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III. CIVIL RIGHTS

A. Actions Under Title VII

The 1972 amendments to Title VII of the Civil Rights Act of 1964[1] grant the Equal Employment Opportunity Commission (EEOC) power to bring a civil suit to eliminate employment practices[2] which result in discrimination against an individual because of race, color, religion, sex, or national origin.[3] Such a suit may result from Commission proceedings[4] initiated by an individual filing a charge[5] with the

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[1] The Equal Employment Opportunity Act of 1972, § 1 *et seq.*, 42 U.S.C. § 2000e *et seq.* (Supp. V. 1975), (amending Civil Rights Act of 1964, 42 U.S.C. § 2000e *et. seq.* (1970) [hereinafter referred to as Title VII, or the Act].

[2] The 1972 amendments empowered the EEOC to sue in its own right in federal district court. 42 U.S.C. § 2000e-5(a) (Supp. V 1975). This power was not previously given to the Commission under Title VII. 42 U.S.C. §2000e-5 (1970); Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974); 1 EMPL. PRAC. GUIDE (CCH) ¶ 2136 (1976). The denial to the EEOC of the power to sue implies that Congress originally viewed employment discrimination as a private wrong not meriting public agency involvement in enforcing Title VII in the federal courts. Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964,* 31 BROOKLYN L. REV. 62, 67 (1965). Congress amended Title VII to empower the EEOC to sue because discrimination is a "societal wrong" inadequately enforced by private suits alone. *See* text accompanying notes 30-33 *infra.*

The EEOC may seek to enjoin a defendant from engaging in unlawful employment practices. The district court may, in addition to an injunction, order any appropriate equitable relief. Such relief may include, but is not limited to, hiring or reinstating of employees with or without back pay. 42 U.S.C. § 2000e-5(g) (Supp. V 1975).

[3] 42 U.S.C. § 2000e-2(a) (Supp. V 1975). The statute enumerates various unlawful discriminatory practices. For example, an employer may not discriminate in hiring, discharging, or compensating employees, or by classifying employees so as to deprive them of economic opportunities and benefits. *Id.* An employment agency may not discriminate in referring or failing to refer individuals for employment. 42 U.S.C. § 2000e-2(b) (1970). A labor union may not discriminate by denying membership to individuals, by classifying members so as to deprive them of economic opportunities and benefits, or by encouraging employers to discriminate. 42 U.S.C. § 2000e-2(c) (Supp. V 1975).

[4] The basic EEOC procedures for processing discrimination charges are outlined in 42 U.S.C. § 2000e-5 (Supp. V 1975). The EEOC's procedural regulations are issued under authority of 42 U.S.C. § 2000e-12 (1970), and are promulgated in 29 C.F.R. § 1601.1 *et seq.* (1975). The Commission's regulations essentially paraphrase and expand on the procedures prescribed by Title VII. For a general outline of EEOC procedures, see text accompanying notes 5-10 *infra.*

[5] An individual's charge must be filed with the EEOC within 180 days after the alleged discriminatory practice occurred. Where the charging party has initially instituted proceedings with a state or local agency empowered to seek elimination of discriminatory employment practices, the charge must be filed either within 300 days after the discriminatory practice occurred, or within 30 days after the charging party is notified that the state or local agency has terminated its proceedings, whichever is

EEOC against a respondent.[6] The EEOC investigates the charge,[7] determines whether reasonable cause exists to believe the respondent engages in discriminatory practices,[8] and attempts to secure conciliation from the respondent.[9] If conciliation fails, the EEOC may bring

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earlier. 42 U.S.C. § 2000e-5(e) (Supp. V 1975).

In Doski v. Goldseker Co., 539 F.2d 1326 (4th Cir. 1976), the Fourth Circuit considered which period of limitation to apply to a charge filed with the EEOC 281 days after the alleged discriminatory practice occurred, when the charge had been filed with a state agency earlier that day. The *Doski* court held that the charge was timely filed with the EEOC because it was initially filed with the agency, thus bringing the charge within the 300-day limitation. *Id.* at 1333. *Accord,* Ashworth v. Eastern Airlines, Inc., 389 F. Supp. 597, 601 (E.D. Va. 1975); Ugiansky v. Flynn & Emrich Co., 337 F. Supp. 807, 808 n.4 (D. Md. 1972). *See also* Vigil v. American Tel. & Tel. Co., 455 F.2d 1229 (10th Cir. 1972); Ortega v. Construction & Gen. Laborers' Union Local 390, 396 F. Supp. 976 (D. Conn. 1975); Gordon v. Baker Protective Services, Inc., 358 F. Supp. 867 (N.D. Ill. 1973); Marquez v. Omaha Dist. Sales Office, 313 F. Supp. 1404 (D. Neb. 1970), *rev'd on other grounds,* 440 F.2d 1157 (8th Cir. 1971); 29 C.F.R. § 1601.12(b)(1)(v)(A) (1975). *But see* Olson v. Rembrandt Printing Co., 511 F.2d 1228 (8th Cir. 1975) (300-day period of limitations does not apply if charge filed subsequent to expiration date of state period of limitations for filing charge with state agency); Dubois v. Packard Bell Corp., 470 F.2d 973 (10th Cir. 1972) (charge not timely filed if filed subsequent to expiration date of state period of limitations for filing charge with state agency).

The *Doski* court's holding accords with the view that Title VII should be construed liberally in order to effectuate its remedial purposes. Coles v. Penny, 531 F.2d 609, 615 (D.C. Cir. 1976); Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924, 929 (5th Cir. 1975); Huston v. General Motors Corp., 477 F.2d 1003, 1008 (8th Cir. 1973). Therefore, courts should construe Title VII so as to resolve procedural ambiguities in favor of the complaining party. Beverly v. Lone Star Lead Constr. Co., 437 F.2d 1136, 1138 (5th Cir. 1971); Sanchez v. Standard Brands, Inc., 431 F.2d 455, 461 (5th Cir. 1970).

[6] 29 C.F.R. § 1601.6 (1975).

[7] 29 C.F.R. § 1601.14 (1975). While investigating the charge to determine whether it is true, the EEOC has broad power to hear testimony and investigate books and records concerning employment practices. 1 EMPL. PRAC. GUIDE (CCH) ¶ 1958 (1976). The evidence sought, however, must be reasonably related to the charge filed with the EEOC. *See* text accompanying note 19 *infra.*

[8] 29 C.F.R. § 1601.19b (1975). A finding of "reasonable cause" is a finding that a reasonable man, upon consideration of all admissible evidence of quality and quantity sufficient to support a reasoned conclusion, could conclude that the employment practices investigated are unlawful under Title VII. EEOC COMPL. MAN. (CCH) ¶ 311 (1976).

[9] 29 C.F.R. § 1601.22 (1975).

The EEOC is required by statute to attempt conciliation with a respondent before seeking judicial relief. 42 U.S.C. § 2000e-5(b) (Supp. V 1975). This requirement indicates that Congress prefers voluntary compliance over judicial enforcement of the Act. United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 846 (5th Cir. 1975); Macklin v. Spector Freight Syst., Inc., 478 F.2d 979, 994 n.30 (D.C. Cir. 1973); Dent v. St. Louis - S.F. Ry. Co., 406 F.2d 399, 402 (5th Cir. 1969). Open and frank concilia-

suit.[10] A persistent issue concerning these procedures is the extent to which issues not raised by the individual in his original charge may be raised in the EEOC's civil complaint.[11]

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tion discussions are encouraged by the provision that anything said or done in such discussions are not admissible in court under 42 U.S.C. § 2000e-5b (Supp. 1975). EEOC v. E. I. duPont de Nemours & Co., 8 Empl. Prac. Dec. ¶ 9793, at 6312 (W.D. Ky. 1974). Conciliation is advantageous to the employer. There is no public or judicial acknowledgement that Title VII has been violated, and issues which would otherwise be raised in a later EEOC complaint are resolved relatively quickly and inexpensively. 1 EMPL. PRAC. GUIDE (CCH) ¶ 1483 (1976).

[10] 29 C.F.R. § 1601.25 (1975). A timely charge must be filed with the EEOC and the charging party must receive notice that he has a right to sue before an individual or class action suit under Title VII may be instituted. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973). The letter notifying the party of his right to sue is sent when the EEOC determines that reasonable cause to believe the respondent discriminates does not exist, when conciliation attempts are terminated, or when the EEOC has not filed suit within 180 days after receipt of the charge, if the charging party requests that such a letter be sent. 42 U.S.C. § 2000e-5(f)(1) (Supp. V 1975).

Once conciliation fails, EEOC regulations provide that an informal letter be sent to the charging party notifying him that conciliation has failed and advising him that he may request a formal letter advising him of his right to sue. 29 C.F.R. § 1601.25 (1975). In Garner v. E. I. duPont de Nemours & Co., 538 F.2d 611 (4th Cir. 1976), the Fourth Circuit considered whether the 90-day limitation period for instituting suit begins to run from the date the first informal letter is received or from the date the second formal letter is received. In *Garner,* the suit was filed within 90 days after receipt of the first letter. The company argued that the first letter qualified as notice under the statute, and that the 90-day limitation period should run from the date the first letter was received.

The *Garner* court held that the 90-day limitation period does not begin to run until the charging party receives the formal letter notifying him he has a right to sue. The EEOC has the power to designate that the second, formal letter fulfills this requirement under the Commission's broad power granted in 42 U.S.C. § 200e-12 (1970) to formulate its own procedures. *Id.* at 115. *Accord,* Lacy v. Chrysler Corp. 533 F.2d 353 (8th Cir. 1976); Williams v. Southern Union Gas Co., 529 F.2d 483 (10th Cir. 1976); Beverly v. Lone Star Lead Constr. Co., 437 F.2d 1136 (5th Cir. 1971). *See* Tuft v. McDonnell Douglas Corp., 517 F.2d 1301 (8th Cir. 1975), *cert. denied,* 423 U.S. 1052 (1976) (the 90-day period commences upon one of three events: the EEOC notifies the charging party it has determined that reasonable cause does not exist; within 180 days after the EEOC determination that reasonable cause does exist, the party requests a formal letter advising him of his right to sue; or, after attempted conciliation fails, the EEOC formally notifies the party he has a right to sue). *Cf.* Love v. Pullman Co., 404 U.S. 522 (1972) (liberal construction of procedures is appropriate where individuals initiate enforcement process under Title VII); Coles v. Penny, 531 F.2d 609 (D.C. Cir. 1976) (the term "notice" should be interpreted to further the humanitarian purpose of Title VII to proscribe employment discrimination). *But see* DeMatteis v. Eastman Kodak Co., 520 F.2d 409 (2d Cir. 1975) (90-day limitation period begins on date upon which charging party is notified that conciliation attempts have been terminated, unless such notification misleads charging party into filing an untimely action).

[11] *Compare* EEOC v. Occidental Life Ins. Co., 535 F.2d 533 (9th Cir. 1976) *with* EEOC v. Copeland Corp., 8 Empl. Prac. Dec. ¶9780 (S.D. Ohio 1974) *and* EEOC v.

The Permisible Scope of an EEOC Complaint

In *EEOC v. General Electric Co.*,[12] the Fourth Circuit held that an EEOC complaint may raise any claim concerning discrimination uncovered during a reasonable investigation of the charge, provided such discrimination was the subject of a reasonable cause determination and subsequent conciliation attempts.[13] In *General Electric*, two black employees filed charges with the EEOC alleging that General Electric engaged in racially discriminatory hiring, promotion, and transfer policies. After investigating the charges, the EEOC concluded that reasonable cause did not exist to believe the company engaged in racially discriminatory hiring practices, but that reasonable cause did exist to believe the company engaged in racially discriminatory promotion and transfer policies. The Commission also concluded, from evidence uncovered in its investigation into the hiring practices of the company, that reasonable cause existed to believe General Electric engaged in sexually discriminatory hiring practices. Attempted conciliation of these issues was unsuccessful, and the EEOC brought suit against the company. In its complaint the EEOC consolidated the claims that General Electric engaged in both racially and sexually discriminatory employment practices. The district court dismissed the claim alleging sex discrimination on the ground that the original charging party, a man, did not have standing to claim that the company discriminated against women.[14] The court held that where the EEOC's complaint is based on an individual's charge filed with the Commission, the claims which can be raised in that complaint are limited to those which the charging individual could raise in court.[15]

In a split decision, the Fourth Circuit reversed the district court,

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New York Times Broadcasting Serv., Inc., 364 F. Supp. 651 (W.D. Tenn. 1973).

[12] 532 F.2d 359 (4th Cir. 1976).

[13] *Id.* at 366.

[14] EEOC v. General Elec. Co., 376 F. Supp. 757, 761 (W.D. Va. 1974).

[15] *Id.* at 761. The district court apparently based its decision on an implicit assumption that when the EEOC's civil suit is based on an original charge, the EEOC sues as the charging individual's surrogate. Thus, the EEOC has standing to raise in its complaint only those issues which the charging individual could raise in a civil complaint. *Id. Accord,* EEOC v. Copeland Corp., 8 Empl. Prac. Dec. ¶ 9780 (S.D. Ohio 1974); EEOC v. United States Indus., Inc., 7 Empl. Prac. Dec. ¶ 9068 (W.D. Tenn. 1974); EEOC v. New York Times Broadcasting Serv., Inc., 364 F. Supp. 651 (W.D. Tenn. 1973). If the charging party in *General Electric* sued, he would not have standing to assert that the company engaged in discriminatory hiring practices against women because he himself had not been injured by such practices. *See* 1 EMPL. PRAC. GUIDE (CCH) ¶ 2128 (1976).

concluding that the court overvalued the importance of the individual's charge filed with the EEOC.[16] Although the filing of the charge results in notice to a respondent[17] that he is possibly violating Title VII, the principal importance of the charge is that it grants the EEOC jurisdiction to investigate whether the respondent has engaged in unlawful discriminatory practices.[18] The investigatory powers of the EEOC are broad, limited only to the extent that information and evidence sought by the Commission must be relevant and material to the facts alleged in the charge.[19] A "reasonable investigation", so defined, frequently uncovers discriminatory practices other than those alleged in the charge.[20] These practices may also be the subject of a judicial complaint filed by the EEOC.[21] The Fourth Circuit aligned itself with the Fifth[22] and Sixth[23] Circuits, determining that the scope of the EEOC complaint may encompass any facts, issues, and discriminatory practices uncovered during a reasonable investi-

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[16] 532 F.2d at 364. The *General Electric* court analogized charges filed with the EEOC to administrative pleadings, of which it has been said that "the most important characteristic of pleadings in the administrative process is their unimportance." 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE §8.04 at 523 (1958).

[17] 29 C.F.R. §1601.13 (1972).

[18] 532 F.2d at 364-65. EEOC v. Huttig Sash & Door Co., 511 F.2d 453, 455 (5th Cir. 1975); Sanchez v. Standard Brands, Inc., 431 F.2d 455, 466 (5th Cir. 1970); EEOC v. E. I. duPont de Nemours & Co., 373 F. Supp. 1321, 1335 (D. Del. 1974), *aff'd* 516 F.2d 1297 (3rd Cir. 1975).

