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ment instruction.[96] The *Henry* decision specifically prohibits the testimony of informants paid by the government.[97]

The informant in *Thomas v. Cox* voluntarily provided authorities with incriminating statements made by a fellow inmate.[98] The *Thomas* court's analysis focused on whether the informant was a government agent or a voluntary witness.[99] The court's conclusion that the informant was not a government agent garners implicit support from *United States v. Henry* and is consistent with other circuit court decisions.[100] Prosecutors and defense attorneys in the Fourth Circuit should continue to rely on *Henry* to gauge the admissibility of a prison informant's testimony.[101] Unless the informant interacts with the government in a way that establishes an agency relationship, the *Henry* prohibition will not apply.[102] In *Thomas*, the Fourth Circuit correctly refrained from sanctioning an unjustified extension of the sixth amendment right to counsel as interpreted by the Supreme Court in *Henry*.

RONALD THOMAS BEVANS, JR.

VIII. EMPLOYMENT DISCRIMINATION

A. *Federal Jurisdiction Under Title VII and Notice of the Right to Sue*

Congress enacted Title VII of the Civil Rights Act of 1964 (Title VII)[1]

96. *See* Massiah v. United States, 377 U.S. 201, 206 (1964) (government's employment of codefendant to elicit incriminating remarks from defendant in absence of counsel violates sixth amendment); *cf.* United States v. Malik, 680 F.2d 1162, 1165 (7th Cir. 1982) (testimony of private informant who obtains incriminating evidence from accused does not violate sixth amendment).

97. United States v. Henry, 447 U.S. 264, 270-71 (1980); *see also supra* notes 26-46 and accompanying text (discussing Supreme Court's analysis in *Henry*).

98. *See supra* notes 10-19 and accompanying text (discussing circumstances under which informant in *Thomas* obtained incriminating evidence from defendant).

99. *See supra* notes 47-56 and accompanying text (discussing *Thomas* court's decision that informant was not agent of government).

100. *See supra* notes 57-68 and accompanying text (comparing Fourth Circuit's decision in *Thomas* with Supreme Court's decision in *Henry*); *supra* notes 69-92 and accompanying text (discussing other circuit court decisions bearing on agency of informants in sixth amendment right-to-counsel cases).

101. *See* United States v. Henry, 447 U.S. 264 (1980). *But see Constitutional Limitations, supra* note 7, at 143 (*Henry* decision does not provide adequate guidance to lower courts faced with sixth amendment cases involving informants).

102. *See* Thomas v. Cox, 708 F.2d 133, 137 (4th Cir. 1983); *see also supra* notes 48-68 and accompanying text (discussing Fourth Circuit's analysis in *Thomas*); *supra* notes 69-92 and accompanying text (discussing holdings of other circuit courts that have addressed the sixth amendment right to counsel after *Henry*).

1. Civil Rights Act of 1964, Title VII, Pub. L. No. 88-352, 78 Stat. 253 (1964) (codified at 42 U.S.C. §§ 2000e to 2000e-17 (1964)), *amended by* Equal Employment Opportunity Act of 1972, Title VII, Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified at 42 U.S.C. §§ 2000e

to eliminate discrimination by public or private employers[2] on the basis of race, color, religion, sex, or national origin.[3] To gain the right to bring a civil action under Title VII, an aggrieved party must first file a complaint with the Equal Employment Opportunity Commission (EEOC).[4] The EEOC is the central administrative agency that enforces Title VII either by negotiating conciliatory agreements between aggrieved parties and employers accused of

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to 2000e-17 (1976 and Supp. V 1981)). Title VII is the designation for the Equal Employment Opportunity segment of the Civil Rights Act. *See* 42 U.S.C. § 2000e (1976 & Supp. V 1981).

2. *See* 42 U.S.C. § 2000e(b) (1976 & Supp. V 1981) (definition of employer). Title VII imposes the same standards of compliance upon public and private employers. *See* Dothard v. Rawlinson, 433 U.S. 321, 332 n.14 (1977) (Congress intended equal treatment of public and private employers); *see also* H.R. REP. No. 238, 92nd Cong., 2d Sess. 1, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2137 (Title VII applies equally to private and public employers). Title VII defines public employers as persons engaged in any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce. 42 U.S.C. § 2000e(b) (1976 & Supp. V 1981). Title VII defines private employers as any person engaged in an industry affecting commerce that employs 15 or more people for 20 or more weeks in the current or preceeding year. *Id.* § 2000e(b). Private employers, for the purposes of Title VII, do not include the United States, corporations wholly owned by the United States, any departments and agencies of the District of Columbia, Indian Tribes, or tax-exempt private membership clubs. *Id.*

3. 42 U.S.C. § 2000e-2(a)(1) (1976 & Supp. V 1981); *see* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (Congress requires removal of barriers to employment that operate discriminatorily). Employers can violate Title VII through discriminatory hiring practices or discriminatory employment practices. *See* 42 U.S.C. § 2000e-2(a)(1),(2) (1976 & Supp. V 1981). An employer engages in discriminatory hiring practices when the employer discharges or fails or refuses to hire any individual because of race, color, religion, sex, or national origin. *Id.* § 2000e-2(a)(1). Discriminatory employment practices occur when an employer acts in any way to hinder an employee's opportunity for advancement because of the employee's race, color, religion, sex, or national origin. *Id.* § 2000e-2(a)(2).

4. 42 U.S.C. § 2000e-5 (1976 & Supp. V 1981). An aggrieved party wishing to obtain Title VII relief must file a charge with the Equal Employment Opportunity Commission (EEOC) within 180 days of an alleged discriminatory act. *Id.* § 2000e-5(e). In addition to the aggrieved party, anyone acting on behalf of the aggrieved party or a member of the EEOC may file a Title VII charge. *Id.* § 2000e-5(b). The EEOC must serve notice of the charge on the employer within ten days of the filing date. *Id.* The EEOC will conduct an investigation to determine whether reasonable cause exists to believe that the charge was true. *Id.* If the EEOC determines that no reasonable cause exists, the EEOC will dismiss the action and notify the charging party and the employer of the dismissal. *Id.* Upon notification of dismissal, the charging party may then bring a Title VII action against the employer within 90 days in federal court. *Id.* § 2000e-5(f)(1). If, however, the EEOC finds reasonable cause to believe that the charged employer engaged in discriminatory practices, the EEOC will attempt to negotiate a settlement between the parties. *Id.* § 2000e-5(b). If the EEOC is unable to negotiate a settlement, the EEOC will bring a civil action against the charged employer. *Id.* § 2000e-5(f)(1). Although the EEOC, prior to 1972, had no enforcement authority other than to refer cases to the Attorney General when private negotiations failed, Congress, in 1972, granted the EEOC the power to eliminate discrimination by bringing a civil action as well as by negotiating a settlement. *See* 42 U.S.C. § 2000e-4(f)(c) (1970), *amended by* 42 U.S.C. § 2000e-5 (1976 & Supp. V 1981) (EEOC enforcement mechanism). Congress intended the 1972 amendments to allow the EEOC to enforce Title VII more effectively. *See* H.R. REP. No. 238, 92nd Cong., 1st Sess. 2, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2137, 2138 (1972 amendments give EEOC power to enforce Title VII more effectively); *see also* Reiter, *The Equal Employment Opportunity Commission and "Duplicitous Suits": An Examination of* EEOC v. Missouri Pacific Railroad Co., 49 N.Y.U.L. REV. 1130, 1130-34 (1974) (pre-1972 EEOC enforcement mechanisms insufficient to enforce Title VII).

discrimination or by bringing civil actions against accused employers.[5] If the EEOC does not negotiate a settlement or file suit within 180 days of an aggrieved party's original filing date, Title VII requires the EEOC to notify the charging party of the inaction.[6] The notification of inaction, or "right to sue notice," gives the charging party the jurisdictional right to bring suit in federal court against the named employer within ninety days after receipt of the right to sue notice.[7] The Fourth Circuit recently considered whether the EEOC's refusal to issue a right to sue notice after an employer breached a negotiated settlement would bar a Title VII complainant from suing the employer in federal court under Title VII.[8] The Fourth Circuit, in *Perdue v. Roy Stone Transfer Corp.*,[9] held that actual issuance of a right to sue notice was not a prerequisite to federal jurisdiction when the employer breached a conciliation agreement.[10]

In *Perdue*, the defendant Roy Stone Transfer Corporation (Stone) refused to admit plaintiff Lexine Perdue to Stone's truck driving training program because Stone felt that Perdue, as a female, would disrupt the training program.[11] Perdue filed a grievance with the EEOC, charging that Stone violated Title VII by discriminating against Perdue on the basis of Perdue's sex.[12] The EEOC negotiated a settlement between Perdue and Stone that provided that Perdue would not bring suit under Title VII if Stone would give fair consideration to Perdue's training-program application.[13] After Roy Stone had failed for three months to comply with the terms of the settlement agree-

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5. *See* 42 U.S.C. § 2000e-5 (1976 & Supp. V 1981) (EEOC enforcement mechanism); *see also supra* note 4 (Title VII filing and enforcement procedures).

6. 42 U.S.C. § 2000e-5(f)(1) (1976 & Supp. V 1981).

7. *Id.* In considering Title VII's notice of inaction provision, the Supreme Court has stated in dicta that the right to sue notice is a prerequisite to federal jurisdiction. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974) (prerequisite to federal jurisdiction met when charging party received right to sue notice); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973) (charging party satisfied jurisdictional prerequisite when party received right to sue notice); *see also infra* note 25 (discussion of *Alexander* and *McDonnell Douglas*).

8. Perdue v. Roy Stone Transfer Corp., 690 F.2d 1091, 1091 (4th Cir. 1982).

9. 690 F.2d 1091 (4th Cir. 1982).

10. *Id.* at 1095.

11. *Id.* at 1092. In *Perdue*, Roy Stone Transfer Corp. (Stone) admittedly denied Perdue admission to a training program because Stone believed that Perdue, as a female, would create marital tensions among the married, male drivers. *Id.* at 1092 n.1. Stone further asserted that Perdue would have to be segregated during the training program. *Id.* Stone also stated that Stone would not offer Perdue a position as a truck driver even if Perdue successfully completed the training program. *Id.* When Perdue protested, a Stone representative replied, "[d]on't worry, [we] can find another reason to reject you." *Id.*

12. *Id.* at 1092. In *Perdue*, the grievance Perdue filed with the EEOC alleged that Stone violated Title VII by engaging in discriminatory hiring practices. *Id.; see* 42 U.S.C. § 2000e-2(a)(1) (1976 & Supp. V 1981) (discriminatory hiring practices occur when the employer fails or refuses to hire an applicant because of applicant's race, color, religion, sex, or national origin).

13. 690 F.2d at 1092. As a part of the conciliation agreement that the EEOC negotiated between Perdue and Stone, Stone promised to mail Perdue an application and to give the application fair consideration. *Id.* In addition, Stone promised to notify Perdue and the EEOC of Perdue's acceptance or rejection to the training program. *Id.*

ment, Perdue asked the EEOC to issue Perdue a right to sue notice.[14] When the EEOC contacted Stone to learn the reason for Stone's failure to comply with the negotiated settlement, Stone informed the EEOC that the training program had been discontinued.[15] Perdue learned later that Stone had not discontinued the training program and again requested the EEOC to issue a right to sue notice.[16] The EEOC informed Perdue by letter that the EEOC interpreted Title VII as stating that the EEOC could not issue a right to sue notice following a negotiated settlement.[17] The EEOC, however, informed Perdue that she did not need a right to sue notice to bring an action based upon a breach of a negotiated settlement.[18]

Perdue subsequently brought suit in the United States District Court for the Western District of Virginia, claiming that even though the EEOC did not issue a right to sue notice, Title VII granted jurisdiction to federal courts to hear Title VII claims when an employer breached a negotiated settlement.[19] The district court, however, dismissed Perdue's suit for lack of jurisdiction, holding that issuance and receipt of a right to sue notice was a federal jurisdictional prerequisite to a district court hearing a Title VII claim.[20] On appeal, the Fourth Circuit reversed the district court's decision and held that Perdue

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14. *Id.*

15. *Id.*

16. *Id.* In *Perdue*, Perdue learned that Stone had not discontinued the training program on the basis of evidence Perdue obtained in February, 1981. *Id.* Perdue's attorney then reported to the EEOC that evidence indicated that Stone had not discontinued the training program. *Id.* The EEOC, however, denied Perdue's subsequent request for a right to sue letter. *Id.; see supra* notes 17-18 and accompanying text (EEOC sent letter to Perdue stating the EEOC procedures did not allow EEOC to issue right to sue letter following negotiated settlement).

17. 690 F.2d at 1092. In *Perdue*, the EEOC based its refusal to issue a right to sue notice following a negotiated settlement on the EEOC's interpretation of § 2000e-5(f)(1) of Title VII. *Id.; see* 42 U.S.C. § 2000e-5(f)(1) (1976 & Supp. V 1981) (Title VII gives claimant private right to bring Title VII action in federal court). Section 2000e-5(f)(1) of Title VII enumerates the circumstances that must occur before the EEOC can issue a right to sue notice. *See* 42 U.S.C. § 2000e-5(f)(1) (grievance filing procedures). Under § 2000e-5(f)(1), the EEOC must issue a right to sue notice if the EEOC has not negotiated a settlement between the parties or brought an action against the employer. *Id.* In *Perdue*, the EEOC interpreted § 2000e-5(f)(1) as allowing the EEOC to issue a right to sue notice only when the EEOC has not negotiated a settlement or brought suit in federal court. 690 F.2d at 1095. *But see infra* notes 26-27 and accompanying text (Fourth Circuit held that EEOC interpretation of § 2000e-5(f)(1) incorrect).

18. 690 F.2d at 1092. In *Perdue*, EEOC sent a letter to Perdue on March 10, 1981 stating that the EEOC's procedures would not allow the EEOC to issue a right to sue letter following a negotiated settlement. *Id.*

19. *Id.* Perdue brought suit on June 4, 1981, within 90 days of receipt of the EEOC letter informing Perdue that the EEOC could not issue a right to sue notice following a negotiated settlement. *Id.; see supra* note 18 and accompanying text (EEOC letter to Perdue). In Perdue's complaint against Stone, Perdue alleged that she had exhausted all available administrative remedies. 690 F.2d at 1092.

20. 690 F.2d at 1091. In *Perdue*, the district court dismissed Perdue's suit for lack of subject matter jurisdiction. *See* Perdue v. Roy Stone Transfer Corp., 528 F. Supp. 177, 178 (W.D. Va. 1981), *rev'd*, 690 F.2d 1091 (4th Cir. 1982); *see also* FED. R. CIV. PRO. 12(h)(3) (court will dismiss case on pleading if lack of subject matter jurisdiction).

need only prove entitlement to a right to sue notice to satisfy Title VII's federal jurisdictional requirements.[21]

In determining whether Title VII required actual issuance of a right to sue notice for federal jurisdiction under Title VII, the *Perdue* court recognized that section 2000e of Title VII expressly created a private right of action for parties charging employers with employment discrimination.[22] The court noted that section 2000e required the EEOC to issue a right to sue notice to an aggrieved party if the EEOC had taken no action within 180 days after the aggrieved party filed the original charge.[23] The *Perdue* court stated that the EEOC's issuance of the right to sue notice allowed the charging party to bring a Title VII action within ninety days against the employer in federal court.[24] The Fourth Circuit, however, noted that although the Supreme Court had characterized the right to sue notice as a federal jurisdictional prerequisite to Title VII actions, the Supreme Court specifically had not held that a plaintiff's failure to receive a right to sue notice would bar the plaintiff from federal court.[25]

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21. 690 F.2d at 1095.

22. *Id.* at 1093; *see* 42 U.S.C. § 2000e-5(f)(1) (1976 & Supp. V 1981) (scope of private right of action); *see also supra* note 4 (discussion of procedure for enforcing Title VII).

23. 690 F.2d at 1093; *see* 42 U.S.C. § 2000e-5(f)(1) (1976 & Supp. V 1981) (EEOC must issue right to sue notice 180 days after charge filed if no suit brought).

24. 690 F.2d at 1093; *see* 42 U.S.C. § 2000e-5(f)(1) (1976 & Supp. V 1981) (Title VII claimant must bring suit within 90 days of receipt of right to sue notice). *See infra* notes 38-41 and accompanying text (discussion of 90 day limit's purpose).

25. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974) (jurisdictional prerequisites met when petitioner received statutory notice of right to sue); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973) (respondent satisfied jurisdictional prerequisites upon receipt of right to sue notice). The Fourth Circuit in *Perdue* distinguished *Alexander* and *McDonnell* as not dealing specifically with Title VII's statutory notice requirement. 690 F.2d at 1093; *see Alexander*, 415 U.S. at 47 (petitioner met Title VII jurisdictional prerequisite by filing timely charge and acting on right to sue notice); *McDonnell*, 411 U.S. at 798 (timely charge and receipt of right to sue notice satisfied Title VII jurisdictional prerequisites). In *Alexander*, the petitioner Alexander filed a grievance pursuant to Alexander's union's collective bargaining agreement with the defendant Gardner-Denver Company after Gardner-Denver discharged the petitioner. 415 U.S. at 39. Petitioner Alexander, a black man, alleged only that Gardner-Denver had discharged him unjustly and not that racial discrimination prompted the discharge. *Id.* During an arbitration hearing concerning Alexander's discharge, the arbitrator concluded that Gardner-Denver had discharged Alexander for just cause. *Id.* at 42. Prior to the arbitration hearing, however, Alexander had filed a racial discrimination charge against Gardner-Denver with the Colorado Civil Rights Commission which referred the complaint to the EEOC. *Id.* Like the arbitrator, the EEOC concluded that no probable cause existed that Gardner-Denver had discharged Alexander in violation of Title VII. *Id.* at 43. The EEOC then notified Alexander of his right to file suit in the District Court for the District of Colorado. *Id.* The district court granted Gardner-Denver's motion for summary judgment. *Id.* The district court found that Alexander had voluntarily submitted the grievance to the collective bargaining agreement arbitrator and the court of appeals affirmed. *Id.* The court therefore held that the arbitrator's holding that Gardner-Denver had just cause to discharge Alexander was binding upon Alexander. *Id.* The United States Supreme Court granted certiorari to consider whether the petitioner waived his Title VII rights by submitting to the collective bargaining arbitration. *Id.* In deciding *Alexander*, the Supreme Court first noted that Alexander had satisfied Title VII's jurisdictional requirements by filing the charge with the EEOC

To determine whether Title VII restricted federal jurisdiction to only those cases in which the EEOC had issued a right to sue notice, the *Perdue* court first examined the language of Title VII's notice section.[26] The court rejected the EEOC's conclusion that the plain language of Title VII's notice section specified the only circumstances in which the EEOC could issue a right to sue notice.[27] The court instead determined that the language of Title VII's notice section established when Title VII entitled a charging party to a right to sue notice.[28] Noting that an EEOC's wrongful failure to issue a right to sue notice does not bar a plaintiff from federal court under Title VII, the Fourth Circuit concluded that the plain language of Title VII's notice section required a charging party only to prove entitlement to a right to sue notice to maintain federal jurisdiction under Title VII.[29] Furthermore, the court rejected the district court's interpretation that section 2000e-5 required a right to sue notice as a prerequisite to federal jurisdiction because the district court's interpretation would bar permanently from federal court a Title VII claimant who entered into negotiations with an employer who never intended to honor

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and receiving the right to sue notice. *Id.* at 47; *see* 42 U.S.C. § 2000e-5(f)(1) (1976 & Supp. V 1981) (Title VII jurisdictional preconditions). The Court stated only in dicta that Title VII requires a Title VII claimant to produce a right to sue notice to satisfy Title VII's jurisdictional prerequisites. 415 U.S. at 47.

In *McDonnell*, the petitioner Green filed a charge with the EEOC alleging that McDonnell Douglas engaged in discriminatory hiring practices. 411 U.S. at 796. The EEOC, however, did not determine whether reasonable caused existed to believe that McDonnell Douglas violated Title VII through discriminatory hiring activity. *Id.* at 797. The Court first stated that Green's timely charge to the EEOC and receipt of the right to sue notice satisfied Title VII's jurisdictional requirements. *Id.* at 798. Noting that Congress enacted Title VII to eliminate discrimination, the Court held that the EEOC's finding of no reasonable cause did not bar Green from pursuing a private Title VII claim. *Id.* at 807. Like *Alexander*, therefore, the Supreme Court in *McDonnell Douglas* stated in dicta that Title VII requires a right to sue notice to satisfy Title VII's jurisdictional prerequisites. *Id.* at 798; *see Alexander*, 415 U.S. at 47 (jurisdictional prerequisites met when Alexander received statutory notice of right to sue).

26. *See* 690 F.2d at 1093 (§ 2000e-5(f)(1) authorizes private right to action); 42 U.S.C. 2000e-5(f)(1) (1976 & Supp. V 1981) (Title VII claimant may bring suit within 90 days of receipt of right to sue notice).

27. 690 F.2d at 1093; *see supra* note 18 and accompanying text (discussion of EEOC letter to Perdue interpreting EEOC's procedures under Title VII).

28. 690 F.2d at 1093.

29. *Id.* The *Perdue* court relied on *Russell v. American Tobacco Co.* in holding that the EEOC's wrongful failure to issue a right to sue notice would not bar a Title VII claimant from federal court. *Id.; see* Russell v. American Tobacco Co., 528 F.2d 357, 365 (4th Cir. 1975) (EEOC administrative mistakes do not bar Title VII claimant from federal court), *cert. denied*, 425 U.S. 935 (1976). In *Russell*, the plaintiffs, black employees, brought a Title VII class action against defendant American Tobacco Company and Tobacco Workers International Union (Union) for engaging in discriminatory employment practices by systematically excluding the plaintiffs from promotions within the defendant company. 528 F.2d at 361; *see supra* note 3 (definition of discriminatory employment practices). Although the plaintiffs named both American Tobacco Company and Union in the original charge to the EEOC, the EEOC failed to notify Union of the charge and did not attempt to negotiate a settlement before issuing the plaintiffs' right to sue notice. 528 F.2d at 365. The Fourth Circuit rejected the Union's contention that the EEOC's failure to notify the union of the charge deprived the lower court of jurisdiction, stating that a Title VII claimant is not held responsible for EEOC procedural failures. *Id.*

a negotiated settlement.[30] The Fourth Circuit, therefore, held that the *Perdue* court would adopt the district court's interpretation of Title VII's notice section only if the three underlying policies of the right to sue notice supported the interpretation that Title VII required a right to sue notice to satisfy Title VII's jurisdictional prerequisites.[31]

The Fourth Circuit noted as the first underlying policy of Title VII that Congress intended the right to sue notice to promote private dispute resolution by requiring a Title VII complainant to attempt a private settlement through the EEOC's negotiating procedures before attempting to bring a Title VII action in federal court.[32] The court further noted that allowing a Title VII complainant to bring an action in federal court when an employer had performed or tendered part of a previous conciliation agreement would hinder EEOC attempts to privately negotiate settlements.[33] The *Perdue* court, however, concluded that allowing plaintiffs access to federal courts after an employer allegedly had breached a settlement agreement would not hinder private dispute resolution but rather would discourage employers from negotiating in bad faith.[34]

The Fourth Circuit next noted that Congress required the EEOC to issue a right to sue notice before a Title VII claimant could file a claim in federal court to indicate that the EEOC's attempt to settle privately the Title VII dispute had ended and thereby avoid concurrent judicial and administrative proceedings.[35] The court, however, determined that the policy against concur-

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30. 690 F.2d at 1093; *see infra* note 89 (district court's interpretation of Title VII's notice requirements promotes bad faith employer negotiations).

31. 690 F.2d at 1093.

32. *Id.; see* Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) (voluntary compliance preferred means for settling Title VII disputes); H.R. REP. No. 238, 92nd Cong., 2d Sess. 10-11, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2137, 2146-47 (administrative agencies superior to federal courts for rapid and informal resolution of Title VII grievances). In drafting Title VII, Congress intended to promote private dispute resolution for several reasons. *See* H.R. REP. No. 238, 92nd Cong., 2d Sess. 10-11, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2137, 2146-7. First, Congress concluded that administrative tribunals are better equipped to sort out complexities involving employment discrimination. *Id.* (issues in employment discrimination cases often perplexed courts). Next, Congress stated that private dispute resolution would prevent increased judicial expenditures because courts would thereby avoid dealing with the complexities of employment discrimination cases. *Id.* Finally, agencies do not have the same formal rules of procedure as the courts and, therefore, the agencies are not vulnerable to dilatory tactics. *Id.*

33. 690 F.2d at 1094; *see* Trujillo v. Colorado, 649 F.2d 823, 826 (10th Cir. 1981) (employer's tender of settlement agreement bars claimant from federal court). In *Trujillo*, Trujillo entered into and enjoyed the benefits of an agreement which the EEOC negotiated between Trujillo and Colorado. *Id.* at 824-25. After the Colorado public agency had tendered partial performance of the agreement, Trujillo attempted to bring a Title VII action to gain a more beneficial settlement. *Id.* The Tenth Circuit held that Trujillo could not bring a Title VII action in federal court because Colorado had tendered partial performance of the settlement. *Id.* The *Trujillo* court concluded that to allow Trujillo to bring the claim would discourage charged employers from privately negotiating settlements of Title VII claims because the employers potential liability under Title VII would not be resolved by a negotiated settlement. *Id.*

34. 690 F.2d at 1094.

35. *Id.; see* H.R. REP. No. 238, 92nd Cong., 2d Sess. 12, *reprinted in* 1972 U.S. CODE

rent proceedings was inapplicable when the EEOC closed a case and refused to reopen it even when the employer breached a negotiated settlement.[36] The *Perdue* court noted that the policy against concurrent proceedings was inapplicable because once the EEOC declared that the EEOC's role in the matter was ended, allowing a claimant access to federal courts would not compromise either the EEOC's or the employer's interest in the administrative process.[37]

The *Perdue* court next stated that after the EEOC declared that the EEOC's role in the matter was ended, the EEOC would issue a right to sue notice and thereby satisfy the third underlying policy of Title VII's right to sue notice requirement by marking the beginning of the ninety day period within which a Title VII claimant must bring suit.[38] The court found that the purpose of the ninety day limitation was the protection of employers from prejudice as a result of an employee bringing a Title VII action after apparently acquiescing to the employer's discriminatory practices.[39] The *Perdue* court, however, noted that to allow Perdue to bring suit would not violate the policy of protecting employers from "stale claims" because Perdue brought suit in the district court within ninety days after receiving the EEOC's letter informing Perdue that the EEOC could not issue a right to sue notice following a negotiated settlement.[40] The Fourth Circuit concluded that the policies underly-

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CONG. & AD. NEWS 2137, 2148 (EEOC and courts should avoid duplicative proceedings). When drafting Title VII, the House Committee on Education and Labor was concerned about the potential conflict between a Title VII complainant's existing private right of action in state forums and the new civil enforcement powers of the EEOC. *Id.* Concluding that duplicative proceedings should be avoided, the Committee determined that EEOC jurisdiction should be terminated when a Title VII complainant pursued a private claim in a state forum. *Id.* Similarly, if the Title VII complainant agreed, the private action should be terminated when the EEOC achieved a negotiated settlement. *Id.* One commentator, however, has concluded that the ban against duplicitous proceedings effectively eliminates the EEOC's enforcement powers. *See* Reiter, *supra* note 4, at 1133-34. Reiter states that the high number of unresolved claims will nullify effectively the EEOC's powers. *Id.* at 1133. Reiter notes that the high number of claims will mean that the EEOC will almost never bring a civil action or negotiate a settlement within the 180 day period and therefore individuals will bring private actions when the EEOC has not negotiated a settlement within the 180 day time limit. *Id.* at 1134.

36. 690 F.2d at 1093.

37. *Id.* In concluding that Perdue would not disrupt the administrative process by bringing the Title VII claim, the *Perdue* court rejected Stone's argument that the court require Perdue to sue the EEOC to obtain the right to sue notice. *Id.* at 1094 n.6. The *Perdue* court noted that requiring *Perdue* to join the federal proceedings would be unjust for two reasons. *Id.* First, joining the EEOC would only complicate and increase the federal Title VII action. *Id.* Because of the increased complexity, the Fourth Circuit concluded that the longer proceeding could prevent the complainant's bringing the Title VII action. *Id.*

38. *Id.* at 1094.

39. *Id.; see* Johnson v. Railway Expressway Agency, Inc., 421 U.S. 454, 463-64 (1975) (ninety day time limitation protects employers from employees who bring late claims of discriminatory employment practices).

