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adds to the federal common law surrounding ERISA the idea that a federal court will not grant recovery under ERISA when an injunction based on a state statute actually caused the damages that a plaintiff seeks to recover. Such damages are not recoverable under ERISA because of the extracontractual nature of the damages.

LABOR LAW

West Virginia Code section 18A-4-8b(b) (1982) (section 18A-4-8b(b)) provides the guidelines for a county board of education to follow in the promotion and hiring of service personnel. The statute requires a board of education to make hiring and promotion decisions on the basis of seniority, qualifications, and evaluation of past service.[104] In *Cox v. Board of Education of Hampshire County*, 355 S.E.2d 365 (W.Va. 1987), the West Virginia Supreme Court of Appeals reviewed the statutory requirement that a board of education fill service personnel positions on a seniority basis.[105] The court in *Cox* did not reach a final determination of the issue of the qualification of plaintiffs for a service position, though, because the board eliminated the job position in question.[106] The United States Court of Appeals for the Fourth Circuit, however, interpreted the requirements of the statute in an action alleging hiring discrimination against a West Virginia county board of education in *Dalton v. Mercer County Board of Education*, 887 F.2d 490 (4th Cir. 1989).

In *Dalton* the Fourth Circuit reviewed the Mercer County Board of Education's (Board) appeal to Frank M. Dalton, Jr.'s claim that the Board violated the Age Discrimination in Employment Act (ADEA)[107] because the Board failed to hire Dalton for a service position because of his age. The Fourth Circuit considered the Board's main contention that section 18A-4-8b(b) required the Board to hire the qualified applicant having the most

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(stating in dicta, without reference to specific section of ERISA, that extracontractual damages are not recoverable under ERISA).

104. W. VA. CODE § 18A-4-8b(b) (1982). Section 18A-4-8b(b) provides:

> A county board of education shall make decisions affecting promotion and filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight [Section 18A-4-8], article four of this chapter, on the basis of seniority, qualifications and evaluation of past service.
>
> Qualifications shall mean that the applicant holds a classification title in his category of employment as provided in this section and must be given first opportunity for promotion and filling vacancies. Other employees then must be considered and shall qualify by meeting the definition of the job title as defined by section eight, article four of this chapter, that relates to the promotion or vacancy. . . .

Id.

105. Cox v. Bd. of Educ. of Hampshire County, 355 S.E.2d 365, 369 (W.Va. 1987) (holding seniority rights provided in West Virginia Code section 18A-4-8b extend only to service personnel positions and not to professional personnel positions).

106. *Id.*

107. 29 U.S.C. § 621 (1967).

seniority. Dalton, a sixty-one year old without any seniority as a service employee with the Board, was one of eleven applicants for the position of coordinator of transportation. The Board hired William Hopkins, a forty-one year old with seventeen years of seniority, for the position. Dalton alleged that the Board did not hire him because of his age, and brought this civil rights action against the Board.

The jury before the United States District Court for the Southern District of West Virginia decided in favor of Dalton. The Board appealed, arguing first that the district court erred in failing to enter a judgment not withstanding the verdict, based on the seniority provision of the section 18A-4-8b(b). The Board also asserted that the district court should have allowed the Board to ask certain hypothetical questions to its personnel, and that the evidence was insufficient to prove that the Board was guilty of willful discrimination against Dalton. On appeal, the Fourth Circuit considered only whether section 18A-4-8b(b) required the Board to hire the qualified applicant with the most seniority.

In deciding whether the statute mandated the Board to hire Hopkins, the candidate possessing seniority with the Board, the Fourth Circuit focused on the language of section 18A-4-8b(b). The *Dalton* court noted that this section required the Board to promote or hire service personnel on the basis of seniority, qualifications, and evaluation of past service. The Fourth Circuit also interpreted the section's definition of "qualifications" to relate to past employment with the Board. Applying these factors to the instant case, the Fourth Circuit recognized that Hopkins was qualified for the position because he qualified for the Board's posted educational and employment experience. The *Dalton* court further found that Hopkins possessed substantial seniority because of Hopkins' seventeen years of seniority as a service employee for the Board. The Fourth Circuit held that the West Virginia statute required the Board to comply with the seniority provision. The *Dalton* court concluded that, based on the seniority of the two applicants, the Board acted correctly by hiring Hopkins and not Dalton. The *Dalton* court additionally found that the ADEA permitted an employer to comply with a seniority system. Consequently, the Fourth Circuit found that the Board did not violate the ADEA by complying with section 18A-4-8b(b)'s seniority provision, and reversed the decision of the United States District Court for the Southern District of West Virginia.

In holding that the Board did not commit age discrimination when it complied with the West Virginia statute and hired the most qualified senior applicant for coordinator of transportation, the Fourth Circuit ruled in accord with the Supreme Court of Appeals of West Virginia.[108]

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108. Cox v. Board of Educ. of Hampshire County, 355 S.E.2d 365, 369 (holding that seniority hiring provisions of W.Va. Code apply only to service personnel positions and not to professional personnel positions).

The Civil Rights Act of 1964, section 703(a), 42 U.S.C. section 2000e-2(a) (1988) (section 2000e-2(a)), prohibits employers from engaging in discriminatory employment practices. An employer's discharge of an employee because of the employee's sex constitutes an unlawful employment practice in violation of section 2000e-2(a).[109] An employer's discharge of a female employee because of the employee's pregnancy also constitutes a discharge because of sex in violation of section 2000e-2(a).[110] An employee who suffers from a discriminatory employment practice may file an enforcement action with the Equal Employment Opportunity Commission (EEOC),[111] or, if the EEOC's enforcement actions fail to resolve the dispute between the employer and employee, the employee may file a civil action against the employer.[112] An employee who prevails in an action against an employer may secure reinstatement with back pay[123] and, in the court's discretion, reasonable attorney's fees.[114] Against this statutory background, in *EEOC v. Service News Co.*, 898 F.2d 958 (4th Cir. 1990), the United States Court of Appeals for the Fourth Circuit reviewed both a district court's judgment that an employer unlawfully discharged a pregnant employee and the district court's award of back pay, medical expenses and attorney's fees to the employee.

In *Service News* the plaintiff, EEOC, sued the defendant, Service News Company (Service News), alleging that Service News had discharged a pregnant employee, Phillips, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1981). Service News is a book and periodical distributor in Wilmington, North Carolina. Heck, the general manager of Service News, hired Phillips on July 3, 1985, to work as a scanner operator, a job requiring Phillips to lift boxes weighing over 25 pounds. After testing negative for pregnancy on September 19 and October 3, 1985, Phillips tested positive for pregnancy on October 22, 1985. After informing Heck of her pregnancy, Phillips met with Heck on October 23, 1985. Although Phillips' doctor approved of her continued employment and although Phillips desired to continue working, Heck expressed concern about Phillips' ability to continue working while pregnant. Heck discussed the possibility of unemployment benefits and continued health insurance coverage with Phillips, and Phillips concluded that Heck had fired her.

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109. *See* Civil Rights Act of 1964, § 703(a), 42 U.S.C. § 2000e-2(a) (1988) (prohibiting sexually discriminatory discharge of employee).

110. *See* Civil Rights Act § 701(k), 42 U.S.C. § 2000e(k) (defining statutory terms "because of sex" to include employment discrimination because of employee's pregnancy).

111. *See* Civil Rights Act § 706(b), 42 U.S.C. § 2000e-5(b) (giving EEOC power to investigate and resolve charges of discriminatory employment practices).

112. *See* Civil Rights Act § 706(g), 42 U.S.C. § 2000e-5(f) (giving employee cause of action against discriminatory employer).

113. *See* Civil Rights Act § 706(g), 42 U.S.C. § 2000e-5(g) (providing for award of back pay to reinstated employee).

114. *See* Civil Rights Act § 706(k), 42 U.S.C. § 2000e-5(k) (providing for discretionary award of attorney's fees to prevailing party in enforcement action).

Although Phillips continued to pay health insurance premiums to Service News, the insurance company soon informed Phillips that she was ineligible for coverage, and Service News refunded Phillips' premium payments. Phillips was unable to secure other coverage because her pregnancy was a pre-existing condition. After her termination, Phillips searched for employment for five months. When Piece Goods Shop rejected Phillips' application for employment because of her pregnancy, Phillips concluded that her search for employment would be fruitless.

After giving birth on June 24, 1986, Phillips worked for different employers from August until September and from December 1986 until mid-February 1987. In each instance, Phillips voluntarily quit working because transportation and child care costs exceeded her possible income. Service News rehired Phillips on June 10, 1987. During each period of unemployment after the birth of her child, Phillips actively sought work and submitted numerous employment applications. Phillips filed a charge of discrimination with the New Hanover Human Relations Commission after her termination on October 23, 1985. Although Service News eventually reinstated Phillips, she could not obtain complete relief in resolution of the charge. Consequently, the EEOC sued Service News in the United States District Court for the Eastern District of North Carolina on March 7, 1988, alleging that Service News had discharged Phillips because of her pregnancy in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1981). The district court held that Service News had violated Title VII by discharging Phillips on account of her pregnancy and awarded Phillips back pay in the amount of $12,059.34, medical expenses associated with Phillips' pregnancy in the amount of $2,791.91, and attorney's fees in the amount of $1,425.00.

Service News appealed the district court's judgment and award of back pay, medical expenses, and attorney's fees to Phillips. Before addressing the propriety of the district court's judgment and award, the Fourth Circuit considered Service News' argument that the district court erred in certain findings of fact and failed to make other necessary findings of fact. The Fourth Circuit disagreed with Service News' argument that Heck did not discharge Phillips and that Phillips was not pregnant when she enrolled in Service News' health insurance plan. The *Service News* court found sufficient evidence in the record supporting each finding and concluded that the district court's judgment in each instance was not clearly erroneous. The Fourth Circuit, however, agreed with Service News concerning the beginning date for computing the award of back pay. The Fourth Circuit noted that the district court awarded Phillips back pay from July 24, 1986, one month after the birth of Phillips' baby, although Phillips did not return to work until August 11, 1986. The *Service News* court noted that no evidence in the record supported the use of the earlier date to compute the award of back pay. Accordingly, the court held that the back pay award should be recalculated using August 11 as the earliest possible date that Phillips could have returned to work.

