1982).

[60] *Bibbs*, 778 F.2d at 1321, 39 FEP Cases at 973 (emphasis in original) (quoting 42 U.S.C. § 2000e-2(a)(2) (1982)).

[61] *Id.* at 1321–22, 39 FEP Cases at 973.

[62] *Id.* The court stated that if race is a factor, thus requiring blacks to meet a higher standard, "the statute is violated even if they actually meet [the standard] and get the jobs in question." *Id.* The court continued: "[e]very kind of disadvantage resulting from racial prejudice in the employment setting is outlawed. Forcing Bibbs to be considered for promotion in a process in which race plays a discernible part is itself a violation of law, regardless of the outcome . . . ." *Id.* at 1322, 39 FEP Cases at 973.

the district court's finding that race had played a discernible part in the decision not to promote Bibbs established the employer's liability.[63]

Furthermore, the court distinguished its standard of causation at the liability stage in a mixed-motive individual disparate treatment suit under Title VII from the United States Supreme Court's standard of causation in mixed-motive contexts other than Title VII. The *Bibbs* court noted that in the 1977 case of *Village of Arlington Heights v. Metropolitan Housing Development*,[64] the United States Supreme Court held that where a plaintiff demonstrated discriminatory purpose in a legislative or administrative decision, the court could not interfere with the challenged decision if the legislative or administrative body could establish that the same decision would have resulted absent the impermissible purpose.[65] Similarly, the *Bibbs* court noted, the United States Supreme Court adopted this "same-decision test" in cases involving employment decisions impermissibly based on the plaintiff's exercise of a constitutionally protected right.[66] Thus, under the United States Supreme Court's mixed-motive analysis in these contexts, the *Bibbs* court concluded, the court should dismiss the complaint if the defendant establishes that it would have made the same decision absent the impermissible consideration.[67]

The *Bibbs* court, however, rejected this "same decision" approach as inappropriate in the Title VII context to establish defendant's liability.[68] The *Bibbs* court stated that Congress has prohibited "any kind of racial discrimination, not just discrimination that actually deprives someone of a job."[69] Thus, according to the *Bibbs* court, the defendant's showing that Bibbs would not have gotten the job regardless of the discrimination did not extinguish the employer's liability.[70]

The court went on to adopt the "same decision" approach, however, to determine the appropriate remedy.[71] According to the *Bibbs* court, after a court has made a threshold determination that the employer is liable, the employer should be permitted to show by a preponderance of the evidence that it would have reached the same decision absent

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[63] *Id.* at 1321 n.4, 39 FEP Cases at 973 n.4.

[64] 429 U.S. 252 (1977).

[65] *Bibbs*, 778 F.2d at 1322–23, 39 FEP Cases at 974 (citing Village of Arlington Heights v. Metropolitan Hous. Dev. 429 U.S. at 265–66). In *Arlington Heights*, a nonprofit housing developer sought to build racially integrated housing units. 429 U.S. at 254. The developer brought suit challenging the village's refusal to rezone the tract in question to permit multiple-family use. *Id.* The village's refusal followed a series of public meetings in which opponents of the proposed rezoning discussed various considerations, including racial implications. *Id.* at 257–58.

[66] *Bibbs*, 778 F.2d at 1323, 39 FEP Cases at 974 (discussing a first amendment retaliatory discharge case, Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) and the "*Mt. Healthy* group of cases"). In *Mt. Healthy*, the district court ruled and the court of appeals affirmed that the plaintiff's activities were protected under the first and fourteenth amendments, and thus, the employer's refusal to renew the plaintiff's employment contract on the basis, in part, of these activities entitled the plaintiff to reinstatement and back pay. 429 U.S. at 276. The Supreme Court vacated and remanded the case on the causation issue, holding that the defendant must be given the opportunity to establish that it would have made its decision not to renew the employment contract even if it had not considered the protected activity. *Id.* at 287. The result, the Court wrote, "protects against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights." *Id.*

[67] *Bibbs*, 778 F.2d at 1323, 39 FEP Cases at 974–75.

[68] *Id.* at 1323, 39 FEP Cases at 975.

[69] *Id.*

[70] *Id.*

[71] *Id.* at 1324, 39 FEP Cases at 975.

impermissible considerations.[72] Such a showing would not extinguish liability,[73] the *Bibbs* court noted, but it would exclude the remedies of retroactive promotion, reinstatement, or back pay, and thus would not award the employee, in effect, "a windfall."[74] The plaintiff's remedy would continue to include, "as appropriate," a declaratory judgment, injunctive relief against future discrimination, and partial attorney's fees.[75] The court found that the "same decision" approach to determining the appropriate remedy was consistent with the statutory provision of Title VII setting forth the conditions upon which courts may grant promotion or back pay, in which Congress provided that no such relief could be ordered if an individual had not been promoted "for any reason other than discrimination on account of race."[76]

In conclusion, the *Bibbs* court stated that on rehearing the government had not challenged the panel's holding that the defendant was liable, but had merely challenged the scope of relief available to Bibbs.[77] The *Bibbs* court noted that before the district court could award Bibbs retroactive promotion and back pay, it would have to make a "same decision" finding.[78] In addition, the court stated that the district court would have to place the burden of production and persuasion on the employer to show by a preponderance of the evidence that the same decision would have been made absent racial considerations.[79] The *Bibbs* court noted that because the trial court apparently had placed the burden on Bibbs to show why he was denied the promotion, it remanded the case to analyze the remedy issue consistent with the proper allocation of the burden of proof.[80]

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[72] *Id.* The court rejected a higher standard of proof, such as "clear and convincing evidence," noting that the public and private interests involved do not require altering the normal risk of error between civil litigants. *Id.* at 1324 n.5, 39 FEP Cases at 975 n.5. Judge McMillian, in a concurrence discussed *infra* note 89 and accompanying text, contended that the employer should be required to prove by clear and convincing evidence that the same decision would have been reached absent impermissible considerations. *Id.* at 1329, 39 FEP Cases at 980 (McMillian, J., concurring).

[73] *Id.* at 1324, 39 FEP Cases at 975. The court stated that in "adopting this mode of analysis," it employed an approach similar to that in a 1984 Eighth Circuit case, King v. Trans-World Airlines, Inc., 738 F.2d 255, 39 FEP Cases 102 (8th Cir. 1984), where, the *Bibbs* court stated, "discrimination in [the] interview process [was] not cured by defendant's legitimate reasons for not hiring plaintiff." *Id.* at 1323, 39 FEP Cases at 975 (citing *King*, 738 F.2d at 259, 35 FEP Cases at 106). The *Bibbs* court went on to cite cases from the Third, Fourth, Seventh, Ninth, Tenth, and District of Columbia Circuits that, in the *Bibbs* court's view, adopted the same analysis. *Id.* The *Bibbs* court also cited generally Brodin; *supra* note 3. *Id.*

[74] *Bibbs*, 778 F.2d at 1322, 39 FEP Cases at 973.

[75] *Id.* at 1324, 39 FEP Cases at 975–76. The court noted that attorney's fees should be adjusted to the extent to which the plaintiff had succeeded. *Id.*

[76] *Id.* at 1322, 39 FEP Cases at 973–74 (quoting 42 U.S.C. § 2000e–5(g) (1982)). The court stated that the "same decision" test also was consistent with the purpose of Title VII to make persons whole for injuries. *Id.* at 1322, 39 FEP Cases at 974 (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 418, 10 FEP Cases 1181, 1187 (1975)). The *Bibbs* court stated that the United States Supreme Court had "reaffirmed the principle of make-whole relief" in interpreting subsection 706(g) of Title VII to require that competitive seniority only could be awarded to actual victims of discrimination. *Id.* (citing Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 34 FEP Cases 1702 (1984)).

[77] *Id.* at 1324, 39 FEP Cases at 976.

[78] *Id.*

[79] *Id.* at 1324, 39 FEP Cases at 975.

[80] *Id.* at 1325, 39 FEP Cases at 976.

Addressing the majority's application of the "same decision" test to the determination of the remedy, Chief Judge Lay, in a concurrence joined by two junior judges, contended that once the plaintiff had established the defendant's liability, the defendant should not have a "second chance" to show that its decision would have been the same absent impermissible considerations.[81] The Chief Judge looked to the purposes of Title VII, the practical effects of the same decision test, and to United States Supreme Court case law to conclude that a "same decision" test would be inappropriate.[82] According to the Chief Judge, the defendant's showing of nondiscriminatory reasons was irrelevant because Title VII "is designed to protect victims against invidious discrimination which *in any way* influences or motivates an employment decision."[83] Furthermore, the Chief Judge contended, granting the employer an opportunity to foreclose plaintiff's ability to recover damages by establishing that the same decision would have been made absent the impermissible considerations in effect would require the plaintiff to convince the court that an impermissible factor was the sole cause of the decision.[84] Congress did not intend such a result, the Chief Judge stated.[85]

Similarly, the Chief Judge looked to United States Supreme Court decisions to conclude that once Bibbs had established that race was a discernible factor, he then was not required to prove that race was a "'substantial' as opposed to a 'minor' factor in the decision."[86] Quoting *Burdine*, the Chief Judge stated that the plaintiff only need prove that "a discriminatory reason more likely [than not] motivated the employer."[87] Thus, the Chief Judge viewed the adoption of a rationale which originated in mixed-motive contexts other than Title VII as inappropriate in the context of an individual disparate treatment case.[88] Two additional concurrences agreed with the majority's separation of liability and remedy.[89]

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[81] *Id.* at 1327, 39 FEP Cases at 978 (Lay, C.J., concurring).

[82] *Id.* at 1326–27, 39 FEP Cases at 977–78 (Lay, C.J., concurring).

[83] *Id.* at 1326, 39 FEP Cases at 977 (Lay, C.J., concurring).

[84] *Id.* at 1327, 39 FEP Cases at 977 (Lay, C.J., concurring). The Chief Judge implied that the practical effect of the same decision test would be a "sole factor requirement" because a plaintiff would have to prove liability and in addition "face the additional uphill battle to rebut defendant's claim that the same decision would have been made absent race." *Id.* at 1326–27, 39 FEP Cases at 977 (Lay, C.J., concurring). The Chief Judge viewed the application of the same decision test as a "hollow victory" for victims of discrimination because it would result in "little real relief." *Id.* The Chief Judge noted that the "spoils" would go only to the victim's attorneys. *Id.*

[85] *Id.* at 1327, 39 FEP Cases at 977 (Lay, C.J., concurring).

[86] *Id.* at 1327, 39 FEP Cases at 977–78 (Lay, C.J., concurring).

[87] *Id.* at 1327, 39 FEP Cases at 978 (quoting *Burdine*, 450 U.S. at 256, 25 FEP Cases at 116) (Lay, C.J., concurring).

[88] *Id.* at 1326–28, 39 FEP Cases at 977–79 (Lay, C.J., concurring). The Chief Judge acknowledged that the same decision test is applied in employment discrimination cases where liability is based upon a class action or disparate impact suit, or in the context of constitutionally protected conduct. *Id.* The Chief Judge contended, however, that it is inappropriate to extend the test to disparate treatment cases, given Congress's intent and the Supreme Court's standards as set forth in *Burdine*. *Id.*

[89] *Id.* at 1328, 39 FEP Cases at 979 (Bright, S.J., concurring); *id.* at 1329, 39 FEP Cases at 979 (McMillian, J., concurring). Senior Judge Bright stressed, however, that liability must rest upon a finding that the discrimination and the adverse employment decision are causally related. *Id.* at 1328, 39 FEP Cases at 979 (Bright, S.J., concurring). Senior Judge Bright disagreed with the majority's conclusion that any discrimination in the workplace, regardless of the ultimate employment decision, supports a finding of liability. *Id.* Judge McMillian concurred in the majority's opinion but contended that the employer should not be able to prove by a preponderance of the evidence

The dissent disagreed with the majority's position that the issue of liability was not before the court.[90] Accordingly, the dissent contended that proving discrimination was a "discernible factor" in the employment decision is not sufficient to establish intentional discrimination and liability under Title VII.[91] The dissent found the "discernible factor test" deficient "because it contains no causal requirement."[92] The dissent noted that Title VII statutory language, case law, and practical considerations required the plaintiff to prove that an impermissible consideration was a "motivating factor" in order to prevail at the liability stage.[93] Because Bibbs had failed to establish that race

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that it would have reached the same decision absent impermissible considerations. *Id.* at 1329, 39 FEP Cases at 980 (McMillian, J., concurring). Instead, Judge McMillian would impose upon the employer a clear and convincing evidentiary standard of proof. *Id.* (quoting Toney v. Block, 705 F.2d 1364, 1373, 31 FEP Cases 995, 1003 (D.C. Cir. 1983) (Tamm J., concurring)).

[90] *Id.* at 1330 & n.1, 39 FEP Cases at 980 & n.1 (Ross, J., dissenting). The dissent stated that "[s]ince the majority's holding reverses the judgment of the district court on the issue of liability, the issue of liability is before the court en banc . . . ." *Id.* The dissent further stated that the issue of liability was before the court because the court had vacated the panel opinion, the government had posed "'questions of exceptional importance' relating to 'a new dramatically reduced burden of proof' on the issue of liability," and "power over en banc proceedings resides with the court and not with the litigants." *Id.*

Chief Judge Lay objected to the dissent's conclusion that the employer was not liable. *Id.* at 1325, 39 FEP Cases at 976 (Lay, C.J., concurring). The Chief Judge stated that the government did not dispute the panel opinion's finding, the parties did not argue the liability issue, and the court en banc did not consider liability. *Id.* The Chief Judge also criticized the dissent's "outright affirmance of the district court" because the district court had "improperly placed the burden of proof onto the plaintiff to show that the same decision would not have been made absent race." *Id.* at 1326, 39 FEP Cases at 977 (Lay, C.J., concurring). The concurrence termed the improper allocation of proof "clear error." *Id.*

[91] *Id.* at 1330, 39 FEP Cases at 980 (Ross, J., dissenting). Chief Judge Lay, in a concurring opinion, criticized what he viewed as the dissent's quantification of the employer's intent and stated that the United States Supreme Court had held expressly that it was improper for a court to quantify discriminatory intent. *Id.* at 1326, 39 FEP Cases at 977 (Lay, C.J., concurring) (citing Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 277, 19 FEP Cases 1377, 1386 (1979)). The Chief Judge quoted from *Feeney*: "'[d]iscriminatory intent is simply not amenable to calibration. It either is a factor that has influenced the legislative choice or it is not.'" *Id.* (quoting *Feeney*, 442 U.S. at 277, 19 FEP Cases at 1386). The Chief Judge also cited Village of Arlington Heights v. Metropolitan Hous. Dev., 429 U.S. 252 (1977): "[r]arely can it be said that a legislative or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the dominant or primary one." *Bibbs*, 778 F.2d at 1326 n.4, 39 FEP Cases at 977 n.4 (Lay, C.J., concurring) (citing *Arlington Heights*, 429 U.S. at 265).

[92] *Bibbs*, 778 F.2d at 1331, 39 FEP Cases at 981 (Ross, J., dissenting). In a concurrence, the Chief Judge rejected the dissent's view that the phrase "discernible factor" constituted a test. *Id.* at 1325, 39 FEP Cases at 977 (Lay, C.J., concurring). Senior Judge Bright, in a separate concurrence, also contended that the majority opinion did contain a causal relation. *Id.* at 1329, 39 FEP Cases at 979 (Bright, S.J., concurring). Senior Judge Bright found that in the instant case, the term "discernible factor" denoted a causal relation between discrimination and the decision not to promote Bibbs because of the district court's finding that "race played a minor role" in the adverse decision. *Id.*

[93] *Id.* at 1330, 39 FEP Cases at 980 (Ross, J., dissenting). Looking first to the statute, the dissent reiterated Section 703(a)(2), but focused instead on the statutory language prohibiting discriminatory employment practices "*because of*" such individual's race. *Id.* at 1330, 39 FEP Cases at 980 (Ross, J., dissenting). See *supra* note 2 for the text of Section 703(a), 42 U.S.C. § 2000e-2 (1982). The majority had focused on the statutory prohibition of conduct that "would deprive or *tend to deprive* any individual of employment *opportunities* . . . ." *Id.* at 1321, 39 FEP Cases at 973 (emphasis in original) (quoting 42 U.S.C. § 2000e-2(a)(2) (1982)). For a discussion of the court's construction of

was a "motivating factor," the dissent stated that it would have dismissed Bibbs' complaint.[94]

The *Bibbs* decision is a strong statement to employers to eliminate all vestiges of invidious discrimination in the work place or pay the price for noncompliance with Title VII. Most significant is the court's statement that discrimination in the *decision-making process* itself violates Title VII, regardless of the employment decision reached. After *Bibbs*, an employer cannot avoid liability by simply asserting that the employer granted the employee the employment decision she or he sought, and thus any discrimination that the employee suffered was "harmless."[95] By eliminating this "fall back" position at the stage of determining liability that would give the employer, in effect, a second chance to avoid liability even after the employee has established a discernible level of discrimination, the *Bibbs* decision should encourage employers to examine carefully their employment procedures as well as their employment decisions.[96] Thus, *Bibbs* should further Title VII's objective of deterring continued discrimination.

Similarly, the *Bibbs* court's choice of a standard of causation that requires merely a showing that an impermissible consideration was a discernible factor in the decision-making process should advance the deterrent objectives of Title VII. The *Bibbs* holding precludes an employer from showing at the liability stage that the employer would not have hired, retained, or promoted the employee even absent the discrimination. The court's low threshold for a finding of liability, coupled with the court's ruling that discrimination at the decision-making stage violates Title VII, should encourage em-

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this language, see *supra* notes 59–62 and accompanying text. The dissent contended that the majority's "discernible factor" test could not satisfy the "'because of' requirement." *Bibbs*, 778 F.2d at 1330, 39 FEP Cases at 981 (Ross, J., dissenting). The plaintiff would satisfy the causation requirement, the dissent stated, if the unlawful factor was a "motivating factor" in the sense that it was "acted upon and produced conduct or an employment decision affected by it." *Id.* at 1331, 39 FEP Cases at 981 (Ross, J., dissenting). The dissent stated that support for its "motivating factor" approach could be found in the 1981 Supreme Court *Burdine* decision in which, the dissent stated, the Supreme Court had held that a plaintiff could meet the required burden of proof "by persuading a court that a discriminatory reason more likely motivated the employer." *Id.* (citing *Burdine*, 450 U.S. at 256, 25 FEP Cases at 116). The *Burdine* decision is discussed *supra* note 15 and accompanying text. In addition, the dissent stated that in a 1980 case, the Eighth Circuit had noted that when the evidence suggested mixed motives, "we have held the court must look for the 'motivating factor . . . .'" *Bibbs*, 778 F.2d at 1331, 39 FEP Cases at 981 (Ross, J., dissenting) (quoting Womack v. Munson, 619 F.2d 1292, 1297 n.7, 22 FEP Cases 1079, 1082 n.7 (8th Cir. 1980), *cert. denied*, 450 U.S. 979, 25 FEP Cases 232 (1981)). In sum, the dissent viewed the majority's decision as an unwarranted departure from a "[c]ontinued adherence to a 'motivating factor' test . . . ." *Id.*

[94] *Id.* at 1332, 39 FEP Cases at 982 (Ross, J., dissenting). In addition, the dissent voiced two practical concerns with the majority decision. The dissent contended that the majority had failed to define "discernible factor" and thus district courts would be confused as to its meaning. *Id.* The dissent also stated that the majority's holding invited attorneys to "file frivolous or extremely marginal cases so they can get attorneys' fees for showing that an unlawful factor was 'discernible.'" *Id.*

[95] Professor Brodin discusses this "harmless error" doctrine and its questionable application in Title VII cases in Brodin, *supra* note 3, at 293, 317–18.

[96] *See* Brodin, *supra* note 3, at 318, where Professor Brodin notes: "a same-decision causal theory is not likely to provide the 'spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges' of their discriminatory practices." *Id.* (quoting *Albemarle Paper Co.*, 422 U.S. at 417–18, 10 FEP Cases at 1187 (1975)).

ployers to seek out and eliminate discrimination in the workplace, rather than risk a finding of liability based on even a minimal level of discriminatory decision-making.

The *Bibbs* court's holding that a plaintiff only need show that discrimination was "a factor" affecting the plaintiff's employment opportunity to hold the employer liable also addresses another central objective of Title VII, that is, compensating victims of discrimination. If the court had held instead that although discrimination played a role, it was either insufficient or defeated by the employer's "same decision" showing, then the plaintiff would have received no compensation for discriminatory treatment in the workplace. Moreover, the plaintiff would have remained in the same employment position, continued to suffer "minor" discrimination in decisions regarding her or his employment status, and borne the financial burden of returning to court to relitigate the substantiality of the already established role of discrimination. As the *Bibbs* court recognized, even if discriminatory factors play only a minor role in the workplace, the plaintiff and perhaps the entire class of employees who share the disfavored characteristic must meet higher job qualification standards than those who do not fall into this class to qualify for favorable employment decisions.[97] By issuing an injunction prohibiting future disparate treatment of the plaintiff, the employee is compensated prospectively, in effect, for having been stigmatized in the workplace.[98]

Perhaps most importantly, the *Bibbs* court's separation of liability and remedy should significantly encourage victims of discrimination to pursue claims of unlawful treatment under Title VII.[99] Despite the concurring justices' contention that a same decision test at the liability stage will foreclose the employee's ability to recover damages, even if an employee cannot rebut the employer's proof that the employer's decision would have affected adversely the employee in any event, she or he at least can receive attorney's fees, a declaratory judgment, and injunctive relief against future discrimination. Because private actions play an essential role in the enforcement scheme of Title VII,[100] the *Bibbs* separation of liability and remedy encourages private suits by sending a message to employees that their litigation efforts and expenses to expose discriminatory employment practices will not go unrewarded. In addition, declaratory relief places the public and other employees on notice that a possible discriminatory pattern may exist.[101] Thus, the court's warning to the employer in such a public fashion can further vindicate the public interest in eliminating all discrimination, not just discrimination that results in economic harm.[102]

In conclusion, the *Bibbs* court's holding that employment decision-making that is based even in part on a discriminatory motive violates the Act gives Title VII a liberal reading. By separating the liability and remedy determinations, the Eighth Circuit furthers the deterrent, compensatory, and vindication objectives of Title VII. At the same

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[97] Professor Brodin comments, "[c]onsidering that discriminatory criteria are by definition aimed against groups, it is at least probable that such an employer is engaged in discriminatory decisionmaking regarding its other minority or female employees and applicants as well." Brodin, *supra* note 3, at 317–18.

[98] *See* Brodin, *supra* note 3, at 318–19 (discrimination based on an immutable characteristic inflicts stigmatization on a person).

[99] *Id.* at 321–22. Professor Brodin states that the plaintiff faces a "very difficult task" when required to refute an employer's same decision showing. *Id.* at 321.

[100] Brodin, *supra* note 3, at 322.

[101] *Id.* at 323 n.129.

[102] *Id.*

time, the *Bibbs* decision tailors the relief granted; it does not place the employee in a better position economically than the employee would have been absent discrimination and thus does not award the employee a "windfall." The *Bibbs* court, in effect, has foreclosed the employer's ability to avoid liability under Title VII through asserting that its discriminatory practices are minor and therefore judicially tolerable.

B. **Title VII and the Authority of the EEOC to Subpoena Confidential Tenure Review Materials:* Equal Employment Opportunity Commission v. Franklin and Marshall College[1]

Title VII of the Civil Rights Act of 1964[2] prohibits employment discrimination on the basis of race, color, religion, sex or national origin,[3] and confers broad authority on the Equal Employment Opportunity Commission (EEOC)[4] to investigate employee allegations of discrimination.[5] In determining whether there is reasonable cause to believe an employee's complaint, the EEOC may issue a subpoena compelling an employer to produce evidence "relevant" to the employee's complaint.[6] The employer, in turn, may

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[1] 775 F.2d 110, 39 FEP Cases 211 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 2288 (1986).

[2] Civil Rights Act of 1964, §§ 701–718, 42 U.S.C. §§ 2000e–e-17 (1982).

[3] § 703, 42 U.S.C. § 2000e-2 (1982).

[4] Under Title VII, Congress created the EEOC. Pub. L. 88–352, § 705(a), 78 Stat. 258 (1964), codified at 42 U.S.C. § 2000e-4 (1982). Proponents of Title VII contemplated that the EEOC would continue the work of an already existing Presidential committee on fair employment. *See Civil Rights — The President's Program, 1963: Hearings on S. 1731 and S. 1750 Before the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. 93, 104 (1963) (statement of Robert F. Kennedy, United States Attorney General).

[5] § 706(b), § 709(a), 42 U.S.C. §§ 2000e-5(b)–8(a) (1982).

§ 709(a), 42 U.S.C. § 2000e-8(a) (1982), provides:

> In connection with any investigation of a charge filed under [Title VII] the [EEOC] shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices . . . and is relevant to the charge under investigation.

The Title VII enforcement procedure is set in motion when the employee files a charge with the EEOC. § 706(b), 42 U.S.C. § 2000e-5(b) (1982). The EEOC defers consideration of the charge, however, if the alleged discriminatory practice occurred within a state with adequate fair employment laws enforced through state agency proceedings. § 706(c), 42 U.S.C. § 2000e-5(c) (1982). Once the deferral requirement has been satisfied, the EEOC serves notice of the charge on the employer and investigates the employee's allegations. § 706(b), 42 U.S.C. § 2000e-5(b) (1982).

If the EEOC concludes on the basis of its investigation that there is reasonable cause to believe the charge is true, *id.*, the EEOC tries to persuade the employer to eliminate voluntarily the discriminatory employment practice. *Id.* Should the employer be uncooperative, the EEOC has the authority to file a civil action against the employer. § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1) (1982). If the EEOC finds no reasonable cause and declines to prosecute, or otherwise fails to prosecute or settle with the employer in a timely fashion, the employee has the right to file a civil action against the employer within 90 days of receiving notice from the EEOC. § 706(b)–(f)(1), 42 U.S.C. § 2000e-5(b)–(f)(1) (1982).

[6] 29 C.F.R. § 1601.16(a) (1985) provides:

> To effectuate the purposes of Title VII, any member of the [EEOC] shall have the authority to sign and issue a subpoena requiring:
>
> . . . .
>
> (2) the production of evidence including, but not limited to, books, records, correspondence, or documents in the possession or under the control of the person

petition the EEOC for revocation or modification of the subpoena,[7] but in the absence of revocation or modification the employer must comply with the subpoena.[8]

The breadth of the EEOC's investigative authority is unclear where the employer is a college and the complaining employee is a faculty member alleging discriminatory denial of tenure. While Title VII indisputably applies to colleges,[9] the Supreme Court has not indicated to what extent a college's need for academic freedom insulates the tenure review process from the ordinarily broad reach of the EEOC.[10] Although the Court has upheld liberal disclosure in a commercial employment context,[11] the Court has not decided yet whether the broad disclosure standard properly extends to academic institutions which traditionally have enjoyed first amendment protection from needless governmental intervention.

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subpoenaed; and

(3) access to evidence for the purposes of examination and the right to copy.

[7] 29 C.F.R. § 1601.16(b) (1985) provides that an employer who intends not to comply with the subpoena must identify the portions of the subpoena with which the employer will not comply and give reasons for refusing to comply.

[8] Where an employer refuses to comply with an EEOC subpoena that has not been revoked or modified, the EEOC is authorized to seek court enforcement of the subpoena. 29 C.F.R. § 1601.16(c) (1985) (citing 29 U.S.C. § 161(2) (1982)).

[9] *See* § 702, 42 U.S.C. § 2000e-1 (1982). As originally enacted, Title VII exempted educational institutions from the Title VII requirements. Pub. L. 88–352, § 702, 78 Stat. 255 (1964). Congressional concern with the problem of discrimination in educational institutions led to the amendment of Title VII in 1972 to include educational institutions. Pub. L. 92–261, § 3, 86 Stat. 104 (1972). *See* H.R. REP. No. 238, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2137, 2155.

[10] Although academic freedom is not enumerated in the United States Constitution, the Supreme Court has conferred protection under the first amendment, *see* Regents of Univ. of California v. Bakke, 438 U.S. 265, 312 (1978), in recognition of an academic institution's role in fostering the "robust exchange of ideas." Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967). Selection of faculty members is one component of academic freedom. *See* Sweezy v. New Hampshire, 354 U.S. 234, 262–63 (1957) (Frankfurter, J., concurring). The tenure review process, in turn, is an important component of a college's academic freedom because the process has become the most reliable method for assuring promotion of the candidates best qualified to serve the college. *See* Johnson v. University of Pittsburgh, 435 F. Supp. 1328, 1345–46, 15 FEP Cases 1516, 1530 (W.D. Pa. 1977).

The Seventh Circuit has provided the following description of tenure review at one college, remarking that many other colleges follow similar if not identical procedures:

> The tenure applicant's department chairman, along with a department committee, first obtains statements and evidence from the tenure applicant in support of his application. The committee then solicits written evaluations regarding the applicant's scholarship, teaching and service from the applicant's academic peers at the university and from eminent scholars at other respected institutions of higher education. After considering these evaluations and the material submitted by the candidate the committee votes by secret ballot to determine whether the applicant is to be granted tenure. The committee then submits its recommendations to the department chairman, who forwards the recommendation, along with his own recommendation, to the dean of the college involved and the university provost for their recommendation, then to the president of the university for the ultimate decision. Evaluators, committee members and others involved in the selection process understand that in accord with long-standing tradition and policy, the confidentiality of their views will be respected and maintained.

EEOC v. University of Notre Dame du Lac, 715 F.2d 331, 333 n.1, 32 FEP Cases 1057, 1058 n.1 (7th Cir. 1983).

[11] *See* EEOC v. Shell Oil Co., 466 U.S. 54, 68–69, 34 FEP Cases 709, 716 (1984) (liberal construction of "relevant" where EEOC sought personnel files of oil refinery).

In tenure dispute cases under Title VII, as in non-Title VII tenure dispute cases,[12] the federal courts of appeals disagree on the propriety of establishing an academic privilege that would protect the college tenure review process during an EEOC investigation.[13] In a 1983 decision, the Seventh Circuit recognized a qualified academic privilege which would protect the identities of academicians participating in the tenure review process.[14] The Seventh Circuit's ruling allowed the college to provide the EEOC with tenure review files from which the college had deleted names and other identifying

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[12] In cases where a faculty member denied tenure has sought relief on non-Title VII grounds, federal courts of appeals have reached different conclusions as to the extent that the faculty member may compel disclosure of tenure committee members' votes on the faculty member's tenure application. The Second Circuit's decision in Gray v. Board of Higher Education, 692 F.2d 901, 30 FEP Cases 297 (2d Cir. 1983) concerned a discrimination action under 42 U.S.C. §§ 1981, 1983 and 1985. *Id.* at 901–02, 30 FEP Cases at 297. In *Gray*, the Second Circuit endorsed a qualified academic privilege which would protect individual votes from disclosure, provided that the college gave the rejected faculty member a written statement of reasons for rejection and provided a grievance procedure. *Id.* at 907–08, 30 FEP Cases at 301–02. The court concluded that unlike a rule of absolute disclosure or one of complete privilege, the qualified privilege struck an appropriate balance between the college's interest in protecting the peer review candor and the complaining faculty member's interest in fair consideration. *Id.* The court nonetheless concluded that the particular employee's need for the voting information, to prove discriminatory intent, outweighed the college's interest in confidentiality. *Id.* at 901–02, 905, 30 FEP Cases at 297, 300–01. The court conceded that even limited disclosure might adversely affect faculty candor and harmony, but suggested that limited disclosure would be no more disruptive than the tenure denial itself and would encourage merit-based faculty decisions. *Id.* at 908–09, 30 FEP Cases at 303. *See* Rollins v. Farris, 108 F.R.D. 714, 719, 39 FEP Cases 1102, 1105 (E.D. Ark. 1985) (employment discrimination plaintiff, who must prove discriminatory intent, may discover confidential tenure review materials).

The Fifth Circuit adopted a different approach in its decision in In re Dinnan, 661 F.2d 426, 27 FEP Cases 288 (5th Cir. 1981), *cert. denied*, 457 U.S. 1106, 28 FEP Cases 1656 (1982). The plaintiff in *Dinnan* alleged that the university had unlawfully denied her a promotion. *Id.* at 427, 27 FEP Cases at 288. The Fifth Circuit refuted the college's assertion of an absolute academic freedom privilege, which would prevent the plaintiff's discovery of a promotion committee member's vote. *Id.* at 430–31, 27 FEP Cases at 291–92. The court concluded that an academic privilege which insulated possibly discriminatory college practices from disclosure would be impermissible in the face of public policy prohibiting discrimination. *Id.* The court discounted the college's arguments that disclosure of votes would inhibit the decisionmakers, stating that the decisionmakers should accept responsibility for their decisions and that those acting for legitimate reasons would have no reason to fear disclosure. *Id.* at 432, 27 FEP Cases at 293. (*Dinnan* originated in a federal district court in Georgia which was part of the Fifth Circuit at that time. *Id.* at 426, 27 FEP Cases at 288. As a consequence of the Fifth Circuit Court of Appeals Reorganization Act of 1980, 94 Stat. 1994 (1980), which split the Fifth Circuit into two circuits, Georgia now is part of the Eleventh Circuit. *See* 28 U.S.C. § 41 (1982)).

[13] *Compare* EEOC v. Franklin and Marshall College, 775 F.2d 110, 39 FEP Cases 211 (3d Cir. 1985) (no academic privilege), *cert. denied*, 106 S. Ct. 2288 (1986) *with* EEOC v. University of Notre Dame du Lac, 715 F.2d 331, 32 FEP Cases 1057 (7th Cir. 1983) (qualified academic privilege).

[14] EEOC v. University of Notre Dame du Lac, 715 F.2d 331, 337, 32 FEP Cases 1057, 1061 (7th Cir. 1983). In *Notre Dame*, the EEOC subpoenaed the college for personnel files of the complainant and other members of the economics department considered for tenure. *Id.* at 332–33, 32 FEP Cases at 1058. When the EEOC applied for a court order to enforce the subpoena, the district court modified the scope of the subpoena but denied the college further protection. *Id.* at 333–34, 32 FEP Cases at 1058–59. Specifically, the district court refused to recognize a qualified academic privilege that would permit the college to delete identities of tenure review participants, and refused to make release of the tenure materials contingent on the EEOC's execution of a nondisclosure agreement. *Id.* at 334, 32 FEP Cases at 1059. The Seventh Circuit reversed the district court's order. *Id.* at 340, 32 FEP Cases at 1064.

information.[15] The court's ruling also restricted the EEOC's use of the files produced.[16] The court stipulated that to gain access to the deleted, privileged information, the EEOC would have to demonstrate a substantial, particular need for disclosure which outweighed the college's interest in confidentiality.[17] Recognition of a qualified privilege, the court concluded, would strike the appropriate balance between the college's need to preserve the integrity of the tenure review process[18] and the EEOC's need to investigate proper charges of discrimination in higher education.[19]

During the *Survey* year, in *Equal Employment Opportunity Commission v. Franklin & Marshall College*,[20] the Third Circuit rejected the Seventh Circuit's approach and declined to recognize an academic privilege that would restrict EEOC access to confidential tenure review materials. The court acknowledged the importance of confidentiality in the tenure review process,[21] but concluded that the legislative history of Title VII compelled broad EEOC access to tenure review materials. Because of the facts in *Franklin & Marshall*, however, the court's ruling is not as sweeping in effect as it appears in theory. In upholding the district court's order for production of files from which academicians' identities had been deleted,[22] the Third Circuit gave effect to the qualified privilege that it purported to reject. Consequently, while the Third Circuit's no privilege approach and the alternative qualified privilege approach conflict in theory, they do not conflict in application.

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[15] *Id.* The Seventh Circuit directed the district court to conduct an in camera review of edited and unedited files. *Id.* at 338, 32 FEP Cases at 1062. If the district court concluded that the deletions were reasonable, the EEOC would receive copies of the edited files only. *Id.*

[16] *Id.* at 340, 32 FEP Cases at 1064. The Third Circuit indicated that the district court should issue a protective order prohibiting EEOC disclosure of the edited files to third parties before the complainant filed suit, and prohibiting disclosure to the complainant before the EEOC found merit in the charge. *Id.* at 340 & n.7, 32 FEP Cases at 1064 & n.7.

Both Title VII and the EEOC regulations address the extent to which the EEOC may disclose information that it acquires during investigation. Section 709(e), 42 U.S.C. § 2000e-8(e) (1982) requires that information remain confidential until and unless the EEOC initiates an action against the employer. Violations of section 709(e) are punishable as misdemeanors. *Id.*

The EEOC regulations, however, provide an exception to the prohibition against disclosure. 29 C.F.R. § 1601.22 (1985) permits disclosure to the charging employee and counsel "where disclosure is deemed necessary for appropriate relief." While the EEOC compliance manual permits disclosure to the employee of edited files on other employees' charges, provided the information is relevant or material, the Supreme Court has concluded that the EEOC may disclose only information pertaining to the employee's charge. *See* EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 597, 603, 24 FEP Cases 1356, 1359, 1361 (1981).

[17] 715 F.2d at 338–39, 32 FEP Cases at 1062–63. The court indicated that the relevancy standard would not suffice and that the EEOC would have to demonstrate a particularized need for the privileged information. *Id.* at 338, 32 FEP Cases at 1062.

[18] *Id.* at 339, 32 FEP Cases at 1063. Unrestricted disclosure to the EEOC, the court stated, would destroy any expectation of privacy and thereby diminish the candor and value of tenure evaluations. *Id.* at 340, 32 FEP Cases at 1064. The court therefore restricted disclosure to accommodate competing interests and prevent the EEOC's investigation from becoming "a 'fishing expedition,' or exploratory surgery without the required prior medical testing, screening, evaluation and diagnosis." *Id.* at 339, 32 FEP Cases at 1063.

[19] *Id.* at 339, 32 FEP Cases at 1063. The court recognized that the college would have to disclose some if not all of the tenure review materials to avoid impairing the EEOC's investigatory powers and frustrating the purposes of Title VII. *Id.* at 337, 32 FEP Cases at 1061.

[20] 775 F.2d 110, 114–15, 39 FEP Cases 211, 215 (3d Cir. 1985).

[21] *Id.* at 115, 39 FEP Cases at 216.

[22] *Id.* at 117, 39 FEP Cases at 217.

In *Franklin & Marshall*, the complainant was denied tenure, appealed the tenure decision unsuccessfully within the college, and then filed a charge with the EEOC, alleging discrimination on the basis of his French origin.[23] In the course of investigating the charge, the EEOC was able to review, but not copy, minutes of the tenure committee meetings regarding the complainant.[24] The EEOC issued a subpoena compelling the college's production of documents pertaining to tenure decisions during the period that the complainant had been a member of the faculty.[25] Among the subpoenaed materials were confidential tenure candidate evaluations, provided by faculty members or outside academicians.[26]

The college refused to provide the confidential materials.[27] When the EEOC sought the college's full compliance with the subpoena, the college unsuccessfully petitioned the EEOC to revoke or modify the subpoena and then refused to fully comply with the subpoena.[28] The EEOC applied for a district court order to enforce the subpoena.[29] The district court ordered the college to comply with most of the requests for confidential information,[30] but permitted the college, with the EEOC's approval, to delete names and other identifying information.[31] The college appealed and procured a district court order staying enforcement of the compliance order, pending disposition of the appeal to the Third Circuit.[32]

On appeal, the Third Circuit upheld the district court's order that the college comply with the EEOC's modified subpoena.[33] The court first found no academic privilege insulating the tenure review process from EEOC investigation, reasoning that Congress did not intend deferential treatment of colleges under Title VII.[34] The court also refused to restrict the EEOC's authority to investigate tenure decisions, noting that only the requirement of relevance limited the EEOC's investigatory authority.[35]

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[23] *Id.* at 111–12, 39 FEP Cases at 212–13. The complainant was an assistant professor of French. *Id.*

[24] *Id.* at 112, 39 FEP Cases at 213.

[25] *Id.*

[26] *Id.* Among the confidential materials subpoenaed were tenure recommendation forms, annual evaluation forms, publication information and outside expert evaluations, letters of reference, all documents considered during other tenure decisions, all documents generated by tenure committee members with regard to the complainant, and tenure committee meeting minutes. *Id.* at 112–13, 39 FEP Cases at 213.

[27] *Id.* at 112–13, 39 FEP Cases at 214.

[28] *Id.* at 113, 39 FEP Cases at 214. The college did offer to produce non-confidential materials, such as grade surveys and class enrollment data, and to provide data on each candidate's performance and each committee decision. *Id.* at 112, 39 FEP Cases at 213–14. Among the non-confidential materials subpoenaed were student evaluations, grade surveys and enrollment data. *Id.*

[29] *Id.*

[30] *Id.* Not subject to disclosure under the district court's order were tenure recommendation forms and publication information and outside expert evaluations. *Id.* at 112–13, 39 FEP Cases at 213–14.

[31] *Id.* at 113, 39 FEP Cases at 214. The deletion would extend to names and information identifying other tenure candidates. *Id.* at 117, 39 FEP Cases at 217.

[32] *Id.* Several other Pennsylvania colleges — Gettysburg College, Dickinson College, Allegheny College, Bucknell College, Chatham College, Haverford College, Lafayette College and Lehigh College — appeared as amici curiae. *Id.*

[33] *Id.* at 117, 39 FEP Cases at 217.

[34] *Id.* at 114–15, 39 FEP Cases at 215–16.

[35] *Id.* at 115–16, 39 FEP Cases at 216–17.

The Third Circuit first addressed the college's suggestion that the court adopt a qualified academic review privilege which would prevent disclosure of confidential tenure review material absent a showing of an inference of discrimination.[36] After summarily discussing the diverse conclusions reached by the Seventh Circuit[37] and by other circuits in non-Title VII cases,[38] the court followed the approach of the Fifth Circuit in a non-Title VII case[39] and declined to recognize a qualified academic privilege.[40] The court acknowledged that the Supreme Court has accorded special protection to academic freedom[41] and that faculty selection is basic to academic freedom.[42] The court further recognized that the tenure review system is essential to faculty selection[43] and that confidentiality, which encourages candid tenure evaluations, is important to the tenure review system.[44] The court determined, however, that nothing in the legislative history of Title VII evidenced Congress' intent to confer a protected status on colleges and insulate colleges from EEOC investigations.[45] Indeed, the Third Circuit noted that Congress, in extending the coverage of Title VII to educational institutions in 1972, indicated that eliminating discrimination in educational institutions was critical.[46] Hence, the court reasoned that Congress must have contemplated that tenure decisions would be subject to scrutiny under Title VII.[47] The court recognized that disclosure to the EEOC of confidential materials might burden the tenure review process.[48] The court nonetheless concluded that Congress' unmistakable intent to eliminate discrimination in education outweighed the risk that disclosure would pose to tenure review candor.[49]

Having refused to recognize an academic privilege, the Third Circuit also declined to restrict the scope of the EEOC's investigatory authority in order to insulate the college from EEOC investigation.[50] The college argued that disclosure of confidential material should be contingent on the EEOC's showing of some merit to the employee's charge.[51]

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[36] *Id.* at 113, 39 FEP Cases at 214.