[19] EEOC v. University of N. M., 504 F.2d 1296, 1301 (10th Cir. 1974). *See* Motorola, Inc. v. McLain, 484 F.2d 1339 (7th Cir. 1973), *cert. denied,* 416 U.S. 932 (1974); Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970); Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportuniiy Act of 1972,* 40 GEO. WASH. L. REV. 824, 871-72 (1972) [hereinafter cited as Sape & Hart].

The EEOC is empowered to examine evidence concerning any person under investigation, so long as the evidence relates to unlawful employment practices and is relevant to the charge under investigation. 42 U.S.C. § 2000e-8 (a) (1970). The EEOC has the same power as the National Labor Relations Board (NLRB) to require access to evidence relating to any matter under investigation. 42 U.S.C. § 2000e-9 (Supp. V 1975). The NLRB can require access to evidence relating to any matter under investigation. 29 U.S.C. § 161 (1970).

[20] EEOC v. Huttig Sash & Door Co., 511 F.2d 453, 455 (5th Cir. 1975).

[21] 532 F.2d at 366.

[22] EEOC v. Huttig Sash & Door Co., 511 F.2d 453, 455 (5th Cir.1975) (although charging party settles claim with employer, EEOC complaint may raise claims of any discriminatory practices uncovered in reasonable investigaton of original charge); EEOC v. National Cash Register Co., 405 F. Supp. 562, 568 (N.D. Ga. 1975).

[23] EEOC v. Kimberly-Clark Corp., 511 F.2d 1352, 1363 (6th Cir.), *cert. denied,* 423 U.S. 994 (1975) (EEOC's charge may encompass allegations of discrimination uncovered in reasonable investigation of original charge); EEOC v. McLean Trucking Co., 525 F.2d 1007, 1010-11 (6th Cir. 1975).

gation of the original charge.[24]

The *General Electric* court found that the claim alleging sexually discriminatory hiring practices was derived from a reasonable investigation of the charge of racially discriminatory hiring practices.[25] The company administered two different series of tests to male and female job applicants, and evaluated the test results differently in deciding whether to hire employees of either sex. Because the administration of these tests formed an integral part of General Electric's hiring practices, the tests were found to be a proper focus of the EEOC's investigation concerning the charge of racially discriminatory hiring practices.[26] Upon a full review of its investigation, the EEOC determined that reasonable cause existed to believe the company engaged in sexually discriminatory hiring practices,[27] and subsequently raised that claim in its complaint. The Fourth Circuit concluded that where employment practices questioned in an original charge were revealed by investigation to be a "root-source"[28] of more than one kind of discrimination, the EEOC need not confine either its investigation or its civil complaint to the particular symptom of discrimination alleged in the original charge.[29]

General Electric is based on the premise that Congress amended Title VII, empowering the EEOC to institute suit, in recognition that

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[24] 532 F.2d at 366.

[25] *Id.* at 369.

[26] The use of employment tests, particularly where used in evaluating the qualifications of job applicants, frequently has discriminatory results. In Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971), the Supreme Court held that the use of employment tests should be permitted only where test performance is demonstrated to have a high degree of job-relatedness. For an analysis of *Griggs* and various methods for determining the job relatedness of tests, see Wilson, *A Second Look at* Griggs v. Duke Power Company: *Ruminations on Job Testing, Discrimination, and the Role of the Federal Courts*, 58 VA. L. REV. 855 (1972). *See also* Note, *Testing for Special Skills in Employment: A New Approach to Judicial Review*, 1976 DUKE L. J. 596.

The EEOC standards for validation of tests are promulgated in 29 C.F.R. § 1607.1 *et. seq.* (1975). *See generally* Note, *Application of the EEOC Guidelines to Employment Test Validation: A Uniform Standard for Both Public and Private Employers*, 41 GEO. WASH. L. REV. 505 (1973).

[27] 532 F.2d at 362.

[28] EEOC v. Huttig Sash & Door Co., 511 F.2d 453, 455 (5th Cir. 1975); EEOC v. E. I. duPont de Nemours & Co., 373 F. Supp. 1321, 1335-36 (D. Del. 1974), *aff'd*, 516 F.2d 1297 (3rd Cir. 1975). Courts should carefully scrutinize whether facts and issues raised in the EEOC complaint actually were uncovered in a reasonable investigation of a charge. A tendency by the Commission to conduct unreasonably broad investigations of charges has been alleged to be significant cause of a steadily increasing backlog of cases pending before the Commission. Rabinowitz, *The Bias in the Government's Anti-Bias Agency*, FORTUNE, Dec. 1976, at 138, 139-140.

[29] 532 F.2d at 366.

discrimination is a "societal wrong,"[30] and that private suits alone are inadequate to effectuate the public policy against discrimination.[31] The EEOC, therefore, sues to "vindicate the public interest,"[32] which is broader than the private interests of both the party charging discriminatory employment practices and the respondent to these charges.[33] Consequently, the EEOC's ability to raise issues in its civil complaint should not be circumscribed by the ability of the original charging party to raise those issues in a civil complaint.[34]

General Electric contended, however, that despite this interpretation of the purpose of the amendments, the claim of sexual discrimination should nevertheless have been dismissed. The procedures prescribed under Title VII require that the respondent be allowed to comment on the charge after it is filed, but before it is investigated.[35]

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[30] 532 F.2d 372-73. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 (1975); note 2 *supra*.

[31] 532 F.2d at 373. *See* Note, *The Tentative Settlement Class and Class Action Suits Under Title VII of the Civil Rights Act*, 72 MICH. L. REV. 1462, 1463 (1974). *See generally* Sape & Hart, *supra* note 19, at 824-25, 836-46, 875-80.

The House Report on the Equal Employment Opportunity Act of 1972 stated that the EEOC should be provided effective enforcement powers because effective remedies had not resulted from previous practices limiting the EEOC's role to merely that of conciliator. H.R. REP. No. 238, 92d Cong., 2d Sess. 12 (1971), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2137, 2139.

[32] EEOC v. Kimberly-Clark Corp., 511 F.2d 1352, 1361 (6th Cir.), *cert. denied*, 423 U.S. 994 (1975); EEOC v. Greyhound Lines, 411 F. Supp. 97, 102-03 (W.D. Pa. 1976).

[33] EEOC v. Kimberly-Clark Corp., 511 F.2d 1352, 1362 (6th Cir.), *cert. denied*, 423 U.S. 994 (1975). *Cf.* Blue Bell Boots, Inc. v. EEOC, 418 F.2d 355, 358 (6th Cir. 1969) (EEOC has broad power to seek evidence relating to employment practices, and may consider that evidence in conciliation efforts to fashion relief affecting employees other than original charging party).

[34] 532 F.2d at 373. *See* cases cited notes 22-23 *supra*; EEOC v. Mobil Oil Corp., 362 F. Supp. 786 (W.D. Mo. 1973). *Cf.* Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970) (individual's complaint may raise additional claims of discrimination uncovered during reasonable investigation of his charge). *Contra*, EEOC v. Westvaco Corp., 372 F. Supp. 985 (D. Md. 1974) (where EEOC complaint is based on individual's charge, the complaint may not raise any claims the charing party could not raise in court.); EEOC v. New York Times Broadcasting Serv., Inc., 364 F. Supp. 651, 653 (W.D. Tenn. 1973) (where charge filed by white female, EEOC complaint may not raise claims of racially discriminatory hiring practices). *See also* Hunter & Branch, *Equal Employment Opportunities: Judicial Developments Under Title VII of the Civil Rights Act of 1964 and the Equal Employment Opportunity Act of 1972*, How. L. J. 543 (1975) [hereinafter cited as Hunter & Branch].

[35] 532 F.2d at 370. 29 C.F.R. § 1601.14 (1975) provides in pertinent part that "[a]s a part of each investigation, . . . the respondent *shall* . . . be offered an opportunity to submit a statement of its position with respect to the allegations" (emphasis supplied). The respondent also "may" be afforded an opportunity to engage in settlement discussions after investigation but before a reasonable cause determination is issued. 29 C.F.R. § 1601.19a (1975).

The company contended that this procedure had been violated. Because no charge of sexual discrimination had been filed, General Electric was denied the opportunity required by the regulation to comment on the charge before it was investigated. The company argued that substantial prejudice resulted from the violation because it was deprived of a significant opportunity to resolve voluntarily the charge of sex discrimination.[36] General Electric also averred that where investigation of an original charge discloses additional kinds of discrimination not alleged in the charge, a Commissioner should be required to file a separate charge alleging the newly discovered kind of discrimination.[37] This new filing would reinitiate procedures resulting in notice to the respondent that he was also being investigated for a different kind of discrimination. The respondent would then be afforded the opportunity to comment upon and to settle voluntarily the new charge prior to a reasonable cause determination on that charge.[38]

The Fourth Circuit rejected the latter argument, determining that to require the EEOC to suspend investigation of a newly discovered kind of discrimination, pending the filing of a Commissioner's charge, would create a needless procedural technicality resulting in waste of administrative resources and delay in the enforcement of individual rights.[39] Furthermore, the court concluded that even if such proce-

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[36] 532 F.2d at 368-69. *See* EEOC v. Airguide Corp., 539 F.2d 1038 (5th Cir. 1976).

[37] Any member of the Commission can file a charge against a respondent. Such a charge has the same procedural effects as an individual's charge. 42 U.S.C. § 2000e-5(b) (Supp. V 1975).

[38] *See* note 35 *supra*.

[39] 532 F.2d at 365; EEOC v. Occidental Life Ins. Co., 535 F.2d 533, 542 (9th Cir. 1976) (adopting the reasoning and language of the Fourth Circuit in *General Electric*). *See* EEOC v. Cleveland Mills Co., 502 F.2d 153, 157 (4th Cir. 1974), *cert. denied*, 420 U.S. 946 (1975) (EEOC not required under 42 U.S.C. § 2000e-5(f)(1) (Supp. V 1975), to file suit within 180 days after receipt of the charge, where the court stated that to require continual refiling of charge every 180 days would result in disruption of proceedings and serve no useful purpose).

Conflicting public and private interests create a tension between methods of enforcing Title VII. The Fourth Circuit has recognized that private complaints are interested in securing speedy vindication of individual rights in court, but that public policy goals are better served by the EEOC securing voluntary compliance with the Act through conciliation, a process which is often time-consuming. Johnson v. Seaboard Airline R. Co., 405 F.2d 645, 651 (4th Cir. 1968), *cert. denied*, 394 U.S. 918 (1969). In discrimination cases, however, the wrongs alleged, if true, have gone too long unremedied, and thus may require the fastest action possible. EEOC v. Local No. 41, Bartenders Int'l Union, 369 F. Supp. 827, 831 (N.D. Cal. 1973). The Fourth Circuit's holding in *General Electric* balances the competing interests by approving expedition of the process designed to secure voluntary compliance with Title VII. *General Electric* is

dures are required, failure to comply with the procedures should not necessarily result in automatic dismissal of a claim raising issues concerning newly discovered kinds of discrimination. Dismissal is appropriate only when the failure results in substantial prejudice to the party entitled to compliance with the procedure.[40] The Fourth Circuit reasoned that a respondent does not normally suffer substantial prejudice when the EEOC fails to afford him an opportunity to comment on an additional claim of discrimination uncovered during investigation of a charge not raising that particular claim.[41] The EEOC has no adjudicatory powers, and thus cannot make decisions or enter into agreements which bind the respondent without his consent.[42] Instead, the EEOC has power merely to attempt voluntary

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analogous to cases holding that an individual is not required to file a new charge with the EEOC every time an investigation of his original charge uncovers additional acts or kinds of discrimination. *See, e.g.*, Gamble v. Birminghan S.R. Co., 514 F.2d 678 (5th Cir. 1975); Oubichon v. North American Rockwell Corp., 482 F.2d 569 (9th Cir. 1973). *Cf.* Love v. Pullman Co., 404 U.S. 522 (1972) (to require individual to file second charge with EEOC after first charge was deferred to state agency would create needless procedural technicality).

[40] 532 F.2d at 370; EEOC v. Kimberly Clark Corp., 511 F.2d 1352, 1361 (6th Cir.), *cert. denied*, 423 U.S. 992 (1975); Hunter & Clark, *supra* note 28 at 568. *Cf.* American Farm Lines v. Black Ball Freight Serv., 397 U.S. 532, 539 (1970). (Interstate Commerce Commission may construe its own procedures liberally unless party entitled to compliance with the rule is thereby substantially prejudiced). Strict compliance with procedures is typically required of any agency only when the agency has adjudicative powers, or when failure to observe a procedure might subject a party before the agency to liability in court. *See* United States v. Heffner, 420 F.2d 809 (4th Cir. 1970) (failure of Internal Revenue Service agent to follow agency rules resulted in evidence which might have subjected the party under investigation to substantial liability in court). *See generally* Note, *Violations by Agencies of Their Own Regulations*, 87 HARV. L. REV. 629 (1974).

[41] 532 F.2d at 370-71.

[42] Alexander v. Gardner-Denver Co., 415 U.S. 36, 44-45 (1974); Fekete v. United States Steel Corp., 424 F.2d 331, 336 (3d Cir. 1970). An amendment granting the EEOC power to issue cease-and-desist orders was rejected by Congress. 118 CONG. REC. § 562 (Jan. 24, 1972). Other proposals to grant the EEOC adjudicative powers were also rejected. Additional Majority Views of Hon. Robert W. Kastenmeier on H.R. 7152, *reprinted in* [1964] U.S.CODE. CONG. & AD. NEWS 2411. *See generally* Sape & Hart, note 19 *supra*, at 836-46.

In *General Electric*, the company broached an additional argument why substantial prejudice would result if the sex discrimination claim was allowed. The company argued that if it were found to have discriminated, it would be liable to female employees and job applicants for back pay awards covering the two years prior to the date the original charge was filed. 42 U.S.C. § 2000e-5(g) (Supp. V 1975). The court rejected this argument, stating that if the company were found liable the district court could limit the back pay award so that it covered the two years prior to the reasonable cause determination, the date the company was notified of the EEOC's sex discrimination

conciliation of discrimination claims.[43] During conciliation discussions the respondent may make a full presentation of his position with respect to any such claim.[44] If these discussions fail, the respondent again has the opportunity to make a full presentation of his case in a trial de novo in district court.[45] The Fourth Circuit found that because General Electric had the opportunity in conciliation discussions to present its position concerning the claim of sexual discrimination, and would still have that opportunity in district court, the company would not suffer substantial prejudice if the claim were allowed to stand.[46]

Judge Widener, however, dissented from the holding that dismissal of the sexual discrimination claim was not justified by the EEOC's failure to comply with procedures requiring that General Electric be allowed to comment on the charge of sexual discrimination. He concluded that the company had suffered prejudice as a result of that failure.[47] The company was denied an opportunity to settle voluntarily the claim of sexual discrimination[48] and thus avert suit on that issue because it was unable to make an effective presentation of its position prior to the reasonable cause determination. Furthermore, truly voluntary compliance with Title VII was impossible once the reasonable cause determination was made because the company then was forced to bargain while aware that failure to conciliate would almost inevitably result in the instigation of a civil suit raising claims of sexual discrimination.[50] The threat of possible suit, however, is the catalyst which induces the respondent to attempt to conciliate and comply voluntarily with Title VII.[51] Absent the threat

claims. 532 F.2d at 372. For a discussion of back pay awards, see text accompanying notes 73-92 *infra.*

[43] *See* text accompanying notes 9 & 42 *supra;* text accompanying notes 52-53 *infra.*

[44] *See, e.g.,* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 799 (1973).