The Fourth Circuit disagreed with Service News' arguments concerning the district court's failure to make certain findings of fact. Service News

argued that the district court should have made a finding on the theory of "constructive discharge" because neither Heck nor Phillips used the word "fired" or "discharged" in their conversation on October 23. The Fourth Circuit disagreed, noting that the use of specific words is unnecessary for a finding of actual discharge and that neither party proposed the theory of constructive discharge at trial. The Fourth Circuit also rejected Service News' argument that the district court should have ruled on the business necessity defense that would have justified Service News' seemingly discriminatory behavior as a protection of the health of Phillips and her unborn fetus. Citing its previous decision in *Wright v. Olin Corp.*, 697 F.2d 1172, 1185-86 n.21 (4th Cir. 1982), the Fourth Circuit noted that the business necessity defense normally applies to disparate impact analysis of discrimination claims and not to overt discrimination claims such as the EEOC's claim on behalf of Phillips. The Fourth Circuit noted, however, that even if the business necessity defense applied to Service News' actions, *Wright* required that the employer establish, by objective evidence, the risk of harm to the fetus, the necessity of protective action, and the effectiveness of the employer's actions in preventing such harm. Because Service News presented only evidence of Heck's subjective belief that Phillips should not continue working, the Fourth Circuit concluded that the district court did not err by failing to address the business necessity defense. Finally, the Fourth Circuit rejected Service News' argument that the district court erred by failing to rule on whether Heck offered to rehire Phillips before the actual date of her re-employment. The *Service News* court noted that no evidence in the record supported such a finding because the evidence suggested that Heck only mentioned rehiring Phillips to an investigator with the New Hanover Human Relations Commission and not to Phillips personally.

After addressing Service News' preliminary arguments, the Fourth Circuit addressed the propriety of the award for back pay, medical expenses, and attorney's fees. Service News first argued that the back pay award was improper because Phillips made insufficient efforts to mitigate damages by seeking other employment. Service News argued that the district court should have examined three discrete time periods when computing the back pay award. The Fourth Circuit declined to adopt a fixed rule requiring a trial court to examine discrete time periods when determining back pay awards, but the court concluded that the award to Phillips for the first five months of unemployment after termination was erroneous. The *Service News* court noted that during these five months Phillips' only effort to secure employment consisted of looking through want ads. The Fourth Circuit held that only looking through want ads for unskilled employment was insufficient to prove mitigation of damages and, therefore, concluded that Phillips' back pay award should be reduced for the five month period. The Fourth Circuit, however, upheld the award of back pay to Phillips for the remainder of her pregnancy after Phillips' unsuccessful employment application at Piece Goods Shop. The Fourth Circuit distinguished *Hayes v. Shelby Memorial Hosp.*, 546 F. Supp. 259, 266 (N.D. Ala. 1982), *aff'd*, 726 F.2d 1543 (11th Cir. 1984), which held that a discharged pregnant employee who

believed that efforts to obtain employment would be futile was not entitled to back pay because the employee had no basis for that belief and made no effort to secure employment. The *Service News* court noted that Phillips had attempted to obtain work and was rejected. Consequently, the court concluded that Phillips justifiably believed that further efforts to secure employment while pregnant would be unsuccessful. Finally, the Fourth Circuit refused to reduce Phillips' back pay award to account for child care costs. The Fourth Circuit noted that no authority for such a reduction exists and that Title VII expressly mentions a reduction in back pay only for amounts that the employee could have earned with reasonable diligence.

Citing *Fariss v. Lynchburg Foundry*, 769 F.2d 958 (4th Cir. 1985), which held that the widow of a wrongfully terminated employee could recover the premiums but not the proceeds of a life insurance policy, Service News argued that the district court erred by awarding Phillips the proceeds of her medical insurance instead of the premiums paid. The Fourth Circuit disagreed. The *Service News* court noted that the *Fariss* holding rested upon the employee's failure to mitigate damages by procuring substitute insurance coverage. In contrast, the Fourth Circuit noted that Phillips tried to procure substitute coverage but was unsuccessful because of her preexisting pregnancy. Consequently, the Fourth Circuit held that Phillips was entitled to reimbursement for the benefits which would have been paid less the costs of premiums.

Finally, Service News argued that the district court improperly awarded attorney's fees to Phillips as a prevailing party under 42 U.S.C. section 2000e-5(k) because Phillips was not a formally nominated party in the suit against Service News. The Fourth Circuit reasoned that restricting the statutory definition of prevailing party to include only formally nominated parties would frustrate the intent of the statute, tax both the parties' and judicial resources, and needlessly raise fees. Consequently, the Fourth Circuit held that Phillips was entitled to an award of reasonable attorney's fees as a prevailing party even though Phillips did not intervene as a plaintiff in the suit against Service News. The *Service News* court noted, however, that the district court's analysis of the reasonableness of the award of $1,325.00 of the total attorney's fees to one attorney was too brief given the evidence in the record. The Fourth Circuit, therefore, remanded the case for a reconsideration of the reasonableness of the fee in light of the twelve factors set forth in *Barber v. Kimbrell's, Inc.*, 577 F.2d 216 (4th Cir.), *cert. denied*, 439 U.S. 934 (1978). The Fourth Circuit also remanded the case for a recalculation of the back pay award and determination and deduction of the amount of premiums from the medical benefits award, affirmed the district court's factual findings, refusal to make certain findings, and determination of the measure of damages for medical benefits, and reversed the district court's award of back pay for certain periods of Phillips' unemployment.

The *Service News* court's decision that an employee discharged in violation of Title VII who is unable to secure substitute insurance may recover from the employer the proceeds instead of the premiums of the

insurance resolves a question left unanswered by prior law.[115] Most courts have generally interpreted the remedial provisions of Title VII to offer only equitable relief and not legal damages.[116] Although the *Service News* decision arguably transgresses the Title VII limitation on legal remedies, the Fourth Circuit was careful to limit the holding to the particular facts of the case.[117] Future litigation will be necessary to determine if other courts will follow the exception to the Title VII limitation on legal relief recognized by the *Service News* court. The impact of the Fourth Circuit's expansive definition of prevailing party to include non-nominated parties also is unclear. Federal Courts of Appeals considering Title VII's provision for the award of attorney's fees have wrestled only with the question of whether nominated plaintiffs qualify for award of fees.[118] The Fourth Circuit's definition of prevailing party in Title VII suits to include non-nominated parties also will require clarification through future litigation.

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The "futile gesture" doctrine is a theory that arose in the area of federal fair employment law.[119] The futile gesture doctrine provides that, in attempting to prove discrimination on the part of an employer, a claimant need not have actually engaged in the futile gesture of applying for a job if the claimant can show that the claimant would have applied for the job but for the claimant's accurate knowledge of the discriminatory practices and that, had the claimant applied for the job, the employer would have discriminated against the claimant. The United States Supreme Court recognized the futile gesture doctrine in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). Since that case, the doctrine has become an entrenched theory in fair employment law.[120] Additionally, federal

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115. *See* Fariss v. Lynchburg Foundry, 769 F.2d 958, 965-66 (4th Cir. 1985) (holding that employer in violation of Title VII is liable for premiums but not proceeds of employee's insurance coverage but refusing to consider proper measure of damages where employee attempted but was unable to procure substitute coverage).

116. *See* Dockter v. Rudolf Wolff Futures, Inc., 913 F.2d 456, 461 (7th Cir. 1990) (stating that remedial provisions of Title VII provide for equitable relief and not legal damages); Williams v. United States Gen. Serv. Admin., 905 F.2d 308, 311 (9th Cir. 1990) (same); King v. Board of Regents, 898 F.2d 533, 537 (7th Cir. 1990) (same); Carroll v. General Accident Ins. Co., 891 F.2d 1174, 1177 (5th Cir. 1990) (same).

117. *See* EEOC v. Service News Co., 898 F.2d 958, 964 (4th Cir. 1990) (reiterating *Fariss* rule that ordinarily employee may recover only premiums and not proceeds of insurance under Title VII but finding exception on facts of case).

118. *See* Woolridge v. Marlene Indus. Corp., 898 F.2d 1169, 1173-74 (6th Cir. 1990) (considering whether plaintiff in Title VII suit qualifies for award of attorney's fees); Spencer v. General Elec. Co., 894 F.2d 651, 661-63 (4th Cir. 1990) (same).

119. *See* International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) (recognizing futile gesture doctrine in area of fair employment law).

120. *See, e.g.*, United States v. Gregory, 871 F.2d 1239, 1242 (4th Cir. 1989) (noting that individual, in making discrimination claim, need not actually submit to humiliation of discrimination if individuals generally know of discriminatory policy); Babrocky v. Jewel Food Co., 773 F.2d 857, 867 (7th Cir. 1985) (noting that employee need not actually apply for position in order to qualify for Title VII relief if employee is aware of discriminatory policy which

courts have adopted fair employment concepts into fair housing law.[121] In *Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447 (4th Cir. 1990), *cert. denied*, ___S.Ct. ___(1991), the United States Court of Appeals for the Fourth Circuit considered whether to extend the futile gesture doctrine of federal fair employment law to fair housing law.

Before reaching the futile gesture issue, the *Pinchback* court considered the district court's factual finding of racial discrimination. In *Pinchback* the plaintiff, Pinchback, contacted a real estate agent, Dailey, concerning a house Pinchback had seen in a newspaper advertisement. After missing the first appointment to see the house, Pinchback called the real estate agent to schedule another appointment. At this time, Dailey asked Pinchback whether Pinchback was black. Pinchback responded affirmatively, and Dailey then informed Pinchback that the community in which the house was located, a cooperative housing arrangement called Armistead Gardens (Armistead), did not permit blacks. Assuming the accuracy of Dailey's description of Armistead's policy, Pinchback looked elsewhere for a home but found nothing of interest.

After reporting the incident to the Department of Housing and Urban Development, Pinchback sued Armistead, alleging violations of her rights under 42 U.S.C. sections 1981 and 1982 (1990), Title VIII, 42 U.S.C. sections 3601-31, and Maryland's fair housing law. The district court dismissed the Title VIII claims because the statute of limitations had run.