[37] *Id.* (citing *Notre Dame*, 715 F.2d at 337–38, 32 FEP Cases at 1061–62).

[38] *Id.* at 113–14, 39 FEP Cases at 214–15 (citing *Gray*, 692 F.2d at 904–05, 27 FEP Cases at 299–300, and *Dinnan*, 661 F.2d at 427, 27 FEP Cases at 289).

[39] *Id.* at 114, 39 FEP Cases at 215.

[40] *Id.*

[41] *Id.* (citing Regents of the Univ. of California v. Bakke, 438 U.S. 265, 312 (1978)).

[42] *Id.* (citing Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)).

[43] *Id.* (citing Johnson v. University of Pittsburgh, 435 F. Supp. 1328, 1346, 15 FEP Cases 1516, 1530 (W.D. Pa. 1977)).

[44] *Id.*

[45] *Id.* at 114–15, 39 FEP Cases at 215–16.

[46] *Id.* at 114–15, 39 FEP Cases at 215 (citing H.R. REP. No. 238, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2137, 2155).

[47] *Id.* at 115, 39 FEP Cases at 215 (citing Kunda v. Muhlenberg College, 621 F.2d 532, 547–48, 22 FEP Cases 62, 73 (3d Cir. 1980); Davis v. Weidner, 596 F.2d 726, 731, 19 FEP Cases 668, 672 (7th Cir. 1979)).

In *Kunda*, the Third Circuit indicated that the academic origins of tenure decisions did not entitle the decisions to special treatment under Title VII. 621 F.2d at 545, 22 FEP Cases at 72. In that case, however, the confidentiality of tenure review materials was not at issue as in *Franklin and Marshall*.

[48] *Franklin and Marshall*, 775 F.2d at 115, 39 FEP Cases at 216.

[49] *Id.* The court suggested that the honesty and integrity of the tenure committee members in evaluating tenure candidates eventually would overcome their feelings of discomfort and embarrassment at disclosure. *Id.*

[50] *Id.*

[51] *Id.*

The court disagreed, stating that limiting the EEOC's authority would be contrary to the language, history and purpose of Title VII.[52] In Title VII, the court explained, Congress expressly had authorized the EEOC to procure information "relevant" to the charge under investigation.[53] The statutory requirement of relevancy, the court added, has been construed broadly[54] to include virtually any material pertaining to the charges against the employer.[55] The court therefore concluded that the subpoenaed materials, pertaining to both the complainant and other tenure candidates, were relevant to the EEOC's investigation.[56] Because there was no privilege prohibiting disclosure of tenure review materials and the materials satisfied the Title VII requirement of relevance, the court affirmed the district court's order compelling the college's disclosure of the subpoenaed tenure review materials.[57]

In a dissenting opinion, Chief Judge Aldisert criticized the majority for authorizing the EEOC to exercise its broad investigatory authority without regard to the college's countervailing interest in confidentiality of the tenure review process.[58] Of particular concern to the dissent was the lack of protection afforded the confidentiality interest of other faculty members with regard to their own tenure applications.[59] The dissent asserted that while the applicability of Title VII to colleges is incontrovertible, it does not follow, as the majority indicated, that the EEOC should have virtually unrestricted access to tenure review materials.[60] Noting that colleges are not commercial employers and, moreover, embody and promote academic freedom, the dissent reasoned that colleges should not be subject to the broad disclosure standards applicable to commercial employers.[61] Because the relevancy requirement only minimally restrains the EEOC's investigative authority, the dissent concluded that the EEOC must justify disclosure of confidential tenure review materials, particularly where the materials pertain to other tenure decisions not under investigation.[62]

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[52] *Id.*

[53] *Id.* at 115–16, 39 FEP Cases at 216 (citing EEOC v. Shell Oil Co., 466 U.S. 54, 64, 34 FEP Cases 709, 714 (1984)).

[54] *Id.* at 116, 39 FEP Cases at 216 (citing EEOC v. University of Pittsburgh, 643 F.2d 983, 986, 25 FEP Cases 508, 510 (3d Cir.), *cert. denied*, 454 U.S. 880, 26 FEP Cases 1687 (1981)).

[55] *Id.* (quoting EEOC v. Shell Oil Co., 466 U.S. 54, 68–69, 34 FEP Cases 709, 716 (1984)). Consequently, the court stated, confidential materials on other tenure decisions made around the same time as the decision regarding the complainant might be "relevant" because such materials would permit comparison of candidates' qualifications and the disposition of their applications. *Id.* at 116, 39 FEP Cases at 216–17.

[56] *Id.* at 117, 39 FEP Cases at 217.

[57] 775 F.2d at 117, 39 FEP Cases at 217. The court cautioned, however, that the EEOC must not exceed its limited function of determining whether there is evidence of discrimination to support the charge, and must leave evaluation of candidates' qualifications to the colleges. *Id.*

[58] *Id.* at 117–18, 39 FEP Cases at 217–18 (Aldisert, C.J., dissenting).

[59] *Id.* The dissent reasoned that there was a particular need for protection of confidentiality in view of the small size of both the college's enrollment and the French Department where the complainant had sought tenure. *Id.* at 118–19, 39 FEP Cases at 218 (Aldisert, C.J., dissenting).

[60] *Id.* at 119, 39 FEP Cases at 219 (Aldisert, C.J., dissenting).

[61] *Id.* at 120, 39 FEP Cases at 219–20 (Aldisert, C.J., dissenting) (citing NLRB v. Yeshiva Univ., 444 U.S. 672, 681, 103 L.R.R.M. 2526, 2530 (1980)).

[62] *Id.* at 118–19, 121–22, 39 FEP Cases at 218–19, 220 (Aldisert, C.J., dissenting). The dissent approved the approach in *Gray*, where the Second Circuit accommodated both the interest in disclosure and the interest in confidentiality. *Id.* *See supra* note 12 for a discussion of *Gray*. The dissent avoided deciding whether there is a qualified academic review privilege such as that rec-

Applying the stricter standard of proof to the specific subpoena requests in *Franklin & Marshall*, the dissent agreed that the college should provide the EEOC with edited tenure review files, but only to the extent that the files concerned the complainant.[63] Materials on other tenure decisions should be unavailable, the dissent indicated, unless the district court determined that the materials would substantiate the complainant's charge.[64] Because the district court had failed to evaluate the EEOC's subpoena requests in accordance with a more exacting standard of proof, the dissent would have reversed the district court's decision and remanded the case for district court findings on the EEOC's requests for materials on other tenure decisions.[65]

In *Franklin & Marshall*, the Third Circuit expressly refused to recognize a qualified academic privilege in view of the Congressional policy, embodied in Title VII, which prohibits discrimination in education.[66] Despite what it deemed clear evidence of Congress' intent not to protect educational institutions from EEOC scrutiny, however, the Third Circuit ultimately did not give the EEOC unrestricted access to the college's tenure materials. Instead, by upholding the district court's order for the college's disclosure of tenure review materials from which academicians' identities had been deleted,[67] the Third Circuit protected the college through what was, in effect, a qualified academic privilege.[68] The court's restriction on the EEOC's access to academicians' identities therefore was similar to the Seventh Circuit's qualified privilege standard.[69]

The qualified academic privilege analysis is appropriate where the EEOC seeks access to tenure review materials. Even if Congress intended broad EEOC access to tenure review materials, some limitation on the EEOC is necessary in light of the protected status that the Supreme Court has conferred on academia.[70] A judicially recognized qualified academic privilege imposes the requisite restraints on the EEOC without frustrating the purposes of Title VII. It is within the discretion of federal courts to recognize evidentiary privileges[71] to protect interests or relationships sufficiently im-

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ognized by the Seventh Circuit in *Notre Dame*. 775 F.2d at 121, 39 FEP Cases at 220 (Aldisert, C.J., dissenting).

[63] *Id.* at 121, 39 FEP Cases at 221 (Aldisert, C.J., dissenting).

[64] *Id.*

[65] *Id.* at 118, 121, 39 FEP Cases at 218, 221 (Aldisert, C.J., dissenting).

[66] *Id.* at 115, 39 FEP Cases at 216.

[67] *Id.* at 117, 39 FEP Cases at 217.

[68] *See supra* notes 14–19 and accompanying text for a discussion of the Seventh Circuit's adoption of a qualified academic privilege. Moreover, as a consequence of the district court's modification of the subpoena, the EEOC was denied access to even edited versions of some documents. *See supra* note 30.

[69] *See supra* notes 14–19 and accompanying text. The issue of what standard of proof the Third Circuit required for EEOC access to the deleted information remained unresolved after *Franklin and Marshall*. For the standard of proof required by the Seventh Circuit in *Notre Dame*, *see supra* note 17 and accompanying text.

[70] *See supra* note 10 for a discussion of the protected status given academia.

[71] FED. R. EVID. 501. *See* Trammel v. United States, 445 U.S. 40, 47 (1980); *Notre Dame*, 715 F.2d at 334–35, 32 FEP Cases at 1059–60. FED. R. EVID. 501 provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

portant to justify the exclusion of information that otherwise should be disclosed.[72] Because privileges contravene the fundamental principle favoring disclosure of evidence, however, privileges generally are construed strictly and permitted only to the extent necessary to protect the interest whose preservation transcends the interest in disclosure.[73] A qualified privilege, which requires the court's case-by-case determination of applicability,[74] is appropriate where there is a need for limited but not absolute protection. A qualified academic privilege, such as the one adopted by the Seventh Circuit, not only is within the federal courts' discretion to devise but accommodates both the college's interest in preserving the tenure review process and Congressional intent that colleges abide by the requirements of Title VII.

Unrestricted EEOC access to tenure review materials is inappropriate. As Judge Aldisert noted in his dissent in *Franklin & Marshall*, employment on a college faculty differs significantly from employment in a commercial setting and, particularly where tenure decisions are concerned, should not be subject to the same broad EEOC investigatory powers.[75] A college is an institution designed to generate and transfer knowledge,[76] and toward that end must be accorded freedom to determine who may teach, as well as what may be taught, how it shall be taught and who may be admitted to study.[77] The tenure review process is the most effective means for a college to select those faculty members best qualified to serve the college's needs. To be effective, however, the tenure review process requires candid peer evaluations. Confidentiality, which fosters candor, is an essential component of tenure review.

On the other hand, total insulation of the tenure decisions from EEOC scrutiny is inappropriate in view of the federal policy, embodied in Title VII, prohibiting employment discrimination in educational institutions. Partial insulation, however, through a

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[72] McCORMICK ON EVIDENCE § 72, at 171 (3d ed. 1984). Courts generally have accepted Dean Wigmore's four essential conditions for the establishment of a privilege:

> (1) The communications must originate in a confidence that they will not be disclosed;
>
> (2) The element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
>
> (3) The relation must be one which in the opinion of the community ought to be sedulously fostered;
>
> (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained from the correct disposal of litigation.

Id. at 171 n.6.

[73] Trammel v. United States, 445 U.S. 40, 50 (1980). *See Dinnan*, 661 F.2d at 427–30, 27 FEP Cases at 288–91.

[74] McCORMICK ON EVIDENCE § 77, at 186–87 (3d ed. 1984). According to McCormick, a qualified privilege can be a desirable compromise because it requires the court to engage in an in camera weighing of the need for disclosure against the need for privacy. *Id.* at 187.

[75] *See supra* notes 5, 10–11, 61 and accompanying text for a discussion of the EEOC's broad investigatory powers. A complaint that the college discriminatorily denied employment, rather than tenure, might not present the same need for protection of the college from EEOC investigation. If the college's hiring decisions were not dependent upon confidentiality to the same extent as its tenure decisions, then the EEOC's authority to investigate the complaint arguably would be subject to fewer restraints.

[76] Johnson v. University of Pittsburgh, 435 F. Supp. 1328, 1346, 15 FEP Cases 1516, 1530 (W.D. Pa. 1977).

[77] Sweezy v. New Hampshire, 354 U.S. 234, 262–63 (1957).

qualified academic privilege, accommodates faculty members' interest in confidentiality without frustrating the purposes of Title VII. Although the extent of protection that the privilege confers may vary with each case,[78] one reasonable solution is the approach taken by the Third and Seventh Circuits. A college's production of files from which the college has deleted identifying information is one means of sparing reviewing and reviewed faculty members the discomfort of identity disclosure, while simultaneously providing the EEOC with the substance of tenure evaluations.[79]

In *Franklin & Marshall*, the Third Circuit endorsed broad EEOC investigatory authority with regard to tenure review materials, and upheld the district court's decision which required the college to comply with the EEOC subpoena. Nonetheless, because the materials to which the court authorized EEOC access were files from which the college could delete names and other identifying information, the Third Circuit gave effect to the same qualified academic privilege that the Seventh Circuit had recognized earlier. A qualified academic privilege, which allows the district court to limit EEOC access to tenure review information, is within the power of the federal courts to devise. More importantly, a qualified academic privilege strikes the proper balance between the college's interest in confidentiality of the tenure review process and the EEOC's need for disclosure in order to enforce the purposes of Title VII.

C. **Title VII Does Not Preempt Section 1983 Actions by State Employees Alleging Employment Discrimination*: Trigg v. Fort Wayne Community Schools[1]

The equal protection component of the fifth and fourteenth amendments prohibits employment discrimination, including discrimination in the public sector, on the basis of sex or race.[2] State workers may challenge employment discrimination by bringing suit pursuant to section 1983,[3] which provides a cause of action for damages in cases where

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[78] For example, a court might conclude that the privilege protects whole documents or, as the court concluded in *Franklin and Marshall*, only names and other identifying information.

[79] EEOC access to the deleted information could be made contingent on the EEOC's showing of substantial need for the information. *See supra* note 17 and accompanying text regarding the Seventh Circuit's endorsement, in *Notre Dame*, of the substantial need standard. Deletion of identifying information also would eliminate the need for restrictions on disclosure of materials pertaining to other tenure candidates. *See supra* notes 63–64 and accompanying text. The availability of edited files on other tenure candidates would permit the EEOC to compare a tenure committee's consideration of similarly qualified candidates and identify possible discriminatory treatment. *See supra* note 55.

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[1] 766 F.2d 299, 38 FEP Cases 361 (7th Cir. 1985).

[2] U.S. CONST. amend. V, XIV. The fifth amendment protects federal workers while the fourteenth amendment safeguards state employees. The equal protection clause's prohibition on employment discrimination has developed through Supreme Court case law. The Court has deemed racial classifications constitutionally suspect. Korematsu v. United States, 323 U.S. 214, 216 (1944). Government actions, including employment decisions, which are based on race therefore are subject to strict scrutiny, and will be found to violate equal protection unless they are narrowly tailored to achieve compelling government objectives. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967); *see generally* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW Ch. 16 § 1. C. (2d ed. 1983). The Court also has held that gender classifications are subject to intermediate scrutiny under the equal protection clause. *See* Craig v. Boren, 429 U.S. 190, 197 (1976).

[3] 42 U.S.C. § 1983 (1982). Section 1983 does not grant any substantive rights, but merely allows plaintiffs to redress injuries resulting from a violation of another federal law or the Constitution.

the claimant is deprived, by one acting under color of state law, of rights secured by federal law or by the Constitution.[4] Thus, where state employers engage in employment discrimination violative of equal protection, state employees can vindicate their rights through an expressly provided federal cause of action.

In contrast to state employees, federal employees generally must challenge employment discrimination by bringing suit under Title VII.[5] At one point the Supreme Court had implied a cause of action, similar in operation to the state employee's express section 1983 action, for federal employees under the fifth amendment.[6] The Court later held, however, that Title VII, which explicitly prohibits employment discrimination based on sex, race, religion or national origin,[7] is the exclusive remedy for employment discrimination suffered by those federal employees covered by Title VII.[8] Thus for covered federal employees, Title VII preempts the cause of action implied from the fifth amendment.[9]

The Supreme Court has also held, in a number of contexts, that where Congress establishes what is intended to be an exclusive remedial framework for vindication of

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Section 1983 reads, in pertinent part, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

Id.

[4] Maine v. Thiboutot, 448 U.S. 1, 4, 9 (1980) (deprivation of rights secured by federal statutes, as well as those secured by the Constitution, actionable under § 1983).

[5] 42 U.S.C. §§ 2000e–e-17 (1982). When Title VII first was passed in 1964 it applied only to private sector employment discrimination. The act was amended in 1972 to extend its coverage to public sector employment discrimination. 42 U.S.C. § 2000(e)(a) (1982); *see Employment Discrimination in State and Local Government: Title VII Amended and Section 1983 Revisited*, 34 LA. L. REV. 540, 540 & n.2 (1974).

[6] *See* Davis v. Passman, 442 U.S. 228, 248, 19 FEP Cases 1390, 1398 (1979) (Court rules that "petitioner has a cause of action under the Fifth Amendment, . . . redress[able] by a damages remedy"). Federal employees had brought suit to enjoin federal employment discrimination in earlier cases, Brown v. Government Services Administration, 425 U.S. 820, 826, 12 FEP Cases 1361, 1367 (1976), but had not been given a damages remedy prior to *Davis*.

[7] 42 U.S.C. § 2000e-2(a) (1982). Title VII establishes a comprehensive administrative and judicial framework for redressing instances of employment discrimination. For a comparative analysis of employment discrimination suits based on Title VII and § 1983 see Noble, *Civil Rights — An Analysis of Section 1983 and Title VII: A Comparative Strategy*, 1979 TRIAL LAW. GUIDE 49 (1979). Prior to bringing suit under Title VII plaintiffs must comply with its administrative process. This involves filing a complaint with the Equal Employment Opportunity Commission (EEOC), *see* Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 880 & n.361 (1972), pursuing state fair employment procedures where available, 42 U.S.C. § 2000e-5(c) (1982), and delaying suit until the EEOC has had an opportunity to investigate and attempt resolution of the dispute. *Id.* § 2000e-5(f). Because Title VII is seen as equitable in nature the trial is to a jury and monetary damages are limited, in general, to back pay. Great American Federal Savings & Loan Ass'n v. Novotny, 442 U.S. 366, 375, 19 FEP Cases 1482, 1485 (1979); *see also Noble, supra* at 74. In contrast, in § 1983 and implied actions both jury trial and punitive damages are available.

[8] *Brown*, 425 U.S. at 834, 12 FEP Cases at 1366. Only a small percentage of federal employees are not covered by Title VII. 42 U.S.C. § 2000e-16(a) (1982).

[9] *See Davis*, 442 U.S. at 247, 19 FEP Cases at 1397-98.

rights violated in a given area, the remedy provided preempts other avenues of redress.[10] Although it is clear that Congress has the power to preempt existing means of redressing constitutional[11] or statutory[12] rights when it so intends, what is often unclear is whether Congress intends that result. To determine whether Congress intended to preempt existing means of redress in a specific area, the Supreme Court reviews the congressional remedial framework and the legislative history of the enactment establishing that framework.[13] Thus, in *Brown v. General Services Administration*,[14] the Court examined both Title VII's remedial framework and the legislative history of the section which extended Title VII to federal employees and concluded that Congress intended this extension to "create an exclusive, preemptive administrative and judicial scheme for redress of federal employment discrimination."[15]

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[10] *See, e.g., Brown*, 425 U.S. at 834, 12 FEP Cases at 1366. As the Court stated in *Brown*, "a precisely drawn detailed statute preempts more general remedies." *Id. See also* Smith v. Robinson, 468 U.S. 922, 1009 (1985) (remedial framework provided by federal statute preempts § 1983 actions based on violation of rights in that statute or violations of equal protection rights); Bush v. Lucas, 462 U.S. 367, 373 (1983) (remedial framework provided by federal statute preempts implied action based on constitutional violation where provided remedy is adequate); Middlesex City Sewerage Auth. v. Sea Clammers, 453 U.S. 1, 18, 21 (1980) (remedial framework provided by federal statute preempts implied actions and § 1983 actions based on violation of rights in that statute).

[11] In *Bush* the Court noted the tension between the views that "it is the province of the judiciary to fashion an adequate remedy for every wrong", *Bush*, 462 U.S. at 373 & n.10 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162–63 (1803)), and the view that federal courts are of limited jurisdiction and therefore should not grant a given remedy unless Congress expressly authorizes it. *Bush*, 462 U.S. at 373 & n.11 (citing Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 428 (1971) (Black, J., dissenting)). The majority in *Bush* concluded that the Court has rejected both of these extremes and instead has recognized that the judiciary has the power to imply actions for damages to redress violations of rights, but should exercise that power "in light of the relevant policy determinations made by the Congress." *Id.* at 373. *See also Bivens*, 403 U.S. at 18–19 (Court may not imply action where Congress specifically foreclosed it or "special factors counsel hesitation"). It seems doubtful, however, that the Court will refrain from implying a cause of action for damages to redress a constitutional deprivation where the congressional remedy is somehow inadequate. *Bush*, 462 U.S. at 388, n.14.

[12] Because Congress creates statutory rights, the Court is unlikely to imply, in the face of congressional intent to make the provided remedy exclusive, a cause of action for damages because of the inadequacy of the remedy given. *See Davis*, 442 U.S. at 241, 19 FEP Cases at 1395.

[13] *Sea Clammers*, 453 U.S. at 13. While both factors are considered in determining congressional intent, the inquiry begins with the statutory language and the framework that it creates. *Id.* The presence of the remedial framework indicates that Congress intended that the remedies provided in the statute be the exclusive means of preserving the rights addressed by that statute. *Id.* at 20. If, however, "Congress specifically indicate[d] in the legislative history that it did not intend to limit the judicial remedies otherwise available," the presence of the remedial scheme is not determinative. *Smith*, 468 U.S. at 1012 n.16. Thus where Congress establishes a comprehensive remedial scheme it is given a status of implied exclusivity. If, however, the legislative history clearly indicates that Congress intended to allow duplicative means of redress, the inference of implied exclusivity is overcome. *See* Storrey v. Board of Regents of Univ. Wis. Sys., 600 F. Supp. 838, 840, 36 FEP Cases 1575, 1577 (W.D. Wis. 1985). *See also* Johnson v. Railway Express Agency, 421 U.S. 454, 459, 10 FEP Cases 817, 819 (1975) (despite presence of Title VII's remedial framework, clear statement of intent in legislative history shows other remedies preserved for private sector employees); Addickes v. S.H. Kress & Co., 398 U.S. 144, 150–52 & n.5 (1970) (express statement in statute that other means of redress are preserved).

[14] 425 U.S. 820, 833–34, 12 FEP Cases 1361, 1365–66 (1976).

[15] *Id.* at 828–29, 12 FEP Cases at 1364. The Court reviewed the legislative history of section eleven of the 1972 amendment to Title VII which extended the statute's coverage to federal

During the *Survey* year in *Trigg v. Fort Wayne Community Schools*[16] the Seventh Circuit ruled that state employees, unlike federal employees, may rely on both Title VII and section 1983 to vindicate equal employment rights. Distinguishing *Brown*, the court concluded that the legislative history of Title VII evinces a congressional intent to preserve other avenues of relief available to *state* employees.[17] The Seventh Circuit also concluded that Title VII and the equal protection clause of the fourteenth amendment grant state employees independent rights to be free from employment discrimination.[18] Thus the court relied on both congressional intent and the existence of two independent sources of the right to be free from employment discrimination in concluding that Title VII does not preempt section 1983 actions alleging a violation of equal protection in the state employment context. As a result, state employees will be able to utilize both of these important federal statutes, and secure the remedies allowed by both, when seeking to redress employment discrimination.

The plaintiff in *Trigg* was a state employee working as a liaison aide at a school in Fort Wayne, Indiana.[19] Upon her discharge from this position, the plaintiff filed a section 1983 action in federal district court alleging racial and sexual discrimination in violation of equal protection.[20] The defendant, Fort Wayne Community Schools, claimed that the plaintiff was discharged for absenteeism and insubordination.[21] The plaintiff contended, however, that she was dismissed because her superior disliked working with black women.[22] The plaintiff also claimed that she had been subject to racial and sexual harassment.[23] The trial court concluded that the plaintiff's complaint stated a claim for employment discrimination, not under section 1983, but under Title VII.[24] Accordingly, because the plaintiff had failed to comply with the administrative procedures under Title VII, the trial court granted summary judgment against her.[25]

The plaintiff appealed the district court's summary judgment ruling to the Seventh Circuit.[26] On appeal the plaintiff contended that it was proper to prosecute her employment discrimination claim under section 1983 regardless of whether the defendant's conduct also violated Title VII.[27] In contrast, the defendant argued that the plaintiff's fourteenth amendment rights were not independent of her Title VII rights and that

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employment practices. The Court stated that Congress felt that prior to the adoption of this section federal employees had no effective judicial remedy for employment discrimination. *Id.* at 828, 12 FEP Cases at 1363–64.

[16] 766 F.2d 299, 302, 38 FEP Cases 361, 363 (7th Cir. 1985).

[17] *Id.* at 301, 38 FEP Cases at 362–63. A small minority of federal courts have taken the opposite view and concluded that where the same conduct violates both Title VII and the equal protection clause, Title VII provides the exclusive avenue of relief. *E.g.*, Rivera v. City of Wichita Falls, 665 F.2d 531, 534 n.4, 27 FEP Cases 1352, 1355 n.4 (5th Cir. 1982); Keller v. Prince George's County, 616 F. Supp. 540, 543–44, 38 FEP Cases 1498, 1500–01 (D. Md. 1985); Ratliff v. City of Milwaukee, 608 F. Supp. 1109, 1127–28, 38 FEP Cases 611, 626 (E.D. Wis. 1985); Talley v. City of DeSoto, 37 FEP Cases 375, 375–76 (N.D. Tex. 1985).

[18] *Trigg*, 766 F.2d at 301, 38 FEP Cases at 363.

[19] *Id.* at 300, 38 FEP Cases at 362.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.* See *supra* note 7 for a summary of Title VII's procedures.

[26] *Id.*

[27] *Id.*

Congress intended Title VII to be the sole method of challenging public employment discrimination.[28] The Seventh Circuit agreed with the plaintiff and ruled that Title VII does not preempt section 1983 actions by state employees.[29]

The Seventh Circuit began its analysis by making some observations about existing federal law prohibiting employment discrimination by state government. First, the court noted, Title VII prohibits racial and gender-based employment discrimination.[30] Second, the court continued, the fourteenth amendment's equal protection clause prohibits discrimination, including employment discrimination, based on class membership.[31] Third, the court observed, section 1983, while not granting substantive rights, is a vehicle to redress deprivations of rights secured by other federal laws and the Constitution.[32] The court noted in concluding this initial overview that the plaintiff's section 1983 action rested on a deprivation of her equal protection rights.[33]

The Seventh Circuit next addressed the defendant's contention that Congress intended Title VII to be the exclusive avenue of relief from state employment discrimination. The court rejected this argument on two grounds. First, the court noted that the legislative history of section two of the 1972 amendment to Title VII (Section Two), which extended the protection of Title VII to state employees, indicated that Congress did not intend to preempt section 1983 actions based on fourteenth amendment violations.[34] On the basis of this legislative history the court distinguished *Brown*, in which the Supreme Court had held that the legislative history of section eleven of the 1972 amendment to Title VII (Section Eleven) indicated that Congress intended Title VII to be the exclusive means of redress for federal employees.[35]

The second reason that the Seventh Circuit rejected the defendant's exclusivity claim was based on its conclusion that state employees have been given two independent rights to be free from employment discrimination; one right granted by Title VII and one right granted by the fourteenth amendment.[36] The court stated that because the fourteenth amendment conferred on the plaintiff an independent right, her case was distinguishable from the case of *Great American Federal Savings & Loan Association v. Novotny*,[37] in which the claimant had only the right granted by Title VII.[38] In *Novotny*,

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[28] *Id.*

[29] *Id.* at 302, 38 FEP Cases at 363.

[30] *Id.* at 301, 38 FEP Cases at 362.

[31] *Id.*

[32] *Id. But see Sea Clammers*, 453 U.S. at 20 (congressional provision of comprehensive remedial device in law securing the right violated precludes § 1983 action to redress the deprivation).

[33] *Trigg*, 766 F.2d at 301, 38 FEP Cases at 362.

[34] *Id.* at 301, 38 FEP Cases at 362–63. In support of this determination the court cited to the House Committee Report accompanying Section Two that stated that "the Committee wishes to emphasize that the individual's right to file a civil action on his own behalf, pursuant to the Civil Rights Act (sic) of 1870 and 1871, 42 U.S.C. §§ 1981 and 1983, is in no way affected . . . ." *Id.* at 301 n.3, 38 FEP Cases at 362 n.3. The Supreme Court has pointed to similar legislative history in Title VII to conclude that the statute does not preempt other judicial relief available to private sector employees. *Johnson*, 421 U.S. at 459, 10 FEP Cases at 819.

[35] *Trigg*, 766 F.2d at 301, 38 FEP Cases at 362–63. The Supreme Court in *Brown* had also pointed to the presence of Title VII's remedial framework to conclude that Congress intended that statute to be the exclusive avenue of relief in the federal employment context. See *supra* text accompanying notes 14–17 for a discussion of *Brown*.

[36] *Id.* at 301, 38 FEP Cases at 363.

[37] 442 U.S. 366, 19 FEP Cases 1482 (1979).

[38] *Trigg*, 766 F.2d at 301–02, 38 FEP Cases at 363. *Novotny* involved only a right conferred by

the *Trigg* court noted, the Supreme Court had ruled that resort to the remedial framework of Title VII is the exclusive means of redressing violations of rights conferred solely by that statute.[39] Because the fourteenth amendment gave the plaintiff in *Trigg* an independent right, not provided the plaintiff in *Novotny*, the Seventh Circuit ruled that she could bring a section 1983 suit based on a violation of that right, thus avoiding Title VII's remedial framework, even if the defendant's conduct also violated Title VII.[40]

The *Trigg* decision is important because it recognizes, in the face of seemingly contrary Supreme Court precedent,[41] that Congress did not intend the extension of Title VII to state employees to prevent those employees from using section 1983 to challenge employment discrimination under the equal protection clause. Although the result in *Trigg* seems correct due to the clear manifestation of congressional intent in the legislative history of Section Two, the decision's reliance on state employees' possession of two independent rights to be free from employment discrimination is misplaced. Nevertheless, *Trigg* is sound in making clear that Congress intended state employees to be free to use section 1983 to challenge employment discrimination.

Although the legislative history of Section Two makes clear that Congress did not intend Title VII to preempt section 1983 actions by state employees, the result in *Trigg* was not a foregone conclusion. The Supreme Court's opinion in *Brown* had relied on the presence of Title VII's remedial framework as well as the legislative history of Section Eleven to conclude that Congress intended Title VII to be the exclusive means of relief for federal employment discrimination.[42] Had the Seventh Circuit not been exacting in its analysis, it could have noted the presence of Title VII's remedial framework, cited to that portion of the *Brown* opinion which relied upon this factor in concluding that Congress intended that statute to preempt other means of redress, and held that *Brown* was controlling and Title VII is therefore the exclusive means of redress available to

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Title VII because the alleged employer misconduct occurred in the private sector. In *Novotny* the plaintiff sought to base his suit on 42 U.S.C. § 1985(3), which provides a cause of action for those injured by conspiracies to deprive any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the law. *Novotny*, 442 U.S. at 372, 19 FEP Cases at 1484. Similar to § 1983, § 1985(3) provides no substantive rights itself. *Id.* The plaintiff in *Novotny* claimed to have been injured by a conspiracy to violate § 704(a) of Title VII of the Civil Rights Act of 1964. *Id.* at 369, 19 FEP Cases at 1483. The Court looked to the presence of Title VII's remedial framework, *id.* at 375–76, 19 FEP Cases at 1485–86, and its legislative history, *id.* at 377 n.21, 19 FEP Cases 1486 n.21, to conclude that Congress intended to preempt § 1985(3) actions based on a violation of Title VII. *Id.* at 378, 19 FEP Cases at 1486.

[39] *Id.*

[40] *Trigg*, 766 F.2d at 302, 38 FEP Cases at 363.

[41] See *infra* text accompanying notes 42–43 for a discussion of the Supreme Court precedent.

[42] *Brown*, 425 U.S. at 833–34, 12 FEP Cases at 1365–66. The Court's determination in *Brown* that Congress intended to preempt other remedies available to federal employees when it extended Title VII to them may seem somewhat dubious given the clearly opposite congressional intent concerning state and private sector employees. Where the legislative history of an enactment with its own remedial framework does not indicate specifically that other judicial remedies are preserved, however, there is an unrebutted inference that they are preempted. *See supra* note 13 and accompanying text. Further, although *Brown* implicates the federal employees' fifth amendment right to be free from employment discrimination, the Court has indicated that it will refrain from implying an action for damages where the exclusive remedy provided by Congress is adequate. *See supra* note 11 and accompanying text. The decision in *Brown* indicates that the Supreme Court considered the Title VII framework to be adequate constitutionally. Finally, Congress has the power to state that Title VII was not meant to preempt other means of redress available to federal employees.

state employees. A small number of federal courts have taken this approach.[43] Because the Seventh Circuit looked beyond the presence of the remedial framework and chronicled Congress's intent not to preempt section 1983, which intent is clearly and specifically manifested in the legislative history, that intent was not frustrated.

After carefully assessing congressional intent through an evaluation of Section Two's legislative history, the court also stated that the plaintiff's section 1983 action was not preempted because both Title VII and the fourteenth amendment granted her the right to be free from employment discrimination.[44] Although this fact distinguishes *Trigg* from *Novotny*,[45] the presence of two independent rights should not be determinative. Congress could have channelled state employees seeking to redress violations of the constitutionally based right through Title VII, as it has federal employees, if it had so desired.[46] Thus, it is Congress's intent that state employees be free to use section 1983 which is decisive, and not the presence of independent rights to be free of employment discrimination.

In sum, *Trigg* holds that the extension of Title VII to state employees does not preclude these employees from bringing section 1983 actions, based on a violation of the fourteenth amendment, to challenge state employment discrimination. By looking beyond the presence of Title VII's remedial framework to the legislative history of Section Two to determine congressional intent, the court avoided an unwarranted extension of *Brown* to state employees. In taking this approach the Seventh Circuit faithfully implemented the congressional intent underlying one segment of equal employment legislation. Although the court's reliance on the independent right to be free of employment discrimination given to state employees by Title VII and the fourteenth amendment is misplaced, this does not undercut the court's holding which is consistent with Congress's intent in this area.

D. **Evidence Necessary to Establish a Hostile Working Environment Claim*: Erebia v. Chrysler Plastic Products Corp.[1]

42 U.S.C. section 1981[2] prohibits all racial discrimination, whether or not under color of law, with respect to the rights enumerated in the statute.[3] In the context of

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[43] *See, e.g.*, Rivera v. City of Wichita Falls, 665 F.2d 531, 534 n.4, 27 FEP Cases 1352, 1355 n.4 (5th Cir. 1982) (consideration of § 1983 claim necessary only if based on different grounds than Title VII claim); Reiter v. Center Consolidated School Dist., 618 F. Supp. 1458, 1462, 39 FEP Cases 833, 836 (D. Colo. 1985) (because same act forms basis of Title VII and § 1983 claims latter is preempted in order to preserve integrity of congressionally created remedial scheme); Keller v. Prince George's County, 616 F. Supp. 540, 543–44, 38 FEP Cases 1498, 1500–01 (D. Md. 1985) (same); Ratliff v. City of Milwaukee, 608 F. Supp. 1109, 1127–28, 38 FEP Cases 611, 625–26 (E.D. Wis. 1985) (where Title VII and § 1983 claims are "inherently bound up" Title VII is sole remedial device); Talley v. City of DeSoto, 37 FEP Cases 375, 376 (N.D. Tex. 1985) (separate consideration of § 1983 claim only if it is based on facts separate from those forming basis of Title VII claim) (citing *Rivera*, 665 F.2d 531, 27 FEP Cases 1352 (5th Cir. 1982)); Torres v. Wis. Dept. of Health & Human Servs., 592 F. Supp. 922, 929–30, 35 FEP Cases 1041, 1047 (E.D. Wis. 1984) (where Title VII and § 1983 claims are "tied up" with each other Title VII is sole remedial device).

[44] *Trigg*, 766 F.2d at 301, 38 FEP Cases at 363.

[45] See *supra* notes 37–40 and accompanying text for a discussion of *Novotny*.

[46] *See supra* notes 10–12 and accompanying text.

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[1] 772 F.2d 1250, 37 FEP Cases 1820 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 1197, 40 FEP Cases 192 (1986).

[2] 42 U.S.C. § 1981 (1982) provides:

labor-related cases, section 1981 is applied frequently in hostile working environment claims.[4] Courts have held that an employer who knowingly creates or condones a hostile working environment is guilty of intentional or purposeful discrimination under section 1981.[5]

Courts have defined a hostile working environment as one so heavily polluted with discrimination as to destroy the emotional and psychological stability of minority workers.[6] The two factors on which courts have focused in determining whether a hostile working environment exists are the frequency of incidents of racial abuse[7] and management's response, or lack thereof, to those incidents.[8] Where courts have found a hostile

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> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactations of every kind.

Id.

[3] Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (defendants' refusal to sell their home to plaintiffs in private suburb because of plaintiffs' race held to violate 42 U.S.C. § 1982, a companion piece of legislation to § 1981 arising from the same legislative history). Section 1981 represents part of the contemporary codification of what was originally the Civil Rights Act of 1866 [Act of April 9, 1866, c. 31, § 1, 14 Stat. 27, re-enacted by § 18 of the Enforcement Act of 1870, Act of May 31, 1870, c. 114, § 18, and codified in §§ 1977 and 1978 of the Revised Statutes of 1874, now 42 U.S.C. §§ 1981 and 1982].

[4] *See* Leonard v. City of Frankfort Elec. and Water Plant Bd., 752 F.2d 189, 36 FEP Cases 1181 (6th Cir. 1985) (black plaintiff subjected to racial harassment and discriminatory practices brought § 1981 and Title VII claims); Taylor v. Jones, 653 F.2d 1193, 28 FEP Cases 1024 (8th Cir. 1981) (§ 1981 claim brought on grounds that noxious racial atmosphere caused constructive discharge of plaintiff based on race); EEOC v. Murphy Motor Freight Lines, Inc., 488 F. Supp. 381, 22 FEP Cases 892 (D. Minn. 1980) (§ 1981 and Title VII claims brought where plaintiff frequently was subjected to incidents of racial abuse).

[5] *Leonard*, 752 F.2d at 193, 36 FEP Cases at 1183; *Taylor*, 653 F.2d at 1198, 28 FEP Cases 1027; *Murphy*, 488 F. Supp. at 386, 22 FEP Cases at 896. Hostile working environment claims also have been brought under Title VII, 42 U.S.C. § 2000e et seq. and, in some cases, under both § 1981 and Title VII. For the purposes of proving the existence of a hostile working environment, however, it makes no difference whether the plaintiff brings a claim under Title VII or § 1981. *See* Neely v. City of Grenada, where the district court stated that "[a]s a practical matter . . . there is little significance . . . whether the action is brought under Title VII, § 1981, or both, as the standards for determining racial discrimination *vel non* are virtually identical for both . . . (citation omitted)." 438 F. Supp. 390, 406, 15 FEP Cases 1717, 1732 (N.D. Miss. 1977). Section 1981 claims, however, require a showing of intentional discrimination, *see* General Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 391 (1982), allow for the recovery of punitive and compensatory damages, *see* SCHLEI AND GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, 695 (2d ed. 1983) [hereinafter SCHLEI AND GROSSMAN], and apply only in cases of discrimination based on race. *Id.* at 674–75. Title VII may apply in cases of disparate impact without a showing of discriminatory animus, *see* Griggs v. Duke Power Co., 401 U.S. 424 (1971), provides no analogous damages, and applies to cases of racial, national origin, sex, and religious discrimination. *See* SCHLEI AND GROSSMAN, *supra*, at 1–2.

[6] Rogers v. EEOC, 454 F.2d 234, 238, 4 FEP Cases 92, 95 (5th Cir. 1971), *cert. denied*, 406 U.S. 957, 4 FEP Cases 771 (1972).

[7] *See, e.g.*, Johnson v. Bunny Bread Co., 646 F.2d 1250, 25 FEP Cases 1326 (8th Cir. 1981) (infrequent racial abuse insufficient to support a hostile working environment claim); Bundy v. Jackson, 641 F.2d 934, 24 FEP Cases 1155 (D.C. Cir. 1981) (racial abuse must be more than sporadic to prove the existence of a hostile working environment).

[8] *See, e.g.*, DeGrace v. Rumsfeld, 614 F.2d 796, 21 FEP Cases 1444 (1st Cir. 1980) (supervisor's failure to respond to pervasive racial abuse imputed to employer); Bell v. St. Regis Paper Co., 425

working environment to exist in violation of section 1981, the incidence of racial abuse was high, and management had failed to take remedial measures. In *EEOC v. Murphy Motor Freight Lines*,[9] for example, co-employees and supervisors subjected a black employee to a pattern of racial epithets and constant racial harassment. Similarly, in *Leonard v. City of Frankfort Electric and Water Plant Board*,[10] the plaintiff was the target of recurrent racial slurs uttered by his supervisor and was demoted because of his race. In *Taylor v. Jones*,[11] the plaintiff endured department-wide racial abuse in the form of threats, fights, and the display of a hangman's noose. In each of these cases, the employers failed to take remedial measures, despite their knowledge of the problems.[12] Conversely, courts have not found hostile working environments where the claimed abuse was infrequent,[13] or where management quickly responded to claims of racial harassment.[14]

In *Murphy*, *Leonard*, and *Taylor*, the frequent incidents of racial harassment, and the employers' failure to take remedial action, were found to create a hostile working environment and enabled the respective courts to infer that the employer in each case intentionally or purposefully created the hostile working environment, thereby satisfying the intent element[15] of a section 1981 claim.[16] These cases illustrate the relatively high level of unremedied racial harassment necessary to prove the existence of a hostile working environment, and through it, the presence of intentional or purposeful discrimination.[17]

During the *Survey* year, the Sixth Circuit Court of Appeals, in *Erebia v. Chrysler Plastics Products*,[18] upheld as sufficient to prove the existence of an employer-condoned hostile working environment evidence that the plaintiff, himself a supervisor, complained to management that two subordinates, each of whom worked in different departments, repeatedly abused the plaintiff racially, and that management had failed to take remedial

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F. Supp. 1126, 16 FEP Cases 1429 (N.D. Ohio 1976) (hostile working environment not found where management quickly responded to claims of racial harassment).