40. 690 F.2d at 1094. In remanding Perdue's Title VII claim to allow Perdue to prove that Stone breached the conciliation agreement, the Fourth Circuit required the district court to determine when Perdue became entitled to the right to sue notice. *Id.* at 1094 n.7. The Fourth Circuit required the district court to determine when the EEOC declared that its role in the matter was ended so the district court could determine whether Perdue brought the Title VII action

ing the right to sue notice requirement supported the conclusion that Title VII entitles a claimant to a right to sue notice if the complainant can prove that the employer neither performed nor tendered performance of a settlement agreement.[41] As a consequence, the Fourth Circuit reversed and remanded the case to allow Perdue to satisfy the jurisdictional requirements of Title VII by proving that Stone breached the conciliation agreement.[42]

Although the *Perdue* dissent agreed with the *Perdue* majority's statement that Perdue was not foreclosed from federal court because of the settlement, the dissent did not agree with the majority's holding that Perdue need only show entitlement to a right to sue notice to maintain federal jurisdiction under Title VII.[43] The dissent classified issuance and receipt of a right to sue notice as a jurisdictional prerequisite to a Title VII suit because the Supreme Court had stated in dicta that a right to sue notice was a Title VII jurisdictional prerequisite.[44] Characterizing the conciliation agreement as an executory accord, the dissent would have permitted Perdue to maintain federal jurisdiction once Perdue demonstrated a breach of the settlement agreement.[45] The dissent, however, also would have required joinder of the EEOC to allow the lower court to order the EEOC to issue a right to sue notice if Perdue should prove a breach of the settlement agreement.[46] Accordingly, the dissent would have affirmed the district court's dismissal of Perdue's claim for lack of jurisdiction but only because Perdue did not join the EEOC as an indispensible party to the litigation.[47]

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within 90 days after becoming entitled to a right to sue notice. *Id.* The *Perdue* court stated that Title VII entitled Perdue to a right to sue notice when the EEOC notified Perdue that the EEOC would take no further action on Perdue's behalf. *Id.*

41. *Id.* at 1095.

42. *Id.*

43. *Id.* (Widener, J., dissenting).

44. *Id.* at 1097; *see supra* note 25 (discussion of Supreme Court cases suggesting that right to sue notice is jurisdictional prerequisite to Title VII cases).

45. 690 F.2d at 1096. In classifying the conciliation agreement as an executory accord, the *Perdue* dissent adopted the argument that Perdue advanced in the briefs. *Id.; see* Brief for Appellant at 19-20, Perdue v. Roy Stone Transfer Corp., 690 F.2d 1091 (4th Cir. 1982) [hereinafter cited as Brief for Appellant]. Although the dissent and Perdue characterized the conciliation agreement in different terms, both concluded that proof of a breach would nullify the conciliation agreement and revive the underlying Title VII claim. 690 F.2d at 1096; Brief for Appellant at 20; *see* Eichelberger v. Mann, 115 Va. 774, 778, 80 S.E. 595, 596 (1914) (accord without satisfaction is nullity); 6 A. CORBIN, CORBIN ON CONTRACTS §§ 1268-69 (1962) (breach of accord revives underlying action).

46. 690 F.2d at 1096-97.

47. *Id.; see* FED. R. CIV. P. 19 (indispensible party rule). An indispensible party is a non-party to a litigation whose joinder a court determines to be necessary either to protect the non-party's interests or to provide complete relief among the parties to the litigation. FED. R. CIV. P. 19(a). If the non-party's joinder is impossible, the court will dismiss the case if the non-party is indispensible. *Id.* 19(b). Among the factors that a court considers when determining whether to dismiss litigation are the extent of prejudice to the parties and non-parties, the possibility of shaping the judgment to mitigate the prejudice, the adequacy of a remedy that the court can grant in the non-party's absence, and the adequacy of a remedy that a party plaintiff will have if the court dismisses the litigation. *Id.*

Although the Supreme Court has suggested in dicta that issuance and receipt of a right to sue notice is a Title VII jurisdictional prerequisite, the Supreme Court has not specifically considered the jurisdictional significance of the right to sue notice.[48] Past Supreme Court holdings in Title VII actions, however, support the reasoning and effect of the *Perdue* court's holding that a plaintiff need only show entitlement to a right to sue notice to satisfy Title VII's jurisdictional requirements.[49] The Supreme Court consistently has held that courts should not interpret Title VII technically but instead should interpret Title VII broadly to allow lower courts the ability to grant Title VII plaintiffs as much relief as possible.[50] In *Perdue*, the Fourth Circuit rejected as too technical the district court's interpretation of Title VII that the right to sue notice was a Title VII jurisdictional prerequisite.[51] The *Perdue* court's reasoning, therefore, is consistent with Supreme Court Title VII cases because the *Perdue* court gave greater consideration to the substantive policies of Title VII than to a possible technical reading of the statute.[52]

In addition to holding that courts should interpret Title VII broadly, the Supreme Court has stated that Title VII grants federal courts plenary powers to ensure the elimination of discrimination.[53] The *Perdue* court ensured the

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48. 678 F.2d at 1192; *see supra* note 25 and accompanying text (Supreme Court cases suggesting that right to sue notice is jurisdictional prerequisite to Title VII cases).

49. 678 F.2d at 1193; *see infra* notes 52-54 and accompanying text (Supreme Court language supports reasoning and effect of *Perdue*).

50. *See* Love v. Pullman, 404 U.S. 522, 527 (1972). In *Love*, the Supreme Court held that courts should construe Title VII broadly. *Id.* at 525. In deciding *Love*, the Court first noted that lay persons rather than legal practitioners enacted Title VII. *Id.* at 527. The Court, therefore, concluded that lawyers who would strictly construe Title VII would place form over content. *Id.* The Court held that courts should resolve Title VII procedural disputes by examining the intent, rather than the language, of Title VII. *Id.* at 525. The Supreme Court has reaffirmed the principle that courts should construe Title VII broadly in several recent cases. *See*, e.g. Zipes v. Trans World Airlines, 455 U.S. 385, 397 (1982) (courts should not read Title VII technically); General Tel. Co. v. Equal Employment Opportunity Comm., 446 U.S. 318, 332 (1980) (Title VII gives courts wide discretion to fashion complete relief) (*quoting* 118 CONG. REC. 7168 (1972) (statement of Sen. Williams)); Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975) (Congress intended courts to provide "make whole" relief).

51. *See* 690 F.2d at 1093 (court will adopt district court's strict reading only if underlying policies so require).

52. *See id.* at 1093 (court bases interpretation of Title VII on underlying policies); *see also supra* notes 50-51 and accompanying text (Supreme Court language supports *Perdue* court's reasoning).

53. Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974). In determining that Title VII grants federal courts plenary enforcement powers, the Supreme Court in *Alexander* first noted that Title VII authorizes courts to issue injunctive relief or such relief as is necessary to eliminate unlawful employment practices. *Id.* at 44; *see* 42 U.S.C. § 2000e-5(f), (g) (1976 & Supp. V. 1981) (provision discussing injunctive relief). The Court also noted that Title VII does not condition a court's powers upon an EEOC finding of reasonable cause to believe that an employer violated Title VII. 415 U.S. at 44-45. The Court, therefore, concluded that Title VII grants plenary powers to courts to enforce Title VII. *Id.; see* McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 798-99 (1972) (federal jurisdiction not contingent upon EEOC finding of reasonable cause); *see also* General Tel. Co. of the Northwest v. Equal Employment Opportunity Comm'n, 446 U.S. 318, 332 (1980) (Title VII gives courts plenary powers to eliminate discrimination); *c.f.* Johnson v.

elimination of discrimination because the effect of the court's holding that Perdue need only prove that Stone breached the negotiated settlement to maintain federal Title VII jurisdiction is to ensure that employers will not attempt to circumvent Title VII by entering into settlement negotiations with no intention of honoring a negotiated settlement.[54] The Fourth Circuit in *Perdue*, therefore, properly exercised the plenary power that the Supreme Court had granted federal courts to eliminate employment discrimination.[55] As a result, although past Supreme Court cases stated in dicta that the right to sue notice was a jurisdictional prerequisite to Title VII actions, past Supreme Court decisions lend considerable support to the reasoning and to the effect of the Fourth Circuit's holding in *Perdue* that a Title VII claimant need only prove entitlement to a right to sue notice to maintain Title VII jurisdiction.[56]

Like the Supreme Court, a majority of federal circuit courts have suggested that issuance and receipt of a right to sue notice is a Title VII jurisdictional prerequisite, but have not specifically evaluated the jurisdictional significance of the right to sue notice.[57] A minority of courts, however, have considered specifically whether the right to sue notice is a prerequisite to Title VII federal jurisdiction.[58] For example, in *Jackson v. Seaboard Coast Line*

Railway Express Agency, Inc., 421 U.S. 454, 457-58 (1975) (Title VII enacted to eliminate discrimination).

54. *See supra* text accompanying notes 32-34 (*Perdue* holding allowing Title VII claimants access to federal courts upon proof of employer's breach of negotiated settlement prevents employer's bad faith negotiations).

55. *Id.*

56. *See supra* text accompanying notes 50-51, 53-54 (*Perdue* court followed reasoning of past Supreme Court Title VII cases by broadly interpreting Title VII to ensure elimination of discriminatory employment and hiring practices).

57. *See* Gonzalez-Allez Balseyro v. GTE-Lenkurt Inc., 702 F.2d 857, 859 (10th Cir. 1983) (court stated that right to sue notice was jurisdictional prerequisite to Title VII while examining whether 90 day limit subject to waiver); Gordon v. National Youth Work Alliance, 675 F.2d 356, 360 (D.C. Cir. 1982) (court stated in dicta that right to sue notice was Title VII federal jurisdictional prerequisite while considering whether 180 day limit subject to waiver); Sheehan v. Purolator Courier Corp., 676 F.2d 877, 881 (2d Cir. 1981) (court stated that right to sue notice necessary to establish federal Title VII jurisdiction while considering whether temporary injunctive relief available under Title VII); Movement for Opportunity, Etc. v. General Motors, 622 F.2d 1235, 1240 (7th Cir. 1980) (court specified right to sue notice as Title VII federal jurisdictional prerequisite while considering whether 42 U.S.C. § 1981 (1976 & Supp. V 1981) supplies Title VII jurisdiction); Omawale v. WBZ, 610 F.2d 20, 22 n.4 (1st Cir. 1979) (per curiam) (court stated that right to sue notice was federal Title VII jurisdictional prerequisite while considering whether plaintiff established prima facie case of discrimination); Shea v. City of St. Paul, 601 F.2d 345, 347-48 (8th Cir. 1979) (court stated that right to sue notice was prerequisite to Title VII federal jurisdiction while considering whether plaintiff filed suit within 90 days of receipt of right to sue notice); Hicks v. ABT Assoc., 572 F.2d 960, 963 (3d Cir. 1978) (court classified right to sue notice as Title VII federal jurisdictional prerequisite while determining whether plaintiff established valid claim of employment discrimination); Mahroom v. Hook, 563 F.2d 1369, 1373 (9th Cir. 1977) (court held obtaining right to sue notice was Title VII jurisdictional prerequisite while considering whether right to sue notice retroactive), *cert. denied*. 436 U.S. 904 (1978).

58. *See* Pinkard v. Pullman Standard, 678 F.2d 1211, 1215 (5th Cir.) (per curiam) (right to sue notice requirement subject to waiver), *reh'g denied*, 685 F.2d 1383 (1982), *cert. denied*, 103 S. Ct. 729 (1983); Jackson v. Seaboard Coast Line R. Co., 678 F.2d 992, 1000 (11th Cir. 1982) (right to sue notice is condition precedent to Title VII claim).

Ry. Co.,[59] the Eleventh Circuit examined whether the plaintiffs' failure to receive a right to sue notice barred the plaintiffs' Title VII claim from federal court.[60] In *Jackson*, the plaintiffs failed to include the name of one of the defendants, the Brotherhood Railway Carmen of America and Canada (Brotherhood), in the original EEOC complaint.[61] As a consequence of the plaintiffs' omission, the right to sue notice that the EEOC issued to the plaintiffs did not name the Brotherhood as a charged party.[62] The Brotherhood, however, failed to assert that the plaintiffs' right to sue notices did not name the Brotherhood as a respondent to the plaintiffs' Title VII action.[63] At trial, the United States District Court for the Southern District of Georgia entered judgment against the Brotherhood.[64] The Brotherhood appealed the district court's judgment to the Eleventh Circuit, alleging that the plaintiffs' Title VII claim failed for lack of subject matter jurisdiction because the plaintiffs' right to sue notice did not name the Brotherhood as a respondent.[65]

On appeal, the Eleventh Circuit first noted that past Supreme Court decisions classified several of Title VII's jurisdictional preconditions as conditions precedent and not jurisdictional prerequisites.[66] The *Jackson* court stated that

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59. 678 F.2d 992 (11th Cir. 1982).

60. *Id.* at 1000.

61. *Id.* at 998-99.

62. *Id.* at 1000.

63. *Id.*

64. *Id.* at 999.

65. *Id.* at 1000. In addition to alleging that plaintiffs did not obtain a right to sue notice that named the Brotherhood as a respondent, the Brotherhood in *Jackson* also alleged that plaintiffs failed to file the initial charge with the EEOC within 180 days of the alleged discriminatory act. *Id.* The Eleventh Circuit, in *Jackson*, dismissed the Brotherhood's claim that the district court lacked subject matter jurisdiction because the plaintiffs failed to file charges within 180 days after the alleged discriminatory act. *Id.* at 1006. In dismissing the claim, the *Jackson* court relied on the Supreme Court's holding in *Zipes v. Trans World Airlines*. *Id.; see Zipes v. Trans World Airlines*, 455 U.S. 385, 398 (1982). In *Zipes*, the Air Line Stewards and Stewardesses Association (Stewardesses) brought a class action against Trans World Airlines (TWA) for engaging in discriminatory employment practices. *Id.* at 388; *see* 42 U.S.C. § 2000e-2(a)(2) (1976 & Supp. V 1981) (discriminatory employment practices occur when employer segregates employees on basis of race, color, religion, sex, or national origin in way that adversely affects employee status). In *Zipes*, the Stewardesses alleged that TWA violated Title VII by its policy of grounding all female flight attendants who became pregnant while allowing male flight attendants who became fathers to remain aloft. 455 U.S. at 388. TWA, however, claimed that the Stewardess' claim failed for lack of subject matter jurisdiction because the Stewardesses failed to file charges with the EEOC within 180 days after the discriminatory employment practices occurred. *Id.* at 389. The Supreme Court examined the legislative history and concluded that Congress had not intended the 180 day time limit to be more than a condition precedent similar to a statute of limitations. *Id.* at 394; *see* 110 CONG. REC. 12723 (1964) (remarks of Sen. Humphrey) (Senator Humphrey characterized 180 day limit as period of limitations). The *Zipes* Court therefore held that Title VII did not bar the stewardess' claim for lack of subject matter jurisdiction because the 180 day time limit was a condition precedent subject to waiver. 455 U.S. at 398.

66. 678 F.2d 1004-07; *see* Zipes v. Trans World Airlines, 455 U.S. 385, 398 (1982) (90 day time limit within which claimant must bring suit is condition precedent and therefore subject to waiver); Delaware State College v. Ricks, 449 U.S. 250, 254 (1980) (Supreme Court characterized 180 day limit as limitations period); Mohasco Corp. v. Silver, 447 U.S. 807, 811 n.9 (1980) (respon-

the result of the Supreme Court's classification of many Title VII jurisdictional preconditions as conditions precedent was that all jurisdictional preconditions of Title VII were subject to equitable waiver.[67] Concluding that Title VII's requirement of a right to sue notice was a jurisdictional precondition, the *Jackson* court held that issuance of a right to sue notice was a condition precedent to Title VII jurisdiction and therefore subject to equitable waiver.[68] The *Jackson* court, however, still required a plaintiff to allege in the pleadings that the EEOC issued the plaintiff a right to sue notice to maintain federal jurisdiction under TItle VII.[69] The court noted that the plaintiffs had not alleged that the EEOC issued the plaintiffs a right to sue notice that named the Brotherhood as a respondent.[70] The court, however, further noted that the Brotherhood did not challenge the plaintiffs' failure until after the district court entered judgment against the Brotherhood.[71] The Eleventh Circuit, therefore, held that the Brotherhood waived the right to challenge the plaintiffs' failure to allege that the EEOC issued the plaintiffs a right to sue notice naming the Brotherhood as a respondent because the right to sue notice was a condition precedent and not a jurisdictional prerequisite.[72] In contrast to the *Jackson* court's holding that the right to sue notice was a condition precedent and therefore subject to equitable waiver, the Fourth Circuit in *Perdue* held that the right to sue notice was a jurisdictional prerequisite to Title VII jurisdiction but that a plaintiff need only prove entitlement to a right to sue notice to maintain federal jurisdiction under Title VII.[73] As a result, the minority of circuits that have specifically considered the jurisdictional significance of the right to sue notice do not support the Fourth Circuit's holding in *Perdue*.[74]

In addition to a minority of other circuits, the Fourth Circuit also has specifically examined the jurisdictional significance of the right to sue notice.[75]

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dent waived right to challenge whether claimant brought suit within 90 days because time limit was condition precedent); Albemarle Paper Co. v. Moody, 422 U.S. 405, 414 n.8 (1975) (Title VII class relief available to class members who did not exhaust administrative remedies because exhaustion condition precedent); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 799 (1973) (EEOC finding of reasonable cause only condition precedent to federal Title VII action).

67. 678 F.2d at 1009-10.

68. *Id.* at 1010.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. 690 F.2d at 1093.

74. *See supra* notes 57-58 and accompanying text (minority of courts that have considered specifically the jurisdictional significance of the right to sue notice classify the right to sue notice as condition precedent and not jurisdictional).

75. *See* Adams v. Proctor & Gamble Mfg. Co., 678 F.2d 1190, 1192 (4th Cir. 1982) (right to sue notice prerequisite to private Title VII action), *rev'd on other grounds*, 697 F.2d 582, 584 (4th Cir. 1983); United Black Firefighters of Norfolk v. Hirst, 604 F.2d 844, 847 (4th Cir. 1979) (right to sue notice determines whether claimant can bring suit in federal court). In *Hirst*, the plaintiffs consisted of two groups. *Id.* at 845. The first group were unsuccessful applicants for employment with the Norfolk fire department who charged that officials of the city of Nor-

The *Perdue* court's holding that a Title VII plaintiff need only prove entitlement to a right to sue notice to satisfy Title VII's jurisdictional requirements, however, is inconsistent with past Fourth Circuit decisions.[76] The Fourth Circuit had held consistently in past cases that issuance of a right to sue notice was a jurisdictional prerequisite in Title VII actions.[77] For example, in *Adams v. Proctor & Gamble Mfg. Co.*,[78] the Fourth Circuit examined whether Title VII permitted the EEOC to issue individual right to sue notices to Title VII complainants not joining a class action that the EEOC brought against the defendant Proctor & Gamble on the complainants' behalf.[79] Although the EEOC subsequently entered into a negotiated settlement with Proctor & Gamble, the EEOC issued right to sue notices to the complainants not joining in the settlement.[80] When the plaintiffs brought a Title VII action against Proctor & Gamble in federal court, the district court dismissed the suit for lack of subject matter jurisdiction.[81] The district court reasoned that the EEOC's settlement with the defendant precluded the EEOC from issuing right to sue notices on the same underlying claim.[82] The plaintiffs' Title VII claim,

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folk violated Title VII by engaging in discriminatory hiring practices. *Id.; see* 42 U.S.C. § 2000e-2(a)(1) (1976 & Supp. V 1981) (definition of discriminatory hiring practices). The second group consisted of members of the Norfolk fire department who alleged that officials of the city of Norfolk violated Title VII by engaging in discriminatory employment practices. 604 F.2d at 847; *see* 42 U.S.C. § 2000e-2(a)(2) (1976 & Supp. V 1981) (definition of discriminatory employment practices). In *Hirst*, the plaintiff applicants failed to file charges of discrimination with the EEOC and as a result never received right to sue notices. 604 F.2d at 847. The Fourth Circuit affirmed the district court's dismissal of the plaintiff's Title VII claim because the failure to obtain a right to sue notice deprived the Title VII claim of federal subject matter jurisdiction. *Id.*

76. 690 F.2d at 1093.

77. *See* Adams v. Proctor & Gamble Mfg. Co., 678 F.2d 1190, 1192 (4th Cir. 1982) (Title VII claim explicitly conditioned on receipt of right to sue notice); United Black Firefighters of Norfolk v. Hirst, 604 F.2d 844, 847 (4th Cir. 1979) (failure to obtain right to sue notice deprived applicants' Title VII claim of subject matter jurisdiction); *see also supra* note 75 (discussion of *Hirst*).

78. 678 F.2d 1190 (4th Cir. 1982), *rev'd on other grounds*, 697 F.2d 582, 584 (4th Cir. 1983).

79. 678 F.2d at 1191. In *Adams*, the EEOC brought a class action against Proctor & Gamble on behalf of two dozen employees who filed charges with the EEOC. *Id.* The EEOC brought the suit because the EEOC could not negotiate a settlement with Proctor & Gamble. *Id.; see* 42 U.S.C. § 2000e-5(f)(1) (1976 & Supp. V 1981) (EEOC may bring civil action if EEOC can not negotiate settlement with charged employer). During the three year discovery period, none of the employees on whose behalf the EEOC brought the suit chose to intervene although Title VII granted the employees the right to intervene. 678 F.2d at 1191; *see* 42 U.S.C. § 2000e-5(f)(1) (1976 & Supp. V 1981) (aggrieved parties have right to intervene in EEOC action).

80. 678 F.2d at 1191. In *Adams*, the civil action that the EEOC brought against Proctor & Gamble never reached the trial stage because the EEOC and Proctor & Gamble reached a consent decree. *Id.* The EEOC and Proctor & Gamble, however, disagreed over the effect of the consent decree on potential private Title VII claims against Proctor & Gamble. *Id.* at 1191-92. The EEOC argued that the private rights of action were not foreclosed because the employees were only potential witnesses in the EEOC action. *Id.* at 1192. Proctor & Gamble argued that the settlement affected the entire class and therefore precluded any class members from bringing subsequent private Title VII claims. *Id.* The EEOC subsequently issued individual right to sue notices to the class members that rejected the monetary award under the consent decree. *Id.*

81. *Id.*

82. *Id.*

therefore, failed for lack of subject matter jurisdiction because the district court classified the right to sue notice as a prerequisite to Title VII federal jurisdiction.[83] On appeal, the Fourth Circuit held without discussion that the right to sue notice was a Title VII jurisdictional prerequisite.[84] The *Adams* court, however, further held that the complainants could bring a Title VII claim in federal court because the EEOC properly issued the right to sue notice.[85] In *Perdue*, therefore, the Fourth Circuit reversed Fourth Circuit precedent by holding that a plaintiff need only show entitlement to a right to sue notice to satisfy Title VII's jurisdictional requirements.[86]

The Fourth Circuit correctly rejected Fourth Circuit precedent and the district court's holding that the EEOC must issue a right to sue notice before a plaintiff may bring a Title VII action in federal court.[87] The strict requirement that a party must always receive a right to sue notice to maintain Title VII federal jurisdiction is contrary to Title VII's overriding purpose of eliminating discrimination.[88] Requiring without exception a right to sue notice prevents the elimination of discrimination because the EEOC will not issue a right to sue notice after the EEOC negotiated a settlement, even when an employer breaches the settlement.[89] The *Perdue* court, however, held that proof

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83. *Id.*

84. *Id.*

85. *Id.* at 1193. In determining that the EEOC could properly issue the right to sue notices, the Fourth Circuit in *Adams* concluded that the legislative history of Title VII indicated that the EEOC action did not preclude the later private claims. *Id.; see* 118 CONG. REC. 1068 (1972) (statement of Sen. Javits) (discussing need to preserve private right of action). The *Adams* court enumerated two aspects of Title VII's legislative and judicial history that compelled the conclusion. *Id.* The *Adams* court first noted that, in addition to the situation in which the EEOC has not negotiated a settlement or filed suit, the Joint Conference analysis of the Equal Employment Opportunity Act of 1972 indicated that a Title VII claimant was also entitled to a right to sue notice if the EEOC resolution was unsatisfactory to the charging party. *Id.* at 1194; *see* Equal Employment Opportunity Act of 1972, Title VII, Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified at 42 U.S.C. § 2000e to 2000e-17 (1976 & Supp. V. 1981) (1972 amendments to Civil Rights Act of 1964); 118 CONG. REC. 1068 (1972) (statement of Sen. Javits) (charging party entitled to right to sue notice if unsatisfied with EEOC resolution); *see also supra* note 1 (discussion of Title VII and Equal Employment Opportunity Act of 1972). The *Adams* next court noted that the Supreme Court has also stated that § 2000e-5(f)(1) of Title VII allows a Title VII claimant to bring a Title VII claim if the claimant is unsatisfied with the EEOC resolution of the claim. 678 F.2d at 1193-94; *see* General Telephone Co. of the Northwest v. Equal Employment Opportunity Comm'n, 446 U.S. 318, 326 (1980) (plaintiff may bring Title VII claim if unsatisfied with EEOC settlement).

86. 690 F.2d at 1093.

87. *See supra* text accompanying notes 53-55 (*Perdue* holding ensures greatest relief to Title VII claimants).

88. *See infra* note 89 (strict interpretation of Title VII's notice requirements prevents effective enforcement of Title VII).

89. 690 F.2d at 1093; *see* Perdue v. Roy Stone Transfer Corp., 528 F. Supp. 177, 179 (W.D. Va. 1981) (Title VII claimant who enters into settlement agreement forfeits private Title VII right of action), *rev'd*, 690 F.2d 1091 (4th Cir. 1982). The strict interpretation that both past Fourth Circuit courts and the district court in *Perdue* made of Title VII's notice requirement would bar permanently a party that enters into a conciliation agreement from federal court, even if the employer never honored the settlement. *See* Perdue, 690 F.2d 1091, 1093 (4th Cir. 1982)

of the employer's breach of the agreement was sufficient to satisfy Title VII's jurisdictional requirements.[90] As a consequence, the *Perdue* court's holding promotes the elimination of discrimination by employers who would seek to circumvent Title VII by entering into negotiated settlements the employers intend to breach.[91] Furthermore, the Fourth Circuit, in rejecting the strict requirement of a right to sue notice, correctly gave greater consideration to the substantive policies of Title VII rather than to a possible technical reading of the language of Title VII's notice requirement.[92]

The Fourth Circuit in *Perdue* also correctly held that the substantive policies underlying Title VII's notice requirement supported a broad interpretation of Title VII's enforcement procedures by allowing a plaintiff to bring suit in federal court upon proof of a breach of a conciliation agreement.[93] Courts have described Title VII's enforcement mechanisms as being the result of a balance struck between Congress' desire for private dispute resolution and the desire for effective compliance with Title VII.[94] The Fourth Circuit's holding

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(district court's interpretation of Title VII's notice section bars claimant from federal court when employer breached agreement). Courts should construe Title VII provisions to allow claimants to enforce Title VII claims because Congress intended Title VII to eliminate discriminatory employment practices. *See* Clark v. Chasen, 619 F.2d 1330, 1334 (9th Cir. 1980) (courts should not impede Title VII's purpose of eliminating employment discrimination); *see also* H.R. REP. No. 238, 92nd Cong. 1st Sess. 3, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2137, 2139 (Title VII meant to eliminate discrimination). In enacting the Equal Employment Opportunity Act of 1972, Congress recognized that the pre-1972 enforcement procedures of the EEOC were inadequate to enforce effectively Title VII. *Id.* Congress granted the EEOC more effective enforcement powers in the Equal Employment Opportunity Act. *Id.* The EEOC's new civil enforcement powers included the ability to issue cease and desist orders and to file Title VII actions in federal court. *Id.* With the new enforcement powers, the EEOC could help achieve Title VII's purpose of eliminating discriminatory employment practices. *Id.; see supra* note 4 (discussion of EEOC's pre-1972 enforcement powers); note 7 (discussion of post-1972 EEOC enforcement powers).

90. 690 F.2d at 1094 (Perdue able to bring Title VII suit in federal court upon proof that employer breached settlement).

91. *See infra* notes 89-90 and accompanying text (*Perdue* holding promotes effective enforcement of Title VII). In addition to discouraging employers from negotiating in bad faith, the *Perdue* holding will also promote the elimination of discrimination by simplifying the preconditions to a Title VII federal suit. *See infra* text accompanying notes 85-86 (*Perdue* court rejected district court's strict interpretation that Title VII requires right to sue notice to satisfy Title VII's jurisdictional prerequisites); *cf.* Clark v. Chasen, 619 F.2d 1330, 1334 (9th Cir. 1980) (additional jurisdictional prerequisites impede elimination of discrimination); Hart v. J.T. Baker Chemical Corp., 598 F.2d 829, 831 (3d Cir. 1979) (congressional purpose of Title VII is to eliminate discrimination).

92. *See* 690 F.2d at 1093 (interpretation of Title VII based upon policies underlying Title VII's notice requirement); *supra* notes 48-52 and accompanying text (Supreme Court supports *Perdue* court's liberal interpretation of Title VII); *supra* text accompanying notes 83-85 (technical reading of Title VII inappropriate).