On the remaining claims, the United States District Court for the District of Maryland found that Armistead had discriminated against blacks. Applying the futile gesture doctrine of fair employment law to the fair housing claims, the district court found that Armistead would have discriminated against Pinchback if Pinchback had applied for a leasehold and also that Pinchback would have applied if Pinchback had not had a reasonable belief that, because of the discriminatory policy, she would be wasting time by applying.

The district court made the following factual findings: first, that Armistead discriminated against blacks; second, that Pinchback was a bona fide purchaser with a sincere interest in and the financial capability to buy the house; third, that Dailey's description of Armistead's discriminatory policy reasonably deterred Pinchback from applying for a leasehold because Pinchback's reliance on Dailey as a source of information about the community was reasonable; and fourth, that Armistead was the direct or indirect source of the information that Dailey conveyed to Pinchback. After making these factual determinations, the district court concluded that Ar-

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would render application useless); Holsey v. Armour & Co., 743 F.2d 199, 208, 209 (4th Cir. 1984) (recognizing that, in supporting employment discrimination claim, employee need not have applied for position where potential applicants generally knew of employer's discriminatory policy).

121. *See, e.g.*, Asbury v. Broyham, 866 F.2d 1276, 1279 (10th Cir. 1989) (applying fair employment law's prima facie proof test of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), to fair housing law); Selden Apartments v. HUD, 785 F.2d 152, 159 (6th Cir. 1986) (same); Phiffer v. Proud Parrot Motor Hotel, Inc., 648 F.2d 548, 551 (9th Cir. 1980) (same).

mistead's policy injured Pinchback even though Pinchback did not apply for a leasehold in the community and suffer a rejection. Accordingly, the court awarded Pinchback $2,500 in compensatory damages, attorney's fees, and costs, and the court further ordered injunctive relief to eliminate Armistead's discriminatory policy.

Armistead appealed, challenging first the factual findings of the district court. Armistead argued that the evidence failed to show that Armistead actually refused to admit a black person. According to Armistead, such evidence is necessary to determine if black applicants and white applicants are treated differently. Armistead also argued that the evidence only showed prejudice on the part of certain individuals in the community but not on the part of the community as a whole. In responding to these arguments, the Fourth Circuit referred to the testimony of two former members of Armistead's governing board regarding specific evidence of the governing board's discrimination. For example, the two former board members testified that the board, at its regular meetings, discussed strategies aimed at keeping blacks out of the community. The *Pinchback* court also recounted other specific instances of discriminatory conduct that, according to the court, reflected Armistead's policy. The Fourth Circuit noted that Armistead's policy was effective in deterring blacks from ever becoming interested in the community. Accepting the district court's findings in the record, the Fourth Circuit rejected Armistead's argument regarding the facts.

Armistead next argued that the district court improperly extended the futile gesture doctrine of fair employment law to Pinchback's section 1981 and 1982 housing claims. To analyze the futile gesture doctrine, the Fourth Circuit referred to *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), which recognized the futile gesture doctrine in fair employment law. In *Teamsters* a company discriminatorily had rejected employees in the employees' applications for promotions. Other employees, however, did not even apply because the employees knew of the company's discriminatory practices. The company argued that these latter employees should not recover because these employees had not actually applied and thus had not directly suffered harm. The Supreme Court reasoned that a person who does not engage in the futile gesture of applying for a promotion is a victim just as a person who actually "goes through the motions" of applying. The Supreme Court determined that those employees who would have applied for a promotion but for actual knowledge of discriminatory practices also should be entitled to recovery. The Fourth Circuit in *Pinchback* then noted the significant role of the futile gesture doctrine in fair employment law today.

In affirming the district court's application of the futile gesture doctrine to housing claims, the Fourth Circuit recognized that courts often adopt fair employment concepts to fair housing law. Armistead argued, however, that the futile gesture doctrine is unworkable in typical housing claims because a nonapplicant does not have the same relationship with the corporation in the housing context as the nonapplicant in the employment context who is somehow connected to the employer. Because the nonappli-

cant in the employment context likely is connected to the employer, the nonapplicant's source of information about the discriminatory policy is oftentimes the employer. In the housing context, however, Armistead asserted that a nonapplicant is less likely to receive the information directly from someone officially tied to the corporation. Such information may not be as accurate as information from sources closely tied to the one engaging in the discrimination. Thus, according to Armistead, extension of the futile gesture doctrine to fair housing claims would lead to frivolous litigation by those without accurate knowledge of discrimination.

Rejecting Armistead's argument, the Fourth Circuit reasoned that the elements that the district court regarded as necessary to establish a fair housing violation through application of the futile gesture doctrine would safeguard against frivolous litigation. The Fourth Circuit reiterated the futile gesture doctrine's elements which the district court formulated for fair housing claims. First, a plaintiff must be a member of a racial minority who was a potential bona fide purchaser with the financial ability to buy at the time the property was offered for sale. Second, the plaintiff must show that the owner of the property discriminated against members of the plaintiff's race. Third, the plaintiff must show that the plaintiff had reliable information about the discriminatory policy and that the plaintiff would have attempted to purchase the property but for the discriminatory policy. Finally, the plaintiff must show that the owner in fact would have discriminated against the plaintiff had the plaintiff attempted to purchase the property.

According to the district court and the Fourth Circuit, Pinchback satisfied all of these elements. Recognizing that the "burden of humiliation is heavy," the Fourth Circuit concluded that a court should not require Pinchback "to press on meaninglessly" and actually apply for the leasehold. The Fourth Circuit asserted that Pinchback, who possessed reliable information of Armistead's discriminatory policy which deterred her from applying to Armistead, is as much a victim as those people who actually approached Armistead. The Fourth Circuit, therefore, affirmed the district court's extension of the futile gesture doctrine to fair housing law.

As a final argument, Armistead contended that the district court erred in awarding the compensatory damages of $2,500. Pinchback earlier had agreed to a consent decree and release of claims against all defendants to the action except Armistead in exchange for $4,000. Pinchback specifically reserved her claim against Armistead in the consent decree. Armistead argued that, under a Maryland statute, the amount of settlement by one tortfeasor must offset the amount of future awards against unreleased joint tortfeasors. Thus, under the Maryland statute, the court should apply the $4,000 settlement toward the $2,500 award, thus reducing Armistead's monetary liability to zero. The Fourth Circuit rejected this argument because the district court did not base the award on violations of Maryland state law. Instead, the district court had determined that the violations of federal law under sections 1981 and 1982 supported the $2,500 award. Furthermore, the *Pinchback* court asserted that the effect of Pinchback's release of her

federal claims against the other defendants on her claim against Armistead presents a federal law question. Because no federal equivalent to the Maryland statute exists, and because Pinchback did not intend for the release to affect Pinchback's claim against Armistead, the Fourth Circuit determined that Pinchback was entitled to the full $2,500 in compensatory damages.

In affirming the judgment of the United States District Court of Maryland with respect to the futile gesture doctrine, the Fourth Circuit accepted the district court's extension of fair employment law's futile gesture doctrine to fair housing law. Significantly, the district court considered the issue of whether to extend the futile gesture doctrine to a fair housing claim as an issue of first impression.[122] Furthermore, the Fourth Circuit affirmed the district court's extension of the futile gesture doctrine without citing any other courts that had ruled on this particular issue. Though courts have adopted other fair employment concepts into fair housing law, the Fourth Circuit apparently is the first circuit to extend the futile gesture doctrine to fair housing law. The United States Supreme Court subsequently denied certiorari in *Armistead Homes Corp. v. Pinchback*, 59 U.S.L.W. 3391 (1990).

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Title V, section 7703 of the United States Code (section 7703) provides for judicial review, upon the request of an adversely affected party, of the Merit Systems Protection Board's (MSPB) actions. Section 7703(b)(2) requires that individuals seeking judicial review of the MSPB's decisions in discrimination cases file actions in federal district court under one or more of three federal antidiscrimination statutes.[123] The section also requires that a claimant file such a suit not later than thirty days after the claimant receives notice of the MSPB's judicially reviewable action. Prior to 1989, five Federal Courts of Appeals had considered the issue of whether a district court can have subject matter jurisdiction over an action arising under section 7703 if the claimant has failed to file the action within the thirty day period set forth in section 7703(b)(2). Of these five circuits, three held that the claimant must file within the thirty day period for the district court to assume jurisdiction over the case[124] and two left the question unanswered.[125] None of the circuits found that the thirty day limit was not a

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122. Pinchback v. Armistead Homes Corp., 689 F. Supp. 541, 553 (D. Md. 1988).

123. 5 U.S.C. § 7703(b)(2). The section provides that:

> Cases of discrimination . . . shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable.

124. *See* Hilliard v. United States Postal Serv., 814 F.2d 325, 327 (6th Cir. 1987) (holding that section 7703(b)(2)'s thirty day limitations period is jurisdictional prerequisite to review of MSPB action in district court); King v. Dole, 782 F.2d 274, 275-77 (D.C. Cir.) (same), *cert. denied*, 479 U.S. 859 (1986); Lofton v. Heckler, 781 F.2d 1390, 1392 (9th Cir. 1986) (same).

125. *See* James v. United States Postal Serv., 835 F.2d 1265, 1267 (8th Cir. 1988)

jurisdictional requirement. In *Johnson v. Burnley*, 887 F.2d 471 (4th Cir. 1989), the Fourth Circuit considered whether a claimant's failure to file an appeal from a MSPB decision within section 7703(b)(2)'s thirty day time limit foreclosed federal subject matter jurisdiction over the action.

During 1985 and 1986, the appellant, Margaret F. Johnson, repeatedly had been tardy and absent without excuse from her secretarial job at a United States Coast Guard facility in North Carolina. When, after several warnings, reprimands, and one suspension, Johnson continued to arrive late for work, the Coast Guard dismissed her. Johnson subsequently appealed her dismissal to the MSPB, which sustained the dismissal.

Pursuant to section 7703(b)(2), Johnson then filed suit in the United States District Court for the Eastern District of North Carolina, seeking review of the MSPB decision. Johnson alleged that she had been subjected to sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. section 2000e (section 2000e). Johnson also claimed that, in dismissing her, the Coast Guard had ignored certain internal personnel procedures in violation of section 7703(c)(2). Although Johnson had originally filed her complaint within the thirty day statutory filing period, she initially failed to include the Secretary of Transportation (the Secretary) as a party to the action, as required by section 2000e-16(c).[126] Johnson later amended her complaint to include the Secretary as a defendant, but did so after the thirty day period had expired.