[9] 488 F. Supp. 381, 384–85, 22 FEP Cases 892, 895–96 (D. Minn. 1980).

[10] 752 F.2d 189, 193, 36 FEP Cases 1181, 1184 (6th Cir. 1985).

[11] 653 F.2d 1193, 1198–99, 28 FEP Cases 1024, 1027 (8th Cir. 1981).

[12] *See Leonard*, 752 F.2d at 193, 336 FEP Cases at 1184; *Taylor*, 653 F.2d at 1199, 28 FEP Cases at 1027; *Murphy*, 488 F. Supp. at 385, 22 FEP Cases at 896.

[13] *See, e.g., Johnson*, 646 F.2d at 1257, 25 FEP Cases at 1332 (infrequent racial abuse insufficient to support a hostile working environment claim).

[14] *See, e.g., Bell*, 425 F. Supp. at 1129, 16 FEP Cases at 1431.

[15] It is well settled that a claim under § 1981 requires proof of intentional or purposeful discrimination. *See* General Bldg. Contractors, Inc. v. Pennsylvania, 458 U.S. 375, 391 (1982).

[16] An employer's knowledge of the hostile working environment's existence must preceed a finding of intent to discriminate. SCHLEI AND GROSSMAN, *supra* note 5, at 292–93. But knowledge need not be actual if the racial hostility is so pervasive that the defendant should know that it exists, because, in such cases, intent may be proven circumstantially. *See Erebia*, 772 F.2d at 1258, 37 FEP Cases at 1826. There is, however, disagreement as to when an employer's awareness should be aroused. *See* SCHLEI AND GROSSMAN, *supra* note 5, at 293.

[17] These cases are intended to be illustrative only; they are not comprehensive. For other findings of hostile working environments, see Walker v. Ford Motor Co., 684 F.2d 1355, 29 FEP Cases 1259 (11th Cir. 1982) (Ford employees repeatedly referred to plaintiff as "nigger" and often used other racially derogatory language); *DeGrace*, 614 F.2d 796, 21 FEP Cases 1444 (1st Cir. 1980) (threats to and harassment of black civilian Navy employee found to constitute a hostile working environment).

[18] 772 F.2d 1250, 1252, 37 FEP Cases 1820, 1821 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 1197, 40 FEP Cases 192 (1986).

action. The *Erebia* decision demonstrates that racial harassment need not be pervasive to satisfy a section 1981 hostile working environment claim if management is aware of repeated racial abuse and takes no remedial action. Indeed, the *Erebia* court's holding that repeated and unremedied abuse from two separate employees working in different departments constitutes a section 1981 violation lowers the level of racial abuse necessary to succeed on a section 1981 hostile working environment claim.

In *Erebia*, the plaintiff, a man of Mexican origin, had worked as a supervisor in two of his employer's departments[19] and complained of racial abuse in each department.[20] In the department where the plaintiff first began to work, a subordinate repeatedly addressed the plaintiff in a racially derogatory manner and refused to follow the plaintiff's instructions.[21] The plaintiff complained of this behavior almost daily to his immediate superior, the production superintendent, but no remedial action resulted.[22] When the plaintiff began to work in a different department, another subordinate directed racial insults at the plaintiff, and refused to follow the plaintiff's instructions.[23] The plaintiff asserted that he spoke repeatedly to the production superintendent about the problem, that he also approached the general foreman, and that on two occasions he spoke with the personnel manager, who told the plaintiff merely to ignore the racial slurs.[24] When the plaintiff persisted and began to criticize management, the personnel manager told him, "I'll hurt you economically."[25]

The plaintiff brought a hostile working environment claim in conjunction with claims alleging discrimination in layoffs, recalls, and denial of shift changes.[26] The trial court granted the defendant's motion for a directed verdict on all issues except for the hostile working environment claim.[27] At trial on the hostile working environment claim, the labor relations and hourly employment supervisor[28] testified that the plaintiff had not followed the company's grievance procedures,[29] and that the plaintiff's supervisors had not made the labor relations manager aware of the problem.[30] The plaintiff testified, however, that he had never been instructed to bring his complaint to the labor relations manager.[31] The labor relations manager also testified that he had received complaints that the plaintiff himself had abused employees verbally, in one instance insulting the husband of a white employee.[32] This particular complaint had been investigated, and the plaintiff had been admonished to conduct himself in a more professional manner.[33]

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[19] *Id.* at 1252, 37 FEP Cases at 1821.

[20] *Id.*

[21] *Id.* (citing the trial transcript at 53). One employee called plaintiff a "wet bag [sic] tomato picker." *Id.*

[22] *Id.* (quoting the trial transcript at 55).

[23] *Id.* (quoting the trial transcript at 55, 56).

[24] *Id.* at 1252, 37 FEP Cases at 1822 (citing the trial transcript at 56, 57).

[25] *Id.* (quoting the trial transcript at 58, 260).

[26] *Id.* at 1251, 37 FEP Cases at 1821.

[27] *Id.*

[28] The labor relations and hourly employment supervisor was responsible for disciplinary and grievance procedures; he could authorize disciplinary measures requested by supervisors and lower management. *Id.* at 1250, 37 FEP Cases at 1822.

[29] *Id.*

[30] *Id.* at 1253, 37 FEP Cases at 1822 (citing trial transcript at 148).

[31] *Id.* (citing the trial transcript at 68).

[32] *Id.* (citing the trial transcript at 190).

[33] *Id.* (citing the trial transcript at 151).

The jury returned a verdict for the plaintiff, awarding him $10,000 in compensatory damages for emotional harm and $30,000 in punitive damages.[34] The defendant appealed to the Sixth Circuit Court of Appeals, contending that the evidence was insufficient to support a finding of a hostile working environment, or to justify an award of compensatory and punitive damages.[35] The Sixth Circuit upheld the finding of a hostile working environment and the award of punitive damages under section 1981, but reversed the award of compensatory damages.[36]

In deciding that there was sufficient evidence to support the jury's finding of a hostile working environment, the Sixth Circuit reviewed previous hostile working environment cases, many of which had been brought under Title VII, or Title VII and section 1981.[37] The court identified two important factors in the cases: the frequency of the racial abuse or harassment,[38] and management's response to it.[39] The court observed that other courts had emphasized that incidents of racial abuse must be more than "sporadic" and that the plaintiff must demonstrate that management failed to take adequate steps to remedy the situation.[40] Turning to *Erebia*, the court concluded that substantial evidence of repeated racial insults over an extended time period, and management's knowing failure to take remedial steps, supported the jury's finding of a hostile working environment.[41]

The court next addressed the question of whether the plaintiff had satisfied section 1981's required showing of intentional or purposeful discrimination.[42] The defendant claimed that in order to prove discriminatory intent, the plaintiff was required to show that the employer had treated harassment claims of minority employees differently from those of white employees.[43] The court rejected this argument, stating that such a requirement would allow an employer with a small number of minority employees to condone harassment without liability because the minorities would be unable to produce any incidents of harassment of white employees as contrasting treatment.[44] Instead, the court reasoned that intent to discriminate under section 1981 could be inferred when an employer who is, or should be, aware of a hostile working environment fails to take remedial action.[45] Accordingly, the *Erebia* court concluded that the substantial evidence of the racially charged working environment, and the employer's failure to take any

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[34] *Id.* at 1251, 37 FEP Cases at 1821.

[35] *Id.*

[36] *Id.* at 1259, 37 FEP Cases at 1827. The court ruled that there was insufficient proof of actual injury to support the award of compensatory damages. *Id.*

[37] *Id.* at 1253–56, 37 FEP Cases at 1822–25 (citing Rogers v. EEOC, 454 F.2d 234, 4 FEP Cases 92 (5th Cir. 1971), *cert. denied*, 406 U.S. 957, 4 FEP Cases 771 (1972); Walker v. Ford Motor Co., 684 F.2d 1355, 29 FEP Cases 1259 (11th Cir. 1982); Vaughn v. Pool Offshore Co., 683 F.2d 922, 29 FEP Cases 1017 (5th Cir. 1982); Johnson v. Bunny Bread Co., 646 F.2d 1250, 25 FEP Cases 1326 (8th Cir. 1981); DeGrace v. Rumsfeld, 614 F.2d 796, 21 FEP Cases 1444 (1st Cir. 1980); Bell v. St. Regis Paper Co., 425 F. Supp. 1126, 16 FEP Cases 1429 (N.D. Ohio 1976)).

[38] *Erebia*, 772 F.2d at 1254–55, 37 FEP Cases at 1823–24.

[39] *Id.* at 1255–56, 37 FEP Cases at 1824–25.

[40] *Id.* at 1254, 37 FEP Cases at 1823 (citing *Bundy*, 641 F.2d at 934, 24 FEP Cases at 1155).

[41] *Id.* at 1256, 37 FEP Cases at 1825.

[42] *Id.* at 1256–57, 37 FEP Cases at 1825.

[43] *Id.* at 1257, 37 FEP Cases at 1826.

[44] *Id.* at 1258, 37 FEP Cases at 1826.

[45] *See id.* at 1257–58, 37 FEP Cases at 1826.

action, proved intentional discrimination in violation of section 1981.[46] The Sixth Circuit thus affirmed the lower court's finding of a hostile working environment.[47]

The dissent in *Erebia* agreed that proof of an employer's tolerance of a hostile working environment would be sufficient to satisfy the intent element of a section 1981 claim, but took issue with the majority as to what actually constitutes a hostile working environment.[48] The dissent reasoned that the determination of the issue rested on the "degree" of racial oppression, using the word to refer to the intensity and pervasiveness of racial hostility.[49] The dissent asserted that the degree of racial hostility found sufficient to constitute a hostile working environment in other cases was considerably greater and more pervasive than in *Erebia*.[50] Regarding the source of the abuse, the court reasoned that racial remarks by an individual subordinate do not create a working environment dominated by racial slurs.[51] Because racial slurs by a single subordinate to a supervisor were of insufficient magnitude to create a hostile working environment, the dissent concluded, the majority had improperly held "an employer vicariously liable for the bigotry of an employee."[52]

Erebia appears to expand the latitude of the factual circumstances which courts may find to constitute a hostile working environment. As other courts have done in hostile working environment claims, the *Erebia* court focused on the existence of racial abuse over an extended time period, and management's failure to respond to such abuse or harassment. The *Erebia* court, however, applied this mode of analysis with a more sensitive hand than other courts. Indeed, the scale of abuse which enabled the *Erebia* court to find a hostile working environment pales in comparison to the abuse found, for example, in *Murphy*, *Leonard*, and *Taylor*.

Erebia thus expands the range of circumstances which may create employer liability for condoning a hostile working environment in violation of section 1981. This expansion, however, and the increase in employees' opportunities for bringing suit that it promises, are consistent with the purposes of the statute to eradicate racial discrimination.[53] *Erebia* signals to employers a need for greater attentiveness to employee complaints of racial harassment, even when the harassment emanates from a small number of workers in different departments. Indeed, because *Erebia* involved only two employees, each working in different departments and beneath the plaintiff, it may establish the minimum level of racial harassment necessary to make out a hostile working environment claim under section 1981.

Although the majority's holding that two employees' abusive conduct may be sufficient to prove the existence of a hostile working environment appears harsh on employ-

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[46] *Id.*

[47] *Id.* at 1260, 37 FEP Cases at 1828. The court also affirmed the jury's award of $30,000 punitive damages, but reversed the award of compensatory damages, finding insufficient proof of plaintiff's claimed emotional distress. *Id.* at 1259–60, 37 FEP Cases at 1827–28.

[48] *Id.* at 1260–61, 37 FEP Cases at 1828–29 (Kennedy, J., dissenting).

[49] *Id.*

[50] *Id.*

[51] *Id.* The dissent reasoned that the two subordinates who had abused the plaintiff worked in different departments, and the plaintiff therefore was subject to harassment from only one employee at any one time. *Id.*

[52] *Id.* at 1261, 37 FEP Cases at 1829 (Kennedy, J., dissenting).

[53] *See* Jones v. Alfred H. Mayer, 392 U.S. 409 (1968).

ers,[54] it is consistent with the remedial purposes of the statute. Indeed, the dissent's concern for the employer will prove unwarranted if the employer simply investigates the claim and responds reasonably according to the needs of the situation. The employer thus would establish a defense against claims of intentional racial discrimination that may grow out of the complaint,[55] while the employee would obtain some satisfaction from the knowledge that the employer is aware of the problem and is taking measures to remedy it. Moreover, a holding contrary to the majority's would permit an employer to harass a minority employee/supervisor indirectly by condoning through inaction racial abuse originating in the lower working ranks.

The *Erebia* court's holding that evidence of racial abuse emanating from a small number of employees working below the plaintiff is sufficient to establish a hostile working environment's existence lowers the standard which must be met to prove such a claim. Although the *Erebia* court diverged from prior precedent to the extent that it did not require evidence of widespread racial abuse to establish the existence of a hostile working environment, the court nonetheless acted in a manner entirely consistent with the purpose and policies underlying section 1981. Indeed, if section 1981 is to contribute to the deterrence and prevention of racial discrimination in the workplace, it must be accorded "a sweep as broad as its language."[56]

E. *A Continued Rejection of Comparable Worth: American Federation of State, County, and Municipal Employees v. Washington[1]

Title VII of the Civil Rights Act of 1964[2] prohibits sex discrimination in employment situations.[3] The Supreme Court has favored a broad interpretation of Title VII's prohibition to guarantee maximum protection for victims of sex discrimination.[4] In the

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[54] The dissent maintained that holding the employer liable for the racial slurs uttered by one employee working beneath the plaintiff was tantamount to holding the employer vicariously liable for an employee's bigotry. 772 F.2d at 1261, 37 FEP Cases at 1829 (Kennedy, J., dissenting). See *supra* notes 42–48 and accompanying text for a discussion of the dissent's reasoning in *Erebia*.

[55] *See DeGrace*, 614 F.2d at 803, 21 FEP Cases at 1448, where the court emphasized that an employer who takes reasonable steps to correct and prevent racial harassment is not subject to liability.

[56] *Jones*, 392 U.S. at 437 (citing U.S. v. Price, 383 U.S. 787, 801 (1966)).

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[1] 770 F.2d 1401, 38 FEP Cases 1353 (9th Cir. 1985).

[2] 42 U.S.C. § 2000e (1982).

[3] Title VII states in relevant part:

> (a) It shall be an unlawful employment practice for an employer —
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> (1) to fail or refuse to hire or to discharge any individual . . . with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) 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 effect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1982).

[4] *See* County of Washington v. Gunther, 452 U.S. 161, 178, 25 FEP Cases 1521, 1527 (1981).

labor area, the Court has held that Title VII prohibits discrimination both in hiring[5] and in compensation.[6]

Plaintiffs may raise claims under Title VII using either the theory of disparate impact or the theory of disparate treatment.[7] Under the disparate impact theory, a plaintiff may establish a prima facie case of discrimination by showing that an employer's facially neutral employment standards have a disproportionate effect on a group protected by Title VII.[8] The plaintiff does not have to prove that the employer intended to discriminate in establishing the standards.[9] The plaintiff may use statistical evidence to demonstrate the disproportionate impact.[10] Once the prima facie case is established, the burden then falls on the employer to prove that the standards are job-related and serve a legitimate purpose.[11] If the employer proves this, the plaintiff then may show that there are other nondiscriminatory employment standards that would satisfy the employer's goals.[12]

Under a theory of disparate treatment, the plaintiff establishes a Title VII violation by showing that the employer treated a group protected by Title VII differently than other groups.[13] The plaintiff in a disparate treatment case must prove that the employer

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[5] Dothard v. Rawlinson, 433 U.S. 321, 328–29, 15 FEP Cases 10, 13–14 (1977) (height and weight requirements for prison guards discriminates against women applicants in violation of Title VII).

[6] *Gunther*, 452 U.S. at 180–81, 25 FEP Cases at 1529 (paying male employees the full amount of their evaluated worth while paying female employees 70% of their evaluated worth violated Title VII).

The Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1982), prohibits sex-based discrimination in compensation for jobs that are the same or substantially the same, based on skill, responsibility, effort and working conditions. *Gunther*, 452 U.S. at 168, 25 FEP Cases at 1523. Title VII is linked to the Equal Pay Act (EPA) by the Bennett Amendment to Title VII, 42 U.S.C. § 2000e-2(h) (1982), which prohibits discrimination in compensation based on sex. *See Gunther*, 452 U.S. at 167–68, 25 FEP Cases at 1523–24. The EPA sets out four defenses to this prohibition, namely that the pay difference is not discriminatory if it is based on: "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex . . . ." 29 U.S.C. § 206(d)(1) (1982). The Supreme Court has held that claims of wage discrimination, however, are not limited to the types of discrimination covered by the EPA but may also be brought under Title VII. *See Gunther*, 452 U.S. at 170–71, 25 FEP Cases at 1524–25.

[7] International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15, 14 FEP Cases 1514, 1519 n.15 (1977).

[8] *Dothard*, 433 U.S. at 329–30, 15 FEP Cases at 14.

[9] *Id.* at 328, 15 FEP Cases at 13–14.

[10] *Id.* at 329–30, 15 FEP at 14. The plaintiffs in *Dothard* used the national average for height and weight of men and women to demonstrate that the requirements had a disproportionate impact on women. *Id.*

[11] *Id.* at 329, 15 FEP Cases at 14.

[12] *Id.*

[13] *Teamsters*, 431 U.S. at 335–36, 335 n.15, 14 FEP Cases at 1519 & n.15.

The four factors of a prima facie case include: 1) the plaintiff is the member of a group protected by Title VII, 2) the plaintiff applied and was qualified for a job for which the employer was looking for workers, 3) the plaintiff was refused the job and 4) after rejecting the plaintiff the employer continued to look for workers. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 5 FEP Cases 965, 969 (1973). The factors apply to a hiring discrimination case, and the Court noted that these factors may not apply to all factual situations. *McDonnell Douglas*, 411 U.S. at 802 n.13, 5 FEP Cases at 969 n.13.

One suggested list of factors for a prima facie case of wage discrimination is: that plaintiffs

intended to discriminate against the protected group.[14] In some situations, the employer's discriminatory motive may be inferred from the different treatment of the two groups.[15] Plaintiffs may use statistics to establish the disparate treatment, but courts generally require that the statistics be supported with other evidence, such as direct testimony of discriminatory treatment.[16]

Plaintiffs have also used the theory of comparable worth in claims of wage discrimination under Title VII.[17] The comparable worth doctrine states that employees in jobs requiring *comparable*, although not equal, skill, effort, and responsibility should be paid the same salary.[18] The theory underlying comparable worth is that different types of jobs, which have different but comparable responsibilities, must have the same value to an employer.[19] If the comparable jobs do not pay the same salary, this theory postulates, there must be a discriminatory reason for the difference in pay.[20]

Plaintiffs who have alleged Title VII violations using the comparable worth doctrine have been unsuccessful in the federal courts.[21] In *Christenson v. Iowa*,[22] the Eighth Circuit rejected the comparable worth theory, holding that setting wages based on market rates did not violate Title VII as long as men and women both had equal access to the higher paying jobs. In *Lemons v. City and County of Denver*,[23] the Tenth Circuit also rejected a

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"(1) are members of a protected class (2) occupying a sex-segregated job classification (3) that is paid less than a (4) sex-segregated job classification occupied by men and (5) that the two job classifications . . . are so similar in their requirements of skill, effort, and responsibility, and working conditions that it can reasonably be inferred that they are of comparable value to an employer." Briggs v. City of Madison, 536 F. Supp. 435, 445, 28 FEP Cases 739, 748 (W.D. Wis. 1982) (holding that plaintiffs could establish a prima facie case of wage discrimination under the comparable worth theory but that no discrimination existed if the wages were based on the marketplace).

[14] *Id.*

[15] *Id.* at 335 n.15, 14 FEP Cases at 1519 n.15.

[16] *See id.* at 339–40, 14 FEP Cases at 1520–21. The plaintiffs in *Teamsters* provided a statistical breakdown of Negroes and Spanish-surnamed Americans hired by the company and their percentage within each job catagory. *Id.* at 337–38, 14 FEP Cases at 1520. Plaintiffs also gave personal testimony that the employer told them their chances for promotion were not good because they were minorities. *Id.* at 338 n.19, 14 FEP Cases at 1520 n.19.

[17] *See, e.g.*, American Nurses' Ass'n v. Illinois, 783 F.2d 716, 722, 40 FEP Cases 244, 248 (7th Cir. 1986); Lemons v. City and County of Denver, 620 F.2d 228, 229, 22 FEP Cases 959, 959 (10th Cir.), *cert. denied*, 449 U.S. 888, 23 FEP Cases 1668 (1980); Christensen v. Iowa, 563 F.2d 353, 357, 16 FEP Cases 232, 235–36 (8th Cir. 1977).

[18] *See* American Nurses' Ass'n v. Illinois, 606 F. Supp. 1313, 1315, 37 FEP Cases 705, 706 (N.D. Ill. 1985), *aff'd*, 783 F.2d 716, 40 FEP Cases 244 (7th Cir. 1986).

[19] *See Lemons*, 620 F.2d at 229, 22 FEP Cases at 959.

[20] *Id.*

[21] *See, e.g., American Nurses*, 783 F.2d at 722, 40 FEP Cases at 248–49; *Lemons*, 620 F.2d at 229–30, 22 FEP Cases at 960; *Christensen*, 563 F.2d at 357, 16 FEP Cases at 235–36.

[22] 563 F.2d 353, 357, 16 FEP Cases 232, 235–36 (8th Cir. 1977) (court upheld state university's modification of a comparable worth based salary scheme to reflect market forces which resulted in higher salaries for predominantly male physical plant workers than for predominantly female clerks of the same job grade).

[23] 620 F.2d 228, 229–30, 22 FEP Cases 959, 960 (10th Cir.), *cert. denied*, 449 U.S. 888, 23 FEP Cases 1668 (1980) (court upheld salary scheme which classified jobs and paid salaries comparable to the wages paid for the jobs in the surrounding community where plaintiffs claimed that the use of market wages incorporated the market's historical discrimination against nurses).

The Fifth Circuit rejected a theory similar to comparable worth. Plemer v. Parsons-Gilbane, 713 F.2d 1127, 1134, 32 FEP Cases 1351, 1356 (5th Cir. 1983). The plaintiff in *Plemer* argued that

comparable worth claim, holding that Congress expressly had rejected the comparable worth theory and, moreover, there was no Title VII violation as long as there were equal job opportunities for men and women and equal pay for equal work.

In *County of Washington v. Gunther*,[24] decided after *Christenson* and *Lemons*, the Supreme Court opened up the possibility that comparable worth claims could succeed under Title VII. The Court in *Gunther* held that claims for sex-based discrimination in job compensation may be brought under Title VII.[25] Title VII, the Court explained, was designed to cover more types of discrimination than the Equal Pay Act and should be interpreted broadly so as not to deprive victims of discrimination of a possible remedy.[26] In concluding that claims for discrimination in pay are not limited to those claims allowed under the EPA, however, the Court expressly declined to decide the precise limits of a Title VII wage discrimination suit.[27] The Court did note, however, that the case before it did not involve the doctrine of comparable worth.[28]

During the *Survey* year, in *American Federation of State, County, and Municipal Employees v. Washington*[29] (*AFSCME*), the Ninth Circuit also rejected the doctrine of comparable worth, holding that reliance upon the market to set wages did not violate Title VII. *AFSCME* is significant because it is the first circuit court case[30] to decide the validity of a comparable worth claim under Title VII after the Supreme Court's decision in *Gunther*, which had raised the possibility that the comparable worth doctrine might be successful under a liberal reading of Title VII. The Ninth Circuit's decision effectively denies employees the possibility of recovery under Title VII for wage discrimination using the comparable worth theory.

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the two jobs involved were not dissimilar enough to warrant a large disparity in pay. *Id.* The court in *Plemer*, however, expressly stated that it was not dealing with a comparable worth issue. *Id.* at 1134, 32 FEP Cases at 1355.

Prior to its rejection of the comparable worth theory in American Fed'n of State, County, and Mun. Employees v. Washington, 770 F.2d 1401, 1408, 38 FEP Cases 1353, 1360 (9th Cir. 1985) (*AFSCME*), the Ninth Circuit had rejected a challenge by the faculty of the Nursing School of the University of Washington that their salary be comparable to the other schools in the University, as opposed to other nursing schools. Spaulding v. University of Wash., 740 F.2d 686, 697, 35 FEP Cases 217, 223–24 (9th Cir.), *cert. denied*, 105 S. Ct. 511, 36 FEP Cases 464 (1984). The court rejected a disparate treatment claim because the court concluded that the work at the different schools was not substantially equal. *Id.* at 700, 35 FEP Cases at 226. The Ninth Circuit further held that the University's reliance on the market to set wages was not a policy which could be challenged under disparate impact. *Id.* at 707–08, 35 FEP Cases at 231–32. The court declined to rule on whether reliance on the market would be a defense to a successful prima facie disparate treatment claim. *Id.* at 699 n.7, 35 FEP Cases at 225 n.7.

[24] 452 U.S. 161, 166, 25 FEP Cases 1521, 1522 (1981).

[25] *Id.* at 180, 25 FEP Cases at 1528.

[26] *Id.* at 178, 25 FEP Cases at 1527.

[27] *Id.* at 181, 25 FEP Cases at 1529.

[28] *Id.* at 166, 25 FEP Cases at 1522. After *Gunther*, the Equal Employment Opportunity Commission (EEOC) also held that a comparable worth claim did not establish a Title VII violation where there were equal job opportunities for both sexes. EEOC Dec. No. 85-8, 37 FEP Cases 1889 (1985).

[29] 770 F.2d 1401, 1408, 38 FEP Cases 1353, 1360 (9th Cir. 1985).

[30] The Seventh Circuit also has recently rejected a comparable worth claim where the salary scale was tied to the market. American Nurses' Ass'n v. Illinois, 783 F.2d 716, 722, 40 FEP Cases 244, 248–49 (7th Cir. 1986).

The plaintiffs in *AFSCME* were state employees in jobs where women made up seventy percent or more of the workers in that particular classification.[31] In 1974, the state of Washington conducted a survey of predominantly male and predominantly female job classifications (jobs with seventy percent or more of either male or female employees) that showed that the predominantly female job classifications were paid twenty percent less than the male classifications for jobs of comparable worth.[32] The State established the salary levels for different job classifications based upon the prevailing market rates, determined from a bi-annual survey of public and private employee salaries.[33]

In 1981, the plaintiffs filed charges with the Equal Employment Opportunity Commission (EEOC), alleging that the state's salary system violated Title VII's prohibition against sex discrimination in employment.[34] The EEOC did not act on the complaint, and the United States Department of Justice subsequently issued the plaintiffs a right-to-sue letter without reference to the merit of the plaintiffs' claims.[35] In 1982, AFSCME filed suit in the United States District Court in Washington, seeking immediate implementation of a salary scale based on comparable worth.[36] The district court held for the plaintiffs, stating that sex discrimination was the only reason behind the State's salary scheme.[37] The district court ordered immediate implementation of a comparable worth salary scheme[38] and the payment of back wages to the plaintiffs from September 1979 to date.[39] The State appealed to the Court of Appeals for the Ninth Circuit.[40] The Ninth Circuit reversed, holding that the State was justified in basing its salaries on prevailing

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[31] *AFSCME*, 770 F.2d at 1403, 38 FEP Cases at 1355. The plaintiffs were represented by AFSCME and the Washington Federation of State Employees (WFSE). *Id.*

[32] *Id.* at 1403, 38 FEP Cases at 1356. The state assigned numerical values to four factors to determine the worth of a job. *Id.* The four factors were knowledge and skills, mental demands of the job, accountability and working conditions. *Id.* A job could have a possible maximum value of 600, weighted as follows: knowledge and skills–280 points, mental demands of the job–140 points, accountability–160 points, and working conditions–20 points. *Id.* Similar studies were made in 1976 and 1980. *Id.*

[33] *Id.* at 1403, 38 FEP Cases at 1355. The results of the market surveys were reported to state personnel boards that made salary recommendations to the State Budget Director. *Id.* at 1403, 38 FEP Cases at 1355–56. The Director placed his recommendations in a proposed budget to the governor, who presented the budget to the state legislature. *Id.* at 1403, 38 FEP Cases at 1356. The legislature then voted on the budget and fixed the salaries. *Id.*

[34] *Id.*

[35] *Id.* The letter did not comment on the merit of plaintiffs' claims. *Id.* If the EEOC decides not to bring a complaint, the Attorney General issues a right-to-sue letter if the plaintiffs' claims are made against a governmental body, and the EEOC issues the letter if the plaintiffs challenge the actions of a private party. 42 U.S.C. § 2000e-5(f)(1) (1982). The complaining party then has ninety days to bring an action against the party allegedly violating Title VII. *Id.*

[36] *AFSCME*, 770 F.2d at 1403, 38 FEP Cases at 1356. The case was American Fed'n of State, County, and Mun. Employees v. Washington, 578 F. Supp. 846, 33 FEP Cases 808 (W.D. Wash. 1983) (*AFSCME I*).

[37] *AFSCME I*, 578 F. Supp. at 866, 33 FEP Cases at 822. Before the district court case was decided, Washington adopted a new salary scheme based on comparable worth to be phased in over a ten year period. *AFSCME*, 770 F.2d at 1403, 38 FEP Cases at 1356.

[38] *AFSCME I*, 578 F. Supp. at 868, 33 FEP Cases at 824.

[39] *Id.* at 871, 33 FEP Cases at 826.

[40] *AFSCME*, 770 F.2d at 1403, 38 FEP Cases at 1355.

market wages and that there was no proof of a discriminatory motive in basing wages on the marketplace.[41]

The Ninth Circuit began its discussion by defining comparable worth and outlining the applicable statutes.[42] The theory of comparable worth, stated the court, assumes that there is sex-based wage discrimination where employees in job classifications filled primarily by women are paid less than employees in job classifications filled primarily by men and the job classifications are of equal value.[43] Title VII, the court explained, prohibited job classifications that deprived people of job opportunities based on their gender.[44] The Bennett Amendment to Title VII,[45] the court elaborated, linked Title VII to the Equal Pay Act and prohibited discrimination in compensation based on sex, unless the different job classifications were justified by one of the Equal Pay Act's four defenses.[46]

The court then reviewed the legislative and judicial interpretations of the statutes.[47] According to the court, there was no indication in the legislative history of the relevant statutes that Congress mandated salary structures based on comparable worth.[48] The court noted that the legislative history of the EPA explicitly rejected the notion of comparable *work*.[49] There was no discussion at all of comparable worth in the legislative history of either Title VII or the Bennett Amendment, the court added.[50] Examining the Supreme Court's interpretation of the statutes, the Ninth Circuit noted that although the Court in *Gunther* allowed wage discrimination suits to be brought on grounds other than equal pay, the Court explicitly declined to rule on whether a suit could be brought under the comparable worth doctrine.[51]

The Court then reviewed the disparate impact and disparate treatment theories under which the district court had granted relief to the plaintiffs.[52] To establish a Title VII claim under the disparate impact theory, the court explained, the plaintiff must show that a facially neutral business practice has a disproportionately adverse effect upon a group protected by Title VII.[53] There is no need to make a separate showing of discriminatory intent under disparate impact, the court noted, because the employer's practice is so focused and specific that the court should be able to determine from the employer's explanation of the practice whether it served a legitimate purpose.[54]

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[41] *Id.* at 1408, 38 FEP Cases at 1360.

[42] *Id.* at 1404, 38 FEP Cases at 1356.

[43] *Id.*

[44] *Id.*

[45] 42 U.S.C. § 2000e-2(h) (1982).

[46] *AFSCME*, 770 F.2d at 1404, 38 FEP Cases at 1356. For a list of the four defenses under the EPA, see *supra* note 6.

[47] *Id.* at 1404, 38 FEP Cases at 1357. The statutes the court discussed were Title VII and the EPA. *Id.*

[48] *Id.*

[49] *Id.* (citing 109 CONG. REC. 9197–9208 (remarks of Rep. Goodell), 9196 (remarks of Rep. Frelinghuysen), 9197–98 (remarks of Reps. Griffin and Thompson) (1963)).

[50] *Id.*

[51] *Id.* at 1404–05, 38 FEP Cases at 1357 (citing *Gunther*, 452 U.S. at 166, 168–71, 25 FEP Cases at 1522, 1524–25).

[52] *Id.* at 1405, 38 FEP Cases at 1357.

[53] *Id.* (citing Dothard v. Rawlinson, 433 U.S. 321, 328–29, 15 FEP Cases 10, 13–14 (1977); Griggs v. Duke Power Co., 401 U.S. 424, 430–31, 3 FEP 175, 177 (1971)).

[54] *Id.*

The Ninth Circuit proceeded to examine the plaintiffs' disparate impact claim.[55] The court rejected the plaintiffs' claim that using prevailing market rates to set salaries had a disproportionate impact upon women because women historically have received lower wages than men.[56] The court noted that disparate impact analysis was limited to specific employment practices which focus on a certain point in the job selection process.[57] In this situation, the court noted, the disparate impact theory was not appropriate because there were too many factors involved in the salary decision and in setting salaries in the market itself.[58] Due to the complexities involved in computing salaries, the court concluded, the plaintiffs could not establish a Title VII claim under disparate impact.[59]

The court then turned to the plaintiffs' disparate treatment claim.[60] The court explained that under disparate treatment, the plaintiffs had to establish the employer's discriminatory motive.[61] Either direct or circumstantial evidence, the court elaborated, could prove discriminatory motive.[62] Direct evidence, the court noted, would include specific examples of how the employer treated members of a group protected under Title VII.[63] Circumstantial evidence, the court continued, would include the use of statistics to show the effect of a particular practice upon a protected group.[64] The court concluded, however, that the plaintiffs failed to establish discriminatory intent through either direct or circumstantial evidence.[65]

The Ninth Circuit first examined the plaintiffs' contention that discriminatory intent could be inferred from the state's choice of using market wages to establish its salary structure.[66] This contention failed for two reasons, the court explained.[67] First, the court stated, Washington had not created a sex differential in the marketplace.[68] Therefore, the court concluded, there was no culpability on the part of the State, and culpability is

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[55] *Id.*

[56] *Id.*

[57] *Id.* at 1405–06, 38 FEP Cases at 1357–58 (citing Atonio v. Wards Cove Packing Co., 768 F.2d 1120, 1132, 38 FEP Cases 1170, 1180 (9th Cir. 1985). The Ninth Circuit cited examples such as height and weight requirements that resulted in excluding women, high school diploma or standardized test requirements that affected minorities, or exclusion of applicants with arrest records that limited job opportunities for minorities. *Id.* (citing *Dothard*, 433 U.S. at 328–29, 15 FEP Cases at 13–14 (height and weight); *Griggs*, 401 U.S. at 430–31, 3 FEP Cases at 177 (diplomas); Gregory v. Litton Sys., 472 F.2d 631, 632, 5 FEP Cases 267, 267 (9th Cir. 1972) (arrest records)).

[58] *Id.* at 1406, 38 FEP Cases at 1358. The court noted that surveys, budget proposals, agency hearings, and executive and legislative action were among other factors considered in the salary decision. *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.* Disparate treatment, in contrast to disparate impact, requires a showing of discriminatory intent, the court stated. *Id.* at 1405, 38 FEP Cases at 1357. Such intent, the court explained, must go beyond mere knowledge of the consequences of an employment policy. *Id.* An employer acts with discriminatory intent, the court elaborated, only if it chooses an employment policy because of the policy's impact, and not in spite of the impact. *Id.*

[62] *AFSCME*, 770 F.2d at 1406, 38 FEP Cases at 1358.

[63] *Id.*; *see McDonnell Douglas Corp.*, 411 U.S. at 804, 5 FEP Cases at 970.

[64] *AFSCME*, 770 F.2d at 1406, 38 FEP Cases at 1358; *see McDonnell Douglas Corp.*, 411 U.S. at 805, 5 FEP Cases at 970.

[65] *AFSCME*, 770 F.2d at 1406, 38 FEP Cases at 1358.

[66] *Id.*

[67] *Id.*

[68] *Id.*

an important aspect of intent.[69] Although Washington was free to establish a comparable worth policy, the court added, Title VII did not require the State to do so because the State had not created the inequality in the market.[70]

The court also noted that there was no evidence that the State had been motivated by sex discrimination in setting the salaries.[71] The court elaborated on the use of the market to determine wages.[72] The value of a job, the court stated, depends on more factors than just the actions performed in that job.[73] The availability of workers and the effectiveness of unions are other considerations that may effect wages, the court explained.[74] The free market system is not inherently suspect, the court reasoned, and there was no evidence in the legislative history of Title VII to indicate that Congress intended "to abrogate fundamental economic principles such as the laws of supply and demand."[75] Moreover, the court noted, Title VII was designed to ensure equal opportunity in employment, and there was no evidence that the state had barred access to jobs.[76]

The court next examined the plaintiffs' use of statistics to prove discriminatory intent.[77] The court cautioned that statistics alone could not prove discriminatory intent, but instead, independent, nonstatistical evidence had to support the statistics.[78] The plaintiffs' statistical evidence, the court observed, consisted of testimony linking sex-separated jobs and sex-based wage discrimination that allegedly showed that although the state no longer segregated jobs by sex, the effects of that discrimination still resulted in lower wages for women.[79] The plaintiffs supported these statistics, the court noted, with evidence that the state directed advertising for certain jobs to a sex-segregated classified section of the newspaper, although this practice essentially had ended in 1972.[80] The statistical and supporting evidence were insufficient to prove discriminatory intent, according to the court, because none of the individual plaintiffs presented testimony regarding specific acts of sex discrimination, and the statistical evidence only bore an indirect relationship to salaries.[81]

The court then rejected the plaintiffs' final argument under disparate treatment, that is, that a study commissioned by an employer should bind the employer to institute a system of comparable worth if the study shows differences in pay between men and women.[82] The court first stated that it was debatable whether a comparable worth system was feasible.[83] Moreover, the court noted, it did not want to discourage employers from conducting job evaluation studies.[84] Because the results of the studies may vary depend-

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[69] *Id.* at 1407, 38 FEP Cases at 1358.
[70] *Id.* at 1407, 38 FEP Cases at 1359.
[71] *Id.* at 1406, 38 FEP Cases at 1358.
[72] *Id.* at 1407, 38 FEP Cases at 1358.
[73] *Id.* at 1407, 38 FEP Cases at 1358–59.
[74] *Id.* at 1407, 38 FEP Cases at 1359.
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.* at 1408, 38 FEP Cases at 1359.
[80] *Id.* at 1407–08, 38 FEP Cases at 1359.
[81] *Id.*
[82] *Id.*
[83] *Id.* at 1408, 38 FEP Cases at 1360.
[84] *Id.*

ing on the factors considered and the weight placed on each factor, the court elaborated, it would be unfair to bind the employers to the results.[85] The court concluded that the plaintiffs failed to establish disparate treatment and that absent a showing of discriminatory intent, the state's reliance on the market for setting wages did not violate Title VII.[86]

The Ninth Circuit's decision in *AFSCME* is significant for at least two reasons. First, it is the first circuit court case to address the issue of comparable worth after the Court's decision in *Gunther*, in which the Court had made comparable worth a possible theory for recovery under Title VII.[87] Second, in holding that employers may base wages on market rates, the *AFSCME* court has established an effective defense that makes it virtually impossible for plaintiffs to win comparable worth cases under Title VII unless the employer has blatantly practiced sex discrimination.[88]

The Supreme Court has stated that Title VII should be interpreted broadly to offer a remedy to victims of discrimination.[89] The *AFSCME* court was correct in allowing plaintiffs to establish a prima facie case of sex discrimination based upon the doctrine of comparable worth because this advances the goals of Title VII without placing an undue burden on employers. The ultimate burden of proving discriminatory intent still rests with the plaintiff.[90] Establishing a prima facie case merely forces the employer, who is in the best position to introduce evidence regarding its salary decisions, to explain its actions.[91] The purpose of the prima facie case is not to eliminate all possible explanations for an employer's actions, just many of the possibilities.[92] If jobs are of comparable worth

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[85] *Id.*

[86] *Id.*

[87] *Gunther*, 452 U.S. at 181, 25 FEP Cases at 1529. The Seventh Circuit, in *American Nurses' Ass'n v. Illinois*, 783 F.2d 716, 40 FEP Cases 244 (7th Cir. 1986), decided after *AFSCME*, also has rejected a claim raised under the comparable worth doctrine. *American Nurses*, 783 F.2d at 722, 40 FEP Cases at 248–49.

[88] *See AFSCME*, 770 F.2d at 1407–08, 38 FEP Cases at 1359. The *AFSCME* court implied that in order to win their case, plaintiffs would have to show that there had been discrimination that resulted in deliberately placing women in the lower-paying jobs. *Id.* This would be more akin to discrimination in hiring than discrimination in compensation. The *AFSCME* court also stated that discriminatory intent could not be inferred and liability imposed simply because employers knew that predominantly male jobs paid higher salaries. *Id.* at 1408, 38 FEP Cases at 1359.

Prior to *AFSCME*, the United States District Court of the Western District of Wisconsin held that although plaintiffs could establish a prima facie case of discrimination under the comparable worth theory, the employer's reliance on the market to set wages was a defense to the prima facie case unless the employer had created the market conditions. *Briggs*, 536 F. Supp. at 445, 447–48, 28 FEP Cases at 748, 750–51.

[89] *Gunther*, 452 U.S. at 178, 25 FEP Cases at 1527.

[90] The plaintiffs have the initial burden of establishing a prima facie case, and if they are successful, the employer then must provide an explanation of its practices. *McDonnell Douglas*, 411 U.S. at 802, 5 FEP Cases at 969.

[91] *See Briggs*, 536 F. Supp. at 449, 28 FEP Cases at 749.