[45] Nothing said or done in conciliation discussions may be admitted into evidence at trial without the consent of the parties. 42 U.S.C. § 2000e-5(b) (Supp. V 1975); 29 C.F.R. § 1601.24 (1975).

[46] 532 F.2d at 371.

[47] *Id.* at 376 (Widener, J., dissenting).

[48] *See* 29 C.F.R. § 1601.19a (1975).

[49] 532 F.2d at 376 (Widener, J., dissenting).

[50] *Id.*

[51] The EEOC has recognized the importance of the threat of suit as a consideration in conciliation discussions: "Central to the concept of conciliation is the right of the Commission . . . to bring a civil action . . . when the Commission has been unable to secure from the respondent a Conciliation Agreement acceptable to the Commission." EEOC COMPL. MAN. (CCH) ¶ 1224 (1976).

of civil enforcement, the respondent would neither benefit from a conciliation agreement nor suffer from failure to reach such agreement. Furthermore, conciliation, not mere voluntary compliance, is the focal point of the statutory process designed to eliminate employment practices unlawful under Title VII.[52]

The Fourth Circuit emphasized the importance of conciliation by limiting the scope of the EEOC complaint to claims which were the subject of conciliation attempts. Thus the holding in *General Electric* has two principal points of significance. On the one hand, the holding equates the EEOC's ability to raise issues in its civil complaint with the EEOC's broad ability to investigate issues reasonably related to an original charge filed with the Commission. On the other hand, issues cannot be raised in the complaint which were not the subject of conciliation attempts. Consequently, the respondent is guaranteed an opportunity during conciliation discussions to resolve voluntarily any claim of employment discrimination before that claim may be raised against him in a civil suit.[53]

Termination of Conciliation Discussions Before Suit

If the EEOC terminates conciliation discussions because the respondent fails or refuses to make a good faith effort to resolve a dis-

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Under Title VII as originally enacted the EEOC could not bring a civil suit. 42 U.S.C. § 2000e-5 (1970). The statute was criticized as denying to the EEOC the power to exert formal pressure in the form of a threat of civil action to lend effect to the Commission's efforts to secure voluntary compliance with Title VII. Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964,* 31 BROOKLYN L. REV. 62, 67, 97 (1965); Comment, *Enforcement of Fair Employment Under the Civil Rights Act of 1964,* 32 U. CHI. L. REV. 430, 435-36 (1965). Because the EEOC could not sue, conciliation efforts were often ineffective. Employers were not deterred from violating Title VII by the threat of individual suits, and often refused to comply voluntarily with the provisions of the Act. Sape & Hart, *supra* note 19, at 825.

[52] Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50, 72 (1975); EEOC v. Hickey-Mitchell Co., 507 F.2d 944 (8th Cir. 1974); EEOC v. E. I. duPont de Nemours & Co., 373 F. Supp. 1321, 1336 (D. Del. 1974), *aff'd,* 516 F.2d 1297 (3d Cir. 1975); Latino v. Rainbo Bakers, Inc., 358 F. Supp. 870 (D. Col. 1973).

[53] Although failure to afford a respondent an opportunity to comment on a particular claim of discrimination will seldom justify dismissal of a suit, failure to allow the respondent an effective opportunity to conciliate does result in prejudice. EEOC v. United States Pipe & Foundry Co., 375 F. Supp. 237, 247 (N.D. Ala. 1974); EEOC v. Westvaco Corp., 372 F. Supp. 985 (D. Md. 1974). *See* EEOC v. Airguide Corp., 539 F.2d 1038 (5th Cir. 1976). That such prejudice justifies dismissal of the EEOC suit indicates the importance of conciliation as a means for securing compliance with Title VII. *See* cases cited note 52 *supra*; Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964,* 31 BROOKLYN L. REV. 62, 85-86 (1965).

pute concerning discrimination, the EEOC is required to notify the respondent that the discussions have been unsuccessful and will not be resumed except upon respondent's written request.[54] In *EEOC v. Raymond Metal Products Co.*,[55] the Fourth Circuit was presented with the question whether the EEOC's failure to comply with the exact provisions of this procedural regulation was ground for dismissal of the Commission's complaint. In *Raymond Metal*, the company's persistent refusal to engage in conciliation discussions with the Commission caused the EEOC to terminate such attempts. The Commission notified the company it was ceasing its attempts to conciliate, but neglected to include in its letter any indication that such attempts would not be resumed unless the company so requested.[56] The letter did indicate, however, that the original charging individual had been informed that he could request a letter notifying him of his right to sue.[57] The EEOC subsequently filed suit.

The Fourth Circuit held that the failure of the EEOC to inform the respondent that he might request a resumption of conciliation discussions did not justify dismissal of the complaint where the respondent had consistently refused conciliation attempts, and where the letter notifying him of the termination of such attempts indicated that the respondent might later be sued.[58] The court indicated, however, that prejudice to the employer resulting from the EEOC's noncompliance with the regulation might justify dismissal of the complaint.[59]

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[54] 29 C.F.R. § 1601.23 (1975). This regulation has been characterized as offering a recalcitrant employer one last chance to conciliate. EEOC v. Firestone Tire & Rubber Co., 366 F. Supp. 273, 276 (D. Md. 1973).

[55] 530 F.2d 590 (4th Cir. 1976).

[56] *Id.* at 596.

[57] *Id.* at 596 n.15. *See* 29 C.F.R. § 1601.23 (1975).

[58] 530 F.2d at 596. *See* EEOC v. Louisville & N.R. Co., 505 F.2d 610 (5th Cir. 1974). The Eighth Circuit has subsequently adopted the reasoning of the Fourth Circuit in *Raymond Metal*. In EEOC v. Laclede Gas. Co., 530 F.2d 281 (8th Cir. 1976), the letter informed the respondent that conciliation discussions had been terminated and indicated that the case was being forwarded to the EEOC's General Counsel to evaluate the possibility of litigation. The *Laclede Gas* court held that because the letter indicated that the EEOC might sue the company, the EEOC's failure to notify the company that it could request a resumption of conciliation discussions did not prejudice the company. *Id.* at 284.

[59] Because the district court made no finding that Raymond Metal had been prejudiced, the Fourth Circuit did not consider what showing the company must make to indicate prejudice. Other courts have held in similar circumstances that a showing that the notification has left a respondent unaware a civil suit might be brought against him is a showing of prejudice sufficient to justify dismissal of the suit. EEOC v. Hickey-Mitchell Co., 507 F.2d 944, 948 (8th Cir. 1974); EEOC v. Western Elec. Co.,

The company also argued that alternative grounds justified dismissal of the suit. The reasonable cause determination, a prerequisite for a suit by the EEOC,[60] was made by an EEOC District Director in *Raymond Metal.*[61] The company argued, however, that a reasonable cause determination by the Commission itself was required by statute.[62] Consequently, the reasonable cause determination by the District Director was ineffective and did not satisfy the prerequisite for suit.[63]

The Fourth Circuit disagreed. The court determined that the power to make a reasonable cause determination is procedural because it prescribes the methods by which the EEOC acts, and does not involve resolution of the rights of persons involved in nonjudicial proceedings under Title VII.[64] The power to issue a reasonable cause

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382 F. Supp. 787, 797 (D. Md. 1974). *Cf.* EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086 (6th Cir. 1974) (succeeding employer deemed not entitled to new notice where he knew conciliation attempts with former employer had failed and suit against company might be forthcoming).

A comparison of the showing necessary to indicate prejudice under *General Electric* with the showing required in cases similar to *Raymond Metal* reveals a prevailing concern for the conciliation process. Under *General Electric* standards, failure to file a charge alleging a particular kind of discrimination will result in prejudice only if that kind of discrimination is not the subject of conciliation efforts. *See* text accompanying note 53 *supra.* Under standards evolved in cases similar to *Raymond Metal,* the respondent will not suffer prejudice unless he is deprived of a last chance to conciliate as a result of his being sued without first being notified that a civil suit is imminent. These requirements reinforce the concept of conciliation as the most important process designed to secure compliance with Title VII. *See* text accompanying note 52 *supra.*

[60] EEOC v. Westvaco Corp., 372 F. Supp. 985, 993 (D. Md. 1974); EEOC v. Local No. 41, Bartenders Int'l Union, 369 F. Supp. 827, 829 (N.D. Cal. 1973); EEOC v. Pick-Memphis Corp., 5 Empl. Prac. Dec. ¶ 8471 (W.D. Tenn. 1973); 1 EMPL. PRAC. GUIDE (CCH) ¶ 2138 (1976).

[61] District Directors are in charge of offices which the EEOC has established in defined geographical areas. These offices have been delegated the power to receive, process, and investigate charges, issue subpoenas, make reasonable cause determinations, attempt conciliations, enter into voluntary settlement agreements, and to issue letters notifying individuals of their right to sue. 1 EMPL. PRAC. GUIDE (CCH) ¶ 1911 (1976). The term "Commission", for the purpose of the procedural regulations, is defined as meaning the EEOC or any of its designated representatives. 29 C.F.R. § 1601.3 (1975).

[62] 42 U.S.C. § 2000e-5(b) (Supp. V 1975), provides in pertinent part that "[i]f the Commission determines . . . that there is reasonable cause to believe that the charge is true, the Commission shall [attempt to secure voluntary compliance]."

[63] 530 F.2d at 593.

[64] *Id.* at 593-95. A reasonable cause determination is merely a determination that, if conciliation is unsuccessful, a civil suit probably should be instituted. EEOC v. Avon Products, Inc., 11 Empl. Prac. Dec. ¶ 10,731 at 7036 (N.D. Ga. 1975). Issuing a reasonable cause determination does not involve resolution of the rights of parties before the

determination is thus delegable under the broad authority of the EEOC to develop its own procedural rules.[65] The Fourth Circuit also rejected the argument that delegation of the power to make reasonable cause determinations was, in effect, a delegation of the EEOC's power to sue, because the Commission reviews and approves every suit brought under its name.[66]

Commission because the EEOC has no adjudicative powers. Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974); Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924, 929 (5th Cir. 1975). If conciliation fails, each party has the opportunity to present his side of the case in a trial de novo in the district court. *See* Chandler v. Roudebush, 425 U.S. 840, 844-45 (1976). Furthermore, the EEOC, in effect, reviews the reasonable cause determination in making its decision whether to bring suit. *See* text accompanying note 66 *infra*. Thus, the power to issue reasonable cause determinations is delegable. *See* Magnesium Casting Co. v. NLRB, 401 U.S. 137 (1971) (NLRB can delegate power to determine the labor unit appropriate for collective bargaining within a company). *Cf.* United States v. Cottman Co., 190 F.2d 805 (4th Cir. 1951), *cert. denied*, 342 U.S. 903 (1952) (Secretary of the Treasury has broad responsibilities of highest character and is not required personally to conduct hearings in every case where customs Officer has assessed duties). *See generally* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 9.01 (3d ed. 1972).

[65] 42 U.S.C. § 2000e-12 (1970). The Eighth Circuit, subsequent to the decision in *Raymond Metal*, was faced with an identical challenge to the authority of the EEOC to delegate its powers, and adopted the reasoning and language of the Fourth Circuit in *Raymond Metal*. EEOC v. Laclede Gas Co., 530 F.2d 281 (8th Cir. 1976). In an analogous context concerning the National Labor Relations Board, the Supreme Court held that broad rule-making power itself may be sufficient authority to delegate a particular function. Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111, 121 (1947).

Congress expanded the enforcement powers of the Commission in part to enable the EEOC to handle more effectively a steadily increasing number of charges filed each year. In 1969 the EEOC received 12,148 charges. In the first seven months of 1972 the EEOC received 14,644 charges. H.R. REP. No. 238, 92d Cong., 2d Sess. 10 (1971), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2137, 2139. By 1975 the number of charges filed with the EEOC had swelled to an estimated 106,700. Report of EEOC Chairman Peary to Senate Labor Committee, *reprinted in* 197 B N A DAILY LAB. REP. SPEC. SUPP., 12-13 (Oct. 9, 1975), *cited in* Smith, *Economic Pressure in Support of Unlawful Employment Discrimination Claims*, 61 CORNELL L. REV. 368, 368n.2 (1976). These statistics indicate that to require the Commission itself to review investigations and make every reasonable cause determination would result in administrative waste and delay. 530 F.2d at 594. The EEOC's situation neatly falls within a general characterization of agencies that Commissioners "are not provided with a staff of five hundred or a thousand or two thousand and then expected to take all action without delegation." 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 9.01, at 215 (3d ed. 1972). *Cf.* Magnesium Casting Co. v. NLRB, 401 U.S. 137 (1971) (NLRB can delegate to regional directors power to make final decisions in labor cases, which decisions are not necessarily subject to review by the Board).

[66] The EEOC must give final authorization for all suits brought under 42 U.S.C. § 2000e-5(f)(1) (Supp. V 1975). EEOC COMPL. MAN. (CCH) ¶ 10,025 (1976).

In *Raymond Metal,* the Fourth Circuit became the first court of appeals to consider whether the power to issue reasonable cause determinations is delegable.[67] The court's decision that the power is delegable accords with the trend of federal courts to permit delegation of agency powers where those powers involve the methods by which parties are brought before the agency.[68] The court's other holding[69] in *Raymond Metal* concerning the EEOC's violation of its rules is especially significant when compared with the procedural holding in *General Electric.*[70] Such a comparison indicates that the Fourth Circuit will not allow dismissal of a suit or claim because the EEOC violates its own regulations unless the violation results in substantial prejudice to the respondent.[71] Thus, the Fourth Circuit will be reluctant to erect technical barriers to suits, thereby impeding fulfillment of the national policy aimed at eliminating employment discrimination.

The Awarding of Back Pay in a Class-Action Suit

Both *General Electric* and *Raymond Metal* involved questions concerning what effect EEOC processing of charges has on whether claims based on those charges can be raised in court. When the EEOC complaint is filed, however, the district court begins adjudicating the discrimination claims. If the respondent is found to have engaged in discriminatory practices, the district court is empowered to award appropriate remedies, including back pay and other equi-

[67] The only other cases in which the EEOC's delegation of powers has been an issue involved questions concerning the exercise by staff members of the power to issue letters notifying individuals of their right to sue. The principal issue involved in these cases was not whether the power was delegable, but whether the power had actually been delegated. Prior to May 21, 1973, the official EEOC manual containing the directive delegating the power to issue the letters was unavailable to the public. Several courts held this delegation invalid because it was not subject to public inspection as required by 5 U.S.C. § 552(a)(2)(c) (1970). *See, e.g.,* Smith v. United Press Int'l, 8 Empl. Prac. Dec. ¶ 9512 (S.D.N.Y. 1974); Stone v. Federal Corp., 351 F. Supp. 340 (N.D. Cal. 1972). Whether the delegation is valid is no longer an issue because on May 21, 1973, the official EEOC manual was made available to the public, and, subsequently, on August 15, 1973, the EEOC redelegated the power to issue the letters. McDonald v. General Mills, Inc., 387 F. Supp. 24, 34-36 (E.D. Cal. 1974). *See,* Crouch v. United Press Int'l, 10 Empl. Prac. Dec. ¶ 10,393 (S.D.N.Y. 1975); Shaffield v. Northrop Worldwide Aircraft Serv., Inc., 373 F. Supp. 937 (S.D. Ala. 1974).