Because of Johnson's failure to timely file a proper complaint, the district court suggested that it might lack subject matter jurisdiction under section 7703(b)(2). However, the court reserved the jurisdictional question, finding the merits to be dispositive of the action. The court then granted summary judgment on the merits in favor of the government, holding that Johnson had failed to present sufficient evidence to establish a prima facie case of discrimination. The district court further reasoned that even if Johnson had established a prima facie case of discrimination, her evidence was insufficient as a matter of law to overcome the government's showing that it had fired Johnson for a valid nondiscriminatory reason—Johnson's continual lateness.

Johnson appealed the district court's decision to the United States Court of Appeals for the Fourth Circuit. On appeal, Johnson argued that she had established a prima facie case of sex discrimination. Johnson further asked the Fourth Circuit to reverse the district court's judgment on the grounds that the Coast Guard had failed to follow proper personnel procedures, and that the MSPB improperly had refused to hear the testimony of certain of

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(explaining that court need not decide whether section 7703(b)(2)'s thirty day filing limit is jurisdictional because nothing in record warranted application of equitable tolling, even if limit was nonjurisdictional); Lee v. United States Postal Serv., 774 F.2d 1067, 1068-69 & n.2 (11th Cir. 1985) (same).

126. *See* 42 U.S.C. § 2000e-16(c) (requiring that claimant filing action pursuant to section 2000e-5 name as defendant head of agency, department, or unit responsible for claimant's employment).

Johnson's witnesses. The government responded that Johnson's appeal should be dismissed because Johnson's failure to file a proper complaint within the thirty day period mandated by section 7703(b)(2) prohibited the district court from assuming jurisdiction over the matter.

Choosing to address first the question of jurisdiction, the Fourth Circuit examined the mandatory wording of section 7703(b)(2). That section uses the phrase "must be filed" to describe the claimant's duty to file her action within thirty days of receiving notice of the MSPB's final action. Relying on *Brock v. Pierce County*, 476 U.S. 253, 258-62 (1986), the court held that the statute's use of mandatory language does not cause the thirty day filing limit to be a jurisdictional requirement. The Fourth Circuit also relied on *Zipes v. Trans World Airlines*, 455 U.S. 385, 393 (1982), in which the Supreme Court found a similar Title VII filing limit using the phrase "shall be filed" to be nonjurisdictional.

The Fourth Circuit then considered the purpose behind Congress' incorporation of the three antidiscrimination statutes into section 7703(b)(2). The court concluded that the incorporation of the three statutes signaled Congress' intent that courts interpret section 7703(b)(2)'s filing deadline as flexibly as courts interpret the deadlines found in the incorporated statutes. The court then looked to section 2000e-16(c), which imposes a thirty day filing deadline upon anyone wishing, immediately after an adverse action by one of the departments, agencies, or units listed in the statute, to file a discrimination suit in federal court. The court found no indication that Congress intended that claimants filing discrimination suits pursuant to section 7703 be treated more harshly than claimants filing only under section 2000e-16(c) merely because the section 7703 claimants first appeal to the MSPB while the section 2000e-16(c) claimants do not do so. Therefore, the court reasoned, if the filing deadline in section 2000e-16(c) is nonjurisdictional, then the thirty day limit in section 7703(b)(2) similarly must be nonjurisdictional.

While the Supreme Court has not ruled on the nature of the section 2000e-16(c) filing deadline, the Fourth Circuit noted that five United States Circuit Courts of Appeals have held the limit to be nonjurisdictional,[127] while three have held that the limit is jurisdictional.[128] However, in *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 349 n.3 (1983), the Supreme

127. *See* Warren v. Department of Army, 867 F.2d 1156, 1158 (8th Cir. 1989) (holding section 2000e-16(c)'s thirty day filing limit does not constitute jurisdictional requirement); Mondy v. Secretary of Army, 845 F.2d 1051, 1055-56 (D.C. Cir. 1988) (same); Hornsby v. United States Postal Serv., 787 F.2d 87, 89 (3d Cir. 1986) (same); Martinez v. Orr, 738 F.2d 1107, 1110 (10th Cir. 1984) (same); Milam v. United States Postal Serv., 674 F.2d 860, 862 (11th Cir. 1982) (same).

128. *See* Williams v. United States Postal Serv., 873 F.2d 1069, 1074 (7th Cir 1989) (holding that section 2000e-16(c)'s thirty day filing limit creates jurisdictional requirement); Jordan v. Clark. 847 F.2d 1368, 1372 (9th Cir. 1988) (holding that under section 2000e-16(c), requirement that plaintiff name proper defendant within thirty day filing period is jurisdictional requirement), *cert. denied sub nom.* Jordan v. Hodel, 109 S. Ct. 786 (1989).

Court noted that the filing deadline in section 2000e-5(f)(1), which concerns the filing of discrimination suits against private firms, is nonjurisdictional. The Fourth Circuit asserted that the same characterization that applies to section 2000e-5(f)(1) should apply to section 2000e-16(c). Relying on *Aronberg v. Walters*, 755 F.2d 1114, 1116 (4th Cir. 1985), the court reasoned that Congress' extension of Title VII protection to government employees in 1972 signaled Congress' desire that government workers have the same overall protection as private sector workers. According to the Fourth Circuit, in *Martinez v. Orr*, 738 F.2d 1107 (10th Cir. 1984), the Tenth Circuit found that Congress intended that government workers bringing suit pursuant to section 2000e-16(c) should have the same benefits of equitable tolling and estoppel that their private sector counterparts enjoy under section 2000e-5(f)(1). Adopting the position set forth in *Martinez*, the Fourth Circuit found the filing deadline in section 2000e-16(c) to be analogous to the deadline in 2000e-5(f)(1). The court, therefore, found the section 2000-16(c) filing deadline to be nonjurisdictional.

By further analogy, the Fourth Circuit next held that section 7703(b)(2)'s thirty day limit also is nonjurisdictional. According to the court, the thirty day limit should be treated as a statute of limitations, subject to the same principles of equitable tolling and estoppel as the filing periods in the Title VII statutes the court had examined. The court expressly reserved judgment on the question of whether the limit would be considered nonjurisdictional with regard to cases filed under the other two antidiscrimination statutes incorporated into section 7703(b)(2)—the Age Discrimination in Employment Act and the Fair Labor Standards Act.

The Fourth Circuit then examined the language in section 7703(b)(2) which states that the thirty day limit should apply "[n]otwithstanding any other provision of law." The court denied that the phrase was intended to prevent courts from referring to the incorporated antidiscrimination statutes to determine whether or not the filing limit was jurisdictional. The court found that Congress' purpose in including the phrase in the statute was not to prevent courts from referring to analogous filing deadlines for interpretation, but merely to stress that the deadline was not longer than thirty days as might be provided for in one of the three incorporated antidiscrimination statutes. The Fourth Circuit, therefore, affirmed the district court's exercise of jurisdiction over the matter.

After affirming the jurisdictional issue, the Fourth Circuit declined to decide whether the plaintiff effectively could invoke equitable estoppel to avoid the filing deadline. The court stated that, in any event, the merits dictated affirmance of summary judgment in favor of the government. The court drew upon *Moore v. Charlotte*, 754 F.2d 1100, 1105-06 (4th Cir.), *cert. denied*, 472 U.S. 1021 (1985), to establish the two criteria necessary for Johnson to make a prima facie showing of sex discrimination. Under the *Moore* test, the claimant first must show that she engaged in a prohibited act similar to that of a male counterpart. Second, the claimant must show that the employer subjected the claimant to disciplinary actions that were

more drastic than those taken against the male employees. While the court found that Johnson had fulfilled the second requirement because Johnson had been the only one at the Coast Guard facility dismissed for absences and tardiness, the court also found that Johnson had failed to show that other employees' infractions were as serious as her own. Although Johnson's evidence indicated that certain other employees at the Coast Guard facility had been late for work on occasion, no evidence demonstrated that any of those employees, like Johnson, had continued to be late after repeated reprimands and punishments. According to the court, Johnson had failed to establish a prima facie case of sex discrimination. Consequently, the Fourth Circuit affirmed the district court's summary judgment on the merits in favor of the government.

Johnson's final claim on appeal focused on three alleged procedural defects in the course of her dismissal and appeal. First, Johnson asserted that the MSPB refused to hear certain witnesses on both Johnson's discrimination and procedural claims. Second, Johnson claimed that the Coast Guard violated its own personnel guidelines when Johnson's immediate supervisor discussed Johnson's tardiness with the Commander responsible for making the ultimate decision regarding Johnson's dismissal. Third, Johnson claimed that her supervisors considered approved absences in deciding to fire Johnson.

Addressing Johnson's claim of procedural flaws in both her dismissal and her appeal, the Fourth Circuit explained that its decision in *Rana v. United States*, 812 F.2d 887, 889 n.1 (4th Cir. 1987), dictated that claimants seeking review of administrative action on discrimination claims in district court are entitled to a trial *de novo*. Applying *Rana*, the court concluded that Johnson had the right to present at her trial in the district court any witnesses excluded by the MSPB. However, because Johnson did not attempt to present these witnesses at trial, the Fourth Circuit held that Johnson had no basis for appeal on this claim. Although Johnson had no right to a trial *de novo* on her procedural claim, she produced no evidence that any of the excluded witnesses would have offered testimony germane to the procedural claim. The court, therefore, refused to overturn the summary judgment on the basis of the exclusion of these witnesses.

The Fourth Circuit then addressed Johnson's claim that the Coast Guard violated one of its own personnel rules, under which the officer designated to make the final decision regarding an employee's punishment may not be involved in making the recommendation to initiate punitive action. Because Johnson offered no evidence that she would have been treated more leniently if the prohibited consultation had not taken place, the court found the violation not to be harmful error as the MSPB regulations define the term "harmful error."[129] Regarding Johnson's final procedural claim, the court found that Johnson failed to produce evidence

129. *See* 5 C.F.R. § 1201.56(c)(3) (1988) (defining harmful error as error by agency in applying internal procedures that, if error had not occurred, likely would have caused agency to make decision different from decision actually made).

that her supervisors would have made a different decision regarding her dismissal if they had not taken into consideration approved absences. Having rejected all of Johnson's claims, the Fourth Circuit affirmed the district court's judgment.