[92] Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253–54, 25 FEP Cases 113, 115–16 (1981). The procedure for adjudicating a Title VII claim requires the plaintiff to establish a prima facie case of discrimination. *Id.* The defendant then may rebut the claim by articulating a nondiscriminatory purpose for the challenged practice. *Id.* at 254–55, 25 FEP Cases at 116. The plaintiff then may prove that the employer's asserted nondiscriminatory reason is a mere pretext for discrimination, by showing that discrimination is a more likely reason for the practice or that the court should give no credence to the employer's assertions. *Id.* at 256, 25 FEP Cases at 116.

to an employer, it is a reasonable inference that the employer would pay both jobs the same salary unless discrimination was involved.[93]

The plaintiff in a comparable worth case should be able to establish the prima facie case under either disparate impact or disparate treatment. The *AFSCME* court rejected a disparate impact challenge to the state's reliance on the market because the court concluded that too many factors were involved to judge adequately the employer's reasons for choosing such a policy to set wages.[94] The *AFSCME* court, however, was too quick to reject a disparate impact analysis. The plaintiffs could have directed their challenge to the state's system of job classification, which paid higher salaries to male-dominated jobs.[95] This practice may be specific enough to warrant an analysis under the disparate impact theory.[96] The *AFSCME* court was correct, however, in allowing the plaintiffs to establish a prima facie case under the disparate treatment theory.[97] Jobs of comparable worth that pay different salaries create an inference of discriminatory intent that the employer may rebut by showing that there are nondiscriminatory reasons for the different salary levels.[98]

The *AFSCME* court also was correct in holding that an employer may use the market to set wages as long as the employer did not help create depressed wages for women in the market.[99] Prior cases deciding comparable worth issues consistently held that reliance on the market is a legitimate defense to charges of sex discrimination in compensation.[100] The courts have emphasized that Title VII requires that women have equal employment *opportunities*, including the opportunity to work at jobs that pay higher in the market.[101] The *AFSCME* court recognized this when it noted that if the plaintiffs had shown specific acts of discrimination against them in hiring, this evidence could be used to prove discriminatory intent in the salary classifications.[102] This absolute market defense may appear to be inconsistent with the *Gunther* Court's recognition of a need to interpret broadly the definition of employment opportunity to protect possible victims of discrimination.[103] In *Gunther*, however, which also involved a system that tied wages to market rates, the Court did not say that wages could not be based on the market. The Court merely held that if salaries are based on market rates, both predominantly male and predominantly female jobs must be paid the same percentage of the market rate.[104] The Court further observed that in *Gunther*, it did not have to make a subjective assessment

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[93] *See Briggs*, 536 F. Supp. at 445, 28 FEP Cases at 748. The *Briggs* court determined that the jobs in question were of comparable worth because the requirements of the jobs were very similar. *Id.*

[94] *AFSCME*, 770 F.2d at 1406, 38 FEP Cases at 1358.

[95] *See* Note, *The Comparable Worth Dilemma: Are Apples and Oranges Ripe for Comparison?*, 37 BAYLOR L. REV. 227, 246 (1985) [hereinafter Note].

[96] *Id.*

[97] *AFSCME*, 770 F.2d at 1406, 38 FEP Cases at 1358.

[98] *See Briggs*, 536 F. Supp. at 445, 28 FEP Cases at 748.

[99] *AFSCME*, 770 F.2d at 1406, 38 FEP Cases at 1358.

[100] *See id.* at 1408, 38 FEP Cases at 1360; *see also Lemons*, 620 F.2d at 229, 23 FEP Cases at 959–60; *Christensen*, 563 F.2d at 356, 16 FEP Cases at 235; *Briggs*, 536 F. Supp. at 447–48, 28 FEP Cases at 750–51. *Briggs* explicitly recognized that plaintiffs could establish a prima facie case under the comparable worth doctrine. *Briggs*, 536 F. Supp. at 445, 28 FEP Cases at 748.

[101] *See, e.g., Christensen*, 563 F.2d at 356, 16 FEP Cases at 235.

[102] *See AFSCME*, 770 F.2d at 1407–08, 38 FEP Cases at 1359.

[103] *Gunther*, 452 U.S. at 178, 25 FEP Cases at 1527.

[104] *Id.* at 181, 25 FEP Cases at 1528.

of the value of jobs, although it did not indicate whether this would be significant in future cases.[105] Thus, it is possible that as long as employers use the objective criteria of the market, the Court would be reluctant to look beyond those figures and hold employers liable.

AFSCME continues the trend of courts in denying sex discrimination claims based on the comparable worth theory. The Ninth Circuit held that if employers base wages on market rates, there is no sex discrimination even if predominantly female jobs are paid less. *AFSCME* is notable for reinforcing the proposition that employers are not required to rely on the results of studies that they have commissioned when setting wages. The approach taken by *AFSCME* and similar decisions gives comparable worth claimants the opportunity to be heard in court, but does not guarantee they will receive favorable results. With the market defense available to employers, it is virtually impossible for plaintiffs to establish liability under Title VII.

II. SEX DISCRIMINATION

A. **Emphasis on the Appearance of TV News Anchors Does Not Violate Title VII*: Craft v. Metromedia, Inc.[1]

Under Title VII of the Civil rights Act of 1964,[2] it is 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."[3] Many courts interpret Title VII, however, as permitting employers to enforce employment regulations relating to male and female employees' grooming and dress.[4] These courts

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[105] *Id.*

One final problem facing plaintiffs seeking to raise comparable worth claims involves evaluating the worth of jobs. The *Gunther* Court noted that it did not have to make a subjective assessment of the value of a particular job, nor was it required to quantify the impact of the discrimination. *Id.* at 181, 25 FEP Cases at 1528. Studies conducted by the employer are one source of data on the worth of jobs. *See AFSCME*, 770 F.2d at 1408, 38 FEP Cases at 1360. Courts may be reluctant to use employer studies, however, for fear of discouraging employers from making further studies. *See, e.g., AFSCME*, 770 F.2d at 1408, 38 FEP Cases at 1360. However, information regarding the value of jobs is something more readily available to the employer, and studies should be used if available, although employers should not be bound by the results. *See id.* The burden of actually proving the comparable worth of jobs should remain with the plaintiff. *See Briggs*, 536 F. Supp. at 446, 28 FEP Cases at 749.

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[1] 766 F.2d 1205, 38 FEP Cases 404 (8th Cir. 1985).

[2] §§ 701–718, 42 U.S.C. § 2000e–2-17 (1982).

[3] § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (1982).

[4] Barker v. Taft Broadcasting Co., 549 F.2d 400, 401, 14 FEP Cases 697, 697 (6th Cir. 1977) (employer's hair style regulation mandating a shorter hair length for men than for women does not violate Title VII); Earwood v. Continental Southeastern Lines, 539 F.2d 1349, 1351, 14 FEP Cases 694, 695 (4th Cir. 1976) (hair length is not an immutable characteristic, thus hair length regulations do not violate Title VII); Longo v. Carlisle DeCoppet & Co., 537 F.2d 685, 685, 12 FEP Cases 1668, 1668 (2d Cir. 1976) (per curiam) (requiring short hair on men and not on women does not violate Title VII); Knott v. Missouri Pac. R.R., 527 F.2d 1249, 1252, 11 FEP Cases 1231, 1233 (8th Cir. 1975) (employer's grooming code imposing their length restrictions on men but not women does not constitute sex discrimination); Willingham v. Macon Telegraph Publishing Co., 507 F.2d 1084, 1091, 9 FEP Cases 189, 194 (5th Cir. 1975) (en banc) (employer's grooming code prohibiting

differentiate between permissible employment regulations that distinguish between the sexes on the basis of *mutable* characteristics, such as modes of dress or cosmetic effects, and impermissible regulations that distinguish between the sexes on the basis of *immutable* characteristics such as race, national origin, color or sex.[5] Although employer dress and grooming standards have been held permissible,[6] employers must apply the standards evenhandedly[7] and the standards must not perpetuate a demeaning sexual stereotype.[8]

During the *Survey* year, in *Craft v. Metromedia, Inc.*,[9] the United States Court of Appeals for the Eighth Circuit upheld the federal district court decision that the defendant-employer's actions regarding the appearance of news anchorwoman, Christine Craft, were not sexually discriminatory and did not violate Title VII. The appellate court upheld the lower court's finding that the defendant's conduct with respect to the plaintiff, Christine Craft, including instruction in makeup and clothing, implementation of a clothing calendar, and close monitoring of her appearance were necessary and appropriate measures tailored to the plaintiff's individual shortcomings.[10] The court of

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the employment of men but not women with long hair was held not to violate Title VII); Baker v. California Land Title Co., 507 F.2d 895, 897–98, 8 FEP Cases 1313, 1314–15 (9th Cir. 1974) (employer's different hair length regulations for men and women do not violate Title VII); Dodge v. Giant Food, Inc., 488 F.2d 1333, 1336, 6 FEP Cases 1066, 1068 (D.C. Cir. 1973) (per curiam) (hair length regulations held not discriminatory); Fagan v. National Cash Register Co., 481 F.2d 1115, 1125, 5 FEP Cases 1335, 1342 (D.C. Cir. 1973) (hair length regulations held not discriminatory).

[5] *Willingham*, 507 F.2d at 1091–92, 9 FEP Cases at 194; *Baker*, 507 F.2d at 897, 8 FEP Cases at 1314.

[6] *See supra* note 4 and accompanying text.

[7] *See* Laffey v. Northwest Airlines, 374 F. Supp. 1382, 1387–88, 7 FEP Cases 687, 691–92 (D.D.C. 1974) (weight restrictions for female but not for male flight attendants violated Title VII unless defendant could show that female attendants were rendered physically incapable of performing duties because of weight), *aff'd*, 567 F.2d 429, 13 FEP Cases 1068 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086, 16 FEP Cases 998 (1978). Courts also have found violations of Title VII where dress codes imposed by employers require only one sex to wear uniforms. Carroll v. Talman Fed. Sav. Loan Ass'n of Chicago, 604 F.2d 1028, 1033, 20 FEP Cases 764, 768 (7th Cir. 1979) (only female employees were required to wear "appropriate business attire"), *cert. denied*, 445 U.S. 929, 22 FEP Cases 315 (1980); EEOC v. Clayton Fed. Sav. Loan Ass'n, 25 FEP Cases 841, 843 (E.D. Mo. 1981) (regulation requiring only female employees to purchase and wear uniforms violates Title VII). *See also Laffey*, 374 F. Supp. at 1388, 7 FEP Cases at 692 (defendant airline's policy of forbidding female cabin attendants from wearing eyeglasses but making no similar provision for male attendants was one of the many illegal practices engaged in by the airline).

[8] EEOC v. Sage Realty Corp., 507 F. Supp. 599, 610–11, 24 FEP Cases 1521, 1530–31 (S.D.N.Y. 1981) (court found violation of Title VII where plaintiff was discharged from her position as an office building lobby attendant for failing to wear a revealing and sexually provocative "Bicentennial" uniform); Marentette v. Michigan Host, Inc., 506 F. Supp. 909, 912, 24 FEP Cases 1665, 1666 (E.D. Mich. 1980) (Title VII violations found where waitresses were required to wear sexually suggestive clothing while waiters were not).

[9] 766 F.2d 1205, 1217, 38 FEP Cases 404, 413 (8th Cir. 1985) [hereinafter *Craft II*].

[10] *Id.* at 1208, 38 FEP Cases at 405. The Eighth Circuit considered three separate issues on appeal. This analysis of the case will focus on only one of these issues, Craft's Title VII claim against Metromedia. In addition to her Title VII claim, Craft brought an Equal Pay Act claim and a fraud count. Craft v. Metromedia, Inc., 572 F. Supp. 868, 870, 33 FEP Cases 153, 154 (W.D. Mo. 1983) [hereinafter *Craft I*]. In addition to reviewing the district court's finding on Craft's Title VII claim, the court of appeals reviewed the district court's decisions on these two counts. *Craft II*, 766 F.2d at 1217–21, 38 FEP Cases at 413–17.

With respect to the Equal Pay Act, Craft alleged that the defendant violated the Act in paying her less salary than similarly situated male employees. *Craft I*, 572 F. Supp. at 870, 33 FEP Cases

appeals concluded that the standards for appearance of employees of the defendant Metromedia's television station, KMBC, were not enforced more strictly for females than for males and that the standards themselves were not discriminatory.[11] The court of appeals found that Craft's arguments were essentially requests for reevaluations of the factual findings made by the lower court.[12] The appellate court concluded that in light of the substantial evidence supporting KMBC, it was not able to find that the district court's decision for the defendant was clearly erroneous.[13] The appellate court decision in *Craft* demonstrates the difficulty of reversing lower court discrimination findings which are always essentially factual findings.[14]

KMBC contacted Craft while she was working as a reporter in Santa Barbara, California and inquired if she was interested in auditioning for the co-anchor position.[15] Craft accepted KMBC's offer of a position as co-anchor in December of 1980.[16] Immediately after Craft began appearing on the news, KMBC's news director and station manager became concerned with Craft's clothing and makeup.[17] The KMBC news director, with the assistance of consultants, advised Craft regarding her makeup and dress as well as her presentation techniques.[18] Beginning in April 1981, the station arranged

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at 154. *See generally* Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1982) ("no employer . . . shall discriminate . . . by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex. . . ."). The jury returned a verdict for the defendant on Craft's Equal Pay Act claim, and the district court judge denied Craft's motion for a new trial. *Id.* at 879–80, 33 FEP Cases at 162. On appeal, Craft contended that the district court erred in excluding another woman's testimony that she was told she would not be hired to replace Craft if she held out for a salary comparable to the male co-anchor's. *Craft II*, 766 F.2d at 1221, 38 FEP Cases at 416. Furthermore, Craft argued that the district court erred in not allowing this woman to give her opinion that the station had created a low-paying female anchor position. *Id.* at 1221, 38 FEP Cases at 417. The court of appeals held that the district court did not clearly abuse the discretion it possessed with respect to the admission of evidence. *Id.* at 1221, 38 FEP Cases at 416. The court of appeals again found no abuse of discretion. *Id.* at 1221, 38 FEP Cases at 417.

In Craft's fraud count, she alleged that the defendant made intentional fraudulent misrepresentations to induce her to accept employment. *Craft I*, 572 F. Supp. at 870, 33 FEP Cases at 154. Craft, having had a previous bad experience with another network who gave her a "makeover' for her position hosting a television sports program, emphasized that she was only interested in the job if it did not involve a "makeover" of her appearance. *Craft II*, 766 F.2d at 1208, 38 FEP Cases at 406. KMBC assured Craft that they made some use of consultants who worked with the appearance and dress of on-air personnel. *Id.* In a trial, the jury awarded Craft $500,000 on the fraud count. *Id.* at 1210, 38 FEP Cases at 407. The district court judge granted a new trial on the fraud count, however, declaring himself "firmly convinced that his verdict is excessive and is the result of passion, prejudice, confusion, or mistake on the part of the jury." *Craft I*, 572 F. Supp. at 881, 33 FEP Cases at 163. The second trial resulted in a jury award of $325,000 to Craft. *Craft II*, 766 F.2d at 1210, 38 FEP Cases at 407. The defendant, Metromedia, contended on appeal that Craft failed to establish a submissable case of fraud and that the jury verdict in Craft's favor should be reversed. *Craft II*, 766 F.2d at 1208, 1217, 38 FEP Cases at 405, 413. The court of appeals reversed the jury verdict, finding that there was insufficient evidence for a reasonable jury to find that plaintiff's employer did not intend to perform in accordance with its representation that it would not "makeover" the plaintiff. *Id.* at 1220–21, 38 FEP Cases at 416.

[11] *Craft II*, 766 F.2d at 1212–16, 38 FEP Cases at 409–12.

[12] *Id.* at 1210, 38 FEP Cases at 408.

[13] *Id.* at 1217, 38 FEP Cases at 413.

[14] *See infra* notes 64–69 and accompanying text.

[15] *Craft II*, 766 F.2d at 1217, 38 FEP Cases at 413.

[16] *Id.* at 1208, 38 FEP Cases at 406.

[17] *Id.*

[18] *Id.*

for Craft to be provided with clothes approved by a consultant.[19] In May 1981, a consulting group called Media Associates tested viewer perceptions of KMBC's newscasts and discovered an overwhelmingly negative viewer response to Craft's appearance.[20] Following this poll, KMBC instituted a "clothing calendar" that allowed the station to closely monitor Craft's dress.[21]

Media Associates did additional testing of viewer response to Craft by a telephone survey of 400 persons in the Kansas City viewing area.[22] In comparison to the female co-anchors at KMBC's competitors, Craft trailed in almost every category the survey measured, including "good looks" and dress and image of a "professional anchor woman."[23] In August of 1981, the consulting firm recommended that KMBC replace Craft because she was having an extremely adverse impact on KMBC's acceptance among viewers.[24] After initial resistance, KMBC agreed and informed Craft that she would be reassigned as a reporter at no loss in pay or other contractual benefits.[25] Craft stated that the KMBC news director, Ridge Shannon, told her she was being reassigned because the audience perceived her as "too old, too unattractive, and not deferential enough to men."[26] Craft refused to accept her reassignment and shortly thereafter returned to California.[27]

Christine Craft filed a four count complaint against Metromedia, Inc. in January 1983 as a result of her reassignment from co-anchor to reporter by KMBC-TV in Kansas City, Missouri.[28] In count I of her complaint, Craft alleged that Metromedia, owner of KMBC-TV, discriminated against her on the basis of sex in violation of Title VII of the Civil Rights Act of 1964.[29] Craft also alleged fraud, violation of the Equal Pay Act based upon the differential between Craft's and the male co-anchor's salaries, and prima facie tort based upon KMBC's alleged intent to injure Craft.[30]

The district court entered judgment for Metromedia on the plaintiff's Title VII claim, rejecting the recommendation of the advisory jury that the plaintiff was a victim of sex discrimination.[31] The district court found that KMBC evenhandedly enforced

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[19] *Id.* at 1208–09, 38 FEP Cases at 406.

[20] *Id.* at 1209, 38 FEP Cases at 406.

[21] *Id.* The "clothing calendar" was a calendar given to Craft specifying the clothes and accessories that she was to wear for each day. *Id.* at 1209 n.2, 38 FEP Cases at 406 n.2.

[22] *Id.* at 1209, 38 FEP Cases at 406.

[23] *Id.*

[24] *Id.*

[25] *Id.* at 1209, 38 FEP Cases at 406–07.

[26] *Id.* at 1209, 38 FEP Cases at 407. KMBC news director, Shannon, denied making such a statement, and the district court found he did not make it. *Id.*

[27] *Id.*

[28] *Id.* at 1207, 1209, 38 FEP Cases at 405, 407.

[29] *Id.* at 1209, 38 FEP Cases at 407.

[30] *Id.* The allegation of a prima facie tort count was abandoned during the first trial and not submitted to the jury. *Id. See also Craft I*, 572 F. Supp. at 870, 33 FEP Cases at 154. This analysis will focus on the Title VII claim. See *supra* note 10 for a discussion of Craft's fraud and Equal Pay Act counts.

[31] *Craft II*, 766 F.2d at 1209, 38 FEP Cases at 407. There is no right to a jury trial in Title VII actions. Harmon v. May Broadcasting Co., 583 F.2d 410, 410, 18 FEP Cases 178, 178 (8th Cir. 1978). Rule 39(c) of the Federal Rules of Civil Procudure authorizes advisory use of the jury. *Craft II*, 766 F.2d at 1209 n.3, 38 FEP Cases at 407 n.3. The district court was free to accept or reject the advisory verdict. Chicago & Northwestern Ry. Co. v. Minnesota Transfer Ry. Co., 371 F.2d 129, 130 (8th Cir. 1967). *See Craft I*, 572 F. Supp. at 870, 33 FEP Cases at 154.

professional, business-like appearance standards for both male and female on-air personnel.[32] Any greater supervision of Craft's appearance, the district court concluded, was a necessary response to her "below-average aptitude in matters of clothing and makeup."[33]

Craft appealed the district court's adverse finding on her title VII claim.[34] The Eighth Circuit, however, affirmed the district court's judgment as to the Title VII issue.[35] Craft raised three arguments on appeal.

First, the court of appeals rejected Craft's argument that because her case involved direct evidence of discrimination, the district court erred in failing to shift the burden of persuasion to Metromedia to prove that no sexual bias was involved in the station's appearance standards and in the station's treatment of Craft.[36] The appellate court reasoned that the burden of persuasion is not shifted when the trier of fact does not find any direct evidence of discrimination.[37]

Second, Craft argued that she had established a Title VII violation through circumstantial evidence and that KMBC now was obligated to articulate a legitimate reason for her demotion to rebut the inference of discrimination.[38] The court of appeals noted that the ultimate issue was whether the defendant intentionally discriminated against the plaintiff.[39] Intentional discrimination is a factual issue, the court maintained, and the burden of proof remains with the plaintiff.[40]

Third, Craft argued that the district court erred in failing to find that KMBC's appearance standards were based on stereotypical images of women and were applied to women more vigorously than to men.[41] The court of appeals, however, rejected Craft's

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[32] *Craft I*, 572 F. Supp. at 877–78, 33 FEP Cases at 160–61.

[33] *Id.* at 878, 33 FEP Cases at 160–61.

[34] *Craft II*, 766 F.2d at 1210, 38 FEP Cases at 407–08. Craft also appealed the district court's adverse finding as to the Equal Pay Act count. *Id.* See *supra* note 10 for further discussion on the Equal Pay Act claim. Metromedia appealed the jury verdict entered for Craft on the fraud count. *Id.* at 1210, 38 FEP Cases at 407. On the fraud count, the first jury trial awarded Craft $375,000 in actual damages and $125,000 in punitive damages. *Id.* The district court found the verdict excessive and granted Metromedia a new trial. *Id.* On retrial, the jury again found for Craft, awarding $225,000 in actual damages and $100,000 in punitive damages. *Id.* Metromedia appealed this jury verdict and the court of appeals reversed. *Id.* at 1221, 38 FEP Cases at 416. See *supra* note 10 for a brief discussion of the appellate court's reasoning.

[35] 766 F.2d at 1210, 38 FEP Cases at 407.

[36] *Id.* at 1210–11, 38 FEP Cases at 408. See *infra* note 38 for discussion of the burden shifting rule.

[37] *Id.* at 1211, 38 FEP Cases at 408.

[38] *Id.* at 1211 & 1211 n.5, 38 FEP Cases at 408 & 408 n.5. The *Craft II* court noted that, according to the Supreme Court in *McDonnell Douglas Corp. v. Green*, after a party suffering from an adverse employment action proves facts sufficient to give rise to an inference of discriminatory motives, the burden shifts to the employer to give a legitimate reason for the employment decision. *Id.* at 1211 n.5, 38 FEP Cases at 408 n.5 (citing *McDonnell Douglas*, 411 U.S. 792, 802–05, 5 FEP Cases 965 (1973)). If the employer articulates such a reason, the court noted, then the aggrieved party has the opportunity to show that the employer's given reason was a pretext and that the employer actually acted upon discriminatory motives. *Id.*

[39] *Id.* at 1211, 38 FEP Cases at 408.

[40] *Id. See* Pullman-Standard v. Swint, 456 U.S. 273, 287–88, 28 FEP Cases 1073, 1079 (1982) (a finding of intentional discrimination is a factual finding); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253, 25 FEP Cases 113, 115 (1981) (the burden of proof on the intentional discrimination issue always remains with the plaintiff).

[41] *Craft II*, 766 F.2d at 1211, 38 FEP Cases at 408. The court of appeals observed that in the

argument, finding that Craft actually was contesting the district court's factual determination that the appearance standards were reasonable and were applied evenhandedly to males and females.[42] The appellate court, noting that Craft's arguments actually were requests for a reevaluation of the evidence and a rejection of the district court's factual findings, stressed its deference to the district court's factual findings.[43] The court explained that factual findings may be set aside only when clearly erroneous.[44] When two permissible views of the evidence exist, the court noted, the fact-finder's choice between them cannot be clearly erroneous.[45] Moreover, the evidence must be construed in the light most favorable to the party prevailing below,[46] the Eighth Circuit stated, and the burden is on the objecting party to demonstrate clear error in the factual findings.[47]

The court of appeals then reviewed the evidence in the case to determine if the district court had made a clear error. The court noted that conflicting evidence was presented to the district court on Craft's allegation that the KMBC news director told her she was being reassigned because she was too old, too unattractive, and not deferential enough to men.[48] In light of this conflicting evidence, the court of appeals refused to find that the district court clearly erred in believing the news director's denial that he made such a statement.[49]

The appellate court then addressed Craft's argument that the district court clearly erred in failing to find that KMBC enforced appearance standards more vigorously for female than for male on-air personnel.[50] The appellate court reviewed evidence of KMBC's treatment of other employees with regard to their appearance. The court recognized that one female on-air employee had never been criticized for her appearance while numerous males had been criticized with respect to their weight, hairstyle and

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grooming case of *Knott v. Missouri Pacific Railroad*, the Eighth Circuit held that appearance regulations distinguishing between the sexes are not discriminatory when the standards are reasonable and are enforced evenhandedly as to males and females. *Id.* (citing *Knott*, 527 F.2d 1249, 1252, 11 FEP Cases 1231, 1233 (8th Cir. 1975)).

[42] *Id.*

[43] *See id.* at 1211–12, 38 FEP Cases at 408–09.

[44] *Id.* at 1211, 38 FEP Cases at 408–09 (citing FED. R. CIV. P. 52(a)). Federal Rule of Civil Procedure 52(a) provides in part:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon . . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

[45] *Craft II*, 766 F.2d at 1212, 38 FEP Cases at 409 (citing Anderson v. City of Bessemer City, 105 S. Ct. 1504, 1512, 37 FEP Cases 396, 400 (1985)).

[46] *Id. See also* Tautfest v. City of Lincoln, 742 F.2d 477, 481, 117 L.R.R.M. 2182, 2184 (8th Cir. 1984) (court must view evidence on appeal in the light most favorable to the prevailing party).

[47] *Craft II*, 766 F.2d at 1212, 38 FEP Cases at 409. *See also* Aetna Casualty & Sur. Co. v. General Elec. Co., 758 F.2d 319, 323 (8th Cir. 1985) (burden on appellant to demonstrate error under Rule 52).

[48] *Craft II*, 766 F.2d at 1212, 38 FEP Cases at 409.

[49] *Id.* The appeals court quoted the *Anderson* case:

> [W]hen a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error.

Anderson, 105 S. Ct. at 1513, 37 FEP Cases at 401.

[50] *Craft II*, 766 F.2d at 1212–13, 38 FEP Cases at 409.

dress.[51] The appellate court found that the district court apparently had chosen not to believe other female KMBC employees who testified that the station overemphasized the appearance of on-air females.[52] The court of appeals found, as the district court did, that the inclusion of makeup and clothing criteria in the "standards of performance" by which Craft's work was evaluated and the absence of any appearance criteria in the male co-anchor's "standards of performance," reflected management's effort to respond to the individual problems of Craft.[53] The court of appeals upheld the district court's finding that KMBC enforced its appearance standards evenhandedly and simply was responding to Craft's individual problems.[54]

Next, the court of appeals addressed Craft's argument that apart from discriminatory enforcement of the standards, the appearance standards were per se discriminatory because they forced her to conform to a stereotypical female image.[55] Evidence showed Craft was advised to wear more blouses with feminine touches such as bows and ruffles because many of her clothes were too masculine.[56] The district court, however, found that the emphasis on feminine clothes was secondary to the focus on color coordination, the effect of studio lighting on clothing and makeup, and the need for conservatism to appeal to the Kansas City market.[57] The court of appeals observed that although there seemed to be an overemphasis by KMBC on appearance, the district court did not clearly err in finding that the appearence standards were permissable under Title VII.[58] The Eighth Circuit concluded that the district court was justified in holding that KMBC's appearence standards were shaped by neutral professional and technical factors and not by stereotypical female roles and images.[59]

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[51] *Id.* at 1213, 38 FEP Cases at 410. The court of appeals pointed to evidence showing that one female KMBC employee, Brenda Williams, had never been criticized for her appearance. *Id.* Moreover, the court noted that Mike Placke, also a KMBC employee, had been advised to lose weight, get better-fitting clothes, refrain from wearing sweaters, and tie his necktie in a certain manner. *Id.* Another male employee had been told to lose weight and a third male employee had been told to wear contact lenses and a hair piece and also had been given a makeup chart similar to the one given the plaintiff. *Id.* The KMBC director also claimed he discussed hair or moustache problems with four other male employees. *Id.*.

[52] *Id.* at 1214, 38 FEP Cases at 410. The Eighth Circuit noted that the district court rejected testimony by KMBC's clothing and makeup consultant and various female KMBC employees that the station emphasized the appearance of females more than males. *Id.* The court of appeals further observed that the district court chose not to believe testimony by KMBC employee, Pam Whiting, that Shannon said it was more important for herself and Craft than for the male co-anchor to look good on the air. *Id.* KMBC had also criticized Whiting's appearance and Whiting eventually left KMBC. *Id.*

[53] *Id.* at 1214, 38 FEP Cases at 410.

[54] *Id.* at 1213, 38 FEP Cases at 410.

[55] *Id.* at 1214, 38 FEP Cases at 410–11.

[56] *Id.* at 1214, 38 FEP Cases at 411.

[57] *Id.* at 1215, 38 FEP Cases at 411. The appellate court also observed that the "dos" and "don'ts" for female anchors included the need to avoid tight sweaters or overly "sexy" clothing and extreme high fashion. *Id.*

[58] *Id.* at 1215, 38 FEP Cases at 412.

[59] *Id.* The court of appeals also upheld the district court's findings that news stories were distributed evenly with respect to the male co-anchor and Craft. *Id.* at 1216, 38 FEP Cases at 412. The appeals court then evaluated and rejected Craft's argument that she was reassigned based upon a discriminatory interpretation of the telephone survey results. *Id.* The court found that there was insufficient evidence to justify a finding that the district court's conclusions were clearly erro-

In conclusion, the court of appeals explained that Craft's arguments as to the Title VII discrimination claims were essentially requests for redeterminations of factual as opposed to legal findings of the district court.[60] To reverse the district court findings, the appeals court observed, it would have had to assume a judicial role contrary to that designated by Rule 52(a) and Supreme Court precedent.[61] The *Craft* court stated that it was "not firmly convinced that any of [the district court's] conclusions were erroneous."[62] Thus, the Eighth Circuit upheld the district court's findings that KMBC was concerned equally with the appearence of its male and female on-air personnel and that any extra monitoring of Craft's appearence was a response to her individual shortcomings.[63]

Craft was unable to meet the heavy burden of showing "clear error" in the district court's adverse finding on her Title VII claim.[64] The refusal of the appellate court to reverse the district court's findings on the Title VII violation highlights the importance of the initial factual determination at the trial level. Because a finding of intentional discrimination is solely a factual finding and not a finding of law,[65] the prevailing party below is likely to prevail on appeal as well.

Rule 52(a) of the Federal Rules of Civil Procedure dictates that factual findings may be set aside only when clearly erroneous.[66] This clearly erroneous standard is a difficult burden for an appellant to overcome. The Supreme Court's elaboration on the language of Rule 52(a) has made it even more difficult for factual findings to be reversed. In *Anderson v. City of Bessemer City*,[67] the Supreme Court stated that "[w]here there are two permissable views of the evidence, the fact finder's choice between them cannot be clearly erroneous." This conclusion is based upon the theory that the trial judge is in the best position to evaluate factual evidence, especially when there is conflicting testimony from witnesses.[68] The *Anderson* court emphasized the crucial role of the district court in making

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neous. *Id.* Craft claimed the telephone survey on which she was rated poorly was designed to remove her because of her gender. *Id.* at 1216, 38 FEP Cases at 413. The court found, however, that the survey methods were acceptable and that Craft scored low on many neutral questions such as knowledge of Kansas City, journalism ability and apparent enjoyment of her job. *Id.*

Finally, the appellate court considered Craft's contention that the unlawfully discriminatory working conditions to which she was subjected constituted constructive discharge. *Id.* at 1217, 38 FEP Cases at 413. The court stated that Craft does not dispute that a constructive discharge claim requires a showing of work conditions that a reasonable person would find intolerable. *Id.* The court found, however, that Craft's argument failed because the court did not find that her working conditions were unlawfully discriminatory. *Id.* KMBC's reassignment of Craft and criticism of her appearance, the court of appeals concluded, was not done with an intent to force her to quit. *Id.* The court apparently required not only a finding that work conditions were intolerable, but also a finding that the conditions were instituted with an intent to force the employee to leave. *Id.* (citing Johnson v. Bunny Bread Co., 646 F.2d 1250, 1256, 25 FEP Cases 1326, 1331 (8th Cir. 1981)).

[60] *Id.* at 1217, 38 FEP Cases at 413. The court viewed Craft's argument as requesting the court of appeals to reevaluate the evidence in a light most favorable to her. *Id.*

[61] *Id. See supra* notes 43–47 and accompanying text. *See also* note 44 for the text of Rule 52(a).

[62] *Craft II*, 766 F.2d at 1217, 38 FEP Cases at 413.

[63] *Id.*

[64] *Id.* at 1221, 38 FEP Cases at 417.

[65] *See supra* note 40 and accompanying text.

[66] *Id.* at 1211, 38 FEP Cases at 408–09. *See* FED. R. CIV. P. 52(a).

[67] 105 S. Ct. at 1512, 37 FEP Cases at 400. *See also* Inwood Laboratories v. Ives Laboratories, 456 U.S. 844, 857–58 (1982).

[68] *Craft II*, 766 F.2d at 1212, 38 FEP Cases at 409. *See Anderson*, 105 S. Ct. at 1512, 37 FEP Cases at 401.

determinations as to the "variations in demeanor and tone of voice" of witnesses and "the listener's understanding of and belief in what is said."[69]

In the *Craft* case, however, doubts are raised as to the trial judge's interpretation of the evidence because of the conflicting finding of the advisory jury. The advisory jury of four women and two men found that Craft had been discriminated against on account of sex in violation of Title VII.[70] Because the advisory jury's finding is not binding on the district court, however, the court made its own findings of fact and conclusions which differed substantially from the jury's view of the case.[71] Although doubts exist about the trial judge's interpretation of the conflicting evidence, the court of appeals had little choice but to affirm the lower court's fact findings. In sum, the decision in *Craft* indicates that trial court conclusions are extremely important in discrimination cases where reversing these conclusions usually requires the reversal of a factual finding.

B. **Failure to Discourage Sexual Stereotyping in Partnership Selection Process Violates Title VII*: Hopkins v. Price Waterhouse[1]

Title VII of the Civil Rights Act of 1964[2] prohibits employers from discriminating against employees because of race, color, religion, sex or national origin.[3] Title VII was designed to achieve equal employment opportunities for all individuals by removing artificial barriers which operate to favor one group to the disadvantage of another.[4] By eliminating these discriminatory factors from consideration in employment decisions, employees can be judged on individual merit, rather than on classwide stereotypical assumptions.[5]

Demonstrating disparate treatment[6] among legally non-distinguishable classes of employees is one recognized approach to establishing an employer's liability for discrimination under Title VII.[7] Under a disparate treatment analysis, a plaintiff must establish

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[69] *Anderson*, 105 S. Ct. at 1512, 37 FEP Cases at 401–02.

[70] *Craft I*, 572 F. Supp. at 870, 33 FEP Cases at 154.

[71] *Id.*

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[1] 618 F. Supp. 1109, 38 FEP Cases 1630 (D.D.C. 1985).

[2] 42 U.S.C. § 2000e (1982).

[3] Section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1982), provides in pertinent part:

> (a)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 race, color, religion, sex, or national origin. . . .

[4] *See* Griggs v. Duke Power, 401 U.S. 424, 429–30, 3 FEP Cases 175, 177 (1971).

[5] *See*, Cooksey, *The Role of Law in Equal Employment Opportunity*, 7 B.C. INDUS. & COM. L. REV. 417, 421 (1966).

[6] Disparate treatment is where "[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin . . . .[D]isparate treatment was the most obvious evil Congress had in mind when it enacted Title VII . . . ." International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15, 14 FEP Cases 1514, 1519 n.15 (1977).

[7] *See Teamsters*, 431 U.S. at 335 n.15, 14 FEP Cases at 1519 n.15. The Supreme Court also has recognized that Title VII actions may be brought under the disparate impact theory. To maintain a disparate impact action, the plaintiff must establish that a facially neutral employment practice results in a disproportionately adverse impact on members of a statutorily protected group as compared with that of the majority group. *See Griggs*, 401 U.S. at 430, 3 FEP Cases at 177.

that the employer's decision was motivated by an invidiously discriminatory intent.[8] Recognizing that direct proof of discriminatory intent is difficult, if not impossible to obtain,[9] the Supreme Court, in *McDonnell Douglas Corp. v. Green*,[10] set forth a three-step scheme by which a plaintiff can prove discriminatory intent.[11] Under this scheme, a (female) plaintiff in a gender discrimination case can establish a prima facie case of discrimination by satisfying four elements: (1) that she applied for and was qualified for a position, (2) that she was rejected for that position, (3) that the position remained open after she was turned down, and (4) that the employer continued to seek applicants with her qualifications.[12] Once the plaintiff satisfies these elements, the employer may rebut the inference of discriminatory intent raised by the prima facie case by articulating a legitimate, nondiscriminatory reason for the adverse employment decision.[13] If the employer fails to articulate a non-discriminatory reason, then the plaintiff prevails.[14] If the employer articulates a legitimate reason, however, the plaintiff may prove that this reason was a pretext to mask a discriminatory motive.[15] Because establishing the prima facie case and rebutting it with a legitimate, nondiscriminatory reason is fairly straightforward under the *McDonnell Douglas* scheme, most sex discrimination cases turn on the issue of pretext.[16]

Where an employer's decision is founded on subjective employment criteria, plaintiffs have had difficulty establishing that the employer's articulated reason was in fact a pretext.[17] Courts acknowledge that the use of subjective criteria in making employment

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[8] *Teamsters*, 431 U.S. at 335 n.15, 14 FEP Cases at 1519 n.15. The Supreme Court has noted that "intent" may be inferred in some situations from the mere fact of differences in treatment. *Id.* Intent requires only a showing that the defendant's acts or practices were not merely accidental. *See* Slack v. Havens, 7 FEP Cases 885, 890 (S.D. Cal. 1973), *aff'd in part on other grounds*, 522 F.2d 1091, 11 FEP Cases 27 (9th Cir. 1975) (citing United States v. Central Motor Lines, 338 F. Supp. 532, 559, 4 FEP Cases 216, 239 (W.D.N.C. 1971).

[9] *See* Gates v. Georgia-Pacific Corp., 326 F. Supp. 397, 399, 2 FEP Cases 978, 979 (D. Or. 1970).

[10] 411 U.S. 792, 5 FEP Cases 965 (1973).

[11] *Id.* at 802–04, 5 FEP Cases at 969–70. Although *McDonnell Douglas* was a race discrimination case, the same criteria also have been applied to sex discrimination cases. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252–53, 25 FEP Cases 113, 115 (1981).

[12] *See McDonnell Douglas*, 411 U.S. at 802, 5 FEP Cases at 969. The Court noted that the specifications of the prima facie case set out in *McDonnell Douglas* will vary with the specific factual situation of each Title VII case. *Id.* at 802 n.13, 5 FEP Cases at 969 n.13. The Supreme Court also has noted that while the prima facie case creates an inference of discriminatory intent, this inference is intended only to "sharpen the inquiry into the elusive factual question of intentional discrimination." *Burdine*, 450 U.S. at 255 n.8, 25 FEP Cases at 116 n.8. The allocation of burdens in a Title VII case, therefore, is not intended to divide a single cause of action into three different cases, but to "frame the factual inquiry with sufficient clarity" to allow a plaintiff to have a full and fair opportunity to present the evidence. *See id.* at 255–56, 25 FEP Cases at 116. Thus, in most Title VII cases, the plaintiff presents all of his or her evidence first, with the evidence going both to the prima facie case and to the question of pretext. *See* Whack v. Peabody & Wind Eng'g, 595 F.2d 190, 193 & n.10, 19 FEP Cases 652, 654 & n.10 (3d Cir. 1979) (per curiam). Because the burden of persuasion remains at all times with the plaintiff, the defendant need only produce evidence that the plaintiff was rejected for a legitimate, nondiscriminatory reason. *Burdine*, 450 U.S. at 254, 25 FEP Cases at 116.

[13] *Burdine*, 450 U.S. at 253–54, 25 FEP Cases at 115–16.

[14] *Id.*

[15] *Id.* at 256, 25 FEP Cases at 116.

[16] *See* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 14 (2d ed. 1983) [hereinafter EMPLOYMENT DISCRIMINATION]; *see also Burdine*, 450 U.S. at 253, 25 FEP Cases at 116.

[17] *See* Waintroob, *The Developing Law of Equal Employment Opportunity at the White Collar and*

decisions is essential in many situations, such as in management and professional contexts,[18] yet also recognize that subjective determinations offer a convenient pretext for discrimination.[19] Consequently, many courts scrutinize subjective evaluation procedures closely, generally requiring that employers provide fair and well-defined procedures to safeguard against the possibility that the employment decisions will reflect underlying personal biases or discriminatory stereotype classifications.[20]

Courts also have had difficulty determining whether the employer's articulated reason actually masks a discriminatory intent in situations where the employer's decision appears to be motivated by a mixture of both legitimate and discriminatory reasons.[21] Courts are split on whether Title VII is violated if the employment decision is based on an impermissible factor, yet is independently justifiable on legitimate grounds. Some courts find that Title VII is violated if the adverse decision was based "in substantial part" on the impermissible factor, while other courts require the plaintiff to prove that the unlawful consideration was the "determinative" factor in the decision.[22] The Supreme Court has not addressed specifically what standard of causation applies in an individual mixed motive case under Title VII.[23] The Court's decisions in class action Title VII cases

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Professional Level, 21 WM. & MARY L. REV. 45, 46 (1979) (discussing the difficulties posed by subjective evaluations in white collar employment practices).

[18] *See, e.g.*, Marimont v. Califano, 464 F. Supp. 1220, 1227, 20 FEP Cases 1545, 1550 (D.D.C. 1979); *see also* Note, *Subjective Employment Criteria and the Future of Title VII in Professional Jobs*, 54 U. DET. J. URB. L. 165, 167 (1976) (evaluating possible judicial response to subjective criteria defense to Title VII actions).

[19] *See, e.g.*, Davis v. Califano, 613 F.2d 957, 965, 21 FEP Cases 272, 279 (D.C. Cir. 1979).

[20] *See, e.g.*, *Davis*, 613 F.2d at 965, 21 FEP Cases at 279; *Marimont*, 464 F. Supp. at 1227, 20 FEP Cases at 1550 (D.D.C. 1979).

[21] *See* Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292, 293 (1982) (discussing problems of liability and remedy under Title VII presented by mixed motive cases).

[22] *Compare* Bibbs v. Block, 778 F.2d 1318, 1324, 39 FEP Cases 970, 975 (8th Cir. 1985) (proof that race was a *discernible* factor in decision not to promote plaintiff sufficient to establish liability for intentional discrimination under Title VII) *with* Mack v. Cape Elizabeth School Bd., 553 F.2d 720, 722, 20 FEP Cases 1679, 1680 (1st Cir. 1977) (plaintiff must prove impermissible factor was *determinative* in decision not to renew contract). Courts have had to chose among various tests to determine the appropriate standard of causation in disparate treatment cases. *See* Brodin, *supra* note 21, at 293. The strictest test, specifically rejected by Congress, requires the plaintiff to prove that the discriminatory factor was the "sole factor" behind the employment decision. *Id.* The most liberal test allows a plaintiff to establish liability if the decision was based merely "in part" on a discriminatory factor. *Id.* In between these two tests are the standards most used by the courts; they are the "in substantial part" test and the "determinitive factor" test. *Id.* Recently, some lower courts have adopted a test, referred to as the same decision test, which is a variation of the "determinitive factor" test. *Id.* The "same decision" test was developed by the Supreme Court in class action disparate treatment cases under Title VII. *See* Franks v. Bowman Transp., 424 U.S. 747, 772–73 (1976) (adopting same decision test to determine if retroactive relief appropriate for individual members of discriminated class). Under this test, once the plaintiff establishes that the defendant was motivated in part by a discriminatory purpose, the burden shifts to the defendant to prove that the same decision would have been made absent the illegitimate factor. *See id.* at 773.

