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## Counting Your Employees for Purposes of Title VII: It's Not as Easy as One, Two, Three

David C. Butow

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# Counting Your Employees for Purposes of Title VII: It's Not as Easy as One, Two, Three

David C. Butow\*

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### I. Introduction

When Metropolitan Educational Enterprises (Metropolitan) denied Darlene Walters a promotion at work, she believed that she had a compelling Title VII claim for gender discrimination against her employer.<sup>1</sup> She might have, but we will never know. The United States Court of Appeals for the Seventh Circuit refused to hear her complaint.<sup>2</sup> Under Title VII of the Civil Rights Act of 1964 (the 1964 Act), parties may bring suit only against employers who employ at least fifteen employees.<sup>3</sup> Ms. Walters, her lawyer, and the Equal Employment Opportunity Commission (EEOC) each counted the number of employees on Metropolitan's payroll,<sup>4</sup> and each counted more than fifteen.<sup>5</sup> Several courts have endorsed the method of counting all employees on an employer's payroll.<sup>6</sup> The Seventh Circuit explained, however, that counting employees was not that simple.<sup>7</sup> The Seventh Circuit counted all salaried employees toward the required fifteen, but considered hourly or part-time workers to be employees only on the days when they were physically present at work or on paid leave.<sup>8</sup> As a result, the court of appeals refused to count Metropolitan's part-time workers and thus counted fewer than fifteen employees.<sup>9</sup> With this decision, the Seventh Circuit perpetuated a split of authority among the United States Courts of Appeals over whether to count part-time workers for purposes of Title VII jurisdiction.<sup>10</sup>

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1. See *EEOC v. Metropolitan Educ. Enters.*, 60 F.3d 1225, 1226 (7th Cir. 1995) (concluding that part-time employees do not count toward requisite minimum number of employees for purposes of jurisdiction under Title VII of Civil Rights Act of 1964), *cert. granted*, 116 S. Ct. 1260 (1996). For further discussion of the *Metropolitan* case, see *infra* notes 164-204 and accompanying text.

2. *Metropolitan*, 60 F.3d at 1226.

3. 42 U.S.C. § 2000e(b) (1994) (defining "employer" for purposes of Title VII). For Title VII's definition of employer and a discussion of the text of the statute, see *infra* notes 27-33 and accompanying text.

4. *EEOC v. Metropolitan Educ. Enters.*, 864 F. Supp. 71, 72 (N.D. Ill. 1994) (stating facts of case from district court record), *aff'd*, 60 F.3d 1225 (7th Cir. 1995), *cert. granted*, 116 S. Ct. 1260 (1996).

5. *Id.*

6. See *infra* part III.A (discussing and analyzing payroll method of counting employees for purposes of jurisdiction under Title VII).

7. See *EEOC v. Metropolitan Educ. Enters.*, 60 F.3d 1225, 1227-30 (7th Cir. 1995) (analyzing and criticizing plaintiff's approach to counting employees and concluding that courts should count only employees at work or on paid leave), *cert. granted*, 116 S. Ct. 1260 (1996).

8. *Id.* at 1227.

9. *Id.*

10. See *infra* part III (discussing circuit courts of appeals split over whether to count part-time employees for purposes of jurisdiction under Title VII).

The question of whether to count part-time employees for purposes of Title VII jurisdiction poses social and legal consequences for a sizable portion of the American work force.<sup>11</sup> There are many potential plaintiffs like Darlene Walters. As of 1992, over twenty-five million employees worked for establishments that employed twenty or fewer workers.<sup>12</sup> Furthermore, approximately five and one-half million establishments employed less than twenty workers.<sup>13</sup> A recent study showed that in 1992 over nine million people worked on a part-time basis in the United States.<sup>14</sup> Thus, the Seventh Circuit's approach to counting employees excludes thousands of potential plaintiffs. The Supreme Court will resolve the issue of whether to count part-time employees when the Court hears Ms. Walters's appeal from the Seventh Circuit.<sup>15</sup>

This Note explores the split among the courts of appeals over whether to count part-time employees for purposes of Title VII jurisdiction. Part II explains the relevant text of the 1964 Act<sup>16</sup> and analyzes the legislative history of the 1964 Act from its initial passage through an important 1972 amendment.<sup>17</sup> Part II concludes that the legislative history of the 1964 Act, although vague, suggests that Congress intended for federal courts to construe Title VII broadly.<sup>18</sup> Part III discusses the split in the courts of appeals

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11. See *infra* notes 12-13 and accompanying text (providing statistics showing that large number of small businesses and part-time employees exist).

12. See U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1995, at 500 (1995) [hereinafter STATISTICAL ABSTRACT 1995]. The Bureau of the Census did not count 1992 government and railroad employees. *Id.* The Census Bureau defined "establishment" as "a single physical location where business is conducted or where services or industrial operations are performed." *Id.* As of mid-March 1992, a total of 3,442,894 employees worked for establishments employing between one and four employees; 1,280,504 employees worked for establishments employing between five and nine employees; and 783,183 employees worked for establishments employing between ten and nineteen employees. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, COUNTY BUSINESS PATTERNS ANNUAL 1991 & 1992 (1994).

13. STATISTICAL ABSTRACT 1995, *supra* note 12, at 550.

14. *Id.* at 408. For 1994, the Bureau counted 9,473,000 people who worked 34 hours or less (for a civilian population of 16 years of age or older). *Id.*

15. See *Walters v. Metropolitan Educ. Enters., Inc.*, 116 S. Ct. 1260 (1996) (granting certiorari to plaintiff's appeal from *EEOC v. Metropolitan Educ. Enters.*, 60 F.3d 1225 (7th Cir. 1995)).

16. See *infra* part II.A (discussing and analyzing statutory language of Title VII of Civil Rights Act of 1964).

17. See *infra* part II.B-C (analyzing legislative history of Title VII and concluding that legislative history lends little assistance to answering question of whether to count part-time employees for Title VII jurisdiction).

18. See *infra* part II.B (suggesting Congress intended broad construction of Title VII).

over the appropriate method for counting employees.<sup>19</sup> In addition, Part III considers the EEOC's position in favor of the payroll method of counting employees.<sup>20</sup> Finally, Part IV advances two arguments: First, Congress, rather than the Supreme Court, should resolve the circuit split over whether to count part-time employees.<sup>21</sup> Second, in light of its recent decision to resolve this issue, the Supreme Court should adopt the payroll method and hold that courts must count part-time employees for purposes of Title VII jurisdiction.<sup>22</sup>

## II. *The Civil Rights Act of 1964*

### A. *The Relevant Text of the 1964 Act*

The 1964 Act addresses a multitude of discriminatory practices.<sup>23</sup> Under Title VII of the 1964 Act, employers may not hire, discharge, compensate, or classify individuals based on race, color, religion, sex, or national origin.<sup>24</sup> Given certain conditions, the EEOC, the Attorney General of the United States, or an aggrieved person may file a civil action against an employer for discriminatory practices in violation of the 1964 Act.<sup>25</sup> To

19. See *infra* part III (discussing and analyzing two methods developed by courts of appeals for counting employees for Title VII jurisdiction).

20. See *infra* part III.A.3 (discussing and analyzing EEOC's position on whether to count part-time employees for purposes of jurisdiction under Title VII).

21. See *infra* part IV.A (arguing that Congress must resolve circuit split because it is more capable and is free to choose modern public policy for language of statutory amendment).

22. See *infra* part IV.B (arguing that Supreme Court should choose payroll method).

23. See generally 42 U.S.C. §§ 1971-2000 (1994) (establishing laws against discrimination in areas of voting, public accommodations, public facilities, public education, federally assisted programs, and employment).

24. See *id.* § 2000e-2(a). Section 2000e-2(a) reads:

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.* Section 2000e-2 also regulates employment agency practices, labor organization practices, and training programs. See *id.* § 2000e-2(b)-(d) (prohibiting discriminatory practices by employment agencies, labor organizations, and training programs).

25. See *id.* § 2000e-5(f) (granting powers to EEOC, Attorney General, and aggrieved person to sue or to intervene in lawsuits against employers for employment discrimination).

meet the 1964 Act's jurisdictional requirements, however, the employer must fall within the Act's definition of "employer."<sup>26</sup>

For purposes of the 1964 Act, an employer is a "person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year."<sup>27</sup> The 1964 Act explains many of the definition's components. For example, the definition of "person" is very broad.<sup>28</sup> The term "employees" generally encompasses all individuals employed by an employer.<sup>29</sup> Although the 1964 Act does not define "current calendar year," case authority has interpreted the phrase to mean the year in which the alleged discrimination occurred.<sup>30</sup>

26. *Id.* § 2000e-5(f)(3); *see also* *Hassell v. Harmon Foods, Inc.* 454 F.2d 199, 200 (6th Cir. 1972) (finding requirement of 25 or more employees to be requirement for jurisdiction under Title VII).

27. 42 U.S.C. § 2000e(b) (1994). The term "employer," however, does not include:

(1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in § 2102 of title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

*Id.*

28. *See id.* § 2000e(a) (defining "person"). The term person includes "one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, or receivers." *Id.*

29. *See id.* § 2000e(f) (defining "employees"). Under Title VII, the term employee does not include:

[A]ny person elected to public office in any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

*Id.*

30. *See Dumas v. Town of Mount Vernon*, 612 F.2d 974, 979 n.4 (5th Cir. 1980) (interpreting "current year" to refer to year in which alleged discrimination took place (citing *BARBARA L. SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 837* (1976))); *Udey v. Marks*, 4 Fair Empl. Prac. Cas. (BNA) 634, 635 (S.D. Ga. 1972) (stating that plaintiff has burden to show that employer had requisite number of employees when alleged discrimination took place and not when plaintiff filed complaint).

The 1964 Act, however, does not explain the phrase "for each working day in each of twenty or more calendar weeks." This phrase's ambiguity has generated the current inter-circuit debate over whether to count part-time employees towards the jurisdictional requirements of the 1964 Act. Some courts have interpreted the language "for each working day" to mean every day of a given work week.<sup>31</sup> Other courts have stated that the phrase's ambiguity requires an interpretation of legislative intent and a consideration of the EEOC's interpretation of the phrase.<sup>32</sup> After considering the statute's legislative history and the EEOC's interpretation, those courts have concluded that all employees on an employer's payroll should be counted towards the jurisdictional minimum of fifteen.<sup>33</sup>

*B. The Legislative History of Title VII's Coverage at the Time of the 1964 Act*<sup>34</sup>

In 1963, President John F. Kennedy asked Congress to deliver to the nation a comprehensive civil rights bill<sup>35</sup> that would guarantee Americans the opportunity for equal employment.<sup>36</sup> Congress did not answer with legislation during President Kennedy's lifetime.<sup>37</sup> After Kennedy's death,

31. See *infra* part III.B (analyzing decisions that take *Zimmerman* approach to counting employees for purposes of Title VII).

32. See *infra* part III.A.1-2 (analyzing decisions that apply payroll method to counting employees for purposes of Title VII).

33. See *infra* part III.A.1-2 (discussing cases that count all employees on employer's payroll for purposes of Title VII).

34. H.R. REP. NO. 914, 88th Cong., 2d Sess. (1964), reprinted in 1964 U.S.C.C.A.N. 2391 (providing legislative history of 1964 Act from House Judiciary Committee's perspective). See generally CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE* (1985) (tracing 1964 Act's legislative history from Congress's initial investigation of civil rights problems through statute's enactment).

35. See 2 BERNARD SCHWARTZ, *STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 1056-61* (1970) (providing historical account of civil rights in United States). In his June 19, 1963 Special Message to Congress, President Kennedy discussed the need to ensure equal accommodations in public facilities, to desegregate schools, to guarantee fair and full employment, and to deny federal aid to programs or activities that discriminate. *Id.*

36. *Id.* at 1059-60. The President stated that:

The problem of unequal job opportunity must not be allowed to grow, as the result of either recession or discrimination. I enlist every employer, every labor union, and every agency of government — whether affected directly by these measures or not — in the task of seeing to it that no false lines are drawn in assuring equality of the right and opportunity to make a decent living.

*Id.* at 1060.

37. *Id.* at 1017 (stating that first session of 88th Congress did not pass any civil rights legislation).