Judge Gordon dissented from the majority's opinion. Judge Gordon stressed Congress' failure to express any legislative intention that section 7703(b)(2)'s thirty day filing period be construed as anything but mandatory and jurisdictional. In light of this failure, Judge Gordon suggested that the court should have followed the plain mandatory language of the statute. Further, Judge Gordon argued that the "notwithstanding" language of section 7703(b)(2) plainly means that courts should not look to the analogous filing limits in the incorporated antidiscrimination statutes in interpreting section 7703(b)(2). Judge Gordon found the deadline to be jurisdictional and would have dismissed the appeal.

The Fourth Circuit's opinion in *Johnson* is in direct contravention of the opinion of every other Federal Court of Appeals that has ruled on the nature of section 7703(b)(3)'s thirty day filing limit.[130] The court seemed to be willing to go to any length to overrule the explicit language of the statute, even without relevant legislative history to back up the statutory interpretation. The decision is especially perplexing in light of the fact that, because the merits were dispositive, the court did not need to reach the jurisdictional issue to affirm the district court's dismissal of the case. Ultimately, *Johnson* may open the door for courts within the Fourth Circuit to ignore explicit mandatory language in time limitation statutes by analyzing a string of purportedly analogous statutes until one that has been held nonjurisdictional is found.

* * *

Title VII of the Civil Rights Act of 1964[131] (Title VII) prohibits both overt and functional employment discrimination. In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Supreme Court determined that although an employment practice may be facially nondiscriminatory, the practice may be functionally discriminatory if the practice has a disparate impact on a protected group. In *Connecticut v. Teal*, 457 U.S. 440 (1982), the Court developed a three-part analysis for courts to apply in weighing disparate impact claims. First, a prima facie case of disparate impact must demonstrate a significantly discriminatory impact. Second, even if the plaintiff establishes a prima facie case, the employer may demonstrate that the contested requirement has a manifest relationship to the employment in question. Finally, the plaintiff may overcome the employer's showing of a manifest relationship by demonstating that the employer was using the practice as a mere pretext for discrimination. In *Walls v. City of Petersburg*, 895 F.2d

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130. *See Williams*, 873 F.2d at 1074 (holding that section 2000e-16(c)'s thirty day filing limit creates jurisdictional requirement); *Jordan* 847 F.2d at 1372 (holding that under section 2000e-16(c), requirement that plaintiff name proper defendant within thirty day filing period is jurisdictional requirement).

131. Civil Rights Act of 1964, §§ 701-18, 42 U.S.C. §§ 2000e-2000e-17 (1983).

188 (4th Cir. 1990), the United States Circuit Court of Appeals for the Fourth Circuit considered whether an employment questionnaire that elicits more negative responses from blacks than whites constitutes a valid claim under Title VII.

In addition to the disparate impact issue, the *Walls* court considered a privacy issue that Walls raised under 42 U.S.C. section 1983 (1981). The Supreme Court has recognized a right of privacy extending both to the freedom to make certain personal decisions without governmental interference and to the interest in avoiding disclosure of personal matters.[132] Privacy questions are subject to a two-part analysis.[133] First, the information must fall within the scope of the right of privacy. Second, a compelling governmental interest may outweigh the individual's interest in privacy and allow disclosure. Based on the two-part privacy analysis, the *Walls* court considered whether the right to privacy protects information concerning homosexual conduct, marital history, criminal history of family members, and financial information that an employment background questionnaire elicited from prospective employees.

In *Walls*, Walls was the administrator of a alternative sentencing program for non-violent criminals. The program was transferred from the City Manager's office to the Bureau of Police (Bureau). After the transfer, the police department required all program employees to undergo a background check, including completing a background questionnaire. Objecting to four questions in particular, Walls refused to fill out the questionnaire. The four questions that Walls disputed concerned the criminal history of Walls' family, her marital history, including divorces, annulments, separations, and children, past homosexual relations, and financial information concerning outstanding debts. Because of Walls' refusal to complete the questionnaire, the City Manager terminated Walls. Walls sued the city of Petersburg (the city) on two grounds. First, Walls alleged a violation of Title VII, claiming that the questionnaire had a disparate discriminatory impact on blacks. Second, Walls alleged a violation of section 1983, claiming that the discharge violated her constitutional right of privacy, freedom of association, and due process. The United States District Court for the Eastern District of Virginia granted summary judgment for the city on both causes of action.

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132. *See* Whalen v. Roe, 429 U.S. 589, 599-600 (1977) (recognizing right of privacy to make certain decisions and to avoid disclosure of personal matters).

133. *See* Carey v. Population Serv. Int'l, 431 U.S. 678, 684-86 (1977) (analyzing privacy question by determining whether information falls within scope of privacy and questioning whether compelling governmental interest exists); Walls v. City of Petersburg, 895 F.2d 188, 192 (questioning whether information is within individual's reasonable expectation of confidentiality and analyzing compelling state interest). The *Walls* court drew an interpretation of the test from a Third Circuit case that enunciated a reasonable expectation of confidentiality prong. *See* Fraternal Order of Police v. Philadelphia, 812 F.2d 105, 112 (3d Cir. 1987) (requiring that information fall within individual's reasonable expectation of privacy). However, the *Fraternal Order of Police* Court cited to a prior Third Circuit case that required only that the information fall within a zone of privacy entitled to protection. *See* U.S. v. Westinghouse, 638 F.2d 570 (3d Cir. 1980) (requiring that information fall within zone of privacy entitled to protection).

With regard to the disparate impact claim, the Fourth Circuit applied both *Griggs* and *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988). In *Watson* the Supreme Court held that statistical disparities are insufficient to establish a prima facie case of disparate impact, absent proof of an adverse effect on employment decisions concerning a protected group.[134] Walls submitted statistical evidence showing that blacks were much more likely than whites to have negative responses to the four disputed questions. However, Walls' evidence provided no connection between the statistics and any of the city's personnel decisions. The *Walls* court, therefore, held that Walls' claim that she would have been subject to some adverse employment action had she filled out the questionnaire was mere speculation. According to the Fourth Circuit, speculation will not substitute for a demonstration of actual disparate impact.

The *Walls* court also addressed Walls' second claim that the questionnaire violated Walls' constitutional right to privacy pursuant to section 1983. The Fourth Circuit first addressed the question concerning homosexual conduct. The court noted that *Bowers v. Hardwick*, 478 U.S. 186 (1986), held that the constitutional right to privacy does not protect private sexual conduct, and specifically homosexual conduct, from state regulation.[135] Relying on *Bowers*, the Fourth Circuit held that the constitutional right of privacy does not preclude an employer from asking questions concerning homosexual conduct. The *Walls* court then considered Walls' contention that the constitutional right to privacy precludes an employer from asking questions concerning marital history, separations, and children. The court reasoned that because marital history was available in public records, the right to privacy does not preclude an employer from soliciting information concerning marital history, separations, or children, except to the extent that the information is not publicly available. The *Walls* court applied similar reasoning to the criminal history of Walls' family. Because criminal history is available as part of the public record, the employee can have no reasonable expectation of privacy concerning the criminal history. Therefore, the constitutional right to privacy does not preclude the employer from asking questions concerning criminal history of family members. Finally, the Fourth Circuit considered whether an employee's financial information is protected by the right to privacy. The *Walls* court held that the right to privacy does extend to an employee's financial information. The court, however, applied the second part of the privacy analysis to determine whether the city had a compelling interest for inquiring into Walls' financial

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134. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 992-93 (1988) (plurality opinion by O'Connor, J.) (holding that statistical disparities are insufficient absent showing of exclusion to prove disparate impact); Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2124 (1989) (requiring showing that employment practices cause disparity).

135. *See* Bowers v. Hardwick, 478 U.S. 186, 190-91 (1986) (holding that constitutional right to privacy does not cover homosexual sodomy). The Court distinguished homosexual sodomy from a line of cases which had conferred a right to privacy for child rearing and education, family relationships, procreation, marriage, and contraception. *Id.* at 190.

information. The court noted that the city had a strong interest in avoiding corruption. The court reasoned that because Walls' position dealt directly with the sentencing and disposition of criminals, Walls' position was susceptible to corruption. Thus, the *Walls* court held that the city had a compelling interest to avoid corruption that overrode Walls' right to privacy.

The Fourth Circuit's decision in *Walls*, that Walls had not established a prima facie disparate impact case, establishes and clarifies the elements necessary to make a disparate impact claim. While acknowledging the importance of statistical evidence in demonstrating disparate impact, the *Walls* court nevertheless required the plaintiff to show adversity arising from the disparate effect. Because the plaintiff must show a causal link between an employer's actions and disparate impact to make a prima facie case of disparate impact, the plaintiff's statistical evidence must show that the disputed practice has caused the exclusion of applicants because of membership in a protected group.[136] The Fourth Circuit's conclusion that speculation as to adverse effects on a protected group is insufficient to establish a prima facie case is a natural corollary to the causation requirement that the Supreme Court outlined in *Watson*. The United States Court of Appeals for the First Circuit has applied the causation requirement in a similar fashion in concluding that plaintiffs fail to demonstrate a prima facie case when plaintiffs fail to demonstrate that hiring practices caused the exclusion of applicants.[137]

The *Walls* court's conclusion that the right to privacy does not protect information concerning homosexual conduct, marital history, criminal history of an employee's family, and financial status is open to greater dispute. A pre-*Bowers* Ninth Circuit case cited by the Fourth Circuit in *Walls* held that inquiry by a police department into an applicant's sexual history was an invasion of privacy.[138] However, a post-*Bowers* court would be unlikely to conclude that the questioning implicated privacy.[139] The marital history and criminal history categories of interests are equally unlikely to be challenged due to the availability of public records which negate the privacy interest. With respect to financial information, the United States Court of Appeals for the Second Circuit has concluded that financial disclosure served the important public interest of accountability.[140] Therefore, the right

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136. *See Watson*, 487 U.S. at 994 (holding that plaintiff must prove link between employment practice and exclusion of applicants); Abbott v. Federal Forge, Inc., 912 F.2d 867, 872 (6th Cir. 1990) (applying *Watson* criteria); Walls v. City of Petersburg, 895 F.2d 188, 191 (4th Cir. 1990) (same).