[68] *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 9.01 (3d ed. 1973).

[69] *See* text accompanying note 58 *supra.*

[70] *See* text accompanying note 13 *supra.*

[71] *See* text accompanying note 40-46 *supra.*

table remedies.[72] In *Albemarle Paper Co. v. Moody*,[73] the Supreme Court enunciated the standard to be used to determine whether a back pay award is appropriate: "Given a finding of unlawful discrimination, back pay should be denied only for reasons which, if applied generally, would not frustrate the statutory purposes of eradicating discrimination throughout the whole economy and making persons whole for injuries suffered through past discrimination."[74] This holding has been characterized as creating a presumption in favor of a back pay award where a respondent is found to have engaged in discriminatory practices.[75]

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[72] 42 U.S.C. § 2000e-5(g) (Supp. V 1975).

[73] 422 U.S. 403 (1975). For analyses of *Moody*, see Note, *Discrimination in Employment-Remedies-Standards Governing Back Pay Awards for Violations of Title VII of the Civil Rights Act of 1964*, 61 CORNELL L. REV. 460 (1976); Note, *Civil Rights - A Back Pay Award Standard: Albemarle Paper Co. v. Moody*, 54 N.C.L. REV. 196 (1976); Comment, *Testing Standards and Back Pay Under Title VII of the Civil Rights Act of 1964 - In* Albemarle Paper Co. v. Moody, 89 HARV. L. REV. 225 (1975).

[74] 422 U.S. at 421. The Supreme Court's decision vacated that of the Fourth Circuit holding that back pay should generally be awarded in the absence of special circumstances. Moody v. Albemarle Paper Co., 474 F.2d 134, 142 (4th Cir. 1973), *vacated*, 422 U.S. 405 (1975). Other courts of appeals had applied standards identical or similar to the Fourth Circuit's to detemine whether back pay should be awarded. *See* Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1376 (5th Cir. 1974) (back pay should be awarded in the absence of "special circumstances"); Head v. Timken Roller Bearing Co., 486 F.2d 870, 876 (6th Cir. 1973) (back pay should be awarded in the absence of "exceptional circumstances"); Rosen v. Public Serv. Elec. & Gas Co., 477 F.2d 90, 96 (3d Cir. 1973) (back pay normally should be awarded); Sprogis v. United Airlines, Inc., 444 F.2d 1194, 1201 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971) (back pay should normally be awarded). Several courts, however, held that the decision whether to award back pay was entirely within the discretion of the district courts. Bryan v. Pittsburg Plat Glass Co., 494 F.2d 799 (3d Cir. 1974), *cert. denied*, 419 U.S. 900 (1975); Thornton v. East Texas Motor Freight, 497 F.2d 416 (6th Cir. 1974). Norman v. Missouri Pac. R.R., 497 F.2d 594 (8th Cir. 1974), *cert. denied*. 410 U.S. 908 (1975), provides an example of circumstances held as justifying the denial of back pay. In *Norman*, the Eighth Circuit denied back pay because of the difficulty in ascertaining an applicable standard to determine retrospectively whether any of the plaintiff class members would have been able to qualify for promotion and higher pay. *Id.* at 597. *Accord*, United States v. St. Louis S. F. Ry., 464 F.2d 301 (8th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973). Most courts of appeals presented with the question, however, have held that difficulty in calculating the amounts of back pay award does not justify denying the award. *See, e.g.*, Ford v. United States Steel Corp., 520 F.2d 1043 (5th Cir. 1975); Meadows v. Ford Motor Co., 510 F.2d 939 (6th Cir. 1975). The difficulty in calculating back pay awards has been ameliorated by the Federal Rules of Civil Procedure, which provide for appointment of a special master to compute the awards. FED. R. CIV. P. 53. *See* Note, *Labor Law - Civil Rights Act - The Standard for Awarding Back Pay in a Title VII Action*, 12 WAKE FOREST L. REV. 466, 482 (1976).

[75] Franks v. Bowman Transp. Co., 424 U.S. 747, 786 (1976) (Powell, J., concurring and dissenting). Even before *Moody*, at least one court found that Title VII created a

In *Local No. 974, United Transport. Union v. Norfolk & W. Ry.*[76] a class action suit, the Fourth Circuit applied the *Moody* standard in overturning a district court decision not to award back pay to members of the plaintiff class.[77] Prior to 1965, Norfolk & Western's hiring practices resulted in the company's maintenance of two racially distinct and separate railroad yards located adjacently in Norfolk, Virginia. In an earlier decision in this case[78] on facts identical to *Local No. 974*, the Fourth Circuit found Norfolk & Western to be

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presumption in favor of back pay. Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1361 (5th Cir. 1974).

[76] 532 F.2d 336 (4th Cir.), *cert. denied,* 96 S. Ct. 1644 (1976).

[77] *Moody* also held that a court of appeals should reverse a district court's denial of back pay only when the lower court was clearly erroneous in its findings of law or fact, or if the court had abused its discretion in denying back pay in view of the circumstances of the case. 422 U.S. at 424. These are the general standards for appellate review of district court decisions. *See* Langnes v. Green, 282 U.S. 531 (1931); Nader v. Allegheny Airlines, Inc., 512 F.2d 527 (D.C. Cir. 1975); *rev'd on other grounds,* 423 U.S. 946 (1976); NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974). The *Local No. 974* court overturned the district court's decision not to award back pay on the ground that the lower court made erroneous findings of law. *See* text accompanying notes 81-85 *infra.*

[78] Rock v. Norfolk & W. Ry. Co., 473 F.2d 1344 (4th Cir.), *cert. denied,* 412 U.S. 933 (1973). *Rock* contains a more detailed factual discussion of Norfolk and Western's discriminatory practices.

Statistics are the evidence most frequently used in class action suits to show discrimination against a class. 1 EMPL. PRAC. GUIDE (CCH) ¶ 2330, at 1845 (1976). When the suit concerns hiring or promotion practices, proof of a great disparity in terms of percentages between the racial composition of a workforce and the racial composition of a group of employees hired or promoted from that workforce is sufficient to establish a prima facie case that discrimination has occurred. *See* Griggs v. Duke Power Co., 401 U.S. 432 (1971); King v. Yellow Freight Syst., Inc., 523 F.2d 879 (8th Cir. 1975); Barnet v. W. T. Grant Co., 518 F.2d 543 (4th Cir. 1975); NAACP v. Beecher, 504 F.2d 1017 (1st Cir. 1974); Afro American Patrolmens League v. Duck, 503 F.2d 1374 (6th Cir. 1974); Pettway v. American Cast Iron Pipe Co., 494 F.2d (5th Cir. 1974); Note, *Application of the EEOC Guidelines to Employment Test Validation: A Uniform Standard for Both Public and Private Employers,* 41 GEO. WASH. L. REV. 505, 510 (1973).

Once the prima facie case is proved, the burden of proof shifts. The employer may rebut the evidence of discrimination by showing that the employment practice in question was essential to some legitimate business purpose, such as safety or efficiency. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805-06 (1973); Day v. Matthews, 530 F.2d 1083, 1085 (D.C. Cir. 1976); EEOC v. Detroit Edison Co., 515 F.2d 301, 316 (6th Cir. 1975); Rock v. Norfolk & W. Ry. Co., 473 F.2d 1344, 1348 (4th Cir.), *cert. denied,* 412 U.S. 933 (1973); United States v. St. Louis S. F. Ry. Co., 464 F.2d 301, 308 (8th Cir.), *cert. denied,* 409 U.S. 1116 (1973); Note, *Testing for Special Skills in Employment: A New Approach to Judicial Review,* 1976 DUKE L.J. 596, 598. For an analysis of standards used to determine whether an employment practice is a business necessity, see Note, *Business Necessity Under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach,* 84 YALE L. J. 98 (1974). If the employer is able to show that

engaging in unlawful discriminatory employment practices by maintaining separate seniority systems in the two yards, which systems perpetuated the effects of past discriminatory practices.[79] The CT Yard was comprised predominantly of white employees, while the Barney Yard was comprised predominantly of black employees. Rates of pay for each job classification in either yard were identical, but wider variances in work demanded from the Barney Yard subjected the employees there to more frequent layoffs and to diminished opportunities for promotion. Upon remand of the case for determination of remedies, the district court listed three principal reasons for denying a back pay award: the disparities in total income between the two yards were the result of personal choice on the part of Barney Yard employees since few Barney Yard employees ever applied for transfer to the CT Yard; rates of pay at the two yards were identical; and, Norfolk & Western had earlier made good faith efforts to merge the seniority rosters of the two yards, which efforts were prevented by the union.[80]

The Fourth Circuit rejected these reasons for denying back pay, however, and held that proof that a class has suffered economic loss as a result of discrimination is sufficient to establish a prima facie case that the class is entitled to back pay.[81] Concerning personal choice, the court emphasized that transfer to the CT Yard would result in the Barney Yard employee losing his earned senioriiy credit, and held that a refusal to commit "seniority suicide" is not an acceptable reason for denying backpay.[82] In disposing of the equal rates of pay argument, the court reasoned that potentials for promotion and layoffs were "terms and conditions" of employment.[83] Because unequal terms and conditions of employment resulted in lower total income for Barney Yard employees, the Fourth Circuit held that a comparison of total income, and not rates of pay, should be the stan-

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the practice in question has a business purpose, the claiming party is then given an opportunity to prove that the business purpose is merely a pretense for discrimination. McDonnell Douglas v. Green, 411 U.S. 792, 804 (1973).

[79] Rock v. Norfolk & W. Ry. Co., 473 F.2d 1344, 1348 (4th Cir.), *cert. denied*, 412 U.S. 933 (1973).

[80] 532 F.2d at 339.

[81] *Id.* at 341.

[82] *Id. Cf.* EEOC v. Detroit Edison Co., 515 F.2d 301, 316 (6th Cir. 1975) (under policy where interdepartmental transfer and promotion results in loss of seniority credits, failure to request transfers does not bar seniority remedy).

[83] Title VII proscribes an employer's discrimination with respect to "compensation, terms, conditions, or privileges" of employment. 42 U.S.C. § 2000e-2(a)(1) (Supp. V 1975). *See* Peters v. Missouri-Pac. R.R., 483 F.2d 490 (5th Cir.), *cert. denied*, 414 U.S. 1002 (1973) (requirement that blacks retire at an earlier age specifically held to be discriminatory term and condition of employment).

dard for determining whether a back pay award is justified.[84]

The court also rejected the argument that the company's good faith efforts to merge the seniority rosters justified denial of back pay, and applied the generally accepted doctrine that an employer's good faith efforts to end discrimination do not constitute a defense to back pay liability.[85] A back pay award is remedial in nature and is designed to compensate the victims of discrimination, not to punish the employer.[86] Therefore, to be subject to back pay liability the employer need not have engaged in an employment practice with the specific intent to discriminate; instead, he must have intended merely to engage in the employment practice.[87] The union's frustration of Nor-

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[84] 532 F.2d at 539-40.

The only cases in which an employer's good faith actions have been upheld as a defense to back pay liability have been those wherein employers, relying on state female protecton laws, refused to cease discriminating against female employees. Kober v. Westinghouse Elec. Co., 480 F.2d 240 (3d Cir. 1973); United States v. N. L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973); LeBlanc v. Southern Bell Tel. & Tel. Co., 460 F.2d 1228 (5th Cir. 1972). *cert. denied,* 409 U.S. 990 (1973); Rosenfield v. Southern Pac. R.R., 444 F.2d 1219 (9th Cir. 1971). State female protection laws are designed to "protect" women workers, often by restricting the number of hours women may work, or by excluding them from various jobs. *See, e.g.,* OHIO REV. CODE ANN. §§ 4107.42, .43, .46 (Page 1953); VA. CODE §§ 40.1-34-38 (1950) (repealed 1974). The Ohio statutes were held invalid as in conflict with Title VII. Manning v. International Union, 466 F.2d 812 (6th Cir. 1972); Jones Metal Products Co. v. Walker, 29 Ohio St.2d 173, 281 N.E.2d 1 (1972).

[85] *Id.* at 341-42; Albermarle Paper Co. v. Moody, 422 U.S. 405, 422 (1975); Carey v. Greyhound Bus Co., 500 F.2d 1372, 1378 (5th Cir. 1974); Baxter v. Savannah Suger Ref. Corp., 495 F.2d 437, 442 (5th Cir.), *cert. denied,* 419 U.S. 1033 (1974); Head v. Timken Roller Bearing Co., 486 F.2d 870, 877 (6th Cir. 1973). *See* Comment, *Discrimination in Employment-Remedies-Standards Governing Back Pay Awards for Violations of Title VII of the Civil Rights Act of 1964,* 61 CORNELL L. REV. 460, 466 (1976); Note, *Civil Rights - A Backpay Award Standard: Albermarle Paper Co. v. Moody,* 54 N.C.L. REV. 196, 201 (1976).

[86] Albermarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975); United States v. Georgia Power Co., 474 F.2d 906, 921 (5th Cir. 1973); Robinson v. Lorillard Corp., 444 F.2d 791, 804 (4th Cir.), *cert. dismissed,* 404 U.S. 1006 (1972); Note, *Labor Law - Civil Rights Act - The Standard for Awarding Back Pay in a Title VII Action,* 12 WAKE FOREST L. REV. 466, 474 (1976).

[87] Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975). 42 U.S.C. § 2000e-5(g) (Supp. V 1975) provides that the defendant may be held liable for back pay if found to have "intentionally" engaged in an unlawful employment practice. Before *Moody,* the majority of courts construed the statute to mean that if the defendant intentionally engaged in the employment practice he could be held liable for back pay. Kober v. Westinghouse Elec. Corp., 480 F.2d 240, 246 (3d Cir. 1973); Spurlock v. United Airlines, Inc., 475 F.2d 216, 218 (10th Cir. 1972); Robinson v. Lorillard Corp., 444 F.2d 791, 795 (4th Cir. 1971), *cert. dismissed,* 404 U.S. 1006 (1972); Sprogis v. United Airlines, Inc., 444 F.2d 1194, 1201 (7th Cir.), *cert. denied,* 404 U.S. 991 (1971). *See* Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General*

folk & Western's attempts to merge the seniority rosters could not, therefore, be used by the company as a shield to cover its own liability.[88]

Concluding that good faith is not a defense to back pay liability, the Fourth Circuit proceeded to delineate the procedures the district court should use in calculating the back pay award for the class plaintiffs.[89] By proving that Norfolk & Western engaged in discriminatory practices, the plaintiffs raised a presumption that the class was entitled to an award of back pay.[90] However, only the members of the class who were actual victims of discriminatory employment practices should share in the award.[91]

Therefore, each member of the class seeking back pay must prove that he is a member of the class seeking relief, and prove his income for the years for which back pay is to be awarded.[92] The employer may

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Approach to Objective Criteria of Hiring and Promotion, 82 HARV. L. REV. 1598, 1674 (1969). Several courts, however, required that the defendant be found to have engaged in the employment practice with a specific intent to discriminate before he could be held liable for back pay. *See, e.g.,* Watkins v. Local No. 2369, United Steel Workers, 516 F.2d 41 (5th Cir. 1975); Jersey Cent. Power & Light Co. v. Local No. 327, International Bhd. of Elec. Workers, 508 F.2d 687 (3d Cir. 1975).