President Lyndon B. Johnson asked Congress once again to enact a civil rights bill.<sup>38</sup> This time Congress responded with the eleven titles of the 1964 Act.<sup>39</sup> Congress explicitly stated its general intent for passing Title VII: "[T]o eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin."<sup>40</sup>

Repeated attempts by the Senate to amend Title VII illuminate other congressional intentions with regard to the statute's meaning. The House of Representatives passed House Bill 7152, which contained a version of Title VII that covered employers "who employed twenty-five or more employees."<sup>41</sup> The bill then went to the Senate, where members attempted to amend the jurisdictional language of Title VII on two occasions.<sup>42</sup> First, Senator Dirksen led a successful effort to amend House Bill 7152's definition of employer by adding the following language to the end of the House definition: "[F]or each working day in each of 20 or more calendar weeks in a current or preceding calendar year."<sup>43</sup> An analysis of this amendment's passage demonstrates that Congress sought to qualify the dictionary meaning of employer and also that Congress intended for the language of the Dirksen amendment to apply to seasonal workers.<sup>44</sup>

In a discussion with Senator Clark before the amendment's passage, Senator Dirksen noted the ambiguity of the House definition of employer and compared the House definition to an Illinois employment practice statute.<sup>45</sup> Senator Clark stated that the House intended that the definition

38. *Id.* at 1018 (discussing President Johnson's call for civil rights legislation).

39. *Id.*

40. H.R. REP. NO. 914, 88th Cong., 2d Sess. 26 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2401.

41. *See* 110 CONG. REC. 7216 (1964) (discussing text of H.R. 7152 when it arrived in Senate).

42. *See infra* notes 43-60 and accompanying text (discussing and analyzing debates surrounding Dirksen and Cotton amendments to H.R. 7152).

43. *See* 110 CONG. REC. 16,001 (1964) (comparing Senate and House bills after final passage of 1964 Act).

44. *See infra* notes 45-53 and accompanying text (discussing Dirksen amendment to H.R. 7152).

45. *See* 110 CONG. REC. 7215-18 (1964) (noting dialogue between Senator Dirksen and Senator Clark over Title VII's definition of employer). Senator Dirksen posed the following questions to Senator Clark, a floor manager of the bill:

Question. Who is an employer within the meaning of [T]itle VII? I am not sure, the bill is indefinite, we have no committee hearings, no report. Can an employer readily ascertain from the language of the bill whether or not he is included? Employers with a large number of employees will have no difficulty,



of employer retain the common dictionary meaning of employer except as qualified by the statute.<sup>46</sup> Senator Clark made this statement, however, after the House passed its version of the bill.<sup>47</sup> Senator Clark's statement, therefore, is of limited value in understanding any change in the definition of House Bill 7152 that might have been made by the Dirksen amendment. Moreover, Senator Clark stated that the dictionary meaning of employer was subject to House qualifications of that definition, namely, that an employer had twenty-five or more employees.<sup>48</sup> Therefore, Dirksen's amendment provides additional qualifying language to a term that otherwise might retain its dictionary meaning.

The term "employer" might, in many instances, be given its common dictionary meaning. In those situations addressed by the Dirksen amendment, however — specifically, seasonal employees and perhaps part-time employees generally — that common dictionary meaning was modified or altered by the prerequisite that an employer maintain a certain number of employees "for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." Indeed, after the amendment passed, Senator Dirksen stated that he added the language to protect businesses employing seasonal workers from coverage under Title VII.<sup>49</sup>

but what of the small businessman?

Answer. The term "employer" is intended to have its common dictionary meaning, except as expressly qualified by the [A]ct.

Question. Most statutes in defining an employer in relation to the number of employees he has are rather specific. Contrast the language on page 28 of this bill: "The term 'employer' means a person engaged in an industry affecting commerce who has 25 or more employees" with the language from the Illinois FEP Act: "(d) 'Employer' includes and means all persons, including any labor organization, labor unions, or labor association employing more than 100 persons within the [s]tate within each of 20 or more calendar weeks, within either the current or preceding calendar year prior to January 1, 1963[.]" [A]ssume if you will the operation of a medium-size orchard. For 11½ months of the year the employer has no employees. But during 2 weeks of the year he employs 100 pickers. Is he to be subjected to the provisions of this title? What of summer or winter resort operations where employment is only for 2 or 3 months at the most. Are they to be covered by this title? Certainly we have no clear statement by which an employer can be guided. Is this the way to legislate?

Answer. Employers whose staffs fluctuate seasonally are covered by the [A]ct at times when the number of employees exceeds the minimum figure; they are not covered when it is below the minimum.

*Id.* at 7216-17.

46. *Id.*

47. *Id.*

48. *Id.*

49. See 110 CONG. REC. 13,087 (1964) (noting Senator Dirksen's remarks regarding

Neither Dirksen, Clark, nor any other member of the Senate, however, said anything directly about the larger universe of part-time employees, of which seasonal employees are but a subset. In fact, Senator Clark's and Senator Dirksen's statements were the only statements recorded that discussed the meaning of the statutory language of Title VII's jurisdiction.<sup>50</sup> Nevertheless, their statements most likely represented the sentiments of a majority of the members of Congress. Not only did Congress pass the Dirksen amendment, but Senator Dirksen organized and controlled the changes and the passage of Title VII.<sup>51</sup> Dirksen's views represent the views that ultimately became law. After the Senate returned the amended version of House Bill 7152, the House passed the bill with little discussion.<sup>52</sup> Al-

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his amendment to Title VII's jurisdictional language). Senator Dirksen stated:

Accordingly, the House bill was modified in some particulars. In the first place, we undertook to provide for seasonal workers, by taking the language out of the Unemployment Compensation Act, to the effect that the definition of the term "employer" would apply to [employers with] 25 or more [employees] who were employees for each working day, in each of 20 or more calendar weeks, in the current or preceding calendar year. We went through that matter with the Department of Labor and others, in order to make sure that we were on good ground.

*Id.*

50. See EEOC, LEGISLATIVE HISTORY OF TITLES VII AND XI OF THE CIVIL RIGHTS ACT OF 1964, at 3001 (1968) (discussing procedural history of H.R. 7152). The EEOC stated that:

An important part of the legislative history of any statute is the congressional debate that preceded its adoption. Through a combination of extraordinary circumstances, however, the congressional debate that preceded the adoption of the Civil Rights Act of 1964, and particularly the Title VII equal employment opportunity provisions, assumed an almost overriding importance.

The Title VII provisions that were adopted by the House and that were the subject of extensive discussion in the report of the House Judiciary Committee were modified substantially in the substitute measure adopted in the Senate. The substitute bill did not go through the usual committee procedure. Instead, it was hammered out in informal bipartisan conferences, with Majority Leader Mansfield (D., Mont.), Minority Leader Dirksen (R., Ill.), and Senators Humphrey (D., Minn.) and Kuchel (R., Calif.) as the principals.

As a result, there was no committee report on the Senate bill. Moreover, since the House then voted to accept the Senate bill without change, there was no Senate-House conference report.

*Id.*

51. *Id.* (describing Dirksen's key role in amending and passing Title VII in Senate).

52. See H.R. REP. NO. 914, 88th Cong., 2d Sess. 63 (1964), reprinted in 1964 U.S.C.C.A.N. 2391, 2431-32 (criticizing majority's procedural handling of House Bill 7752). The minority report provided the following perspective on the House discussion of the amended House Bill 7152 immediately before members voted:

though this haste may have been the product of political manipulation, the majority of the House members quickly acquiesced to the Senate's changes in Title VII's coverage.<sup>53</sup>

The second occasion on which the Senate attempted to amend the jurisdictional language of Title VII was Senator Cotton's proposal to limit Title VII's coverage to employers with one hundred or more employees.<sup>54</sup> The Senators in favor of the Cotton amendment stated that the twenty-five employee threshold was too low. They argued that the twenty-five employee limit invaded the intimate social milieu of small businesses,<sup>55</sup> pre-

The bill was, upon order of the chairman, read hastily by the clerk, without pause or opportunity for amendment. Several members of the committee repeatedly requested to be permitted to ask questions, have an explanation of the bill, discuss it, consider its provisions, and offer amendments. The Chair refused to grant such requests or to recognize these members of the committee for any purpose. After the reading of the bill in the fashion hereinabove described, the chairman announced that he would allow himself 1 minute to discuss the bill, after which he would recognize for 1 minute the ranking minority member, the gentleman from Ohio. This was an ostensible attempt to comply, technically, with the rules of the House but did not amount to debate, as debate is generally understood. Neither of these gentlemen discussed the bill for more than 1 minute; both of them refused to yield to any other member of the committee; and neither of them debated the bill nor discussed it in any fashion other than to say that they favored it. They made no effort in the 2 minutes consumed by both together to even so much as explain the provisions of the bill. In short, there was no actual debate or even any opportunity for debate.

*Id.*

53. *Id.*

54. See 110 CONG. REC. 13,088 (1964) (noting congressional debate concerning Senator Cotton's amendment to change Title VII's coverage to businesses with 100 employees or more).

55. *Id.* at 13,085 (consisting of Senator Cotton's remarks in favor of his amendment to limit Title VII's coverage). Senator Cotton stated:

[T]he principal reason why [T]itle VII is so repugnant, at least to me, lies in the fact that in a small business which employs 30 or 40 persons, the personal relationship is predominant. I can understand how the [f]ederal [g]overnment could operate in connection with large factories and industries and in dealing with their employment practices, and in seeking, whenever it finds it necessary to do so, to enforce these provisions — although I think there are even objections to that. But when a small businessman who employs 30 or 25 or 26 persons selects an employee, he comes very close to selecting a partner; and when a businessman selects a partner, he comes dangerously close to the situation he faces when he selects a wife. A small business — for example, an insurance agency or a real estate business or a small manufacturing business with only a few employees — stands or falls, in this age of competition, on the congeniality and skill and ability of the man or the partners who own it and the persons who work for them and work with them.

*Id.*

vented small minority employers from hiring exclusively minority work forces,<sup>56</sup> and created legal liability that threatened the financial viability of small family businesses.<sup>57</sup> The Senators who opposed the Cotton amendment argued that the amendment's coverage unfairly discriminated between large and small employers<sup>58</sup> and would eliminate coverage of a significant portion of the labor force.<sup>59</sup> With a vote of 63 to 34 against the Cotton amendment, the Senate affirmed its intention to extend Title VII's coverage

56. *Id.* at 13,086. Senator Cotton stated:

I would assume that anyone who will administer the laws in future years will not discriminate between the races. If I were [an African-American], and by dint of education, training, and hard work, I had amassed enough property as [an African-American] so that I had a business of my own — and there are many of them in this country — and I felt that, having made a success of it myself, I wanted to help people of my own race to step up as I had stepped up, I think I should have the right to do so. I think I should have the right to employ [African-Americans] in my own establishment and put out a helping hand to them if I so desired. I do not believe that anyone in Washington should be permitted to come in and say, "You cannot employ all [African-Americans]. You must have some Poles. You must have some Yankees." The latter would not be available down South to any extent, but there are other places that would be affected.

*Id.*

57. *Id.* at 13,092. Senator Cotton told the story of an employer who lost a case before an examiner. *Id.* The examiner recommended that the employer's former employee be reinstated and paid his back wages under the Wagner Act. *Id.* The Senator advised the employer to appeal the examiner's ruling. *Id.* The employer decided against such action, despite the employee's drunk and disorderly behavior on the job and lack of safety concern for his fellow employees. *Id.* The employer replied, "I cannot afford to do that. I will pay this fellow's back wages, and will re-employ him; that will be the cheapest way for me out of the situation." *Id.*

58. *Id.* at 13,089. Senator Morse argued that employer size should not be a license to discriminate:

To me, the issue is very simple. It is whether or not we will permit, in this democracy, discrimination against people because of the color of their skin. That is a moral issue as well as a great legal issue. I am at a loss to understand how it can be immoral to have an employer of 100 or more employees denied the exercise of discrimination and have it granted to an employer of fewer than 100 employees.

I do not intend to take my eyes off the basic issue, and that is the immorality of discrimination based upon race or the color of one's skin.

It is just as wrong for an employer who employs two people to have that right to discriminate as the basis of his employment as it is for an employer of 2,000 employees to have it.

*Id.* Senator Morse also argued that small businesses should not have a license to discriminate. *Id.* at 13,092.

59. *Id.* at 13,087. Senator Dirksen stated: "Now if we undertake to make the cutoff 100 employees or more, I am afraid we shall really be subject to the charge that we are undertaking to emasculate the bill." *Id.*

to employers with a minimum of 25 employees.<sup>60</sup> The defeat of the Cotton amendment illustrates the fact that, although Congress intended for Title VII's coverage to be limited in order to protect small businesses, Congress also intended for Title VII to be a remedial measure that covered a significant portion of the labor force.

*C. The Legislative History of Title VII's Coverage at the Time of the Equal Employment Opportunity Act of 1972*

Congress passed the Equal Employment Opportunity Act of 1972 (the 1972 Act) to broaden Title VII's jurisdictional coverage.<sup>61</sup> The 1972 Act

60. *Id.* at 13,093 (noting Senate's final vote on Cotton amendment).