[23] *Bibbs*, 778 F.2d at 1322, 39 FEP Cases at 969. The Supreme Court has addressed the problem of mixed motives in class action Title VII suits. *See supra* note 22. In the context of class action Title VII suits, the issues of liability and relief generally are tried separately. *See* Brodin, *supra* note 21, at 302. If the plaintiff establishes liability for discrimination, individual plaintiffs are then entitled to relief only if the defendant fails to prove that the same decision would have been made absent discrimination. *See* East Tex. Freight Sys. v. Rodriguez, 431 U.S. 395, 16 FEP Cases 163

and elsewhere,[24] however, suggest the Court would approve a test that would allow the defendant to avoid liability under Title VII if the defendant can prove that the same decision would have been reached absent the impermissible consideration.[25]

During the *Survey* year, in *Hopkins v. Price Waterhouse*,[26] a female applicant alleged that she was denied promotion to partner in an accounting firm on the basis of subjective evaluations tainted by sexual stereotyping. The United States District Court for the District of Columbia applied the three-part *McDonnell Douglas* scheme, holding that the plaintiff satisfied her burden of proving discriminatory intent under Title VII.[27] The plaintiff satisfied this burden, the court stated, by showing that the defendant failed to discourage stereotyping in a situation where the firm should have been aware that women being evaluated by male partners were victimized by discriminatory stereotyping.[28]

Hopkins is significant in two respects. First, it extends to partnerships Title VII liability for failure to provide a well-defined subjective evaluation process which safeguards against sexual bias. More importantly, however, it illustrates the continuing confusion among lower courts regarding the proper test to apply in individual mixed motive cases under Title VII, and the need to develop a standard method of treatment which would be consistent with the goals of Title VII.

The plaintiff in *Hopkins* was a female senior manager at Price Waterhouse, a nationwide professional accounting partnership.[29] Price Waterhouse selected new partners

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(1977); *Teamsters*, 431 U.S. 324, 14 FEP Cases 1514 (1977); *Franks*, 424 U.S. 747, 12 FEP Cases 549 (1976); *see also* Brodin, *supra* note 21, at 302–04.

[24] In non-Title VII suits, the Supreme Court has adopted the same decision test in cases raising constitutional violations. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (adopting same decision test to determine whether a village's refusal to rezone a tract of land constituted racial discrimination in violation of the equal protection clause); Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) (using same decision test to determine if nonrenewal of a teacher's contract was based on the teacher's exercise of first amendment rights).

[25] *See* Brodin, *supra* note 21, at 293. Judge Lay, concurring in *Bibbs*, noted that there exists a confusion among the circuit courts regarding the proper standard of causation in individual mixed motive cases under Title VII. *Bibbs*, 778 F.2d at 1327, 39 FEP Cases at 978 (Lay, C.J., concurring). Courts attempting to deal with this problem by using the same decision test have reached differing results. In some cases, courts have used the same decision test in individual disparate treatment cases to determine liability under Title VII, while other courts have applied the test to determine the appropriate remedy once liability has been established. *See* Nanty v. Barrows Co., 660 F.2d 1327, 1333, 27 FEP Cases 410, 415 (9th Cir. 1981) (same decision test at relief stage); Williams v. Boorstin, 663 F.2d 109, 117, 23 FEP Cases 1669, 1674–75 (D.C. Cir. 1980) (same decision test at liability stage), *cert. denied*, 451 U.S. 985, 25 FEP Cases 1192 (1981). The Eighth Circuit in *Bibbs*, in line with the theory proposed by Professor Brodin, held that the same decision test should be used only to determine affirmative relief such as back pay and reinstatement, while proof that the illegitimate factor played some role in the employment decision would be sufficient to establish liability under Title VII. *Bibbs*, 778 F.2d at 1323–24, 39 FEP Cases at 975.

[26] 618 F. Supp. 1109, 1113–14, 38 FEP Cases 1630, 1634 (D.D.C. 1985). The plaintiff raised her claim based on a disparate treatment theory. *Id.* The court noted in a footnote that currently there is a split among the circuits as to whether a subjective evaluation process may be challenged, apart from the disparate treatment theory, on a theory of disparate impact. *Id.* at 1120 n.16, 38 FEP Cases at 1639 n.16. The court reserved this issue, noting that the plaintiff could not show the substantial statistical disparity ordinarily required to show that the employer's practice produces a discriminatory disparate impact. *Id.*

[27] *Id.* at 1119–20, 38 FEP Cases at 1638.

[28] *Id.*

[29] *Id.* at 1111, 38 FEP Cases at 1632.

annually from among the senior managers through a detailed recommendation and review process that culminated in a partnership-wide vote.[30] The partnership selection process began with proposals from the local offices of the firm that one or more of their senior managers should be considered as candidates for partnership.[31] All partners were invited to submit evaluations on any candidate to the admissions committee.[32] After reviewing each candidate's personnel file, the committee made recommendations to the firm's policy board.[33] The policy board then voted to include a candidate on the partnership ballot, to "hold" a candidate, or to deny partnership.[34]

In 1982, the plaintiff was proposed for partnership by her local office.[35] She was the only woman among eighty-eight candidates for partnership that year.[36] Although the plaintiff had had a successful career as a senior manager[37] and was more successful than other candidates in securing major contracts for the firm, the policy board decided to place the plaintiff on "hold" for at least a year.[38] Evaluations submitted to the admissions committee indicated that the plaintiff had problems with her "interpersonal skills" — specifically, that she was "overly aggressive, unduly harsh, difficult to work with and impatient with staff."[39] Various comments described her as "macho," a "somewhat masculine" and "tough-talking" manager who needed to take a course at "charm school."[40] Four months after the decision to "hold" the plaintiff's candidacy, the plaintiff was

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[30] *Id.* At the time this suit was filed, Price Waterhouse had 662 partners operating in 90 offices across the United States. *Id.* The court noted that despite its size, the firm consistently sought to maintain the traditional characteristics of a professional partnership. *Id.*

[31] *Id.* at 1111–12, 38 FEP Cases at 1632.

[32] *Id.* at 1112, 38 FEP Cases at 1632. The court noted that partners who have had significant contact with the candidate complete "long-form" evaluations, while other partners may complete "short form" evaluations. *Id.* These forms require the partners to rank the candidate in comparison to other recent partnership candidates in 48 different categories, supplemented by the partners' written assessment regarding the candidate's suitability for partnership. *Id.*

[33] *Id.* The admissions committee may also interview partners who have completed evaluations. *Id.*

[34] *Id.*

[35] *Id.* at 1112, 38 FEP Cases at 1633.

[36] *Id.* All of the partners at the plaintiff's local office at that time were men. *Id.* In addition, the court noted that as of July, 1984, there were only seven women partners at Price Waterhouse. *Id.*

[37] *Id.* The court noted that the plaintiff had no difficulty dealing with clients, because the clients appeared to be satisfied with her work. *Id.* The plaintiff was generally viewed as a "highly competent project leader" who worked long hours and demanded much from her staff. *Id.* at 1112–13, 38 FEP Cases at 1633.

[38] *Id.* at 1113, 38 FEP Cases at 1633.

[39] *Id.* Both supporters and opponents of the plaintiff's candidacy indicated that the plaintiff had problems dealing with staff, commenting that she used profanity and appeared insensitive to others. *Id.*

[40] *Id.* at 1117, 38 FEP Cases at 1636. Other comments about the plaintiff suggested that she "overcompensated for being a woman" by being aggressive and using profanity. *Id.* at 1116–17, 38 FEP Cases at 1636. Supporters of the plaintiff believed that her critics judged her harshly because of her sex. *Id.* at 1117, 38 FEP Cases at 1636. The head partner at the plaintiff's local office, who supported the plaintiff's candidacy, advised her to act more "femininely" in order to overcome the negative criticisms about her interpersonal skills. *Id.* Another supporter noted that while the plaintiff had a "clearly different personality," her use of profanity was no worse than male partners but was focused upon because she was "a lady using foul language." *Id.* Another supporter of the plaintiff noted that she had matured from a "somewhat masculine hard-nosed manager" into an "authoritative, formidable but much more appealing lady partner candidate." *Id.*

advised that her local office would not repropose her for partnership and that it was unlikely she would ever be admitted to partnership.[41] After resigning, the plaintiff brought suit alleging that the decision not to admit her to partnership was predicated upon sex discrimination in violation of Title VII.[42]

The district court held that the plaintiff satisfied her burden of proving intentional sex discrimination in violation of Title VII by showing that the defendant's decision not to admit her to partnership was due to discriminatory evaluations resulting directly from the defendant's failure to address the obvious problem of sexual bias in its partnership evaluation procedures.[43] In reaching this conclusion, the district court noted at the outset that the plaintiff met the *McDonnell Douglas* standard for establishing a prima facie case of disparate treatment under Title VII by showing that she was a qualified candidate for partnership, that she was rejected, and that the defendant continued to seek partners with her qualifications.[44] Next, the court held that the defendant rebutted the inference of discriminatory intent by articulating a legitimate, nondiscriminatory reason for refusing to admit her to partnership, namely, that the plaintiff had poor interpersonal skills and was unable to get along with staff.[45] Consequently, the court concluded, the only issue to be resolved was whether the defendant's articulated reason for not promoting the plaintiff was merely a pretext to disguise sex discrimination.[46]

The plaintiff offered three explanations to prove that the articulated reason for not admitting her to partnership was a mere pretext, and thus, discriminatory.[47] First, the plaintiff alleged that the criticisms of her interpersonal skills were fabricated by the defendant, and that the two local partners who decided not to repropose her for partnership falsified their reasons to hide their discriminatory motive.[48] The court rejected these allegations, noting that the plaintiff herself admitted she was a "hard-driving" manager and had received evaluations containing negative comments about her interpersonal skills well before the time she was being considered for partnership.[49] In addition, the court found that the two local office partners who decided not to repropose the plaintiff for partnership put forth credible explanations for their positions.[50]

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[41] *Id.* at 1113, 38 FEP Cases at 1633. Two partners in the plaintiff's local office at that time strongly opposed her candidacy. *Id.*

[42] *Id.* The plaintiff requested an order that she be made a partner and be awarded back pay from the date she would have been elected partner. *Id.* at 1121, 38 FEP Cases at 1640.

[43] *Id.* at 1120, 38 FEP Cases at 1639.

[44] *Id.* at 1113, 38 FEP Cases at 1633.

[45] *Id.* at 1114, 38 FEP Cases at 1634.

[46] *Id.* at 1113, 38 FEP Cases at 1633–34.

[47] *Id.* at 1113–14, 38 FEP Cases at 1634.

[48] *Id.* at 1114, 38 FEP Cases at 1634.

[49] *Id.* The court noted that at the time the plaintiff received these prior evaluations, she had indicated agreement with many of the criticisms. *Id.*

[50] *Id.* at 1114–15, 38 FEP Cases at 1634–35. The court noted that one partner who decided not to repropose the plaintiff for partnership had recommended she be placed on hold when she was proposed the first time because he found it disagreeable to work with her and had reservations about her technical skills and dedication to the firm. *Id.* at 1114, 38 FEP Cases at 1634. The other partner who had supported the plaintiff originally changed his mind after receiving additional criticism from staff members and reviewing his own experiences with the plaintiff. *Id.* The court accepted this partner's account of these events, noting that his decision placed him in the uncomfortable position of being in direct conflict with the head partner in the office who supported the plaintiff. *Id.*

The plaintiff's second argument alleged that she was "similarly-situated" to two male candidates who were criticized for their interpersonal skills yet were admitted to partnership.[51] Moreover, the plaintiff offered statistical evidence allegedly supporting her contention that women and men received disparate treatment in the partnership selection process.[52] The court rejected the plaintiff's argument that she was in a comparable situation with the two male partners who were admitted to partnership despite their interpersonal skills problems.[53] Unlike these male candidates, the court noted, the plaintiff had received more "no" votes than all but two of the other eighty-eight candidates for partnership that year, and moreover, had no specific skills to offer the firm.[54] In addition, the court found that the plaintiff's statistical evidence was inconclusive, noting that because women only recently had entered the field of accounting, the pool of women qualified for partnership provided insufficient data from which to infer evidence of discrimination.[55]

Finally, the plaintiff alleged that the criticisms of her interpersonal skills were the product of sexual stereotyping by male partners,[56] and despite clear indications that the evaluations were tainted by discriminatory stereotyping, the firm's policy board improperly gave great weight to these evaluations and allowed them to defeat her candidacy.[57] The court conceded that the plaintiff presented strong evidence supporting her contention that the partners' evaluations were influenced by sexual stereotyping,[58] noting that one partner went so far as to comment that he could not consider any woman a suitable candidate for partnership because he believed women were not even capable of functioning as senior managers.[59] In addition, the court noted that the head partner at her local office advised the plaintiff to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" to overcome the problems with her candidacy that were identified by the policy board.[60]

Despite finding that sexual stereotyping influenced the partners' subjective evaluations of the plaintiff, the court nonetheless concluded that this was not sufficient by itself to prove an intentional discriminatory motive or purpose.[61] Regardless of the extent that the discriminatory stereotyping may have tainted the selection process, the court rea-

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[51] *Id.* at 1115, 38 FEP Cases at 1635.

[52] *Id.* at 1116, 38 FEP Cases at 1636. The plaintiff offered statistical proof to reinforce her allegation of discriminatory intent. *Id.* Although statistical proof typically is used in class action disparate treatment cases to establish a "pattern or practice" of discrimination, it also may be used to establish employment discrimination in an individual case. *See Davis*, 613 F.2d at 962–63, 21 FEP Cases at 277.

[53] *Hopkins*, 618 F. Supp. at 1115–16, 38 FEP Cases at 1635–36.

[54] *Id.* at 1116, 38 FEP Cases at 1635.

[55] *Id.* at 1116, 38 FEP Cases at 1636.

[56] *Id.*

[57] *Id.* at 1118, 38 FEP Cases at 1637.

[58] *Id.* at 1117–18, 38 FEP Cases at 1636–37. The court noted that, in addition to the comments regarding the plaintiff, comments on other women partnership candidates in prior years supported the inference that sexual stereotyping influenced the subjective evaluations. *Id.* at 1117, 38 FEP Cases at 1636. Comments that suggested a woman tried to be "one of the boys" or was a "women's libber" were regarded as negative comments. *Id.* Women candidates were viewed more favorably, the court noted, if partners believed that the women had maintained their femininity while becoming effective managers. *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.* at 1118, 38 FEP Cases at 1637.

soned, such stereotyping was "unconscious" on the part of the male partners.[62] In view of the infinite variety of working conditions, the differences in experiences and education, and the complexity of interactions between personalities of either sex, the court noted, it was impossible to label any particular negative comment as being motivated by sexual stereotyping.[63] Congress could not have intended courts to police every situation, the court concluded, where unconscious assumptions based on sexual roles influenced subjective judgments.[64]

Nevertheless, the court found that the plaintiff was able to prove discriminatory intent by demonstrating that it was a "conscious" act of the partnership as a whole to maintain a system which gave substantial weight to biased evaluations.[65] The court noted that while subjective judgments of interpersonal skills properly play a significant role in employment decisions relating to high-level professional jobs, evaluators are not free to inject into the evaluation process stereotyped assumptions based on "outmoded attitudes" about women.[66] Moreover, the court reasoned, even if the sexual stereotyping was unconscious on the part of the male partners, neither a partnership nor an employer can ignore evidence clearly indicating that sexual stereotyping is influencing its selection process.[67] Thus, the court concluded, the firm's failure to alert partners to the possibility of bias in their evaluations, and to investigate and discard comments suggesting a double standard, constituted sex discrimination in violation of Title VII.[68]

The result in *Hopkins*, that Title VII was violated by the defendant's failure to take steps necessary to discourage sexual bias in its selection process, is a proper one. The court incorrectly based this result, however, on the conclusion that Title VII was violated because the defendant consciously maintained a subjective evaluation system influenced

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[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.* at 1119, 38 FEP Cases at 1638.

[66] *Id.* (citing *Marimont*, 464 F. Supp. at 1226 & n.15, 20 FEP Cases at 1549 & n.15).

[67] *Hopkins*, 618 F. Supp. at 1119, 38 FEP Cases at 1638.

[68] *Id.* at 1119–20, 38 FEP Cases at 1638. Although the court found that the plaintiff proved that sex discrimination was a factor in the employment decision, the court awarded only attorneys' fees to the plaintiff, refusing her request that she be made a partner and that she be awarded back pay from the date that she would have been elected a partner. *Id.* at 1122, 38 FEP Cases at 1640. At the outset, the court observed that because the plaintiff proved sex discrimination under Title VII, she was entitled to relief unless the defendant demonstrated by clear and convincing evidence that the decision would have been the same absent discrimination. *Id.* at 1120, 38 FEP Cases at 1639. Because the defendant in *Hopkins* failed to prove that the same decision would have been reached absent stereotyping, the court stated, the plaintiff was entitled to some relief. *Id.* The court refused to order the defendant to make the plaintiff a partner, however, unless the plaintiff could prove she was constructively discharged. *Id.* at 1121, 38 FEP Cases at 1639. Constructive discharge would have been shown, the court reasoned, if the plaintiff had proved that there were "aggravating factors" which drove the plaintiff to quit. *Id.* Because the plaintiff failed to prove such factors existed, however, she did not prove constructive discharge, and thus, was not entitled to be made a partner. *Id.* at 1121, 38 FEP Cases at 1640. In addition, the court stated, although the plaintiff was entitled to back pay from the date she would have been elected partner to the date she resigned, back pay could not be awarded because the plaintiff presented no evidence on the amount of compensation she would have received. *Id.* No evidence was presented, the court noted, because the parties improperly agreed, without the knowledge or consent of the court, to defer the issue of back pay until the issue of liability was resolved. *Id.* Because parties cannot separate issues without the authority of the court, back pay was not awarded in this case. *Id.*

by sexual bias, and the defendant should have been aware of the possibility of bias.[69] In reaching this conclusion, the court apparently confused "conscious" action with "intentional" action required to be shown under disparate treatment analysis.

Intentional discrimination under Title VII may be proven by showing that the employer intended to treat the employee in a certain manner, that is, that the defendant's actions were not merely accidental.[70] It does not require, as the *Hopkins* court erroneously reasoned, that the defendant be aware that this treatment is discriminatory. In *Hopkins*, regardless of whether the partners were "conscious" that their comments resulted from stereotypical assumptions, the partners "intended" to judge the plaintiff in terms of appropriate "feminine" behavior, rather than appropriate behavior for a senior accounting manager. Thus, whether or not the defendant in *Hopkins* was aware that discriminatory stereotyping was influencing the subjective evaluations, the defendant intentionally treated the plaintiff, an assertive woman, differently than it treated assertive men, and thus, under Title VII, the defendant was guilty of sex discrimination.[71]

Courts have had difficulty, in the context of professional jobs, applying traditional Title VII standards to evaluate the validity of subjective evaluation procedures.[72] Decisionmaking based on subjective evaluations, although necessary in many situations, provides vast possibilities for hiding discriminatory intent[73] — whether this discrimination occurs consciously or unconsciously from stereotypical assumptions about women in the workplace. In the context of non-professional jobs, it is well settled that employers may be liable under Title VII for failing to provide evaluators with definite, identifiable criteria by which to evaluate relevant job skills.[74] In the context of professional jobs, several courts have required, at the minimum, that subjective evaluation procedures be fair and well-defined, so that bias may be avoided and decisionmakers can make subjective judgments in a responsible manner.[75] Indeed, lack of proper safeguards in a subjective evaluation system has allowed female plaintiffs to prevail, in some cases, where they have shown that the selection process was tainted by assumptions that females lack management potential, or are less acceptable as professionals than men.[76] Thus, the *Hopkins* extension of Title VII liability to a partnership for failing to provide a safeguarded subjective evaluation process is a logical and necessary step toward ensuring

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[69] *Id.* at 1119–20, 38 FEP Cases at 1638.

[70] *See* Slack v. Havens, 7 FEP Cases 885, 890 (S.D. Cal. 1973), *aff'd in part on other grounds*, 522 F.2d 1091, 11 FEP Cases 27 (9th Cir. 1975) (citing United States v. Central Motor Lines, 338 F. Supp. 532, 559, 4 FEP Cases 216, 239 (W.D.N.C. 1971)).

[71] *See Hopkins*, 618 F. Supp. at 1119, 38 FEP Cases at 1638. The *Hopkins* court noted that this case involved a situation where one who was in the minority was viewed differently by the majority simply because "the individual deviat[ed] from an artificial standardized profile." *Id.* at 1118, 38 FEP Cases at 1637.

[72] *See* Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947, 959 (1982) (arguing that courts incorrectly apply different standards to upper level jobs).

[73] *See* Rogers v. International Paper, 510 F.2d 1340, 1345–46, 10 FEP Cases 404, 408–09 (8th Cir.), *vacated on other grounds*, 423 U.S. 809, 11 FEP Cases 576, *reinstated with modification on other grounds*, 526 F.2d 722, 723, 11 FEP Cases 1000, 1001 (8th Cir. 1975); *see also Marimont*, 464 F. Supp. at 1227, 20 FEP Cases at 1550.

[74] *See Rogers*, 510 F.2d at 1345–46, 10 FEP Cases at 408–09; *see also* Note, *Subjective Employment Criteria*, *supra* note 18, at 177–80.

[75] *Marimont*, 464 F. Supp. at 1227, 20 FEP Cases at 1550; *see also* EMPLOYMENT DISCRIMINATION, *supra* note 16, at 199.

[76] *See* EMPLOYMENT DISCRIMINATION, *supra* note 16, at 200.

equal employment opportunities for all individuals. As the *Hopkins* court correctly concluded, a subjective evaluation system which relies heavily on stereotyped assumptions, rather than on neutral professional consideration of individual skills, clearly constitutes sex discrimination in violation of Title VII.[77]

Although the court reached the proper result in concluding that sex discrimination played a role in the decision not to admit the plaintiff to partnership, the court was incorrect in concluding that the unconscious sexual stereotyping by the evaluators was not sufficient to establish discriminatory motive.[78] Again, the court apparently confused that idea of "conscious" action with "intentional" action. In *Hopkins*, regardless of whether the partners were "conscious" that their comments resulted from stereotypical assumptions, the partners "intended" to judge the plaintiff in terms of appropriate "feminine" behavior. The process of basing employment decisions on this type of stereotyping, whether conscious or unconscious, clearly constitutes disparate treatment, since women employees are being judged on the basis of their sex, rather than on the basis of individual merit.[79] Indeed, not only did the *Hopkins* court fail to recognize that the sexual stereotyping in this case constituted disparate treatment, the court's decision seems to allow "unconscious" sexual stereotyping to continue. The court suggested that in the future, partnerships can avoid liability under Title VII simply by alerting partners that their judgments may be biased and by cautioning partners to avoid comments that suggest a double standard.[80] Thus, unconscious sexual stereotyping in subjective evaluations could continue, but the adverse employment decision would be shielded from attack. As the *Hopkins* court pointed out, this type of subtle discrimination provides the greatest obstacle to achieving the goals of Title VII.[81]

In addition to confusing unconscious and conscious action with the "intentional" action required under disparate treatment analysis, the *Hopkins* court misapplied the *McDonnell Douglas* scheme[82] for determining discriminatory intent. The *Hopkins* court framed the issue as whether the defendant's articulated reason for rejecting the plaintiff's candidacy — her poor interpersonal skills — constituted a pretext for discrimination.[83] Although the court noted that stereotyping played some role in the employer's conclusion that the plaintiff had poor interpersonal skills,[84] the court never explicitly resolved the issue of pretext. Instead, the court held that because the stereotyping was unconscious and its role in the subjective evaluations could not be determined, the mere presence of stereotyping did not constitute an intentionally discriminatory purpose.[85] At this point,

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[77] *Hopkins*, 618 F. Supp. at 1120 n.15, 38 FEP Cases at 1638 n.15.

[78] *See id.* at 1118, 38 FEP Cases at 1637.

[79] *See Teamsters*, 431 U.S. at 335 n.15, 14 FEP Cases at 1519 n.15. Stereotypical expectations based on a person's sex, one commentator has suggested, reinforce the barriers to equal employment opportunities for women by precluding accurate, individualized judgments on the basis of merit. *See* Taub, *Keeping Women in Their Place: Stereotyping* Per Se *as a Form of Employment Discrimination*, 21 B.C.L. REV. 345, 417 (1980). Moreover, each time an employment decision is made on the basis of role expectations, the stereotypes are reinforced in the minds of both the employer and the employee. *Id.*

[80] *See Hopkins*, 618 F. Supp. at 1119–20, 38 FEP Cases at 1638.

[81] *Id.* at 1117–18, 38 FEP Cases at 1637.

[82] *See supra* notes 10–16 and accompanying text for a discussion of the *McDonnell Douglas* three-part scheme.

[83] *Hopkins*, 618 F. Supp. at 1113, 38 FEP Cases at 1633–34.

[84] *Id.* at 1118, 38 FEP Cases at 1636.

[85] *Id.* at 1119, 38 FEP Cases at 1637.

the defendant should have prevailed under the *McDonnell Douglas* three-part scheme, because the plaintiff failed to prove that the defendant's articulated reason was a pretext. Nevertheless, the plaintiff prevailed, because of the obvious problem of sexual stereotyping which permeated the defendant's selection process. By concluding that "unconscious" stereotyping did not constitute "intentional" discrimination, however, the court was forced to support its finding of sex discrimination by relying on the theory that the firm's maintenance of a system which gave great weight to biased evaluations constituted a "conscious" act of discrimination.

A possible explanation for the *Hopkins* court's failure to resolve the pretext issue under the *McDonnell Douglas* scheme is that the court failed to address the mixed motive problem.[86] That is, the court was uncertain of the extent to which sexual bias had to be present in the employment decision before the employment decision could constitute a Title VII violation.[87] This uncertainty may have been caused, as one commentator has observed, by the difficulty of analyzing mixed motive cases in pretext terms.[88] The *McDonnell Douglas* pretext approach, it is suggested, is based on the assumption of "single-motive decisionmaking," where the employer has a single unlawful motive which he or she attempts to cover up with fabricated lawful motives.[89] In a mixed motive case, however, the articulated reason for the adverse decision is legitimate and nondiscriminatory, but it is accompanied by other discriminatory reasons.[90] If the employer's illegitimate reasons are secondary to the legitimate concerns, the employer's action may not necessarily violate Title VII. Thus, in *Hopkins*, the court should have rejected a strict application of the *McDonnell Douglas* scheme to find discriminatory intent because the defendant's articulated reason in this case was a mixture of both legitimate and discriminatory considerations.

The *Hopkins* court evaded the problem of analyzing the mixed motives in this case by focusing on the issue of "consciousness," which is not an element of a Title VII violation.[91] Rather, as suggested above, the court should have found that the evaluators discriminated intentionally. If it had done so, the court would not have had to look to the policy board for a violation. Instead, the court would have had to decide the extent to which the firm's decision had to be based on the impermissible factor — the sexual stereotyping — as opposed to the permissible factor — the concerns regarding interpersonal skills — before a Title VII violation would be found.[92] The court's avoidance of this issue evidences the confusion which exists among courts analyzing individual mixed motive cases with traditional Title VII standards.

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[86] *See id.* at 1118, 38 FEP Cases at 1637. The *Hopkins* court apparently recognized that mixed motives were present in this case, however, by applying the same decision test to determine the appropriate relief. *Id.* at 1120, 38 FEP Cases at 1639. The court noted that the plaintiff was entitled to relief unless the defendant could prove, by clear and convincing evidence, that the same decision would have been reached absent the discrimination. *Id.* The *Hopkins* court, however, failed explicitly to address the issue of mixed motives at the liability stage. *See id.* at 1118, 38 FEP Cases at 1637.

[87] *See id.* at 1120, 38 FEP Cases at 1639.

[88] *See* Brodin, *supra* note 21, at 301 n.40.

[89] *Id.*

[90] *Id.*

[91] See *supra* notes 70–71 and accompanying text for a discussion of "consciousness" in Title VII actions.

[92] See *supra* notes 21–25 and accompanying text for a discussion of the standard of causation in individual mixed motive cases. *See also* Brodin, *supra* note 21, at 293.

In sum, the *Hopkins* court correctly held that the plaintiff satisfied her burden of proving intentional sex discrimination under Title VII. The defendant's failure to take the steps necessary to discourage sexual stereotyping, and failure to investigate and discard comments which suggested a double standard, resulted directly in the discriminatory evaluations which defeated the plaintiff's candidacy for partnership. Courts have long recognized, in reviewing employment decisionmaking for managerial and non-professional positions, that employers must provide well-defined subjective evaluation procedures in order to safeguard against discriminatory biases in the evaluation process. The extension of this standard to partnerships is a logical and necessary step toward providing equal employment opportunity for all individuals.

The *Hopkins* court was incorrect, however, in concluding that unconscious sexual stereotyping by the male partners of the firm is not intentional discrimination. Sexual stereotyping, whether unconscious or conscious, results in treating women less favorably than men simply because of their sex. Thus, adverse employment decisions based on any degree of intentional sexual stereotyping should be recognized as violations of Title VII, in order to encourage employers to recognize and eliminate disparate treatment among men and women based on stereotypical assumptions, and to permit employment decisions to be made properly on the basis of merit.

III. TITLE VII AND THE FIRST AMENDMENT

A. **The Constitutional Requirement of a "Ministerial Exception" to Title VII*: Rayburn v. General Conference of Seventh Day Adventists[1]

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, sex, or national origin.[2] Congress explicitly exempted religious organizations' employment decisions from Title VII's prohibition against religious discrimination.[3] This statutory exception applies only to discrimination based on religion. Courts consistently have held that Congress intended Title VII to prohibit employment discrimination by religious organizations on the basis of race, sex, or national origin.[4]

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[1] 772 F.2d 1164, 38 FEP Cases 1641 (1985), *cert. denied*, 106 S. Ct. 3333, 41 FEP Cases 272 (1986).

[2] Civil Rights Act of 1964, § 703, 42 U.S.C. 2000e-2(a) (1982). Section 703 reads, in pertinent part:

> It shall be an unlawful 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 race, color, religion, sex, or national origin . . . .

Id.

[3] Civil Rights Act of 1964, § 702, 42 U.S.C. 2000e-1 (1982). Section 702 reads, in pertinent part:

> This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

Id.

[4] *See, e.g.*, EEOC v. Pacific Press Publishing Ass'n, 676 F.2d 1272, 1276–77, 28 FEP Cases 1596, 1599–60 (9th Cir. 1982); EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 281–82, 26 FEP Cases 558, 561–62 (5th Cir. 1981), *cert. denied*, 456 U.S. 905, 28 FEP Cases 584 (1982).

In *McClure v. Salvation Army*,[5] however, the Fifth Circuit found a more general exception to the Act's applicability to religious organizations by ruling that Congress did not intend Title VII to apply at all to the relationship between a church and its ministers. The court found that if the government applied Title VII to a church-minister relationship, it would be a forbidden encroachment into an area protected by the free exercise clause of the first amendment.[6] To provide a construction of the statute that would avoid this constitutional issue, the court concluded that Congress did not intend to regulate the church-minister relationship.[7]

The "ministerial exception" has remained a non-constitutional doctrine[8] in the Fifth Circuit and has been accepted by the Ninth Circuit.[9] When faced with a church-related Title VII issue, these courts first consider whether the employment relationship fits the non-constitutional ministerial exception.[10] Only if this non-constitutional exception does not apply will the courts address the constitutional issues raised under the free exercise and establishment clauses of the first amendment.[11]

When addressing the free exercise issue, both the Fifth and the Ninth Circuits have distinguished the impact on a religious organization itself from the impact on its "sincerely held religious beliefs."[12] Pursuant to the free exercise clause, these courts have

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[5] 460 F.2d 553, 560–61, 4 FEP Cases 490, 496 (5th Cir. 1972), *cert. denied*, 409 U.S. 896, 5 FEP Cases 46 (1972).

[6] *Id.* at 560, 4 FEP Cases at 496. The first amendment reads, in pertinent part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

[7] *McClure*, 460 F.2d at 560–61, 4 FEP Cases at 496. The court appeared to reach this conclusion by merely asserting that Congress, "through the non-specific wording of the applicable provisions of Title VII, did not intend" such a result. *Id.*

[8] The phrase "non-constitutional doctrine" means a doctrine based on congressional statute rather than the constitution.

[9] *See Pacific Press*, 676 F.2d at 1277–78, 28 FEP Cases at 1600–01; *Southwestern Baptist Theological Seminary*, 651 F.2d at 281–85, 26 FEP Cases at 561–64; EEOC v. Mississippi College, 626 F.2d 477, 484–86, 23 FEP Cases 1501, 1506–08 (5th Cir. 1980), *cert. denied*, 453 U.S. 912, 26 FEP Cases 1688 (1981).

[10] *See, e.g., Pacific Press*, 676 F.2d at 1272, 28 FEP Cases at 1596 (ministerial exception does not apply to employee of religious publishing house); *Southwestern Baptist Theological Seminary*, 651 F.2d at 277, 26 FEP Cases at 558 (Title VII does not apply to seminary faculty and some administrators found to be ministers due to their role as intermediaries between the church and future ministers and instruction of religious doctrine; constitutional issue not addressed relative to these employees); *Mississippi College*, 626 F.2d at 477, 23 FEP Cases at 1501 (faculty are not ministers and thus not exempt from coverage of Title VII under the ministerial exception).

[11] *See, e.g., Pacific Press*, 676 F.2d at 1279–82, 28 FEP Cases at 1602–05; *Southwestern Baptist Theological Seminary*, 651 F.2d at 285–87, 26 FEP Cases at 564–66; *Mississippi College*, 626 F.2d at 486–89, 23 FEP Cases at 1508–10. In none of these cases did the court find a constitutional violation by application of Title VII to a non-ministerial position.

[12] *See Pacific Press*, 676 F.2d at 1280, 28 FEP Cases at 1603; *Mississippi College*, 626 F.2d at 488, 23 FEP Cases at 1509–10. Under the test formulated in Wisconsin v. Yoder, 406 U.S. 205 (1972), courts must examine and weigh three factors in determining whether application of a specific statute would violate the free exercise clause:

> (1) the magnitude of the statute's impact upon the exercise of the religious belief, (2) the existence of a compelling state interest justifying the burden imposed upon the exercise of the religious belief, and (3) the extent to which recognition of an exemption from the statute would impede the objectives sought to be advanced by the state.

Mississippi College, 626 F.2d at 488, 23 FEP Cases at 1509 (citing Wisconsin v. Yoder, 406 U.S. 205 (1972)).

stated, it is of little significance that application of Title VII may have "far reaching"[13] or "profound"[14] effects upon a religious organization so long as the exercise of its religious beliefs is not affected directly. Under this rationale, if an organization's religious tenets do not require it to discriminate on the basis of race, sex, or national origin in its employment decisions regarding a specific job, the free exercise clause of the first amendment does not prohibit applying the requirements of Title VII to those decisions.[15] This approach requires a court to conduct an initial examination of a church's religious beliefs to determine whether the alleged discrimination is required by church doctrine.

During the *Survey* year, in *Rayburn v. General Conference of Seventh Day Adventists*,[16] the Court of Appeals for the Fourth Circuit implicitly rejected the non-constitutional "ministerial exception,"[17] and held that application of Title VII to a non-ordained pastoral position violates the first amendment. The court also refused to consider whether church doctrine required the alleged discrimination.[18] Instead, the court held, unless there is a sufficient countervailing state interest,[19] the free exercise clause of the first amendment prohibits application of Title VII to an employment position which is important to the spiritual mission of the church, regardless of the doctrinal basis for the alleged discrimination.[20] The court, therefore, established the ministerial exception to Title VII as a constitutional requirement, without basing its decision on, or even considering, the Fifth and Ninth Circuits' distinction between impact on religious beliefs and impact on religious organization.

In *Rayburn*, the Seventh Day Adventist Church (the Church) denied the application of a white female for a position as an associate in pastoral care.[21] The position did not involve ordination but had ministerial characteristics: an associate in pastoral care teaches baptismal and Bible classes, pastors a singles group, occasionally preaches, and performs other evangelical, liturgical, and counseling responsibilities.[22]

The appellant filed a complaint with the Equal Employment Opportunity Commission (EEOC) claiming that her rejection was a result of sexual and racial discrimination.[23] She received a right-to-sue letter and filed an action with the United States District Court for the District of Maryland.[24] Although the appellant submitted some evidence to

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[13] *See Pacific Press*, 676 F.2d at 1280, 28 FEP Cases at 1603.

[14] *See Mississippi College*, 626 F.2d at 488, 23 FEP Cases at 1509.

[15] *Id.* at 488, 23 FEP Cases at 1509–10.

[16] 772 F.2d 1164, 1172, 38 FEP Cases 1641, 1647 (1985), *cert. denied*, 106 S. Ct. 3333, 41 FEP Cases 272 (1986).

[17] *See id.* at 1166–67, 38 FEP Cases at 1642–43.

[18] *See id.* at 1167–69, 38 FEP Cases at 1643–45.

[19] See *supra* note 12 for the three general factors a court must balance to determine whether a statute can be applied to a religious organization.

[20] *See id.* at 1168–69, 38 FEP Cases at 1644–45.

[21] *Id.* at 1165, 38 FEP Cases at 1642. The appellant also was denied a related intern position but this issue was not raised on appeal. *See id.*

[22] *Id.* The position of associate pastor may be held by either an ordained minister, a ministerial intern, or an associate in pastoral care. *Id.* Only a female who has received seminary training may serve as an associate in pastoral care. *Id.* A female cannot be ordained within the Church and thus can serve as neither a minister nor a ministerial intern. *Id.*

[23] *Id.* Although the appellant was white and the vacant position for which she had applied was filled by another female, the appellant claimed she was rejected on the basis of her sex, her association with blacks and black-oriented religious organizations, and her opposition to discriminatory practices outlawed by Title VII. *Id.*

[24] *Id.*

support her claims, that court granted the defendant's motion for summary judgment on the basis that the religion clauses of the first amendment barred the suit.[25] On appeal, the Court of Appeals for the Fourth Circuit affirmed the district court's judgment, holding that state scrutiny of the Church's choice in this matter would restrain impermissibly the Church's free exercise of religion.[26]

Recognizing a responsibility to determine first whether there was a fair construction of Title VII that would avoid the constitutionality question,[27] the court examined whether Congress intended Title VII to apply to the type of employment relationship in this case.[28] The court first noted that section 702 of Title VII specifically exempts only the decisions of religious organizations made with respect to employing individuals "*of a particular religion.*"[29] Furthermore, the court noted, Congress specifically rejected efforts to broaden the scope of the exemption, and a House analysis of section 702 clearly stated that religious organizations still would be subject to Title VII's prohibition against racial and sexual discrimination.[30] The court concluded that Congress intended a very limited exemption from Title VII for religious organizations and, therefore, the statute applied to the Church's associate pastor position.[31]

The court next addressed whether subjecting the Church's choice of associate pastor to the jurisdiction of the EEOC would violate the free exercise clause of the first amendment.[32] The guarantee embodied in this clause, the court reasoned, applies not only to matters of faith and doctrine but to church government as well.[33] In particular, the court stated, the choice of ministers free of government restriction is at the heart of the well-being of a church because its very existence may be determined by whom it chooses to carry forth its message.[34] Whether the position in question required ordination is not significant, the court ruled; rather, the issue is whether the position is central to the spiritual and pastoral mission of the church.[35] The associate pastor position in this case, the court found, was such a position.[36] The court concluded that the risk to religious

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[25] *Id.*

[26] *Id.* at 1165, 38 FEP Cases at 1641. The court also concluded that application of Title VII in this instance would excessively entangle government in the church's religious affairs, contrary to the establishment clause of the first amendment which provides that, "Congress shall make no law respecting the establishment of religion . . . ." *Id.* at 1169–70, 38 FEP Cases at 1645–46. The court found that applying Title VII to the employment decision in this case would result in an intolerably close relationship between church and state on two levels. First, on a substantive level, the court ruled that it cannot review the Church's choice to fill the position in question, stating that "the guidance of the state cannot substitute for that of the Holy Spirit and . . . a courtroom is not the place to review a church's determination of 'God's appointed.'" *Id.* at 1170, 38 FEP Cases at 1646. Second, on a procedural level, the court expressed concern that fear of litigation would become a factor in a church's choice of personnel, undermining the church's independent assessment of the applicants and the needs of its congregation. *Id.* at 1171, 38 FEP Cases at 1646–47.

[27] *Id.* at 1165–66, 38 FEP Cases at 1642 (citing International Ass'n of Machinists v. Street, 367 U.S. 740, 749–50 (1961) and NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 501 (1979)).

[28] *Id.* at 1165–67, 38 FEP Cases at 1642–43.

[29] *Id.* at 1166, 38 FEP Cases at 1643 (emphasis added by the court).

[30] *Id.* at 1167, 38 FEP Cases at 1643.

[31] *Id.*

[32] *Id.* at 1167–69, 38 FEP Cases at 1643–45.

[33] *Id.* at 1167, 38 FEP Cases at 1643–44 (citing Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94 (1952)).

[34] *Id.* at 1167–68, 38 FEP Cases at 1644.

[35] *Id.* at 1168–69, 38 FEP Cases at 1644–45.

[36] *Id.* at 1168, 38 FEP Cases at 1644. The court noted that the associate in pastoral care at the

liberty from government intervention in the selection of the associate pastor clearly outweighed any impediments to government objectives that would flow from exempting this position from the jurisdiction of the EEOC under Title VII.[37]

In reaching this conclusion, the court emphasized that while it must assess whether the associate pastor position is important to the spiritual mission of the Church, the court need not inquire into whether there was a theological basis for the discriminatory rejection of the appellant's application.[38] The Church has an "unfettered right" to resolve certain questions, the court stated.[39] The Church's motivation behind the resolution of those questions, the court continued, is not the concern of the courts; it is the act of deciding, itself, that the first amendment protects.[40] Accordingly, the court held that Title VII could not be applied to a non-ordained pastoral position in the Seventh Day Adventist Church.