[88] Carey v. Greyhound Bus Co., 500 F.2d 1372, 1378 (5th Cir. 1974). The Fourth Circuit in *Local No. 979* indicated, however, that the union's resistance to the efforts to merge the seniority rosters might be sufficient justification to shift at least part of the back pay liability to the union. 532 F.2d at 342. *Accord,* Sabala v. Western Gillette, Inc., 516 F.2d 1251 (5th Cir. 1975).

[89] 532 F.2d at 341.

[90] *See* text accompanying note 78 *supra.*

[91] Davidson, *"Back Pay" Awards Under Title VII of the Civil Rights Act of 1964,* 26 RUTGERS L. REV. 741, 743 (1973); Edwards, *The Back Pay Remedy in Title VII Class Actions: Problems of Procedure,* 8 GA. L. REV. 781, 794 (1974); Fiss, *A Theory of Fair Employment Laws,* 38 U. CHI. L. REV. 235, 307 (1971); Comment, *Discrimination in Employment-Remedies-Standards Governing Back Pay Awards for Violations of Title VII of the Civil Rights Act of 1964,* 61 CORNELL L. REV. 460, 464, 476 (1976).

[92] 532 F.2d at 341. The Fifth Circuit has stated that the most a member of the plaintiff class should have to prove to be entitled to back pay is his current position and rate of pay, the jobs he applied for and was denied despite his qualifications, and a record of his employment history with the employer. Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 259 (5th Cir. 1974). Such a showing is more extensive than the showing required by the Fourth Circuit, that the claimant prove he is a member of the class and prove his income over the period convered by the award. The same evidence, however, necessarily would be considered in determining the exact amount of back pay awarded to the class member. *See* text accompanying note 95 *infra.*

A more extensive burden of proof is required of an individual plaintiff before he is adjudged entitled to back pay. Because the individual plaintiff does not have the benefit of a presumption of class-wide entitlement to back pay, he must prove that he applied for a job or promotion; that despite his qualifications he was rejected; and that the job was subsequently filled by a person not a member of a racial minority. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). *See* Note, *Labor Law—Civil*

then rebut the evidence that the individual is entitled to an award of back pay by proving that the individual was denied promotion for a legitimate business purpose, or because he was unqualified for promotion.[93] If the individual is found to be entitled to an award of back pay, the amount of the award will be the difference between the amount of pay actually earned and the amount of pay he would have earned but for discrimination.[94]

The award of back pay alone in *Local No. 974,* however, would be insufficient to compensate the victims of Norfolk & Western's past discriminatory hiring practices. Left unaltered, the dual seniority systems would perpetuate the effects of the past discriminatory hiring practices. The Barney Yard employees who were victims of dis-

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Rights Act of 1964—Burdens of Proof in Employment Discrimination Cases, McDonnell Douglas Corp. v. Green, 15 B.C. IND. & COM. L. REV. 654 (1974).

[93] The shifting of the burdens of proof is identical to that discussed in note 77 *supra.*

[94] Section 2000e-5(g), 42 U.S.C. § 2000e-5(g) (Supp. V 1975), provides in pertinent part that "[i]nterim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable."

The procedures delineated by the Fourth Circuit institute what is termed a bifurcated trial system for determining back pay awards in class action suits. United States v. United States Steel Corp., 520 F.2d 1042, 1053 (5th Cir. 1975). The system is designed to reduce difficulties in calculating the awards and to alleviate problems with the notice requirements for class action suits under FED. R. CIV. P. 23. *See* Edwards, *The Back Pay Remedy in Title VII Cases: Problems of Procedure,* 8 GA. L. REV. 781 (1974). *See also* Note, *Civil Procedure-Class Action Suits - Class Wide Awards of Back Pay in Suits Under Title VII of the Civil Rights Act of 1964,* 35 OHIO STATE L.J. 1027 (1974); Note *The Tentative Settlement Class and Class Action Suits Under Title VII of the Civil Rights Act of 1964,* 72 MICH L. REV. 1462 (1974).

At least one commentator has argued that the principal purpose of Title VII is to insure equal employment treatment for minorities, emphasizing that victims of discrimination should be compensated because they are victims, not because they are members of a racial minority. Fiss, *A Theory of Fair Employment Laws,* 38 U. CHI. L. REV. 235, 307-08 (1971). The Fourth Circuit's procedures for calculating the back pay award reflect the concern that only the victim of discrimination be compensated, and then only to the extent necessary to remedy his economic injury. *See* text accompanying notes 92-93 *supra.* Perhaps a better, but more complex method to ensure this result in most cases would require use of sophisticated statistical analysis. The goal of such analysis would be a more precise calculation of what effect the racial characteristic had in complex employment decisions, which could be used to adjust the back pay award to reflect the exact effect the racial characteristic actually had. *See* Note, *Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal,* 89 HARV. L. REV. 387 (1975). It would be unnecessary to extend such analysis in a case like *Local No. 974,* where it obviously was the racial characteristic which caused blacks to be systematically excluded from the CT Yard. *See* text accompanying notes 78-79 *supra.*

crimination would be constructively prevented from transferring to take advantage of the greater opportunities for promotion available in the CT Yard, because transfer would cause them to relinquish their seniority credits.[95] As a result, the Barney Yard employees would remain in that yard, still subject to impediments to promotion and to the greater possibility of layoffs. To prevent this eventuality, adjustments in the seniority systems were ordered.[96]

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[95] The requirement that seniority credits be relinquished upon transfer would cause the former Barney Yard employee to begin in the CT Yard with no seniority credit. He would thus be put in the position of a newly-hired employee, again subject to the greater possibility of being laid off and another long wait for a promotion. *See* Franks v. Bowman Transp. Co., 424 U.S. 747, 767 (1976).

[96] The necessity for seniority adjustments was recognized in the earlier Norfolk & Western case, where the Fourth Circuit emphasized that such adjustments were needed to eliminate the present effects of past discriminatory practices. Rock v. Norfolk & W. Ry. Co., 473 F.2d 1344, 1348 (4th Cir. 1972), *cert. denied,* 412 U.S. 993 (1973).

Initially there was controversy over whether Title VII permitted the courts to order adjustments in seniority systems where discriminatory hiring, transfer, or promotion practices were terminated before the effective date of the Act. *See* Blumerosen, *Seniority and Equal Employment Opportunity: A Glimmer of Hope,* 23 RUTGERS L. REV. 268 (1968). Title VII applied only to practices occurring after the effective date of the Act. Love v. Pullman Co., 430 F.2d 49, 57 (10th Cir. 1970), *rev'd on other grounds,* 404 U.S. 522 (1972). Bona fide seniority systems were expressly protected under Title VII. 42 U.S.C. § 2000e-2(h) (1970). Furthermore, the legislative history of that section indicated that seniority systems were virtually sacrosanct. The Interpretative Memorandum of Senators Clark and Case, floor managers of the Civil Rights Bill, explicitly stated that under Title VII an employer would not be obliged to "fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier." 110 CONG. REC. 7213 (1964). To clarify and codify this intent, 42 U.S.C. § 2000e-2(h) (1970) was added. 110 CONG. REC. 12,723 (1964) (remarks of Sen. Humphrey). *See generally* Vass, *Title VII: Legislative History,* 7 B.C. IND. & COM. L. REV. 431 (1966).

Quarles v. Phillip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968), was the first case in which seniority adjustments were ordered. Prior to the effective date of the Act, Phillip Morris hired minority workers only into departments comprised of lower-paying jobs. Transfer to better departments subsequent to the effective date of the Act was discouraged because the minority worker was forced to relinquish his seniority credit if he transferred. Adjustments were ordered to allow less restrictive transfer and promotion policies based on criteria other than departmental seniority. The court found that Title VII permits adjustments in seniority systems when they perpetuate the effects of past discrimination, and stated that the Act "condemns . . . all racial discrimination affecting employment, without excluding present discrimination that originated in seniority systems devised before the effective date of the act." *Id.* at 515. The implication of the holding in *Quarles* is that the past and present are inextricable, and, thus, a present practice reflecting past discrimination is a present violation of Title VII. Gould, *Seniority and the Black Worker: Reflections on* Quarles *and Its Implications,* 47 TEX. L. REV. 1039, 1047 n.41 (1969). The theory that a departmental

The district court ordered that the seniority rosters of the two yards be merged, with the date of hiring determining relative seniority between the brakemen and between the conductors in the two yards.[97] The plaintiff class appealed the decision concerning conduc-

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seniority system can be adjusted where it perpetuates the effects of past discriminatory practices is now generally accepted. Zugschwerdt, *Remedies Granted in Employment Discrimination Cases,* in EQUAL EMPLOYMENT OPPORTUNITY-RESPONSIBILITIES, RIGHTS, REMEDIES, 239, 278 (J. Pemberton ed. 1975). *See* Russell v. American Tobacco Co., 528 F.2d 357 (4th Cir. 1975), *cert. denied,* 96 S. Ct. 1668 (1976); Thornton v. East Texas Motor Freight, 497 F.2d 416 (6th Cir. 1974); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971); Local No. 189, United Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970); Poplin, *Fair Employment in a Depressed Economy: The Layoff Problem,* 23 U.S.L.A. L. REV. 197 (1975).

Whether a plant-wide seniority system can be adjusted because it perpetuates the effects of past discrimination is an unsettled issue. In Local No. 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980, 988-90, 994-95 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970), one of the earlier departmental seniority cases, the court stated that departmental seniority systems can be adjusted if they perpetuate the effects of past discrimination, but not plant-wide seniority systems. The Third Circuit recently held that evidence showing that a plant-wide seniority system perpetuates the effects of past discrimination is inadmissible unless plaintiffs first prove that the system, valid on its face, disguises an intent to discriminate. Jersey Cent. Power & Light Co. v. Local 327, IBEW, 508 F.2d 687, 706 (3d Cir. 1975). *cert. denied,* 425 U.S. 998 (1976). *Cf.* Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir. 1974) (despite fact that employee hired in 1964 was denied job in 1957, employee is not entitled to seniority credit sufficient to prevent his layoff because plant-wide seniority system requiring layoffs on last-hired, first-fired basis did not perpetuate effects of past discriminatory hiring practices). *Jersey Central* has been characterized as unqualifiedly exempting plant-wide seniority systems from adjustments in Title VII discrimination cases. Note, *Civil Rights - Title VII - Employee Security - Layoffs -* Jersey Cent. Power & Light v. Local 327, IBEW, 14 DUQ. L. REV. 475, 491 (1976). The opposing view is that plant-wide seniority systems can be adjusted where the systems perpetuate the effects of past discrimination. Proponents of this view advocate that the employee should receive seniority credit dating from the time his application for employment was rejected, provided that his rejection was discriminatory. Watkins v. Local No. 2369, United Steel Workers, 516 F.2d 41, 44 (5th Cir. 1975); Note, *Last Hired and First Fired Layoffs and Title VII,* 88 HARV. L. REV. 1544, 1556, 1570 (1975).

Recently the Fourth Circuit found occasion to order an adjustment in a plant-wide seniority system. In Nance v. Union Carbide Co., 540 F.2d 718 (4th Cir. 1976), the company had hired females only for certain jobs. The female complainant contended that such limited hiring restricted her opportunities to bid on an equal basis with male employees for job vacancies and that, as a result, she suffered five layoffs prior to the effective date of Title VII. These layoffs reduced her company service seniority, causing her to be laid off in 1970 prior to male employees with seniority less than she would have had but for her previous layoffs. The Fourth Circuit held that the seniority system perpetuated the effects of past discrimination, and that she was thus entitled to company service seniority comparable to that she would already have but for discrimination. *Id.* at 728-30.

[97] The term "seniority" as used here includes both "benefit" and "competitive" seniority. These terms are defined in note 103 *infra.*

tors, contending that such a readjustment would preserve the present effects of past discrimination practiced with respect to two classes of Barney Yard employees. The first class would consist of employees hired before March 18, 1956 who have been promoted to conductor.[98] The second class would consist of brakemen hired between that date and September 18, 1963 who have never had the chance to be promoted to conductor.[99] The Fourth Circuit agreed with the plaintiff class, and ruled that date of employment as brakeman should determine relative seniority between these classes of Barney Yard employees and their counterparts in the CT Yard.[100]

By choosing this remedy, the court implicitly accepted the "rightful place" theory for formulating remedies for employment dis-

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[98] All CT Yard and Barney Yard brakemen hired before March 18, 1956, had had the opportunity to be promoted to conductor. In the CT Yard, however, these opportunities came earlier than in the Barney Yard. 532 F.2d 340, 342-43.

[99] All CT Yard brakemen hired before September 18, 1963 had the opportunity to be promoted to conductor, but not all Barney Yard brakemen hired before that date were afforded the same opportunity. *Id.* at 342-43.

[100] The remedy was designed to put Barney Yard conductors and potential conductors on an equal footing with their CT Yard counterparts having equal length of company service. For example, assume that a CT Yard employee and a Barney Yard employee were hired on the same date. Each was qualified for promotion to conductor, but the CT Yard employee was promoted to conductor first. Under the remedy providing that each employee be ranked according to company-service seniority, the Barney Yard employee would compete on an equal basis with the CT Yard employee for the next CT Yard vacancy.

Local No. 974 is analogous to cases involving departmental seniority systems. In those cases minority workers were hired into inferior departments and discouraged from transferring to other departments because transfer resulted in loss of seniority credits. *See* note 96 and cases cited therein *supra*. The Barney Yard is the counterpart of the inferior departments in those cases. Thus, the remedy allowing transfer with retention of seniority credit from the Barney Yard to the CT Yard is similar to the remedies granted in the departmental seniority cases. *See, e.g.*, United States v. T.I.M.E., Inc., 517 F.2d 299 (5th Cir. 1975); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971).

Four months before the decision in *Local No. 974*, the Fourth Circuit decided Williams v. Norfolk & W. Ry., 530 F.2d 539 (4th Cir. 1974). *Williams* was an individual action by two plaintiffs arising out of the 1959 merger of the Norfolk & Western and the Virginian railroads. The Virginian also operated racially separate and distinct railroad yards. As part of the merger agreement, white employees of the Virginian were allowed to carry over to the CT Yard seniority as of the date they were hired by the Virginian. Black employees, however, were assigned to the Barney Yard. For substantially the same reasons as in *Local No. 974*, the Fourth Circuit held that Norfolk & Western discriminated against the plaintiffs by maintaining a seniority system which perpetuated the effects of past discrimination, and that the plaintiffs were entitled to back pay and competitive and benefit seniority commensurate with that of their CT Yard counterparts. *Id.* at 542-43.

crimination.[101] This theory dictates that in employment discrimination cases remedies should be devised to secure for the victim of discrimination the economic position he would already be occupying but for discrimination.[102] Under this theory, the victim of seniority-related discrimination is accorded "benefit seniority" commensurate with that of the employee holding the job the victim would have had but for discrimination, and "competitive seniority" so that the victim might compete on an equal basis with that same employee for future job vacancies.[103]

The determination of the seniority remedy in class action suits is governed by the same procedures and allocations of the burden of proof as the determination of the back pay award.[104] The plaintiff class must prove the seniority system had discriminatory effects and was engaged in intentionally. The burden then shifts to the party advocating preservation of the system to show that it is essential to a legitimate business purpose. If the seniority system is not proved essential, the system may be adjusted to grant each member of the class his "rightful place," dependent upon proof that he is qualified

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[101] The "rightful place" theory was first espoused in Note, *Title VII, Seniority Discrimination, and the Incumbent Negro,* 80 HARV. L. REV. 1260, 1266, (1967). It became the principal theory behind seniority remedies after it was adopted by the Fifth Circuit in Local No. 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980, 988-89 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970).