137. *See* Lowe v. Commack Union Free School Dist., 886 F.2d 1364, 1370 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 1470 (1990) (holding that plaintiff's failed in prima facie burdens by failing to demonstrate that disputed employment practice caused exclusion of applicants for jobs).

138. *See* Thorne v. City of El Segundo, 726 F.2d 459, 469-70 (9th Cir. 1983), *cert. denied*, 469 U.S. 979 (1984) (finding that questions asked of female applicant of police department concerning sexual history was violation of right to privacy).

139. *See* Fleisher v. City of Signal Hill, 829 F.2d 1491, 1497-99 (9th Cir. 1987) (holding that right of privacy does not extend to employee's illegal sexual behavior).

140. *See* Igneri v. Moore, 898 F.2d 870, 877 (2d Cir. 1990) (upholding statute requiring financial disclosure for city employees as furthering important governmental interest).

to privacy holding in *Walls* is in accord with the general principles of a right to privacy analysis.

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The Demonstration Cities and Metropolitan Development Act of 1966, 42 U.S.C. section 3301-3374 (Model Cities Act), provided cities with federal funding for urban renewal projects approved by the Department of Housing and Urban Development (HUD).[141] The Model Cities Act required participating cities to provide maximum employment opportunities and better work and training opportunities for the residents of the participating cities.[142] Recently, courts have tried to determine whether Congress intended for the Model Cities Act to create a private cause of action allowing employees hired under the Model Cities Act to enforce their rights to civil service status and pension credit. Courts also have attempted to determine whether employees can use 42 U.S.C. section 1983[143] (section 1983) to redress state agents' alleged violations of the Model Cities Act.[144] The United States Court of Appeals for the Second Circuit, in *Members of Bridgeport Housing Authority Police Force v. Bridgeport*, 646 F.2d 55 (2d Cir.), *cert. denied*, 454 U.S. 897 (1981), held that the statutory rights created under the Model Cities Act were enforceable through section 1983. On the same day the Second Circuit handed down its *Bridgeport* opinion, the United States Supreme Court decided the case of *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), which clarified the issue of congressional

141. 42 U.S.C. §§ 3301-3374. The pertinent part of the Demonstration Cities and Metropolitan Development Act of 1966 (Model Cities Act), § 3301, provides that:

> The Congress . . . finds . . . that cities do not have adequate resources to deal effectively with the critical problems facing them, and that Federal assistance . . . is essential to enable cities to plan, develop, and conduct programs to improve their physical environment. . . .
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> The purposes of this subchapter are to provide additional financial and technical assistance to enable cities of all sizes . . . to plan, develop, and carry out locally prepared and scheduled comprehensive city demonstration programs . . . to expand housing, job, and income opportunities . . . and generally to improve living conditions for the people who live in such areas, and to accomplish these objectives through the most effective and economical concentration and coordination of Federal, State, and local public and private efforts to improve the quality of urban life.

Congress omitted §§ 3301-13 pursuant to 42 U.S.C. § 5316 and terminated the authority to make grants or loans under the Model Cities Act after January 1, 1975. 42 U.S.C. § 5316 (1988).

142. 42 U.S.C. § 3303(a)(2).

143. 42 U.S.C. § 1983 (1988). Section 1983 provides in pertinent part that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

144. *See* Maine v. Thiboutot, 448 U.S. 1 (1980) (holding that 42 U.S.C. § 1983 encompasses claims based not only upon violations of constitutional law but also upon purely statutory violations of federal law).

intent to create enforceable section 1983 interests. In 1987, the Court in *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987), refined the holding of *Pennhurst*. During the same year, the Fourth Circuit, in *Smith v. Kirk*, 821 F.2d 980 (4th Cir. 1987), also refined the scope of enforceable section 1983 interests. Armed with these three opinions unavailable to the *Bridgeport* court, the Fourth Circuit, in *Former Special Project Employees Association v. Norfolk*, 909 F.2d 89 (4th Cir. 1990), addressed the issue of whether the Model Cities Act created a private cause of action or enforceable section 1983 interests.

In *Former Employees* the plaintiffs, fifty-seven individual members of the Former Special Project Employees Association (the Association), contended that they were entitled to retroactive civil service status and pension credit under the Model Cities Act. The Model Cities Act had provided funding to the City of Norfolk, Virginia, in 1969. Norfolk used the funding to establish a centralized administrative unit, consisting of employees known as special project employees, to implement the programs of the Model Cities Act. The special project employees were employed outside of the city's regular civil service structure. Additionally, under the statutorily granted authority of the Model Cities Act, HUD issued further requirements regarding the special project employees. HUD believed that these requirements were necessary to advance the purposes of the Model Cities Act. HUD circulated these additional requirements through pronouncements known as Community Development Act Letters (CDA Letters). In CDA Letter 2, HUD stated that the special project employees should receive the same fringe benefits that were standard for other civil service employees. In CDA Letter 11, HUD required the participating cities to incorporate special project employees into the cities' regular civil service systems within two years from the time the cities filled the special positions. However, HUD later issued a series of memoranda, applicable to Norfolk, which waived some of the requirements contained in CDA Letter 11. When Norfolk's Model Cities Act program ended in 1974, some special project employees were transferred to regular civil service positions, while another group of special project employees was transferred to jobs under two other federal programs. This latter group of special project employees, along with other employees subsequently hired under the two federal programs, comprised the Association. Norfolk did not incorporate the members of the Association into the city's retirement system until 1982, and Association members did not receive regular civil service status until 1985 and 1986.

The Association filed suit in the United States District Court for the Eastern District of Virginia, claiming that its members were entitled to retroactive civil service status with full employee benefits, on the ground that the Model Cities Act created a private cause of action to enforce the rights HUD had established in CDA Letters 2 and 11. The Association also claimed that the Model Cities Act created statutory rights that were enforceable under section 1983. Finding no implied private cause of action under the Model Cities Act, the district court stated that even if the CDA Letters

had created rights to pension credit and civil service status, Norfolk was not bound by the content of the CDA Letters because of HUD's subsequent waiver memoranda. The district court did not address the issue of whether the Model Cities Act created rights enforceable under section 1983. The Association appealed the district court's dismissal of the complaint to the United States Court of Appeals for the Fourth Circuit. The Association sought declaratory and injunctive relief under the Model Cities Act.

To begin its analysis, the Fourth Circuit considered whether Congress intended, when it passed the Model Cities Act, to create a private cause of action. The Fourth Circuit examined the factors listed in *Cort v. Ash*, 422 U.S. 66 (1975), to determine when a private cause of action may be implied in a federal statute. Under the first *Cort* factor, the plaintiff must show that the statute creates a federal right in favor of the plaintiff. Under the second *Cort* factor, the plaintiff must prove that Congress intended to create a private cause of action. Under the third *Cort* factor, the plaintiff must demonstrate that implying a private cause of action is consistent with the underlying purposes of the statute. Finally, under the fourth *Cort* factor, the plaintiff must show that the cause of action is not one traditionally relegated to state law, so that it is appropriate for a court to infer the existence of a cause of action based solely on federal law. The Supreme Court explained in *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-76 (1979), that each of the *Cort* factors is not necessarily entitled to equal weight. When the focus of the inquiry is to determine congressional intent, *Touche Ross* holds that only the first three *Cort* factors are relevant.

Examining whether the statute created a right in favor of the plaintiff, the first *Cort* factor, the Fourth Circuit in *Former Employees* found that Congress did not intend to benefit the Association's members when it passed the Model Cities Act. According to the Fourth Circuit, the main inquiry does not simply concern who would benefit, but whether Congress intended to grant federal rights to those beneficiaries. The court examined the statutory language of the Model Cities Act and concluded that Congress' intended beneficiaries were the cities participating in the program, not the employees hired under the program. The Fourth Circuit then reasoned that any benefits the employees received were merely incidental and that the existence of these benefits did not indicate that Congress intended to provide a private cause of action. After characterizing the Model Cities Act as a funding statute, the Fourth Circuit held that because funding statutes do not directly focus on a specific beneficiary, the Model Cities Act did not confer a private cause of action on any class of individuals.

Examining the second *Cort* factor, whether evidence of congressional intent to create a private cause of action exists, the Fourth Circuit found nothing in the statutory language or legislative history of the Model Cities Act indicating any such intent. The Fourth Circuit refused to imply a private cause of action in the absence of any evidence of congressional intent. Examining the third *Cort* factor, whether a private cause of action is consistent with the underlying purpose of the statute, the *Former Employees* court recognized that the typical remedy for failure to comply with the

conditions of a funding statute, such as the Model Cities Act, is not the creation of a private cause of action, but rather the federal government's termination of the funding.

After concluding that Congress did not intend to create a private cause of action when it passed the Model Cities Act, the *Former Employees* court addressed the issue of whether the Association's members could enforce their statutorily-created rights under section 1983. First, the Fourth Circuit noted that a section 1983 remedy is unavailable if the statute itself does not create enforceable rights, privileges, or immunities within the meaning of section 1983. Examining the leading United States Supreme Court decisions, the Fourth Circuit concluded that Congress did not intend to create an enforceable section 1983 interest.

In *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), the Supreme Court held that enforceable rights are not created if Congress does not clearly indicate that the section of the statute containing the rights creates a mandatory obligation for the participating governmental entity. The Court stated that mere congressional encouragement that states comply with the provisions of a statute does not sufficiently indicate that Congress intended to create an enforceable section 1983 interest. In *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987), the Supreme Court expanded the *Pennhurst* inquiry. *Wright* held that, before qualifying as enforceable section 1983 interests, statutorily-created rights must be clear and specific so that courts can adequately enforce the rights. Only upon a finding that the rights created by a federal statute are clear and specific may a court then proceed with *Pennhurst*'s inquiry of whether Congress intended for the rights to be mandatory obligations on participating governmental entities.