93. *See* 690 F.2d at 1095 (policies of Title VII's notice requirement support decision that only entitlement to right to sue notice satisfies federal jurisdiction); *see also infra* notes 88-94 and accompanying text (*Perdue* holding protects Title VII enforcement procedures).

94. *See* Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 463-64 (1975) (time limit signifies balancing of competing private and administrative interests); *see also* Note, *Developments In The Law: Employment Discrimination And Title VII Of The Civil Rights Acts of 1964*, 84 HARV. L. REV. 1109, 1208 (1971) (180 day period reflects limited deference for conciliation) [hereinafter cited as *Employment Discrimination*].

achieved a sound balance of these competing interests by requiring a Title VII claimant to comply with the available administrative remedies before attempting civil action.[95] Furthermore, the effect of *Perdue* is to allow a Title VII claimant access to federal courts when that party is able to prove exhaustion of administrative remedies, thereby satisfying Congress' preference for private dispute resolution while still promoting enforcement of Title VII.[96]

In addition to promoting Congress' preference for private resolution of Title VII disputes, the Fourth Circuit's holding that a plaintiff must show entitlement to a right to sue notice also satisfied the congressional policy of preventing duplicitous litigation.[97] In *Perdue*, the Fourth Circuit required Perdue to prove entitlement by showing that the EEOC would not issue a right to sue notice even though Stone breached the negotiated settlement.[98] The *Perdue* court, therefore, required Perdue to prove that the EEOC closed the case by proving that the EEOC would no longer act on Perdue's behalf.[99] As a result, the *Perdue* court satisfied the policy of preventing duplicitous litigation because the danger of duplicitous litigation was no longer applicable once Perdue proved that the EEOC closed the case.[100]

In addition to preventing duplicitous litigation and ensuring exhaustion of administrative remedies, Title VII's notice requirement also serves to begin the ninety-day time limit within which the Title VII claimant must bring suit in federal court.[101] The ninety-day time limit protects employers from Title VII claimants who bring stale claims after apparently acquiescing to an employer's discriminatory practices.[102] The right to sue notice, however, also

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95. 690 F.2d at 1095. In *Perdue*, the Fourth Circuit remanded the case to allow Perdue to show that Stone breached the negotiated settlement. *Id.* By requiring Perdue to show that Stone had breached the negotiated settlement, the Fourth Circuit required Perdue to demonstrate that she had exhausted the administrative remedies. *Id.*

96. *See id.* (Perdue allowed to bring Title VII action in federal court upon proof of breach of settlement agreement); *see also* H.R. REP. No. 238, 92 Cong., 2d Sess. 12, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2137, 2147-48 (180 day time limit allows individual to escape from occasional administrative delays); Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 879-80 (1972) (180 day time limit allows individuals to enforce Title VII).

97. 690 F.2d at 1094.

98. *See id.* (*Perdue* court remanded case to allow Perdue to prove entitlement to a right to sue notice by demonstrating that Stone breached the settlement agreement).

99. *See supra* note 40 (*Perdue* court required Perdue on remand to prove that Perdue had notice that EEOC would no longer act on Perdue's behalf).

100. *See* Truvillion v. King's Daughters Hospital, 614 F.2d 520-527 (5th Cir. 1981) (purpose of notice is to reduce possibility of duplicative private suits); Fields v. Village of Skokie, 502 F. Supp. 456, 458 (N.D. Ill. 1980) (Congress based policy against duplicitous litigation due to concern that EEOC be given opportunity to resolve disputes); *Employment Discrimination, supra* note 94, at 1208 (Congress preferred private resolution of Title VII disputes); *see also supra* notes 17-18 and accompanying text (letter informing Perdue that EEOC closed case).

101. 690 F.2d at 1094; *see* 42 U.S.C. § 2000e-5(f)(1) (party has 90 days after receipt of right to sue notice to bring private suit).

102. *See* Delaware State College v. Ricks, 449 U.S. 250, 253 (1980) (limitations period protects employers from stale claims); Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 463-64 (1975) (time limits protect employers from stale claims).

serves the interests of Title VII claimants by formally notifying the claimants that the EEOC has closed the case and that the ninety-day time limit has begun.[103] In *Perdue*, the Fourth Circuit correctly equated the EEOC letter informing Perdue that the EEOC could not issue a right to sue notice following a negotiated settlement with a formal right to sue notice.[104] The EEOC letter notified Perdue that the EEOC had closed the case and that Perdue would have to pursue any Title VII grievance individually.[105] The EEOC letter, therefore, achieved the same effect as a right to sue letter in terms of notifying Perdue that the EEOC closed the case.[106] Furthermore, the *Perdue* court's conclusion equating the EEOC letter and a formal right to sue notice sufficiently protected the interests of employers from stale claims by holding that the EEOC letter activated the ninety-day time limit.[107] The *Perdue* court's holding, therefore, satisfies the three policies underlying Title VII's notice requirement promoting private dispute resolution, preventing duplicitous litigation, and protecting employers from stale claims.[108]

The Fourth Circuit in *Perdue* held that a Title VII claimant need only prove entitlement to a right to sue notice to satisfy Title VII's jurisdictional requirements.[109] The *Perdue* court's holding soundly balances the underlying policies of the right to sue notice requirement by providing a logical equivalent to the right to sue notice.[110] Furthermore, the *Perdue* court's holding reaffirms the language in past Supreme Court Title VII decisions that Title VII grants lower courts plenary powers to broadly construe Title VII in order to provide Title VII claimants the most complete relief possible.[111] Finally, the *Perdue* holding expands Title VII protection within the Fourth Circuit by promoting more efficient elimination of discrimination.[112]

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103. *See* H.R. REP. No. 238, 92nd Cong. 2d Sess. 12 *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS, 2137, 2147 (right to sue letter notifies aggrieved party of time limit within which party must bring suit).

104. 690 F.2d at 1094; *see supra* text accompanying notes 99-101 (EEOC letter in *Perdue* equivalent to formal right to sue notice).

105. *See* 690 F.2d at 1092 (EEOC letter informed Perdue that EEOC could not issue right to sue notice); *see also supra* note 97 and accompanying text (right to sue letter notifies party of 90 day limit).

106. *See supra* notes 97, 99 and accompanying text (both *Perdue* letter and right to sue letter notify claimant of EEOC's decision to close case).

107. 690 F.2d at 1094. In *Perdue*, the Fourth Circuit protected employers from stale claims by appointing the district court to determine when the 90-day period began. *Id.*

108. *See supra* text accompanying notes 96, 100, 107 (*Perdue* holding satisfies three policies underlying Title VII's notice requirement).

109. *See supra* text accompanying notes 41-42 (plaintiff need only show entitlement to right to sue notice to maintain jurisdiction under Title VII).

110. *See supra* notes 93-108 and accompanying text (*Perdue* holding soundly balances underlying policies of right to sue notice requirement).

111. *See supra* notes 48-56 and accompanying text (language in past Supreme Court Title VII cases supports reasoning and result of *Perdue* holding).

112. *See supra* notes 53-56, 81-86 and accompanying text (*Perdue* holding promotes more effective enforcement of Title VII).

B. *Sexual Harassment: Stating and Proving a Claim Under Title VII*

Congress enacted Title VII of the Civil Rights Act of 1964 (Title VII)[1] to remedy discrimination in all areas of employment by prohibiting employment discrimination on the basis of race, color, sex, religion or national origin.[2] Courts recently have held that Title VII protects victims of sexual harassment by applying Title VII to harassment that does not affect an employee's tangible job benefits, such as wages, promotion or work hours.[3] This new sexual harassment claim, called the condition of work claim, involves the creation of a hostile or offensive work environment in violation of Title VII through sustained verbal or physical abuse, directed at an employee because of the employee's sex.[4] Since courts only recently have recognized condition of work

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1. 42 U.S.C. §§ 2000e to e-17 (1976 & Supp. V 1981) (Title VII). Title VII prohibits an employer, employment agency, labor organization or the federal government from discriminating against an individual with respect to hiring and discharge policies or the compensation, terms, conditions or privileges of an individual's employment. *Id.* § 2000e-2(a)-(c), e-16. Title VII also prohibits an employer, employment agency, labor organization or the federal government from discriminating against an individual in retaliation for that individual's legal activities opposing unlawful employment practices. *Id.* §§ 2000e-3, e-16. Title VII, however, does not require an employer to give preferential treatment in employment practices to minority job applicants or employees. *Id.* § 2000e-2(j). Nor does Title VII prohibit an employer, employment agency or labor organization from discriminating against an individual because the individual is a member of the Communist party or Communist-front organizations. *Id.* § 2000e-2(f). To enforce Title VII, Congress established the Equal Employment Opportunity Commission (EEOC). *Id.* § 2000e-4; *see infra* note 140 (powers and procedures of the EEOC).

2. *See* Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978) (Congress intended Title VII to prohibit all types of sex discrimination); Rogers v. Equal Employment Opportunity Comm'n., 454 F.2d 234, 238 (5th Cir.) (courts should interpret Title VII liberally to achieve Congress' goal of ending discrimination), *cert. denied*, 406 U.S. 957 (1971). Title VII applies as equally to sex discrimination as to racial, ethnic or religious discrimination. *See* H.R. REP. No. 238, 92nd Cong., 2d Sess. ____, *reprinted in* 1972 U.S. CODE & CONG. AD NEWS 2137, 2141 (sex discrimination is no less serious than other types of unlawful discrimination). *But see* Wells, *Sex Discrimination And Title VII*, 43 U.M.K.C. L. REV. 273, 274 (1975) (provision in Title VII relating to sex discrimination was legislative afterthought introduced as amendment to original bill).

3. *See, e.g.*, Katz v. Dole, 709 F.2d 251, 256 (4th Cir. 1983) (sustained verbal abuse that led to existence of sexually hostile working environment constituted Title VII violation); Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982) (sexual advances unrelated to job benefits violate Title VII); Bundy v. Jackson, 641 F.2d 934, 943-44 (D.C. Cir. 1981) (sexual advances unrelated to job benefits violate Title VII).

4. *See* Katz v. Dole, 709 F.2d 251, 256 (4th Cir. 1983) (sustained verbal abuse of employee created sexually offensive work environment which violated Title VII); Henson v. City of Dundee, 682 F.2d 897, 905 (11th Cir. 1982) (demeaning sexual inquiries and insults combined with repeated sexual advances toward employee created offensive work environment in violation of Title VII); Bundy v. Jackson, 641 F.2d 934, 946 (D.C. Cir. 1981) (repeated sexual advances and inquiries toward employee violated Title VII by creating offensive work environment); Cooley v. Consolidated Rail Corp., 561 F. Supp. 645, 647 (E.D. Mich. 1982) (employer's constant remarks about plaintiff's breasts and employer's recording of plaintiff's menstrual periods on office calendar created offensive working environment which violated Title VII); Morgan v. Hertz Corp., 27 Fair Empl. Prac. Cas. (BNA) 990, 994 (W.D. Tenn. 1981) (continuous sex-related questioning of employee by employer created offensive working environment). Most courts have held that

claims as violating Title VII,[5] courts have adopted conflicting methods concerning how a plaintiff proves a condition of work claim.[6]

The confusion of courts concerning condition of work claims arises from the difference between condition of work claims and the more common *quid pro quo* harassment claim.[7] The *quid pro quo* claim involves an employer conditioning future job benefits upon an employee's submission to the employer's sexual advances.[8] Unlike condition of work claims, *quid pro quo* claims require a nexus between the harassment and job benefits.[9] The primary

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sexual harassment creates an offensive environment if the harassment is extensive and uninvited by the employee. *See, e.g.*, Henson v. City of Dundee, 682 F.2d 897, 903-04 (11th Cir. 1982) (sexual harassment must be uninvited by employee and substantial enough to affect term, condition, or privilege of employment to create offensive working environment); Gan v. Kepro Circuit Sys., 27 Empl. Prac. Dec. (CCH) ¶ 32,379, at 23,648-49 (E.D. Mo. 1982) (vulgar language did not create offensive work environment where plaintiff initiated conversations); Walter v. KFGO Radio, 518 F. Supp. 1309, 1314 (D.N.D. 1981) (isolated bottom-patting incidents did not create offensive working environment); Halpert v. Wertheim & Co., 27 Fair Empl. Prac. Cas. (BNA) 21, 23-34 (S.D.N.Y. 1980) (truck driver language at office did not create offensive working environment where plaintiff contributed to language).

5. *See* Attanasio, *Equal Justice Under Chaos: The Developing Law of Sexual Harassment*, 51 U. CIN. L. REV. 1, 7 (1982) (first case to recognize that sexual harassment without tangible job detriment violated Title VII was Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981)); *infra* notes 86-90 and accompanying text (discussion of *Bundy* holding that sexually offensive working environment violates Title VII).

6. *Compare* Henson v. City of Dundee, 682 F.2d 897, 905 n.11 (11th Cir. 1982) (normal principles of pleading and proof allocation apply to condition of work claims under Title VII) *with* Katz v. Dole, 709 F.2d 251, 256 (4th Cir. 1983) (*Katz* court established shifting allocation of proof scheme for Title VII condition of work claims).

7. *See* Attanasio, *supra* note 5, at 6 (courts treat sexual harassment claims differently from Title VII discrimination claims); *cf. supra* note 6 and accompanying text (courts differ over method of proof for condition of work claims).

8. *See* Henson v. City of Dundee, 682 F.2d 897, 908 n.18 (11th Cir. 1982) (*quid pro quo* harassment entails an employer demanding sexual favors from employee in exchange for job benefits); *see also* Miller v. Bank of Am., 600 F.2d 211, 212-13 (9th Cir. 1979) (discharge of employee for refusing supervisor's demands for sex constituted Title VII violation); Garber v. Saxon Business Prods. Inc., 552 F.2d 1032, 1032 (4th Cir. 1977) (per curiam) (employer may violate Title VII by discharging employee for refusing supervisor's sexual advances); Tompkins v. Public Serv. Elec. & Gas, 568 F.2d 1044, 1046 (3rd Cir. 1977) (supervisor's denial of employee's promotion in retaliation for rebuffed sexual advances violated Title VII); Barnes v. Costle, 561 F.2d 983, 995 (D.C. Cir. 1977) (Title VII violated if supervisor eliminated employee's job in retaliation for rebuffed sexual advances); Williams v. Civiletti, 487 F. Supp. 1387, 1388 (D.D.C. 1980) (discharge of employee for refusing supervisor's sexual advances violated Title VII); Heelan v. Johns-Manville Corp., 451 F. Supp. 1382, 1390 (D. Colo. 1978) (employer violated Title VII by discharging employee for refusing employer's sexual advances); Munford v. James T. Barnes & Co., 441 F. Supp. 459, 466 (E.D. Mich. 1977) (Title VII violated if employee discharged for refusing to have sexual relations with supervisor).

9. *See* Fisher v. Flynn, 598 F.2d 663, 665 (1st Cir. 1979) (plaintiff must allege nexus between sexual advances and adverse employment action to state Title VII *quid pro quo* claim); Hill v. BASF Wyandotte Corp., 27 Fair Empl. Prac. Cas. (BNA) 66, 71 (E.D. Mich. 1981) (plaintiff must show nexus between harassment and discharge to establish *prima facie* case of *quid pro quo* harassment); Davis v. Bristol Laboratories, 26 Fair Empl. Prac. Cas. (BNA) 1351, 1352-53 (W.D. Okla. 1981) (plaintiff must show nexus between harassment and discharge to establish *prima facie* case of *quid pro quo* harassment); Smith v. Rust Eng'g Co., 18 Empl. Prac. Dec.

issue in a *quid pro quo* claim is whether the employer intended to deny job benefits to an employee in retaliation for rebuffed sexual advances.[10] To resolve the issue of intent in *quid pro quo* claims, courts generally have adopted a variation of the Supreme Court's allocation of proof scheme in Title VII disparate treatment claims.[11]

(CCH) ¶ 8698, at 4783-84 (N.D. Ala. 1978) (court dismissed *quid pro quo* claim because no nexus between verbal abuse and job benefits).

10. *See supra* note 9 (cases denying Title VII action because sexual harassment not related to job benefits).

11. *See* Hall v. F.O. Thacker Contracting Co., 24 Fair Empl. Prac. Cas. (BNA) 1499, 1502 (N.D. Ga. 1980) (court applied Supreme Court's allocation of proof scheme for disparate treatment claims to *quid pro quo* harassment claim); Heelan v. Johns-Manville Corp., 451 F. Supp. 1382, 1390 (D. Colo. 1978) (court established allocation of proof scheme for *quid pro quo* harassment claim). *See infra* notes 19-24 and accompanying text (requirements of *prima facie* case and allocation of burden of proof in disparate treatment claims). In applying the allocation of proof scheme for disparate treatment claims to *quid pro quo* claims, courts have differed over the allocation of proof between the parties. *See* Attanasio, *supra* note 5, at 37 (courts have applied varying burdens to defendants in sex discrimination cases).

For example, in *Hall v. F.O. Thacker Contracting Co.*, the District Court for the Northern District of Georgia modified only the *prima facie* case requirements when adopting the disparate treatment proof scheme to a *quid pro quo* claim. 24 Fair Empl. Prac. Cas. (BNA) at 1503. The *Hall* court required the plaintiff to prove a *prima facie* case of *quid pro quo* harassment by demonstrating that a supervisor made sexual advances to the plaintiff, that the supervisor conditioned the plaintiff's employment on submission to the advances, that the supervisor fired the plaintiff for refusing the advances, and that the supervisor did not make similar advances to male employees. *Id.* Once the plaintiff established a *prima facie* case of *quid pro quo* harassment, the court shifted the burden of proof to the employer to articulate legitimate, nondiscriminatory reasons for discharging the plaintiff. *Id.* If the employer successfully rebutted the plaintiff's *prima facie* showing of harassment, then the court allowed the plaintiff to show the employer's legitimate reasons for firing the plaintiff were merely pretext for discrimination. *Id.* The court, however, noted that the ultimate burden of persuasion remains with the plaintiff throughout the process. *Id.; see* Henson v. City of Dundee, 682 F.2d 897, 911 n.22 (11th Cir. 1982) (*Henson* court applied disparate treatment allocation of proof scheme to *quid pro quo* claim).

In *Heelan v. Johns-Manville Corp.*, however, the District Court for the District of Colorado modified the allocation of proof scheme in a *quid pro quo* claim, placing a burden on the employer greater than the employer's burden in disparate treatment claims. 451 F. Supp. at 1390-91. The *Heelan* court required the plaintiff to establish a *prima facie* case of *quid pro quo* harassment by proving that the plaintiff's submission to a supervisor's sexual advances was a condition of plaintiff's employment, that the advances substantially affected the plaintiff's employment, and that the advances did not affect employees of the opposite sex. *Id.* at 1390. Once the plaintiff proved a *prima facie* case of *quid pro quo* harassment, the court shifted the burden to the employer to rebut the plaintiff's *prima facie* case by showing legitimate reasons for discharging the plaintiff. *Id.* at 1390-91. The court stated that the employer must show by the clear weight of the evidence that the legitimate reasons for the discharge were not a pretext for discrimination. *Id.; see* Williams v. Civiletti, 487 F. Supp. 1387, 1389 (D.D.C. 1980) (*Williams* court placed heavy burden on defendant to rebut plaintiff's *prima facie* showing that supervisor discharged plaintiff because plaintiff's affair with supervisor ended); *infra* note 97 (*Bundy* court placed heavy burden on employer to rebut plaintiff's *prima facie* showing of *quid pro quo* harassment if plaintiff had already proved condition of work claim).

Unlike the *Thomas* court, those courts such as *Heelan* and *Williams* which place a heavy rebuttal burden on the employer may violate the *McDonnell Douglas* mandate that the plaintiff always bears the burden of persuasion in a disparate treatment claim. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) (plaintiff always bears ultimate burden of

Like *quid pro quo* harassment claims, Title VII disparate treatment claims involve an employer denying job status or benefits to a plaintiff for discriminatory reasons.[12] An employer's decision regarding the hiring of personnel or extension of job benefits to employees may concern a variety of factors such as job performance, qualifications or hiring needs.[13] Thus the main problem in a disparate treatment claim is determining an employer's motives behind an adverse employment decision.[14] Since direct proof of discriminatory intent is hard to produce,[15] the Supreme Court, in *McDonnell*

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persuasion in Title VII disparate treatment claim); Attanasio, *supra* note 5, at 37-38 (courts which place rebuttal burden greater than burden of production on employer violate *McDonnell Douglas* precepts).

12. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (disparate treatment claim involves an employer acting unfavorably toward certain people on account of race, color, religion, sex, or national origin). In a Title VII disparate treatment claim, the central issue is whether an employer intended to discriminate against a plaintiff in making an employment decision. *Id.* The intent question in disparate treatment claims distinguishes disparate treatment claims from the other major Title VII claim, the disparate impact claim. *Id.; see* 2 A. LARSON & L. LARSON, EMPLOYMENT DISCRIMINATION, § 50.40, at 10-40 (1983) (disparate impact cases contrast with disparate treatment cases because disparate impact cases do not involve proof of employer's discriminatory motive). The disparate impact claim involves a facially neutral employment policy which operates to discriminate against certain groups. *See Teamsters*, 431 U.S. at 335 n.15. The main issue in disparate impact claims is whether a facially neutral employment policy is job-related, or a business necessity. *See* 2 A. LARSON & L. LARSON, *supra*, § 50.40, at 10-40; *see also* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (test for legality of facially neutral employment policies in disparate impact claims is whether employment policies are business necessity). *Quid pro quo* harassment claims are disparate treatment claims rather than disparate impact claims because *quid pro quo* claims involve the question whether an employer intentionally discriminated against an employee in retaliation for rebuked sexual advances. *Cf.* Henson v. City of Dundee, 682 F.2d 897, 909-11 (11th Cir. 1982) (*Henson* court used disparate treatment analysis for resolving intent to discriminate issue in *quid pro quo* harassment claim).

13. *See* 2 A. LARSON & L. LARSON, *supra* note 12, § 50.70, at 10-46 to -48 (employment decisions often involve subtle factors not definable in objective terms). Especially in professional and non-routine jobs, subjective factors such as personality or attitude may weigh heavily on an employer's decision to hire or promote an employee. *Id.* § 50.72(c), at 10-69; *cf.* Rowe v. General Motors Corp., 457 F.2d 348, 359 (5th Cir. 1972) (court stated that promotion procedures which depended entirely on subjective evaluation were ready mechanisms for discrimination).

14. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) (ultimate question in disparate treatment claims is whether employer intentionally discriminated against plaintiff).

15. *See* Gates v. Georgia-Pacific Corp., 326 F. Supp. 397, 398-99 (D. Or. 1970) (direct proof of discrimination is virtually impossible to obtain), *aff'd*, 492 F.2d 292 (9th Cir. 1974); 2 A. LARSON & L. LARSON, *supra* note 12, § 50.10, at 10-4 to -6 (plaintiffs must resort to circumstantial evidence to prove discriminatory intent in disparate treatment cases because sophisticated employers do not produce direct evidence of discrimination); Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205, 1224 (1981) (direct proof of discrimination is rare because discrimination involves subtle rather than overt practices); Note, *Sexual Harassment and Title VII: The Foundation for the Elimination of Sexual Cooperation as an Employment Condition*, 76 MICH. L. REV. 1007, 1021 (1978) (subtle forms that employers use to discriminate against employee include failing to train employee properly, assigning employee undesirable work, or scrutinizing employee's work product more closely than other employees' work product); Comment, *Allocations of Burdens of Proof and Persuasion in Disparate Treatment Cases of Title VII Litigation*, 39 WASH. & LEE L. REV. 637,

Douglas Corp. v. Green,[16] established a three-pronged allocation of proof scheme designed to aid the trier of fact in determining whether an employer denied job status or benefits to a plaintiff for discriminatory reasons.[17]

In *McDonnell Douglas*, the plaintiff claimed that McDonnell Douglas refused to hire him because he was black.[18] In addressing Green's disparate treatment claim, the Court stated that to prove a disparate treatment claim of racial discrimination under Title VII, a plaintiff must first prove a *prima facie* case of racial discrimination[19] by showing that the plaintiff belonged to a racial minority, that the plaintiff was qualified for the position sought, and that the defendant failed to hire the plaintiff when filling the position.[20] The *McDonnell Douglas* Court noted that the elements of a *prima facie* case in disparate treatment claims will vary depending upon the particular fact situations involved.[21] The Court held that once a plaintiff proves a *prima facie* case of disparate treatment, the burden of proof shifts to the defendant to rebut the plaintiff's *prima facie* case by producing evidence of legitimate, non-

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639 (1982) (plaintiffs have difficulty producing direct evidence of employer's discriminatory intent) [hereinafter cited as *Allocations of Burdens of Proof*].

16. 411 U.S. 792 (1973).

17. *See id.* at 802-06; *see also* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) (*McDonnell Douglas* allocation of proof scheme helps litigants and courts resolve question of intent to discriminate in disparate treatment claims); Attanasio, *supra* note 5, at 11 (Court designed *McDonnell Douglas* proof scheme to determine employer's intent in employment decisions by focusing on employee's objective qualifications rather than employer's hidden intentions).

18. 411 U.S. at 794-96. The plaintiff in *McDonnell Douglas* was a black engineer who worked for defendant McDonnell Douglas until McDonnell Douglas laid him off work. *Id.* at 794. While the plaintiff was laid off, he participated in an illegal "stall-in" and "lock-in" against McDonnell Douglas. *Id.* at 794-95. When McDonnell Douglas began putting laid off employees back to work, McDonnell Douglas refused to rehire the plaintiff. *Id.* at 796. Plaintiff sued McDonnell Douglas alleging that McDonnell Douglas would not hire the plaintiff because of the plaintiff's involvement in the civil rights movement. *Id.* McDonnell Douglas claimed that it rejected the plaintiff because the plaintiff participated in the illegal protests against McDonnell Douglas. *Id.; see id.* at 807 (Court remanded *McDonnell Douglas* to allow plaintiff opportunity to prove McDonnell Douglas' justifications for refusing to hire plaintiff were pretext for discrimination).

19. *Id.* at 802; *see* Furnco Const. Corp. v. Waters, 438 U.S. 567, 577 (1978) (*McDonnell Douglas prima facie* case is practical way to evaluate evidence concerning discriminatory intent of employer). Establishment of a *prima facie* case of disparate treatment creates an inference of intent to discriminate by an employer. *Id.* Since the *prima facie* case only creates an inference of discrimination, the establishment of a *prima facie* case is not an ultimate or conclusive finding of fact concerning an employer's motive behind an employment decision. *Id.* at 579-80. The establishment of a *prima facie* case merely triggers the shifting burden of proof scheme which leads to the ultimate finding on the intent question. *Id.* at 577-80; *see infra* notes 20-24 and accompanying text (discussion of *McDonnell Douglas* allocation of proof scheme for disparate treatment cases).

20. *See* 411 U.S. at 802. The *McDonnell Douglas* court found that the plaintiff established a *prima facie* case of disparate treatment by showing that plaintiff was black, that McDonnell Douglas conceded that the plaintiff qualified for the position sought, and that *McDonnell Douglas* continued to seek applicants for the position after refusing to hire the plaintiff. *Id.*

21. *Id.* at 802 n.13 (*McDonnell Douglas prima facie* case for disparate treatment in hiring does not apply to all fact situations).

discriminatory reasons justifying the adverse employment action.[22] If the defendant carried the burden of production, the Court required the plaintiff to show that the defendant's justifications were not the real reasons for refusing to hire the plaintiff but were merely pretext for the discrimination.[23] Under the *McDonnell Douglas* proof scheme, however, the ultimate burden of persuading the trier of fact of discriminatory intent always remains on the plaintiff.[24]

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22. *Id.* at 802. An employer's burden to rebut a plaintiff's *prima facie* disparate treatment showing is a burden of production. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254-55 (1981) (employer rebuts plaintiff's *prima facie* disparate treatment showing by producing through admissible evidence reasons for refusing to hire plaintiff). A burden of production is merely a burden of going forward with enough evidence on an issue to allow the factfinder to act on the issue. *See* Belton, *supra* note 15, at 1216 (failure to meet burden of production on particular issue results in removal of issue from consideration of jury). The *McDonnell Douglas* court determined that McDonnell Douglas met its burden of production and successfully rebutted the plaintiff's *prima facie* case of disparate treatment by articulating that McDonnell Douglas refused to hire the plaintiff because the plaintiff engaged in illegal activity against McDonnell Douglas. *See* 411 U.S. at 803-04 (Title VII does not compel an employer to hire someone who participated in illegal activity against employer).

23. 411 U.S. at 804-05. Under the *McDonnell Douglas* allocation of proof scheme, the plaintiff's burden to show the employer's justifications for the adverse employment action is a burden of persuasion. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981) (plaintiff's burden to show pretext merges with plaintiff's ultimate burden of persuasion to show employer's discriminatory intent). A party with the burden of persuasion must convince the trier of fact that certain elements exist in fact or the party will lose the case. *See* Belton, *supra* note 15, at 1216 (party having burden of persuasion will lose if factfinder's mind is undecided after considering all evidence). Under *McDonnell Douglas*, a plaintiff meets its burden of persuasion by proving pretext by a preponderance of the evidence. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981) (plaintiff's burden to prove pretext merges with plaintiff's ultimate burden of persuasion in disparate treatment claims).

24. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). In *Burdine*, the Supreme Court clarified the *McDonnell Douglas* proof allocation scheme for disparate treatment claims. *Id.* at 253-59. The plaintiff in *Burdine* claimed that the defendant employer refused to promote her and eventually fired her because the plaintiff was a woman. *Id.* at 251. The Fifth Circuit found that the plaintiff established a *prima facie* case of disparate treatment for discharge and for failure to promote by showing that the plaintiff qualified for a job which the employer gave to a male employee of inferior qualifications. *See* Burdine v. Texas Dep't of Community Affairs, 608 F.2d 563, 568 (5th Cir. 1979), *vacated*, 450 U.S. 248 (1981). The Fifth Circuit then held that the employer did not rebut the plaintiff's *prima facie* case because the employer failed to show by a preponderance of the evidence legitimate, non-discriminatory reasons for the adverse employment action. *Id.* at 567, 569. The employer appealed, alleging that the Fifth Circuit misallocated the employer's burden of proof to rebut the plaintiff's *prima facie* case. *See* 450 U.S. at 251-52.

The Supreme Court agreed with the plaintiff and reversed the Fifth Circuit, holding that the Fifth Circuit erred in requiring the defendants to rebut the plaintiff's *prima facie* case by a preponderance of the evidence. 450 U.S. at 256-57. The *Burdine* Court stated that establishing a *prima facie* case merely creates an inference of discriminatory intent. *Id.* at 253-54. The Court explained that the defendant's burden to rebut this inference is a burden of production which the defendant carries by raising a genuine issue of fact about the question of intent to discriminate. *Id.* at 254-55; *see supra* note 22 (burden of production is burden of going forward with enough evidence to allow factfinder to act on issue). Since Title VII does not require employers to give preferential treatment to minorities, the Court declared that an employer need only explain clearly legitimate reasons for the employer's actions in order to carry its burden of production and rebut the plaintiff's *prima facie* case of disparate treatment. 450 U.S. at 257. The Court then

Although courts generally have applied the *McDonnell Douglas* allocation of proof scheme to *quid pro quo* claims,[25] the Fourth Circuit in *Katz v. Dole*[26] recently decided that the *McDonnell Douglas* burden of proof scheme did not apply to condition of work claims because the dominant question of discriminatory intent in disparate treatment claims is absent from the condition of work harassment claim.[27] In *Katz*, the plaintiff Deborah Ann Katz was the only female working on a federal air traffic control crew.[28] From May 1977 to May 1981 Katz's co-workers and supervisors subjected Katz to continual sexual harassment and verbal abuse.[29] Although Katz complained of the harassment to John J. Sullivan, the control crew's supervisor, Sullivan took no action to remedy the situation.[30] Instead, Sullivan responded to Katz's complaints with further sexual harassment.[31] In addition, Sullivan denied Katz's request for transfer to another crew, and denied Katz's requests regarding the scheduling of Katz's familiarization rides on airplanes.[32] When Katz sustained injuries in a fall, Sullivan initially placed Katz on regular sick leave rather than traumatic injury leave.[33] Traumatic injury leave provides more benefits to employees than does sick leave.[34] Katz finally arranged with Sullivan

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stated that once the defendant has rebutted the plaintiff's *prima facie* case, the plaintiff has the opportunity to prove that the defendant's legitimate reasons for the employment actions were actually pretext for discrimination. *Id.* at 255-56. The Court noted that the plaintiff could prove pretext by persuading a court that discriminatory intent more likely than not motivated the adverse employment decision or that the defendant's justifications for the adverse employment action were not credible. *Id.* at 256. Additionally, the *Burdine* Court noted that the ultimate burden of persuasion to prove the defendant's intent to discriminate always remains with the plaintiff. *Id.* at 253; *see* Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 29 (1978) (Stevens, J., dissenting) (defendant has burden to produce legitimate reasons for employment action but plaintiff always has burden of persuasion to prove discriminatory intent). The *Burdine* Court stated that at the last stage of the proof scheme the plaintiff's burden to prove pretext merges with plaintiff's ultimate burden of persuasion to prove the defendant's intent to discriminate. 450 U.S. at 256.

25. *See supra* note 11 and accompanying text (courts generally apply *McDonnell Douglas* application of proof scheme to *quid pro quo* harassment claims).

26. 709 F.2d 251 (4th Cir. 1983).

27. *Id.* at 255.

28. *Id.* at 253. As an air traffic controller, the plaintiff in *Katz* was an employee of the Federal Aviation Administration (FAA). *Id.*

29. *Id.* at 253-54. In *Katz*, witnesses testified at trial that employees often referred to Katz using obscene words. *Id.* The Fourth Circuit described the words as widely recognized to be intensely degrading. *Id.* at 254. *See generally* C. MILLER & K. SWIFT, WORDS AND WOMEN 109 (1977) (certain words offend people not only because of meaning but also because of disgust and violence in pronunciation of words). Conversations at Katz's workplace also centered on Katz's sexual abilities). *See* 709 F.2d at 254 (supervisor claimed he would accept transfer of Katz to his unit because of Katz's sexual prowess).

30. 709 F.2d at 254.

31. *Id.* The Fourth Circuit in *Katz* stated that when Katz complained to Sullivan about the sexual advances of another employee, Sullivan remarked that the harassment would stop if Katz would submit to the advances. *Id.*

32. *Id.* at 256.

33. *Id.*

34. *Id.*

to transfer to another crew in May, 1981.[35] In June, 1981, Katz brought suit against the Federal Aviation Administration (FAA) for sexual harassment in violation of Title VII.[36] The FAA subsequently fired Katz in September 1981 for illegally striking against the government.[37]

At trial in the District Court for the Eastern District of Virginia, Katz claimed that the verbal abuse she suffered while a member of Sullivan's crew was sexual harassment which violated Title VII.[38] Katz also claimed that Sullivan's denial of Katz's transfer and leave requests, and Sullivan's denial of Katz's plans for scheduling familiarization flights, was disparate treatment constituting gender discrimination in violation of Title VII.[39] The trial court ruled for the FAA on both the sexual harassment and disparate treatment claims, holding that Katz failed to establish that the FAA intended to discriminate against Katz.[40] Consequently, Katz appealed the trial court's holding to the Fourth Circuit.[41] On appeal, the Fourth Circuit affirmed the trial court's holding regarding the disparate treatment claim, and reversed the trial court's holding regarding the sexual harassment claim.[42]

In addressing Katz's sexual harassment claim, the Fourth Circuit identified Katz's claim as a condition of work claim rather than a *quid pro quo* claim because Katz alleged that her employer's demeaning sexual related behavior toward her created an offensive working environment.[43] The *Katz* court held that the creation of such an offensive work environment violated Title VII.[44] Furthermore, the court noted that since sexual harassment is almost

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35. *Id.* at 253.

36. *See id.* (named defendant in *Katz* was Secretary of Transportation who is FAA's superior).

37. *Id.*

38. *See id.* (Katz alleged that sexual harassment which she received created intimidating and offensive working environment in violation of Title VII).

39. *Id.; see supra* notes 12-17 and accompanying text (analysis of Title VII disparate treatment claims); *supra* notes 19-24 and accompanying text (McDonnell Douglas allocation of proof scheme for proving disparate treatment claims).

40. 709 F.2d at 253.

41. *Id.*

42. *Id.* at 257.

43. *Id.* at 255. The *Katz* court stated that although Katz suffered some *quid pro quo* harassment, Katz's claim was a condition of work claim because Katz alleged in her complaint that the sexual harassment created an offensive work environment. *Id.*

44. *Id.* at 254. The *Katz* court's holding that sexual harassment which created an offensive working environment violated Title VII is analogous to court decisions holding that racial harassment which created an offensive environment violated Title VII. *See* Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982) (sexual harassment which creates offensive environment prevents sexual equality just as racially offensive environment prevents racial equality); Bundy v. Jackson, 641 F.2d 934, 945 (D.C. Cir. 1981) (relevance of sexually offensive environment claims to racially offensive environment claims is beyond dispute); *see also* Taylor v. Jones, 653 F.2d 1193, 1199 (8th Cir. 1981) (racially offensive atmosphere in Arkansas National Guard constituted Title VII violation); Firefighters Inst. for Racial Equality v. City of St. Louis, 549 F.2d 506, 515 (8th Cir. 1977) (court stopped fireman's use of segregated supper clubs because clubs promoted discriminatory atmosphere), *cert. denied*, 452 U.S. 938 (1980); Rogers v. Equal Employment Opportunity Comm'n, 454 F.2d 234, 238-39 (5th Cir. 1971) (creation of racially offensive environment violated Title VII), *cert. denied*, 406 U.S. 957 (1972).

always intentional,[45] the primary issue in condition of work claims is whether the employer is liable for the harassment under the doctrine of *respondeat superior*.[46] The doctrine of *respondeat superior* provides that an employer is liable for the wrongful acts of the employer's employee committed during the course of employment.[47] Since condition of work claims involve the question of *respondeat superior* rather than the question of intentional discrimination, the *Katz* court separated Katz's condition of work claim from Katz's disparate treatment claim.[48]

The *Katz* court then established a two-pronged test for proving liability in condition of work claims.[49] Under the *Katz* court's two-pronged test, a plaintiff must first establish a *prima facie* case of sexual harassment by showing that substantial, continuing sexual harassment occurred.[50] The court stated

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45. *See* 709 F.2d at 255 (*Katz* court stated that sexual advance or insult is almost always intentional assault on individual's privacy) (citing Bundy v. Jackson, 641 F.2d 934, 945 (D.C. Cir. 1981)). The *Bundy* court stated that although some forms of sex discrimination, such as dress codes, may not necessarily indicate intentional discrimination, harassment of an employee through sustained sexual insults and advances is usually intentional. 641 F.2d at 945.

46. 704 F.2d at 255.

47. *See generally* Note, *The Responsibility of Employers For The Actions of Their Employees: The Negligent Hiring Theory of Liability*, 53 CHI.-KENT L. REV. 717, 718 (1978) (employer is vicariously liable for wrongful acts employee committed in scope of employee's employment). An employee acts within the scope of his employment when the employee furthers the employer's interest. *Id.* The common law, however, provided four exceptions for holding employers liable for the acts of employees even though the employees did not act within the scope of the employees' employment. *See Restatement (Second) of Agency* § 219(2) (1958). Under the common law exceptions to the scope of employment rule an employer is liable for his employee's acts if the employee intended the consequences, if the employer was negligent, if the conduct violated a duty which the employer could not delegate to the employee, or if the employee pretended to act under apparent authority from the employer. *Id.*

Sexual harassment is an intentional tort and therefore outside the scope of an employee's employment. *See* Barnes v. Costle, 561 F.2d 983, 995 (D.C. Cir. 1977) (Mackinnon, J., concurring) (employee sexually harassing another employee does not act within scope of employment). Consequently, courts have held employers liable for sexual harassment if the employer negligently allowed harassment to occur. *See* Tompkins v. Public Ser. Elec. & Gas Co., 568 F.2d 1044, 1048-49 (3rd Cir. 1977) (court stated that plaintiff must show employer had actual or constructive knowledge of harassment in order to hold employer liable for harassment); Barnes v. Costle, 561 F.2d 983, 993 (D.C. Cir. 1977) (employer may avoid liability for harassment by showing prompt remedial action taken to end harassment). Other courts have held an employer liable for the harassing acts of an employee if the employee was acting within his apparent authority when harassing other employees. *See* Henson v. City of Dundee, 682 F.2d 897, 909 (11th Cir. 1982) (employer is strictly liable for harassment by supervisors which causes tangible job detriment for employee); Hall v. F.O. Thacker Contracting Co., 24 Fair Empl. Prac. Cas. (BNA) 1499, 1503 (N.D. Ga. 1980) (employer liable for supervisors' harassment of employee where harassment related to job benefits). *See generally* Attanasio, *supra* note 5, at 30-34 (discussing vicarious liability of employers in sexual harassment cases).

48. 709 F.2d at 255.

49. *See id.* at 255-56 (*Katz* court stated that plaintiff asserting sexual harassment claim must show that harassment occurred and that employer was responsible for harassment to prove Title VII violation).

50. *Id.* at 256. The *Katz* court's requirement that sexual harassment must be continual and extensive to create an offensive working environment is similar to other courts' requirements

that an employer may rebut the plaintiff's *prima facie* case of sexual harassment by proving that the harassment did not occur, or by showing that the plaintiff suffered only isolated and trivial acts of harassment.[51] Second, the court determined that the plaintiff must prove *respondeat superior* by showing that the employer knew or should have known about the harassment but made no effective effort to stop the harassment.[52] The court stated that a plaintiff can prove the employer knew or should have known of the harassment by showing that the plaintiff complained of the harassment to the employer or by showing that the harassment was so extensive that the harassment could not have escaped the employer's notice.[53] The court, however, acknowledged that the employer may rebut the plaintiff's showing of *respondeat superior* either directly by proving that the employer had no knowledge of the harassment or indirectly by showing measures that the employer took to end the harassment.[54] The court maintained that the employer's burden to rebut the plaintiff's showing of *respondeat superior* was especially heavy if supervisory personnel were either party to or privy to the harassment because such actions by supervisory personnel indicate unmistakable acquiesence in or approval of the harassment.[55] The court, however, noted that the ultimate burden of persuasion concerning the existence of intentional harassment remains with the plaintiff throughout the two-pronged test.[56]

Applying the two-pronged test for liability in condition of work harassment cases to the facts in *Katz*, the Fourth Circuit determined that Katz had established a *prima facie* case of harassment by showing a pattern or practice of sustained sexual harassment.[57] As support for its finding that Katz had established a *prima facie* case, the court noted that the testimony of witnesses for both Katz and the FAA showed that the harassment was extensive and non-trivial.[58] The *Katz* court then stated that the defendants failed to produce

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for showing that racial harassment created an offensive working environment violating Title VII. *See, e.g.*, Johnson v. Bunny Bread Co., 646 F.2d 1250, 1257 (8th Cir. 1981) (infrequent and casual racial slurs did not constitute Title VII violation because they did not create an offensive environment); Spearman v. Southwestern Bell Tel. Co., 505 F. Supp. 761, 765 (E.D. Mo. 1980) (isolated touching incident and racial slur did not violate Title VII), *aff'd*, 662 F.2d 509 (1981); Equal Employment Opportunity Comm'n. v. Murphy Freight Lines, 488 F. Supp. 381, 384-85 (D. Minn. 1980) (racial jokes and abuse were continuous enough to violate Title VII); *but see* Vaughn v. Pool Offshore Co., 29 Fair Empl. Prac. Cas. (BNA) 1017, 1020 (5th Cir. 1982) (continuous derogatory racial remarks did not create an offensive environment where plaintiff remained on friendly relations with co-workers).

51. 709 F.2d at 256. *But see* Comment, *Sexual Harassment and Title VII*, 51 N.Y.U. L. REV. 148, 164 n.76 (isolated incident of harassment may be abusive enough to create offensive environment).

52. 709 F.2d at 256; *see supra* note 47 (discussion of *respondeat superior* issue in Title VII sexual harassment claims).

53. 709 F.2d at 256.

54. *Id.*

55. *Id.; see supra* note 47 and accompanying text (discussion of *respondeat superior* issue in Title VII sexual harassment cases).

56. *Id.*

57. *Id.*

58. *Id.*

evidence to rebut Katz's *prima facie* case of sexual harassment.[59] The court further found that Katz proved *respondeat superior* by establishing that Katz complained to Sullivan about the harassment, and that the harassment was so extensive that the FAA should have known about the harassment.[60] Although the FAA established the existence of an official policy against sexual harassment, the court determined that the mere existence of the policy did not serve to rebut Katz's showing of *respondeat superior* because the policy was ineffective and Sullivan's supervisors knew the policy was ineffective.[61] Since both Katz's *prima facie* showing of sexual harassment and her showing of *respondeat superior* remained unrebutted, the Fourth Circuit held that the FAA was liable for the harassment Katz suffered.[62]

After finding that Katz proved her sexual harassment claim, the Fourth Circuit addressed Katz's disparate treatment claim.[63] The *Katz* court stated that Katz established a *prima facie* case of disparate treatment by proving that Katz had scheduling problems concerning familiarization flights that male employees did not have.[64] The court also stated that Katz proved a *prima facie* case of disparate treatment by showing that Sullivan denied Katz's transfer requests, and that Sullivan refused to place Katz on traumatic injury leave.[65] The *Katz* court, however, found that the FAA rebutted Katz's *prima facie* case by establishing nondiscriminatory reasons for the FAA's treatment of Katz.[66] First, the court determined that the demands of Katz's training program prevented her from taking familiarization rides at certain times.[67] Second, the court determined that Sullivan could not grant Katz's transfer requests because no open positions existed on the crew Katz preferred.[68] Third, the court found that at the time Sullivan denied Katz traumatic injury leave most FAA supervisors did not understand the new provisions for traumatic injury leave.[69] Consequently, the court maintained that Sullivan's refusal to allow Katz the leave was the result of a misunderstanding rather than because of a discriminatory motive.[70] The Fourth Circuit then noted that Katz failed to introduce evidence to demonstrate that the FAA's articulated reasons for her adverse treatment were actually a pretext for discrimination.[71] Since Katz

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59. *Id.; see* see supra note 51 and accompanying text (*Katz* court stated that employer can rebut plaintiff's *prima facie* case by showing that harassment consisted of isolated incidents).

60. 709 F.2d at 256.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.; see supra* notes 19-21 and accompanying text (*McDonnell Douglas* requirements for establishing *prima facie* case of disparate treatment).

65. 709 F.2d at 256.

66. *Id.; see supra* note 22 and accompanying text (employer's burden to rebut plaintiff's *prima facie* case in Title VII disparate treatment claims); *supra* note 24 (*Burdine* Court's analysis of defendant's burden to rebut plaintiff's *prima facie* case of disparate treatment).

67. 709 F.2d at 256.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.; see supra* note 23 and accompanying text (plaintiff must show that employer's

failed to overcome the FAA's rebuttal of her *prima facie* case, the *Katz* court affirmed the district court's ruling for the FAA on the disparate treatment claim.[72]

Prior to the Fourth Circuit's decision in *Katz*, two other circuit courts had held that sexual harassment which created an offensive working environment violated Title VII.[73] For example, the District of Columbia Circuit Court of Appeals in *Bundy v. Jackson*[74] was the first court to hold that sexual harassment could constitute a violation of Title VII in the absence of proof of a tangible job detriment.[75] In *Bundy*, a supervisor of plaintiff Sarah Bundy repeatedly made sexual advances to Bundy at the office.[76] Although Bundy complained of the harassment to other supervisors, the supervisors did not act to remedy the situation.[77] When Bundy became eligible for promotion, Bundy's supervisor informed Bundy that the supervisor could not recommend Bundy for a promotion because of a promotion freeze.[78] Bundy later learned that the supervisor recommended the promotion of other male employees despite the promotion freeze.[79] Bundy subsequently brought a Title VII action against Bundy's employer in the District Court for the District of Columbia, claiming that the supervisor's sexual advances were sexual harassment in violation of Title VII.[80] Bundy also claimed that she suffered disparate treatment in violation of Title VII because the supervisor failed to recommend

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justification for adverse employment action was pretext for discrimination in order to prove disparate treatment claim).

72. 709 F.2d at 257. In *Katz*, Katz argued that since the district court erred in ruling on Katz's condition of work claim, the *Katz* court should also reverse the district court's ruling on the disparate treatment claim. *Id.* The Fourth Circuit, however, rejected Katz's argument because the condition of work and disparate treatment claims were separate and independent claims. *See id.* (*Katz* court stated that condition of work claim presented novel legal question whereas courts have settled questions over resolution of disparate treatment claims). *But see infra* note 92 and accompanying text (District of Columbia Circuit in *Bundy* held that proof of condition of work claim alters allocation of proof in disparate treatment claims).

73. *See* Henson v. City of Dundee, 682 F.2d 897, 905 (11th Cir. 1982) (sexual harassment which created offensive work environment violated Title VII); Bundy v. Jackson, 641 F.2d 934, 946 (D.C. Cir. 1981) (sexual advances creating offensive work environment violated Title VII).

74. 641 F.2d 934 (D.C. Cir. 1981).

75. *See* Attanasio, *supra* note 5, at 7. Although *Bundy* was the first federal circuit court to recognize that sexual harassment without tangible job detriment is a Title VII violation, the Minnesota Supreme Court in an earlier case used analogies to Title VII cases to rule that sexual harassment creating an offensive work environment violated the Minnesota Human Rights Act. *See* Continental Can Co. v. State of Minnesota, 297 N.W.2d 241, 249 (Minn. 1980) (offensive working environment violated Minnesota Human Rights Act if employer knew of offensive environment and did not act to remedy environment); MINN. STAT. § 363.03 (Supp. 1983).

76. 641 F.2d at 939-40. The *Bundy* court stated that Bundy's supervisor also questioned Bundy about her sexual proclivities. *Id.*

77. *Id.* at 940. The *Bundy* court stated that the supervisor responded to Bundy's complaint by making a sexual advance toward Bundy. *Id.*

78. *Id.*

79. *Id.*

80. *See* Bundy v. Jackson, 19 Fair. Empl. Prac. Cas. (BNA) 828, 829 (D.D.C. 1979) (Bundy claimed that working conditions were more onerous for her than for male employees), *rev'd*, 641 F.2d 938 (D.C. Cir. 1981).

Bundy for promotion in retaliation for the rebuffed sexual advances.[81] The district court ruled for the employer on the condition of work harassment claim, holding that sexual harassment without tangible job detriment does not violate Title VII.[82] The district court also ruled for the employer on the disparate treatment claim, holding that the employer had established legitimate, nondiscriminatory reasons for denying Bundy's promotion by showing that Bundy's work record did not merit a promotion.[83] Bundy subsequently appealed the district court's decision to the District of Columbia Circuit Court.[84] On appeal, the *Bundy* court reversed the district court's rulings on both the condition of work and disparate treatment claims.[85]

The *Bundy* court first addressed Bundy's condition of work claim, holding that sexual harassment which created an offensive work environment violated Title VII.[86] The court stated that Bundy proved a condition of work claim by showing that the employer permitted a pattern or practice of sexual harassment to exist at the workplace by allowing Bundy's supervisor to make continual sexual advances to her.[87] The court then determined that Bundy demonstrated that Bundy's employer permitted the harassment by showing that Bundy's supervisors participated in the harassment and that the employer, after learning of the harassment, did not act to remedy the situation.[88] The *Bundy* court stated that Bundy had proved a pattern of harassment by showing that substantial rather than isolated and trivial harassment occurred.[89] Since Bundy proved that her employer permitted a pattern of sexual harassment at the office, the *Bundy* court ruled for Bundy on the condition of work claim.[90]

After addressing Bundy's condition of work claim, the *Bundy* court reversed the district court's ruling on the disparate treatment claim because the district court did not allocate properly the burden of proof between the parties.[91] Although the court termed Bundy's denial of promotion claim a

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81. *Id.* at 829.

82. *Id.* at 832. The district court in *Bundy* ruled that the harassment Bundy suffered did not affect a term or condition of Bundy's employment and, therefore, did not violate Title VII. *Id.* Additionally, the district court found that neither Bundy nor her supervisors took the harassment seriously. *Id.*

83. *Id.* In support of its finding that Bundy's work record did not merit a promotion, the district court in *Bundy* stated that Bundy took extraordinary amounts of sick leave from work, that Bundy failed to file required reports, and that Bundy did not make as many field contacts as other similarly situated employees. *Id.* at 829-30. In addition, the court found that Bundy's employer promoted Bundy as fast or faster than male employees. *Id.* at 832.

84. 641 F.2d at 938.

85. *Id.* at 946, 953.

86. *Id.* at 943. In support of its holding that a sexually offensive environment violates Title VII, the *Bundy* court relied on Title VII cases which had held that a racially offensive environment violated Title VII. *Id.* at 944-45; *see supra* note 44 (cases holding that racially offensive environment violated Title VII).

87. 641 F.2d at 946.

88. *Id.* at 943.

89. *Id.* at 946.

90. *Id.*

91. *Id.* at 950. Since the *Bundy* court ruled that the trial court applied the wrong allocation

disparate treatment claim, the *Bundy* court treated the claim like a *quid pro quo* claim because Bundy alleged that her supervisor denied her a promotion in retaliation for Bundy's rejection of the supervisor's sexual advances.[92] The court held that the existence of an offensive work environment in violation of Title VII mandated a change in the burden of proof scheme for *quid pro quo* claims because once a plaintiff proves a condition of work claim the plaintiff has shown that the defendant discriminates against employees.[93] Since a plaintiff who has established a condition of work claim already has proven that the defendant discriminates against employees, the court determined that the plaintiff should not have to reprove the defendant's discriminatory intent in a *quid pro quo* claim.[94] Consequently the court modified the *McDonnell Douglas* allocation of proof scheme for cases involving both *quid pro quo* and condition of work claims.[95] The *Bundy* court stated that Bundy could prove a *prima facie* case of *quid pro quo* harassment by first proving that Bundy suffered a pattern of sexual harassment attributable to her employer, and then showing that the employer denied Bundy a promotion for which Bundy was eligible.[96] The court held that once Bundy established a *prima facie* case of *quid pro quo* harassment the burden would shift to the employer to prove that the employer had legitimate reasons for denying the promotion.[97]

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of proof scheme to Bundy's *quid pro quo* claim, the *Bundy* court did not rule on the correctness of the trial court's findings of fact. *Id.; see supra* note 82 and accompanying text (trial court found that Bundy did not merit promotion). The *Bundy* court, however, stated that if the court were to rule on the trial court's findings of fact, the court might reject the findings as clearly erroneous because the supervisors who evaluated Bundy's work were the supervisors involved in the harassment. 641 F.2d at 950.

92. *Id.* at 948. Although the *Bundy* court termed Bundy's claim for promotion a disparate treatment claim, the claim was a *quid pro quo* claim because Bundy alleged that her employer denied Bundy the promotion in retaliation for Bundy's rejection of the employer's sexual advances. *See id.* at 953 (court describes Bundy's claim as claim for denial of promotion in retaliation for rebuffed sexual advances); *see supra* notes 11-12 and accompanying text (relationship of *quid pro quo* and disparate claims).

93. *See* 641 F.2d at 952 (*Bundy* court determined that court should ease plaintiff's burden of establishing *prima facie* case of disparate treatment once plaintiff had proven discrimination occurred through harassment). Proof of discrimination through harassment is evidence of an employer's intent to discriminate against an employee. *See* Hatton v. Ford Motor Co., 508 F. Supp. 620, 630-31 (E.D. Mich. 1981) (existence of racist work environment is evidence of employer's intent to discriminate); *cf.* Baxter v. Savannah Sugar Refining Corp., 495 F.2d 437, 444-45 (5th Cir.) (court placed heavy rebuttal burden on employer to show legitimate reasons for adverse employment action against employee where employee belonged to plaintiff's class which employer discriminated against), *cert. denied*, 419 U.S. 1033 (1974). *See generally* Attanasio, *supra* note 5, at 11, 25 (employer's sex-related behavior towards employee creates inference of discrimination when coupled with adverse employment action).

94. 641 F.2d at 952.

95. *See id.* at 953.

96. *Id.* The *Bundy* court noted that the major benefit of the court's new *prima facie* case requirements for *quid pro quo* claims involving the denial of a promotion is that the plaintiff does not have to present evidence of other employees, with qualifications similar to plaintiff's, who received a promotion at the time the plaintiff did not receive a promotion. *Id.*

97. *Id.* The *Bundy* court stated that the employer's burden to rebut the plaintiff's *prima facie* case of *quid pro quo* harassment was to establish by clear and convincing evidence legitimate

The court noted that if the employer successfully rebutted the plaintiff's *prima facie* case, then the plaintiff has the opportunity to prove that the defendant's justifications for denying the promotion were merely a pretext for discrimination.[98] Since the trial court improperly allocated the evidentiary burden, the *Bundy* court remanded the *quid pro quo* claim to the district court for a new trial according to the court's allocation of proof scheme.[99]

Although the *Bundy* court held that proof of a condition of work claim eases the plaintiff's burden to establish a *quid pro quo* claim,[100] the Eleventh Circuit in *Henson v. City of Dundee*[101] separated completely a plaintiff's condition of work claim from the plaintiff's *quid pro quo* claim.[102] The plaintiff in *Henson* was a female police dispatcher who suffered verbal abuse and sexual advances from the chief of police.[103] Henson complained of the harassment to the city manager, claiming that the police chief kept Henson from attending the police academy because she had rebuffed the chief's sexual advances.[104] The city manager, however, did not act to remedy the situation.[105] Henson subsequently brought suit against the City of Dundee, Florida, claiming that she suffered sexual harassment which created an offensive environment in violation of Title VII,[106] and that her exclusion from the policy academy was disparate treatment in violation of Title VII.[107] The district court ruled for the defendant on the condition of work claim, holding that sexual harassment must affect job benefits to violate Title VII.[108] The district court also ruled for the defendant on the disparate treatment claim, reasoning that the police chief did not condition Henson's attendance at the policy academy on

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reasons for the adverse employment actions. *Id.* By clear and convincing evidence the *Bundy* court meant more than a preponderance of the evidence. *Id.; see supra* note 23 (preponderance of evidence is one standard courts use in setting standard for burden of persuasion). The *Bundy* clear and convincing evidence standard may no longer be valid after the Supreme Court's holding in *Burdine* that a defendant's burden to rebut a plaintiff's *prima facie* case of disparate treatment amounts to a burden of production. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 257-58 (1981); *supra* note 24 (*Burdine's* clarification of *McDonnell Douglas* allocation of proof scheme for disparate treatment claims).