[102] Thronton v. East Texas Motor Freight, 497 F.2d 416, 419-20 (6th Cir. 1974); Bing v. Roadway Express, Inc., 485 F.2d 441. 540 (5th Cir. 1973); United States v. Bethlehem Steel Corp., 446 F.2d 652, 661 (2d Cir. 1971). *See generally* Fiss, *A Theory of Fair Employment Laws,* 38 U. CHI. L. REV. 235 (1971); Stacey, *Title VII Seniority Remedies in a Time of Economic Downturn,* 28 VAND. L. REV. 487 (1975); Note, *Title VII, Seniority Discrimination, and the Incumbent Negro,* 80 HARV. L. REV. 1260 (1967); Comment, *Title VII and Seniority Systems: Back to the Foot of the Line?,* 64 KY. L.J. 114 (1975).

[103] "Benefit" seniority is seniority calculated to determine what amount of fringe benefits the employee will receive. "Competitive" seniority is used in ranking preference among applicants for future promotions. 1 EMPL. PRAC. GUIDE (CCH) ¶ 572 (1976).

Although court-ordered adjustments might disrupt seniority systems instituted as a result of collective bargaining agreements, such adjustments are permitted because of the strong national policy favoring the elimination of discrimination, and because employees' promotional expectations under seniority systems are not "vested" interests. Franks v. Bowman Transp. Co., 424 U.S. 747, 778 (1976); United States v. Bethlehem Steel Corp., 446 F.2d 652, 659 (2d Cir. 1971); Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion,* 82 HARV. L. REV. 1598, 1605 (1969). *Cf.* Tilton v. Missouri Pac. R. Co., 376 U.S. 169 (1964) (construing 50 U.S.C. §§ 459(C)(1), (2) (1970), which provides that a re-employed returning veteran be granted the seniority credit he would have received in his absence).

[104] *See* text accompanying note 78 *supra.*

for the job he claims he would already be occupying but for discrimination.[105]

The Fourth Circuit's decision in *Local No. 974* demonstrates the correlation between back pay and seniority adjustment as remedies for Title VII violations. Norfolk & Western's discriminatory hiring practices, the effects of which were prepetuated in the seniority systems, were practices justifying the award of back pay. Nevertheless, the award of back pay alone would be an insufficient remedy for the victims of discrimination so long as the seniority systems, with their discriminatory effects, were allowed to remain in effect.[106] Therefore, by ordering back pay and seniority adjustments, the Fourth Circuit was able to secure for the victims a closer approximation of their rightful economic positions.[107]

Subsequent to the Fourth Circuit's decision in *Local No. 974,* the Supreme Court decided *Franks v. Bowman Transportation Co.*[108] In *Franks,* the Court found the company liable for back pay because it had engaged in discriminatory hiring practices by excluding blacks from jobs as "over-the-road" drivers and discouraging their transfer to those positions. In overturning the Fifth Circuit's refusal to adjust the seniority credit of the victims the Court held that the *Moody* standard[109] should apply to determine whether seniority adjustments should be denied. The Court also emphasized that to award back pay, but not to allow transfer with the seniority credits the victims would have earned but for discrimination, would effectively deny the victims their rightful place in the economy.[110] The company, therefore, was ordered to permit the members of the plaintiff class who had been denied jobs as "over-the-road" drivers to be hired, or to transfer to those jobs with seniority calculated from the date of their refusal.[111]

In *Franks* the Court affirmed the principle that seniority should be adjusted in most circumstances to secure for the victim of employment discrimination an approximation of the economic position he would be occupying but for discrimination.[112] Thus the theory supporting the seniority remedy in *Local No. 974* was sanctioned in *Franks.*[113]

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[105] *See* text accompanying note 93 *supra.*

[106] 532 F.2d at 342-43. *See* Franks v. Bowman Transp. Co., 424 U.S. 747, 764-68 (1976).

[107] *See generally* Franks v. Bowman Transp. Co., 424 U.S. 747 (1976).

[108] *Id.*

[109] *See* text accompanying notes 74-75 *supra.*

[110] 424 U.S. at 764-68.

[111] *Id.* at 762-70.

[112] *Id.*

[113] *See* text accompanying notes 100-103 *supra.*

"Bumping" and Front Pay Relief

In *Patterson v. American Tobacco Co.*,[114] the Fourth Circuit considered two additional remedies which might be devised to grant the victim his rightful economic position. The company and the union in *Patterson* were found to have engaged in discriminatory promotion practices. The company maintained separate branches within the city of Richmond. Each branch had prefabrication and fabrication departments. Blacks and females had been hired only into the prefabrication departments. Their promotional opportunities were limited because of the systems the company used in determining which employees would be awarded promotions. These systems denied to blacks and women the opportunity to advance through lines of progression[115] to higher paying jobs, or to transfer among branches or departments without loss of seniority.[116] The district court ordered elimination of the lines of progression system for determining promotions, except where justified by business necessity.[117] In its place, the court ordered that length of company service be utilized in ranking employees applying for promotions or transfer into the fabrication department.[118] The Fourth Circuit affirmed.[119] The Fourth Circuit, however, overturned the district court's grant of an additional seniority remedy allowing blacks and females to bump incumbent white employees with less company-service seniority from preferred jobs in the fabrication department.[120]

The Fourth Circuit relied on the legislative history of Title VII and its construction by other courts in deciding not to allow bumping. The legislative history of Title VII indicates that the bumping of white incumbents should not be utilized to eliminate the effects of discrimination,[121] and it has been so construed by the courts of ap-

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[114] 535 F.2d 257 (4th Cir. 1976), *cert. denied*, 42 U.S.L.W. 3325 (U.S. Nov. 2, 1976) (No. 76-46).

[115] Under a lines of progression system for determining promotions an employee must hold or have held a particular job before he will be considered for promotion to the next higher quality, higher paying category of jobs. 1 EMPL. PRAC. GUIDE (CCH) ¶ 602 (1976).

[116] The system requiring that a transferring employee relinquish his seniority credit is similar to the system in *Local No. 974*, where transfer would involve a victim's starting in the new job with no seniority credit, and a seniority ranking behind that of incumbent whites with less company service seniority. *See* text accompanying note 82 *supra*.

[117] 535 F.2d at 264-65.

[118] *Id.*

[119] *Id.* at 264.

[120] *Id.* at 267-68.

[121] Comment, *Employment Discrimination—The Use of the "Bumping" Remedy*

peals presented with the issue.[122] The Fourth Circuit also described pragmatic reasons for disallowing bumping. First, one of the principal goals of Title VII is to secure voluntary compliance with the Act by employers and unions.[123] The court recognized that bumping incumbents from their jobs would create labor and management unrest and possible resistance to efforts designed to eliminate employment discrimination.[124] Second, because various business practices are being recognized and redefined as having discriminatory effects, to allow bumping would result in workers and businessmen having their working lives rearranged periodically by court decrees.[125] The Fourth Circuit also decided that bumping should not be allowed because a different remedy could be devised for the victims which would effectively place the victims in substantially the economic position they would occupy as if bumping had occurred.[126] This remedy is the prospective, or front pay award.[127]

There is often a time-lag between the date of a back pay award and the date the employee is promoted to his rightful economic position.[128] During this time the employee's rate of pay remains the same as it was before the court decision awarding back pay.[129] The front pay award is designed to grant to the employee the difference between his prospective earnings at his current rate of pay until the date he is expected to be promoted, and what he would earn until that date were he promoted on the day of the court's judgment.[130] In *Patterson,* the Fourth Circuit became the first court of appeals to approve front

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to Alleviate Effects of Past Sex and Race Discrimination, 28 RUTGERS L. REV. 1285, 1299 (1975). *See* Interpretative Memorandum of Senators Case and Clark, 110 CONG. REC. 7213 (1964). *See also* 110 CONG. REC. 7207 (1964) (statement of Senator Clark); 110 Cong Rec. 7217 (1964) (answers of Senator Clark in response to questions of Senator Dirksen).

[122] EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975); United States v. Chesapeake & O. Ry., 417 F.2d 582 (4th Cir. 1972), *cert. denied,* 411 U.S. 939 (1973); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971).

[123] *Cf.* text accompanying note 52 *supra.*

[124] 535 F.2d at 267-68. *See* Gould, *Seniority and the Black Worker: Reflections on* Quarles *and Its Implications,* 47 TEX. L. REV. 1039, 1068 (1969); Comment, *Employment Discrimination—The Use of the "Bumping" Remedy to Alleviate Effects of Past Sex and Race Discrimination,* 28 RUTGERS L. REV. 1285, 1300-01 (1975).

[125] 535 F.2d at 267-68.

[126] *Id.* at 269.

[127] *See generally* Note, *Front Pay-Prophylactic Relief Under Title VII of the Civil Rights Act of 1964,* 29 VAND. L. REV. 211, 212 (1976).

[128] 535 F.2d at 269.

[129] Note, *Front Pay-Prophylactic Relief Under Title VII of the Civil Rights Act of 1964,* 29 VAND. L. REV. 211, 212 (1976).

[130] *Id.* at 211.

pay relief.[131] Several district courts, however, have awarded front pay, using varying calculations to reach an award.[132] The Fourth Circuit suggested two possible methods for calculating award. The first is that the district court should estimate the amount of time it will take the victim of discrimination to be promoted to his rightful position, and award the present value of expected lost earnings within that time period.[133] Alternatively, the court might exercise continuing jurisdiction over the case, requiring the victim to appear periodically in court and prove his income. The court would then award the difference between actual income for the period under consideration and the income the individual would have received but for discrimination. This process would continue until the employee was promoted to his rightful place.[134] Whichever method is used, the benefit of the front pay award is that it secures for the victim his rightful place in

[131] The Fifth Circuit has held that the period for calculating compensatory awards under Title VII should terminate on the date of the district court decree ordering back pay. Sabala v. Western Gillette, Inc., 516 F.2d 1251, 1266 (5th Cir. 1975); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 258 (5th Cir. 1974).

The Second Circuit has recently cited *Patterson* in support of its holding that the termination date of the back pay award should be the date that the discrimination is actually remedied. EEOC v. Enterprise Ass'n Steamfitters, Local No. 638, 542 F.2d 579, 590-91 (2d Cir. 1976).

[132] One court, without specifying how the award was to be calculated, merely held that the plaintiffs were to be compensated for future loss of earnings. Johnson v. Ryder Truck Lines, Inc., 11 Empl. Prac. Dec. ¶ 10,692, at 6900 (W.D.N.C. 1975). Two courts have awarded lump sums of 50 per cent of the total of average yearly differential between the employee's current pay and the pay he would be earning but for discrimination, multiplied by the estimated number of years it will take the employee to reach his rightful place. White v. Carolina Paperboard Corp., 10 Empl. Prac. Dec. ¶ 10,470, at 6020 (W.D.N.C. 1975); United States v. United States Steel Corp., 371 F. Supp. 1045, 1060 (N.D.Ala. 1973), *modified,* 520 F.2d 1043 (5th Cir. 1975). One court has ordered that the employee either be promoted to the position he would be occupying but for discrimination, or be paid at the rate of pay for that position until he is so promoted. Cross v. Board of Ed., 395 F. Supp. 531, 535 (E.D. Ark. 1975). Another court has ordered that the individual be awarded the total differential between his current pay and that he would be receiving but for discrimination for the estimated amount of time it will take him to reach his rightful place. Bush v. Lone Star Steel Co., 373 F. Supp. 526, 538 (E.D. Tex. 1974).

[133] 535 F.2d at 269.

[134] One commentator has suggested that the best method for calculating front pay would be to require the district court to exercise continuing jurisdiction over the case and periodically reassess back pay awards. He argues that as a result the employer would be provided with an incentive to promote the victims at a faster pace. Note, *Front Pay-Prophylactic Relief Under Title VII of the Civil Rights Act of 1964,* 29 VAND. L. REV. 211, 226 (1976). Where promotion is made, however, strictly on the basis of seniority among qualified applicants, the incentive to promote would not exist and the present value method would serve as well.

terms of probable compensation as if the white employee had been bumped, and thus eliminates the factors which would indicate bumping was necessary in the first instance.[135]

The decisions of the Fourth Circuit in the past year indicate a deep concern for the rights and economic position of the victims of discriminatory employment practices prohibited by Title VII. The procedures required under Title VII and prescribed by EEOC regulations have been construed liberally by the court to remove procedural technicalities restricting the access of victims and the Commission to the federal courts. Furthermore, the court has demonstrated flexibility in designing remedies under Title VII. If the decision in *Patterson* is indicative of the attitude of the Fourth Circuit in employment discrimination cases, the court will not hesitate to fashion remedies broadly designed to secure for the victim of employment discrimination his rightful place in the economy.

BENJAMIN G. PHILPOTT

B. The Age Discrimination in Employment Act of 1967

The Age Discrimination in Employment Act of 1967,[1] (ADEA), protects persons between the ages of forty and sixty-five,[2] whether seeking employment or already working,[3] from age discrimination. The intent of the ADEA is to promote employment on the basis of ability rather than age.[4] The protection is not limited to employers' acts, since personnel agencies and other job procurement organizations are also within the ambit of the ADEA.[5] In its first review of an action brought under the Act, the Fourth Circuit defined the ADEA's impact on advertisements for job opportunities.

In *Hodgson v. Approved Personnel Service, Inc.*[6] the Secretary of Labor sought under the ADEA to enjoin the defendant personnel

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[135] White v. Carolina Paperboard Corp., 10 Empl. Prac. Dec. ¶ 10,470, at 6019 (W.D.N.C. 1975).

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[1] 29 U.S.C. §§ 621-634 (1970)(amended 1974). *See generally* Note, *Age Discrimination in Employment: Available Federal Relief,* 11 COLUM. J.L. & SOC. PROB. 281 (1975).

[2] 29 U.S.C. § 631 (Supp. V, 1975).

[3] 29 C.F.R. § 860.30 (1975).

[4] 29 U.S.C. § 621(b) (1970). The congressional history and the intent of the Act are summarized in Brennan v. Ace Hardware Corp., 495 F.2d 368 (8th Cir. 1974).

[5] 29 U.S.C. § 623(b) (1970). *See* note 7 *infra.* 29 U.S.C. § 630(c) (1970) defines employment agency as ". . . any person regularly undertaking with or without compensation to procure employees for an employer and includes the agent of such a person; but shall not include an agency of the United States."