The Fourth Circuit found that the Model Cities Act satisfied the *Pennhurst* requirement because the Model Cities Act imposed mandatory obligations on participating cities. However, the Fourth Circuit held that the Association's claim failed because the Model Cities Act did not meet the *Wright* requirement of clarity and specificity. The *Former Employees* court stated that rights to maximum employment opportunities were too vague for the judiciary to enforce. Furthermore, the Fourth Circuit noted that rights to better work and training opportunities did not include civil service status and pension benefits.

Although the Fourth Circuit's decision in *Former Special Project Employees Association v. Norfolk* conflicts with the Second Circuit's holding in *Members of Bridgeport Housing Authority Police Force v. Bridgeport*, 646 F.2d 55 (2d Cir.), *cert. denied*, 454 U.S. 897 (1981), the Second Circuit did not have the benefit of the Supreme Court's *Pennhurst* or *Wright* decisions, or of the Fourth Circuit's opinion in *Smith v. Kirk*, 821 F.2d 980 (4th Cir. 1987). The *Bridgeport* court held that HUD's CDA Letter 11, requiring participating cities to incorporate Model Cities Act employees into the regular civil service system, created enforceable section 1983 interests. However, in *Smith v. Kirk*, the Fourth Circuit held that an administrative regulation cannot create an enforceable section 1983 interest not already

existing within the federal statute itself. Because the *Former Employees* court found that the Model Cities Act itself did not create an enforceable section 1983 interest, HUD's CDA Letters were irrelevant. *Former Employees* is in accord with the current status of the law regarding enforceable section 1983 interests, because the Fourth Circuit rendered its decision in light of the mandatory obligation requirement of *Pennhurst* and the specificity requirement of *Wright*, Supreme Court opinions unavailable to the Second Circuit in *Bridgeport*.

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In *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195 (4th Cir. 1990), the Fourth Circuit, in an effort to determine whether the Age Discrimination in Employment Act, 29 U.S.C. section 621-634 (1988) (ADEA), was arbitrable, applied the Supreme Court's arbitrability test. In a trilogy of recent cases, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985), *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), and *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 109 S. Ct. 1917 (1989), the Supreme Court endorsed arbitration as an effective and efficient means of dispute resolution. In *Mitsubishi* and *McMahon*, the Court developed an arbitrability test to determine whether an arbitration agreement is enforceable under a federal statute.[145]

The Court based its endorsement of arbitration on language in the Federal Arbitration Act (FAA), 9 U.S.C. sections 1-14 (1988) that establishes a federal policy favoring arbitration. In these decisions, the Court held that under the FAA, enforcement of an arbitration agreement is equally appropriate regardless of whether the rights that parties have agreed to arbitrate are contractual or statutory rights.

The Court ruled that the FAA, standing alone, mandates enforcement of arbitration agreements. However, Congress can override the FAA mandate by indicating an intent to preclude waiver of the judicial forum for the particular statutory right at issue. The Court stated that the burden of showing that Congress intended to preclude waiver is on the party opposing arbitration. According to the Supreme Court, courts can deduce congressional intent from the statute's text or legislative history, or from an inherent conflict between arbitration and the statute's underlying purposes.

In *Gilmer* Interstate/Johnson Lane Corporation (Interstate) hired the plaintiff in May 1981 as a manager of financial services. Following an Interstate employment requirement, Gilmer registered as a securities representative with the New York Stock Exchange. Gilmer's application for securities registration contained an arbitration clause, pursuant to which he agreed to arbitrate any disputes between himself and his employer arising out of his employment or the termination of his employment.

In November 1987, Interstate terminated Gilmer's employment. In August 1988, Gilmer sued Interstate in the United States District Court for the Western District of North Carolina. Gilmer alleged that his termination

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145. *See* Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 226-27 (1987) (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 628, 632-37 (1985)).

violated the ADEA. Interstate moved to compel arbitration as authorized under the FAA. The district court denied Interstate's motion to compel arbitration, reasoning that arbitration procedures were inadequate for the final resolution of ADEA rights and that Congress intended to protect ADEA plaintiffs from waiver of a judicial forum.

Interstate appealed, arguing that the *Mitsubishi* and *McMahon* arbitrability test mandates compulsory arbitration of ADEA claims. Addressing Interstate's claim, the Fourth Circuit applied the *Mitsubishi* arbitrability test and determined that neither the text nor the legislative history of the ADEA reflects a congressional intent to preclude arbitration under the ADEA. Additionally, the court found no conflict between arbitration and the underlying congressional purposes of the ADEA. Therefore, the Fourth Circuit compelled arbitration of Gilmer's ADEA claim.

Gilmer presented eight arguments to show that arbitration conflicted with the expressed and underlying purposes of the ADEA. The Fourth Circuit rejected all eight arguments. First, Gilmer argued that the Equal Employment Opportunity Commission's (EEOC) role in enforcement of ADEA claims indicated a congressional intent to preclude waiver. Gilmer asserted that if the courts forced an ADEA complainant to submit to arbitration, the EEOC would be deprived of notification of the discriminatory conduct and could not attempt to remedy the conduct through discussions with the employer. The Fourth Circuit disagreed, finding that the EEOC's effectiveness did not depend upon its participation in the resolution of all ADEA claims. The court compared the lack of EEOC involvement in arbitration to the lack of EEOC involvement in voluntary claim settlement.

Second, Gilmer argued that the funding statute for the EEOC contained a congressional intent to preclude waiver. The Fourth Circuit dismissed this argument, stating that Congress referred in the funding statute only to a prohibited waiver of ADEA substantive rights. According to the court, Congress did not intend to preclude waiver of a procedural right such as forum selection.

Third, Gilmer asserted that compelling arbitration would be inconsistent with the ADEA's designation of initial adjudicatory authority in a court rather than an agency. Rejecting this argument, the Fourth Circuit found that the congressional choice of courts over agencies as the initial forum for resolution of ADEA disputes had nothing to do with the congressional attitude toward arbitration. The court reasoned that an arbitral forum, unlike a court or an agency, is a forum selected by the agreement of the parties involved in the dispute.

In his fourth argument, Gilmer stated that the courts' possession of broader remedial powers than the remedial powers of arbitrators displayed a congressional intent to preclude waiver. The court, however, stated that a lack of equality in remedial power between the arbitrator and the court is not fatal to arbitration. According to the court, an arbitrator is required to possess only the equitable power necessary to remedy the dispute between the employer and the employee. Concluding that ADEA litigants plainly

were permitted to waive the right to a trial by jury, the Fourth Circuit also dismissed Gilmer's fifth argument that he was entitled to a trial by jury.

In his sixth argument, Gilmer asserted that the liquidated damages provision for willful violations under the ADEA reflected a congressional intent to preclude waiver of a judicial forum. Finding no reason why an ADEA dispute arbitrator could not award liquidated damages if the arbitrator found a willful statutory violation, the Fourth Circuit rejected the argument. Gilmer further contended that the court could not enforce the arbitration agreement because the agreement constituted a prospective waiver. Finding this argument inconsistent with the law, the court cited *Mitsubishi*, *McMahon*, and *Rodriguez* as precedent that clearly approved prospective waiver.

Finally, the court found no reason to assume that ADEA claims are inherently incompatible with arbitration. The court stated that ADEA claims are much less complex than the Sherman Act claims of *Mitsubishi* and the RICO claims of *McMahon*. According to the *Gilmer* court, an arbitrator must only decide the straightforward factual issue of whether a particular employee was maltreated because of age.

Thus, after applying the *Mitsubishi* arbitrability test, the Fourth Circuit held that Gilmer must arbitrate his ADEA claim. Circuit Judge Widener filed a dissenting opinion. Judge Widener found no distinction between compulsory arbitration of ADEA disputes and the Supreme Court's opinion in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), in which the Court found Title VII employment discrimination claims nonarbitrable. Judge Widener advocated that the court declare the ADEA nonarbitrable for three reasons.

First, Judge Widener reasoned that the ADEA preserves an employment discrimination plaintiff's right to a trial by jury. Second, the dissenting judge suggested that due to the similarity of ADEA and Title VII protection, the *Gilmer* majority opinion is contrary to the Supreme Court opinion in *Alexander*. According to Judge Widener, because the Supreme Court in *Alexander* disallowed prospective waiver of an employee's Title VII rights, the Fourth Circuit should deny prospective waiver of an employee's ADEA rights. Third, Judge Widener stated that the Fourth Circuit failed to give the Supreme Court proper credit for its knowledge of the law. According to Judge Widener, although the Supreme Court in *Alexander* did not explicitly mention the FAA, the Court was aware of and did mention a federal policy favoring arbitration. Gilmer subsequently petitioned the Supreme Court for certiorari. The Court granted certiorari and heard arguments in the case on January 14, 1991.

The Fourth Circuit's *Gilmer* decision created a split in the circuits. The Third Circuit, in *Nicholson v. CPC International, Inc.*, 877 F.2d 221 (3d Cir. 1989), refused to enforce arbitration of an ADEA claim. Although both the Third and Fourth Circuits applied the *Mitsubishi* and *McMahon* arbitrability test to the ADEA, each circuit reached a different conclusion regarding whether a court must compel arbitration of an age discrimination claim pursuant to an individual arbitration agreement.

Applying the test of arbitrability, the Third Circuit in *Nicholson* concluded that neither the text nor the legislative history of the ADEA reflect a clear congressional intent to preclude waiver of judicial remedies under the ADEA.[146] After applying the third prong of the test of arbitrability, the Third Circuit in *Nicholson* found an inherent conflict between arbitration and two statutory schemes of the ADEA.

Specifically, the Third Circuit found that Congress clearly intended for a public agency to oversee ADEA claims.[147] The court found not only that the EEOC should attempt to settle specific age discrimination disputes, but also that the EEOC should set a goal to eliminate age discrimination in the workplace. The Third Circuit reasoned that arbitration would keep the EEOC from witnessing certain ADEA violations that might require the EEOC to propose amendments to the law. The court acknowledged that employees, even if they had submitted to arbitration, could go to the EEOC and file a complaint to vindicate the public interest. However, the court stated that aggrieved employees likely would not file a complaint because the employees' interests in personal compensation for the discriminatory conduct could only be served by arbitration.