61. See SENATE SUBCOMM. ON LABOR, COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., 2D SESS., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 80 (Comm. Print 1972) [hereinafter LABOR SUBCOMMITTEE'S REPORT]. Senator Hawkins, from the Senate Committee on Education and Labor, stated the following purpose of the 1972 Act:

The committee feels that discrimination in employment is contrary to the national policy and equally invidious whether practiced by small or large employers. Because of the existing limitation in the bill proscribing the coverage of Title VII to 25 or more employees or members, a large segment of the Nation's work force is excluded from an effective Federal remedy to redress employment discrimination. For the reasons already stated in earlier sections of this report, the committee feels that the Commission's remedial power should also be available to all segments of the work force. With the amendment proposed by the bill, Federal equal employment protection will be assured to virtually every segment of the Nation's work force.

*Id.* The Senate Labor and Public Welfare Committee's report, which explained H.R. 1746, stated:

[The 1964 Act] is amended to expand the coverage of [T]itle VII to include employers of eight or more persons, and labor organizations with eight or more members. The Committee agrees with the Chairman of EEOC that discrimination should be attacked wherever it exists, and recognizes that small establishments have frequently been the most flagrant violators of equal employment opportunity.

At present, the jurisdiction of the EEOC extends to approximately 83% of the nation's non-agricultural work force (approximately 250,000 employers and 37,800 labor organizations). By adding the provisions as currently proposed, the jurisdiction of the EEOC would encompass another 8% of the present work force, or approximately 6.5 million employees and about 90,000 employers.

The need for coverage in this area is obvious. The absence of EEOC jurisdiction over these small employers and labor organizations has made it impossible for the Commission to compile sufficient information in this area to pinpoint those areas where patterns or practices of discrimination exist. As a consequence, it has not been possible to institute changes where necessary to insure compliance with the provisions of Title VII.

changed the employee minimum for Title VII from twenty-five to fifteen.<sup>62</sup> The House first passed House Bill 1746, a version of Title VII covering employers with eight or more employees.<sup>63</sup> The Committee on Labor and Public Welfare brought the bill to the Senate floor under the name Senate Bill 2515, which retained the eight or more employee threshold.<sup>64</sup> During the Senate debate, Senator Ervin proposed an amendment to Senate Bill 2515 to maintain the twenty-five employee threshold of the 1964 Act.<sup>65</sup> The Senators who spoke in favor of the Ervin amendment made the same arguments as the Senators who wanted Title VII's coverage limited in 1964:<sup>66</sup> specifically, that the twenty-five employee limit invaded the intimate social milieu of small businesses, prevented small minority employers from hiring exclusively minority work forces, and created legal liability that threatened the financial viability of small businesses.<sup>67</sup>

During the debate, Senator Fannin made the only mention of part-time workers in Title VII's legislative history. While speaking in favor of the Ervin amendment, Senator Fannin expressed concern that Senate Bill 2515's expansion of Title VII's coverage would cause many small businesses to eliminate their part-time work forces.<sup>68</sup> Senator Fannin must have believed

*Id.* at 417-18.

62. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103, 103 (1972) (codified as amended at 42 U.S.C. § 2000e(b) (1994)).

63. See LABOR SUBCOMMITTEE'S REPORT, *supra* note 61, at 80 (discussing text of H.R. 1746 at time bill left House).

64. *Id.* at 410, 417 (noting that Senate discussed H.R. 1746 under name S. 2515, and that bill had eight-employee minimum when it arrived on Senate floor).

65. *Id.* at 879 (discussing Senator Ervin's amendment to S. 2515).

66. *Id.* at 1009-11, 1297-99 (noting Senator Cotton's and Senator Fannin's statements in favor of Ervin amendment). Senator Cotton expressed concern that S. 2515 gave the federal government too much power, prohibited minority businesses from hiring exclusively within their own race, and prevented small businesses from firing insubordinate employees for fear of costly litigation. *Id.* at 1010. Senator Fannin argued that S. 2515 threatened ethnic family businesses that maintained the cultural heritage of their owners. *Id.* at 1298.

67. See *supra* notes 54-60 and accompanying text (noting reasons advanced in favor of Cotton amendment, which would have limited Title VII's jurisdiction to cover employers with 100 or more employees).

68. See LABOR SUBCOMMITTEE'S REPORT, *supra* note 61, at 1298 (noting Senator Fannin's statements in favor of Ervin amendment). Senator Fannin stated:

I am concerned about what happens to part-time workers. It is possible that this legislation may cause some firms to eliminate the services of semi-retired employees?

We have many retirement areas in Arizona. These people need, especially since we have had inflation in the past few years, some employment to make it possible for them to support themselves. I feel that it is vital that they have a

that part-time employees were counted for purposes of Title VII, for only on such an assumption would he worry that businesses would discharge their part-time staff to avoid jurisdiction under Title VII. However, the significance of the statement is uncertain because there was no response to it on the floor, and nothing in the legislative history addresses the part-time employee question.

In the end, therefore, the Senate's reduction of Title VII's threshold of coverage from twenty-five to fifteen employees was surrounded with as much silence on the part-time employee question as was the original 1964 Act.<sup>69</sup> Nevertheless, the expanded jurisdiction added an estimated six million private industry employees to the EEOC's jurisdiction.<sup>70</sup> The Senate's concern for the protection of small businesses from Title VII coverage was clearly relevant to drawing some limit on the statute's coverage, but the way in which the Senate manifested that aim for part-time employees remained deeply ambiguous.

### III. *The Current Circuit Split over the Proper Method of Counting*

The First and Fifth Circuits and the EEOC disagree with the Seventh and Eighth Circuits and several district courts over the proper method of counting employees for purposes of Title VII jurisdiction. The First and Fifth Circuits, as well as the EEOC, endorse the payroll method.<sup>71</sup> Courts applying this method count the number of employees on an employer's payroll for a given week, regardless of whether every employee on the payroll reports to work every day of the calendar week.<sup>72</sup> If an employer maintains at least fifteen employees on the payroll for at least twenty calendar weeks during the year in which the alleged discrimination occurs, the

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chance to work part time.

*Id.* at 1298-99.

69. See *supra* notes 49-50 and accompanying text (noting absence of consideration of part-time workers for purposes of jurisdiction under Title VII at time of 1964 Act).

70. See Herbert Hill, *The Equal Employment Opportunity Acts of 1964 and 1972: A Critical Analysis of the Legislative History and Administration of the Law*, 2 INDUS. REL. L.J. 1, 52 (1977) (noting increase in number of employees covered under Title VII after 1972 Act).

71. See *infra* part III.A (discussing and analyzing cases and EEOC Guidelines that endorse payroll method of counting employees). For a discussion of a First Circuit opinion that endorses the payroll method, see *infra* part III.A.1. For a discussion of a Fifth Circuit opinion that endorses the payroll method, see *infra* part III.A.2. For a discussion of the EEOC's support of the payroll method, see *infra* part III.A.3.

72. See *infra* part III.A.1-2 (discussing and analyzing cases that endorse payroll method).

employer meets the jurisdictional minimum of Title VII.<sup>73</sup> Advocates of the payroll method contend that, in enacting the Family and Medical Leave Act (FMLA), Congress endorsed the payroll method.<sup>74</sup> Furthermore, these courts argue that case law and the EEOC's Guidelines command use of the payroll method.<sup>75</sup> Finally, they assert that the payroll method better comports with public policy considerations.<sup>76</sup>

By contrast, the Seventh and Eight Circuits, as well as several district courts, use the *Zimmerman* approach.<sup>77</sup> The *Zimmerman* approach derives from the Seventh Circuit's opinion in *Zimmerman v. North American Signal Co.*<sup>78</sup> Courts using the *Zimmerman* approach count all salaried employees toward the required fifteen, but count hourly or part-time workers as employees only on the days when those employees are physically present at work or on paid leave.<sup>79</sup> Fifteen employees must be at the workplace or on paid leave for each day of the work week for that work week to count toward the twenty-week jurisdictional minimum.<sup>80</sup> Advocates of the *Zimmerman* approach argue that their approach arises out of a plain text reading of the statute.<sup>81</sup> In addition, these courts claim that stare decisis compels them to continue using the *Zimmerman* approach.<sup>82</sup>

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73. See *infra* part III.A.1-2 (explaining payroll method).

74. See *infra* notes 186-90 and accompanying text (comparing statutory language of definition of employer in FMLA and Title VII). For a similar synopsis of the payroll method, see 64 U.S.L.W. 2071, 2071 (Aug. 8, 1995) (noting circuit split over Title VII's jurisdiction).

75. See *infra* part III.A (discussing arguments that advance payroll method by EEOC and First and Fifth Circuits).

76. See *infra* notes 131-40 and accompanying text (discussing public policy arguments made by EEOC that advance payroll method).

77. See *infra* part III.B (discussing and analyzing cases that endorse *Zimmerman* approach to counting employees). For a discussion of Seventh and Eight Circuit opinions that endorse the *Zimmerman* approach, see *infra* part III.B.1. For a discussion of a district court opinion that endorses the *Zimmerman* approach, see *infra* part III.B.2.

78. 704 F.2d 347 (7th Cir. 1983) (counting employees only on days when they came to work or were on paid leave for purposes of jurisdiction under Age Discrimination in Employment Act (ADEA)). For a discussion and analysis of this case, see *infra* notes 142-59 and accompanying text.

79. See *infra* part III.B (discussing *Zimmerman* approach to counting employees for purposes of jurisdiction under Title VII).

80. See *infra* part III.B (explaining *Zimmerman* approach).

81. See *infra* notes 179-80 and accompanying text (arguing that plain reading of Title VII's text supports *Zimmerman* approach).

82. See *infra* note 178 and accompanying text (arguing that precedent of statutory interpretation is not easily overturned).



A. *A Case Analysis of the Payroll Method*

1. *The First Circuit*

In *Thurber v. Jack Reilly's, Inc.*,<sup>83</sup> the First Circuit considered whether to count regular part-time employees for purposes of Title VII jurisdiction.<sup>84</sup> The plaintiff worked as a waitress at a restaurant named "Jack's," operated by the defendant.<sup>85</sup> When the plaintiff applied for a bartender position, the defendant told her that he hired only men as bartenders.<sup>86</sup> The plaintiff filed a lawsuit against the defendant under Title VII.<sup>87</sup> The defendant argued that he did not employ the requisite number of employees to satisfy the jurisdictional requirements of Title VII and moved to dismiss the complaint.<sup>88</sup> In deciding to count the part-time employees, the court of appeals first stated that every court that had considered the issue of whether to count "regular" part-time employees had decided to count those employees.<sup>89</sup> Second, the court distinguished *Takeall v. Werd, Inc.* based on the nature of the employment relationship.<sup>90</sup> In *Takeall*, a federal district court in Florida decided not to count part-time employees who worked in a temporary capacity to cover for regular employees who were on vacation.<sup>91</sup> The work habits of those

83. 717 F.2d 633 (1st Cir. 1983), *cert. denied*, 466 U.S. 904 (1984).

84. *See Thurber v. Jack Reilly's, Inc.*, 717 F.2d 633, 634 (1st Cir. 1983) (holding that part-time employees are counted for purposes of jurisdiction under Title VII), *cert. denied*, 466 U.S. 904 (1984).

85. *Id.* at 633.

86. *Id.* at 634.

87. *Id.*

88. *Id.* The court stated:

Jack's is a small bar in Cambridge, Massachusetts which operates by having approximately 9 employees report to work each day. Some of these employees work full-time; most, however, work part time. In order to remain open 7 days a week, Jack's maintained more than 15 employees on the payroll for more than 20 weeks during the relevant time although no more than 11 employees ever reported for work on any one day.

*Id.*

89. *Id.* at 634 (citing *Dumas v. Town of Mount Vernon*, 612 F.2d 974, 979 n.7 (5th Cir. 1980); *Hornick v. Borough of Duryea*, 507 F. Supp. 1091, 1097 (M.D. Pa. 1980); *Pedreya v. Cornell Prescription Pharmacies*, 465 F. Supp. 936, 941 (D. Colo. 1979); 2 ARTHUR LARSON, EMPLOYMENT DISCRIMINATION § 5.32 (1973)).

90. 23 Fair Empl. Prac. Cas. (BNA) 947, 948 (M.D. Fla. 1979).