[6] 529 F.2d 760 (4th Cir. 1975).

agency from advertising in what he determined to be a discriminatory manner. The defendant had used such terms as "recent college grads," "girl," and "excellent first job" in newspaper advertisements, contrary to the Department of Labor's reading of the statute.[7] The ADEA places emphasis on voluntary compliance and requires the Secretary of Labor to attempt conciliation as a prerequisite to suit.[8] Although five separate attempts at conciliation had failed, including two with the president of Approved Personnel,[9] the district court denied injunctive relief and held that the plaintiff had merely confused the defendant agency and had not attempted compliance.[10] The Fourth Circuit reversed, holding that the Secretary had fulfilled his duty to conciliate and therefore the suit was not precluded.[11]

The Fourth Circuit termed the conciliation effort, composed of the five visits and an unspecified number of calls and letters, a patient effort.[12] Despite this effort and Approved Personnel's promised cessation, the defendant continued newspaper advertisements with the same terms until the Department of Labor brought suit. The court held that defendant's compliance after institution of the suit was not dispositive of the discrimination claims, reasoning that an injunction would not hinder future business if the defendant truly intended to comply.[13]

After declaring that suit was not precluded, the court turned to the alleged violations. The court divided defendant's advertisements into two groups: those soliciting inquiries about specific positions, and those meant to acquaint a class of persons with the availability of employment services. As to specific advertisements, the use of the terms "recent college grads," "girls," and "career girls" was found to

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[7] 29 U.S.C. § 623(b) (1970) provides:

> It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

[8] 29 U.S.C. § 626 (1970).

[9] 529 F.2d at 762-63.

[10] *Id.* at 763.

[11] *Id.* at 764-65.

[12] *Id.* at 764.

[13] *Id.* An injunction would force defendant to discontinue the advertisements. The burden, however, would be on defendant thereafter to show the absence of contemptible behavior. Brennan v. Weis Mkts., 5 Empl. Prac. Dec. ¶ 8519 (M.D. Pa.1973), held that continued broken promises of an employer showed a sufficient conciliation effort by the Department of Labor, because an opposite holding would allow an employer to avoid suit indefinitely.

violate both the intent of the ADEA and the statute.[14] These terms imply that older persons need not apply for the jobs. In contrast, the court found no such implication in the term "junior secretary," since "junior" is descriptive of the job, not the age of the person to fill it.[15] Advertisements for positions denoted "first job" or "excellent first job" did not discriminate, nor did proferred employment with a "young office group" or for a "young executive." The court found only that description of the working environment did not show preference for youth in hiring. These informational or acquaintance advertisements were subject to scrutiny, and could be justified only if they were infrequent[16] and not directed to specific job opportunities.[17]

Although deciding that certain terms violated Department of Labor standards, the court did not explicitly define the permissibility of these terms in a different context. Refusing to find certain terms "trigger words," and thus per se violations, as urged by the Department of Labor, the court suggested that context was the determinative factor.[18] The court apparently allows subtle suggestion of preference for young applicants by the use of connotative terms in the job title, job description, or description of the employer, when the terms appear to be denotative.[19] For example, in addressing the terms "athletically inclined" and "All-American," the court found that these qualities can exist in a person of any age and were therefore permissible. This finding, however, conflicts with the finding that terms such as "recent college grads" are violative, as there are recent college graduates in every age group. The use of acquaintance advertisements declaring a number of job openings for "recent grads" may

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[14] *See* notes 4 & 7 *supra.*

[15] 529 F.2d at 765. The court noted that the Department of Labor itself used those terms, *id.* at 765 n.10, *citing* U.S. DEP'T OF LABOR, I DICTIONARY OF OCCUPATIONAL TITLES: DEFINITION OF TITLES 393 (3d ed. 1965).

[16] The court noted that Approved Personnel made general appeals only in the spring of the year, a time when the recipients of the appeal had the greatest need for employment advice and counseling. 529 F.2d at 766 n.12.

[17] *Id.* at 766. Job descriptions in the plural may avoid illegality. *See* text accompanying notes 19-20 *infra.*

[18] 529 F.2d at 765.

[19] The kind of advertisement which, by subtle connotation, suggests that certain persons need not apply is precisely the kind that discriminates on the basis of age. *See* Note, *Age Discrimination in Employment: Available Federal Relief,* 11 COLUM. J.L. & SOC. PROB. 281, 305 (1975), *citing Secretary of Labor,* REPORT OF THE SECRETARY OF LABOR TO THE CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT (1965). The latter report led to the enactment of the Age Discrimination in Employment Act of 1967. 11 COLUM. J.L. & SOC. PROB., *supra,* at 305-06 n.122.

allow an employment service to discriminate simply by making the job offering plural so that the service complies by not offering specific jobs in an informational advertisement. The plaintiff Department of Labor suggested that, in fulfilling the congressional mandate, whether the deterrent applies to one job or a multitude is irrelevant.[20] Allowing acquaintance advertisements and the use of non-violative words in a preferential context, the court has left avenues of potential discrimination open to personnel agencies in their invitations to employment.

In another Fourth Circuit decision reviewing the ADEA, *McMann v. United Air Lines, Inc.*,[21] the court held that United's employee benefit plan, which required retirement at age sixty, was proscribed by the Act. United's plan, which McMann voluntarily joined, forced his retirement at the employer-chosen age of sixty.[22] The selection of that age brought the plan within the ADEA.[23] The Act, however, exempts bona fide plans that do not evade the purposes of the Act.[24] Although United's plan began before the passage of the ADEA,[25] the court held that maintenance of a forbidden subterfuge after enactment of the ADEA was within the scope of review.[26]

Considering the facts, the court held United's plan violative of the Act unless defendant could prove some business purpose other than arbitrary age discrimination.[27] The Fourth Circuit, relying heavily on

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[20] Brief for the Secretary of Labor at 15-16, Hodgson v. Approved Personnel Serv., Inc., 529 F.2d 760 (4th Cir. 1975).

[21] 542 F.2d 217 (4th Cir. 1976), *cert. filed*, 45 U.S.L.W. 3466 (U.S. Jan. 11, 1977) (No. 76-906).

[22] *Id.* at 219. McMann's application, executed nine years before his retirement and three years prior to the enactment of the ADEA, contained notice of the "normal retirement age." An employee had no discretion whether to continue past this age. United never allowed continued employment, forcing all employees to retire at age sixty. *Id.*

The court did not mention the voluntariness of McMann's enrollment. By signing the contract containing notice of the normal retirement age, he might have been said to have accepted the age limit. In addition, his failure to complain until forced to retire might have been taken as a waiver. However, the reach of the ADEA is remedial, and thus is retrospective. *See* 29 U.S.C. § 621 (1970).

[23] *See* notes 1-3 and accompanying text *supra*.

[24] 29 U.S.C. § 623(f) (1970) provides in pertinent part:

> It shall not be unlawful for an employer . . . (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension or insurance plan, which is not a subterfuge to evade the purposes of this chapter.

[25] The effective date of the ADEA was June 12, 1968. *See* 29 U.S.C. § 621 (1970).

[26] 542 F.2d at 221.

[27] *Id.* at 221-22.

the legislative history of the ADEA[28] for its conclusion, held that United offered no justification for the plan sufficient under the Act. Since United sought exemption only because its formulation of the retirement plan predated the ADEA, and argued that it therefore could not be a subterfuge, the court remanded[29] for inquiry into motives other than age discrimination.

In contrast to the Fourth Circuit, the Fifth Circuit in *Brennan v. Taft Broadcasting Co.*[30] refused to inquire into the legislative history and relied solely on the "unambiguous language of the statute"[31] to hold that a retirement plan in existence before the ADEA's enactment is excluded from review.[32] Reasoning that attempts to override the clear statutory language with legislative history have been rejected by the Supreme Court,[33] the Fifth Circuit upheld Taft Broadcasting's right to force early retirement.

The two circuits conflict over the necessity or permissibility of resort to legislative history in defining the intent of congressional actions. The Supreme Court recently held that examination of legislative history is appropriate, though not required, regardless of how clear a statute may be on its face.[34] Thus the Fourth Circuit's approach is preferable. The court also was careful to limit the inquiry to history consistent with the wording of the ADEA.[35] Since the review granted by the Fourth Circuit was based solely on United's failure to demonstrate the business purpose of its plan, *McMann* does not go far to illuminate the court's posture towards the ADEA, but indicates only that it will utilize the legislative history in defining it.[36]

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[28] *Id.* at 222. H.R. REP. No. 805, 90th Cong., 1st Sess. (1967), *reprinted in* [1967] U.S. CODE CONG. & AD. NEWS 2213, 2217.

[29] 542 F.2d at 222.

[30] 500 F.2d 212 (5th Cir. 1974).

[31] *Id.* at 217.

[32] *Id.*

[33] *See, e.g.,* Braunstein v. Commissioner, 374 U.S. 65 (1963); NLRB v. Highland Park Mfg. Co., 341 U.S. 322 (1951). *But see* Corn Prods. Refining Co. v. Commissioner, 350 U.S. 46 (1955) (plain wording of tax statute ignored to further congressional intent).

[34] Train v. Colorado Pub. Interest Research Group, Inc., 426 U.S. 1, 10 (1976), *reaffirming* United States v. American Trucking Assns., 310 U.S. 534, 543-44 (1940).

[35] 542 F.2d at 221.

[36] Because the language in *McMann* indicates that a business nexus would be a bona fide plan not based upon arbitrary age discrimination, the Fourth Circuit would presumably allow such a plan. The court indicated, however, that it will pay close attention to the validity of the business nexus claim. *Id.*

C. Racial Discrimination

Discharge of Minority Teacher: Standard of Proof of Lack of Discriminatory Motive and Scope of Appellate Review

In 1966, the Fourth Circuit held in *Chambers v. Hendersonville City Board of Education*[1] that a sudden reduction in the number of black instructors raised a rebuttable inference of racial discrimination. The integration plan of the local school district had moved forty percent of the black students to other school districts.[2] Maintaining the faculties of the newly integrated schools at a racial balance equivalent to that of the students resulted in the discharge of approximately forty percent of the black teachers.[3] The *Chambers* court held that the inference that long-standing discrimination continues is rebuttable only by clear and convincing evidence that discrimination is not among the reasons for firing a teacher.[4] The court derived the presumption from its conclusion that judicial action was necessary to secure integration, and required defendant to carry the burden of proof because most of the facts were in the defendant's power to produce.[5]

The Fourth Circuit reviewed this standard of proof in a similar situation ten years later in *Jones v. Pitt County Board of Education.*[6] Plaintiff, a black, had taught seventh and eighth grades in an all-black school for ten years, and received ratings of "average" on her evaluations during that time. Upon integration of the school district in 1970,[7] she was assigned to teach fifth grade in a different facility. Based upon poor evaluations by a supervisor and principal, both white, Jones was not rehired for the 1972-73 school year.[8] Plaintiff sought administrative review of her dismissal.

The Pactolus School Advisory Board, a panel of six whites and three blacks, unanimously affirmed the principal's recommendation

[1] 364 F.2d 189 (4th Cir. 1966), *noted in* 45 N.C.L. Rev. 166 (1966).

[2] 364 F.2d at 190.

[3] *Id.* The school principal "concluded that the Negro pupils should have 'adequate representation at the teacher level'" *Id.*

[4] *Id.* at 192. The court did not explain why the higher standard of proof was necessary. The Fourth Circuit included in the *Chambers* decision an order requiring the school district to formulate "definite objective standards for the employment and retention of teachers," including standardized evaluation forms. *Id.* at 193.

[5] *Id.* at 192.

[6] 528 F.2d 414 (4th Cir. 1975).

[7] The Pitt County, North Carolina, school system was integrated pursuant to court order in Teel v. Pitt County Bd. of Educ., 272 F. Supp. 703 (E.D.N.C. 1967).

[8] 528 F.2d at 416.

at a hearing where Jones was represented by counsel.[9] The Board of Education also granted a hearing, which resulted in another unanimous decision not to reemploy Jones. Plaintiff then filed suit under the Civil Rights Act of 1871[10] alleging racial discrimination under color of state law.

The district court found[11] that plaintiff's race had influenced neither the evaluations nor the decision of the school board.[12] In finding Jones an ineffective teacher, the school had used a standardized evaluation form and three evaluators.[13] Moreover, Jones was replaced by a black woman, who subsequently resigned and also was replaced by a black woman.[14] Recognizing that the defendant school district must show an absence of racial motivation by clear and convincing evidence,[15] the district court concluded that the school board discharged plaintiff solely because of professional incompetence.

Upon Jones' appeal, the Fourth Circuit considered the "clearly erroneous"[16] stricture of appellate review in response to the "clear and convincing" standard of proof required at trial. Recognizing that the court may not decide factual issues already adjudicated by the lower court unless they are clearly erroneous,[17] the Fourth Circuit held that

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[9] One of the black members of the Advisory Board was absent from the meeting during which Jones' retention was discussed. *Id.* The Fourth Circuit has consistently required scrupulous attention to due process rights at school board hearings on discharge. *See, e.g.*, Thomas v. Ward, 529 F.2d 916 (4th Cir. 1975); Huntley v. North Carolina State Bd. of Educ., No. 75-2096 (4th Cir. June 14, 1976), *disposition recorded* 538 F.2d 324.

[10] 42 U.S.C. § 1983 (1970) provides:

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

[11] The action of the district court regarding due process was not challenged on appeal. 528 F.2d at 416 n.1.

[12] *Id.* at 417.

[13] *Id.* at 416. All the evaluators were white.

[14] *Id.* at 417. The majority noted the excellent evaluations given Jones' two successors in the recitation of facts, *id.*, and in holding that the evaluations were not merely pretextual. *Id.* at 417 n.8.

[15] Keyes v. School Dist. No. 1, 413 U.S. 189, 209 (1973).

[16] FED. R. CIV. P. 52(a) provides in pertinent part: "[f]indings of facts shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." *See generally* C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2571 (1971).

[17] The *Jones* court relied on Zenith Radio Corp. v. Hazeltine Research, Inc., 395

the higher standard of proof did not expand the scope of appellate review.[18] The majority noted that the appellate court should not be bound by the determinations below solely because they were based on substantial evidence, but held the lower court's judgment not clearly erroneous because it was based on competent testimony. Absent the "definite and firm conviction that a mistake [had] been committed,"[19] the Fourth Circuit affirmed, holding that the district court properly found for the school board.[20]

The Fourth Circuit majority relied in part on the Supreme Court's decision in *Keyes v. School District No. 1*[21] which delineated the

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U.S. 100, 123 (1969), to establish that an appellate court, applying the clearly erroneous standard to findings of fact of a district court sitting without a jury, may not decide facts de novo.

Zenith Radio was a patent infringement action in which the district court found that antitrust laws had been violated, 239 F. Supp. 51 (N.D. Ill. 1965). The court of appeals reversed the finding of facts regarding restriction of competition, 388 F.2d 25 (7th Cir. 1967), but the Supreme Court held that the appellate court exceeded appropriate review by failing to observe the trial court's proximity to the facts. 395 U.S. at 118, 123.

[18] 528 F.2d at 417.