98. 641 F.2d at 953.

99. *Id.*

100. *See supra* notes 93-94 and accompanying text (*Bundy* court ruled that proof of condition of work claim eases plaintiff's burden on *quid pro quo* claim).

101. 682 F.2d 897 (11th Cir. 1982).

102. *See id.* at 906 (*Henson* court stated that trial court's error regarding condition of work claim did not affect trial court's resolution of separate *quid pro quo* claim); *infra* note 128 and accompanying text (*Henson* court rejected *Bundy* allocation of proof scheme for *quid pro quo* claim where plaintiff had already proven condition of work claim).

103. 682 F.2d at 899.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 899-900. In *Henson*, Henson claimed that her resignation from the police department was a constructive discharge constituting disparate treatment under Title VII because the harassment forced her to resign. *Id.; see infra* note 109 (*Henson* district court ruled for defendants on Henson's constructive discharge claim).

108. 682 F.2d at 900-901.

submission to the chief's sexual advances.[109] Henson appealed the district court's ruling to the Eleventh Circuit.[110]

On appeal, the Eleventh Circuit agreed with the *Bundy* court that sexual harassment which created an offensive working environment violated Title VII.[111] The *Henson* court then outlined the criteria of a *prima facie* case for a condition of work claim.[112] First, the court maintained that the plaintiff must belong to a protected group and must have suffered uninvited sexual harassment.[113] Furthermore, the court stated that the harassment must have been based on sex[114] and have affected a term, condition or privilege of the plaintiff's employment.[115] As the final element of the *prima facie* case for a condition of work claim, the court maintained that the plaintiff must prove *respondeat superior* by demonstrating that the employer knew or should have known of the harassment and that the employer made no attempt to stop the harassment.[116] Although the *Henson* court established the elements of a *prima facie* case for condition of work claims, the court did not establish an allocation of proof scheme for condition of work cases.[117] The court reasoned that the intent to discriminate question which necessitates the use of the *McDonnell Douglas* burden of proof scheme in disparate treatment cases was absent in harassment cases because sexual harassment was almost always intentional.[118]

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109. *Id.* at 901. The *Henson* court stated that the district court did not believe that Henson's resignation was a constructive discharge but that Henson resigned because another police officer with whom Henson was having an affair left the department. *Id.*

110. *Id.* at 899.

111. *Id.* at 902.

112. *Id.* at 903-906.

113. *Id.* at 903. The *Henson* court stated that for purposes of gender discrimination a plaintiff belongs to a protected group by virtue of being a man or a woman. *Id.* The court also stated that sexual harassment is uninvited if the employee did not initiate or solicit the harassment. *Id.; see* Gan v. Kepro Circuit Sys., 27 Empl. Prac. Dec. (CCH) ¶ 32,379, at 23,649 (E.D. Mo. 1982) (plaintiff failed to establish *prima facie* case of harassment because plaintiff encouraged harassment through sexual suggestions and profane comments); Vinson v. Taylor, 23 Fair Empl. Prac. Cas. (BNA) 37, 42 (D.D.C. 1980) (court found that plaintiff's affair with employer was voluntary and consequently was not condition of plaintiff's employment).

114. 682 F.2d at 903-904. The *Henson* court determined that sexual harassment is based on sex if an employer harasses members of one sex but not members of the other sex. *See id.* (*Henson* court stated that no discrimination exists if employer makes sexual advances to members of both sexes because employer treats men and women same); Barnes v. Costle, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977) (employer's bisexual advances would not constitute gender discrimination because employer is treating both sexes alike).

115. *See* 682 F.2d at 904 (*Henson* court stated that harassment affects terms or conditions of employment if harassment is substantial enough to create an offensive working environment).

116. 682 F.2d at 905. The *Henson* court noted that a plaintiff can prove an employer's knowledge of the harassment by showing that plaintiff complained of the harassment to management personnel. *Id.* The court also noted that a plaintiff can create an inference of an employer's knowledge of the harassment by showing the harassment was pervasive. *Id.*

117. *See* 628 F.2d at 905 n.11 (*Henson* court stated normal pleading and proof principles apply to condition of work claims).

118. *See id.* The *Henson* court stated that intent to discriminate is only an issue in condition

The court concluded that normal pleading and burden of proof principles should apply to condition of work cases under Title VII.[119]

Having established the requirements for a *prima facie* case in a condition of work claim, the Eleventh Circuit addressed the facts of Henson's case and held that Henson established a *prima facie* case of sexual harassment.[120] The court stated that Henson belonged to a protected group because she was a woman.[121] The court further stated that Henson did not invite the harassment.[122] The court then found that the alleged harassment was based on sex because the police chief did not make sexual advances to male employees.[123] Furthermore, the court maintained that the harassment affected a term, condition or privilege of Henson's employment since Henson had suffered continual, as opposed to isolated or trivial, harassment.[124] The court also maintained that Henson proved *respondeat superior* by showing the employer knew of the harassment because Henson complained about the harassment to the city manager.[125] Consequently, the Henson court reversed the trial court's holding that Henson failed to prove her condition of work claim.[126]

After ruling on Henson's condition of work claim, the *Henson* court addressed Henson's *quid pro quo* claim.[127] The *Henson* court rejected the *Bundy* court's allocation of proof scheme for *quid pro quo* cases which also involve condition of work claims because the *Bundy* requirement that the employer rebut the plaintiff's prima facie *quid pro quo* case by clear and convincing evidence places too heavy a burden on the employer.[128] Consequently, the *Henson* court separated Henson's *quid pro quo* claim from her condition of work claim.[129] The court stated that although the district court applied the correct allocation of proof scheme to Henson's *quid pro quo* claim, the district court's findings of fact concerning the relationship between the police chief's sexual advances and Henson's attendance at the police academy were clearly

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of work claims if the employer made bisexual advances to employees. *See id.; supra* note 114 (bisexual advances would not constitute discrimination based on sex).

119. 682 F.2d at 905 n.11.

120. *Id.* at 905.

121. *Id.; see supra* note 113 and accompanying text (*Henson* court's requirements for inclusion in protected group).

122. 682 F.2d at 905; *see supra* note 113 and accompanying text (*Henson* court's definition of uninvited harassment).

123. 682 F.2d at 905; *see supra* note 114 and accompanying text (*Henson* court's definition of "based on sex").

124. 682 F.2d at 905; *see supra* note 115 and accompanying text (*Henson* court's definition of "terms, conditions, or privileges of employment").

125. 682 F.2d at 905; *see supra* note 116 and accompanying text (*Henson* court's definition of *respondeat superior*); *supra* note 47 and accompanying text (discussion of *respondeat superior* in sexual harassment cases).

126. 682 F.2d at 905.

127. *Id.* at 906.

128. *Id.* at 906 n.14; *see supra* notes 93-97 and accompanying text (*Bundy* court's allocation of proof scheme for *quid pro quo* cases if plaintiff has proven condition of work claim).

129. 682 F.2d at 907.

erroneous.[130] The *Henson* court then reversed the trial court's ruling on the *quid pro quo* claim and remanded the case for a new trial.[131]

Although the *Henson* and *Bundy* courts applied different allocation of proof schemes to sexual harassment cases involving both condition of work and *quid pro quo* claims,[132] the *Katz* court did not address the differences between the *Henson* and *Bundy* decisions.[133] The *Katz* court instead rejected the *Henson* and *Bundy* courts' allocation of proof schemes and created a third allocation of proof scheme for condition of work claims.[134] In establishing the new proof scheme, the *Katz* court did not address the *Henson* court's determination that special allocation of proof schemes are inappropriate for condition of work claims.[135] Although the *Katz* court kept the condition of work claim separate from the disparate treatment claim, the court did not address the merits of the *Bundy* court's decision to alter the proof scheme in a *quid pro quo* claim once the plaintiff had proven a condition of work claim.[136] Nor did the *Katz* court mention the merits of the *Henson* court's decision to reject the *Bundy* court's altered proof scheme for *quid pro quo* cases.[137] The question concerning the relationship of condition of work and *quid pro quo* claims is relevant to *Katz* even though *Katz* involved a disparate treatment claim because the primary issue in both disparate treatment claims and *quid pro quo* claims is whether the employer intended to discriminate against the plaintiff.[138] Since the *Katz* court proposed the new proof scheme

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130. *Id.* at 911-12. Specifically, the *Henson* court disagreed with the trial court's findings that Henson's supervisor never propositioned Henson and that no male police officers from the department had attended the police academy. *Id.* at 911; *see supra* note 109 and accompanying text (*Henson* trial court rejected Henson's *quid pro quo* claim).

131. 682 F.2d at 912-13.

132. *Compare* Henson, 682 F.2d at 906 n.14 (*Henson* court separated condition of work claim from *quid pro quo* claim) *with* Bundy, 641 F.2d at 952-53 (court stated that proof of condition of work claim eases plaintiff's burden on *quid pro quo* claim).

133. *See* 709 F.2d at 256-57 (*Katz* court resolved Katz's disparate treatment claim without referring to *Henson* or *Bundy*).

134. *See* 709 F.2d at 255-56 (*Katz* court's allocation of proof scheme for condition of work claims).

135. *See id.* (*Katz* court established allocation of proof scheme for condition of work claims without referring to *Henson*); 682 F.2d at 905 n.11 (*Henson* court stated normal principles of pleading and proof allocation apply to condition of work claims).

136. *See* 709 F.2d at 257 (*Katz* court held that proof of condition of work claim did not affect resolution of disparate treatment claim); 641 F.2d at 953 (*Bundy* court held that proof of condition of work claim alters burden of proof in *quid pro quo* claim).

137. *See* 709 F.2d at 257 (*Katz* court held that proof of condition of work claim did not affect disparate treatment claim); 682 F.2d at 906 n.14 (*Henson* court rejected *Bundy's* allocation of proof scheme for *quid pro quo* cases).

138. *See supra* notes 10-12 and accompanying text (courts use similar allocation of proof schemes for *quid pro quo* and disparate treatment claims because both claims involve question of employer's intent to discriminate). The relationship between a condition of work claim and a disparate treatment claim is the same as the relationship between a condition of work claim and a *quid pro quo* claim because proof of a condition of work claim suggests discriminatory intent in both disparate treatment and *quid pro quo* claims. *See supra* note 93 and accompanying text (*Bundy* court stated that existence of discriminatorily offensive environment is evidence of employer's intent to discriminate).

for condition of work cases without discussing the conflicts between *Bundy* and *Henson*, the *Katz* opinion does little to settle the confusion among courts over proving sexual harassment claims.[139]

Before the *Bundy, Henson* and *Katz* courts ruled that sexual harassment creating an offensive work environment violated Title VII, the Equal Employment Opportunity Commission (EEOC)[140] declared that a sexually offensive working environment violated Title VII and established guidelines on sexual harassment claims.[141] The EEOC is the administrative agency which Congress established to enforce Title VII.[142] Although courts do not have to follow the EEOC's position on a particular area of discrimination law,[143] most courts respect the EEOC guidelines as the product of professional research and often use the guidelines as an aid in deciding discrimination cases.[144] Under the EEOC guidelines, courts should determine whether harassment creates an offensive working environment from the facts on a case by case basis.[145] In both condition of work and *quid pro quo* claims, the EEOC guidelines advocate holding an employer strictly liable if supervisory or upper level personnel participated in the harassment of an employee.[146] If only co-workers participated in the

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139. *See supra* notes 132-37 and accompanying text (*Katz* decision failed to reconcile differences between *Bundy* and *Henson* decisions).

140. 42 U.S.C. § 2000e-4 to e-5 (1976 & Supp. V). The EEOC has the authority to enforce provisions of Title VII. *Id.* § 2000e-5(a). Pursuant to the power to enforce Title VII, the EEOC may research and publish methods of effectuating congressional purposes for Title VII. *Id.* § 2000e-4(g)(5). Before an employee can bring suit under Title VII, the employee must file a Title VII charge with the EEOC within 180 days of the alleged unlawful employment practice. *Id.* § 2000e-5(e). Within 10 days after the employee files charges with the EEOC, the EEOC must give notice of the charge to the employer. *Id.* § 2000e-5(b). After the EEOC investigates the employee's charge to determine whether reasonable cause exists to believe the charge is true, the EEOC undertakes to eliminate the unlawful employment practice through negotiation and persuasion. *Id.* If after 180 days the negotiations are unsuccessful and the EEOC has not filed an action against the employer, the EEOC gives the employee a notice to sue which allows the employee 90 days time to bring suit against the employer. *Id.* § 2000e-5(f)(1). *See generally* 2 A. LARSON & L. LARSON, *supra* note 12, §§ 48.00-48.80 (EEOC procedures under Title VII).

141. *See* EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (1983). *See generally* Development, *New EEOC Guidelines on Discrimination Because of Sex: Employer Liability for Sexual Harassment Under Title VII*, 61 B.U. L. REV. 535 (1981) (discussing EEOC guidelines and Title VII principles).

142. *See supra* note 140 (discussion of EEOC's powers and procedures).

143. *See* General Elec. Co. v. Gilbert, 429 U.S. 125, 141-42 (1976) (Court stated that EEOC rulings and guidelines are not controlling upon courts). Instead of the power to control the courts, the Supreme Court in *General Electric* stated that the EEOC has the power to persuade the courts through thorough research and valid reasoning. *Id.* at 142.

144. *See* Walter v. KFGO-Radio, 518 F. Supp. 1309, 1315 (D.N.D. 1981) (court considering sexual harassment claims gave great deference to EEOC guidelines on sexual harassment); Caldwell v. Hodgeman, 25 Fair Empl. Prac. Cas. (BNA) 1647, 1649 (D. Mass. 1981) (court used EEOC guidelines in deciding sexual harassment issue under Massachusetts law); *supra* note 143 (EEOC guidelines may persuade rather than control courts).

145. 29 C.F.R. § 1604.11(b) (Commissioner will look at totality of circumstances in determining what conduct constitutes sexual harassment).

146. *Id.* at § 1604.11(c). Like the EEOC guidelines, the dissent in *Henson* called for strict liability of employers if supervisors harassed employees. *See* 682 F.2d at 913-14 (Clark, J., dissenting) (*Henson* dissent stated that employer should be strictly liable for supervisor's harassment of employee

harassment, then the guidelines require evidence that the employer knew or should have known of the harassment in order to hold the employer liable.[147] The EEOC guidelines, however, allow an employer to avoid liability for harassment among co-workers if the employer demonstrates that the employer acted effectively to end the harassment.[148] In advocating employer liability for both condition of work and *quid pro quo* harassment claims, the EEOC guidelines reflect the EEOC's policy of preventing discrimination through sexual harassment in all areas of employment.[149]

By holding that a sexually offensive work environment violated Title VII, the *Katz* court furthered the EEOC's policies favoring the abolition of sexual harassment.[150] Accordingly, the *Katz* court's test for employer liability in condition of work claims reflects the EEOC position that employers should be liable for creating a sexually offensive work environment for employees.[151] Like the EEOC, the *Katz* court viewed an employer's knowledge as essential to the employer's liability for the harassment.[152] Furthermore, the *Katz* court would permit an employer to avoid liability for sexual harassment by showing measures that the employer took to prevent the harassment.[153] Although the *Katz* court did not follow the EEOC's position that courts should hold employer's strictly liable if supervisory personnel participated in the harassment, the *Katz* court imposed an especially heavy burden on the employer to avoid liability if supervisors harassed employees.[154] Since *Katz* held that employers are in violation of Title VII if the employer knew of sexual harassment at the workplace and yet allowed the harassment to continue, the *Katz* opinion is consistent with the EEOC guidelines on sexual harassment.[155] The

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because employer delegated responsibility of maintaining non-offensive work environment to supervisor).

147. 29 C.F.R. § 1604.11(d).

148. *Id.*

149. *See id.* at § 1604.11(f) (prevention is best method for ending sexual harassment); *see also* Bundy, 641 F.2d at 947 (general goal of EEOC guidelines is prevention of harassment).

150. *See* 709 F.2d at 254-55 (*Katz* court's recognition of condition of work claims reflects EEOC guidelines on sexual harassment); *supra* note 149 and accompanying text (EEOC guidelines express EEOC policy of preventing sexual harassment).

151. *See infra* note 152 and accompanying text (*Katz* opinion and EEOC guidelines both consider employer's knowledge of harassment as major factor in employer's liability for harassment).

152. 709 F.2d at 255-56; *compare supra* note 52 and accompanying text (under *Katz* test for *respondeat superior* plaintiff must show that employer knew or should have known of harassment) *with supra* text accompanying note 147 (under EEOC guidelines employer is liable for harassment among co-workers if employer knew or should have known of harassment).

153. 709 F.2d at 256; *compare supra* note 54 and accompanying text (under *Katz* allocation of proof scheme employer can rebut plaintiff's *respondeat superior* showing by indicating remedial action employer took to end harassment) *with supra* text accompanying note 148 (under EEOC guidelines employer can avoid liability for harassment among co-workers by indicating remedial action that employer took to stop harassment).

154. *See supra* notes 54-55 and accompanying text (employer's burden to rebut plaintiff's *respondeat superior* showing under *Katz* allocation of proof scheme).

155. *See supra* note 149 and accompanying text (EEOC guidelines advocate employer liability for sexual harassment not affecting tangible job benefits).

Katz decision, therefore, furthers the EEOC policy of ending all types and forms of sexual harassment at the workplace by expanding Title VII to cover condition of work claims.[156]

Although the *Katz* holding parallels the EEOC's position on sexual harassment, the *Katz* holding does not establish a clear standard for proving sexual harassment claims.[157] For example, the court did not clarify the weight of the evidentiary burden that shifts from party to party, but instead defined the burdens in very general terms.[158] Although the court explained that the employer's burden to rebut the plaintiff's *respondeat superior* showing may be especially heavy if supervisory personnel participated in the harassment of employees, the court apparently contradicted this explanation in a footnote stating that the ultimate burden of proving intent to discriminate always remains with the plaintiff.[159] The footnote is additionally confusing because the court previously had declared that intent to discriminate was not an issue in condition of work claims.[160] Since the *Katz* court did not discuss specifically the evidentiary burdens in the allocation of proof scheme, the new *Katz* decision may be a source of confusion to courts trying condition of work claims.[161]

By holding that sexual harassment which created an offensive working environment violated Title VII, the *Katz* case is consistent with both the EEOC guidelines on sexual harassment and the general trend in the law recognizing condition of work claims.[162] The *Katz* court, however, failed to settle confu-

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156. *See supra* note 149 and accompanying text (policy behind EEOC guidelines is prevention of sexual harassment at workplace).

157. *See infra* note 158 and accompanying text (*Katz* court unclear about burden of proof in *Katz* allocation of proof scheme).

158. *See supra* notes 49-56 and accompanying text (*Katz* court's allocation of proof scheme for condition of work claims). The *Katz* court stated that the plaintiff makes a *prima facie* case of a condition of work claim by "showing" that sexually harassing actions occurred. 709 F.2d at 256. The court described the employer's rebuttal burden in terms of the employer directly "proving" that the plaintiff was wrong or indirectly "showing" or "pointing to" circumstances which would release the employer from liability. *See id.; cf. Allocations of Burdens of Proof, supra* note 15, at 646 (Supreme Court's choice of imprecise terms to define weight of shifting evidentiary burdens in Title VII cases created confusion in circuit courts over trying Title VII claims).

159. *Compare* 709 F.2d at 256 (*Katz* court stated that employer's rebuttal burden on *respondeat superior* is especially heavy if supervisors were party to or privy to harassment) *with id.* at 256 n.7 (under *Katz* allocation of proof scheme for condition of work claims plaintiff always bears ultimate burden of persuasion).

160. *Compare* 709 F.2d at 255 (*Katz* court determined that issue of *respondeat superior* replaces issue of intent to discriminate in condition of work claims) *with id.* at 256 n.7 (*Katz* court determined that plaintiff always bears ultimate burden of persuasion to prove intentional nature of harassment).

161. *Cf. Allocations of Burdens of Proof, supra* note 15, at 646 (Supreme Court's choice of imprecise terms to define weight of shifting burdens in Title VII cases created confusion in circuit courts over trying Title VII claims).

162. *See supra* note 141 and accompanying text (EEOC Guidelines declare sexually offensive working environment violates Title VII); *supra* note 3 and accompanying text (courts recently have held that sexually offensive work environment violates Title VII); *see also* 709 F.2d at 255 (*Katz* court held sexually offensive work environment violated Title VII).

sion in the courts concerning sexual harassment claims.[163] The Fourth Circuit established a shifting allocation of proof scheme for condition of work claims, even though the court recognized that the question of intent which necessitates a shifting allocation of proof scheme in disparate treatment cases is absent in condition of work claims.[164] In creating the allocation of proof scheme, the *Katz* court did not address the *Henson* court's reasoning that special proof schemes are unnecessary in condition of work claims given the absence of any difficult intent to discriminate issue.[165] Although the Fourth Circuit implicitly followed part of the *Henson* decision by separating the condition of work and disparate treatment claims, the *Katz* court did not discuss either the *Henson* court's decision to separate the two claims or the *Bundy* court's decision to allow proof of a condition of work claim to affect resolution of a *quid pro quo* claim.[166] Furthermore, in establishing the allocation of proof scheme for condition of work claims, the *Katz* court did not define adequately the weight of the burdens of proof which shift from party to party under the new allocation of proof scheme.[167] Consequently, *Katz* merely adds a new method of proof to the area of sexual harassment claims that does not settle the conflicts among courts over sexual harassment claims.[168]

JOHN CALHOUN MORROW

C. *Standards of Statistical Significance in Employment Discrimination*

Congress enacted Title VII of the Civil Rights Act of 1964[1] to prohibit discrimination in employment on the basis of race, color, religion, sex, or

163. *See supra* notes 132-33 and accompanying text (*Katz* court established third standard for condition of work claims without addressing differences in *Bundy* and *Henson* decisions).

164. *See supra* notes 159-60 and accompanying text (*Katz* court designed shifting allocation of proof scheme for condition of work claims although no difficult intent to discriminate question was at issue).

165. *See supra* note 135 and accompanying text (*Katz* court failed to consider *Henson* court's ruling that special allocation of proof schemes are unnecessary in condition of work claims).

166. *See supra* notes 136-37 and accompanying text (*Katz* court separated Katz's condition of work and *quid pro quo* claims without addressing *Bundy* court's decision combining two claims or *Henson* court's decision to keep two claims separate).

167. *See supra* notes 158-59 and accompanying text (*Katz* court defined weight of evidentiary burden which shifts from party to party in condition of work claims in very general terms).

168. *See supra* note 139 and accompanying text (*Katz* decision adds new standard for proving claims to areas of sexual harassment law without settling confusion among courts over how to prove sexual harassment claims).

1. Civil Rights Act of 1964, Pub. L. No. 88-352, § 701, 78 Stat. 241, 302-17 (codified as amended at 1) 42 U.S.C. §§ 2000e-2000e-17 (1982). Section 703 of Title VII makes it an unlawful employment practice for an employer to discriminate against any individual with respect to the individual's compensation, terms, conditions, or privileges of employment because of the individual's

national origin.[2] In Title VII cases, litigants often rely on statistical evidence to either establish a prima facie case of employment discrimination[3] or to rebut

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race, color, religion, sex, or national origin. 42 U.S.C § 2000e-2(a) (1982). Section 703 of Title VII also prohibits an employer from limiting, segregating, or classifying employees or applicants for employment in any way that would adversely affect the individual's employee status because of the individual's race, color, religion, sex, or national origin. *Id.* Title VII's primary goal is to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. *See* Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971) (Title VII's goal is to achieve equal employment opportunity). Congress enacted Title VII to remove artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of race or other impermissible classifications. *Id.* at 431.

Title VII should be liberally interpreted since the Act tolerates no discrimination, subtle or otherwise. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973) (overriding interest in fair and racially neutral employment and personnel decisions). While Title VII deserves a liberal interpretation, Title VII does not guarantee every person a job regardless of qualifications. *See Griggs*, 401 U.S. at 430 (Title VII does not command that any person be hired simply because person was formerly subject to discrimination or because person is member of minority group). By enacting Title VII, Congress only proscribed discriminatory preference for any group, minority or majority. *See id.* at 431.

2. *See* 42 U.S.C. § 2000e-2(a) (1982) (prohibiting discrimination in hiring, discharge, compensation, terms, conditions, or privileges of employment).

3. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (order and allocation of proof in disparate treatment case). *But see* EEOC v. Western Electric Co., 32 Empl. Prac. Dec. (CCH) ¶ 33,759, at 30,657, 30,663 (4th Cir. July 26, 1983) (plaintiffs' reliance on statistical data insufficient to establish prima facie case). Courts recognize two types of employment discrimination cases. *See* 411 U.S. at 802 (recognizing disparate treatment theory of discrimination); Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971) (recognizing disparate impact theory of discrimination); *see also* International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (plaintiff may sue on disparate impact or disparate treatment theories of discrimination).

A plaintiff in a disparate treatment case must show that an employer treated plaintiff employee less favorably because of the employee's membership in a protected group. *See* 411 U.S. at 805. To establish a prima facie case of employment discrimination in an individual disparate treatment case, a plaintiff must prove that plaintiff belonged to a protected group, that plaintiff applied and was qualified for a job for which an employer sought applicants, that the employer rejected plaintiff's application despite plaintiff's qualifications, and that the position remained open and the employer continued to seek applicants from persons of plaintiff's qualifications after plaintiff's rejection. *Id.* at 802.

The disparate treatment theory requires that a plaintiff prove an employer's discriminatory intent. *See* Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 26-27 (1978) (per curiam) (Stevens, J., dissenting) (discriminatory intent required in disparate treatment cases); *Teamsters*, 431 U.S. at 335 n.15 (discriminatory motive critical in disparate treatment actions). In a disparate impact case, however, a plaintiff must prove that a facially neutral employment practice has a substantially discriminatory impact on a protected group. *See* Dothard v. Rawlinson, 433 U.S. 321, 328-30 (1977) (facially neutral standards selected applicants for hire in significantly discriminatory pattern); Albermarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (neutral employment practices selected applicants in racial pattern significantly different from pool of applicants) *Griggs*, 401 U.S. at 430 (practices, procedures, or tests neutral on face but discriminatory in operation). The key difference between the disparate impact and disparate treatment theories of discrimination concerns the employer's intent. *Compare McDonnell Douglas Corp.*, 411 U.S. at 805-06 (proof of employer's discriminatory intent required in disparate treatment case) *with Griggs*, 401 U.S. at 431-33 (proof of employer's discriminatory motive irrelevant in disparate impact action).

a prima facie case of discrimination.[4] In employment discrimination cases, contestants present the court with statistical studies comparing the number of persons in a protected group that a contestant would expect the employer to hire or promote in a race or sex neutral environment, with the number of persons in the protected group actually hired or promoted.[5] For example, if ten black employees were expected to be promoted and the employer actually promoted only five black employees, the statistical comparison would be ten compared to five.[6] To determine whether a disparity between actual and expected employment practices constitutes a Title VII violation, a court must determine how statistically significant[7] the disparity between the expected result and the observed result must be before the court can assume that the disparity resulted from discrimination rather than from random chance.[8]

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4. *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254-56 (1981). In *Burdine*, the Supreme Court held that to rebut a plaintiff's prima facie case of discrimination a defendant must only articulate a legitimate, nondiscriminatory reason for engaging in a discriminatory employment practice. *Id.* The *Burdine* Court stated that to rebut a plaintiff's prima facie case a defendant's burden of proof is a burden of production, not persuasion. *Id.* The burden of persuasion remains with the plaintiff to prove discrimination. *Id.*

5. *See* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1370 (1983). The end result of the process of statistical proof presents the court with the expected number of persons in the protected group hired or promoted in a race- or sex-neutral environment compared to the actual number of persons in the protected group hired or promoted. *Id.* at 1370 n.325.