The *Nicholson* court also found that an arbitrator possesses inadequate remedial and enforcement power and cannot effectively remedy ADEA disputes. The Third Circuit noted that only courts possess the authority to issue injunctions. Therefore, the *Nicholas* court concluded that because the power of the arbitrator does not extend beyond the individual employee brought before him, an arbitrator cannot prohibit an employer from applying discriminatory practices to other employees.[148]

The effect of the *Mitsubishi* and *McMahon* arbitrability test upon the Supreme Court's *Alexander* decision declaring Title VII nonarbitrable is uncertain. In the aftermath of *Mitsubishi* and *McMahon*, a number of Federal Circuit Courts of Appeal have addressed the arbitrability of civil rights statutes. *Nicholson* and *Gilmer* are the only two decisions in which the federal appellate courts addressed the issue of ADEA arbitrability. However, every Federal Circuit Court of Appeal that has addressed the arbitrability of a civil rights statute other than the ADEA has declared the civil rights statute nonarbitrable.[149]

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146. Nicholson v. CPC International, Inc., 877 F.2d 221, 224-26 (3d Cir. 1989).

147. *Id.* at 227.

148. *Id.* at 228.

149. *See* Alford v. Dean Witter Reynolds, Inc., 905 F.2d 104 (5th Cir. 1990) (holding Title VII employment discrimination claims nonarbitrable, but finding that Supreme Court may overrule *Alexander* if faced with this issue again); Utley v. Goldman Sachs & Co., 883 F.2d 184 (1st Cir. 1989) (holding Title VII employment discrimination claims nonarbitrable); Nicholson v. CPC International, Inc., 877 F.2d 221 (3d Cir. 1989) (holding ADEA employment discrimination claims nonarbitrable); Swenson v. Management Recruiters International, Inc., 858 F.2d 1304 (8th Cir. 1988) (holding Title VII employment discrimination claims nonarbitrable); Wilmington v. J.I. Case Co., 793 F.2d 909, 917 (8th Cir. 1986) (holding section 1981 employment discrimination claims nonarbitrable).

Congress enacted the Equal Pay Act (EPA),[150] 29 U.S.C. section 206(d) (1990) (section 206(d)), to remedy a serious and endemic problem of employment discrimination in private industry.[151] Through the EPA, Congress sought to rid American industry of the outmoded belief that a man, because of his role in society, should be paid more than a woman even though the man and woman's duties are the same.[152] Furthermore, Congress sought to overcome the depressing social and economic consequences resulting from the payment of reduced wages to female employees.[153] Under section 206(d)(1), employers must pay equal wages to members of the opposite sex for equal work which requires equal skill, effort, and responsibility, and which male and female employees perform under similar working conditions. Section 206(d)(1) allows an employer to pay a wage rate differential if the employer pays employees pursuant to a seniority system, a merit system, a system which measures earnings, or a differential based on any factor other than sex.

In *Keziah v. W.M. Brown & Son, Inc.*, 888 F.2d 322 (4th Cir. 1989), the United States Court of Appeals for the Fourth Circuit considered whether evidence that the defendant, W.M. Brown & Son (Brown), paid a male sales representative, Michael Dohn, more than the plaintiff, Linda Keziah, a female sales representative, constituted a prima facie case for violation of section 206(d)(1). The Fourth Circuit also considered whether Keziah presented a prima facie claim for intentional infliction of emotional distress and negligent supervision for alleged harassment in the work place as well as Brown's alleged knowledge of the harassment.

In *Keziah* Brown, who provides printing services in the southeastern United States, hired Keziah in August 1984 to operate as a sales representative out of Brown's small outside sales office in Charlotte, North Carolina. Keziah, who had one and one half years prior experience, joined Dohn, whom Brown had hired in June 1983, and a male regional sales manager, Edward Jones, in the Charlotte office. Brown contended that Dohn had ten years of experience in the printing and paper industries, mostly in outside sales and marketing, had extensive contacts in the Charlotte area, was well known in the Charlotte community, and had served as president of the Charlotte Society of Communicating Arts. Keziah testified that Dohn told her that his previous jobs were unrelated to printing sales.

Brown compensated its sales representatives with a nine percent commission on regular accounts and a ten percent commission on new accounts.

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150. *See* Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1990) (adding to Fair Labor Standards Act of 1938's, 29 U.S.C. §§ 201-219 (1990), prohibition against discrimination in wages because of sex). *See* 29 C.F.R. §§ 800.102-800.113 (explaining applicability of equal pay provisions in general).

151. *See* Dole v. Shenandoah Baptist Church, 899 F.2d 1389, 1398 (4th Cir. 1990) (stating Congress' purpose in enacting Equal Pay Act).

152. *See id.*

153. *See* Equal Pay Act of 1963, Pub. L. 88-38, 77 Stat. 56, *reprinted in* 1963 U.S. Code Cong. & Admin. News. 59-60 (stating Congress' purpose in enacting Equal Pay Act) (*codified at* 29 U.S.C. § 206(d) (1990)).

In practice, Brown paid each salesperson a draw, based on the salesperson's experience and projected sales, allegedly to help the salesperson through the difficult first years of sales. Keziah's yearly draw was $22,000 while Dohn's draw was $32,500. Brown allegedly expected the salespersons to earn sales commissions at least equaling the draw. Keziah presented evidence to indicate that from 1984 until 1987, neither Keziah nor Dohn earned sales commissions equal to their respective draws.

Keziah alleged that tension existed in the Charlotte office throughout her employment with Brown and that she suffered harassment and humiliation in the office. According to Keziah, Dohn or Jones secretly withheld telephone messages to usurp her prospective sales opportunities and secretly retrieved information from her business files and her mail. Keziah asserted that Jones unnecessarily delayed or denied her sales orders and requests for quotes and set higher mark ups for her customers than those set for Dohn's customers. Keziah claimed that Dohn was stealing her accounts and that Jones, although aware of Dohn's conduct, did nothing to stop Dohn's activities. When Keziah complained of Dohn's tactics, Jones allegedly gave several of Keziah's accounts to Dohn. The evidence demonstrated that many accounts were switched between Keziah and Dohn.

Brown fired Keziah on April 1, 1987, allegedly as a result of poor job performance. Keziah, claiming that her termination resulted from, and is evidence of, gender-based discrimination, sued Brown in the United States District Court for the Western District of North Carolina. The district court granted summary judgment against Keziah on her EPA, intentional infliction of emotional distress, and negligent supervision claims. After hearing Keziah's case, the district court reasoned that Brown had shown that Dohn's higher salary was not a violation of the EPA because Dohn's salary was based on Dohn's qualifications, a permissible factor under the EPA as a factor other than sex. The district court granted summary judgment against Keziah on the claim for intentional infliction of emotional distress because the conduct that Keziah alleged did not meet the stringent standard of outrageousness that North Carolina law requires. Having found that Keziah could not prevail on the claim for intentional infliction of emotional distress, the district court entered summary judgment against Keziah on the negligent supervision claim, which was predicated upon the emotional distress claim.

On appeal, the Fourth Circuit noted that to establish a prima facie violation of the EPA, a female plaintiff must demonstrate that she is receiving lower wages than a male co-worker for equal work requiring equal skill, effort, and responsibility. According to the court, once a plaintiff establishes a prima facie case, the burden shifts to the defendant to prove by a preponderance of the evidence that the wage differential resulted from a seniority system, a merit system, a system pegging earnings to quality or quantity of production or any factor other than sex. While explaining that differences in experience, training, or ability of workers may justify differences in their salaries as a factor other than sex, the Fourth Circuit noted that the employer's burden is heavy, and the exceptions must be narrowly construed.

The Fourth Circuit approved the district's finding that Keziah and Dohn performed the exact same job. To conclude that a wage differential existed between Keziah and Dohn, the Fourth Circuit relied upon the fact that Brown paid the $22,000 draw to Keziah and the $32,500 draw to Dohn regardless of the actual commissions earned and despite the fact that neither ever earned commissions equal to their respective draws. Because Brown never reduced the draws, nor carried forward the deficits, and even referred to the annual payments as base salary or guaranteed pay in Brown's own records, the Fourth Circuit approved the district court's conclusion that the draws were in fact unequal base salaries.

To rebut Keziah's prima facie showing that she received lower wages than Dohn for equal skill, effort, and responsibility, Brown claimed that the wage differential resulted from an experience differential which was the "any factor other than sex" exception under the EPA. Noting the conflicting testimony and evidence regarding Dohn's actual experience in the printing industry, the Fourth Circuit found a genuine question concerning whether an experience differential actually existed between Keziah and Dohn. The Fourth Circuit criticized the district court's decision as a credibility decision that should have been left to the jury, and noted the district court's failure to view the evidence in the light most favorable to the plaintiff. Accordingly, the Fourth Circuit reversed the district court's grant of summary judgment in favor of Brown on Keziah's EPA claim and remanded the claim for trial.

After finding that Keziah's evidence established a prima facie violation of the EPA, the Fourth Circuit turned to Keziah's claim of intentional infliction of emotional distress. The Fourth Circuit explained that the elements of an intentional infliction of emotional distress claim in North Carolina are extreme and outrageous conduct, intent, causation, and severe emotional distress. Relying on *Hogan v. Forsyth Country Club*, 340 S.E.2d 116, 123 (N.C. App. 1985), the Fourth Circuit explained that conduct sufficiently outrageous to give rise to liability must be so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community.

To support the emotional distress claim, Keziah testified that Dohn withheld Keziah's telephone messages and secretly retrieved Keziah's business files and mail to usurp her prospective sales opportunities. Keziah also asserted that Jones delayed and denied Keziah's sales orders and requests for quotes, arbitrarily transferred Keziah's customer accounts to Dohn, and set higher mark ups for Keziah's customers than those set for Dohn's. Keziah further claimed that Dohn and Jones harassed, humiliated and subjected Keziah to an adverse employment environment. Agreeing with the district court, the Fourth Circuit concluded that the incidents in this case did not rise to the required level of intolerability. The Fourth Circuit also noted that Keziah did not appear to suffer severe emotional distress because she failed to testify to any physical ailment related to emotional distress but instead attributed her own distress to frustration. Accordingly, the