91. *See Takeall v. Werd, Inc.*, 23 Fair Empl. Prac. Cas. (BNA) 947, 948 (M.D. Fla. 1979) (holding that defendant company did not employ minimum of 15 employees for purposes of Title VII jurisdiction). In *Takeall*, a federal district court considered whether to count occasional part-time employees for purposes of jurisdiction under Title VII. *Id.* The court found that "persons who merely filled in for a very short period of time for regular employees taking a day off or on vacation" should not be counted as employees. *Id.* The *Takeall* court

temporary employees were so erratic that the *Thurber* court was not convinced that a regular or ongoing employment relationship existed between the temporary employees and their employer.<sup>92</sup> In *Thurber*, however, the part-time employees worked on a regularly scheduled basis.<sup>93</sup> Third, the First Circuit stated that the legislative history of Title VII favored the payroll method.<sup>94</sup> Jack Reilly's argued that by using the language "for each working day," Congress intended to include employers who had fifteen employees actually at work on each working day.<sup>95</sup> The court of appeals conceded that, at the time of Title VII's passage, Congress expressed concern about the over-regulation of small, family, or neighborhood businesses.<sup>96</sup> Nevertheless, the court relied on remarks made by Senator Dirksen for support of its interpretation of the scope of Title VII's coverage.<sup>97</sup> Senator Dirksen stated that Title VII's definition of employer came from the Unemployment Compensation Act (UCA).<sup>98</sup> For purposes of the UCA, employees are counted for each day that an employment relationship exists, rather than for each day that an employee shows up to work.<sup>99</sup> Although counting regular part-time employees might bring small family businesses with a large number of part-time employees within the statute, the court of appeals found that the statute's policy preferred the inclusion of businesses that might be discriminating over the exclusion of "Mom and Pop" stores.<sup>100</sup> In conclusion, the *Thurber* court ruled that regular part-time employees, as distinguished from temporary employees, should be counted for purposes of jurisdiction under Title VII.<sup>101</sup>

## 2. The Fifth Circuit

In *Dumas v. Town of Mt. Vernon*,<sup>102</sup> the Fifth Circuit considered whether a town met the definitional requirements of an employer under Title

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concluded that the defendant's occasional part-time employees should not be counted. *Id.*

92. *Thurber v. Jack Reilly's, Inc.*, 717 F.2d 633, 634 (1st Cir. 1983), *cert. denied*, 466 U.S. 904 (1984).

93. *Id.*

94. *Id.* at 634-35.

95. *Id.* at 634.

96. *Id.*

97. *Id.*

98. *Id.* (citing 110 CONG. REC. 13,087 (1964)).

99. *Id.* (citing Rev. Rul. 55-19, 1955-1 C.B. 496). According to the court: "This ruling had been in force for nine years prior to the enactment of Title VII." *Id.*

100. *Id.* at 635.

101. *Id.*

102. 612 F.2d 974 (5th Cir. 1980).

VII.<sup>103</sup> Joannie Dumas, an African-American female, sued the town of Mount Vernon for alleged racial discrimination.<sup>104</sup> The district court found that the defendants did not employ the requisite fifteen employees and dismissed the action.<sup>105</sup> On appeal, the Fifth Circuit also concluded that Mount Vernon employed fewer than the minimum of fifteen employees during the relevant years.<sup>106</sup> In a footnote to the decision, the court of appeals stated that individuals on the payroll are counted whether or not they worked full time on any particular day of a given week.<sup>107</sup> Nevertheless, even after counting part-time employees, the Fifth Circuit concluded that Mount Vernon did not meet the statutory definition of employer.<sup>108</sup>

### 3. The EEOC's View

The EEOC, an independent federal agency, administers Title VII.<sup>109</sup> In support of the payroll method, the EEOC contends that the legislative history of Title VII indicates that courts should look to the existence of an employment relationship rather than to the number of hours that an employee works,<sup>110</sup> that the payroll method comports with both the legislative intent and the statutory language "for each working day,"<sup>111</sup> and that public policy considerations weigh in favor of counting all employees on the payroll.<sup>112</sup> In its Compliance Manual, the EEOC illustrates the difference

103. See *Dumas v. Town of Mt. Vernon*, 612 F.2d 974, 976 (5th Cir. 1980) (counting part-time employees for purposes of Title VII jurisdiction).

104. *Id.*

105. *Id.* at 976-77 (citing *Dumas v. Town of Mt. Vernon*, 436 F. Supp. 866 (S.D. Ala. 1977)).

106. *Id.* at 979.

107. *Id.* at 979 n.7 (citing BARBARA L. SCHLEI & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 837-38 (1976 & Supp. 1979)).

108. *Id.* at 980.

109. See 42 U.S.C. §§ 2000e-4(a), 2000e-5(a) (1994). Section 2000e-4(a) establishes the EEOC with the following statement: "There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party." *Id.* § 2000e-4(a). Section 2000e-5(a) establishes the enforcement provisions of the EEOC by stating: "The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in [§] 2000e-2 [unlawful employment practices] or 2000e-3 [other unlawful employment practices] of [Title VII]." *Id.* § 2000e-5(a).

110. See *infra* notes 117-21 and accompanying text (discussing EEOC's argument that legislative history favors payroll method).

111. See *infra* notes 122-30 and accompanying text (discussing EEOC's argument that payroll method comports with both legislative intent and statutory language of Title VII).

112. See *infra* notes 131-40 and accompanying text (discussing EEOC's argument that

between the payroll method and the *Zimmerman* approach.<sup>113</sup> According to the EEOC, a majority of courts considering the issue have applied the payroll method.<sup>114</sup> In citing these cases, the EEOC notes that these courts did not distinguish between full-time employees and employees who work only part of each day or part of each week.<sup>115</sup> The EEOC argues that, in light

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payroll method is better method for public policy reasons).

113. EEOC, EEOC AND THE LAWS IT ENFORCES: A REFERENCE MANUAL § 605.8(b) (1986). The EEOC illustrated its counting method of both full-time and part-time employees with the following two examples:

*Example 1* — CP filed a charge of national origin discrimination against R in December 1978. R alleges that the [EEOC] does not have jurisdiction over it because it employs only 13 employees. After obtaining the information in (1) and (2) below, the EOS determined that R has 13 regular full-time employees who worked all year in 1978 and 1977 with the exception of two weeks vacation each. The EOS is also able to determine that R employed 10 part-time and temporary employees both years. Six of these employees worked each working day during each of 26 weeks during 1978. Adding these six employees to the 13 regular full-time employees, R employs 19 individuals and is an employer within the meaning of § 701(b). Compare the following example.

*Example 2* — R employed 10 full-time employees in 1978 and 1979. For the first 26 weeks of the year, R also employed 4 part-time employees. For the last 10 weeks, R employed 8 part-time employees. The [EEOC] would not have jurisdiction over a charge filed by R's employee. During the relevant time period, R did not employ 15 or more employees during *each* of 20 weeks.

*Id.* at 605.8(b) (emphasis added).

114. See EEOC Compl. Man. (CCH) ¶ 2167, at 2313-11 to 2313-12 (1990). The EEOC cited *Thurber v. Jack Reilly's, Inc.*, 717 F.2d 633, 634 (1st Cir. 1983) (applying payroll method of counting employees for purposes of Title VII jurisdiction), *cert. denied*, 466 U.S. 904 (1984); *Dumas v. Town of Mt. Vernon*, 612 F.2d 974, 979 n.7 (5th Cir. 1980) (same); *Evans v. Davie Truckers, Inc.*, 38 Fair Empl. Prac. Cas. (BNA) 1553, 1554 (M.D.N.C. 1984) (same), *aff'd*, 769 F.2d 1012 (4th Cir. 1985); *Lynn v. JER Corp.*, 573 F. Supp. 17, 20 (M.D. Tenn. 1983) (same); *Hornick v. Borough of Duryea*, 507 F. Supp. 1091, 1098 (M.D. Pa. 1980) (same); *Pedreyra v. Cornell Prescription Pharmacies*, 465 F. Supp. 936, 941 (D. Colo. 1979) (same); *Pascutoi v. Washburn-McReavy Mortuary*, 11 Fair Empl. Prac. Cas. (BNA) 1325, 1327 (D. Minn. 1975) (same), *aff'd*, 566 F.2d 1178 (8th Cir. 1977). The EEOC also cited *Gorman v. North Pittsburgh Oral Surgery Assocs.*, 664 F. Supp. 212, 214 (W.D. Pa. 1987) (applying payroll method of counting employees for purposes of jurisdiction under ADEA); *Musser v. Mountain View Broadcasting, Inc.*, 578 F. Supp. 229, 230 (E.D. Tenn. 1984) (same); 1 ARTHUR LARSON, EMPLOYMENT DISCRIMINATION § 5.32 (1987) (advocating payroll method of counting employees); BARBARA L. SCHLEI & PHILLIP GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 996 (2d ed. 1983) (same).

115. See EEOC Compl. Man. (CCH) ¶ 2167, at 2313-11 (1990). The EEOC stated that the payroll method of counting does not take into account whether or not an employee reported to work on any given day: "Therefore, all regular part-time employees are counted whether they work part of each day or part of each week." *Id.*

of the legislative history, their interpretation of the statute's language, and public policy considerations, the payroll method should be adopted.<sup>116</sup>

First, the EEOC asserts that the legislative history of Title VII indicates that the employment relationship — and not the employee's work schedule — should be considered when counting employees.<sup>117</sup> The EEOC states that Congress borrowed Title VII's definition of employer from the UCA.<sup>118</sup> In a revenue ruling, the Internal Revenue Service (IRS) ruled that, under the UCA, employees are counted for each day that an employment relationship exists.<sup>119</sup> Because Congress modeled Title VII's definition of employer after the UCA's definition of employer, the EEOC takes the position that Congress must have been aware of the IRS's interpretation and must have intended Title VII to be subject to that interpretation.<sup>120</sup> The EEOC also maintains that the absence of legislative history indicating that employees must report each day of the work week to be counted means that Congress did not intend to distinguish between part-time and full-time employees.<sup>121</sup>

Second, the EEOC contends that a proper construction of Title VII's language supports the payroll method.<sup>122</sup> As stated above, the EEOC maintains that Congress intended for part-time employees to be counted.<sup>123</sup> The EEOC also argues that Congress enacted Title VII as a remedial statute and intended for the statute to be applied broadly.<sup>124</sup> According to the EEOC, a literal interpretation of "for each working day" that counts employees only when they show up to work each day of the work week is contrary to Congress's remedial intent.<sup>125</sup> When an interpretation of apparent legislative intent conflicts with a literal interpretation of the statute, the EEOC states that the interpretation of legislative intent should prevail.<sup>126</sup>

116. *Id.* at 2313-12.

117. *Id.*

118. *Id.* (borrowing analysis from *Thurber* decision).

119. *Id.* (citing Rev. Rul. 55-19, 1955-1 C.B. 496).

120. *Id.* (citing *Cannon v. University of Chicago*, 441 U.S. 677, 696-98 (1979) for proposition that, when discerning legislative intent, courts may assume elected representatives know current law).

121. *Id.* (citing *Thurber v. Jack Reilly's, Inc.*, 717 F.2d 633, 635 (1st Cir. 1983), *cert. denied*, 466 U.S. 904 (1984)).

122. *Id.* at 2313-12 to 2313-13.

123. *Id.* at 2313-13.

124. *Id.* (citing debates of Senators Morse and Saltonstall in 110 CONG. REC. 13,087-93 (1964)).

125. *Id.*

126. *Id.* at 2313-12 to 2313-13 (citing NORMAN SINGER, 2A SUTHERLAND'S STATUTORY

The EEOC also concludes that the words "for each working day" have enough flexibility to comport with an interpretation that counts part-time workers.<sup>127</sup> The language "for each working day" does not literally mean days "at work," and the phrase contains no language that limits coverage to those employees who show up to work every day.<sup>128</sup> The EEOC also points out that the definition of employee does not contain any language relating to the number of hours that an individual works.<sup>129</sup> In addition, the EEOC cites several federal court decisions stating that any of the ambiguities in Title VII's definition of employer or employee should be resolved in favor of coverage because of the statute's remedial purpose.<sup>130</sup>

Third, the EEOC states that public policy considerations weigh in favor of a broad interpretation of Title VII's definition of employer.<sup>131</sup> Counting employees under the *Zimmerman* approach can yield problematic results.<sup>132</sup> For example, under the *Zimmerman* approach, courts would count "employee A," who works only two hours each day of a five-day work week.<sup>133</sup> These courts, however, would not count "employee B," who

CONSTRUCTION § 46.07 (1984)). As a broad principle, Singer states:

The literal interpretation of the words of an act should not prevail if it creates a result contrary to the apparent intention of the legislation and if the words are sufficiently flexible to allow a construction which will effectuate the legislative intention. The intention prevails over the letter, and the letter must if possible be read to conform to the spirit of the act. While the intention of the legislature must be ascertained from the words used to express it, the manifest reason and obvious purpose of the law should not be sacrificed to a literal interpretation of such words.

NORMAN SINGER, 2A SUTHERLAND'S STATUTORY CONSTRUCTION § 46.07 (1984).