6. *Id.*

7. *See* EEOC v. Federal Reserve Bank of Richmond, 698 F.2d 633, 647 n.17 (4th Cir.) (in employment discrimination context level of significance identifies probability that observed cause-effect relationship occurred by chance), *cert. granted sub nom.* Cooper v. Federal Reserve Bank of Richmond, 52 U.S.L.W. 3330 (U.S. Nov. 1, 1983) (No. 83-185).

8. *See* B. SCHLEI & P. GROSSMAN, *supra* note 5, at 1371-75. A court may apply one of three possible tests for statistical significance. *Id.* The three tests of statistical significance include the .05 level of statistical significance, the *Hazelwood* two or three standard deviations test, or the four-fifths rule of the government's Uniform Selection Guidelines. *Id.* at 1372. The .05 level of statistical significance is a convention adopted from social science which signifies that the probability of a disparity occurring by chance is 5% or one out of twenty. *Id.* Several courts apply the .05 level of statistical significance in discrimination cases. *See* Albermarle Paper Co. v. Moody, 422 U.S. 405, 430, 437 (1975) (citing testimony of statisticians analyzing disparity between black and white pass/fail rates on a standardized test using .05 level of statistical significance); Vuyanich v. Republic Nat'l Bank, 505 F. Supp. 224, 384-85 (N.D. Tex. 1980) (referring to customary and traditional 5% level of statistical significance); *see also* D. BALDUS & J. COLE, STATISTICAL PROOF OF DISCRIMINATION 308 n.36 (1980 & Supp. 1983) (social scientists generally use .05 level of significance and .05 level of significance accepted by many courts). A number of commentators have recommended that courts require the .05 level of statistical significance in employment discrimination cases. *See* Hallock, *The Numbers Game—The Use and Misuse of Statistics in Civil Rights Litigation*, 23 VILL. L. REV. 5, 13 (1977); Note, *Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal*, 89 HARV. L. REV. 387, 400-01 n. 58 (1975).

The Supreme Court applied a two or three standard deviations test to an employment discrimination case in *Hazelwood School Dist. v. United States*. *See Hazelwood*, 433 U.S. 299, 309-11 nn. 14 & 17 (1977) (disparity greater than two or three standard deviations proof of discrimination in teacher hiring); *see also* Castaneda v. Partida, 430 U.S. 482, 496-97 n.17 (1977) (in jury selection process standard deviations of more than two or three from expected number of minority jurors to actual number of minority jurors would be suspect to social scientist). Although

A majority of courts apply standard deviation analysis to determine whether a disparity between an expected result and an observed result is statistically significant.[9] A standard deviation is a measure of the variation from an expected to an observed number.[10] The likelihood that chance caused a difference between an expected outcome and an observed outcome decreases as the number of standard deviations increases.[11] For example, a standard deviation of two indicates a 4.6 percent likelihood that an observed outcome occurred by chance and a standard deviation of three indicates a .3 percent likelihood that an observed outcome occurred by chance.[12] In *Hazelwood School Dist. v. United States*,[13] the Supreme Court held that a disparity between the expected number of employees and the actual number of employees greater than two or three standard deviations decreases the probability that

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the *Hazelwood* Court did not hold that all courts must apply the two or three standard deviations test in employment discrimination cases, most courts have applied the two or three standard deviations test to assess statistical significance. *See* Pegues v. Mississippi State Employment Serv., 699 F.2d 760, 768 n.9 (5th Cir.)(standard deviation applied in employment referral case), *reh'g en banc denied*, 705 F.2d 450 (1983); Moultrie v. Martin, 690 F.2d 1078, 1082 (4th Cir. 1982) (Fourth Circuit courts must apply standard deviation analysis in all racial discrimination cases); Hameed v. International Ass'n of Bridge, Structural & Ornamental Iron Workers Local 396, 637 F.2d 506, 513-14 (8th Cir. 1980) (standard deviations of two or three are statistically significant); Board of Education of N.Y. v. Califano, 584 F.2d 576, 584 n.29 (2d Cir. 1978) (standard deviation measures significance of statistical disparities).

The employee selection procedures in the Uniform Guidelines provide a framework for determining the proper use of tests and other selection procedures in employment practices. *See* 29 C.F.R. § 1607.1(B) (1983). The Uniform Guidelines state that federal law will presume adverse impact if the selection rate for the protected group is less than 4/5 or 80% of the selection rate for the favored group. *See* 29 C.F.R. § 1607.4(D) (1983). The Uniform Guidelines' 4/5 rule, however, has received mixed acceptance by the courts. *Compare* Moore v. Southwestern Bell Tel. Co., 19 Fair Empl. Prac. Cas. (BNA) 232, 234 (E.D. Tex. 1978) (4/5 rule adopted as standard for determining adverse impact in pass/fail comparison), *aff'd per curiam*, 593 F.2d 607 (5th Cir. 1979) *with* Reynolds v. Sheet Metal Workers, Local 102, 498 F. Supp. 952, 966 (D.D.C. 1980) (4/5 rule is arbitrary standard), *aff'd*, 25 Fair Empl. Prac. Cas. (BNA) 837 (D.C. Cir. 1981). One commentator sharply criticized the Uniform Guidelines 4/5 rule for failing to consider differences in sampling size. *See* Shoben, *Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII*, 91 HARV. L. REV. 793, 805-11 (1978) (4/5 rule compares only ratios and does not account for differences in sample size and magnitude of differences in pass rates).

9. *See* B. SCHLEI & P. GROSSMAN, *supra* note 5, at 1371 (courts must decide what test of statistical significance to use).

10. *See* D. BARNES, STATISTICS AS PROOF: FUNDAMENTALS OF QUANTITATIVE EVIDENCE 80 (1983) (standard deviation quantifies disparity between expected and actual number); *see also* R. ELLIS, STATISTICAL INFERENCE: BASIC CONCEPTS 51 (1975) (standard deviation indicates relative frequencies of different occurrences as a direct indication of probability of occurring); H. HARTKEMEIER, INTRODUCTION TO APPLIED STATISTICAL ANALYSIS 134-35 (1968) (standard deviation is measure of variation from expected to observed number).

11. *See* H. HARTKEMEIER, *supra* note 10, at 135 (larger standard deviation becomes greater amount of variation).

12. *See* D. BARNES, *supra* note 10, at 140-41. Whenever a sample is expected to be normally distributed around the mean, 68% of the observations will be within one standard deviation of the mean, 95.4% of all observations will be within two standard deviations of the mean, and 99.7% of all observations will be within three standard deviations of the mean. *Id.* at 140.

13. 433 U.S. 299 (1977).

the observed result occurred by chance.[14] Standard deviation analysis, therefore, quantifies the likelihood that chance caused a difference between an expected result and an observed result.[15]

To calculate standard deviations, courts have applied either the hypergeometric distribution test or the binomial distribution formula.[16] The hypergeometric distribution test is a test of statistical significance that statisticians apply to small samples.[17] The hypergeometric distribution test assumes that a sample population is finite and that each selection from that pool is not replaced in the pool once selected.[18] In contrast to the hypergeometric distribution test, the binomial distribution test is a test of statistical significance that statisticians apply to samples exceeding thirty in number.[19] The binomial distribution test applies to a sample population that has only two observed values.[20] The binomial distribution, therefore, quantifies the probability that

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14. *See id.* at 306-18. In *Hazelwood*, the United States Supreme Court addressed the issue of statistical significance in an employment discrimination context. *Id.* The *Hazelwood* Court examined the disparity between the actual number of black teachers on the Hazelwood teaching staff and the expected number of black teachers on the school district's staff. *Id.* at 308-09 n.14. The Court noted that the Court had explained in *Castaneda v. Partida* a precise method of measuring the significance of statistical disparities. *Id.; see* Castaneda v. Partida, 430 U.S. 482, 496-97 n.17 (1977) (standard deviation analysis used to obtain statistical significance). The *Hazelwood* Court stated that standard deviation analysis, as used in *Castaneda*, provided a measure of statistical significance by calculating predicted fluctuations from the expected value of a sample. 433 U.S. at 308-09 n.14. The *Hazelwood* Court further stated that disparities between an expected value and an observed value greater than two or three standard deviations would be statistically significant. *Id.; see* EEOC v. American Nat'l Bank, 652 F.2d 1176, 1191-92 (4th Cir. 1981) (standard deviations greater than two or three necessarily exclude chance as a cause of underrepresentation), *cert. denied*, ___ U.S. ___, 103 S. Ct. 235 (1982). The *American Nat'l Bank* court concluded that courts should be extremely cautious in drawing any conclusions from standard deviations in the range of one to three. *Id.* at 1192. The *American Nat'l Bank* court held that within the range of one to three standard deviations, a contestant must provide additional evidence to prove or rebut a finding of discrimination. *Id.* at 1192-93; *see* Moultrie v. Martin, 690 F.2d 1078, 1082 (4th Cir. 1982) (standard deviation analysis mandated in all Fourth Circuit racial discrimination cases). In *Moultrie*, the Fourth Circuit explicitly held that district courts must apply standard deviation analysis to all racial discrimination cases to promulgate standard mathematical procedures in Fourth Circuit decisions. 690 F.2d at 1082.

15. *See supra* note 10 (definition of standard deviation).

16. *Compare* Brown v. Delta Air Lines, 522 F. Supp. 1218, 1228-29 (S.D. Tex. 1980) (applying hypergeometric test) *with* Hazelwood School Dist. v. United States, 433 U.S. 299, 309 n.17 (1977) (applying binomial distribution test).

17. *See* EEOC v. Federal Reserve Bank of Richmond, 698 F.2d 633, 650 (4th Cir.) (hypergeometric distribution formula appropriate when small numbers are involved that are finite and without replacements), *cert. granted sub nom.* Cooper v. Federal Reserve Bank of Richmond, 52 U.S.L.W. 3330 (U.S. Nov. 1, 1983) (No. 83-185).

18. *See* R. WINKLER & W. HAYS, STATISTICS: PROBABILITY, INFERENCE, AND DECISION, 225 (2d ed. 1975) (hypergeometric test used on small, finite sample populations); P. HOEL & R. JESSEN, BASIC STATISTICS FOR BUSINESS AND ECONOMICS, 132-33 (2d ed. 1977) (specifying circumstances where hypergeometric test appropriate); P. HOEL, INTRODUCTION TO MATHEMATICAL STATISTICS, 67-68 (4th ed. 1971) (stating when hypergeometric tests correct).

19. *See* D. BALDUS & J. COLE, *supra* note 8, 1982 Supp. at 82 (binomial test proper when sample at least 30 or more).

20. *See* D. BARNES, *supra* note 10, at 70 (binomial distribution used where only two possi-

an employer will select a protected group member and the probability that the employer will select a non-protected group member.[21]

In *EEOC v. Federal Reserve Bank of Richmond*,[22] the Fourth Circuit reaffirmed the use of standard deviation analysis to obtain statistical significance and held that lower courts must apply the binomial distribution formula to calculate standard deviation in Title VII cases.[23] In *Federal Reserve Bank*, the Equal Employment Opportunity Commission (EEOC) and four intervenors[24] instituted a class action[25] suit in the United States District Court for the Western District of North Carolina alleging that the Federal Reserve Bank of Richmond (Bank)[26] engaged in racially discriminatory practices and policies by failing to promote black employees to higher pay grade job classifications[27] At trial, plaintiffs presented statistical evidence to prove that

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ble outcomes). *See* D. BARNES, *supra* note 10, at 82. For a binomial distribution, the standard deviation equals the square root of the total population sample multiplied by the percentage of persons in the protected group (i.e. blacks) multiplied by the percentage of persons not in the protected group (i.e. non-blacks). *Id.; see* EEOC v. Federal Bank of Richmond, 698 F.2d 633, 650-52 (4th Cir.), *cert. granted sub nom.* Cooper v. Federal Reserve Bank of Richmond, 52 U.S.L.W. 3330 (U.S. Nov. 1, 1983) (No. 83-185). A binomial distribution represents an either-or situation. *Id.* In racial discrimination cases, a binomial distribution indicates the probability of either selecting a minority member or the probability of choosing a non-minority member from a sample population. *Id.; see* D. BARNES, *supra* note 10, at 70 (binomial distribution used to establish probability of event occurring when only two outcomes are possible).

21. *See supra* note 20 (binomial distribution formula quantifies probability of selecting either X or non-X).

22. 698 F.2d 633 (4th Cir.), *cert. granted sub nom.* Cooper v. Federal Reserve Bank of Richmond, 52 U.S.L.W. 3330 (U.S. Nov. 1, 1983) (No. 83-185).

23. *Id.*

24. *See id.* at 637. In *Federal Reserve Bank,* four intervenors, Moore, Hannah, Cooper, and Russell represented both former and present employees of the Federal Reserve Bank of Richmond, Charlotte, North Carolina branch. *Id.* The District Court for the Western District of North Carolina denied the individual claims of intervenors, Moore and Elmore Hannah because neither Moore nor Hannah proved that they suffered any discrimination because of their race. *Id.* at 638. The district court held that the bank had discriminated against intervenor Sylvia Cooper by failing to promote Cooper from a job as a settlement clerk to a position as utility supervisor. *Id.* at 637-38. The district court also held that the bank discriminated against intervenor Constance Russell by failing to promote Russell to a utility clerk position from a position as a utility operator and by retaliatorily discharging Russell in response to Russell's filing of discrimination charges with the EEOC. *Id.* at 638. On appeal, the Fourth Circuit remanded Cooper's claim to the district court with directions to dismiss and reversed Russell's claim. *Id.* at 664-73.

The Supreme Court has recently granted review in *Cooper v. Federal Reserve Bank of Richmond. See* 52 U.S.L.W. 3330 (U.S. Nov. 1, 1983) (No. 83-185). The question presented for review is whether the Fourth Circuit erred in holding that a prior finding that any pattern or practice of employment discrimination was not pervasive precluded as res judicata all employees from litigating individual claims of discrimination. *Id.*

25. 698 F.2d at 637. The district court in *Federal Reserve Bank* certified intervenors as representatives of all black persons that worked for the defendant after January 3, 1974. *Id.*

26. *See id.* The action in *Federal Reserve Bank* involved only the Charlotte branch of the Federal Reserve Bank of Richmond. *Id.*

27. *Id.* The district court in *Federal Reserve Bank* held that the bank discriminated against black employees in pay grades four and five only. *Id.* at 638. The bank classified employees from pay grade three to pay grade sixteen. *Id.* at 637. The district court held that the bank did not engage in discrimination in any of the twelve other job rating levels. *Id.* at 638.

the Bank failed to grant black employees promotion opportunities similar to promotion opportunities that the Bank granted white employees.[28] After examining two statistical tables comparing the number of expected black promotions with the number of actual black promotions, the district court held that plaintiffs established that the bank discriminated against blacks by failing to promote blacks out of pay grades four and five into higher pay grade levels.[29] The Bank appealed the district court's judgment to the Fourth Circuit.[30]

On appeal, the Fourth Circuit recognized two problems with the numbers plaintiffs used in the two statistical tables plaintiffs submitted to establish a prima facie case of discrimination.[31] First, the *Federal Reserve Bank* court observed that the plaintiffs computed the number of employees in each pay grade for any year of the 1974-1978 period by counting only the persons employed in the pay grade for the entire year.[32] The court noted that plaintiff's method of calculating employee numbers by not counting employees who resigned, terminated, or were promoted from a pay grade prior to year end increased the percentage of black employees eligible for promotion. Plaintiffs' method of calculation increased the expected number of black promotions over what the number would have been if plaintiffs used either the number of employees at the beginning of the year, or the number at the end of the year, or an average of the two.[33] Second, the court objected to plaintiffs'

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28. *See id.* at 648-62.

29. *See id.* at 638. The district court in *Federal Reserve Bank*, held that the bank engaged in a pattern and practice of discrimination from 1974 to 1978 by failing to grant black employees promotion opportunities similar to opportunities offered to white employees in pay grades 4 and 5. *Id.* In *Federal Reserve Bank* the district court relied on the statistical tables as submitted in testimony by plaintiffs' expert to find statistically significant disparity in promotions of black employees in pay grades four and five. *Id.* at 648.

A plaintiff may establish a prima facie case of discrimination by statistics alone. *See* Teamsters v. United States, 431 U.S. 324, 339 (1977) (Supreme Court rejected employer's argument that statistics alone can never establish a prima facie case of discrimination); *see also* EEOC v. American Nat'l Bank, 652 F.2d 1176, 1188 (4th Cir. 1981) (prima facie case established by statistics alone or by cumulation of evidence including statistics, patterns, practices, general policies, or specific instances of discrimination).

An employer may rebut a plaintiff's prima facie case of discrimination by demonstrating that plaintiff's proof is either inaccurate or insignificant. *See* Teamsters v. United States, 431 U.S. 324, 360 (1977) (employer may dispel inference of discrimination by providing own statistical evidence); *see also* EEOC v. American Nat'l Bank, 652 F.2d 1176, 1188 (4th Cir. 1981) (employer may prove plaintiff's statistics insignificant by proving that disparities result from pre-Title VII rather than from post-Title VII employment practices).

30. *See* 698 F.2d at 660-62.

31. *See id.* at 648-62. The *Federal Reserve Bank* court noted that the district court relied on two statistical tables submitted by plaintiffs' expert purporting to show for the years 1974-1978 the number of employees in pay grades four and five, the percentage of black employees in pay grades four and five, the number of promotions in each year in pay grades four and five, the number of black promotees in pay grades four and five, the expected number of black promotees if black promotions had coincided with the black percentage of the total number of employees in pay grades four and five, and the difference between the expected and actual number of black promotions in pay grades four and five. *Id.* at 648.

32. *Id.* at 648-49.

33. *Id.* at 649. The *Federal Reserve Bank* court noted that plaintiffs' calculation of the

manner of calculating the number of black promotions.[34] The court stated that plaintiffs underrepresented the number of black promotions for each year by failing to include black promotees who left the Bank prior to year end.[35] Moreover, the court noted that plaintiffs presented no rational basis for underrepresenting the actual number of black promotions.[36] The *Federal Reserve Bank* court concluded that plaintiffs' reliance on untrustworthy data to calculate standard deviations between the expected and actual number of black promotions rendered plaintiffs' statistical tables inaccurate and misleading.[37]

The Fourth Circuit next examined plaintiffs' method of calculating the standard deviations between the expected and actual numbers demonstrated by plaintiffs' two statistical tables.[38] The plaintiffs used a hypergeometric distribution test to calculate standard deviations.[39] The *Federal Reserve Bank* court, however, rejected plaintiffs' use of a hypergeometric test because plaintiffs' samples exceeded thirty in number.[40] The court also rejected plaintiffs' hypergeometric test because the sample represented a pool of eligibles from which the Bank replaced employees receiving promotions or terminations.[41] The *Federal Reserve Bank* court held that the Bank's presumed replenishing of the pool of employees eligible for promotion made the binomial distribution test instead of the hypergeometric test appropriate because the replaced sampling model applied.[42] Furthermore, even under plaintiffs' hypergeometric formula, the court discovered that the plaintiffs' computation of standard

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employee total which did not consider employee attrition during the test year, resulted in inaccurate totals for the percentage of black employees, particularly in pay grade four. *Id.* Although the Fourth Circuit did not clarify this conclusion, the court presumably found that more whites than blacks left the pay grades during the course of any one of the test years. *See id.*

34. *Id.*

35. *Id.* The Fourth Circuit in *Federal Reserve Bank* noted that the actual number of black promotions in pay grade four for the years 1974-77 totaled 39. *Id.* The court, however, observed that plaintiffs' statistical tables revealed only 35 black promotions in pay grade four for the years 1974-77. *Id.* The Fourth Circuit concluded that plaintiffs' method of reducing the number of black promotions in pay grade four increased the disparity between the expected number of black promotions and the observed number of black promotions. *Id.* at 649-50. The court held that since plaintiffs used artificial numbers to calculate statistically significant standard deviations, such disparities should not be given the full weight of authority. *Id.* at 649-50.

36. *Id.* at 649. The Fourth Circuit in *Federal Reserve Bank* stated that the court could find no rational basis for plaintiffs' use of an inaccurate figure for black promotions unless plaintiffs wanted to obtain a standard deviation greater than -2. *Id.*

37. *Id.* at 650.

38. *Id.* at 650-54.

39. *See id.*

40. *Id.* at 650. The *Federal Reserve Bank* court noted that in pay grade four the sample population totaled 154 and in pay grade five the sample population totaled 269. *Id.* The sample size in both pay grades four and five, therefore, required the use of a binomial distribution formula. *Id.*

41. *Id.* at 650-51. The Fourth Circuit observed that a binomial distribution test should apply to plaintiffs' statistical tables since plaintiffs' population sample represented a pool of employees from which employees promoted to higher pay grades or terminated from employment subsequently were replaced by new employees. *Id.*

42. *Id.*

deviations in pay grade five was inaccurate.[43] Using the hypergeometric formula, the court calculated a standard deviation of -1.87 in pay grade five compared to plaintiffs' calculation of a standard deviation of -2.01 in pay grade five.[44] Moreover, when the court applied the binomial distribution test to pay grades four and five, the court calculated a standard deviation of -2.07 for pay grade four and a standard deviation of -1.45 for pay grade five.[45] Based on the court's new calculations using the binomial test, the Fourth Circuit found neither standard deviation statistically significant under the *Hazelwood* two or three standard deviations test since the deviation for pay grade four was marginally over -2 and the deviation for pay grade five was well below -2.[46]

The *Federal Reserve Bank* court then examined plaintiffs' study matching black and white employees with similar characteristics including lengths of service, pay grades, educational levels, departments, and lengths of service in pay grades.[47] The purpose of a matching study is to indicate discrimination against blacks in promotions.[48] The court, however, objected to plaintiffs' study because the number of matches represented only a small percentage of the total workforce, and because plaintiffs did not confine the study to pay grades four and five.[49] The Fourth Circuit concluded that acceptance of plaintiffs' study, which indicated discrimination at all levels of employment, would contradict the district court's finding of discrimination only in pay grades four and five.[50] The court, however, did not examine the study's reliability since plaintiffs' expert admitted that the study revealed a standard deviation of -1.79, well below the two or three standard deviations test set forth by the *Hazelwood* Court for statistical significance.[51]

The Fourth Circuit next observed that plaintiffs' expert reviewed the statistical evidence with a presumption of discrimination.[52] Plaintiffs' expert

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43. *Id.* at 651.

44. *Id.*

45. *Id.*

46. *Id.* The Fourth Circuit held that even though the standard deviation in pay grade four exceeded -2, the disparity in pay grade four was legally insignificant because plaintiffs' expert did not use the correct number of actual black promotions in calculating the standard deviation between the number of actual black promotions to the expected number of black promotions. *Id.; see* Hazelwood School Dist. v. United States, 433 U.S. 299, 311 n.17 (1977) (two or three standard deviations minimum for legal significance); *see also supra* note 8 (discussion of *Hazelwood* two or three standard deviations test).

47. *See* 698 F.2d at 652.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 652-53. The Fourth Circuit in *Federal Reserve Bank* examined the testimony of plaintiffs' expert to determine whether the evidence entitled plaintiffs to conduct a statistical analysis of the Bank's promotion practices with a presumption of discrimination. *Id.* Plaintiffs' expert testified that plaintiffs' statistics assumed significance only with a reasonable belief that an employer discriminated against black employees. *Id.* The Fourth Circuit rejected plaintiffs' presumption of discrimination since such an assumption arbitrarily favors plaintiffs in discrimination cases. *Id.* The court concluded that a presumption that favors one party over another party could not provide a reliable basis for a finding of discrimination. *Id.* at 653.

used a one-tailed test to obtain statistical significance.[53] A one-tailed test of statistical significance examines the question how often a observer would see a disparity favoring only white employees in the absence of discrimination.[54] In contrast to the one-tailed test, a two-tailed test of statistical significance inquires how often an observer would see a disparity favoring either black or white employees in the absence of discrimination.[55] In practical terms, the difference between a one-tailed and a two-tailed test is that the level of statistical significance produced by a two-tailed test is generally twice the level of statistical significance produced by a one-tailed test.[56] For example, using a one-tailed test of statistical significance, a value of 1.64 standard deviations corresponds to about two standard deviations when using a two-tailed test.[57] Using a one-tailed test to obtain statistical significance, a contestant could reach the two standard deviations threshold of the *Hazelwood* two or three standard deviations rule by demonstrating a standard deviation of only 1.64.[58] The *Federal Reserve Bank* court held that to justify use of the one-tailed test of statistical significance, a plaintiff must produce independent evidence supporting a belief or assumption of discrimination.[59]

In *Federal Reserve Bank*, plaintiffs' expert relied on multiple regression studies to provide the necessary inference of discrimination.[60] Multiple regression analysis assigns numerical weights to certain independent variables (*e.g.*, age, race, sex) in relation to a single dependent variable (*e.g.*, promotions).[61]

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53. *Id.* at 655-56.

54. *Id.; see* D. BALDUS & J. COLE, *supra* note 8, at 307-08 (defining one-tailed test of statistical significance). A one-tailed test of statistical significance addresses the question of how often an observer would see a disparity that favored only white employees in a race-neutral environment. *Id.*

55. *See* 698 F.2d at 655-56. A two-tailed test of statistical significance addresses the question, if given a race-neutral environment, how frequently would an observer see a disparity that favored either black or white employees. *See* D. BALDUS & J. COLE, *supra* note 8, at 307-08 (two-tailed test used to demonstrate probability of selecting either a white or a black).

56. *See* D. BALDUS & J. COLE, *supra* note 8, at 307 (two-tailed test produces level of statistical significance twice size of level of significance one-tailed test produces).

57. *See* 698 F.2d at 655.

58. *Id.*

59. *See id.* at 656 (must start with assumption of discrimination based on independent evidence to apply one-tailed test).

60. *Id.* at 656-60.

61. *See* Schoeman, *Understanding the Role of Statistical Evidence in Equal Employment Opportunity Law*, 54 N.Y. ST. B.J. 136, 139 (April 1982) (multiple regression analysis weighs relative importance of possible causes of observed result). Multiple regression analysis is a statistical method for summarizing the independent effects of numerous factors. *Id.* Multiple regression analysis summarizes the degree that changes in the values of a number of variables correspond to changes in the value of a single variable. *Id.* Multiple regression analysis has a wide application. *Id.* Often, the value of a particular variable is due to changes in the values of more than one other variable. *Id.* For example, salary may be determined not only by education but also by seniority, experience, and a number of other factors. *Id.* When more than one variable is used to explain the value of another variable, multiple regression may indicate how much influence each of a number of independent variables has on a dependent variable. *Id.; see* D. BALDUS & J. COLE, *supra* note 8, at 240-86 (multiple regression model can measure impact of one factor while simultaneously adjusting for effect of several factors); B. SCHLEI & P. GROSSMAN, *supra* note 5, at 1342-46 (multiple regression analysis measures influence of independent variables on dependent variable).

Statisticians use multiple regression analysis to determine whether a particular independent variable influenced a dependent variable.[62] Plaintiffs' expert prepared three multiple regression studies to justify a presumption of discrimination in the bank's promotion practices.[63] The first multiple regression study compared the salaries of blacks and whites in all pay grades and showed that the Bank had a greater percentage of whites than blacks in the upper pay grades.[64] Plaintiffs' second multiple regression study demonstrated both that the Bank assigned a larger percentage of blacks than whites to cafeteria and cleaning jobs and that the Bank assigned a smaller percentage of blacks than whites to pay grades six to fourteen.[65] The third multiple regression study indicated that fifty-three percent of the Bank's black employees as compared to twenty-six percent of the Bank's white employees worked in pay grades six and below.[66]

The Fourth Circuit held that plaintiffs' salary comparison, could not support a presumption of discrimination because the salary study compared the bank officers to employees in the lowest pay grade treating all jobs as interchangeable.[67] The court also held that plaintiffs' job assignment study could not provide plaintiffs' expert with a basis for inferring discrimination since the district court found no discrimination in job assignments.[68] The court held that plaintiffs' study comparing the percentage of black employees to the percentage of white employees in pay grades six and below could not justify plaintiffs' presumption of discrimination because plaintiffs' study failed to consider additional qualifications as a prerequisite to promotion to pay grades above level six.[69] The Fourth Circuit then held that plaintiffs' use of a one-tailed test was inappropriate. Plaintiffs failed to present sufficient independent evidence of discrimination.[70]

After a thorough examination of plaintiffs' statistical tables, the Fourth Circuit concluded that plaintiffs' statistical evidence failed to establish a prima

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62. *See* B. SCHLEI & P. GROSSMAN, *supra* note 5, at 1342-46 (multiple regression analysis explains effect of independent variables on dependent variable).

63. *See* 698 F.2d at 656-60.

64. *Id.* at 656-57.

65. *Id.*

66. *Id.* at 658.

67. *Id.* The Fourth Circuit in *Federal Reserve Bank* noted that studies involving an overall comparison of salaries which include employees at the lowest pay level and employees at the highest pay level are unreliable since overall salary comparisons do not treat salary as a function of job position and job qualifications. *Id.* at 657-58; *see* Agarwal v. Arthur McKee & Co., 19 Fair Empl. Prac. Cas. (BNA) 503, 512 (N.D. Cal.) (all job positions do not require equal levels of knowledge, skill, and responsibility), *aff'd*, 644 F.2d 803 (9th Cir. 1981).