Rayburn is significant for the Fourth Circuit's refusal to adopt the Fifth and Ninth Circuits' non-constitutional "ministerial exception" to Title VII.[41] Although the court indicated that the position of associate in pastoral care would have fallen within the ministerial exception as defined in the relevant opinions of the Fifth Circuit,[42] the court refused to base its decision on a finding that Congress did not intend for Title VII to apply to such a position.[43] Instead, the court explicitly found that application of Title VII to an employment position which is important to the spiritual mission of a church is unconstitutional.[44] The impact of this aspect of the decision, however, is more procedural than substantive, because it is likely that if Title VII would be inapplicable to a church position due to the non-constitutional "ministerial exception" of the Fifth and Ninth Circuits, application of Title VII to that position would also be unconstitutional under the "spiritual mission" analysis of the Fourth Circuit. Indeed, the Fourth Circuit appears merely to have given an explicit constitutional basis to the ministerial exception.

Significantly, the *Rayburn* court did not base its decision on the distinction drawn by the Fifth and Ninth Circuits between a statute's impact on a religious organization and its impact on the organization's "sincerely held religious beliefs." The *Rayburn* court

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church involved in this case introduced children to church life, led Bible studies, provided counseling and spiritual guidance to individuals in personal crisis, and otherwise was a spiritual leader for members of the church's congregation. *Id.*

[37] *Id.* The court used the *Wisconsin v. Yoder* test presented *supra* at note 12.

[38] *Rayburn*, 772 F.2d at 1169, 38 FEP Cases at 1645.

[39] *Id.*

[40] *Id.*

[41] See *supra* notes 5–10 and accompanying text for a discussion of the "ministerial exception" to Title VII.

[42] *See* 772 F.2d at 1168–69, 38 FEP Cases at 1644–45. The court cited the "ministerial exception" as described in McClure v. Salvation Army, 460 F.2d 553, 4 FEP Cases 490 (5th Cir. 1972), *cert. denied*, 409 U.S. 896 (1972) and EEOC v. Southwestern Baptist Seminary, 651 F.2d 277, 26 FEP Cases 558 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982) for support of the proposition that the fact that an associate in pastoral care can never be ordained is immaterial to the court's analysis of whether the position is important to the spiritual mission of the church. 772 F.2d at 1168–69, 38 FEP Cases at 1644–45.

[43] *See supra* notes 11–14 and accompanying text. The *Rayburn* court did not accept or reject the holdings of these circuits' first amendment, Title VII decisions. 772 F.2d at 1172, 38 FEP Cases at 1647. The court noted only that the factual situations of those cases present examples where "employment decisions may be subject to Title VII scrutiny, where the decison does not involve the church's spiritual functions." *See id.* at 1171, 38 FEP Cases at 1647.

[44] *Id.* at 1168–69, 38 FEP Cases at 1644–45.

explicitly stated that it is unconstitutional to apply Title VII to an employment decision regarding a position that is important to the spiritual mission of a church, regardless of whether the church's alleged discriminatory decision has a doctrinal basis in the church's religious beliefs.[45] In the Fourth Circuit, courts may not rule that because a church professes not to discriminate on the basis of race, sex, or national origin, Title VII can be applied constitutionally to a church's employment decision, at least regarding a position important to the church's spiritual mission. The fact that the decision will have a discriminatory effect, whether intentional or unintentional, will be immaterial if the church position at issue is important to the spiritual mission of the church, regardless of the particular religious beliefs of that organization.

The outcome of *Rayburn* would not have been different if it had been decided pursuant to the ministerial exception analysis of the Fifth and Ninth Circuits, because it is unlikely that the court would have considered the duties of a pastoral assistant less "ministerial" than the duties of a seminary's faculty.[46] Indeed, in most cases involving minister-type personnel, constitutional analysis as employed by the Fourth Circuit in *Rayburn* and "minister exception" analysis as developed by the Fifth Circuit would lead to the same result. The *Rayburn* decision makes clear, however, that at least relative to ministerial-type positions, courts in the Fourth Circuit may not hold that application of Title VII will have no impact on the exercise of the church's religious beliefs and is thus allowable under the free exercise clause of the first amendment simply because the church involved does not profess to discriminate on the basis of race, sex, or national origin.

The *Rayburn* decision leaves open the question of whether, in the Fourth Circuit, the distinction between impact on religious organization and impact on religious beliefs is relevant to an analysis of the constitutionality of applying Title VII in a manner that does not affect directly a church's choice of ministers. Possibly this case established the first tier of a two-tier constitutional analysis. That is, when the application of Title VII to a church is challenged as a violation of the free exercise clause, a court may determine first whether it involves a position important to the spiritual mission of the church. If the court finds in the negative, it then may determine, like the Fifth and Ninth Circuits, whether the church's sincerely held religious beliefs require that it discriminate as alleged. The Fourth Circuit, if it follows this approach, merely would have substituted constitutionally based "spiritual mission" terminology for the Fifth and Ninth Circuits' non-constitutional "ministerial exception."

Alternatively, *Rayburn* may signal that the Fourth Circuit will reject the distinction between impact on religious beliefs and impact on religious organization in all analyses of the constitutionality of applying Title VII to a religious organization. The court could extend its spiritual mission analysis to hold that any application of Title VII that significantly affects a church's ability to carry out its spiritual mission is contrary to the free exercise clause of the first amendment. For example, a church's ability to carry out its mission effectively could be hampered if the EEOC, pursuant to its Title VII authority, were to impose excessively burdensome reporting requirements upon a church or were to obtain large monetary damages for a church's past discriminatory practices. If the Fourth Circuit extended its spiritual mission analysis to such situations, it may find a

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[45] *Id.* at 1169, 38 FEP Cases at 1645.

[46] *See Southwestern Baptist Theological Seminary*, 651 F.2d at 277, 26 FEP Cases at 558 (seminary faculty found to be ministers).

violation of the free exercise clause due to the impact of the statute on the church's ability to carry out its spiritual mission, even though the specific employment positions in question were not important to the mission.

Application of the spiritual mission analysis to non-ministerial church issues arising under Title VII would be a logical extension of the principles embodied in that analysis. The *Rayburn* case indicates that according to the Fourth Circuit, the free exercise clause protects a religious organization from undue government interference with the church's ability to carry out its spiritual mission. This ability can be impaired not only by government involvement in the church's choice of ministers, but also by imposing burdens on the administrative or other resources of the organization. The Fourth Circuit's analysis appears to be aimed at protecting the religious organization's ability to carry forth its spiritual mission, not just protecting specific positions within that organization.

As a result of *Rayburn*, there is now a split among the circuit courts regarding the proper method of analysis to use in Title VII litigation affecting churches. The Fifth and Ninth Circuits maintain that there is a non-constitutional "ministerial exception" to the applicability of Title VII.[47] Furthermore, these courts distinguish between impact on religious organization and impact on religious beliefs, holding that only the latter is relevant to first amendment analysis under the free exercise clause. The Fourth Circuit, on the other hand, found that Congress intended no ministerial exception, and focused its free exercise analysis on whether the employment position in question is important to the spritual mission of the church. If the court finds that the position is important to the church's spiritual mission, applying Title VII to that position is unconstitutional, regardless of whether discrimination is important to the religious beliefs of the church. The court, however, has not addressed whether it will apply its "spiritual mission" analysis to any situatution where a church's ability to carry out its mission may be impaired. Such an extension would be consistent with the principles announced in *Rayburn*.

IV. HANDICAP DISCRIMINATION

A. **Interpreting "Qualified Handicapped Person" Under Section 501 of the Rehabilitation Act of 1973:* Mantolete v. Bolger[1]

Congress enacted the Rehabilitation Act of 1973 (Act)[2] to promote employment opportunities for handicapped individuals[3] by prohibiting discrimination in the employment of the handicapped based on inaccurate stereotypes.[4] The Act covers the employment decisions of federal contractors, recipients of federal funds, and the federal government itself.[5] Section 501 of the Act requires the federal government as an employer

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[47] *See supra* notes 5–10 and accompanying text.

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[1] 767 F.2d 1416, 38 FEP Cases 1081 (9th Cir. 1985).

[2] 29 U.S.C. §§ 701–796i (1982).

[3] *See* Prewitt v. United States Postal Service, 662 F.2d 292, 301, 27 FEP Cases 1043, 1048 (5th Cir. 1981).

[4] *See* Mantolete v. Bolger, 767 F.2d 1416, 1422, 38 FEP Cases 1081, 1085 (9th Cir. 1985). Congress enacted the legislation because "[i]ndividuals with handicaps are all too often excluded from school and educational programs, barred from employment or are under-employed because of archaic attitudes and laws . . . ." *Id.* (citing S. REP. 1297, 93d Cong., 2d Sess. 32, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6373, 6400).

[5] *See Prewitt*, 662 F.2d at 301, 27 FEP Cases at 1048.

to develop and implement affirmative action plans on behalf of handicapped employees.[6] Congress enacted this section of the Act with the expectation that governmental policy regarding the employment of handicapped individuals would serve as a model for other employers.[7]

Regulations adopted pursuant to section 501[8] define a "qualified handicapped person" as a handicapped individual who meets the necessary educational and experience requirements of a job and is able to perform the essential functions of that job without putting either the individual or others in danger.[9] The regulations further provide that

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[6] 29 U.S.C. § 791 (1982). Section 501 provides, in relevant part:

(a) Interagency Committee on Handicapped Employees . . .

It shall be the purpose and function of the [Interagency Committee on Handicapped Employees] (1) to provide a focus for Federal and other employment of handicapped individuals, and to review, on a periodic basis . . . the adequacy of hiring, placement, and advancement practices with respect to handicapped individuals, by each department, agency, and instrumentality in the executive branch of Government, and to insure that the special needs of such individuals are being met; and (2) to consult with the Office of Personnel Management to assist the Office to carry out its responsibilities . . . .

(b) Federal agencies; affirmative action program plans

Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall, within one hundred and eighty days after September 26, 1973, submit to the Office of Personnel Management and to the [Interagency Committee on Handicapped Employees] an affirmative action program plan for the hiring, placement, and advancement of handicapped individuals in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of handicapped employees are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Office [of Personnel Management], if the Office determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for handicapped individuals . . . .

29 U.S.C. §§ 791(a) and (b) (1985). Section 501 also addresses the employment decisions of federal agencies, including the Postal Service. The Fifth Circuit Court of Appeals, in discussing the legislative history of the Rehabilitation Act, stated:

> [B]y its 1978 amendments to the Rehabilitation Act, Congress clearly recognized both in section 501 and in section 504 that individuals now have a private cause of action to obtain relief for handicap discrimination on the part of the federal government and its agencies.

Prewitt, 662 F.2d at 304, 27 FEP Cases at 1051.

[7] 29 C.F.R. § 1613.703 (1985). The regulations implementing section 501 state the policy behind the statute:

> Agencies shall give full consideration to the hiring, placement and advancement of qualified mentally and physically handicapped persons. The Federal Government shall become a model employer of handicapped individuals. An agency shall not discriminate against a qualified physically or mentally handicapped person.

Id.

[8] Section 501 of the Act assigns to the Interagency Committee on Handicapped Employees the responsibility for making recommendations to the Office of Personnel Management concerning legislative and administrative changes in the implementation of this section of the Act. 29 U.S.C. § 791(a) (1985). The regulations are codifed at 29 C.F.R. §§ 1613.701 *et seq.*

[9] 29 C.F.R. § 1613.702(f) (1985). The regulations state, in pertinent part:

"Qualified handicapped person" means with respect to employment a handicapped person who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the

the federal agency must consider whether the individual's handicap can be accommodated reasonably and must make its determination as to the handicapped person's qualifications for employment in light of that accommodation.[10]

Most cases involving claims of handicap discrimination address the interpretation of section 504 of the Act. Section 504 prohibits federally funded programs and government agencies from excluding from employment an "otherwise qualified handicapped individual . . . solely by reason of [his or her] handicap."[11] In its 1983 decision in *Strathie v. Department of Transportation*,[12] the Third Circuit Court of Appeals required an employer to demonstrate under section 504 a "factual basis" for disqualifying a handicapped individual from a position. In *Strathie*, the state denied a license to a school bus driver because of a hearing impairment.[13] The Third Circuit reversed the district court's summary judgment for the defendant because the defendant had failed to demonstrate a factual basis for concluding that accommodating the plaintiff's handicap would impose an undue burden on the employer.[14] The court noted that the standard it adopted would preclude the exclusion of handicapped individuals based solely on the "remote possibility" of future harm.[15]

The viewpoint of the Third Circuit in *Strathie* is consistent with the 1981 decision of the Tenth Circuit Court of Appeals in *Pushkin v. Regents of the University of Colorado*.[16] In *Pushkin*, the plaintiff, a medical doctor with multiple sclerosis, was wheelchair-bound and disabled in his ability to read and write.[17] He brought an action under section 504 against the defendants, alleging that he wrongfully had been denied admittance to the University of Colorado's residency program in psychiatry because of his disability.[18] In upholding the trial court's judgment for the plaintiff, the Tenth Circuit looked to the plain language of the statute, which requires that the employer demonstrate that the individual is not otherwise qualified for the position.[19] The court specifically rejected the defendant's suggestion that its decision to deny admittance to the plaintiff was lawful as long as it was rational.[20] The court noted that to apply a rational basis analysis to claims

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individual or others and who . . . (1) Meets the experience and/or education requirements (which may include passing a written test) of the position in question, or (2) meets the criteria for appointment under one of the special appointing authorities for handicapped persons.

Id.

[10] *See Mantolete*, 767 F.2d at 1421, 38 FEP Cases at 1085; *see also* 29 C.F.R. §§ 1613.702(f), 1613.704 (1985).

[11] 29 U.S.C. § 794 (1982). Section 504 provides in part:

No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

Id.

[12] 716 F.2d 227, 231, 32 FEP Cases 1561, 1564 (3d Cir. 1983).

[13] *Id.* at 228, 32 FEP Cases at 1562.

[14] *Id.* at 234, 32 FEP Cases at 1567.

[15] *Id.* at 231, 32 FEP Cases at 1564.

[16] 658 F.2d 1372 (10th Cir. 1981).

[17] *Id.* at 1376.

[18] *Id.*

[19] *Id.* at 1384.

[20] *Id.* at 1383. The defendant argued that its actions should be reviewed under equal protection

of discrimination based on handicap under section 504 of the Rehabilitation Act would ignore the plain statutory language.[21]

The Tenth Circuit in *Pushkin* and the Third Circuit in *Strathie* adopted a heightened standard of analysis, thus rejecting the approach of those courts that require only a reasonable or rational basis for finding a handicapped person unqualified for employment.[22] Under the rational basis approach, unsubstantiated predictions about future performance may be sufficient bases for denying employment opportunities to handicapped individuals.[23] In its 1983 decision in *Doe v. Region 13 Mental Health-Mental Retardation Commission*,[24] the Fifth Circuit Court of Appeals upheld a judgment notwithstanding the verdict for the defendant because the plaintiff's psychological condition reasonably could be interpreted to pose a risk to her patients in her role as a staff psychologist. Although the plaintiff's performance was outstanding, she was dismissed because of concerns that her depression would affect adversely the well-being of her patients.[25] Determining that there existed a substantial, rational basis for the defendant's decision to terminate the plaintiff's employment, the court of appeals affirmed the decision of the district court.[26]

During the *Survey* year, in *Mantolete v. Bolger*,[27] the United States Court of Appeals for the Ninth Circuit considered the proper standard to apply under section 501 of the Act in determining whether a government employer lawfully can deny employment to a handicapped individual on the grounds that the handicap poses some risk to the safety of the individual and co-workers. The court held that the employer may not exclude a handicapped person from employment on the basis of possible future injury simply because of an "elevated risk of injury."[28] Only upon a showing of a "reasonable probability of substantial harm," the court stated, could employment be denied.[29] The court reasoned that the heightened standard was necessary to achieve the legislative objectives of the Act.[30] By rejecting the "elevated risk" standard, the *Mantolete* court made clear that employment decisions cannot be based on unsubstantiated generalizations and stereotypes, but should instead be made on the basis of individual qualifications, taking into account the employee's handicap.

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standards:

> . . .[i]n cases not involving a suspect class, fundamental rights, an irrebutable presumption, or a federal statute establishing different legal standards than that enunciated by a public body, judicial deference to administrative decision, especially academic decisions relating to admissions criteria, must be followed whenever the decision of the public body is rationally related to legitimate governmental needs.

Id.

[21] *Id.* at 1384.

[22] *See, e.g.*, Doe v. Region 13 Mental Health-Mental Retardation Comm'n, 704 F.2d 1402, 1410, 31 FEP Cases 1332, 1338 (5th Cir. 1983); Doe v. New York University, 666 F.2d 761, 775–76 (2d Cir. 1981).

[23] *See, e.g., Region 13 Mental Health-Mental Retardation Comm'n*, 704 F.2d at 1412, 31 FEP Cases at 1340; *New York University*, 666 F.2d at 777.

[24] 704 F.2d 1402, 1409–10, 31 FEP Cases 1332, 1338 (5th Cir. 1983).

[25] *Id.* at 1404, 1406, 31 FEP Cases at 1333, 1335.

[26] *Id.* at 1412, 31 FEP Cases at 1340.

[27] 767 F.2d 1416, 38 FEP Cases 1081 (9th Cir. 1985).

[28] *Id.* at 1422, 38 FEP Cases at 1085.

[29] *Id.*

[30] *Id.* at 1422–23, 38 FEP Cases at 1086.

The plaintiff in *Mantolete* was an epileptic[31] who applied for a job as a mail distribution clerk with the United States Postal Service.[32] The position involved working as a member of a crew of seventeen clerks in the operation of a large letter sorting machine.[33] Operators normally performed three distinct functions: loading the machine with mail trays, coding mail for delivery as it moved through the machine, and retrieving sorted mail from collection bins in the machine.[34] The operators also were required to disengage letters that became jammed inside the machine.[35]

The plaintiff passed a written exam and was placed on a list for further consideration for the position.[36] During a standard pre-employment physical examination, the examining physician concluded that the plaintiff averaged one grand mal epileptic seizure[37] per year, and that her epilepsy was controlled adequately by medication.[38] Nevertheless, the physician recommended that the plaintiff not be employed in a position involving machinery with moving parts.[39] On the basis of the medical reports available to him,[40] the Postal Service Medical Examiner recommended that the plaintiff not be considered further for employment as a letter sorting machine operator, and her application was rejected.[41]

The plaintiff subsequently brought suit in the United States District Court for the District of Arizona against the United States Postal Service under section 501 of the Rehabilitation Act of 1973, alleging that she had been denied the Postal Service position on the basis of her physical handicap.[42] At trial, the plaintiff presented evidence regarding the nature of her medical condition and previous employment.[43] This evidence included the testimony of her former treating physician that the chances of the plaintiff

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[31] *Id.* at 1418, 38 FEP Cases at 1082. The Ninth Circuit defined epilepsy as "a paroxysmal disorder of the nervous system which may be associated with, or accompanied by, impairment of the individual's consciousness or awareness and may also be accompanied by convulsive or more complex movements of the body." *Id.* at 1419, 38 FEP Cases at 1083–84.

[32] *Id.* at 1418, 38 FEP Cases at 1082.

[33] *Id.*

[34] *Id.* at 1418–19, 38 FEP Cases at 1083.

[35] *Id.* at 1419, 38 FEP Cases at 1083.

[36] *Id.* at 1418, 38 FEP Cases at 1082.

[37] The Ninth Circuit noted that grand mal, or generalized, seizures involve the whole brain, leading to loss of consciousness and convulsive movements affecting the entire body. These seizures may also involve stiffening ("tonic") or jerking ("clonic") movements of the extremities. *Id.* at 1419, 38 FEP Cases at 1084.

[38] *Id.* at 1418, 38 FEP Cases at 1082.

[39] *Id.*

[40] The medical records relied upon included the plaintiff's medical history record, her physical fitness inquiry, a certificate of medical examination, an x-ray report, and a medical report. *Id.* No additional medical information or prior employment history was requested. *Id.*

[41] *Id.* at 1418, 38 FEP Cases at 1082–83.

[42] *Id.* at 1417, 38 FEP Cases at 1082. The action was brought originally as a national class action on behalf of all epileptics. The district court limited discovery to the class of epileptics applying for employment with the United States Postal Service within Arizona, where the plaintiff had applied, and eventually granted the defendant's motion to strike the class allegations. *Id.* at 1420, 38 FEP Cases at 1084. The Court of Appeals affirmed the trial court on this point. *Id.* at 1424–25, 38 FEP Cases at 1088.

[43] *Id.* at 1419–20, 38 FEP Cases at 1083–84. Before trial, the plaintiff filed a motion *in limine* to exclude any evidence about her medical or employment history that the Postal Service obtained after denying her employment. The motion was denied and this decision was affirmed by the Court of Appeals. *Id.* at 1420, 1424, 38 FEP Cases at 1084, 1088.

having a seizure at work were minimal.[44] Further, the physician testified that the likelihood of injury in the event of a seizure was even less than the likelihood of a seizure itself.[45] The plaintiff's former employer testified that the plaintiff successfully had performed job functions in her prior employment on machinery more dangerous than the letter sorting machine.[46]

The district court held that an employer lawfully may refuse to hire a handicapped person who presents "'an elevated risk' of injury" to herself or others.[47] The court found that the plaintiff was not a qualified handicapped person under section 501 of the Rehabilitation Act because she could be injured seriously if she experienced a seizure while performing the job functions of a letter sorting machine operator.[48] In reaching this conclusion, the court relied on dicta in the 1982 decision of the Ninth Circuit Court of Appeals in *Bentivegna v. United States Department of Labor*,[49] a section 504 case.[50] In that decision, the Ninth Circuit had noted that the risk of injury might justify rejecting handicapped applicants from jobs involving elevated risks of injury.[51] Further, the district court in *Mantolete* found that modifying the letter sorting machine to accommodate the plaintiff's medical condition was not reasonable because of the expense involved.[52] Thus, the court held, the Postal Service's refusal to hire the plaintiff did not violate the Rehabilitation Act.[53]

On appeal, the Ninth Circuit Court of Appeals reversed the district court's decision, holding that a federal employer must demonstrate with reasonable probability that a person's handicap will cause substantial harm to the individual or co-workers before that person can be denied employment.[54] The court noted that no court previously had interpreted the term "qualified handicapped person" under section 501, but held that the definition developed under section 504 of the Rehabilitation Act was applicable also under section 501 of the Act.[55] The only distinction between the two sections of the Act, the court found, is that section 501, unlike section 504, requires that accommodation of the individual's handicap be considered in determining that person's qualification for employment.[56]

The Ninth Circuit acknowledged that under the Act federal employers may be justified in denying employment to an otherwise qualified person on the basis of possible future injury, but held that employers must show a "reasonable probability of substantial harm" in order to exclude such individuals.[57] The court clarified its *Bentivegna* decision that the district court had relied upon in reaching its conclusions.[58] The court made

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[44] *Id.* at 1420, 38 FEP Cases at 1084.
[45] *Id.*
[46] *Id.* at 1419, 38 FEP Cases at 1083.
[47] *Id.* at 1421, 38 FEP Cases at 1085.
[48] *Id.*
[49] 694 F.2d 619, 30 FEP Cases 875 (9th Cir. 1982).
[50] *See Mantolete*, 767 F.2d at 1421–22, 38 FEP Cases at 1085–86.
[51] *Bentivegna*, 694 F.2d at 623 n.3, 30 FEP Cases at 878 n.3.
[52] *Mantolete*, 767 F.2d at 1420–21, 38 FEP Cases at 1085.
[53] *Id.* at 1420, 38 FEP Cases at 1085.
[54] *Id.* at 1422, 38 FEP Cases at 1086.
[55] *Id.* at 1422, 38 FEP Cases at 1085.
[56] *Id.* at 1421, 38 FEP Cases at 1085.
[57] *Id.* at 1422, 38 FEP Cases at 1086.
[58] *See id.* at 1421–22, 38 FEP Cases at 1085–86.

clear in *Mantolete* that *Bentivegna* did not refer to risk elevated by the applicant's handicap but rather to elevated risk due to the nature of the job.[59]

The *Mantolete* court further held that the employer's determination cannot be based solely on subjective evaluation or information contained in medical reports.[60] Rather, the court held, the employer must conduct a case-by-case evaluation of the probability and severity of potential injury based on all relevant information concerning the individual's work and medical history.[61] The court recognized that this requirement places a substantial fact-gathering burden on the federal employer.[62] The court reasoned that imposing this burden comported with the intent of Congress in enacting the Rehabilitation Act, which was to prevent employers from making employment decisions about handicapped applicants on the basis of improper stereotypes.[63]

In reaching this conclusion, the *Mantolete* court rejected the district court's conclusion that an "elevated risk of injury" is sufficient to justify the denial of employment to handicapped individuals.[64] The court reasoned that the "elevated risk" standard is inadequate because it perpetuates stereotypes and thus fails to evaluate adequately a handicapped individual's ability to work in an environment that Congress specifically has opened up to persons with mental and physical handicaps.[65] To achieve the legislative objective of promoting employment opportunities for the handicapped, the court observed, the employment decision should be based on an individualized evaluation of the handicapped applicant's ability to perform the job.[66]

The Ninth Circuit remanded the case to the district court for determination of whether employing the plaintiff as a letter sorting machine operator, given her medical and work history, would pose a "reasonable probability of substantial harm."[67] Further,

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[59] *Id.* at 1422, 38 FEP Cases at 1086. The *Bentivegna* court warned:

> [a]ny qualification based on the risk of future injury must be examined with special care if the Rehabilitation Act is not to be circumvented easily, since almost all handicapped persons are at greater risk from work-related injuries . . . .[A]llowing remote concerns to legitimize discrimination against the handicapped would vitiate the effectiveness of Section 504 of the act.

Bentivegna, 694 F.2d at 622–23, 30 FEP Cases at 878.

[60] *Mantolete*, 767 F.2d at 1422, 38 FEP Cases at 1086. The court noted that medical reports alone may be sufficient where the probability of substantial harm is apparent. *Id.*

[61] *Id.* at 1423, 38 FEP Cases at 1086. The court did not make clear what it viewed as the proper scope of investigation. Because the evaluation made with respect to the plaintiff's epilepsy was based only on documents created by the defendant Postal Service's medical examiner, *see id.* at 1418, 38 FEP Cases at 1082, it appears that the Ninth Circuit would require that the federal employer obtain as much information as possible from independent sources.

[62] In a concurring opinion, one judge stressed that the Ninth Circuit's decision did not resolve whether Congress intended in Section 504 of the Rehabilitation Act to impose the same information-gathering requirements on private employers:

> Today's decision not only lays down a standard for consideration of risk of future injury, it also imposes demanding information-gathering requirements upon federal employers. Such burdens are justified in light of the express language of § 501 and its implementing regulations. However, whether these requirements are applicable to private employers under § 504 is a question left open by this case.

Id. at 1425 (Rafeedie, J., concurring) (footnote omitted).

[63] *Id.* at 1422, 38 FEP Cases at 1086.

[64] *Id.*

[65] *Id.* at 1424, 38 FEP Cases at 1087.

[66] *Id.* at 1422–23, 38 FEP Cases at 1086.

[67] *Id.* at 1424, 38 FEP Cases at 1087–88.

the court instructed the district court to evaluate the reasonableness of proposed accommodation of the plaintiff's handicap, if the district court determined that her employment would pose a reasonable probability of substantial harm.[68]

The Ninth Circuit Court of Appeals adopted in *Mantolete* a heightened standard for evaluating the employment decisions of federal employers. Requiring employers to demonstrate a reasonable probability of substantial harm as a result of the individual's handicap is appropriate because it is essential to implement meaningfully the policies of the Act as expressed in regulations and the legislative history.[69] In reaching this conclusion, the court rejected an approach which would uphold an employer's decision to reject the application of a handicapped individual merely upon a showing of elevated risk of injury because of the handicap. A person is deemed to have a handicap based on the public perception, substantiated or not, of a deficiency in ability created by the handicap,[70] thus it might be rational for an employer to believe that the handicap will impact job safety. Because a handicap by its very nature is so inextricably tied to an individual's ability to perform job functions, employment decisions made on the basis of a person's handicap without individualized investigation also may be irrational and thus discriminatory. Allowing employers to exclude handicapped persons from employment on the basis of stereotypes, without an individualized assessment of the job functions and the person's own capabilities, would defeat the legislative objectives of the Rehabilitation Act, under both section 501 and section 504.[71]

Congress enacted the Rehabilitation Act to promote employment opportunities for handicapped individuals.[72] If employers can exclude the handicapped from employment on the basis of vague and factually unsupported assumptions, opportunities will be restricted rather than expanded. Thus, employers should be encouraged to make employment decisions on the basis of individual qualifications, rather than generalizations and stereotypes.[73]

The Ninth Circuit's approach in *Mantolete* is consistent with the objectives of section 501 of the Rehabilitation Act. The *Mantolete* court held that the employer may exclude a handicapped person from employment on the basis of possible future injury only upon

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[68] *Id.* at 1424, 38 FEP Cases at 1088. The Ninth Circuit adopted an equally strict standard for the second prong of analysis, that is, whether reasonable accommodation could make the workplace safe for the handicapped applicant:

> Thus an employer has a duty under the Act to gather sufficient information from the applicant and from qualified experts as needed to determine what accommodations are *necessary* to enable the applicant to perform the job safely. The application of this standard requires a strong factual foundation in order to establish that an applicant's handicap precludes safe employment . . . . However, although it is the employer who must make a substantial gathering of necessary facts, the determination of whether the employer violated § 501 is to be made by the trial court *de novo*. Therefore, a good faith or rational belief on behalf of the employer will not be a sufficient defense to an act of discrimination.

Id. at 1423, 38 FEP Cases at 1087 (emphasis in original).

[69] *Id.* at 1424, 38 FEP Cases at 1087.

[70] *See* Garritty v. Gallen, 522 F. Supp. 171, 206 (D.N.H. 1981).

[71] *See id.* One of the reasons Congress enacted section 504 of the Rehabilitation Act was to "encourage treatment of the handicapped on the basis of individualized assessment of ability . . . ." *Id.*

[72] 29 U.S.C. § 791(a) (1982). See *supra* note 6 for the text of the statute.

[73] *See* E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1099, 23 FEP Cases 1253, 1260 (D. Hawaii 1980).

a showing of a "reasonable probability of substantial harm," and not simply because of an "elevated risk of injury." The "elevated risk" standard the court rejected would allow government employers to exclude the handicapped applicant on the basis of factually unfounded generalizations bearing no relationship to the capabilities of the individual. By requiring the federal employer to justify its decision to exclude a handicapped individual from employment by a factual showing that an applicant will present a reasonable probability of substantial harm, the court has taken a step towards precluding discrimination in employment on the basis of handicap, in furtherance of the objectives of the Rehabilitation Act.

V. AGE DISCRIMINATION IN EMPLOYMENT ACT

A. *Defining the Narrow Scope of the BFOQ Exception to the ADEA*: Western Air Lines v. Criswell [1]

The Age Discrimination in Employment Act (ADEA or the Act)[2] prohibits discrimination against older persons in employment decisions.[3] Enacted in 1967, the ADEA was designed "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment."[4] Recognizing that mandatory retirement provisions based solely on age are detrimental because they fail to consider a person's actual abilities and skills,[5] Congress amended the ADEA in 1978 to extend the Act's protections to individuals up to seventy years of age.[6]

A principal exemption to the ADEA's proscription against age discrimination is the "bona fide occupational qualification"(BFOQ).[7] The BFOQ exception permits an employer to discharge or to refuse to hire an older employee when age is a "bona fide

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[1] 105 S. Ct. 2743, 37 FEP Cases 1829 (1985).

[2] 29 U.S.C. §§ 621–34 (1982).

[3] *Id.* § 623(a)–(e). The ADEA protects persons aged forty to seventy. *Id.* § 631(a). Congress enacted the ADEA to respond both to the plight of older persons, as well as society's economic loss attributable to age discrimination. 29 U.S.C. § 621. In 1965 the Secretary of Labor reported to Congress on the widespread incidence of age discrimination. For a brief discussion of the Secretary's findings, see Note, *The Age Discrimination in Employment Act of 1967*, 90 HARV. L. REV. 380, 383–84 (1976).

[4] 29 U.S.C. § 621(b) (1982).

[5] H.R. REP. No. 527, 95th Cong. 1st Sess., pt. 1 at 2 (1977).

[6] *See* 29 U.S.C. § 631 (1982) (amending 29 U.S.C. § 631 (1976)). The ADEA's protection originally extended only to age 65.

[7] 29 U.S.C. § 623(f)(1) (1982). Section 632(f) states in pertinent part:

> It shall not be unlawful for an employer, employment agency or labor organization —
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> (1) to take any action otherwise prohibited . . . where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan . . . ; or
>
> (3) to discharge or otherwise discipline an individual for good cause.

Id.

occupational qualification reasonably necessary to the normal operation of the particular business."[8] The ADEA's enforcement agencies have indicated that the BFOQ exception is of limited scope and application and should be construed narrowly.[9] Further, Congress has noted that disparity in employment situations because of occupational and industrial variations requires that the ADEA be administered on a case-by-case basis.[10] Consequently, courts frequently must weigh the older worker's interest in obtaining or sustaining employment against the necessary occupational qualifications implemented to protect not only an employer's business interests, but often the public safety as well.[11]

Until recently the United States Supreme Court had not set forth a workable test that courts could use to weigh the employer's BFOQ exception against the purposes of the ADEA. Most jurisdictions, however, have followed the rule first enunciated in the 1976 case of *Usery v. Tamiami Trail Tours, Inc.*[12] In *Tamiami*, the Court of Appeals for the Fifth Circuit was called upon to determine whether Tamiami's refusal to hire persons over the age of 40 as intercity bus drivers fell within the BFOQ exception to the ADEA.[13] The *Tamiami* court applied a two-prong test that incorporated standards set forth in prior case law.[14] The first prong of the *Tamiami* test requires an employer to have a reasonable basis of fact supporting the premise that virtually all of the group discriminated against "'would be unable to perform safely and efficiently the duties of the job involved.'"[15] The second prong of the *Tamiami* test requires proof that the BFOQ was

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[8] *Id.*

[9] *See, e.g.*, Department of Labor Interpretive Bulletin on the ADEA, 29 C.F.R. § 860.102(b) (1985). *See generally* Note, *The Bona Fide Occupational Qualification Exception — Clarifying the Meaning of "Occupational Qualification"*, 38 VAND. L. REV. 1345, 1347–54 (1985) [hereinafter Note, *Occupational Qualification*].

[10] H.R. REP. No. 805, 90th Cong., 1st Sess. 7, *reprinted in* 1967 U.S. CODE CONG. & ADMIN. NEWS 2213, 2220.

[11] *See, e.g.*, Orzel v. City of Wauwatosa Fire Department, 697 F.2d 743, 30 FEP Cases 1070 (7th Cir.) (defendants did not prove that the assistant fire chief was unable to perform firefighting duties safely and effectively), *cert. denied*, 464 U.S. 992, 33 FEP Cases 440 (1983); Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 12 FEP Cases 1233 (5th Cir. 1976) (bus company demonstrated that its refusal to hire bus drivers between ages of forty and sixty-five for intercity routes was based on valid safety concerns).

[12] 531 F.2d 224, 12 FEP Cases 1233 (5th Cir. 1976).

[13] *Id.* at 226, 12 FEP Cases at 1233.

[14] *Id.* at 234, 12 FEP Cases at 1239. The *Tamiami* court set forth the *Weeks-Diaz* test. *Id.* In Weeks v. Southern Bell Telephone & Telegraph Co., 408 F.2d 228, 1 FEP Cases 656 (5th Cir. 1969), the Court of Appeals for the Fifth Circuit stated that, at a minimum, it must be "impossible or highly impractical to deal with women on an individualized basis" before discriminatory employment practices would fall within the BFOQ exception. *Id.* at 235 n.5, 1 FEP Cases at 660–61 n.5. In Diaz v. Pan Am. World Airways, 442 F.2d 385, 3 FEP Cases 337 (5th Cir. 1971), the Fifth Circuit set forth a "business necessity" test, emphasizing that a BFOQ "is valid only when the *essence* of the business operation would be undermined" without the discriminatory hiring practice. *Id.* at 388, 3 FEP Cases at 339 (emphasis in original). In *Diaz* the airline-employer had refused to hire the plaintiff as a flight attendant because he was male. *Id.* at 386, 3 FEP Cases at 337.

Both *Weeks* and *Diaz* are sex discrimination cases arising under Title VII of the Civil Rights Act of 1964. Courts also have adopted a Title VII analysis in the ADEA-BFOQ context. *See, e.g.*, Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 12 FEP Cases 1233 (5th Cir. 1976). Applying a Title VII analysis to age discrimination theoretically is sound because both the Civil Rights Act and the ADEA are designed to prohibit discrimination and have similar BFOQ exceptions. *See* Note, *Occupational Qualifications*, *supra* note 9, at 1349.

[15] *Tamiami*, 531 F.2d at 235, 12 FEP Cases at 1240 (quoting *Weeks*, 408 F.2d at 235, 1 FEP Cases at 661).

"reasonably necessary" to the essence of the employer's business operations.[16] The employer could satisfy the second prong of the *Tamiami* test by showing that it was "impossible or highly impractical" to deal with the unqualified group on an individualized basis.[17] Applying this two-prong test to the facts of *Tamiami*, the Fifth Circuit held that Tamiami's policy of not hiring persons over the age of forty as intercity bus drivers fell within the BFOQ exception to the ADEA.[18]

During the *Survey* year, the United States Supreme Court clarified the considerations necessary to establish a BFOQ defense. In *Western Air Lines v. Criswell*,[19] the Court explicitly adopted the two-prong test set forth in *Tamiami*. Applying this test, the Supreme Court held that Western Air Lines' mandatory retirement policy for flight engineers at age sixty violated the ADEA.[20] *Criswell* is significant because it established the standards a court must consider before permitting the BFOQ defense to defeat a claim for age discrimination. The Court correctly held that to satisfy the BFOQ exception, an employer must prove both that a mandatory retirement provision is reasonably necessary for safety and that it is impossible or highly impractical to deal with employees on an individual basis.

The plaintiffs in *Criswell*, two pilots and a flight engineer, were retired in 1978 by their employer Western Airlines after each had reached their sixtieth birthday.[21] The two pilots had applied for reassignments as flight engineers, but Western denied this request because the company's retirement plan required all crew members to retire at age sixty.[22] The plaintiffs filed suit against the airline in federal district court claiming that Western's policy violated the ADEA's prohibition against mandatory retirement of persons less than seventy years of age.[23] The defendant argued that the age restriction was necessary to the essence of its business.[24]

The district court instructed the jury, in accordance with the *Tamiami* standard, that the BFOQ defense is available only if the discrimination is "reasonably necessary to the normal operation or essence of defendant's business,"[25] and that "the essence of defen-

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[16] *Id.* at 235, 12 FEP Cases at 1241.

[17] *Id.* at 235 n.5, 12 FEP Cases 1240 n.5.

[18] *Id.* at 236–37, 12 FEP Cases at 1242.

[19] 105 S. Ct. 2743, 2752–53, 37 FEP Cases 1829, 1836 (1985).

[20] *Id.* at 2751–53, 37 FEP Cases at 1834–36.

[21] *Id.* at 2747, 37 FEP Cases at 1831–32

[22] *Id.* The FAA requires all pilots to retire at age 60. *See* 14 C.F.R. § 121.383(c) (1985). The FAA, however, declined to impose a mandatory retirement age on flight engineers. *Id.*

[23] *Id.* at 2747, 37 FEP Cases at 1832.

[24] *Id.* at 2747, 37 FEP Cases at 1831–32. Nevertheless, the Western official who was responsible for retirement orders stated that the company's decision to retire the plaintiffs was based solely on a provision in the company's pension plan and was not based on safety concerns. *Id.* at 2747 n.4, 37 FEP Cases at 1832 n.4. Moreover, Western's early retirement policy for flight engineers was unlike most other commerical airlines. Indeed, plaintiffs demonstrated at trial that several large commercial airlines have flight engineers over age sixty. Criswell v. Western Air Lines, 514 F. Supp. 384, 390, 29 FEP Cases 350, 355 (C.D. Cal. 1981). *See* Trans World Airlines, Inc. v. Thurston, 105 S. Ct. 613, 626 & n.23, 36 FEP Cases 977, 986 & n.23 (1985) (TWA is a commercial airline permitting flight engineers to work past age sixty.).

[25] *Criswell*, 514 F. Supp. at 388–89, 29 FEP Cases at 353–54. At trial, Western Air Lines offered the expert testimony of a former FAA Deputy Federal Air Surgeon who concluded that the onset of certain diseases is age-related and beyond age sixty it was unpredictable when and whether these diseases would occur. *Id.* at 389, 29 FEP Cases at 354. The doctor expressed particular concern with the incidence of heart attack. *Id.* Plaintiffs' witnesses testified to the contrary that disease, not

dant's business is the safe transportation of their passengers."[26] Based on these instructions and the evidence adduced at trial, the jury entered a verdict for the plaintiffs.[27]

Western Airlines appealed, arguing in part that the district court's jury instruction on the BFOQ exception did not adequately embrace Western's legitimate concern for the safety of its passengers.[28] Affirming the district court's ruling, the Ninth Circuit found that there was ample evidence supporting the finding that a mandatory retirement age of sixty for flight engineers did not fall within the narrow BFOQ exception to the ADEA's proscription against age discrimination.[29]

The United States Supreme Court unanimously affirmed the holding of the Ninth Circuit Court of Appeals.[30] The Court delineated a two-prong test whereby an employer may establish an age qualification for safety-related occupations.[31] To establish the BFOQ exception, the Court required the employer prove that an age-based qualification is reasonably necessary to the essence of the employer's business and further to demonstrate that age is a proxy for the safety-related job qualification.[32] To establish age as a reasonable discriminatory criterion, the Court stated that the employer must demonstrate that there is a reasonable basis to believe either that virtually all members of the class discriminated against would be unable to perform the job safely and efficiently,[33] or that some members of the group possess undesirable traits that preclude their safe and efficient job performance but which could not be discerned practicably except by reference to age.[34]

Prior to considering the merits of the case, the Court reviewed the purpose of the ADEA and the narrow scope of the BFOQ exception.[35] The Court noted that forced retirement can have devastating social and economic effects on older persons.[36] The

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aging, caused physiological deterioration. *Id.* They concluded that it was possible on the basis of individualized medical examinations to determine whether crew members, including those over the age of sixty, had the capability to fly. *Id.*

[26] *Id.* The district court judge also instructed the jury that:

> One method by which defendant Western may establish a BFOQ in this case is to prove:
>
> 1) That in 1978, when these plaintiffs were retired, it was highly impractical for Western to deal with each second officer over age 60 on an individualized basis to determine his particular ability to perform his job safely; and
>
> 2) That some second officers [flight engineers] over age 60 possess traits of physiological, psychological or other nature which preclude safe and efficient job performance that cannot be ascertained by means other than knowing their age.

Id.

[27] *Criswell*, 105 S. Ct. at 2748, 37 FEP Cases at 1833.