127. EEOC Compl. Man. (CCH) ¶ 2167, at 2313-12 to 2313-13 (1990).

128. See *id.* (stating that "for each working day" means having employees for each working day and not necessarily employees *working* each working day). The EEOC further states that the statutory language of Title VII does not "contain any limitation indicating that only those individuals actually at the work site on each working day are to be considered employees under Title VII." *Id.*

129. *Id.* (citing *Pedreya v. Cornell Prescription Pharmacies*, 465 F. Supp. 936, 941 (D. Colo. 1979)).

130. *Id.* (citing *Thurber v. Jack Reilly's, Inc.*, 717 F.2d 633, 634-35 (1st Cir. 1983), *cert. denied*, 466 U.S. 904 (1984); *Armbruster v. Quinn*, 711 F.2d 1332, 1341 (6th Cir. 1983); *Quijano v. University Fed. Credit Union*, 617 F.2d 129, 131 (5th Cir. 1980); *Baker v. Stuart Broadcasting Co.*, 560 F.2d 389, 391 (8th Cir. 1977); *Pascutoi v. Washburn-McReavy Mortuary*, 11 Fair Empl. Prac. Cas. (BNA) 1325, 1326-27 (D. Minn. 1975), *aff'd*, 566 F.2d 1178 (8th Cir. 1977)).

131. *Id.* at 2313-13 to 2313-14.

132. *Id.* at 2313-13.

133. *Id.*

works eight hours for each of four days out of a five-day work week.<sup>134</sup> Thus, the courts would count employee *A*, who works ten hours per week, but not employee *B*, who works thirty-two hours per week.<sup>135</sup> In addition, employers could conceivably manipulate a work schedule to avoid Title VII coverage.<sup>136</sup> Employers could claim that they have a seven-day work week so that employees who work a typical five-day, forty-hour work week would not be counted.<sup>137</sup> The EEOC also emphasizes the difficulty in counting employees under the *Zimmerman* approach.<sup>138</sup> An employer's payroll records may indicate the number of hours that an employee worked in a given week, but not the days that the employee worked.<sup>139</sup> The EEOC emphasizes, however, that parties and courts easily can acquire payroll records in order to use the payroll method.<sup>140</sup>

## B. A Case Analysis of the *Zimmerman* Approach

### 1. The Seventh and Eighth Circuits

In *Zimmerman v. North American Signal Co.*,<sup>141</sup> the Seventh Circuit considered whether to count hourly paid workers as employees for purposes of jurisdiction under the Age Discrimination in Employment Act (ADEA).<sup>142</sup> Sam Zimmerman, who was sixty-seven years of age, sued his employer, North American Signal Company (North American), for age discrimination in violation of the ADEA.<sup>143</sup> The district court ruled that North American

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* The EEOC states that a business could operate with all part-time employees (or almost all part-time employees) to escape the prohibitions of Title VII, despite the number of employees actually employed. *Id.* (citing *Gorman v. North Pittsburgh Oral Surgery Assocs.*, 664 F. Supp. 212, 214 (W.D. Pa. 1987)).

138. *Id.*

139. *Id.* The EEOC stated:

[P]roof under the *Zimmerman* approach would be difficult for plaintiffs to obtain. Even assuming that an employer kept and maintained time cards and leave records, it would be an extremely tedious task to determine how many employees reported to work each day during the two-year period provided for by the statute.

*Id.*

140. *Id.*

141. 704 F.2d 347 (7th Cir. 1983).

142. See *Zimmerman v. North Am. Signal Co.*, 704 F.2d 347, 352 (7th Cir. 1983) (holding that part-time employees are not counted on days when they do not show up to work or are not on paid leave for purposes of jurisdiction under ADEA).

143. *Id.* at 349. In prohibiting age discrimination by employers, the ADEA states:  
It shall be unlawful for an employer —

did not meet the statutory definition of employer because the company employed fewer than fifteen employees.<sup>144</sup>

On appeal, the Seventh Circuit noted that the ADEA and Title VII share identical language regarding the definition of employer.<sup>145</sup> The ADEA defines an employer as "a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . ."<sup>146</sup> North American counted salaried employees for every day of the week that they appeared on the payroll, but counted hourly paid workers only on days when they worked or were on paid leave.<sup>147</sup> After counting the number of employees at work on a given day, the company counted the number of weeks over the relevant year when twenty or more employees were present.<sup>148</sup> The plaintiff, on the other hand, counted all salaried and hourly paid workers regardless of whether they worked or were on paid leave.<sup>149</sup> The plaintiff simply counted North American's employees by counting the number of workers on the payroll for a given week.<sup>150</sup>

(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;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C. § 623(a) (1994).

144. *Zimmerman*, 704 F.2d at 349.

145. *Id.* at 352.

146. 29 U.S.C. § 630(b) (1994).

147. *Zimmerman v. North Am. Signal Co.*, 704 F.2d 347, 353 (7th Cir. 1983). Under North American's system of counting:

[A]n hourly paid worker who worked Monday through Thursday is not counted as an employee on Friday, regardless of the number of hours he worked that week and regardless of whether he is a permanent employee who will return the next week or a temporary employee who will not. If that worker is given a week of paid vacation, he is counted as an employee for each day of that week.

*Id.*

148. *Id.* North American did not count weeks when the number of employees present fell below 20 on any day of the week:

[R]egardless of the number of employees counted on the rest of the days. For example, for the week ending February 2, 1979, North American's analysis shows nineteen employees on Friday and twenty employees on Monday through Thursday. Since the count fell below twenty on Friday, North American does not count this week toward the jurisdictional minimum.

*Id.*

149. *Id.*

150. *Id.* Using *Zimmerman's* counting method:



The *Zimmerman* court acknowledged that other courts have adopted the payroll method.<sup>151</sup> In addition, the Seventh Circuit conceded that, in light of its remedial nature, the ADEA's definition of employer should be given a liberal reading in order to effectuate its purpose.<sup>152</sup> Nevertheless, the court cautioned that an interpretation of a remedial statute cannot contradict the statutory definition.<sup>153</sup> According to the court of appeals, the phrase "for each working day" refers to employees who work each day during the work week.<sup>154</sup> The court, therefore, could not reconcile the payroll method with the statutory definition of employer because the payroll method counts all employees on the payroll, whether or not they report to work each day of the week.<sup>155</sup> Finally, the court stated that Congress could have exempted certain small employers from the definition of employer by carefully delineating a required number of employees on a payroll, the number of hours worked by each employee, the number of full-time or part-time employees on a payroll, or the total number of hours worked by employees.<sup>156</sup> Under any restriction, close cases like *Zimmerman* will exist.<sup>157</sup> According to the court of appeals, however, the existence of close cases did not justify an especially broad interpretation of statutory language that Congress *did*

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[T]he week ending February 2, 1979 would be included toward the jurisdictional minimum . . . because twenty [employees] received paychecks for work done or leave taken during that work week. In essence, the hourly paid worker who worked Monday through Thursday would be considered an employee on Friday also, based . . . on the proposition that the employment relationship is not broken on the day he does not work, at least if he returns the next week, as most North American workers seem to do.

*Id.*

151. *Id.* at 353 (citing *Hornick v. Borough of Duryea*, 507 F. Supp. 1091 (M.D. Pa. 1980); *Pedreya v. Cornell Prescription Pharmacies*, 465 F. Supp. 936 (D. Colo. 1979); *Pascutoi v. Washburn-McReavy Mortuary*, 11 Fair Empl. Prac. Cas. (BNA) 1325 (D. Minn. 1975)).

152. *Id.* (citing *Parham v. Southwestern Bell Tel.*, 433 F.2d 421, 425 (8th Cir. 1970); *Baker v. Stuart Broadcasting Co.*, 560 F.2d 389, 391 (8th Cir. 1977)).

153. *Id.* The court stated that, "[a]s a general rule, a court should not construe a statute in a way that makes words or phrases meaningless, redundant, or superfluous." *Id.* (citing *United States v. Marubeni Am. Corp.*, 611 F.2d 763, 767 (9th Cir. 1980); *Conway County Farmers Ass'n v. United States*, 588 F.2d 592, 598 (8th Cir. 1978); *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 406 (D.C. Cir. 1976)).

154. *Id.*

155. *Id.* at 354. The court stated that under the payroll method, "an hourly paid worker who works two hours each Monday would be counted as an employee for every day of the week, a result we believe would be contrary to the explicit definitional restriction chosen by Congress." *Id.*

156. *Id.*

157. *Id.*

choose.<sup>158</sup> The Seventh Circuit concluded that employees should be counted only on days when they report to work or are on paid leave.<sup>159</sup>

The Eighth Circuit also has supported the *Zimmerman* approach. In *McGraw v. Warren County Oil Co.*,<sup>160</sup> the Eighth Circuit considered whether part-time employees who do not work each day of the work week should be counted for purposes of jurisdiction under the ADEA.<sup>161</sup> The court did not analyze the debate over counting part-time employees.<sup>162</sup> Rather, the Eighth Circuit merely affirmed the decision of the district court with a citation to *Zimmerman*.<sup>163</sup>

In *EEOC v. Metropolitan Educational Enterprises, Inc.*,<sup>164</sup> the Seventh Circuit recently considered whether to apply the *Zimmerman* approach to Title VII.<sup>165</sup> The EEOC and plaintiff-intervenor Darlene Walters brought suit against Metropolitan. Walters alleged that the defendant fired her in retaliation for her filing of a gender discrimination charge.<sup>166</sup> The *Metropolitan* court initially noted that Title VII does not state a method of counting employees to determine jurisdiction under the statute.<sup>167</sup> After explaining the *Zimmerman* approach and the payroll method,<sup>168</sup> the *Metropolitan* court

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158. *Id.*

159. *Id.*

160. 707 F.2d 990 (8th Cir. 1983).

161. *See McGraw v. Warren County Oil Co.*, 707 F.2d 990, 991 (8th Cir. 1983) (deciding that part-time employees are not counted for purposes of jurisdiction under ADEA).

162. *Id.*

163. *Id.* (citing *Zimmerman v. North Am. Signal Co.*, 704 F.2d 347 (7th Cir. 1983)).

164. 60 F.3d 1225 (7th Cir. 1995), *cert. granted*, 116 S. Ct. 1260 (1996).

165. *See EEOC v. Metropolitan Educ. Enters., Inc.*, 60 F.3d 1225, 1226 (7th Cir. 1995) (deciding that part-time employees are not counted on days when they do not report to work or are not on paid leave), *cert. granted*, 116 S. Ct. 1260 (1996).

166. *Id.*

167. *Id.* at 1227.

168. *Id.* In describing the payroll method, the court stated:

One, endorsed by the EEOC and adopted by a number of courts, is the "payroll method." It looks at the number of employees maintained on an employer's payroll within a given week: if this number is at least 15 for at least 20 calendar weeks the jurisdictional minimum is satisfied, regardless of whether or not every employee on the payroll shows up for work every day of the calendar week.

*Id.* Describing the *Zimmerman* approach, the court stated:

The alternative method counts all salaried employees toward the minimum, but takes a different approach toward hourly or part-time workers. Such workers are considered employees only on days when they are physically present at work or are on paid leave. The jurisdictional minimum of employees must be at the workplace or on paid leave for each day of the work week, or the week will not be counted.

*Id.*

agreed with the *Zimmerman* court's ruling.<sup>169</sup> The *Metropolitan* court stated that Title VII's legislative history offered little assistance in determining the proper method for counting employees,<sup>170</sup> that Title VII and the ADEA shared the same definition of employer,<sup>171</sup> and that interpretation of the ADEA's coverage set a precedent for an interpretation of Title VII's coverage.<sup>172</sup>

On appeal, the plaintiffs criticized the *Zimmerman* approach on three counts.<sup>173</sup> First, the plaintiffs argued that in enacting the FMLA,<sup>174</sup> Congress

169. *Id.*

170. *Id.* (citing *Zimmerman v. North Am. Signal Co.*, 704 F.2d 347, 352-53 (7th Cir. 1983)). The *Metropolitan* court stated:

Plaintiffs contend that in fact, the legislative history of Title VII supports their reading, and base this argument on remarks of Senator Dirksen which suggest that Title VII's definition of employer was borrowed from the Unemployment Compensation Act. Although certain remarks of Senator Dirksen are consistent with plaintiffs' argument, we agree with the *Zimmerman* court that the legislative history of Title VII is too confused and chaotic to be of much use.

*Id.* at 1227 n.3 (referencing *EEOC v. Missouri Pac. R.R. Co.*, 493 F.2d 71, 74 (8th Cir. 1974)).

171. *Id.* at 1227. The *Metropolitan* court stated:

Seeing no way to reconcile the phrase "for each working day" with the payroll method, the panel held that the correct method excluded hourly paid workers on days when they were neither working nor on paid leave. To conclude otherwise, the *Zimmerman* panel held, would render the words "for each working day" superfluous and would be contrary to the "explicit definitional restriction chosen by Congress." The panel also noted that had Congress wanted to define the jurisdictional minimum in terms of the number of employees on the payroll each week, it could certainly have done so.