68. *See* 698 F.2d at 658. In *Federal Reserve Bank* the Fourth Circuit noted that plaintiffs' expert demonstrated that over 85% of the bank's housekeeping and food service workers either had requested cleaning or cafeteria jobs or had prior work experience in cleaning or cafeteria jobs. *Id.* The court, therefore, concluded that plaintiffs could not prove discrimination through the job assignment study. *Id.*

69. *Id.* at 658-60.

70. *Id.*

facie case of discrimination in pay grades four and five.[71] The *Federal Reserve Bank* court held that the district court's finding of a pattern and practice of discrimination was clearly erroneous and without substantial evidentiary support in the record.[72] Accordingly, the Fourth Circuit dismissed plaintiffs' class action claim.[73]

The Fourth Circuit has subsequently affirmed the rule promulgated in *Federal Reserve Bank* that courts must use a binomial distribution test when calculating standard deviations in *EEOC v. Western Electric Co., Inc.*[74] In *Western Electric*, plaintiff alleged that defendant, Western Electric Company, engaged in age discrimination by demoting older workers during a reduction in the number of workers.[75] Plaintiffs presented statistical evidence purporting to show actual demotions at a level of approximately three standard deviations from the expected number of demotions.[76] The *Western Electric* court noted that plaintiffs used a hypergeometric test of statistical significance to obtain results more favorable to plaintiffs than findings that would result from the use of a binomial distribution formula.[77] The *Western Electric* court, however, did not convert plaintiffs' statistics to a binomial equivalent since the court held plaintiffs' studies insufficient to establish a prima facie case of discrimination.[78] The court held that plaintiff failed to establish a prima facie case of discrimination because plaintiff did not account for the role of job qualifications in Western Electric's procedure for selecting supervisors for demotion.[79] On the basis of performance and expertise, the supervisors Western Electric selected for demotion were less qualified than the supervisors Western Electric retained.[80] The *Western Electric* court's failure to examine the par-

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71. *See id.* at 664.

72. *Id.*

73. *Id.*

74. 32 Empl. Prac. Dec. (CCH) ¶ 33,759, at 30,657 (4th Cir. July 26, 1983).

75. *Id.* at 30,661-62.

76. *Id.*

77. *Id.* at 30,662. In *Western Electric*, the EEOC's statistical tables 99A and 100A calculated the standard deviations between the expected and actual number of supervisors demoted for ages 50 and over during the period July 1, 1974, to July 1, 1976 using a binomial distribution test. *Id.* Tables 99B and 100B, however, used a hypergeometric formula to calculate the number of standard deviations. *Id.* Using a binomial formula, tables 99A and 100A revealed total standard deviations of 4.8890 and 4.0327 respectively. Tables 99B and 100B, however, showed standard deviations of 5.8830 and 4.7955 respectively using a hypergeometric formula. *Id.* at 30,664-67. The *Western Electric* court, therefore, observed that plaintiff's tables using the hypergeometric formula noticeably favored the plaintiff. *Id.* at 30,662.

78. *Id.* at 30,663. The *Western Electric* court noted that the EEOC failed to establish a prima facie case of discrimination against supervisors between the ages of 40 to 65. *Id.* Under the binomial test, plaintiffs' statistics for ages 50 to 65 demonstrated standard deviations of more than three for only two areas in Western Electric's Southern Region. *Id.* Plaintiffs' hypergeometric tables revealed standard deviations in excess of three for only three geographic areas within the Southern Region. *Id.*

79. *Id.* The *Western Electric* court held that the trial court erred in finding that job qualifications did not play a role in Western Electric's demotion selection process. *Id.*

80. *Id.*

ticular reasons why plaintiffs should not have used a hypergeometric test demonstrates the Fourth Circuit's acceptance of the binomial distribution test when calculating standard deviations to measure legal significance in employment discrimination cases.[81] As evidenced by the Fourth Circuit's decisions in *Federal Reserve Bank* and *Western Electric* the court is correctly applying the binomial distribution test to calculate standard deviations in assessing statistical significance in Title VII cases.[82]

Although the Fourth Circuit correctly applied a binomial distribution test to the statistical analysis in *Federal Reserve Bank*, the court incorrectly rejected a one-tailed test of statistical significance.[83] In *Little v. Master-Bilt Products, Inc.*,[84] the United States District Court for the Northern District of Mississippi sanctioned the use of one-tailed significance tests in employment

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81. *Id.* at 30,663. *But see* D. BALDUS & J. COLE, *supra* note 8, 1983 Supp. at 104 (Supreme Court never intended that courts apply two or three standard deviations test of *Castaneda* and *Hazelwood* as rule of law). Baldus and Cole maintained that a court treats the two or three standard deviations test of statistical significance as a rule of law when the court asks whether an observed disparity satisfies the two or three standard deviations rule. *Id.* If a court treats the two or three standard deviations test as a rule of law, plaintiff may establish a prima facie case of discrimination by proving that an observed disparity exceeds two or three standard deviations. *Id.* Baldus and Cole argue that courts should treat the two or three standard deviations test as an aid to interpretation rather than as a rule of law. *Id.* Although the *Federal Reserve Bank* court cited Baldus and Cole for the proposition that *Castaneda* and *Hazelwood* did not establish the two or three standard deviations test as a rule of law, the *Federal Reserve Bank* court applied the two or three standard deviations test as a rule of law. *See* 698 F.2d at 647 n.18; *see also* D. BALDUS & J. COLE, *supra* note 8 at 295 n.13 (application of two or three standard deviations test to employment discrimination cases requires caution and expert guidance).

Baldus and Cole argued that the *Federal Reserve Bank* court incorrectly rejected the hypergeometric distribution formula in favor of a binomial distribution formula. *See* D. BALDUS & J. COLE, *supra* note 8, 1983 Supp. at 94 n.12 (criticizing Fourth Circuit's rejection of hypergeometric distribution formula). The *Federal Reserve Bank* court concluded that the replaced sampling model applied to plaintiffs' employee population sample because the employer presumably replaced any employee who terminated employment or who promoted to a higher pay grade. *Id.* Baldus and Cole, however, argued that the replacement of individuals in plaintiffs' employee population sample could not validate the replaced sampling model. *Id.* Baldus and Cole concluded that while a situation like the one presented in *Federal Reserve Bank* required a nonstandard statistical analysis fashioned to fit the particular facts of the case, the Fourth Circuit should have used a hypergeometric model because of the large size of the overall selection rate of individuals for promotion from the pool of eligibles. *Id.* In *Federal Reserve Bank*, the observed number of promotions demonstrated an overall selection rate of 20% or more from the pool of eligibles. *Id.* An overall selection rate of 20% corresponds to a five to one ratio between the population and sample size. *Id.* at 93 n.11. A hypergeometric formula produces more accurate and reliable results than a binomial distribution at overall selection rates exceeding 20%. *Id.* Baldus and Cole concluded that the replaced sampling model violates the without replacements requirement of the hypergeometric model. *Id.* Using a hypergeometric model, however, violates the without replacements requirement to a lesser extent than using a binomial distribution violates the under 20% selection rate requirement. *Id.*

82. *See supra* text accompanying notes 19-21 (defining proper use of binomial distribution test).

83. *See supra* notes 84-90 and accompanying text (arguing case for use of one-tailed test of statistical significance in discrimination cases).

84. 506 F. Supp. 319 (N.D. Miss. 1980).

discrimination cases.[85] In *Master-Bilt*, the court held that a defendant refrigeration products manufacturer discriminated against women employees in promotion practices on the basis of sex.[86] The *Master-Bilt* court held that a one-tailed test of statistical significance was more appropriate than a two-tailed test in employment discrimination cases because a court was concerned only with discrimination against a protected group.[87] The *Master-Bilt* court held that a one-tailed test should be applied since the controversy concerned only underrepresentation of female workers.[88]

Considering the *Master-Bilt* court's analysis the Fourth Circuit's holding in *Federal Reserve Bank* rejecting a one-tailed test of statistical significance is unnecessarily strict.[89] The Fourth Circuit should recognize the logical applicability of a one-tailed test of significance to cases involving discrimination against a particular group.[90] Congress enacted Title VII to eliminate employment practices that discriminate against a protected group.[91] Using a method like the one-tailed test of statistical significance, which gives greater significance to discrimination against a particular group, would greater effectuate the goals of Title VII.[92]

In *Federal Reserve Bank*, the Fourth Circuit promulgated standards of statistical significance by which lower courts must assess the significance of a litigant's evidence of employment discrimination.[93] The Fourth Circuit's ruling that statisticians and courts must apply a binomial distribution test when calculating standard deviations demonstrates the Fourth Circuit's desire to standardize mathematical analyses used in Title VII actions litigated in the Fourth

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85. *Id.* at 333.

86. *Id.* at 334.

87. *Id.* at 333.

88. *Id.*

89. *See* D. BALDUS & J. COLE, *supra* note 8, 1983 Supp. at 100-01 (Fourth Circuit's independent, discrimination requirement unnecessarily strict). Baldus and Cole criticized the *Federal Reserve Bank* court's ruling that a litigant must establish an independent showing of discrimination before using a one-tailed test of statistical significance. *Id.* Baldus and Cole argued that a one-tailed test is appropriate if the possibility of discrimination favoring the protected group can be ruled out as illogical. *Id.* The system is either nondiscriminatory or discriminatory toward the protected group. *Id.* If an observer can be certain of no discrimination in favor of plaintiff's protected group, then any disproportionate impact favoring plaintiff may be attributed to chance. *Id.* at n.38. Only discrimination against plaintiff's group, therefore, would assume significance. *Id.* Since only discrimination against the protected group is significant, a one-tailed level of significance may be used. *Id.; see* Kaye, *The Numbers Game: Statistical Inference in Discrimination Cases,* 80 MICH. L. REV. 833, 841 (1982) (arguing case for one-tailed test of statistical significance).

90. *See* D. BALDUS AND J. COLE, *supra* note 8, 1983 Supp. at 100-01 (one-tailed test logical when measuring discrimination against a particular group).

91. *See supra* note 1 (purpose of Title VII).

92. *See* Little v. Master-Bilt Products, 506 F. Supp. 319, 333 (N.D. Miss. 1980) (evidence that one-tailed test of statistical significance applies to discrimination hypothesis); *see also supra* note 1 (purpose of Title VII to achieve equality of employment opportunities).

93. *See supra* text accompanying notes 40-50 and 56-76 (Fourth Circuit's discussion of appropriate tests of statistical significance in Title VII cases).

Circuit.[94] The *Federal Reserve Bank* decision should clarify an unsettled area of legal decisionmaking and provide guidance to courts and contestants when applying the principles borrowed from a non-legal discipline.

BRUCE MICHAEL HATRAK

D. *Title VII and Fetal Protection*

Title VII of the Civil Rights Act of 1964[1] prohibits employment discrimination based on race, color, religion, sex, or national origin.[2] Title VII prohibits both intentional discrimination[3] and the use of neutral employment policies that disparately affect a protected class.[4] A Title VII plaintiff asserting that an employer intentionally discriminated on a prohibited basis may sue under either of two models which together comprise the disparate treatment theory of Title VII liability.[5] The first, the covert disparate treatment model, focuses on determining whether intentional discrimination formed the basis of an employment decision.[6] An employer may defend himself against a charge of

94. *See* Moultrie v. Martin, 690 F.2d 1078, 1082 (4th Cir. 1982) (mandatory application of standard deviation analysis in discrimination cases will establish standard mathematical procedure). In *Moultrie*, the Fourth Circuit explicitly held that district courts must apply standard deviation analysis to all racial discrimination cases to promulgate standard mathematical procedures. *Id.*

1. 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. V 1981).

2. 42 U.S.C. § 2000e-2(a) (1976). Title VII of the Civil Rights Act of 1964 prohibits employment classifications based on race, sex, religion, color, or national origin if such classifications constitute barriers that restrict equal employment opportunities. 42 U.S.C. § 2000e-2(a) (1976). Title VII protects the employment opportunities of every individual, irrespective of whether the employee's class is well represented in the workplace. *See* Connecticut v. Teal, 457 U.S. 440, 445-51 (1982); Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 709 (1978). Title VII protects both traditional minority and majority workers from discriminatory practices. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279 (1976); *see* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). A private employer, however, may institute an affirmative action program in order to raise the minority level of representation in the workplace to the minority's percentage of the local labor force. United Steelworkers of Am. v. Weber, 443 U.S. 193 201-04 (1979). Title VII protects subgroups of protected classes if the employer discriminates only against the subgroup and not the entire class. *See* Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (per curiam) (employer may not discriminate against women with school-aged children even though employer does not discriminate against women generally).

3. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (employer who intentionally discriminates against employee on account of race violates Title VII).

4. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (Title VII prohibits practices which appear to be fair but are discriminatory in effect).

5. *See* Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals Under Title VII*, 69 GEO. L.J. 641, 668-73 (1981) (cases of intentional discrimination may be divided into categories of facial, or overt, discrimination and pretextual, or covert, discrimination).

6. United States Postal Serv. Bd. of Governors v. Aikens, 51 U.S.L.W. 4354, 4355 (1983).

covert disparate treatment by articulating a legitimate nondiscriminatory reason for an employment decision.[7] The second, the overt or facial discrimination model, applies when the discriminatory character of an employment practice is apparent or easily discerned.[8] An employer may justify an overtly discriminatory employment practice by proving that the practice constitutes a bona fide occupational qualification (bfoq).[9] A Title VII plaintiff may sue

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The covert disparate treatment model focuses on whether the employer intentionally has treated one or more employees less favorably than others because of race, color, religion, sex, or national origin. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). The Supreme Court enunciated the standard for proving the existence of covert disparate treatment in *McDonnell Douglas Corp. v. Green*. 411 U.S. 792, 802 (1973). In *McDonnell Douglas*, the employer denied reemployment to a former employee who had acted in a criminal manner while protesting the employer's labor practices. *Id.* at 794-96. The *McDonnell Douglas* Court held that a claimant could establish a prima facie case of covert disparate treatment by showing that the job applicant was a member of a traditionally disadvantaged minority, that the applicant was qualified for an available job, that the employer rejected the applicant, and that the job remained open after the applicant's rejection. *Id.* at 802. The *McDonnell Douglas* model does not require direct evidence of intent to discriminate. *Teamsters*, 431 U.S. at 358 n.44; *see Aikens*, 51 U.S.L.W. at 4355 n.3 (plaintiff may prove intent to discriminate by introducing circumstantial evidence of discrimination). Establishing the prima facie case gives rise to an inference of intentional discrimination because common experience has shown that, absent another explanation, discriminatory motive is the most likely cause of an applicant's rejection. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 579-80 (1978). The prima facie case of covert disparate treatment reduces the likelihood that the most common nondiscriminatory reasons for an applicant's rejection formed the basis of the employment decision. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-54 (1981).

7. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). To rebut the prima facie case of covert disparate treatment, the employer must articulate a legitimate, nondiscriminatory reason for the employment action. *Id.* If the employer succeeds in articulating a legitimate reason for his action, the plaintiff may still prove the existence of intentional discrimination by persuading the court that the articulation is merely a pretext for intentional discrimination. *Id.* at 804. Throughout the litigation, the claimant retains the burden of persuasion of the ultimate issue of intentional discrimination. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981); *see* United States Postal Serv. Bd. of Governors v. Aikens, 51 U.S.L.W. 4354, 4355 (1983) (when trial court has rendered judgment on ultimate issue of intent, appellate court may not upset trial court's factual determination solely because of deficiencies in prima facie case).

8. *See, e.g.*, Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 704 (1978) (employer's requirement that female employees make larger contributions to pension plan than male employees because of gender based actuarial tables constituted overt sex discrimination); Dothard v. Rawlinson, 433 U.S. 321, 325-26 n.6 (1977) (employer's express segregation of male and female prison guards on basis of sex constitutes overt discrimination); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 282-85 (1976) (overt discrimination occurred when employer retained black employee but discharged white employee although both employees misappropriated company supplies); Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (per curiam) (overt sex discrimination occurred when employer refused to hire women with preschool-aged children).

9. *See* Dothard v. Rawlinson, 433 U.S. 321, 332-37 (1977) (state employer may assert bona fide occupational qualification (bfoq) as defense to charge of discrimination on the basis of sex in hiring of prison guards); Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (per curiam) (employer who discriminates against women must prove bfoq to avoid liability); 42 U.S.C. § 2000e-2(e) (1976) (bfoq must be reasonably necessary to normal operation of employer's business to justify discrimination on basis of religion, sex, or national origin). To establish a bfoq defense, an employer must prove that the essence of the employer's business requires discrimination on

under the disparate impact theory when a neutrally expressed employment policy, which on its face does not appear to be discriminatory, unintentionally results in a discriminatory effect on a protected class of employees.[10] An employer may defend himself against a charge of disparate impact by proving that business necessity justified the policy.[11] In *Wright v. Olin Corp.*,[12] the Fourth Circuit considered a Title VII claim that did not conform to any of the established models of analysis.[13]

In *Olin*, the defendant, Olin Corporation (Olin), instituted a fetal protection program purportedly to protect the health of Olin employees' offspring.[14]

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the basis of religion, sex, or national origin. *See* Diaz v. Pan Am. World Airways, 442 F.2d 385, 388 (5th Cir.) (bfoq justifies sex discrimination only when failure to discriminate would undermine essence of business operation), *cert. denied*, 404 U.S. 950 (1971); *see also* Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969) (to establish bfoq defense, employer must have factual basis for believing that all women would be unable to perform job safely).

10. *See* Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971). In *Griggs*, the Supreme Court held that Title VII prohibits an employment practice that adversely affects a protected class of employees in a disproportionate manner, irrespective of the apparent neutrality of the practice. *Id.* The Title VII claimant will typically raise a prima facie case of disparate impact by introducing statistical evidence showing that the representation of a protect class of employees fails to meet the expected results of random selection from the qualified labor force. *See* EEOC v. United Va. Bank/Seaboard Nat'l., 615 F.2d 147, 150 (4th Cir. 1980) (court must determine disparate impact in light of qualified work force because general labor force statistics provide inadequate basis for comparison). A finding of lack of randomness gives rise to the inference that an impermissible classification entered into the employment decision. *See* EEOC v. American Nat'l Bank, 652 F.2d 1176, 1191 (4th Cir. 1981) (small probability of randomness confirms legal inference of discrimination), *cert. denied*; 103 S.Ct. 235 (1982); Comment, *Proper Methods of Statistical Proof in Disparate Impact Cases of Title VII Litigation*, 39 WASH. & LEE L. REV. 665, 669 n.26 (1982) (statistically small probability of randomness in minority representation implies discriminatory design).

11. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). An employer may rebut a prima facie case of disparate impact by showing that business necessity justified the employment practice that led to disproportionate representation. *Id.* The test for business necessity applied by the lower courts requires an employer to show that an overriding legitimate business purpose justifies the practice in question. Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971). In addition, the employment practice must be necessary for safety and efficiency and must carry on the business purpose effectively. *Id.* If the employer succeeds in establishing that business necessity justified the employment practice, the plaintiff then must prove that the asserted business necessity constituted a pretext for intentional discrimination. *See* New York Transit Auth. v. Beazer, 440 U.S. 568, 587 & n.31 (1979). *See generally* Furnish, *A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After* Beazer *and* Burdine, 23 B.C.L. REV. 419 (1982) (discussing structural similarities between disparate impact and disparate treatment models).

12. 697 F.2d 1172 (4th Cir. 1982).

13. *Id.* at 1184; *see infra* notes 28-40 and accompanying text (discussing *Olin* court's choice of Title VII model of analysis).

14. 697 F.2d at 1182. Olin Corporation (Olin) instituted its "female employment and fetal vulnerability" program in Olin's Pisgah Forest plant after four years of planning. *Id.* The program created three job classifications for women. *Id.* Unrestricted jobs, which presented no health hazards to the fetus, were open to all women. *Id.* Controlled jobs, which presented some risk of contact with harmful chemicals, were open to nonpregnant women. *Id.* Restricted jobs, which required contact with known harmful chemicals, were closed to all fertile women. *Id.* Of the

The fetal protection program excluded all fertile women from restricted job categories that entailed risk of exposure to lead or other dangerous substances used in the production of paper at Olin's Pisgah Forest Plant.[15] For purposes of the program, Olin assumed that any woman between five and sixty-three years of age was fertile.[16] Olin would permit a woman in this age group to work in restricted jobs only if Olin's medical staff would certify the woman's sterility.[17]

The Equal Employment Opportunity Commission (EEOC)[18] filed suit

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265 job classifications at the Pisgah Forest plant, the fetal protection program categorized twelve as restricted. *Id.* The program placed no restrictions on male employees. *Id.*

15. *Id.* Olin excluded women from jobs which entailed a risk of exposure to lead or other teratogenic or abortifacient substances. *Id.* Teratogens and abortifacients comprise two of three overlapping categories of substances that threaten human reproductive processes. *See* Note, *Birth Defects Caused by Parental Exposure to Workplace Hazards: The Interface of Title VII With OSHA and Tort Law*, 12 U. MICH. J.L. REF. 237, 239-40 (1979) [hereinafter cited as *Birth Defects*]. The first category, mutagens, affects the germ cells of exposed male and female adults prior to conception. *Id.* at 239. Mutagens cause changes in the chromosomal structure of cells that may be transmitted to future generations. *Id.* Single or repeated exposures to mutagens may result in mutagenesis. *Id.* at 240. The effects of mutagenesis may not become apparent for decades after the initial exposure. *Id.* Mutagenesis may result in fetal mortality, birth-defects, or miscarriage. *Id.* The second category of substances that threaten human reproduction, gametotoxins and abortifacients, cause miscarriage or fetal malformation by damaging sperm or ova prior to conception. *Id.* Teratogens, the third category, act on the embryo itself after conception. *Id.* A teratogen is any substance which causes a functional deviation or structural deformity, not heritable, in a developing embryo or fetus. 40 C.F.R. § 162.3 (mm) (1983). Teratogens generally affect only the offspring of exposed female workers, but also may affect the offspring of a male worker who exposes his spouse by carrying home trace amounts of teratogenic material on his body or in his clothing. *Birth Defects, supra* at 240 & n.24. Teratogenesis may occur even if a female employee has left the workplace prior to conceiving if sufficient time has not elapsed to allow her system to detoxify. *Id.* at 240. A strictly teratogenic substance may affect the fetus without harming either parent. *See* Nothstein & Ayres, *Sex-Based Considerations of Differentiation in the Workplace: Exploring The Biomedical Interface Between OSHA and Title VII*, 26 VILL. L. REV. 239, 245 n.18 (1981). Teratogens differ from abortifacients and gametotoxins in that a teratogen-affected infant frequently is born alive, while abortifacients and gametotoxins cause spontaneous miscarriage. *Id.* Several commentators believe that an employer's fear of tort liability to a teratogen-affected infant is the source of an employer's motivation to institute a fetal protection plan. *See id.* at 293; *infra* note 94 and accompanying text (describing employer's potential tort liability for causing harm to fetus).

16. 697 F.2d at 1182.

17. *Id.*

18. *See* 42 U.S.C. § 2000e-5 (1976). Under Title VII, an employee who considers himself or herself to be the subject of prohibited discrimination must file a claim with the Equal Employment Opportunity Commission (EEOC) before pursuing recourse in the courts. *Id.* § 2000e-5(e). The employee must file his or her claim with the EEOC within 180 days of the alleged discriminatory act. *Id.* If the EEOC finds reasonable cause to believe that discrimination if present, the EEOC will attempt to persuade the employer to cease the discriminatory practice through informal conferences and conciliations. *Id.* § 2000e-5(b). If the EEOC's efforts at informal resolution fail, the EEOC will issue a right to sue letter and the aggrieved employee may sue the employer directly. *Id.* The EEOC will issue the notice of right to sue upon either dismissal of the administrative charge, termination of conciliation proceedings, or lapse of 180 days from the employee's initial filing of the charge. *Id.* § 2000e-5(e). The EEOC itself also may file a civil action against a private employer. *Id.* § 2000e-5(f).

against Olin alleging that Olin's fetal protection program violated Title VII by intentionally discriminating against female employees.[19] The EEOC sought to enjoin continuation of the program.[20] At trial, Olin presented the testimony of several employees who stated that Olin instituted the exclusionary policy to protect the health of potential offspring of Olin employees.[21] The United States District Court for the Western District of North Carolina held that Olin did not institute the fetal protection program with the intent to discriminate on the basis of sex and consequently held that Olin's fetal protection program did not violate Title VII.[22]

On appeal to the Fourth Circuit, the EEOC contended that the undisputed evidence of Olin's gender based classification constituted a prima facie case of overt discrimination.[23] The EEOC asserted that the district court erred in finding for Olin because Olin had failed to prove that infertility constituted a bfoq.[24] The EEOC argued that, in the alternative, the fetal protection program resulted in a disparate impact on women.[25] Since Olin had failed to establish at trial the business necessity of the program, the EEOC argued that the district court erred by failing to find that Olin had violated Title VII.[26] Olin responded that the EEOC's factual assertions constituted at best a prima facie case of covert disparate treatment requiring only that Olin articulate a legitimate nondiscriminatory reason for the program to allow the program to stand.[27]

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19. EEOC v. Olin Corp., 24 F.E.P. Cases 1646, 1649 (W.D.N.C. 1980). In addition to charging that Olin's fetal protection program violated Title VII, the EEOC alleged that Olin discriminated against blacks with respect to hiring, job assignments, promotions, terminations, and re-employment, and against women with respect to re-employment. *Id.* at 1650. In the lawsuit against Olin, the EEOC sought remedial and injunctive relief for the individual employees and classes of employees named in the complaint. *Id.* at 1649. No employee alleged actual damage as a result of Olin's fetal protection program. *Id.* The *Olin* district court consolidated the EEOC's action with a class action brought by two Olin employees. *See* Wright v. Olin Corp., 24 F.E.P. Cases 1615 (W.D.N.C. 1980). The district court found for Olin on all issues. 697 F.2d at 1176. On appeal, the Fourth Circuit held that the district court lacked jurisdiction over the majority of the claims because the EEOC had failed to make a reasonable cause determination of discrimination before filing suit. *Id.; see* 42 U.S.C. § 2000e-5(b) (1976) (EEOC must find reasonable cause to believe discrimination occurred before taking any action against employer). The Fourth Circuit held that the district court's determinations of all charges except the fetal protection plan were not clearly erroneous and therefore affirmed the district court's judgment on those charges. 697 F.2d at 1180-81.

20. 24 F.E.P. Cases 1646, 1649 (W.D.N.C. 1980).

21. 697 F.2d at 1182. Olin's Corporate Director of Health Affairs, a medical doctor, testified that Olin's Department of Hygiene and Toxicology had reviewed the relevant medical literature in arriving at the conclusion that the fetal protection program was necessary to protect the health of employees' future offspring. *Id.* Olin's Director of Safety Loss Prevention testified that no feasible alternative to excluding fertile women was available to reduce the risk of fetal harm. *Id.*

22. 24 F.E.P. Cases 1646, 1659. The *Olin* district court found that Olin instituted the fetal protection program for sound medical and humanitarian reasons, and not with the intent to discriminate against women. *Id.*

23. 697 F.2d at 1183; *see supra* notes 8-9 (describing overt discrimination model).

24. 697 F.2d at 1183.

25. *Id.* at 1183-84; *see supra* notes 10-11 (describing disparate impact model).

26. 697 F.2d at 1183-84.

27. *Id.* at 1183; *see supra* notes 6-7 (describing covert disparate treatment model). On appeal

The Fourth Circuit recognized that selecting the proper Title VII model of analysis for Olin's fetal protection program was an issue of first impression in the federal courts.[28] The court noted that the fetal protection program did not conform precisely with any of the existing Title VII models.[29] The *Olin* court rejected the covert disparate treatment model as wholly inappropriate for evaluating the validity under Title VII of the fetal protection program.[30] The court reasoned that the covert disparate treatment model applies only when the employer denies that he considered gender as an employment factor, the employer's intent is not manifest, and the employer's intent may only be proven circumstantially.[31] The Fourth Circuit recognized that the EEOC based its claim on the assertion that Olin's intention to treat female employees less favorable than male employees was manifest in the very definition of the program.[32] The court further reasoned that analyzing the fetal protection program as a case of covert disparate treatment would deny the EEOC the opportunity to assert a disparate impact claim as an alternate theory.[33]

Although the *Olin* court rejected covert disparate treatment as the analytical model for a fetal protection plan, the court did not adopt the overt discrimination model.[34] The court stated that the overt model, if adopted, would limit Olin to the narrow bfoq defense.[35] The court suggested that Title VII did not limit an employer to one defense, but permitted an employer to advance either a business necessity or a bfoq defense.[36]

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to the Fourth Circuit, Olin contended that it had articulated a legitimate nondiscriminatory reason for excluding fertile women from certain jobs. 697 F.2d at 1183. Olin also asserted that the EEOC had failed to prove that Olin's articulated nondiscriminatory reason constituted a pretext for intentional discrimination. *Id.*

28. 697 F.2d at 1184.