[28] Criswell v. Western Air Lines, 709 F.2d 544, 549, 32 FEP Cases 1204, 1210 (9th Cir. 1983).

[29] *Id.* at 546, 551–52, 32 FEP Cases at 1206, 1210–11, 1216. Specifically, the court of appeals stressed that present day diagnostic techniques made individualized health determinations possible, that there is another flight crew member aboard the plane to perform the flight engineer's job if he or she becomes incapacitated, and that the majority of other airlines do not require their flight engineers to retire at age 60. *Id.* at 552, 32 FEP Cases at 1210–11.

[30] *Criswell*, 105 S. Ct. at 2756, 37 FEP Cases at 1839. Justice Powell took no part in the decision.

[31] *Id.* at 2751–53, 37 FEP Cases at 1834–36.

[32] *Id.* at 2751, 37 FEP Cases at 1834–35.

[33] *Id.* at 2751–52, 37 FEP Cases at 1835.

[34] *Id.* at 2752, 37 FEP Cases at 1835.

[35] *Id.* at 2749–51, 37 FEP Cases at 1833–34.

[36] *Id.* at 2749, 37 FEP Cases at 1833. The Court quoted the legislative history of the Act which concluded that mandatory retirement is a "'cruel sacrifice in happiness and well-being which

Court also acknowledged that physical deterioration varies with each individual.[37] Thus, the Court recognized that Congress enacted the ADEA to require employers to consider an older person's individual ability, rather than age, when making retirement decisions.[38]

The Court next reviewed the balancing test established by the Fifth Circuit in *Tamiami*.[39] Acknowledging that every court of appeals confronted with age as a safety-related job qualification had applied the *Tamiami* standard,[40] the United States Supreme Court concluded that *Tamiami* correctly identifies the relevant considerations for proper analysis of age as a necessary occupational qualification for the safe operation of an employer's business.[41] Accordingly, the Court held that an employer must show that restrictive job qualifications are reasonably necessary to the essence of its business, and moreover, that an age qualification is necessary because it is impossible or impracticable to deal with each employee on an individual basis.[42]

Applying the *Tamiami* test to the facts of *Criswell*, the Court first considered Western's contention that the district court's instructions did not adequately address public safety.[43] The Supreme Court found that the jury had been instructed properly on the requisite elements of the BFOQ exception and that those instructions sufficiently emphasized public safety.[44] The Court determined that the BFOQ standard is one of "reasonable necessity" rather than "reasonableness."[45] In adopting the standard of reasonable necessity, the Court concluded that Congress had reconciled the importance of public safety with the ADEA's strong policy against age discrimination.[46]

The Court also noted that the difficulty in isolating the safety risks associated with advanced age always would make it "reasonably necessary" for an employer "to err on the side of caution."[47] The Court therefore reasoned that an employer would not find it overly burdensome to satisfy the "reasonable necessity" standard if the employer had adopted a particular age discriminatory qualification as a response to genuine safety concerns.[48] Accordingly, the Court concluded that the jury's verdict for the plaintiffs

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joblessness imposes on these citizens and their families.'" *Id.* at 2749 n.13. The Court also stated that the national economy, in terms of lost GNP, suffers from mandatory retirement. *Id.* at 2750.

[37] *Id.* at 2749, 37 FEP Cases at 1833.

[38] *Id.* at 2749–50, 37 FEP Cases at 1833–34. The Court also acknowledged that although the FAA mandates retirement at age 60 for pilots, the FAA declined to impose a similar rule on flight engineers. *Id.* at 2746, 37 FEP Cases at 1831.

[39] *Id.* at 2751–52, 37 FEP Cases at 1834–35. See *supra* notes 12–18 and accompanying text for a discussion of *Tamiami*.

[40] 105 S. Ct. at 2752–53 & n.23, 37 FEP Cases at 1836 & n.23.

[41] *Id.* at 2753, 37 FEP Cases at 1836.

[42] *Id.* at 2753–54, 37 FEP Cases at 1836–37.

[43] *Id.* at 2754, 37 FEP Cases at 1837.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.* The Court stated: "[w]hen the employer's argument has a credible basis in the record, it is difficult to believe that a jury of persons — many of whom no doubt have flown or could be expected to fly on commercial air carriers — would not defer in a close case to the airline's judgment." *Id.*

[48] *Id.* The Court also addressed Western's contention that the trial court's instructions which defined the essence of their business as "the safe transportation of their passengers" were inadequate because they failed to educate the jury that Western had a statutory duty to operate with the highest possible degree of safety. *Id.* at 2755, 37 FEP Cases at 1837. Viewing the record in its entirety, the Court found sufficient reference to safety, both in the judge's charge to the jury and in Western's

reflected Western's failure to satisfy its burden of proving a valid BFOQ defense, rather than an inadequacy in the trial court's instructions to the jury.[49]

Next, the Court considered whether Western had established age as a valid criterion for the airline's job qualifications, thereby satisfying the second prong of the *Tamiami* test.[50] While neither the Court nor the plaintiffs disputed Western's contention that a flight engineer's good health was reasonably necessary to the essence of the airline's business, the Court stated that the BFOQ exception requires that age be a necessary proxy for the job qualification.[51] The Court concluded that unless an employer can establish a significant basis for believing that virtually all employees above the chosen retirement age lack the necessary characteristics to perform the job satisfactorily, the employer must prove that it is highly impractical or impossible to use individualized testing to ensure that its employees are qualified for the job.[52]

The Court rejected Western's contention that the employer need establish only "a rational basis in fact" for believing that identifying persons who lack the requisite job qualifications cannot be done on an individualized basis. The Court reasoned that such an interpretation of the ADEA was entirely inconsistent with the statutory phrase "reasonable necessity."[53] Applying a "rational basis in fact" standard, the Court indicated, would undercut the ADEA's stated preference for individualized evaluation of the qualifications of older persons.[54] Thus, the Court in *Criswell* required not only that an employer prove that a discriminatory job qualification is reasonably necessary to its business, but also that age is the only reasonable basis on which to distinguish between those workers who are qualified to perform the job and those who are unqualified.

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closing argument, to conclude that the jury had been apprised adequately of the importance of safety to the airline's operations. *Id.* at 2755, 37 FEP Cases at 1837–38.

[49] *Id.* at 2755, 37 FEP Cases at 1838.

[50] *Id.* at 2755–56, 37 FEP Cases at 1838.

[51] *Id.* at 2753–54, 37 FEP Cases at 1836–37.

[52] *Id.* at 2756, 37 FEP Cases at 1838.

[53] *Id.* at 2755, 37 FEP Cases at 1838. An argument identical to Western's was successful in the Seventh Circuit in Hodgson v. Greyhound Lines, 499 F.2d 859, 863, 7 FEP Cases 817, 819 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122, 9 FEP Cases 58 (1975). In *Hodgson* the Seventh Circuit required only that an employer have a "rational basis in fact" to believe that the discriminatory hiring policy furthered the goal of public safety. *Hodgson*, 499 F.2d at 863, 7 FEP Cases at 819. The Seventh Circuit later reconciled *Hodgson* with the standard adopted in *Tamiami* in Orzel v. City of Wauwatosa Fire Department, 697 F.2d 743, 752–54, 30 FEP Cases 1070, 1077–78 (7th Cir.), *cert. denied*, 464 U.S. 992, 33 FEP Cases 440 (1983).

The *Criswell* Court also quickly dismissed Western's contention that the jury should have been instructed to defer to the flight engineer job qualifications chosen by Western as "reasonable in light of the safety risks." 105 S. Ct. at 2754, 37 FEP Cases at 1837. In adopting the ADEA, the Court noted, Congress intended facially discriminatory management decisions to be subject to the objective scrutiny of a court of law. *Id.*

[54] *Id.* at 2756, 37 FEP Cases at 1838. The Court also dismissed as unfounded Western's argument that an employer must be allowed to resolve conflicting expert testimony regarding whether older persons can be treated on an individualized basis in a conservative manner. *Id.* The Court noted that such a ruling is not only premised on the erroneous assumption that all expert testimony is of equal value but it also denigrates the role of the jury as the finder of fact. *Id.* Such a presumption would be too deferential to the employer, the Court observed, and would subvert the legislative purpose of enacting the ADEA. *Id.* Indeed, the Court noted that the ADEA, "even in cases involving public safety," does not permit complete deference to the employer's management determinations. *Id.* at 2756, 37 FEP Cases at 1838–39.

Criswell created a practical standard to apply to BFOQ challenges premised on safety-related job qualifications. The Supreme Court's decision reflects both the legislative purpose in promulgating the ADEA and the statutory requirements of the BFOQ defense. Moreover, the *Criswell* Court struck the correct balance between public safety concerns and the ADEA's prohibition against age discrimination.

The *Criswell* Court's adoption of the *Tamiami* test as the standard to establish the BFOQ defense furthers the purposes of the ADEA. By adopting the standard that discriminatory job qualifications based on age must be reasonably necessary to the essence of the employer's business, rather than merely reasonable, the Court narrowly construed the BFOQ exception. Thus, the BFOQ exception can be used as a defense to age discrimination only where the employer proves that the age qualification relates to a "central mission" of the employer's business, such as safety considerations.

Further, the ruling in *Criswell* establishes that the discriminatory job qualification must not only be reasonably necessary, but also that age must be a determinative factor in the employee's ability to perform the job satisfactorily. The Court noted that there are only two limited instances when age would be a reasonable criterion for a job: first, when virtually all persons over the given age are incapable of safely performing the necessary duties of the job; or second, when it is highly impractical to deal with the older employees on an individualized basis.[55] Moreover, the Court correctly noted that the employer cannot justify an age qualification by merely establishing that there is a "rational basis in fact" for not dealing with employees on an individualized basis. Instead, the employer, consistent with the statutory mandate of the ADEA, must establish the "reasonable necessity" of the age qualification.[56] Thus, unless employers can meet this standard, older employees will be judged on the basis of their individual ability and capability, rather than on the basis of an arbitrary age qualification.

The *Criswell* decision also correctly balances the purposes of the ADEA and the importance of public safety concerns by adopting the *Tamiami* standard. The Fifth Circuit in *Tamiami* extensively demonstrated that public safety concerns were satisfied by the "reasonable necessity" element of the test.[57] Indeed, the *Tamiami* court stated: "[t]he greater the safety factor . . . the more stringent may be the job qualifications."[58] The Supreme Court in *Criswell* emphasized that both the "reasonable necessity" standard and the natural tendency of a jury to weigh safety concerns heavily and to "err on the side of caution" will ensure that public safety is preserved.[59] By adopting the clearly enunciated *Tamiami* two-prong test, the Supreme Court also has given the lower courts the concise guidance needed to decide cases consistently in accordance with strong policy concerns in favor of public safety and against arbitrary age discrimination.

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[55] 105 S. Ct. at 2755–56, 37 FEP Cases at 1838.

[56] In addition to satisfying the statutory dictates of the ADEA, the Supreme Court's decision in *Criswell* supports the ADEA's stated purpose to "help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b) (1982). The Supreme Court's decision preserves the ability of a pilot to downgrade to the position of flight engineer upon his sixtieth birthday, thus minimizing the impact of the FAA's age 60 mandatory retirement. Thus, in scrutinizing the necessity for mandatory retirement of flight engineers, the Court both furthered the purpose of the ADEA and preserved Congress's intention that the BFOQ exception be construed narrowly.

[57] *Tamiami*, 531 F.2d at 235–36, 238, 12 FEP Cas at 1241, 1243–44.

[58] *Id.* at 236, 12 FEP Cases at 1241.

[59] 105 S. Ct. at 2754, 37 FEP Cases at 1837.

In sum, the Supreme Court's interpretation of the BFOQ exception requires employers to prove age is a *necessary* job qualification before employers can impose mandatory retirement on employees prior to the statutory age of seventy. *Criswell* clarifies the instances where the BFOQ defense can be invoked successfully. To qualify, the employer first must establish age as a discriminatory job qualification that is "reasonably necessary to the normal operation of the particular business." Second, the employer must show that age is a necessary criterion for that job qualification by demonstrating that virtually all employees above the designated age lack the safety-related job qualification, or that it is "highly impractical" to isolate the unqualified employees on an individual basis. By narrowly construing the BFOQ exception, the Court has furthered Congress's purpose in enacting the ADEA without prejudicing employers in situations in which age might affect public safety.

B. **Federal Retirement Provision Does Not Establish Mandatory Retirement Age for Nonfederal Employees*: Johnson v. Mayor and City Council of Baltimore[1]

Congress enacted the Age Discrimination in Employment Act of 1967 (ADEA)[2] to prohibit employers from discriminating against employees on the basis of age.[3] In 1974, the ADEA was amended to apply to federal and state government employers.[4] Notwithstanding this general prohibition against age discrimination, the ADEA allows an employer to make employment decisions based upon age when the employer can demonstrate that "age is a bona fide occupational qualification [BFOQ] reasonably necessary to

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[1] 105 S. Ct. 2717, 37 FEP Cases 1839 (1985).

[2] 29 U.S.C. § 621 (1982).

[3] The statute provides in pertinent part:

> (a) The Congress hereby finds and declares that —
>
> (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs . . . .
>
> . . . .
>
> (b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

29 U.S.C. § 621 (1982).

The ADEA protects individuals between forty and seventy years of age only. 29 U.S.C. § 631 (1982). Initially the protection was limited to employees between the ages of forty and sixty-five, but the ADEA amendments of 1978 raised the limitation to seventy. *See* EEOC v. Wyoming, 460 U.S. 226, 232, 31 FEP Cases 74, 76 (1983).

[4] H.R. REP. No. 913, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS, 2811, 2849. The Congressional Committee expected that the expanded scope of the ADEA would remove discriminatory barriers against employment of older workers in the government as it had in the private sector. *Id.* at 2850.

The United States Supreme Court upheld the application of the ADEA to state employers in EEOC v. Wyoming, 460 U.S. 226, 31 FEP Cases 74 (1983), as a valid exercise of Congress's power under the Commerce Clause. *Wyoming*, 460 U.S. at 243, 31 FEP Cases at 80–81.

the normal operation of the particular business."[5] Because it is an exception to the ADEA, however, the BFOQ provision must be construed narrowly.[6]

The employer bears the burden of proving that age is a BFOQ for a particular business.[7] To prove that age is a BFOQ, the employer must satisfy a two-prong test the United States Court of Appeals for the Fifth Circuit formulated in *Usery v. Tamiami Trail Tours*.[8] The first prong requires the employer to establish that the age qualification is

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[5] 29 U.S.C. § 623(f)(1) (1982). The statute provides that:

> It shall not be unlawful for an employer, employment agency, or labor organization —
>
> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age. . . .

29 U.S.C. § 623(f)(1) (1982).

After the 1974 amendment, state and local governments still may impose mandatory retirement provisions for certain positions, but they must demonstrate that age is a BFOQ for the position. *Wyoming*, 460 U.S. at 240, 31 FEP Cases at 79. The federal regulation detailing the administration of the ADEA states in pertinent part:

> (c) Many State and local governments have enacted laws or administrative regulations which limit employment opportunities based on age. Unless these laws meet the standards for the establishment of a valid bona fide occupational qualification under section 4(f)(1) of the Act [29 U.S.C. § 623(f)(1)], they will be considered in conflict with and effectively superseded by the ADEA.

29 C.F.R. § 1625.6(c) (1985).

[6] Orzel v. City of Wauwatosa Fire Dept., 697 F.2d 743, 748, 30 FEP Cases 1070, 1073 (7th Cir. 1983). Narrow interpretation of the exception is supported by federal regulations. *See* 29 C.F.R. § 1625.6 (1985). The federal regulations provide:

> (a) Whether occupational qualifications will be deemed to be "bona fide" to a specific job and "reasonably necessary to the normal operation of the particular business," will be determined on the basis of all the pertinent facts surrounding each particular situation. It is anticipated that this concept of a bona fide occupational qualification will have limited scope and application. Further, as this is an exception to the Act it must be narrowly construed.

29 C.F.R. § 1625.6(a) (1985).

The legislative history of the ADEA further supports this narrow construction of the BFOQ, stating that a case-by-case analysis should serve as the underlying rule in administrating the legislation. H.R. REP. No. 805, 90th Cong., 1st Sess., *reprinted in* 1967 U.S. CODE CONG. AND AD. NEWS 2213, 2220. One court noted that overuse of the BFOQ exception risks reintroducing the very age discrimination the ADEA was designed to prevent, because the exception itself frees an employer from the ADEA's general requirement of making individualized judgments based on ability. Orzel v. City of Wauwatosa Fire Dep't, 697 F.2d 743, 748, 30 FEP Cases 1070, 1073 (7th Cir. 1983). Therefore, the Seventh Circuit reasoned, the BFOQ exception must be construed narrowly and determined by the particular facts in each case. *Id.* at 748 & n.10, 30 FEP Cases at 1073 & n.10.

[7] Hill, Jr., and Bishop, *Aging and Employment: The BFOQ Under the ADEA*, 34 LAB. L.J. 763, 766 (1983). The employee first must establish the prima facie case that he or she was qualified for the position in terms of knowledge and ability. *Id.* at 767. The burden then shifts to the employer to prove that age was not the dispositive factor or that age was a BFOQ for the position. *Id.* at 766.

[8] 531 F.2d 224, 235, 12 FEP Cases 1233, 1240–41 (5th Cir. 1976). During the *Survey* year, in *Western Airlines v. Criswell*, the Supreme Court concluded that the two-prong *Tamiami* standard properly identifies the relevant considerations for resolving the issue of whether age is a BFOQ in occupations involving safety considerations. *Criswell*, 105 S. Ct. 2743, 2753, 37 FEP Cases 1829, 1836 (1985). In reaching this conclusion, the Court considered the narrow language of the BFOQ exception, the parallel treatment of the same issue under Title VII, and the uniform application of the *Tamiami* standard by the federal courts, Congress, and the Equal Employment Occupational Commission (EEOC). *Id.*

reasonably necessary to the essential operation of the business.[9] Under the second prong, the employer must demonstrate either that there is a factual basis for believing all or substantially all of the employees over a certain age are unable to perform their duties safely and efficiently, or that it is impractical to determine job fitness on an individualized basis.[10]

Prior to the time the ADEA was amended to apply to government employees, Congress had determined that age fifty-five was the mandatory retirement age for certain federal workers.[11] Under this mandatory federal retirement provision, federal law enforcement officers and firefighters must retire at age fifty-five if they have at least twenty years of service to qualify for a pension and the head of their agency finds that it is not in the public interest to continue their employment.[12] Although the Supreme Court has never addressed directly the relationship between this federal mandatory retirement provision and the ADEA, the Court has intimated that this mandatory federal retirement provision does not undermine the ADEA.[13] Federal courts have been divided, however, on whether this federal statute indicates a Congessional belief that fifty-five should be the mandatory retirement age for state and local employees in comparable positions.[14]

During the *Survey* year, the Supreme Court held in *Johnson v. Mayor and City Council of Baltimore*[15] that the federal statute requiring firefighters to retire at age fifty-five does not establish age fifty-five as a BFOQ for nonfederal firefighters. The Court determined that the legislative history of the federal provision demonstrated that the provision was not based on a BFOQ for the specified employees.[16] Accordingly, the Court concluded

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[9] *Tamiami*, 531 F.2d at 235, 12 FEP Cases at 1241.

[10] *Id.* at 235, 12 FEP Cases at 1240.

[11] *See* 5 U.S.C. § 8335(b) (1982). This statute provides:

> A law enforcement officer or a firefighter who is otherwise eligible for immediate retirement under section 8336(c) of this title shall be separated from service on the last day of the month in which he becomes 55 years of age or completes 20 years of service if then over that age. The head of the agency, when in his judgment the public interest so requires, may exempt such an employee from automatic separation under this subsection until that employee becomes 60 years of age. The employing office shall notify the employee in writing of the date of separation at least 60 days in advance thereof. Action to separate the employee is not effective, without the consent of the employee, until the last day of the month in which the 60-day notice expires.

5 U.S.C. § 8335(b) (1982).

[12] *Id.*

[13] *See Wyoming*, 460 U.S. at 242 n.17, 31 FEP Cases at 80 n.17 ("the strength of the federal interest underlying the Act is not negated by the fact that the Federal Government happens to impose mandatory retirement on a small class of its own workers").

[14] *Compare* Johnson v. Mayor and City Council of Baltimore, 731 F.2d 209, 212–13, 34 FEP Cases 854, 857 (4th Cir. 1984) (in view of Congress's own standard providing for retirement at age fifty-five for federal police and firefighters, age held to be a BFOQ for similar jobs within the city), *with* Orzel v. City of Wauwatosa Fire Dep't, 697 F.2d 743, 750, 30 FEP Cases 1070, 1075 (7th Cir. 1983) (presence of Congress's statutorily mandated retirement age of fifty-five for federal firefighters does not automatically establish the validity of a BFOQ for city employees) and Galvin v. Vermont, 598 F. Supp. 144, 150, 36 FEP Cases 1674, 1677–78 (D. Vt. 1984) (Congress's standard that age is a BFOQ for federal employees does not necessarily establish a BFOQ in similar state-employee ADEA actions). *Cf.* Tuohy v. Ford Motor Co., 675 F.2d 842, 843, 845, 28 FEP Cases 1116, 1117, 1119 (6th Cir. 1982) (federal regulation establishing sixty as the maximum age for commercial airline pilots does not necessarily establish age as a BFOQ for corporate pilots).

[15] 105 S. Ct. 2717, 2727, 37 FEP Cases 1839, 1846 (1985).

[16] *Id.* at 2723, 37 FEP Cases at 1843.

that because the provision does not articulate a BFOQ for firefighters, weighing it conclusively in determining a mandatory retirement age for nonfederal firefighters violated the ADEA.[17] *Johnson* is significant because the Court unanimously adhered to the purpose of the ADEA in promoting employment of older persons based upon their ability rather than their age.

In *Johnson*, six firefighters challenged the City of Baltimore's municipal code provisions which established a mandatory retirement age for firefighters and police personnel at an age lower than age seventy, the limitation provided by the ADEA.[18] Prior to 1962, the Employees Retirement System (ERS), which provided for mandatory retirement at age seventy, covered all Baltimore employees.[19] In 1962, however, the City of Baltimore established the Fire and Police Employee Retirement System (FPERS) which required that all law enforcement and firefighting personnel below the rank of lieutenant retire at age fifty-five.[20]

The six firefighters brought an action in the United States District Court for the District of Maryland, alleging that the Baltimore Code provisions violated the ADEA.[21] The district court analyzed whether age was a BFOQ for Baltimore firefighters under the two-prong *Tamiami* test.[22] The court concluded that the provision failed to meet the BFOQ exception to the ADEA because it set an arbitrary age for retirement.[23] The City of Baltimore appealed the district court decision and the United States Court of Appeals for the Fourth Circuit reversed.[24] The court of appeals, looking to the Supreme Court's statement in *EEOC v. Wyoming*[25] that states must test their provisions against a "reasonable

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[17] *Id.* at 2726, 37 FEP Cases at 1845.

[18] *Id.* at 2720, 37 FEP Cases at 1840.

[19] *Id.*

[20] *Id.* at 2720, 37 FEP Cases at 1840–41. The provisions set forth in Article 22, § 34(a), Baltimore City Code provide in pertinent part: "Any member in service who has attained the age of fifty-five shall be retired on the first day of the next calendar month after attaining such age . . . ." Johnson v. Mayor and City Council of Baltimore, 515 F. Supp. 1287, 1289, 26 FEP Cases 44, 45 (D. Md. 1981). A special provision gives personnel, hired before 1962, the option of remaining in the ERS and continuing to work until age sixty or in some limited circumstances until age sixty-five. *Johnson*, 105 S. Ct. at 2720, 37 FEP Cases at 1841.

[21] *Johnson*, 105 S. Ct. at 2720, 37 FEP Cases at 1840. Five of the firefighters were hired before 1962 and subject to retirement at age sixty while one firefighter was hired after 1962 and subject to retirement at age fifty-five. *Id.* at 2720, 37 FEP Cases at 1841.

[22] Johnson v. Mayor and City Council of Baltimore, 515 F. Supp. 1287, 1300, 26 FEP Cases 44, 55 (D. Md. 1981). Under the first prong of the *Tamiami* test the court concluded that the defendants had not proven that retirement at age fifty-five is reasonably necessary for the operation of an efficient fire department. *Id.* at 1296, 26 FEP Cases at 51. Under the second prong, the court concluded that the defendants had not shown that all or substantially all of the firefighters between the ages of sixty and sixty-five could not perform their duties safely and efficiently. *Id.* In addition, the court held that the defendants did not demonstrate that it was impossible or impractical to ascertain job fitness on an individualized basis through exercise tolerance tests and other procedures. *Id.* at 1298, 26 FEP Cases at 52–53.

[23] *Id.* at 1300, 26 FEP Cases at 55.

[24] Johnson v. Mayor and City Council of Baltimore, 731 F.2d 209, 216, 34 FEP Cases 854, 859 (4th Cir. 1984).

[25] 460 U.S. 226, 31 FEP Cases 74 (1983). In EEOC v. Wyoming, the Supreme Court stated:

> Perhaps more important, appellees remain free under the ADEA to continue to do *precisely what they are doing now*, if they can demonstrate that age is a "bona fide occupational qualification" for the job of game warden . . . . Thus, in direct contrast to the situation in *National League of Cities* . . . even the State's discretion to achieve its

federal standard," and concluded that the federal mandatory retirement provision set a reasonable federal standard for determining that age fifty-five was a BFOQ.[26]

The Supreme Court reversed the Fourth Circuit's holding that the federal provision set age fifty-five as a BFOQ for nonfederal employees.[27] According to the Court, the "reasonable federal standard" to which the *Wyoming* Court referred is the standard supplied by the ADEA.[28] The Court stated that its use of this phrase in *Wyoming* was intended to reaffirm that the employer may maintain a mandatory retirement age only if the employer demonstrates that age is a BFOQ.[29] Moreover, the Court asserted that nothing in either the ADEA or the *Wyoming* decision implied that a federal rule applicable only to federal employees necessarily authorized any state or local government employer to maintain a mandatory retirement age.[30]

After ruling that the federal mandatory retirement provision does not necessarily provide a BFOQ exception for nonfederal employees, the Court addressed the issue of whether the federal provision reflects a congressional determination that age fifty-five is a BFOQ for firefighters.[31] Through analyzing the legislative history of the federal civil service provision, the Court determined that the decision to retire federal employees was not based on bona fide occupational qualifications.[32] Rather, the Court found that the provision was drafted to enable Congress to deal with problems inherent in the federal civil service.[33] The Court noted that initially the statute was enacted to stimulate morale by giving certain employees an option for early retirement.[34] Subsequently, the Court continued, the statute was amended to provide for mandatory retirement at age fifty-five for federal employees if they had completed twenty years of service.[35] The

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> goals *in the way it thinks best* is not being overridden entirely, but is merely being tested against a reasonable federal standard.

460 U.S. at 240, 31 FEP Cases at 79 (emphasis in original). *See also* Johnson v. Mayor and City Council of Baltimore, 731 F.2d at 212, 34 FEP Cases at 856 (quoting *Wyoming*, 460 U.S. at 240, 31 FEP Cases at 79).

[26] Johnson v. Mayor and City Council of Baltimore, 731 F.2d at 212–13, 34 FEP Cases at 857. In a dissenting opinion, Chief Judge Winter disagreed with the Fourth Circuit's holding that Congress has established a BFOQ for Baltimore City firefighters. *Id.* at 216, 34 FEP Cases at 859–60 (Winter, C.J., dissenting). Through a discussion of the text and legislative history of the federal mandatory retirement provision in 5 U.S.C. § 8335, the Chief Judge determined that the emphasis on eligibility and alternative formulas belies the existence of any congressional intent to set age fifty-five as a BFOQ. *Id.* at 217–218, 34 FEP Cases at 860 (Winter, C.J., dissenting). Even if Congress had established a BFOQ for federal firefighters, Chief Judge Winter reasoned, Baltimore would still have to prove that age was a BFOQ for its employees. *Id.* at 218, 34 FEP Cases at 860 (Winter, C.J., dissenting). To support this assertion, the Chief Judge interpreted *Wyoming* as stating that the treatment Congress gives to federal employees does not excuse other employees from satisfying the requirements set out in the ADEA. *Id.* at 218, 34 FEP Cases at 861 (Winter, C.J., dissenting).

[27] *Johnson*, 105 S. Ct. at 2727, 37 FEP Cases at 1846.

[28] *Johnson*, 105 S. Ct. at 2722, 37 FEP Cases at 1842.

[29] *Id.*

[30] *Id.*

[31] *Id.* at 2723, 37 FEP Cases at 1843.

[32] *Id.*

[33] *Id.*

[34] *Id.* The Court stated that the intention of the provision was: "'[To] stabilize the service of the Federal Bureau of Investigation into a career service . . . .[and to] act as an incentive to investigative personnel of the [FBI] to remain in the Federal service until a reasonable retirement age is reached.'" *Id.* (quoting S. REP. No. 76, 80th Cong., 1st Sess. 1–2 (1947)).

[35] *Id.*

Court found that two reasons prompted this change.[36] The first reason was to maintain "'relatively young, vigorous, and effective law enforcement and firefighting work forces.'"[37] The second reason was to change the adverse impact the original statute had on the quality of employees.[38] Under the original provision, older alert employees voluntarily retired to enter the private workforce and those employees that suffered from a loss of proficiency remained.[39] The Court thus concluded that Congress did not establish the age limit based upon the demands of the occupation.[40]

After concluding that the age limit was not based upon actual occupational qualifications, the Court next discussed Congress' decision to retain the federal retirement provision when the ADEA was extended to federal employees.[41] The Court stated that this Congressional decision did not mean that the provision indicated that age fifty-five is a BFOQ for federal firefighters.[42] According to the Court, the retirement age was not based upon an occupational qualification.[43] Rather, the Court noted the federal retirement provisions were retained to provide those congressional committees responsible for the programs with an opportunity to reexamine the provisions.[44] Thus, the Court found that there was no objective basis for retaining age fifty-five as the mandatory retirement age.

After determining that the provision did not articulate a BFOQ for firefighters, the Court observed that the decision might have differed if there had been factual evidence of age as a BFOQ.[45] The Court stated that if Congress had expressly extended the finding of a BFOQ to nonfederal firefighters, the determination would be dispositive.[46] The Court also suggested that if there had been a BFOQ determination which was not extended to nonfederal occupations, it might nevertheless be probative in determining

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[36] *Id.* at 2723–24, 37 FEP Cases at 1843.

[37] *Id.* at 2723, 37 FEP Cases at 1843 (quoting H.R. REP. No. 93-463, p. 2 (1973)).

[38] *Id.*

[39] *Id.* at 2723–24, 37 FEP Cases at 1843.

[40] *Id.* at 2724, 37 FEP Cases at 1844. The Court also raised the possibility that Congress might have established the age limit based upon stereotypical assumptions without any factual basis, an action which the ADEA was intended to prohibit. *Id.* Because the Court did not know Congress's rationale for its determination of age fifty-five as the limit for federal employment, the Court could not decipher whether Congress's reasoning was consistent with the ADEA. *Id.* Yet, the Court noted, Congress does have the power to exempt federal employees from application of the ADEA and is not required to treat federal and nonfederal employees in the same manner. *Id.* at 2724 n.10, 37 FEP Cases at 1844 n.10.

[41] *Id.* at 2725, 37 FEP Cases at 1844.

[42] *Id.* at 2724, 37 FEP Cases at 1844.

[43] *Id.*

[44] *Id.* at 2725, 37 FEP Cases at 1844. The Court noted that subsequent hearings on the retirement provisions of 5 U.S.C. § 8335 found merely that policies disregarding "difference in physical abilities and productive capacity are costly and wasteful." *Id.* at 2725 n.11, 37 FEP Cases at 1845 n.11 (quoting Report to the House Committee in Post Office and Civil Service by the Comptroller General of the United States: Special Retirement Policy for Federal Law Enforcement and Firefighter Needs Reevaluation 10 (1977)). Yet the Court noted that the subcommittee took no action to amend the provisions. *Id.* The Court stated, however, that Congress recently has been confronted with another report suggesting that mandatory retirement age provisions are unnecessary and wasteful and that legislation has been introduced to eliminate these federal provisions not covered by the ADEA. *Id.*

[45] *Id.* at 2726, 37 FEP Cases at 1845.

[46] *Id.*

a BFOQ for nonfederal employees.[47] The Court expounded the idea that the probative value would depend upon the extent of congruity between the federal and nonfederal occupations.[48]

In summary, the Court concluded that in the absence of any indication that Congress based the mandatory federal retirement provision on occupational qualifications, the provision does not establish a BFOQ for nonfederal employees.[49] Accordingly, the Court reversed the Fourth Circuit's holding that the federal retirement provision established a BFOQ for firefighters in the City of Baltimore.[50] The case therefore was remanded for proceedings consistent with the Court's determination that the BFOQ exception may be established only through a particularized, factual showing that age is a bona fide occupational qualification.[51]

The *Johnson* decision's thorough treatment of the federal mandatory retirement provision touches on two essential concepts underlying the administration of the ADEA. First, the Court considered the issue of whether Congress intended to set age fifty-five as a BFOQ by maintaining the mandatory retirement age provision despite the adoption of the ADEA. Second, although concluding that Congress had not set such a standard, the Court acknowledged the possible ramifications if there had been such a finding of congressional intent. The Court's twofold discussion further clarifies the extent to which nonfederal employers must adhere to federal retirement provisions. The *Johnson* Court correctly determined that the *Wyoming* decision does not support a conclusion that a federal retirement provision necessarily authorizes a state or local government employer to maintain the same mandatory retirement age.[52] Instead, according to the *Johnson* Court, the existence of a federal provision initially necessitates a thorough examination of Congress's intent in formulating the provision to determine if Congress had acted in setting age as an occupational qualification.[53] If it can be established that Congress used factors relevant under the ADEA to analyze the position, there still remains a factual issue as to what extent the federal position itself corresponds to nonfederal positions within the same category.[54]

In addition to presenting a well reasoned discussion, the Court's decision is sound because it supports the purposes of the ADEA. The ADEA was formulated to promote the employment of older persons based upon their ability by prohibiting employers from discriminating against employees on the basis of age.[55] *Johnson*'s refusal to permit nonfederal employers to circumvent the requirement of proving that age is a dispositive qualification for the position supports this purpose of the ADEA.[56]

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[47] *Id.* at 2726–27, 37 FEP Cases at 1845–46.

[48] *Id.* at 2726–27, 37 FEP Cases at 1846.

[49] *Id.* at 2726, 37 FEP Cases at 1845. The Court noted, however, that the situation might differ if it were demonstrated that Congress determined that certain federal employees must retire at a particular age based upon the same considerations that would warrant a finding of a BFOQ under the ADEA. *Id.*

[50] *Id.* at 2727, 37 FEP Cases at 1846.

[51] *Id.*

[52] *Johnson*, 105 S. Ct. at 2722, 37 FEP Cases at 1842.

[53] *Id.* at 2723, 37 FEP Cases at 1843.

[54] *Id.* at 2726–27, 37 FEP Cases at 1845–46.

[55] See *supra* notes 3–6 and accompanying text for a discussion of the purposes of the ADEA.

[56] *See generally Johnson*, 105 S. Ct. at 2722, 37 FEP Cases at 1842.

Although the Court's decision focused on the federal firefighter's mandatory retirement provision,[57] the decision expounds the broader proposition that, pursuant to the ADEA, it is not sufficient to rely on other retirement provisions without analyzing whether age is a necessary criteria for the particular occupation. The Court's own inability to discern Congress's intent in maintaining the retirement provision demonstrates that a federal retirement statute should not be relied upon without determining whether it is based upon factual considerations, legislative balancing of competing policy interests, or stereotypical assumptions.[58] Through its examination of the federal retirement provision, the Court also raises the ironic possibility that in establishing the retirement provision, Congress itself may have engaged in the same stereotypic assumptions which the ADEA was designed to prohibit.[59]

In conclusion, *Johnson* held that a federal statute designating age fifty-five as the mandatory retirement age for federal firefighters does not establish age fifty-five as a bona fide occupational qualification for nonfederal firefighters. The Court formulated a well reasoned approach for determining the extent to which a federal retirement age may be dispositive in situations involving nonfederal employees. The Court's opinion in *Johnson* stressed the purpose of the ADEA — to prohibit discrimination against employees on the basis of age. Through an analysis of the legislative history of the retirement provision, the Court demonstrated that the adoption of any retirement age without factual proof that the age qualification is reasonably necessary to the essential operation of a particular business may contravene the ADEA. Thus, in order to satisfy the requirements of the ADEA, nonfederal employers should analyze the purpose and intent of any federal legislation concerning a mandatory retirement age before contemplating its application to nonfederal employees.

C. **Establishing the Elements of the Portal-to-Portal Act Defense in ADEA Actions*: Quinn v. New York State Electric & Gas Corp.[1]

The Age Discrimination in Employment Act (ADEA)[2] proscribes employers' discrimination against employees because of age. Under the Portal-to-Portal Act (Portal

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[57] See *supra* note 11 for the text of the federal firefighters' mandatory retirement provision.

[58] *See Johnson*, 105 S. Ct. at 2724, 37 FEP Cases at 1844; *see also Western Airlines v. Criswell*, which cited *Johnson* to support the proposition that although the Federal Aviation Administration's [FAA] adoption of an age sixty retirement rule for pilots is relevant evidence for a BFOQ defense, it is not to be afforded conclusive weight in determining that flight engineers must meet the same stringent qualifications. *Criswell*, 105 S. Ct. 2743, 2754, 37 FEP Cases 1829, 1837 (1985).

[59] *Johnson*, 105 S. Ct. at 2724, 37 FEP Cases at 1844.

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[1] 621 F. Supp. 1086, 39 FEP Cases 690 (N.D.N.Y. 1985).

[2] 29 U.S.C. §§ 621–34 (1982). 29 U.S.C. § 621 provides in pertinent part:

> (b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age: to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

29 U.S.C. § 623(a)(1) provides:

> § 623. Prohibition of age discrimination
> (a) Employer practices
> It shall be unlawful for an employer —
> (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate

Act),[3] however, employers are not liable for actions proscribed by the ADEA if the employer proves that the act or omission complained of was in good faith, in conformity with, and in reliance on a written administrative regulation.[4] The Portal Act defense, if established, bars actions by employees notwithstanding that after such act or omission, the administrative regulation was modified, rescinded, or judically determined to be invalid.[5]

In the 1982 decision of *Equal Employment Opportunity Commission v. Home Insurance Co.*,[6] the United States Court of Appeals for the Second Circuit recognized that the Portal Act protects employers from liability if they take certain actions based on a government agency's interpretation of a law referred to within the Portal Act even if the agency's interpretation proved incorrect. To establish the Portal Act defense, the court stated the employer must prove that its action was taken in reliance on a ruling, that it was taken in conformity with that ruling, and that it was taken in good faith.[7] Based on these elements, the *Home Insurance* court held that the defendant was not relieved of liability because the administrative interpretation on which it relied was so uninformative that it left the employer to make its own reading of the precise requirements of the statute.[8] Therefore, the court noted, the administrative ruling gave the employer no guidance on which to rely within the meaning of the Portal Act.[9] The court emphasized that the Portal Act was not intended to let employers determine whether they have been guilty of a violation,[10] nor to allow employers to insulate themselves from liability for the consequences of their own improvident interpretation of the ADEA.[11] In conclusion, the *Home Insurance* court held that the Portal Act standard of good faith

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against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . .

[3] 29 U.S.C. § 259 (1982). 29 U.S.C. § 259 provides in pertinent part:

§ 259. Reliance in future on administrative rulings

(a) In any action or proceeding based on any act or omission on or after May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended [29 U.S.C. §§ 201–19], the Walsh-Healey Act [41 U.S.C. §§ 35–45], or the Bacon-Davis Act [40 U.S.C. §§ 276a–5], if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

Sections 6 and 10 of the Portal-to-Portal Act of 1947 (29 U.S.C. §§ 255 and 259) are made applicable to the Age Discrimination in Employment Act by 29 U.S.C. § 626(e)(1) (1982).

[4] *See* 29 U.S.C. § 259 (1982).

[5] *Id.*

[6] 672 F.2d 252, 263; 27 FEP Cases 1665, 1675 (2d Cir. 1982).

[7] *Id.*

[8] *Id.* at 266, 27 FEP Cases at 1677.

[9] *Id.* at 264, 27 FEP Cases at 1676.

[10] *Id.* at 265, 27 FEP Cases at 1676 (quoting Message of President Truman to accompany the Portal-to-Portal Act of 1947, 1947 U.S. CODE CONG. & ADMIN. NEWS 1827 (May 14, 1947)).

[11] *Id.* at 266, 27 FEP Cases at 1677.

is an objective standard, at least where the administrative ruling leaves room for interpretation.[12] The *Home Insurance* court stated that a subjective standard has greater validity, however, where the administrative ruling is specific, leaves no room for interpretation, and does not leave employers to their own devices.[13]

During the *Survey* year, in *Quinn v. New York State Electric & Gas Corp.*,[14] the United States District Court of the Northern District of New York ruled that an employer established the necessary elements of the Portal Act defense when it relied upon a regulation exempting bona fide apprenticeship programs from the ADEA. The court held that the employer was entitled to the protection of the Portal Act defense even though the employer never sought an opinion from the Equal Employment Opportunity Commission (EEOC) as to whether the apprenticeship program complied with the regulation and in spite of the fact that the EEOC had proposed rescinding the regulation.[15] After *Quinn*, an employer may prove reliance for purposes of the Portal Act defense without an agency interpretation if the regulation clearly states the requirements necessary to be exempt from the provisions of the ADEA. In addition, an employer may have acted in good faith even where the exempting regulation faced possible rescission. Most importantly, *Quinn* clarifies that the Portal Act standard of good faith is an objective standard, even where the administrative ruling is specific and leaves no room for interpretation.

In *Quinn*, the plaintiff, a forty-four year old employee of the defendant, applied for an open position in the company's training program.[16] At the time the application was made the defendant-employer had a policy in effect that limited entry into the training program to persons under thirty-two years of age.[17] Consequently, the employer did not consider the plaintiff's application.[18] The plaintiff alleged that the employer's practice and policy violated his rights under the ADEA.[19] In an amended answer, the defendant employer admitted that it set a maximum age limit for trainees and that the plaintiff was precluded from competing for a position in the program due to his age.[20] In response to the plaintiff's claims alleging violations of the ADEA, however, the defendant raised an EEOC regulation as an affirmative defense, contending that this regulation exempted

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[12] *Id. But see* Addison v. Huron Stevedoring Corp., 204 F.2d 88, 11 WH 312 (2d Cir.)(only subjective faith is required to satisfy the Portal Act defense), *cert. denied*, 346 U.S. 877, 11 WH Cases 682 (1953).