*Id.*

172. *Id.* The *Metropolitan* court stated:

*Zimmerman*, as we have stated, involved a claim brought under the ADEA rather than one brought pursuant to Title VII. The district court, however, properly found *Zimmerman* dispositive. Because Title VII and the ADEA have a common purpose, we have relied upon cases interpreting a definition in one statute as persuasive when construing a similar definition in the other.

*Id.* at 1227 n.2 (citing *Hayden v. La-Z-Boy Chair Co.*, 9 F.3d 617, 619 (7th Cir.), *cert. denied*, 114 S. Ct. 1371 (1993)). The court stated that "[t]he ADEA's definition is 'essentially identical to Title VII's,' and '[c]ourts routinely apply arguments' to the two interchangeably." *Id.* (quoting *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1280 n.1 (7th Cir. 1995); *Zimmerman v. North Am. Signal Co.*, 704 F.2d 347, 352 (7th Cir. 1983)). The court further stated: "While Walters argues that we may view this case unfettered by *Zimmerman*, therefore, the mirror similarity between the definition of employer in the two contexts and their common purposes counsels — indeed requires — deference to our precedent." *Id.*

173. *Id.* at 1227-28.

174. *See generally* 29 U.S.C. §§ 2601-2654 (1994).

endorsed the payroll method over the *Zimmerman* approach.<sup>175</sup> Second, the plaintiffs contended that case law and the EEOC's interpretation of Title VII challenged the legitimacy of the *Zimmerman* approach.<sup>176</sup> Third, the plaintiffs asserted that the payroll method comported better with the public policy considerations of Title VII.<sup>177</sup> As the Seventh Circuit addressed these arguments, the court noted that overturning circuit precedent required compelling reasons.<sup>178</sup> The court of appeals then emphasized the importance of reading Title VII's plain text.<sup>179</sup> The court concluded that the most natural interpretation of the phrase "for each working day" counts only employees physically at work.<sup>180</sup> The Seventh Circuit stated that the payroll method, which looks at situations when employees join or exit the payroll in the middle of the week, suggests a highly unlikely reading of the statutory language.<sup>181</sup> Such situations, said the court, are so rare that Congress probably would not include such considerations in Title VII.<sup>182</sup> The court of appeals also stated that although Congress could have worded the statute more clearly, the *Zimmerman* court's plain reading of the text was correct because it endured the scrutiny of several courts.<sup>183</sup>

The Seventh Circuit addressed the plaintiff's comparison of Title VII to the FMLA.<sup>184</sup> The court acknowledged that the Senate report of the FMLA endorsed the payroll method.<sup>185</sup> Congress intended the definition of employer

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175. *Id.* The FMLA defines an employer as "any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day in each of 20 or more calendar workweeks in the current or preceding year." *Id.* § 2611(4)(A)(i).

176. *EEOC v. Metropolitan Educ. Enters., Inc.*, 60 F.3d 1225, 1228 (7th Cir. 1995), *cert. granted*, 116 S. Ct. 1260 (1996).

177. *Id.*

178. *Id.* (citing *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991); *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989)).

179. *Id.* at 1228.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* According to the Seventh Circuit, if a court can "glean the meaning of a statute from its text," the court should not look to other sources to assist in the interpretation of the statute. *Id.* (citing *United States v. Hudspeth*, 42 F.3d 1015, 1022 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 2252 (1995)).

184. *Id.*

185. *Id.* The FMLA defines an employer as "any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year." 29 U.S.C. § 2611(4)(A)(i) (1994).

under the FMLA to receive the same interpretation as the definition received under Title VII.<sup>186</sup> The court also admitted that the EEOC and many courts interpreted the word "employs" to mean "maintains on the payroll."<sup>187</sup> Yet, the Seventh Circuit found the congressional commentary unpersuasive for two reasons.<sup>188</sup> First, the Congress that passed the FMLA had no express authority to interpret the previous congressional action that resulted in Title VII.<sup>189</sup> Moreover, only the FMLA's legislative history, and not the FMLA's text, contained an interpretation of Title VII.<sup>190</sup> The court asserted that legislative history has no force of law.<sup>191</sup> The *Metropolitan* court also cited the Supreme Court's rejection of the notion that judicial interpretation of a statute must defer to legislative reports.<sup>192</sup> The Seventh Circuit concluded that if Congress truly intended to enact the payroll method it would have stated the method clearly and unambiguously in the text of Title VII.<sup>193</sup> Congress knew of the various judicial interpretations of Title VII's coverage when it enacted the FMLA, yet Congress failed to enact either of the interpretations into law.<sup>194</sup>

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186. EEOC v. Metropolitan Educ. Enters., Inc., 60 F.3d 1225, 1228 (7th Cir. 1995), cert. granted, 116 S. Ct. 1260 (1996).

187. *Id.* In other words, "[i]t is not necessary that every employee actually perform work on each working day to be considered for this purpose." *Id.* (citing S. REP. No. 3, 103d Cong., 1st Sess. 21-22 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 24).

188. *Id.*

189. *Id.* The *Metropolitan* court stated that "[t]he interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute." *Id.* (citing Public Employees Retirement Sys. v. Betts, 492 U.S. 158, 168 (1989)).

190. *Id.*

191. *Id.* at 1228-29 ("As the District of Columbia Circuit recently observed, 'A congressional report, even a conference report, is not legislation . . . and it does not change the law.'") (quoting *In re North*, 50 F.3d 42, 46 (D.C. Cir. 1995)); see also *Davel v. Sullivan*, 902 F.2d 559, 562 (7th Cir. 1990) (recognizing that "[t]he words of the statute, not the words of the legislative history, control statutory interpretation").

192. EEOC v. Metropolitan Educ. Enters., Inc., 60 F.3d 1225, 1229 (7th Cir. 1995), cert. granted, 116 S. Ct. 1260 (1996). The *Metropolitan* court stated:

The [Supreme] Court held that where there was an "almost uniform appellate interpretation" of legislation, re-enactment of the same statutory language would be presumed to re-enact that "settled judicial interpretation" regardless of a legislative report to the contrary. While further action taken by Congress can justify the abandonment of statutory precedent, legislative history is not akin to legislative action.

*Id.* (citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989); *Pierce v. Underwood*, 487 U.S. 552, 567-68 (1988)).

193. *Id.*

194. *Id.* The *Metropolitan* court stated that Congress knew of the problems with the language "for each working day" because of *Zimmerman* and other similar cases: "If indeed

In addition, the Seventh Circuit addressed the plaintiffs' arguments that judicial and regulatory authority supported overruling *Zimmerman*.<sup>195</sup> The *Metropolitan* court stated that the Eighth Circuit and several district courts followed the *Zimmerman* approach.<sup>196</sup> Moreover, the court noted that the EEOC's Compliance Manual advocated the payroll method long after the *Zimmerman* decision.<sup>197</sup> The *Metropolitan* court refused to defer to an agency interpretation of statutory language after the court already had ruled on the issue.<sup>198</sup>

The Seventh Circuit then responded to the plaintiffs' public policy arguments.<sup>199</sup> The court declined to interpret the FMLA and, thereby, to create

Congress wished to resolve the [c]ircuit conflict in a particular direction, this was 'a strange way to make a change.'" *Id.*

195. *Id.* The court noted that the First and Fifth Circuits and a number of district courts had adopted the payroll method. *Id.* at 1229 & n.5. In support of this proposition, the court cited *Thurber v. Jack Reilly's, Inc.*, 717 F.2d 633, 634-35 (1st Cir. 1983) (adopting payroll method of counting employees), *cert. denied*, 466 U.S. 904 (1984); *Dumas v. Town of Mount Vernon*, 612 F.2d 974, 979 n.7 (5th Cir. 1980) (same); *Reith v. Swenson*, 63 Fair Empl. Prac. Cas. (BNA) 885, 897 (D. Kan. 1993) (same); *Cohen v. S.U.P.A., Inc.*, 814 F. Supp. 251, 254-56 (N.D.N.Y. 1993) (same); *Vano v. Au*, No. Civ. A. 91-0038-H, 1992 WL 175498, at \*2 (W.D. Va. July 16, 1992) (same); *Gorman v. North Pittsburgh Oral Surgery Assocs., Ltd.*, 664 F. Supp. 212, 214 (W.D. Pa. 1987) (same); *Evans v. Davie Truckers, Inc.*, 38 Fair Empl. Prac. Cas. (BNA) 1553, 1554 (M.D.N.C. 1984) (same), *aff'd*, 69 F.2d 1012 (4th Cir. 1985); *Lynn v. JER Corp.*, 573 F. Supp. 17, 20 (M.D. Tenn. 1983) (same); *Hornick v. Borough of Duryea*, 507 F. Supp. 1091, 1098 (M.D. Pa. 1980) (same); and *Pedreya v. Cornell Prescription Pharmacies, Inc.*, 465 F. Supp. 936, 941 (D. Colo. 1979) (same). See *Metropolitan*, 60 F.3d at 1229. Moreover, "[t]he EEOC's Statement of Policy Guidance explicitly rejects the *Zimmerman* approach and endorses the payroll method." *Id.* at 1229 (citing EEOC Compl. Man. (CCH) ¶ 2167, at 2313-12 (1990)).

196. *Metropolitan*, 60 F.3d at 1229 & n.6. As examples, the court cited EEOC v. Garden and Assocs., Ltd., 956 F.2d 842 (8th Cir. 1992) (using *Zimmerman* approach to count employees for purposes of jurisdiction under Title VII); *McGraw v. Warren County Oil Co.*, 707 F.2d 990, 991 (8th Cir. 1983) (same); *Richardson v. Bedford Place Hous. Phase I Assocs.*, 855 F. Supp. 366 (N.D. Ga. 1994) (same); *Wright v. Kosciusko Medical Clinic, Inc.*, 791 F. Supp. 1327, 1332 (N.D. Ind. 1992) (same); *Lord v. Casco Bay Weekly, Inc.*, 789 F. Supp. 32, 34-35 (D. Me. 1992) (same); *Norman v. Levy*, 756 F. Supp. 1060, 1063-64 (N.D. Ill. 1990) (same); EEOC v. Argent Indus., 746 F. Supp. 705, 708-09 (S.D. Ohio 1989) (same); and *Schoenbaum v. Orange County Ctr. for the Performing Arts, Inc.*, 677 F. Supp. 1036, 1039 (C.D. Cal. 1987) (same)). *Metropolitan*, 60 F.3d at 1229 & n.6.

197. EEOC v. Metropolitan Educ. Enters., Inc., 60 F.3d 1225, 1229 (7th Cir. 1995), *cert. granted*, 116 S. Ct. 1260 (1996).

198. *Id.* at 1229-30 (citing *Chevron, USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 n.9 (1984)). The court stated that "the judiciary, not administrative agencies, is the final arbiter of statutory construction." *Id.*

199. *Id.* at 1330.

a conflict among the circuits when none had existed before.<sup>200</sup> The plaintiffs argued that under *Zimmerman*, an employer could evade Title VII liability by structuring its work force to avoid having fifteen employees present on each working day.<sup>201</sup> Nevertheless, the *Metropolitan* court noted that, in over a decade since the court had decided *Zimmerman*, few employers actually had attempted to avoid jurisdiction through such tactics.<sup>202</sup> Although the payroll method can be implemented more easily than the *Zimmerman* approach, the *Metropolitan* court stated that the policy of administrative feasibility did not override the authority of its established statutory interpretation.<sup>203</sup> In conclusion, the Seventh Circuit affirmed the district court's application of the *Zimmerman* approach and dismissed the plaintiff's suit for lack of jurisdiction.<sup>204</sup>

## 2. The Northern District of Georgia

In *Richardson v. Bedford Place Housing Phase I Associates*,<sup>205</sup> the United States District Court for the Northern District of Georgia criticized several cases that applied the payroll method and held that hourly wage employees should not be counted for weeks in which they did not work every day.<sup>206</sup> The plaintiff sued her employer for sexual discrimination under Title VII.<sup>207</sup> The magistrate ruled that the defendant satisfied the fifteen-employee threshold.<sup>208</sup> On appeal to the district court, the defendant argued that either part-time employees did not count toward reaching the jurisdictional minimum or that part-time employees counted only when they worked at least a portion of each day of the week.<sup>209</sup>

The *Richardson* court recognized that many courts construe Title VII liberally and count all employees on the payroll.<sup>210</sup> In discussing those cases,

200. *See id.* ("We have not yet been asked to interpret the FMLA and decline to create a conflict where none yet exists.").

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. 855 F. Supp. 366 (N.D. Ga. 1994).

206. *See Richardson v. Bedford Place Hous. Phase I Assoc.*, 855 F. Supp. 366, 367 (N.D. Ga. 1994) (ruling that part-time employees are not to be counted for purposes of jurisdiction under Title VII).