29. *Id.*

30. *Id.* at 1185.

31. *Id.* at 1185 n.20.

32. *Id.*

33. *Id.* The Fourth Circuit reasoned that treating the covert disparate treatment model as the exclusive model of analysis would interfere with the EEOC's right to pursue a disparate impact claim. *Id.* The court noted that the disparate impact and disparate treatment models constitute settled alternative bases of liability. *Id.*

34. *See id.* at 1185.

35. *Id.* at 1185 n.21.

36. *Id.* The *Olin* court's holding that an employer may assert the Title VII defenses of bfoq and business necessity interchangeably is not supported by the decisions of other courts. Factual situations may arise that justify the plaintiff's pursuit of both disparate impact and disparate treatment claims. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (both disparate impact and disparate treatment theories may apply to a particular set of facts); Wright v. National Archives & Records Serv., 609 F.2d 702, 711 (4th Cir. 1979) (disparate impact and disparate treatment theories may provide alternate grounds for relief in same case).

No court, however, has permitted an employer to select defenses at the employer's will. *See Miller v. Texas State Bd. of Barber Examiners*, 615 F.2d 650, 653 (5th Cir.) (courts generally have assumed that business necessity defense applies only to cases of disparate impact), *cert. denied*, 449 U.S. 891 (1980). In *Miller*, the employer assigned the plaintiff, a black man, to inspect only barber shops operated by blacks and discharged the plaintiff for seeking to inspect shops operated by whites. *Id.* at 651. The *Miller* court found that the work assignment constituted intentional discrimination on the basis of race. *Id.* at 652. The court recognized that because the statutorily created bfoq exception does not permit discrimination on the basis of

The Fourth Circuit found that the disparate impact model most closely accommodated the unique characteristics of the fetal protection program.[37] The court recognized that the facial neutrality of Olin's fetal protection program was questionable, but nevertheless adopted the disparate impact model.[38]

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race or color, the bfoq defense could not justify discrimination against the plaintiff. *Id.* The Fifth Circuit, furthermore, rejected the employer's business necessity defense on the grounds that the business necessity defense applies only when the plaintiff has established a prima facie case of disparate impact. *Id.* at 653; *see* Note, *Business Necessity: Judicial Dualism and the Search for Adequate Standards*, 15 GA. L. REV. 376, 385 (1981) (business necessity defense may justify only neutral rules whereas bfoq defense may justify intentionally discriminatory employment practices). *But see* deLaurier v. San Diego Unified School Dist., 588 F.2d 674, 678 (9th Cir. 1978) (business necessity defense may rebut any prima facie case of discrimination under Title VII). In *deLaurier*, the employer required the plaintiff, a female school teacher, to take maternity leave at the beginning of her ninth month of pregnancy. *Id.* at 676. Although the *deLaurier* court stated that the business necessity defense could rebut any prima facie case, the court implicitly found that discrimination on the basis of pregnancy constituted disparate impact discrimination. *See id.* at 677 (*deLaurier* court relied on disparate impact cases to determine existence of prima facie case). The *deLaurier* court's statements regarding the interchangeability of Title VII defenses therefore represent dicta because the business necessity defense normally applies to disparate impact cases. *See supra* note 11 and accompanying text (describing business necessity defense). *Cf.* Nashville Gas Co. v. Satty, 434 U.S. 136, 143 (1977) (business necessity may justify disparate impact on women resulting from discrimination on basis of pregnancy).

The only Supreme Court opinion that addresses both the bfoq and business necessity defenses implicitly distinguishes bfoq from business necessity. *See* Dothard v. Rawlinson, 433 U.S. 321, 329-34 (1977). In *Dothard*, the Supreme Court applied the business necessity defense to an employer's minimum height and weight requirements which had a disparate impact on women. *See id.* at 332-33. The Court also applied the bfoq defense to the employer's disparate treatment of female prison guards. *See id.* at 332-34. The Fourth Circuit, however, previously has stated in dicta that the bfoq and business necessity defenses are not necessarily mutually exclusive. *See Burwell v. Eastern Air Lines, Inc.*, 633 F.2d 361, 370 (4th Cir. 1980) (en banc), *cert. denied*, 450 U.S. 965 (1981). In *Burwell*, the court held that an airline's discrimination against pregnant flight attendants constitutes a prima facie case of disparate impact against women. *Id.* at 369. The *Burwell* court, however, exonerated the airline by applying the business necessity defense. *Id.* at 370, 371-73; *see infra* notes 87-92 and accompanying text (describing *Burwell* court's business necessity criteria). The *Burwell* court found that the bfoq defense was unnecessary since the business necessity defense was sufficient to resolve the case. 633 F.2d at 370. The court therefore refused to decide whether the employer could have asserted bfoq as an additional defense to a case of disparate impact. *Id.* Although the *Burwell* court refused to apply the bfoq defense to a disparate impact case, the court conjectured that a case might occur in which selection of a single Title VII theory would lead to confusion. *Id.* at 370 n.16. The could held that when confusion exists, Title VII permits the application of either the bfoq or the business necessity defense except in race discrimination cases. *Id.; see* 42 U.S.C. § 2000e-2(e) (1976) (bfoq defense applies only to discrimination based on religion, sex, or national origin). Although the dicta in *Burwell* indicates that the bfoq and business necessity defenses are interchangeable in sex discrimination cases, the *Burwell* court focused on whether the bfoq defense could apply to a case of disparate impact and did not discuss whether the business necessity defense could apply to a disparate treatment case. *See id.* at 369-70; *see also* Comment, *Pregnancy Discrimination under Title VII*, 38 WASH. & LEE L. REV. 633, 642-43 (1981) (asserting that Fourth Circuit should have analyzed *Burwell* as disparate treatment case and should have applied bfoq defense only).

37. 697 F.2d at 1185.

38. *Id.* In deciding to analyze the fetal protection program in terms of disparate impact, the *Olin* court relied upon the Supreme Court's analysis in *Nashville Gas Co. v. Satty*. *Id.* at 1186-87; *see* Nashville Gas Co. v. Satty, 434 U.S. 136, 143 (1977) (denial of accumulated seniority

The court determined that the underlying principles of Title VII focus on the consequences of discrimination and not on the form in which an employer expresses the policy.[39] The Fourth Circuit found that, irrespective of the facial neutrality of the program's terms, the fetal protection program's disparate impact on women constituted a prima facie violation of Title VII.[40]

Having chosen to analyze Olin's program as a case of disparate impact, the Fourth Circuit proceeded to remand the case for retrial in the district court and to define the nature of the business necessity defense that Olin would have to establish on retrial.[41] The court emphasized that an employer may not exclude female workers from the workplace to protect the female workers themselves, but may exclude women to protect their potential offspring.[42] The court recognized that the business necessity defense permits an employer to adopt an apparently neutral policy that disparately affects women if the purpose of the policy is to ensure the safety of business customers or fellow workers.[43] The Fourth Circuit reasoned by analogy that an employee's child deserved an equivalent level of protection.[44] The court found that the national interest in the health of members of society could justify the employer's pursuit of a policy that excludes women from the workplace.[45] The court noted that since the general societal interest in fetal health constituted a sufficient basis for a business necessity defense, the employer's motivation to avoid potential tort liability was irrelevant.[46] The *Olin* court held that under appropriate circumstances an employer, as a matter of business necessity, could impose restrictions that were reasonably required to protect the health of unborn children of female workers against workplace hazards.[47]

The *Olin* court stated that an employer who defends a fetal protection program must introduce objective evidence that shows the necessity and effectiveness of the program.[48] The court held that to prove necessity, an

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during maternity leave constitutes disparate impact on women); *infra* notes 70-75 and accompanying text (discussing *Satty*).

39. 697 F.2d at 1186.

40. *Id.* at 1186-87.

41. *Id.* at 1187-92. Prior to defining the nature of the business necessity defense, the *Olin* court noted that in the absence of specific congressional guidance, courts must determine congressional intent and not fashion policy. *Id.* at 1188.

42. *Id.*

43. *Id.* at 1188-89.

44. *Id.*

45. *Id.* at 1190 n.26. In permitting an employer to pursue the goal of fetal safety, the *Olin* court noted that the general goal of fetal protection does not justify the exclusion of women in an individual case. *Id.* The court warned that each employer must prove that a fetal protection plan is both necessary and effective in that employer's specific workplace. *Id; see infra* notes 48-52 and accompanying text (describing necessity and effectiveness criteria).

46. 697 F.2d at 1190 n.26. In rejecting the threat of tort liability as a basis for a fetal protection plan, the Fourth Circuit recognized that economic cost alone is insufficient to establish a justification defense. *Id.; see* Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 716-17 (1978) (cost savings does not justify discrimination).

47. 697 F.2d at 1189-90.

48. *Id.* at 1190. In requiring an employer to show the necessity and effectiveness of an employment policy that disparately affects women, the Fourth Circuit stated that the employer

employer must show that such a considerable body of expert opinion predicts risk to the fetus that an informed and responsible employer could not fail to act.[49] To prove effectiveness, the employer must show that excluding women actually protects the health of the unborn child.[50] The court held, however, that the employer need not prove that a general consensus of expert opinion regarding the necessity and effectiveness of the program exists.[51] The Fourth Circuit held that proof of necessity and effectiveness constitutes a prima facie business necessity defense.[52]

The *Olin* court held that a Title VII plaintiff could rebut the prima facie business necessity defense by showing the availability of alternative practices that would accomplish the employer's objectives with less impact on female employees.[53] The court held that a claimant's showing of less restrictive alternatives could lead to two different results.[54] The existence of a less restrictive

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must rely primarily on expert scientific testimony. *Id.* The court noted that the evidence presented at trial by Olin's three witnesses was insufficient to meet the employer's burden of proving necessity and effectiveness. *Id.* at 1190 n.28; *see supra* note 21 and accompanying text (discussing nature of evidence that Olin presented at trial).

The *Olin* court adopted the criteria expressed in *Robinson v. Lorillard* for determining necessity and effectiveness. *See id.* at 1190; Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971). The *Lorillard* court held that an employment practice that results in disparate impact on a protected class is permissible under Title VII only if the practice meets three criteria. *Id.* First, the practice must be necessary to ensure the safe and efficient operation of the business. *Id.* Second, the practice must effectively carry out the purpose which it is alleged to serve. *Id.*

The third *Lorillard* criterion requires that the employer prove that no acceptable alternative policies exist which would better accomplish the business purpose advanced. *Id.* The *Olin* court,however, found that Supreme Court cases decided subsequently to *Lorillard* implicitly overrule the *Lorillard* requirement that the employer show the nonexistence of acceptable alternatives. 697 F.2d at 1191 n.29; *see* New York Transit Auth. v. Beazer, 440 U.S. 568, 587 n.31 (1979) (claimant bears ultimate burden of proving violation of Title VII); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (once employer shows job-relatedness of practice, claimant must show existence of acceptable nonrestrictive alternatives to prove pretext); Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (same). Consequently, the *Olin* court applied only the necessity and effectiveness criteria expressed in *Lorillard*. *See* 697 F.2d at 1190.

49. 697 F.2d at 1191. In requiring an employer to present objective evidence and expert testimony, the *Olin* court emphasized the fact that evidence of the employer's good faith was irrelevant to proving business necessity. *Id.* at 1190.

50. *Id.* at 1190 & n.27. In placing the burden to prove effectiveness upon the employer, the *Olin* court required the employer to prove that workplace exposure of the male employee does not pose the same risk to the fetus that exposure of the female employee poses. *Id.* at 1190 n.27. The court stated that a fetal protection program that fails to protect fetuses from the risk of harm due to the exposure of male workers is underinclusive and therefore fails for lack of effectiveness. *Id.* The potential for underinclusiveness constituted the focus of the attack on Olin's fetal protection plan. *See* Reply Brief of ACLU, Amici Curiae at 17-24, *Wright v. Olin Corp.*, 697 F.2d 1172 (1982) (exposure of male employees to mutagenic substances poses equivalent risk of harm to fetus as does exposure of female employees). *See generally* Williams, *supra* note 5, at 656 (exposure of either parent to mutagenic substances prior to conception may harm fetus).

51. 697 F.2d at 1190.

52. *Id.* at 1191.

53. *Id.*

54. *Id.*

alternative may lead to a finding that the asserted business purpose constituted a pretext for intentional discrimination.[55] In contrast, a court may find that the existence of a less restrictive alternative implies that the exclusionary policy was a genuine, although excessive attempt to assure fetal well-being.[56] The Fourth Circuit noted that if the trial court were to find that the policy was merely excessive, the proper remedy would be to award damages for the difference between the harm that the female employee suffered under the policy and the harm that she would have suffered under the less restrictive alternative.[57] If the rebuttal evidence were to show pretext, however, the proper remedy would compensate the excluded female employee for the full amount of harm suffered.[58]

The Fourth Circuit's rejection of the covert disparate treatment model is consistent with Supreme Court precedent.[59] In *McDonnell Douglas Corp. v. Green*,[60] the Supreme Court designed the covert disparate treatment model to determine from circumstantial evidence whether an employer intentionally discriminated against employees on the basis of a prohibited classification.[61] In *McDonnell Douglas*, such a model was necessary since only the employer could know the actual criterion on which the employer based his refusal to rehire a former employee.[62] In *Olin*, however, the employer plainly stated that childbearing capacity was the criterion upon which the company excluded certain employees from jobs that entailed risk of exposure to dangerous chemicals.[63] The EEOC did not allege that Olin based its exclusion of women on any basis other than childbearing capacity.[64] The EEOC, rather, challenged the validity of using childbearing capacity as an employment criterion and alleged that discrimination on the basis of childbearing capacity constituted overt gender discrimination.[65]

The *Olin* court's rejection of the overt discrimination model is consistent with Supreme Court precedent only if discrimination on the basis of childbearing capacity is not equivalent to discrimination on the basis of gender.[66]

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55. *Id.* at 1192.

56. *See id.* at 1191. Although the Fourth Circuit held that the existence of less restrictive alternatives could lead to a finding of either intentional discrimination or excessive unintentional discrimination, the *Olin* court acknowledged that the Supreme Court has not resolved this issue. *Id.* at 1191 n.30.

57. *Id.* at 1190.

58. *Id.* at 1192.

59. *See infra* notes 60-65 and accompanying text (discussing applicability of covert disparate treatment model to *Olin*).

60. 411 U.S. 792 (1973); *see supra* note 6 (discussion of *McDonnell Douglas*).

61. 411 U.S. at 802.

62. *See id.* at 801.

63. 697 F.2d at 1182; *see supra* notes 14-17 and accompanying text (discussing nature of Olin's fetal protection program).

64. 697 F.2d at 1183.

65. *Id.*

66. *See infra* notes 67-82 and accompanying text (discussing Supreme Court's and Congress' approach to pregnancy discrimination); *see also* Nashville Gas Co. v. Satty, 434 U.S. 136, 140-41 (1977) (disparate impact model rather than overt discrimination model applied since

In *General Electric Co. v. Gilbert*,[67] the Supreme Court permitted an employer to exclude pregnancy benefits from a comprehensive group disability plan.[68] The Court reasoned that the policy wa not based on gender but on the condition of pregnancy and, therefore, did not violate Title VII.[69] In *Nashville Gas Co. v. Satty*,[70] the Supreme Court similarly concluded that discrimination on the basis of pregnancy was not overt gender discrimination.[71] In *Satty*, the employer denied accumulated seniority to female employees returning from pregnancy leave, but permitted employees returning from other disability leaves to retain seniority.[72] The *Satty* Court found that a policy based on pregnancy was related to a medical condition and not to gender.[73] Because the *Satty* Court did not consider discrimination on the basis of pregnancy to be equivalent to gender discrimination, the *Satty* Court rejected the overt discrimination model.[74] The Court, however, found that because the policy imposed a burden on women that men did not suffer, the policy resulted in disparate impact on women.[75]

In response to the Supreme Court's opinion that pregnancy discrimination did not constitute overt gender discrimination, Congress enacted the Pregnancy Discrimination Act.[76] The Act provides that discrimination on the basis of pregnancy, childbirth, or related medical conditions constitutes overt discrimination.[77] The Pregnancy Discrimination Act, however, does not specify whether an employment decision based on childbearing capacity constitutes discrimination on the basis of pregnancy.[78] Whether discrimination on the basis

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discrimination on basis of pregnancy constitutes neutral employment classification and not overt sex discrimination).

67. 429 U.S. 125 (1976).

68. *Id.* at 128-33. In *General Electric v. Gilbert*, the employer excluded pregnancy benefits from a comprehensive group disability plan which paid disabled employees 60% of their normal earnings. *Id.* at 128. The employer included in coverage all temporary disabilities except pregnancy. *Id.* at 129 n.4.

69. *Id.* at 139-40.

70. 434 U.S. 136 (1977).

71. *Id.* at 140.

72. *Id.* at 138.

73. *Id.* at 140.

74. *Id.*

75. *Id.* at 142-43. In *Nashville Gas Co. v. Satty*, the court found that denial of accumulated seniority to women who took pregnancy leaves of absence resulted in a disparate impact on women. *Id.* The Court found that the employer had failed to prove the business necessity of the seniority policy and therefore held that the employer had violated Title VII. *Id.* at 143.

76. Pub. L. No. 95-555, § 1, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (Supp. III 1979)); *see* H.R. REP. No. 948, 95th Cong., 2d Sess. 2-4, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 4749, 4753 (rationale of *Gilbert* and *Satty* is inconsistent with congressional intent).

77. 42 U.S.C. § 2000e(k) (Supp. III 1979).

78. *See id.* (discrimination on basis of pregnancy, childbirth, or related medical conditions constitutes sex discrimination); H.R. REP. No. 948, 95th Cong., 2d Sess. 3-7, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 4749, 4750-54. The legislative history of the Pregnancy Discrimination Act indicates that employers consider women to be marginal workers based on the common misconceptions that pregnant women are malingerers and will leave the workforce, and that pregnan-

of childbearing capacity constitutes overt gender discrimination under the Pregnancy Discrimination Act, therefore, still is unresolved.[79] Discrimination based on childbearing capacity, however, like discrimination based on pregnancy, results in a heavier burden on women than on men.[80] The disparate impact model, therefore, is an appropriate model for evaluating the validity of a fetal protection program.[81] Consequently, Olin was entitled to establish a business necessity defense.[82]

The Fourth Circuit's definition of the business necessity defense constitutes the first attempt by a federal court to determine the validity of a fetal protection plan that excludes fertile women from the workplace.[83] The Supreme Court

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cy will constitute an additional expense to company health plans. *See* H.R. REP. No. 948 at 3-7, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS at 4750-54.

79. *See supra* notes 76-78 and accompanying text (Pregnancy Discrimination Act focuses on preventing discrimination based on stereotypic misconceptions about pregnancy); *see also* H. R. REP. No. 948, 95th Cong., 2d Sess. 5, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 4749, 4753 (Pregnancy Discrimination Act is limited to discriminatory effects upon woman who is pregnant and does not include effect upon one woman due to pregnancy of another). *Wright v. Olin Corp.* is the first case dealing with an employment policy in which childbearing capacity constituted the sole employment criterion. *See* 697 F.2d at 1184 (no court other than *Olin* court has addressed legality of fetal protection plan); *infra* note 83 and accompanying text (*Olin* is case of first impression).

80. *Cf.* Nashville Gas Co. v. Satty, 434 U.S. 136, 140-41 (1977) (employment policy that discriminates on basis of pregnancy is facially neutral but may result in disparate impact); Zuniga v. Kleberg County Hospital, 692 F.2d 986, 991 (5th Cir. 1982) (exclusion of pregnant x-ray technician constituted case of disparate impact under Pregnancy Discrimination Act); Clanton v. Orleans Parish School, 649 F.2d 1084, 1086 (5th Cir. 1981) (discretionary reinstatement policy for maternity leave results in disparate impact on women).

81. *See supra* notes 76-80 and accompanying text (discrimination on basis of childbearing capacity does not clearly constitute overt discrimination but does result in disparate impact on women).

82. *Cf.* Nashville Gas Co. v. Satty, 434 U.S. 136, 143 (1977) (business necessity justifies neutral policy that results in disparate impact on women).

83. *See* 697 F.2d at 1184 (no court other than *Olin* court has addressed legality of fetal protection plan); *see also* Bertin, *Workplace Bias Takes the Form of Fetal Protectionism*, Legal Times of Washington, August 1, 1983 at 18 col. 1 (although many petrochemical companies and heavy industries have fetal protection programs, *Olin* represents first federal case on fetal protection issue); Stohner & Underhill, *'Olin' Debates Title VII Applicability to Fetal Rights*, Legal Times of Washington, April 18, 1983 at 24 col. 1 (*Olin* decision will provide guidelines for other courts).

Two weeks prior to the *Olin* decision, the Fifth Circuit decided that an employer who had discharged a pregnant x-ray technician purportedly to protect the health of the employee's fetus had violated Title VII. *See* Zuniga v. Kleberg County Hospital, 692 F.2d 986, 991 (5th Cir. 1982) (Although employer had maternity and sick leave policies, employer forced pregnant x-ray technician to resign). The *Zuniga* court used disparate impact analysis and applied the business necessity defense because the facts in *Zuniga* occurred prior to the effective date of the Pregnancy Discrimination Act. *Id.* at 989 n.6. The *Zuniga* court held that the forced resignation on the basis of pregnancy constituted a prima facie case of disparate impact discrimination. *Id.* at 991. The Fifth Circuit refused to decide whether the employer's desire to protect the health of an employee's unborn child could constitute business necessity. *Id.* at 992. The court did note in dictum, however, that the economic consequences of a tort suit brought on behalf of a child deformed by prenatal x-rays could disrupt the safe and efficient operation of the hospital. *Id.* at 992 n.10. The *Zuniga*

has defined only in general terms the scope of the business necessity defense.[84] The Supreme Court's discussions of business necessity have focused on the relationship between the challenged employment practice and the employee's job performance.[85] Lower federal courts generally have concluded that the pursuit of safety and efficiency in an employee's job performance is the only permissible goal of an employment practice that impinges on Title VII interests.[86]

Under the business necessity defense, courts consider the safety of business customers and fellow employees as a legitimate goal of employment practices that disparately affect a protected class of employees.[87] For example, in *Burwell*

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court held that irrespective of the existence of business necessity, the hospital's failure to follow its own maternity and sick leave policies constituted proof of pretext. *Id.* at 992-94; *cf. supra* notes 53-58 and accompanying text (discussing *Olin* court's treatment of less restrictive alternatives to fetal protection program).

Four months prior to the *Olin* decision, the district court for the Northern District of Alabama held that a hospital's dismissal of a pregnant x-ray technician constituted intentional discrimination. *See* Hayes v. Shelby Memorial Hospital, 546 F. Supp. 259, 262-63 (N.D. Ala. 1982). Based on the Pregnancy Discrimination Act, the *Hayes* court found that discrimination on the basis of pregnancy constituted overt discrimination. *Id.* The *Hayes* court, however, did not specify whether the bfoq or business necessity defense applied. *See id.* at 263. The *Hayes* court held that neither defense justified firing the pregnant x-ray technician because the employer had failed to pursue less restrictive alternatives to dismissal. *Id.* at 264-65. In discussing business necessity, however, the court noted in dictum that potential tort liability could not justify discrimination. *Id.* at 264; *cf. supra* notes 53-58 and accompanying text (discussing *Olin* court's treatment of less restrictive alternatives to fetal protection plan).

84. *See infra* note 85 and accompanying text (citing cases in which Supreme Court has defined business necessity defense requirements).

85. *See* New York Transit Auth. v. Beazer, 440 U.S. 568, 587 n.31 (1979) (employment policy that promotes rail passenger safety bears manifest relation to employment in question). Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (ability test that has disparate impact on protected class must bear manifest relation to employment in question); Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971) (written employment test that has disparate impact on protected class must be reasonable measure of job performance).

86. *See, e.g.*, Watkins v. Scott Paper Co., 530 F.2d 1159, 1168 (5th Cir.) (employer must show job relatedness, business utility, and lack of suitable alternatives that have less disparate impact on protected class to sustain business necessity defense), *cert. denied*, 429 U.S. 861 (1976); United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971) (business necessity defense requires that employment policy serves more important goal than mere legitimate management function); Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.) (policy that disparately affects a protected class of employees must be necessary to safe and efficient operation of business to sustain business necessity defense), *cert. dismissed*, 424 U.S. 1006 (1971); Johnson v. Pike Corp. of Am., 332 F. Supp. 490, 495 (C.D. Cal. 1971) (employee's ability to perform job effectively is sole permissible reason for discriminating against actual or prospective employees); *see also* Comment, *The Business Necessity Defense to Disparate-Impact Liability Under Title VII*, 46 U.CHI. L. REV. 911, 920 (1979) (test enunciated in *Robinson v. Lorillard* has been adopted by majority of lower courts).

87. *See, e.g.*, New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 & n.31 (1979) (safety of metrorail passengers justified refusal to hire former drug addicts); Burwell v. Eastern Air Lines, 633 F.2d 361, 371-72 (4th Cir. 1980) (safety of airline passengers justified flight attendants' mandatory maternity leave after thirteenth week of pregnancy), *cert. denied*, 450 U.S. 965 (1981); Spurlock v. United Airlines, Inc., 475 F.2d 216, 219 (10th Cir. 1972) (safety of airline

v. Eastern Air Lines, Inc.,[88] the Fourth Circuit approved an airline's exclusion of pregnant airline attendants from flight duty.[89] The *Burwell* court recognized that passenger safety is an essential goal of an airline and that the exclusion of pregnant attendants is sufficiently related to that goal.[90] The *Burwell* court rejected as unpersuasive the employer's alternate goal of protecting the health of the pregnant attendant and her unborn child, especially since flight posed little risk of harm to the fetus.[91] By limiting its holding to a determination that a flight attendant's job included furtherance of passenger safety, the *Burwell* court maintained conformity with the general definition of business necessity.[92]

In *Wright v. Olin Corp.*, the Fourth Circuit held that the business necessity defense does not require a link between an employment practice and job performance.[93] The *Olin* court decided that general societal concern for the health of unborn generations may justify a practice that interferes with the Title VII interests of a large class of employees.[94] The Fourth Circuit's opinion, therefore, has expanded the scope of the business necessity defense.[95] The court, however, tempered its expansion of the business necessity defense by imposing on the employer a stringent burden to prove necessity and

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passengers justified refusal to hire applicants for flight officer training program who lacked flying experience). *See generally* Note, *Business Necessity: Judicial Dualism and the Search for Adequate Standards*, 15 GA. L. REV. 376 (1981).

88. 633 F.2d 361 (4th Cir. 1980) (en banc), *cert. denied*, 450 U.S. 965 (1981).

89. *Id.* at 373. In *Burwell v. Eastern Air Lines, Inc.*, an airline required that flight attendants commence maternity leave as soon as the attendant learned that she was pregnant. *Id.* at 365. The airline did not exclude employees from flight duty for any other health conditions that might have interferred with the employee's job performance. *Id.* The airline contended that a pregnant flight attendant would pose a safety risk during an emergency because the attendant would be unable to perform her duties. *Id.* at 365-66. The *Burwell* court noted that the flight attendant's emergency duties included lifting heavy objects and assisting passengers through narrow aisles and portals. *Id.* at 366.

90. *Id.* at 373. In recognizing that the exclusion of pregnant attendants is related sufficiently to the goal of passenger safety, the *Burwell* court reasoned that advanced stages of pregnancy would interfere with an attendant's ability to perform her job. *Id.* at 373.

91. *Id.* at 371.

92. *Compare* Burwell v. Eastern Air Lines, Inc., 633 F.2d 361, 373 (1980) (en banc) (airlines's mandatory maternity leave policy was necessary to safe and efficient operation of business) *with* New York Transit Auth. v. Beazer, 440 U.S. 568, 587 n.31 (1979) (legitimate employment goals of safety and efficiency justify refusal to hire former drug users).

93. 697 F.2d at 1189-90.

94. *Id.* at 1190 n.26. By basing the legitimacy of the goal of fetal protection on broad societal grounds, the Fourth Circuit obviates the need for the employer to justify the fetal protection plan solely in terms of reducing potential tort liability to the fetus. *Id.; cf.* Note, *Employment Rights of Women in the Toxic Workplace*, 65 CAL. L. REV. 1113, 1132 (1977) (potential for enormous tort liability is actual motivation for fetal protection plans). Tort law is several jurisdictions currently allows a child who is injured as a result of maternal exposure to harmful elements to recover damages from the responsible party even though the exposure occurred prior to the child's conception. *See generally* Nothstein & Ayres, *supra* note 15, at 293 n.244 (cataloguing literature and cases concerning tort liability for preconception injury to fetus).

95. *See supra* note 86 and accompanying text (circuit courts consistently have required that exclusionary employment practices relate to employee's ability to perform job).