[13] 672 F.2d at 266, 27 FEP Cases at 1677. The Fourth, Sixth and Ninth Circuits predated *Home Insurance* in holding that the good faith standard is objective. *See* Marshall v. Baptist Hosp., 668 F.2d 234, 237 n.2, WH Cases 232, 234 n.2, (6th Cir. 1981)(employer acts in good faith so long as it had no notice of fact which would lead a reasonably prudent person to make further inquiry); Clifton D. Mayhew, Inc. v. Wirtz, 413 F.2d 658, 661, 19 WH Cases 46, 47 (4th Cir. 1969)("Congress intended standard to be an objective one, and we so hold"); Kam Koon Wan v. E.E. Black, Ltd., 188 F.2d 558, 562, 10 WH Cases 197 (9th Cir.)(the test of good faith is whether the employer acted as a reasonably prudent person would have acted under similar circumstances), *cert. denied*, 342 U.S. 826 (1951).

The objective standard is now codified in 29 C.F.R. § 790.15(a) (1985). See *infra* note 40 for the text of this regulation.

[14] 621 F. Supp. 1086, 1092, 39 FEP Cases 690, 694 (N.D.N.Y. 1985).

[15] *Id.* at 1090–91, 39 FEP Cases at 692–93.

[16] *Id.* at 1088, 39 FEP Cases at 691.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

the training program from the provisions of the ADEA.[21] The EEOC regulation provides that the ADEA did not affect age limitations for entry into bona fide apprenticeship programs.[22] The defendants moved for summary judgment. [23]

In granting the defendant's motion for summary judgment, the court reiterated the *Home Insurance* holding that the Portal Act defense required the employer to establish three interrelated elements: that its action was taken in reliance on a ruling of a government agency; that its action was in conformity with that ruling; and that its action was taken in good faith.[24] To establish the first element of the defense, the *Quinn* court stated, the defendant must show that its challenged action was taken in reliance on the EEOC regulation.[25] The court noted that although the defendant had set its maximum age limit for entry into the program eleven years prior to the regulation's existence, the defendant nevertheless retained the age limitation and relied upon the regulation subsequent to its promulgation.[26] The court noted that the defendant was not only aware of the promulgation of the regulation, but also made sure that the training program complied with the requirements of the regulation by looking to the regulation itself.[27]

The court rejected the plaintiff's argument that the defendant-employer could not rely on the regulation because it never sought an opinion from the EEOC whether its apprenticeship program complied with the regulation.[28] The court noted that, unlike

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[21] *Id.*

[22] 29 C.F.R. § 1625.13 (1985). 29 C.F.R. § 1625.13 reads:

> § 1625.13 Apprenticeship programs.
>
> Age limitations for entry into bona fide apprenticeship programs were not intended to be affected by the Act. Entry into most apprenticeship programs has traditionally been limited to youths under specified ages. This is in recognition of the fact that apprenticeship is an extension of the educational process to prepare young men and women for skilled employment. Accordingly, the prohibitions contained in the Act will not be applied to bona fide apprenticeship programs which meet the standards specified in §§ 521.2 and 521.3 of this chapter.

[23] 621 F. Supp. at 1089, 39 FEP Cases at 691. In 1983, on cross motions for summary judgment, the employer had asserted three affirmative defenses in addition to the training program's exemption from the ADEA: 1) the complaint fails to state a claim upon which relief can be granted; 2) the age limitation is a bona fide occupational qualification (BFOQ); and 3) plaintiff is estopped from challenging an age limitation that is part of a collective bargaining agreement. *See* Quinn v. New York State Elec. & Gas Co., 569 F. Supp. 655, 656, 32 FEP Cases 1070, 1071 (N.D.N.Y. 1983). The plaintiff's motion sought partial summary judgment, striking all but the defendant's BFOQ defense. *Id.* The employer sought judgment in its favor based on its defense that the program was exempt from the provisions of the ADEA under the EEOC regulation. *Id.* The court held that although the defendant's training program complied with the provisions of the EEOC regulation and would be exempt from the prohibitions of the ADEA if that regulation were valid, the regulation conflicted with the language and intent of the ADEA and should not be given legal effect. *Id.* at 661–64, 32 FEP Cases at 1075–77. The court therefore granted plaintiff's motion for summary judgement and denied the defendant's motion. *Id.* at 664, 32 FEP Cases at 1077. Subsequently, the court granted the defendant leave to file an amended answer in which it set forth as an affirmative defense that it was acting in good faith reliance on the EEOC regulation in precluding the plaintiff from competing for a position in the training program, and therefore was protected from liability by the Portal Act defense. *Quinn*, 621 F. Supp. at 1089, 39 FEP Cases at 691.

[24] *Id.* at 1090, 39 FEP Cases at 692 (citing EEOC v. Home Ins. Co., 672 F.2d 252, 263, 27 FEP Cases 1665, 1675 (2d Cir. 1982)).

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

the unclear regulation in *Home Insurance*, the EEOC regulation[29] in this situation provided clear guidance as to what is required for a program to qualify as a bona fide apprenticeship program.[30] Accordingly, the court ruled that the employer was not required to seek approval of its program with the EEOC.[31]

Similarly, the court rejected the plaintiff's argument that the employer could not rely on the regulation because the EEOC had proposed rescinding the regulation.[32] The court noted that the regulation was in fact reaffirmed.[33] When neither the agency charged with enforcing the regulation nor any court had concluded that the regulation was invalid, the court reasoned, the employer could not be expected to conclude that the regulation was invalid.[34] Moreover, the court observed, the plaintiff was not precluded from competing for entry into the training program until well after the regulation was reaffirmed.[35] Therefore, the court concluded that the defendant's reliance on a regulation which exempted bona fide apprenticeship programs from ADEA prohibitions met the first element of the Portal Act defense.[36]

To establish the second element of the Portal Act defense, the court explained, the defendant had to prove that the training program was in conformity with the regulation.[37] The court, referring to an earlier *Quinn* ruling, found that the program did conform to the EEOC regulation.[38] Because no evidence had been presented that would lead to a different conclusion, the court noted, it was not necessary to repeat the relevant analysis.[39]

Turning to the final element of the defense, the court stated that to establish that it acted in good faith, an employer must show that it acted as a reasonably prudent person would have acted under the circumstances, with honesty of intention and without knowledge of circumstances which ought to put an employer on inquiry.[40] Because the EEOC regulation in question set forth very clear requirements for bona fide apprenticeship programs and the defendant's program met these requirements, the court stated that it could not conclude that the defendant acted unreasonably when it relied on the

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[29] 29 C.F.R. §§ 521.2–.3 (1985), referred to in 29 C.F.R. § 1625.13, set out detailed definitions and standards of apprenticeship.

[30] 621 F. Supp. at 1090, 39 FEP Cases at 692.

[31] *Id.*

[32] *Id.* at 1090–91, 39 FEP Cases at 693.

[33] *Id.* at 1091, 39 FEP Cases at 693.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *See Quinn*, 569 F. Supp. at 660, 32 FEP Cases at 1074. See *supra* note 23 for a discussion of the earlier *Quinn* decision.

[39] 621 F. Supp. at 1091, 39 FEP Cases at 693.

[40] *Id.* (citing 29 C.F.R. 790.15(a)(1985)). 29 C.F.R. 790.15(a) reads in pertinent part:

> . . . The legislative history of the Portal Act makes it clear that the employer's "good faith" is not to be determined merely from the actual state of his mind. Statements made in the House and Senate indicate that "good faith" also depends upon an objective test — whether the employer, in acting or omitting to act as he did, and in relying upon the regulation, order, ruling, approval, interpretation, administrative practice or enforcement policy, acted as a reasonably prudent man would have acted under the same or similar circumstances. "Good faith" requires that the employer have honesty of intention and no knowledge of circumstances which ought to put him upon inquiry.

regulation.[41] Nor could the court find any basis for concluding that the defendant did not have honesty of intention.[42] Moreover, the fact that the EEOC proposed rescinding the regulation, the court explained, should not have put the defendant upon inquiry.[43] Such inquiry is relevant to a situation where an employer has knowledge of conflicting rules and chooses the one most favorable to it.[44] The court stated that because the defendant chose to follow a regulation that was lawfully in effect at the time, the court could not conclude that the defendant had attempted to avoid compliance with the ADEA, or that it lacked good faith.[45] Accordingly, the court concluded that the defendant acted in good faith in relying on the regulation.[46] Because the defendant established the necessary elements of the Portal Act defense, the court granted the defendant's motion for summary judgment.[47]

Despite the defendant's establishment of a Portal Act defense, the plaintiff maintained that the court could still grant injunctive relief in his favor.[48] Noting that there currently exists a split among the courts as to whether equitable relief may be granted once the Portal Act defense is established,[49] the *Quinn* court refused to order that the plaintiff be placed in the training program.[50] The court stated that even if it assumed that it could grant equitable relief, there was no basis to do so in this case because the defendant already had eliminated the maximum age limit for entry into the training program to comply with a New York state law enacted subsequent to the institution of the action.[51] Furthermore, even if the plaintiff had prevailed on his claims, the court explained that there was no support for the plaintiff's assertion that he should be placed

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[41] *Quinn*, 621 F. Supp. at 1091, 39 FEP Cases at 692.

[42] *Id.*

[43] *Id.*

[44] *Id.* (citing 93 CONG. REC. 4390 (1947) (statement of Congressman Walter)).

[45] *Id.* at 1092, 39 FEP Cases at 693.

[46] *Id.* at 1092, 39 FEP Cases at 694.

[47] *Id.* at 1093, 39 FEP Cases at 695.

[48] *Id.* at 1092, 39 FEP Cases at 694. The plaintiff also argued that the court could award him attorney's fees. *Id.* The court reasoned that an award of attorney's fees should be made only when the plaintiff prevails and a plaintiff prevails only when he has achieved at least some of the benefit that he sought in bringing the suit. *Id.* at 1093, 39 FEP Cases at 694. The court noted that this plaintiff filed his complaint in order to be placed in the training program and to recover damages. *Id.* at 1093, 39 FEP Cases at 695. Because the plaintiff had not achieved either of these benefits, the court denied his request for attorney's fees. *Id.*

[49] The court noted that some courts have granted equitable relief in spite of the establishment of the defense. *Id.* at 1092, 39 FEP Cases at 694 (citing Northwestern-Hanna Fuel Co. v. McComb, 166 F.2d 932, 7 WH Cases 795 (8th Cir. 1948); Spirit v. Teachers Ins. and Annuity Ass'n, 93 F.R.D. 627, 28 FEP Cases 489 (S.D.N.Y. 1982)). In *Northwestern-Hanna Fuel Co. v. McComb*, 166 F.2d 932, 7 WH Cases 795 (8th Cir. 1948), the Eighth Circuit Court of Appeals noted that the purpose of an injunction is not to punish an employer for past violations but merely to compel future obedience. *Id.* at 939, 7 WH Cases at 800. Furthermore, the court stated, nothing in the Portal Act suggested that Congress intended to affect the granting of an injunction against an employer when the court believed that there was a probability of recurrent violation. *Id.* at 939, 7 WH Cases at 800–01. On the other hand, the *Quinn* court pointed out, at least one court has held that once a Portal Act defense has been established, a court is deprived of any further jurisdiction to grant injunctive relief for a plaintiff. 621 F. Supp. at 1092, 39 FEP Cases at 694 (citing Marshall v. Baptist Hosp., 668 F.2d 234, 25 WH Cases 232 (6th Cir. 1981)). Such a holding, the court explained, was based on the language of the statute itself that provided that the defense shall be a bar to the action. *Id.*

[50] 621 F. Supp. at 1093, 39 FEP Cases at 694.

[51] *Id. See* N.Y. EXEC. LAW § 296 (McKinney 1985).

in the training program.[52] First, the court noted that there was no evidence that the plaintiff would have been selected for participation in the program.[53] Second, the court indicated that because reinstatement is within the discretion of the trial court, the court need not order that a person already in the program be removed to make room for the plaintiff.[54] The court pointed out that "bumping" of innocent employees has been viewed with disfavor in both age and race discrimination cases, even where the employer has not established the good faith defense.[55] Consequently, the court refused to order that the plaintiff be placed in the training program, but did order that he be given full consideration for the next available opening.[56]

The district court's holding in *Quinn* clarifies the standard by which courts should evaluate the elements of the Portal Act defense. First, *Quinn* emphasizes that the first prong of the defense, reliance, does not require employers to seek advice from the administrative agency charged with enforcing the ADEA if the regulation relied upon provides clear guidance to the statutory requirements.[57] This reasoning is consistent with *Home Insurance*, which in effect stated the inverse of *Quinn*, that is, if the regulation does not provide clear guidance, it provides nothing upon which an employer can rely.[58] The *Quinn* court also is consistent with *Home Insurance* in holding that an employer cannot freely interpret regulations. In *Quinn*, the regulation in question was so specific it was open to only one interpretation. The standard for justifiable reliance remains to be defined in a case falling between the extremes of the ambiguity of the regulation in *Home Insurance* and the specificity of the regulation in *Quinn*.

Next, *Quinn* explains that under the third prong of the defense, good faith, circumstances that should put an employer on inquiry are limited to situations where there are conflicting interpretations and the employer chooses to believe the one exempting it from coverage.[59] The *Quinn* situation did not involve conflicting interpretations. In holding that the defendant should not have been put on inquiry, the court emphasized that the "knowledge of circumstances which ought to put him on inquiry" portion of the good faith prong is an objective standard. Even with actual knowledge of a proposed rescission of a regulation, a reasonably prudent person would have no choice but to follow the regulation until it was rescinded. In conclusion, *Quinn* clarifies that the Portal Act defense can be established as long as the regulation provides clear guidance upon which an employer can rely and the employer's reliance meets an objective good faith standard.

Most importantly, *Quinn* solidifies that the good faith standard of the Portal Act defense is always objective. This issue was left unclear by the *Home Insurance* court's statement that a subjective standard has greater validity where the administrative ruling relied upon is specific and leaves no room for interpretation.[60] Faced directly with a specific regulation, the *Quinn* court defers to the language of the regulation providing that good faith requires an employer to show that it acted as a reasonably prudent person

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[52] *Quinn*, 621 F. Supp. at 1093, 39 FEP Cases at 694.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.* at 1090, 39 FEP Cases at 692.
[58] *See Home Ins.*, 672 F.2d at 264, 27 FEP Cases at 1676.
[59] *See Quinn*, 621 F. Supp. at 1091, 39 FEP Cases at 693.
[60] 672 F.2d at 266, 27 FEP Cases at 1677.

would have acted under the circumstances.[61] Therefore, in conjunction with the *Home Insurance* decision, the *Quinn* decision places the Second Circuit in the company of the Fourth, Sixth and Ninth Circuits in holding that the good faith standard of the Portal Act defense is an objective standard.[62]

Quinn leaves undecided the issue whether the court retains jurisdiction to grant injunctive relief to the plaintiff after the defendant establishes a Portal Act defense. The issue is split between those courts that hold that because the statutory language provides that the defense bars the action, a court loses jurisdiction once the defense is made out, and those courts that find the establishment of the defense irrelevant to the purpose behind the injunctive relief of compelling future obedience.[63] Although the court did not decide this issue, it is clear that a grant of injunctive relief would be improper in this case. First, the plaintiff was barred from competing for entry, not from entry itself. Therefore, there is not necessarily a causal connection between the age discrimination and the plaintiff's ineligibility to participate in the program. As the court points out, there was no evidence that the plaintiff would have been selected for participation. Second, reinstatement lies within the sound discretion of the trial court. Even if the court had decided that injunctive relief was available, it is clear that consistent with the trend in other areas of discrimination, the court would not allow bumping of innocent employees to cure the violation of the plaintiff's ADEA rights.

In summary, *Quinn v. New York State Electric & Gas Corporation* held that an employer established the necessary elements of the Portal Act defense when it relied upon a regulation exempting bona fide apprenticeship programs from the ADEA. Furthermore, the court made clear that as long as a regulation provides clear guidance as to the statutory requirements, an employer need not seek an opinion from the EEOC in order to satisfy the reliance prong of the defense. Finally, *Quinn* clarified that the good faith standard of the Portal Act defense is always an objective standard.

D. **The Value of Employer-Provided Insurance Policies Under the ADEA*: Fariss v. Lynchburg Foundry[1]

The Age Discrimination in Employment Act of 1967 (ADEA)[2] prohibits employers from discriminating in their employment practices against individuals on the basis of age.[3] Under the ADEA, the courts may grant such legal or equitable relief as appropriate to put the plaintiff into the position he or she would have been but for the unlawful

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[61] *See supra* note 40 for text of 29 C.F.R. § 790.15(a) (1985).

[62] See *supra* note 13 for holdings of the Fourth, Sixth and Ninth Circuit decisions.

[63] See *supra* note 49 and accompanying text for a discussion of the split among the courts.

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[1] 769 F.2d 958, 38 FEP Cases 992 (4th Cir. 1985).

[2] 29 U.S.C. §§ 621–634 (1976).

[3] 29 U.S.C. § 623(a)(1) provides: "It shall be unlawful for an employer — (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."

The Act protects individuals between the ages of forty and seventy. *Id.* at § 631.

discrimination.[4] Thus, courts may order employers who have violated the ADEA to employ, reinstate, or promote a victim of discrimination.[5]

In addition to these equitable remedies, courts may hold employers liable for lost wages, fringe benefits, and other job-related benefits.[6] Where such damages are awarded, courts calculate the "amounts owed" under the ADEA as the amount of wages, fringe benefits, and other job-related benefits less any amount the plaintiff received as a result of the discharge, for example, pension payments.[7] Where the employer's ADEA violation is found willful, courts may add to the plaintiff's remedy liquidated damages equal to the amount of the initial damages.[8]

Insurance policies that are part of the employee's compensation are considered fringe benefits.[9] Thus, the value of an insurance policy is recoverable in cases where age discrimination has been proven.[10] Most courts measure the "value" of the insurance policy as the amount of the loss incurred where the plaintiff has purchased substitute insurance coverage after the unlawful termination, or the loss incurred from uninsured out-of-pocket expenses for which the plaintiff would have been reimbursed under the defendant's insurance plan.[11] Accordingly, courts have awarded plaintiffs either the cost

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[4] *See, e.g., id.*, Spagnuolo v. Whirlpool Corp., 717 F.2d 114, 118, 32 FEP Cases 1382, 1385 (4th Cir. 1983) (quoting Franks v. Bowman Transp. Co., 424 U.S. 747, 764 (1976)). *See* 29 U.S.C. § 626(b) which provides in part: "In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter . . . ." *Id.*

Courts have reasoned that one of the purposes of ADEA is to make victims of discrimination whole. *See, e.g.*, Merkel v. Scovill, Inc., 570 F. Supp. 141, 148, 38 FEP Cases 1026, 1031 (S.D. Ohio 1983). Accordingly, courts have interpreted the ADEA as demanding the most complete relief possible to put the victim back into the position he or she would have been in but for the unlawful discrimination.

[5] *See, e.g.*, Merkel v. Scovill, Inc., 570 F. Supp. 141, 144, 38 FEP Cases 1026, 1028 (S.D. Ohio 1983) (reinstatement). *See also* 29 U.S.C § 626(b) which provides: "the court shall have jurisdiction to grant . . . relief . . . including without limitation judgments compelling employment, reinstatement or promotion or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section." *Id.*

[6] *See, e.g.*, Blackwell v. Sun Electric Corp., 696 F.2d 1176, 1185–86, 30 FEP Cases 1177, 1184–85 (6th Cir. 1983) (court awarded plaintiff in ADEA action amount of health benefits which he would have received if he had not been wrongfully discharged). *See* 29 U.S.C. § 626(b) which provides that the "amounts owed" under the ADEA § 626(b) include "items of pecuniary or economic loss such as wages, fringe, and other job-related benefits" H.R. REP. No. 950, 95th Cong., 2d Sess. 13, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 504, 528, 535.

[7] *See, e.g., Merkel*, 570 F. Supp. at 145, 38 FEP Cases at 1029; Hazelthorn v. Kennecott Corp., 710 F.2d 76, 87 (2d Cir. 1983).

[8] 29 U.S.C. § 626(b) (1982) (plaintiff may recover liquidated damages where employer willfully violated the ADEA). The Supreme Court recently extended liability for liquidated damages to employers who acted in "reckless disregard" of the ADEA. Trans World Airlines, Inc. v. Thurston, 105 S. Ct. 613, 624 (1985).

[9] *See, e.g., Merkel*, 570 F. Supp. at 145, 38 FEP Cases at 1028; Coates v. National Cash Register Co., 433 F. Supp. 655, 663, 15 FEP Cases 222, 229 (W.D. Va. 1977); Combes v. Griffin Television, 421 F. Supp. 841, 844, 13 FEP Cases 1455, 1457–58 (W.D. Okla. 1976).

[10] *See, e.g., Merkel*, 570 F. Supp. at 145, 38 FEP Cases at 1028; *Coates*, 433 F. Supp. at 663, 15 FEP Cases at 229; *Combes*, 421 F. Supp. at 844, 13 FEP Cases at 1457–58.

[11] *See, e.g., Merkel*, 570 F. Supp. at 146, 38 FEP Cases at 1029. Courts have applied the same rule in cases involving claims brought under Title VII. *See, e.g.*, Pedreyra v. Cornell Prescription Pharmacies, 465 F. Supp. 936, 951, 21 FEP Cases 1207, 1219 (D. Colo. 1979) (recovery under Title VII for cost of replacing medical insurance); Willett v. Emory & Henry College, 427 F. Supp. 631,

of obtaining substitute insurance coverage or the amount of uninsured expenses actually incurred that the policy proceeds would have covered.[12]

Where the plaintiff has neither purchased substitute insurance coverage nor incurred expenses that would have been reimbursable under the defendant's insurance plan, however, courts have varied in their approach to determining the value of insurance policies. The Minnesota District Court upheld a jury award that included the cost of replacing the insurance coverage provided by the defendants even though the plaintiff had neither obtained substitute insurance nor incurred any expense that would have been reimbursable under the defendant's insurance plan.[13] The Minnesota court thus held that the "value" of an insurance plan is not equivalent to actual losses incurred, but instead the value is equivalent to the cost the plaintiff would have incurred had the plaintiff obtained substitute coverage.[14] Traditionally, however, most courts refuse to award plaintiffs any compensation for lost insurance benefits where the plaintiffs have neither purchased substitute coverage nor incurred any reimbursable out-of-pocket expenses.[15] These courts measure the "value" of an insurance policy as the amount of loss actually incurred.[16] Thus, where the plaintiff has incurred no actual loss, these courts measure the value of the employer-provided insurance policy as zero.[17]

During the *Survey* year, in *Fariss v. Lynchburg Foundry*,[18] the United States Court of Appeals for the Fourth Circuit applied a novel measure of value to an employer-provided insurance policy. The *Fariss* court held that where an employee fails to purchase substitute insurance, the value of an insurance policy recoverable under the ADEA is measured as the amount of premiums that the employer would have paid if the employee had not been terminated.[19] The *Fariss* court thus rejected the theory that value equals the amount of proceeds that the insurance company would have paid to the employee.[20] The court

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636, 14 FEP Cases 580, 584 (W.D. Va. 1977) (recovery under Title VII for medical expenses incurred).

[12] *See, e.g., Merkel*, 570 F. Supp. at 146, 38 FEP Cases at 1029.

[13] Jacobson v. Pitman-Moore, Inc., 582 F. Supp. 169, 179, 34 FEP Cases 1267, 1274 (D. Minn. 1984) ("The insurance benefits plaintiff lost are not any less of a monetary benefit to her because she could not afford to replace her insurance benefits or because she did not become sick.").

[14] *See id.*

[15] *See, e.g.*, Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149, 161, 27 FEP Cases 610, 620 (7th Cir. 1981) (court denied recovery of lost insurance benefits where plaintiff failed to purchase substitute insurance).

[16] *See id.*

[17] *See id.*

[18] 769 F.2d 958, 38 FEP Cases 992 (4th Cir. 1985).

[19] *Id.* at 965, 38 FEP Cases at 996–97.

[20] The plaintiff in *Fariss* was the designated beneficiary of a life insurance policy that the defendant employer bought for the plaintiff's husband, an employee. While *Fariss* is the first court to consider a life insurance beneficiary's claim to proceeds under a claim alleging the discriminatory discharge of an insured employee, the Fourth Circuit did not distinguish between insured employees and beneficiaries of insured employees' plans. *See* 769 F.2d at 965–66, 38 FEP Cases at 996–97. Rather, the Fourth Circuit broadly stated that they declined to follow several cases that the plaintiff cited favoring recovery of insurance proceeds or covered expenses. *Id.* at 965, 38 FEP Cases at 997. The court reasoned that, "[t]hose courts prepared to place on the employer the risk that an employee will have an insured loss after termination misconstrue the 'make whole' function of the ADEA." *Id.* The court's denial of recovery of the policy proceeds on policy grounds indicates that the court will apply the same reasoning not only to future claims by life insurance beneficiaries but also to claims for various types of insurance proceeds by plaintiff employees themselves.

also implicitly rejected the theory that absent any out-of-pocket expenses incurred by the plaintiff, the value of an insurance policy should be zero.

In *Fariss*, the employee's widow, Mrs. Fariss, sued her husband's employer, Lynchburg Foundry, alleging that Mr. Fariss had been fired because of his age.[21] The United States District Court for the Western District of Virginia granted summary judgment for the employer, holding that the plaintiff lacked a claim for monetary relief.[22] The district court found that even if Mrs. Fariss established age discrimination, no monetary relief would be due because the pension benefits that her husband received from the employer after his discharge exceeded his employer's liability for back pay and life insurance premiums.[23] The plaintiff appealed from the summary judgment for the defendant.[24]

The Fourth Circuit affirmed summary judgment on the ground that even if Mrs. Fariss proved age discrimination, no monetary relief would be due.[25] In reaching this conclusion, the *Fariss* court addressed three issues: first, the appropriate value of an employer-provided life insurance policy;[26] second, whether the pension benefits received as a result of the discharge should offset the plaintiff's losses;[27] and finally, whether the plaintiff could recover liquidated damages under the ADEA.[28]

Regarding the first issue, the *Fariss* court held that the value of an employer-provided insurance policy is measured as the amount of premiums that the employer would have paid if the employee had not been terminated.[29] In reaching this holding, the court first recognized that the value of a health or life insurance policy is recoverable where age discrimination has been proven.[30] The court next defined the "value" of an insurance policy under the ADEA.[31] The *Fariss* court reasoned that the benefit of being insured for a given period is precisely the amount of the premiums paid for the coverage.[32] The court relied on several policy arguments to support this proposition.

The *Fariss* court first considered the contractual nature of employer-provided insurance policies.[33] Noting that typically insurance proceeds are paid not by the employer, but by a third party insurer with whom the employer contracts,[34] the court focused on the employer's expectations arising from such a contractual arrangement.[35] The court reasoned that the employer's election to use this method of protecting its employees, rather than acting as an insurer itself, demonstrates the employer's intent to limit its

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[21] *Id.* at 961, 38 FEP Cases at 993. The employee, Mr. Fariss, was the original plaintiff in the action. After he died, Mrs. Fariss was substituted as plaintiff. *Id.*

[22] *Id.* By holding that the plaintiff lacked a claim for monetary relief, the district court did not reach the merits of the case. *Id.*

[23] *Id.*

[24] *Id.* at 961, 38 FEP Cases at 993–94.

[25] *Id.* at 961, 38 FEP Cases at 994.

[26] *Id.* at 964–66, 38 FEP Cases at 996–98.

[27] *Id.* at 966–67, 38 FEP Cases at 998.

[28] *Id.* at 967, 38 FEP Cases at 998–99.

[29] *Id.* at 965, 38 FEP Cases at 997.

[30] *Id.* at 965, 38 FEP Cases at 996.

[31] *Id.* at 965, 38 FEP Cases at 996–97.

[32] *Id.* at 965, 38 FEP Cases at 997.

[33] *Id.*

[34] *Id.* The court left open the question of how the value of insurance coverage would be measured where an employer chooses to act as insurer for its employees. *Id.* at 965 n.9, 38 FEP Cases at 997 n.9.

[35] *Id.* at 965, 38 FEP Cases at 997.

own expenditures to definite and regular premium payments.[36] Under this type of arrangement, the court reasoned, the employer is not contracting to cover personally any risks covered by the policy.[37] Moreover, the court stated, Congress did not intend to "transform" the employer into an insurer.[38] By providing an employee with an insurance policy as a benefit, the court concluded, the employer does not take on the obligation to cover personally the risk of loss or illness that the employees might suffer.[39]

The *Fariss* court then considered the effect of imposing personal liability upon the employer.[40] The court observed that imposing an obligation upon the employer to pay the proceeds which the insurance would have provided could create a "staggering" expense for the employer.[41] The court reasoned that the risk of being held personally liable for such potentially enormous amounts could deter employers from providing any insurance coverage at all.[42] The court noted that those courts allowing recovery of insurance proceeds or covered expenses misconstrued the "make whole" function of the ADEA.[43] Therefore, the *Fariss* court defined the value of an insurance policy as the amount of premiums which the employer would have paid if the employee had not been terminated.[44]

The *Fariss* court next rejected the plaintiff's argument that an employer violating the ADEA deserves to bear a sizeable and unanticipated penalty, explaining that even if an employer has discriminated unlawfully, that employer should not be held to bear a risk which the employee could have avoided by obtaining substitute insurance.[45] Noting that an ADEA plaintiff has a general duty to seek other available employment with reasonable diligence to mitigate damages for lost wages,[46] the *Fariss* court concluded that it is equally appropriate to require the plaintiff to obtain substitute insurance to mitigate damages for lost insurance coverage.[47] The court reasoned that the mitigation requirement is necessary for two reasons: first, it ensures that the plaintiff recovers the full cost of purchasing comparable insurance should he or she prevail on the substantive claim of discrimination;[48] and second, it enables the court to determine whether the employee actually desired insurance coverage, thereby avoiding a windfall recovery for the plaintiff.[49] The court explained that because there was no evidence that Mr. Fariss attempted

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[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.* The court pointed out the disparity between the amount the employer actually would have paid in premiums, $1,337.70, and the amount of the proceeds under the policy, $40,000. *Id.* Additionally, the court noted that in many instances, an obligation to pay the full proceeds of a life or health insurance policy could amount to hundreds of thousands of dollars. *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.* at 965–66, 38 FEP Cases at 997–98. The court stated that where the plaintiff purchases substitute insurance, the plaintiff may recover the actual cost of obtaining such insurance. *Id.* at 966, 38 FEP Cases at 997.

[46] *Id.* (citing Cline v. Roadway Express, Inc., 689 F.2d 481, 490, 29 FEP Cases 1365, 1371 (4th Cir. 1982)).

[47] 769 F.2d at 966, 38 FEP Cases at 997.

[48] *Id.* at 966, 38 FEP Cases at 997–98.

[49] *Id.* at 966, 38 FEP Cases at 998.

to obtain substitute insurance, the defendant should not be made to bear the risk of Mr. Fariss' life being uninsured.[50] Accordingly, the *Fariss* court held that the plaintiff could recover only the amount that the defendant would have paid in premiums had Mr. Fariss not been wrongfully discharged, rather than the amount of the proceeds of the insurance policy.[51]

The court next considered whether the district court properly calculated damages.[52] The district court had determined that the plaintiff's damages should be offset by the lump sum pension payment the plaintiff's husband received from the defendant.[53] The Fourth Circuit approved the district court's calculation, reasoning that failure to use pension payments to offset damages would give the plaintiff a windfall, instead of merely making the plaintiff whole.[54] The court stated that using pension payments received to offset the plaintiff's losses was in accord with settled precedent.[55] Because the lump sum pension payment that Mr. Fariss had received exceeded the plaintiff's potential recovery,[56] the court found that no relief could be awarded.[57]

Finally, the Fourth Circuit addressed the plaintiff's claim for liquidated damages, holding that the plaintiff could not recover any liquidated damages.[58] In reaching this holding, the court noted that liquidated damages may be awarded under the ADEA only where the employer willfully violates the ADEA.[59] The *Fariss* court did not reach the substantive issue of whether liquidated damages were due,[60] however, because the court noted that even if grounds for liquidated damages were proven, the plaintiff could not recover these damages because the amount of liquidated damages recoverable is limited to the amount of net loss incurred by the plaintiff.[61] The court concluded that

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[50] *Id.*

[51] *Id.* The court noted that if discrimination was proven, the plaintiff would be entitled to recover $1,337.70 of premium payments. *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.* That court noted that a purpose of the ADEA is to make the wrongly discharged employee whole. *Id.* Noting that the plaintiff would not have received the pension payments if he had not been discharged, the court reasoned that if the amount of the pension payments were not offset against the amount necessary to make the plaintiff whole, the plaintiff would receive a windfall recovery. *Id.*

[55] *Id.* at 966, 38 FEP Cases at 998.

[56] The potential recovery included the plaintiff's claim for back pay plus the amount of life insurance premiums which the defendant would have paid but for the wrongful discharge. *Id.* at 966–67, 38 FEP Cases at 998–99.

[57] *Id.*

[58] *Id.* at 967, 38 FEP Cases at 999.

[59] *Id.* (citing 29 U.S.C. § 626(b) (1982)). The *Fariss* court cited Trans World Airlines, Inc. v. Thurston, 105 S. Ct. 613, 624, 36 FEP Cases 977, 985 (1985), where the Supreme Court held that liquidated damages may be awarded under the ADEA only where the employer willfully violates the ADEA or acts in reckless disregard of whether it is violating the ADEA. *Fariss*, 769 F.2d at 967, 38 FEP Cases at 998.

[60] *Id.* Thus, the court did not consider whether the defendant either willfully violated the ADEA or acted in reckless disregard of whether his conduct violated the ADEA. *See id.*

[61] *Id.* Liquidated damages under the ADEA for nonpecuniary losses are to be "calculated as an amount equal to the pecuniary loss." H.R. REP. No. 950, 95th Cong., 2d Sess. 13, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 528, 535. The *Fariss* court resolved the question of whether liquidated damages should be calculated in relation to damages claimed *before* any offset or to damages claimed *after* any offset in favor of the latter approach. 769 F.2d at 967, 38 FEP Cases at 999.

because Fariss had received pension benefits exceeding the recoverable damages and thus suffered no net loss, liquidated damages could not be awarded.[62] Thus, because the plaintiff in *Fariss* did not incur a net loss, the court held that the plaintiff suffered no compensable injury. Accordingly, the court affirmed the district court's summary judgment for the defendant.[63]

The Fourth Circuit result is sound; where the plaintiff does not purchase substitute insurance, employer-provided insurance properly should be valued according to the cost of the coverage and not according to the value of the insurance proceeds.[64] The value of insurance policies are recoverable under the ADEA because they are fringe benefits which are an item of pecuniary loss under the ADEA.[65] The pecuniary benefit that the employee receives from the employer providing insurance is the amount of money the employee saves by not having to purchase insurance coverage.[66] Although an employee may receive further pecuniary benefit if a covered risk is realized and the proceeds are paid, this benefit is an additional benefit provided by the insurance company, not the employer.[67] In an age discrimination lawsuit, the defendant should be liable to the plaintiff for the amount that the defendant no longer expends on the plaintiff's behalf because of the wrongful discharge, but not for the amount an insurance company might pay to the plaintiff.[68]

Although the *Fariss* court refused to award the plaintiff the amount of the insurance proceeds because it reasoned that the discrimination victim had a duty to mitigate his damages,[69] the court did not impose this mitigation requirement on Mr. Farris' recovery of the premium amount.[70] The *Fariss* court thus struck an equitable compromise in its application of the mitigation requirement. Where the plaintiff does not purchase substitute insurance, the plaintiff's inability to recover insurance proceeds under an insurance policy is due both to the employer depriving the plaintiff of employer-provided insurance and to the employee's failure to obtain substitute coverage. The employer should not be held liable for the full amount of proceeds where the employee's inaction partly is responsible for the lack of coverage. On the other hand, where the employer's wrongful failure to continue paying insurance premiums is responsible for the employee's lack of coverage, courts should hold the employer responsible for the amount of

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[62] *Id.* In *Fariss*, the plaintiff's damages claim for $42,000 in back wages and $1,337.70 in life insurance premiums arising from Mr. Fariss' termination was more than offset by the $64,742.85 lump sum pension benefit Mr. Fariss received as a result of the termination. *Id.*

[63] *Id.* at 967–68, 38 FEP Cases at 999. The court's finding that there was no net loss resulted from its measure of the value of the life insurance policy as the amount of premiums which the employer would have paid but for the unlawful termination. If the court had measured the value of the insurance policy as the amount of proceeds which the plaintiff was claiming, $40,000, the plaintiff's damages claim would *not* have been exceeded by the pension benefits he received.

[64] *Id.* at 968, 38 FEP Cases at 999.

[65] *Id.* at 965, 38 FEP Cases at 997.

[66] *Accord* Worsowicz v. Nashua Corp., 612 F. Supp. 310, 313, 38 FEP Cases 1444, 1446–47 (D.N.H. 1985) (citing the district court opinion in *Fariss*, the *Worsowicz* court held in an ADEA lawsuit that an executrix of the plaintiff's estate was entitled at most to recover the cost to the defendant-employer of providing life insurance coverage).

[67] *See Fariss*, 769 F.2d at 965, 38 FEP Cases at 997.

[68] *See Worsowicz*, 612 F. Supp. at 313, 38 FEP Cases at 1446–47 (citing Fariss v. Lynchburg Foundry, 588 F. Supp. 1369, 1371, 35 FEP Cases 852, 853 (W.D. Va. 1984)).

[69] *Fariss*, 769 F.2d at 966, 38 FEP Cases at 997.

[70] *Id.* at 966, 38 FEP Cases at 998.

premiums it should have paid, rather than allowing the employer to escape liability altogether.[71] The *Fariss* decision demonstrates an equitable allocation of financial responsibility where a discrimination victim has failed to mitigate damages through obtaining substitute insurance.

The *Fariss* decision also properly considered the employer's economic position in holding that the employer is not liable for the amount of proceeds under the policy.[72] Employers are not insurers. They do not allocate part of their earnings to a reserve available for covering uninsured losses of their employees. If employers were held liable for covering uninsured losses, potentially amounting to hundreds of thousands of dollars, employers might cease to provide insurance coverage altogether. This result would penalize all employees, who would be forced to pay higher individual insurance rates to obtain insurance coverage compared to the lower group insurance rates available to employers.[73]

If employers were held liable for the amount of the insurance policy proceeds, employers might be forced to create, as an alternative to eliminating insurance coverage, a fund to cover this potential liability. Consequently, employers might cut back on salaries, expenditures or profits. This result could threaten the viability of a business and adversely impact employees as well as employers. Alternatively, the cost of providing for potential liability could be passed to the consumer. Consumers should not have to pay the price of holding that employers in violation of the ADEA are liable for uninsured losses.

Even if it were possible for employers to cover their liability for insurance proceeds without adversely impacting employees or consumers, imposing liability of this potential magnitude would be equivalent to holding the employer liable for punitive damages. Holding the employer liable for insurance proceeds obligates the employer to pay more than is required under the ADEA to provide compensatory relief.[74] Punitive damages are unavailable under the ADEA.[75] Liquidated damages, which are compensatory damages, are available only where a jury finds that an employer willfully or recklessly discriminated.[76] Unlike punitive damages, the purpose of liquidated damages is not to deter employer misconduct,[77] but instead, to allow discrimination victims to recover for intangible losses not calculated easily.[78] Had Congress intended plaintiffs to be made

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[71] Several courts would permit the employer to escape liability altogether. *See, e.g., Syvock*, 665 F.2d at 161, 27 FEP Cases at 620.

[72] *See Fariss*, 769 F.2d at 965, 38 FEP Cases at 997.

[73] *See id.* at 966, 38 FEP Cases at 997. The employee's penalty results from having to pay the difference in premium cost for group insurance paid by the employer and the higher premium cost of obtaining individual coverage.

[74] Awarding plaintiffs the amount of insurance policy proceeds would make the plaintiff more than whole. *See id.* at 965, 38 FEP Cases at 997.

[75] Walker v. Pettit Constr. Co., 605 F.2d 128, 130, 20 FEP Cases 933, 935, *modified on reh'g on other grounds sub nom.* Frith v. Eastern Airlines, Inc., 611 F.2d 950, 25 FEP Cases 87 (4th Cir. 1979) (per curiam).

[76] *Trans World Airlines, Inc.*, 105 S. Ct at 624, 36 FEP Cases at 985.

[77] *See id.*

[78] Liquidated damages under the ADEA are intended to compensate the victim of willful discrimination for intangible losses, or those losses not easily calculated in terms of back pay and lost fringe benefits. *Merkel*, 570 F. Supp. at 148, 38 FEP Cases at 1031 (citing Pfeiffer v. Essex Wire Corp., 682 F.2d 684, 687, 29 FEP Cases 420 (7th Cir.), *cert. denied*, 459 U.S. 1039, 30 FEP Cases 440 (1982) (quoting the 1978 report of the Congressional Conference Committee considering

more than whole in egregious cases of discrimination, it would have made punitive damages available under the ADEA.[79] A holding in *Fariss* that the plaintiff was entitled to the amount of insurance proceeds would have allowed the plaintiff to recover damages equivalent to punitive damages.

In sum, the *Fariss* court measured the value of an insurance policy recoverable under the ADEA as the amount of premiums that the employer would have paid for the employee but for the unlawful termination. The court reasoned that where the plaintiff purchases substitute insurance coverage, the "make whole" function of the ADEA requires that the employer be held liable for the cost of obtaining the substitute insurance.[80] Where the plaintiff does not purchase substitute insurance, the court concluded, an employer in violation of the ADEA should be liable for the amount of the premiums it no longer expends on the employee's behalf. An employer should not be held liable for the amount of proceeds recoverable under the policy. The employer contracts with a third party insurer who is liable for paying policy proceeds if necessary.[81] Imposing liability for proceeds upon the the employer could penalize both employees and consumers. Additionally, imposing liability for proceeds upon the employer violates congressional intent. Departing from the traditional views, the *Fariss* measure of value of an insurance policy provides practitioners with an alternative measure of value — one that other courts have since adopted[82] thus supporting the argument that this measure is both equitable and proper under the ADEA.

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amendments to the ADEA)). Liquidated damages allow discrimination victims to recover for obscure losses. *Merkel*, 570 F.Supp. at 148, 38 FEP Cases at 1031.

[79] *See Merkel*, 570 F. Supp. at 148, 38 FEP Cases at 1031.

[80] *Farris*, 769 F.2d at 966, 38 FEP Cases at 997.

[81] *Id.* at 965, 38 FEP Cases at 997.

[82] *See, e.g., Worsowicz*, 612 F. Supp. at 313, 38 FEP Cases at 1446–47.

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