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* (citing *Cohen v. S.U.P.A., Inc.*, 814 F. Supp. 251 (N.D.N.Y. 1993); *Vano v. Au*, No. Civ. A. 91-0038-H, 1992 WL 175498, at \*2 (W.D. Va. July 16, 1992); *Gorman*

the court noted that most of the cases that endorse the payroll method relied on the reasoning in *Thurber v. Jack Reilly's, Inc.* and *Dumas v. Town of Mt. Vernon*.<sup>211</sup> In attacking the First Circuit's decision in *Thurber*, the *Richardson* court first noted that the First Circuit relied particularly on Senator Dirksen's statement that Title VII's definition of employer came from the definition of employer in the UCA.<sup>212</sup> The *Richardson* court stated that Title VII defines employer with language far different from that of the UCA.<sup>213</sup> The UCA defines an employer as any person who "on each of some twenty days during the calendar year or during the preceding calendar year, each day being in a different calendar week, employed at least one individual in employment for some portion of the day."<sup>214</sup> In contrast, Title VII defines an employer as a "person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year."<sup>215</sup> The *Richardson* court stated that a regulation drafted under the UCA would focus on the existence of an employment relationship for the purpose of counting employees.<sup>216</sup> The court asserted that the language in the two statutes was not close enough to credit Senator Dirksen's assertion.<sup>217</sup> Congress could have written Title VII with language more similar to the UCA if Congress had wanted Title VII's definition of employer to require a consideration of employment relationships for each day of the work week, rather than a consideration of

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v. North Pittsburgh Oral Surgery Assocs., 664 F. Supp. 212, 214 (W.D. Pa. 1987); Lynn v. JER Corp., 573 F. Supp. 17, 19 (M.D. Tenn. 1983); Hornick v. Borough of Duryea, 507 F. Supp. 1091, 1098 (M.D. Pa. 1980); Pedreyra v. Cornell Prescription Pharmacies, 465 F. Supp. 936, 940-41 (D. Colo. 1979); Pascutoi v. Washburn-McReavy Mortuary, 11 Fair Empl. Prac. Cas. (BNA) 1325 (D. Minn. 1975)).

211. *Id.*

212. *Id.*

213. *Id.*

214. 26 U.S.C. § 3306(a)(1)(B) (1994).

215. 42 U.S.C. § 2000e(b) (1994). The term employer, however, does not include:

(1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

*Id.*

216. *Richardson v. Bedford Place Hous. Phase I Assoc.*, 855 F. Supp. 366, 367 (N.D. Ga. 1994).

217. *Id.*



whether employees report to work each day of the work week.<sup>218</sup> In further criticism of *Thurber*, the *Richardson* court noted that the First Circuit relied on court opinions that cited a particular statement from the congressional debate over Title VII: "The 'term' employer is intended to have its common dictionary meaning [and] employers with part-time or seasonal staffs were intended to be covered by the act when the number of employees exceeds the minimum figure."<sup>219</sup> According to the *Richardson* court, this statement did not reveal the legislative intent of Title VII's coverage for two reasons:<sup>220</sup> First, Title VII's definition does not distinguish between part-time and full-time employees.<sup>221</sup> A part-time worker still would be included, without *Thurber's* interpretation, if that employee worked "each working day" of a particular week.<sup>222</sup> Second, if Congress intended "employer" to be defined by its common dictionary meaning, the definition in the statute would contain broader language, such as that found in most dictionary definitions of the word.<sup>223</sup>

The *Richardson* court also criticized the *Dumas* opinion.<sup>224</sup> The court noted that *Dumas* actually did not interpret Title VII's definition of employer.<sup>225</sup> In *Dumas*, the employer would not have met the minimum number of employees for Title VII coverage under either counting method.<sup>226</sup> In a footnote, the *Dumas* court relied on Barbara Lindemann Schlei's and Paul Grossman's *Employment Discrimination Law*.<sup>227</sup> That treatise relied solely on *Pascutoi v. Washington-McReavy Mortuary, Inc.*<sup>228</sup> The *Pascutoi* decision

218. *Id.*

219. *Id.* (citing *Hornick v. Borough of Duryea*, 507 F. Supp. 1091, 1098 (M.D. Pa. 1980); *Pedreya v. Cornell Prescription Pharmacies*, 465 F. Supp. 936, 941 (D. Colo. 1979)).

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* The *Richardson* court cited WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 743 (1981) (defining employer as "the owner of an enterprise . . . that employs personnel for wages or salaries") and BLACK'S LAW DICTIONARY 618 (4th. ed. 1968) (defining employer as "one who employs the services of others; one for whom employees work and who pays their wages or salaries"). *Richardson v. Bedford Place Hous. Phase I Assoc.*, 855 F. Supp. 366, 369-70 (N.D. Ga. 1994).

224. *Richardson*, 855 F. Supp. at 370.

225. *Id.* (citing *Dumas v. Town of Mount Vernon*, 612 F.2d 974 (5th Cir. 1980)).

226. *Id.*

227. *Id.* (citing *Dumas*, 612 F.2d at 979 n.7 (citing BARBARA L. SCHLEI & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 837 (1976 & Supp. 1979)).

228. BARBARA L. SCHLEI & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 837 (1976 & Supp. 1979); see *Pascutoi v. Washington-McReavy Mortuary, Inc.*, 11 Fair Empl. Prac. Cas. (BNA) 1325, 1327 (D. Minn. 1975) (ruling that company employing aggregate of

found Title VII's remedial nature and contemporary working conditions to be a sufficient basis to hold that an employee does not have to work every day of the week to be counted under Title VII.<sup>229</sup> As a result of *Pascutoi's* lack of examination of statutory language and lack of discussion of the payroll method, the *Richardson* court found *Pascutoi*, and therefore *Dumas*, unpersuasive.<sup>230</sup>

In support of the *Zimmerman* approach, the *Richardson* court cited numerous cases that counted employees only when those employees worked

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15 full-time and part-time employees met jurisdictional minimum despite fact that company rarely had more than aggregate of 14 employees on any one day). In *Pascutoi*, a federal district court considered whether a person must work 40 hours or more during a seven-day period to be counted as an employee under Title VII. *Id.* at 1326. The plaintiff, Brigitte Pascutoi, worked for a mortuary run by the defendant. *Id.* After the mortuary discharged her, she sued her former employer for wrongful discharge based on gender and for denial of work opportunities based on gender. *Id.* The defendants contested the court's jurisdiction because they did not employ 15 employees on each working day of the work week. *Id.* The defendants also argued that the legislative history of the 1972 Act indicated that Title VII only covered employers with 15 or more full-time employees. *Id.* Pointing to two opinions by the EEOC General Counsel, the plaintiff argued that all employees on an employer's payroll should be counted to determine jurisdiction under Title VII. *Id.* The court stated that Congress created the 1964 Act and the 1972 Act for remedial purposes and that they should be given a broad interpretation consistent with this purpose. *Id.* at 1327 (citing *EEOC v. Eagle Iron Works*, 367 F. Supp. 817 (S.D. Iowa 1973); *Parham v. Southwestern Bell Tel.*, 433 F.2d 421 (8th Cir. 1970)). The court also noted that the EEOC's interpretation of the statute deserved great deference. *Id.* (citing *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)). The court found that the mortuary employed, on average, 10 or 11 full-time employees working over 40 hours per week; 5 or 6 part-time employees working between 25 and 45 hours per week; and 1 or 2 other part-time employees working less than 25 hours per week. *Id.* The *Pascutoi* court concluded that the mortuary met the minimum requirements for Title VII jurisdiction. *Id.*

229. *Richardson v. Bedford Place Hous. Phase I Assoc.*, 855 F. Supp. 366, 370 (N.D. Ga. 1994). The *Richardson* court stated:

Subsequent editions of this treatise cite to the *Pedreya*, *Hornick*, *Thurber* and *Dumas* opinions. Another oft-cited treatise, relied on by the *Thurber* court, also relies on *Pascutoi* in summarily reading the same conclusion on the meaning of section 2000e(b)'s "for each working day" language. Both treatises, however, provide no analysis themselves regarding the true meaning of this language.

*Id.* at 370 n.6.

230. *Id.* at 370. The *Richardson* court stated:

The EEOC relies particularly on *Thurber* and *Dumas* in taking the position that employees are counted regardless of whether they work less than each day of the work week. EEOC Policy Statement No. 915-052 (April 20, 1990). It is not surprising that the administrative agency in charge of enforcement of Title VII would choose the most expansive reading of its jurisdiction. The Policy Statement, however, adds no additional analysis on the meaning of the section.

*Id.* at 370 n.7.

each day of the work week.<sup>231</sup> Those cases found little guidance from Title VII's legislative history and instead relied on the words "for each working day."<sup>232</sup> The *Richardson* court agreed with these opinions for three reasons:<sup>233</sup> First, the court noted that a plain reading of Title VII reveals that an employee should be counted only for the weeks that the employee worked every day of the work week.<sup>234</sup> Otherwise, the clause "for each working day" would be superfluous.<sup>235</sup> Second, the court stated that Title VII's legislative history did not explain why Congress selected a minimum number of employees.<sup>236</sup> When a statute's legislative history is uncertain, a court may interpret a statute by relying on a plain reading of the statute's text.<sup>237</sup> Third, the court asserted that a literal interpretation of Title VII should be favored over an interpretation based on legislative history.<sup>238</sup> Congress passed the 1972 Act, which reduced the number of employees from twenty-five to fifteen, after debates concerning how many employees should be covered and whether increasing the coverage would overload the court dockets.<sup>239</sup> The *Richardson* court noted that Congress did not pass Title VII with the intention of covering all employers affecting interstate commerce.<sup>240</sup> Whether the product of political compromise or of a desire to protect small businesses from liability under Title VII, Congress established a specific limitation on

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231. *Id.* at 370. The court cited *EEOC v. Garden & Assocs., Ltd.*, 956 F.2d 842, 844 (8th Cir. 1992) (counting employees only when those employees showed up to work each day of work week); *McGraw v. Warren County Oil Co.*, 707 F.2d 990, 991 (8th Cir. 1983) (same); *Zimmerman v. North Am. Signal Co.*, 704 F.2d 347, 354 (7th Cir. 1983) (same); *Lord v. Casco Bay Weekly, Inc.*, 789 F. Supp. 32, 35 (D. Me. 1992) (same); *Norman v. Levy*, 756 F. Supp. 1060, 1064 (N.D. Ill. 1990) (refusing to count hourly paid workers when they did not show up to work). *Richardson v. Bedford Place Hous. Phase I Assoc.*, 855 F. Supp. 366, 370 (N.D. Ga. 1994). Discussing *Zimmerman*, the *Richardson* court explained that:

The Seventh Circuit . . . made a distinction between hourly and salary employees. While a presumption that a salary employee works each day of the working week may be appropriate, the language itself does not necessarily lend itself to such a reading. Such a distinction, however, between hourly or salary employees is unnecessary for this court to consider since the employees at issue were paid hourly wages.

*Id.* at 370 n.8.

232. *Id.* at 370.

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.* at 370-71.

240. *Id.* at 371.

coverage.<sup>241</sup> The *Richardson* court concluded that Title VII's legislative history did not support reading Title VII to maximize the inclusion of employers and, as a result, endorsed a literal interpretation of Title VII's language.<sup>242</sup>

Finally, the *Richardson* court noted that the *Zimmerman* approach did not lack flexibility<sup>243</sup> and articulated two additional defenses of the *Zimmerman* approach:<sup>244</sup> First, under the *Zimmerman* approach, rather than falsely dividing part-time and full-time employees, a court should only inquire whether the employee worked every day of the work week.<sup>245</sup> Second, although some small businesses may evade Title VII's jurisdiction under the *Zimmerman* approach, that result is consistent with congressional intent.<sup>246</sup> Congress clearly established a limitation on coverage.<sup>247</sup> Therefore, a narrower reading is necessary to further congressional intent.<sup>248</sup> In conclusion, the *Richardson* court followed the *Zimmerman* approach endorsed by the Seventh and Eighth Circuits.<sup>249</sup>

#### IV. Argument

##### A. An Argument for Congressional Enactment of a Uniform Method of Counting Employees

An argument for a uniform method of counting among the judicial circuits rests on one simple principle: equality. In cases where an employer's total combined work force of full-time and part-time employees fluctuates around fifteen, the ability of a plaintiff to seek a federal remedy for employment discrimination should not depend on geographical location. The same principle applies to small businesses: They should neither enjoy the advantages of exemption from a federal discrimination statute nor suffer legal and financial liability from a federal discrimination statute simply because of their location in a particular judicial circuit. In his concurring opinion in *EEOC v. Metropolitan Educational Enterprises, Inc.*,<sup>250</sup> Judge Kenneth F. Ripple

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241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. 60 F.3d 1225 (7th Cir. 1995) (holding that *Zimmerman* approach applied to Title VII and that part-time employees are counted in weeks only when they worked every day of given work week), *cert. granted*, 116 S. Ct. 1260 (1996). For a discussion of the

also argued that the present disagreement over Title VII's coverage must be clarified.<sup>251</sup> Furthermore, this circuit split has festered for over two decades. The Supreme Court will sometimes allow a circuit split to persist for a period of time to provide the circuits an opportunity either to resolve the dispute themselves, or at a minimum, to exhaust the issue with arguments and analysis so that the Supreme Court can consider a fully developed question. The question of whether to count part-time employees has been exhausted, and the circuit dialectic will never yield an answer because Congress never considered the question.<sup>252</sup>

A uniform method for counting employees could be established in either of two ways. First, Congress could amend Title VII to include language that establishes the payroll method, the *Zimmerman* approach, or even an altogether different method that better reflects the competing interests of small, family-like businesses and a universally clear rule of non-discrimination.<sup>253</sup> To enact the payroll method, Congress could amend Title VII's definition of employer to read: "[A] person engaged in an industry affecting commerce who has fifteen or more employees on that person's payroll in each of twenty or more calendar weeks in the current or preceding calendar year." This language would require the courts to count both part-time and full-time employees. To enact the *Zimmerman* approach Congress could amend Title VII's definition of employer to read "a person engaged in an industry affecting commerce who has fifteen or more employees who report to work or are on paid leave for each working day of the work week in each of twenty or more calendar weeks." This language would require courts to count employees only when those employees showed up to work or were on paid leave for every day of the work week. Congress also could address latent ambiguities in Title VII's statutory language that have not yet arisen, such as whether to count part-time employees who work every day of the week but for only a few hours each day.<sup>254</sup> Second, the Supreme Court can resolve the impending

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*Metropolitan* case, see *supra* notes 164-204 and accompanying text.

251. *EEOC v. Metropolitan Educ. Enters., Inc.*, 60 F.3d 1225, 1230 (7th Cir. 1995) (Ripple, J., concurring), *cert. granted*, 116 S. Ct. 1260 (1996). Judge Ripple stated: "The ambiguity of the present situation ought to be clarified. The scope of Title VII ought to be the same in Boston and New Orleans as it is in Chicago." *Id.*

252. See *supra* notes 68-70 and accompanying text (noting general absence, excepting Senator Fannin's statement, of any discussion of part-time employees during legislative debates regarding Title VII).

253. U.S. CONST. art. I, § 1 (giving all federal legislative powers to Congress).

254. Congress seems to have intended to count part-time workers who work only a few hours each day in light of the phrase "for each working day." See 42 U.S.C. § 2000e(b) (1994) (defining employer for purposes of jurisdiction under Title VII). If Congress did not intend to count part-time workers who show up only a few days of the work week, Congress

ing circuit split by granting certiorari to an appeal from a circuit court decision.<sup>255</sup> The Supreme Court is capable of establishing a precedent for counting employees for the purposes of Title VII jurisdiction.<sup>256</sup> This action also will end the present circuit dispute and the present inequity of Title VII's current application to employees and small businesses.

Congress should resolve the dispute for two reasons. First, Congress is better able to resolve the dispute. Congress can avoid paying attention to the complicated debate that has developed among the courts. This dialectic pits the payroll method's arguments of congressional intent against the *Zimmerman* approach's plain reading of the statute. There is no clear escape from the debate, for both Title VII's legislative history and statutory language are very ambiguous. The statutory definition's ambiguity reflects Congress's attempt to balance conflicting policy considerations. On one hand, Congress chose to limit Title VII's coverage to businesses with a minimum number of employees in order to protect small family businesses.<sup>257</sup> On the other hand, Congress intended for rights to equal employment to be widely available under the Act.<sup>258</sup> The chosen language reflects Congress's inability to reconcile the inherent tensions between these two policies. The Supreme Court would be required to decide the issue by examining Title VII's vague statutory language and ambiguous legislative history. Therefore, a judicial resolution would be imperfect. By contrast, Congress could resolve the issue by starting from a clean slate.

Second, Congress can craft a resolution based on contemporary policy considerations. The Supreme Court is supposed to rule on disputes between parties — not to decide public policy.<sup>259</sup> Whether and how to include part-time employees for purposes of Title VII jurisdiction are questions of public

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probably did not intend to count part-time workers showing up every day of the work week. *See Takeall v. Werd, Inc.*, 23 Fair Empl. Prac. Cas. (BNA) 947, 948 (M.D. Fla. 1979) (deciding that part-time employees should not be counted for purposes of Title VII jurisdiction when they show up only few days per week).

255. *See* U.S. CONST. art. III, § 2, cl. 2 (granting appellate jurisdiction to Supreme Court).

256. *See id.* § 1, cl. 2 (establishing Supreme Court as superior judicial power of United States).

257. *See* 110 CONG. REC. 13,092 (1964) (noting Senator Cotton's concern that small family businesses would be adversely affected by broad coverage of Title VII).

258. *Id.* at 13,087 (noting Senator Dirksen's concern that limiting coverage of Title VII to only large businesses would undermine purpose of Act).

259. *See* U.S. CONST. art. III, § 2, cl. 1 (requiring that Supreme Court exercise jurisdiction only to resolve cases or controversies). *See generally* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989) (analyzing problems with Supreme Court's use of public values to aid in statutory interpretation).

policy, as neither the statute nor the legislative record provides a sufficient basis upon which the underlying policy preferences of Congress can be discerned.<sup>260</sup> The next Congress could decide that it wants to preserve an exemption from Title VII for small businesses that employ sizeable part-time staffs, or it could decide it wants to expand the jurisdiction of Title VII. Congress also can factor other public policy considerations into the final decision, such as the ability of parties to document the work schedules of part-time employees<sup>261</sup> and the ability of the EEOC to meet the responsibilities of expanded jurisdiction.<sup>262</sup> Also, Congress may draw upon various resources (such as agency and expert testimony before congressional committees) to decide public policy questions. In sum, Congress could deliver a better resolution to the circuit split over whether to count part-time employees for purposes of jurisdiction under Title VII.

### *B. An Argument for the Payroll Method*

When the Supreme Court rules upon Darlene Walters's petition, it should decide the case in favor of the payroll method for two reasons. First, although the legislative history of Title VII does not discuss the appropriate method for counting part-time workers,<sup>263</sup> the legislative history lends greater support to the view that Congress intended that all part-time workers be counted. Senator Dirksen's statement that his amendment exempted seasonal businesses from Title VII singled out only one form of part-time workers — seasonal workers.<sup>264</sup> Thus, Dirksen's statement is consistent with the view that the statute covers other part-time workers. Senator Fannin's concern that increasing Title VII's coverage would provide an incentive for businesses to fire their part-time staffs also supports the view that Congress anticipated part-time employees being counted.<sup>265</sup> Finally, the remedial nature of Title VII supports the view that part-time employees should be counted if they are on an employer's payroll.<sup>266</sup>

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260. See *supra* part II.B-C (discussing ambiguity of Title VII's legislative history).

261. See *EEOC v. Metropolitan Educ. Enters.*, 60 F.3d 1225, 1330 (7th Cir. 1995) (conceding difficulty of maintaining records of hours worked by part-time employees), *cert. granted*, 116 S. Ct. 1260 (1996).

262. See 110 CONG. REC. 13,085 (1964) (arguing that federal government would be incapable of meeting jurisdictional responsibilities of Title VII if small businesses were covered).

263. See *supra* notes 50-52 and accompanying text (discussing absence of discussion of counting part-time workers for purposes of jurisdiction under Title VII).

264. See *supra* notes 42-53 and accompanying text (analyzing debates surrounding Dirksen amendment).

265. See *supra* notes 68-69 and accompanying text (analyzing Fannin's statements against expansion of Title VII's coverage).

266. See *supra* note 42 and accompanying text (stating that because Congress intended Title

Second, the First and Fifth Circuits make more convincing arguments on behalf of the payroll method than the Seventh and Eighth Circuits make on behalf of the *Zimmerman* approach. Admittedly, the Seventh Circuit's plain reading of the statutory language presents a cogent argument on behalf of the *Zimmerman* approach.<sup>267</sup> But such analysis reads more into the statutory language than the text itself requires, for Senator Dirksen intended the language to exempt *seasonal businesses*, rather than all businesses.<sup>268</sup> With respect to nonseasonal businesses, the payroll method is not inconsistent with a plain reading of the statute's language.<sup>269</sup> Furthermore, the recent *Metropolitan* decision responded poorly to criticisms of the *Zimmerman* approach. The *Metropolitan* majority repeatedly noted that circuit precedent required the court of appeals to follow the *Zimmerman* approach.<sup>270</sup> Judge Ripple, in his concurrence, stated that the *Zimmerman* approach was not free from doubt, but he voted with the majority because he felt obliged to follow circuit precedent.<sup>271</sup> Of course, the Supreme Court is not bound by a federal court of appeals decision. The Supreme Court will consider the question before Congress does and should avoid engaging in an overly technical analysis of legislative history and statutory language such that the original congressional considerations of the statute fall to the side. Instead, the Supreme Court should recognize that the payroll method better comports with Congress's intent and should support its decision with the more persuasive arguments of the First and Fifth Circuits.

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VII to remedy wrongs of past discrimination, Title VII's coverage should be construed liberally).

267. See *Zimmerman v. North Am. Signal Co.*, 704 F.2d 347, 353-54 (7th Cir. 1983) (arguing that words "for each working day" literally means that employee was at work for each work day).

268. See *supra* notes 42-53 and accompanying text (analyzing debates surrounding Dirksen amendment).

269. See *supra* notes 127-28 and accompanying text (citing EEOC's arguments that payroll method can be read consistently with plain reading of Title VII's statutory language).

270. See *EEOC v. Metropolitan Educ. Enters., Inc.*, 60 F.3d 1225, 1228 (noting that stare decisis is of fundamental importance when considering question involving statutory construction (citing *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991))).

271. *Id.* at 1230 (Ripple, J., concurring) (deciding that *Zimmerman* approach applied to Title VII and that part-time employees are counted in weeks only when they worked every day of given work week). Judge Ripple stated: "Although the correctness of *Zimmerman v. North Am. Signal Co.*, 704 F.2d 347 (7th Cir. 1983), is not free from doubt, I must conclude, with some reluctance, that the EEOC has not made a sufficiently strong case to warrant our overruling established precedent of long standing." *Id.* (Ripple, J., concurring). For a discussion of the *Metropolitan* case, see *supra* notes 164-204 and accompanying text.



### V. Conclusion

The current circuit split over the counting of part-time employees to satisfy the jurisdictional requirement of Title VII must be resolved.<sup>272</sup> No easy road to a resolution exists, however, if one takes the traditional avenue of examining the meaning of statutory language. The statutory language of Title VII does not indicate whether part-time employees should be counted,<sup>273</sup> and the legislative history of the 1964 Act does not reveal whether Congress intended for part-time employees to be counted.<sup>274</sup> Moreover, the debate among the circuits has failed to produce a satisfactory analysis or resolution of the counting question.<sup>275</sup> This question should not be answered by the Supreme Court because the Court will not be able to find a solution that reflects statutory construction or congressional intention, for Congress did not consider the issue.<sup>276</sup> Nevertheless, the Supreme Court is about to answer the question that Congress failed to consider thirty years ago.

The Supreme Court will decide whether Title VII jurisdiction over an employer in the federal courts will be based on the employer having either the requisite number of employees on the payroll or the requisite number of employees at work for each working day. For employers, the question seems properly framed. The question explores the parameters of Congress's desire to protect small businesses. For plaintiffs like Darlene Walters, the posture of the question seems foreign to their problems. Darlene Walters wonders why, in order to address the merits of her sexual discrimination complaint against her employer, federal courts must conduct an inquiry into the number of days that she and her fellow employees worked during certain work weeks. Individuals consider themselves to be employees of a business simply if they work. To plaintiffs, the inquiry seems like an improper fuss over whom and how to count.

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272. See *supra* part IV.A (arguing for resolution of current circuit courts of appeals split over counting of part-time employees for purposes of jurisdiction under Title VII).

273. See *supra* part II.A and accompanying text (discussing ambiguity of language of Title VII's definition of employer).

274. See *supra* part II.B-C (analyzing legislative history of Title VII and concluding that Congress did not consider whether part-time employees were to be counted for purposes of jurisdiction).

275. See *supra* part III (discussing and analyzing arguments between circuit courts of appeals over whether or not to count part-time employees for purposes of jurisdiction under Title VII).

276. See *supra* note 260 and accompanying text (arguing that Supreme Court will only be able to craft imperfect resolution to part-time employee question).