[19] *Id.*, *quoting* United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). The *Gypsum* test is as follows: "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.* The Supreme Court recently declared, in a suit involving racial discrimination in employment, that the appropriate scope of appellate review is to determine whether the district court's findings are clearly erroneous and whether that court had abused its discretion. Albemarle Paper Co. v. Moody, 422 U.S. 405, 424 (1975).

[20] 528 F.2d at 418. The court of appeals, following its earlier decision in Jersey Ins. Co. v. Heffron, 242 F.2d 136, 139 (4th Cir. 1957), rejected an inquiry into whether there existed doubt as to the lower court's finding. An expression of doubt would apparently constitute substantial questioning of the trial court's decision. Presumably a doubt is less demonstrable than a firm conviction that a mistake has been committed. *See, e.g,* Smith v. Missouri Pac. Ry., 143 Mo. 33, 34, 44 S.W. 718, 719 (1898) (doubt implies want of settled conviction).

[21] 413 U.S. 189 (1973). *Keyes* was the first school desegregation case to reach the Supreme Court from outside the South, arising from the segregation of "Anglos" and "Hispanos" in the Denver school system. *Keyes* was also the first school desegregation suit to be decided by the Supreme Court in the absence of a statutory scheme that required or allowed segregation, whereas in previous cases, *e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Brown v. Board of Educ., 347 U.S. 483 (1954), the Court dealt with de jure segregation. The Denver schools were segregated de facto. The Court emphasized that the difference lies in the intent associated with de jure segregation, but held that whenever any intent may be inferred the burden rests on the school district to show the absence of racially motivated intent. 413 U.S. at 208-09. *See* Note, *Public School Desegregation and the Contours of Unconstitutionality: The Denver School Board Case*, 45 U. Colo. L. Rev. 457 (1974). *See generally* Note, *Constitutional Law—School Desegregation—Constitutional Duty to Desegregate De*

burden of proof necessary to defend a charge of racial discrimination directed against an historically discriminatory school district. The Court held that once the issue of segregation is raised by credible testimony, the burden shifts to the school district to show that racial animus is not a factor in the composition of the student bodies.[22] The *Jones* majority did not relate the holding of *Keyes* to the issue in *Jones* other than to extract the clear and convincing proof standard.[23] Judge Craven in his dissent, however, argued that *Keyes* demanded that the defendant school system show a total absence of racial motivation in discharging Jones.[24] The Pitt County system had an admitted history of racial segregation,[25] thus bringing it within the *Keyes* mandate. While Judge Craven detected no racial animus,[26] he described the exceptional burden of proof placed on school boards as comtemplating the situation where the animus would go undetected, and urged that affirming the lower court would abandon appellate enforcement of the *Keyes* mandate.[27]

Reviewing the evidence, the dissent found significance in Jones' assignment to a different teaching level and to a new facility after the integration plan was implemented. Indeed, no suggestion of incompetence was made until this change occurred. The dissent particularly noted the inference of racial discrimination that arose from the equal distribution of black and white instructors leaving the system, compared with the hiring ratio of one black for every five whites.[28]

Facto Segregation, Keyes v. School District Number 1, *413 U.S. 189 (1973),* 23 EMORY L.J. 293 (1974); Comment, Keyes v. School District No. 1: *Unlocking the Northern Schoolhouse Doors,* 9 HARV. C.R.-C.L.L. REV. 124 (1974); Note, *Keyes, the Key to National Desegregation?,* 3 CAP. L. REV. 105 (1974); Note, *Constitutional Law—School Desegregation—De Facto Hangs On,* 52 N.C.L. REV. 431 (1973).

[22] 413 U.S. at 209.

[23] 528 F.2d at 417 n.4. The court could have inferred de facto or de jure intent in *Jones* from the ratio of hiring and firing of black teachers. *See* text accompanying note 28 *infra.* This would have enabled the court to have applied more effectively the *Keyes* inquiry into motive which would have resulted in a more detailed and broader review of the Pitt County employment pattern. The Fourth Circuit instead limited its inquiry to the facts surrounding only Jones' dismissal.

[24] 528 F.2d at 419, (Craven, J., dissenting), *citing* Keyes v. School Dist. No. 1, 413 U.S. 189, 210 (1973). Neither the majority nor the dissent in *Jones* found it necessary to relate the *Keyes* decision regarding student body segregation to racial discrimination in hiring instructors. *See* note 23 *supra.*

[25] A history of racial discrimination and segregation was admitted in, *e.g.,* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Brown v. Board of Educ., 347 U.S. 483 (1954); Chambers v. Board of Educ., 364 F.2d 189 (4th Cir. 1966).

[26] 528 F.2d at 418 (Craven, J., dissenting).

[27] *Id.* at 419 (Craven, J., dissenting).

[28] *Id.* at 420 (Craven, J., dissenting).

However, the fact that Jones' replacements, both blacks, had received excellent performance evaluations was overlooked by the dissent. Judge Craven did not accuse the school district of using the evaluations as a pretext for discharge, but did say that the reports were "largely subjective and wholly unsupported by the underlying documentation."[29] Concluding that the weight of the evidence[30] showed that the defendant has not met its burden, he declared, in contrast to the majority's finding, that "a mistake has been committed."[31]

The *Jones* decision on the scope of appellate review indicates that the Fourth Circuit would apply the same scrutiny to a district court's judgment regardless of the standard of proof required at trial. The court adhered to the prevailing rule that without substantial evidence a judgment is clearly erroneous.[32] In addition, the court rejected the converse rule that a decision supported by substantial evidence may not be clearly erroneous.[33] Thus, the Fourth Circuit would substitute its judgment for that of the trial court contrary to substantial evidence, but only when it is left with a definite conviction that a mistake has been committed. The standard led the court to hold that the higher burden of proof did not expand the scope of appellate review in a racial discrimination suit.[34] The application of the *Keyes* standards, however, alters the circumstances of review. The majority's effort to meet *Keyes* involved careful scrutiny of the charges while maintaining the traditional limits of review. The dissent, critical of this partial independence from *Keyes*, suggests that *Keyes* standards require a new standard for appellate review in discrimination cases—the complete absence of any racial motivation. This would be a significant step, requiring, in effect, a defendant to prove a negative.[35]

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[29] *Id.*

[30] Judge Craven urged that the evidence must be reviewed as a whole, *citing* Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951) (court, in weighing evidence, must take into account any item which fairly detracts from the positive weight of the evidence).

[31] 528 F.2d at 420 (Craven, J., dissenting), *quoting* United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). *See* note 19 *supra*.

[32] 528 F.2d at 418 n.9. *See* C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2585 (1971).

[33] The rule that a decision supported by substantial evidence may not be clearly erroneous was applied in, *e.g.*, Jackson v. Hartford Accident & Indemnity Co., 422 F.2d 1272, 1275 (8th Cir.), *cert. denied*, 400 U.S. 855 (1970); Unitec Corp. v. Beatty Safway Scaffold Co., 358 F.2d 470, 477 (9th Cir. 1966); West Am. Ins. Co. v. Allstate Ins. Co., 295 F.2d 513, 515 (10th Cir. 1961). Its earliest application appears to be in Aetna Life Ins. Co. v. Kepler, 116 F.2d 1, 5 (8th Cir. 1941).

[34] 528 F.2d at 417.

The *Jones* disposition manifests the Fourth Circuit's desire to employ conventional strictures of appellate review rather than embrace new standards.

Unavailability of Damages Relief in Housing Discrimination Suits

Recognizing that overt racial discrimination was foreclosed by the Civil Rights Act of 1968,[36] the defendant in *United States v. Long*[37] maintained the racial segregation of his rental property by the use of coded rental applications.[38] In addition, black applicants were subjected to credit checks three times as often as whites, and a deposit was required of ninety-five percent of the blacks, if accepted, as opposed to only ten percent of the whites.[39] The Department of Justice sued for an injunction plus affirmative relief.[40] Finding that defendant discriminated in renting apartments, the district court issued an injunction.[41] Although the court had no direct precedent, it required defendant to pay justified damage claims.[42]

Reviewing the relief granted by the district court, the Fourth Circuit identified three remedies available for housing discrimination: private administrative actions,[43] private civil suits,[44] and suits by the

[35] The burden of proof language in *Keyes* was applied only to "the special context of school desegregation . . ." 413 U.S. at 208. In addition, the *Keyes* Court suggested that there are no "hard-and-fast standards governing the allocation of the burden of proof in every situation." *Id.* at 209. The Court required only sufficient evidence of a lack of segregative intent to *support* such a finding, and did not require absolute proof. *Id.* at 210.

[36] 42 U.S.C. § 3601 *et. seq.* (1970).

[37] 537 F.2d 1151 (4th Cir. 1975), *cert. denied* 45 U.S.L.W. 3254 (U.S. Oct. 5, 1976) (No. 75-1920).

[38] United States v. Long, EQUAL OPPOR. IN HOUSING (P-H) ¶ 13,631 (D.S.C. Jan. 14, 1974). Defendant's clerks coded the applications so as to maintain intra-office segregation of the forms. Black persons requesting housing were shown only those apartments defendant wished to keep all-black, even if housing was also available in his "white" apartment buildings.

[39] *Id.*

[40] The affirmative relief sought included an order compelling future compliance with the Civil Rights Act, display of equal housing signs, and damages for the victims. 537 F.2d at 1151.

[41] United States v. Long, EQUAL OPPOR. IN HOUSING (P-H) ¶ 13,631 (D.S.C. Jan. 14, 1974).

[42] *Id.* The district court appointed and authorized a special master to hear claims, as provided in FED. R. CIV. P. 53. If appropriate, he was to make damage award recommendations to the court. The question of whether a jury was required was certified to the court of appeals pursuant to 28 U.S.C. § 1292(b) (1970), but the Fourth Circuit's decision on the remedy precluded disposition. 537 F.2d at 1155.

[43] 42 U.S.C. § 3610 (1970) provides for filing complaints with the Secretary of Housing and Urban Development.

Attorney General in cases of "general public importance" to obtain relief including "injunction, restraining order or other order."[45] Faced with the question of whether "or other order" may include the damage remedy, the court declared that the context denoted equitable relief only.[46] Thus, by ordering legal relief the district court had exceeded its authority. The *Long* court approved the lower court's order which required not only cessation of discriminatory acts but affirmative efforts to correct past acts.[47] The court also noted that the damage remedy remained open to the victims by way of private civil suit.[48]

In support of the damage remedy, the government argued that victims of employment discrimination received back pay and that this relief was analogous to that sought in *Long*. The court conceded that such relief had been granted in both private[49] and government[50]

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[44] 42 U.S.C. § 3612 (1970) provides in pertinent part: "The rights granted by . . . this title may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction." In Clark v. Universal Builders, Inc., 501 F.2d 324 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974), a private civil suit, the Seventh Circuit held that black homebuyers had a cause of action against defendant for a claim of damages equal to the increase in prices of houses caused by racial discrimination.

[45] 42 U.S.C. § 3613 (1970) provides for civil action by the Attorney General when persons have been denied the rights granted by the Civil Rights Act of 1968.

[46] 537 F.2d at 1153.

[47] The injunction required defendant to cease the discriminatory acts, and to undo by affimative action past acts by advertising as an equal opportunity housing source, and to display the Housing and Urban Development's logo (an easily identifiable sign indicating compliance with H.U.D. regulations) on its advertisements and on the sign in front of the agency. *Id. Cf.* note 40 *supra.*

[48] 537 F.2d at 1154. *See* note 44 *supra.* Plaintiffs could also pursue remedies granted in 42 U.S.C. §§ 1981, 1982 (1970).

The court did not address the burden of costly litigation nor the judicial economy of single litigation. If the court allowed the damage remedy, the United States would have been in a position analogous to the representative in a class action suit. Class actions serve an important function and should be encouraged, Green v. Wolf Corp., 406 F.2d 291, 298 (2d Cir. 1968), *cert. denied* 395 U.S. 977 (1969). In addition, persons with claims smaller than the costs of suit, bound together, have an incentive to pursue a remedy. *See generally* Homburger, Private Suits in the Public Interest in the United States of America, 23 BUFFALO L. REV. 343 1974; Note, *The Rule 23(b) Class Actions: An Empirical Study*, 62 GEO. L.J. 1123 (1974).

[49] 42 U.S.C. § 2000e-5 (1970) authorizes back pay awards upon a finding that an employer discriminated intentionally. Courts have characterized this as equitable relief. *See, e.g.*, Meadows v. Ford Motor Corp., 510 F.2d 939 (6th Cir. 1975); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971). *Cf.* note 43 *supra.*

[50] 42 U.S.C. § 2000e-6 (1970) contains no provision for back pay. Back pay has been approved, however, in United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973), and in United States v. Hayes Int'l Corp., 456 F.2d 112 (5th Cir. 1972), based

suits regarding employment discrimination, but held that these suits were not controlling.[51] The Fourth Circuit distinguished a back pay award from a damage award for housing discrimination by reasoning that in the former the court forces the party to disgorge wrongfully withheld funds belonging to the victim of discrimination, whereas in the latter a damage award for losses due to discrimination is not such a recovery.[52] The court relied on *Curtis v. Loether,*[53] a private housing discrimination suit, where the Supreme Court held that a suit for damages brought by a victim of racial discrimination is clearly a request for legal relief.[54] Persuaded that the relief sought in *Long* failed to meet the definition of restitution necessary to characterize it as equitable, the court held that the relief granted below exceeded the trial court's remedial jurisdiction.[55]

Consequently, future victims of racial discrimination who receive injunctive relief as a result of a Justice Department suit must bring a private suit to recover damages and must prove discrimination anew.[56] Generally, the cost of this litigation will be borne by the victims, although a class action status would diminish expenses.[57] The victims' use of the prior decision in proving discrimination in a subsequent suit for damages may be limited, as the courts are unsure

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in part upon the intentional discrimination of the employers. *Cf.* note 44 *supra.*

[51] 537 F.2d at 1155.

[52] *Id., citing* Rogers v. Loether, 467 F.2d 1110, 1121-22 (7th Cir. 1972), *aff'd sub nom.* Curtis v. Loether, 415 U.S. 189 (1974).

[53] 415 U.S. 189 (1974).

[54] *Id.* at 195. In an analogous case, Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975), the Court held that private suits and EEOC claims are independent, but not mutually exclusive. *Id.* at 459, 461.

[55] 537 F.2d at 1153.

[56] The decision holding Long's acts to be violative would be stare decisis in a subsequent suit. However, courts are unsure of the affirmative use of collateral estoppel in a second suit concerning the same facts. The "*Bernhard* doctrine", Bernhard v. Bank of America Nat'l Trust & Sav. Assn., 19 Cal.2d 807, 122 P.2d 892 (1942), which allows offensive use of collateral estoppel despite a lack of mutuality, has not been adopted by the Supreme Court. The Court, in Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313 (1971), acknowledged the defensive use of collateral estoppel, but did not endorse offensive use.

Victims of discrimination may, of course, bring suit prior to, or concurrently with, a suit by the Attorney General. *See* note 43 *supra.*

[57] FED. R. CIV. P. 23(a) provides for class action suits in the federal courts. *See* note 48 *supra.* Under 42 U.S.C. § 3612 (1970), a court is allowed to award attorneys' fees to a prevailing plaintiff if such plaintiff is unable to bear the costs himself. The courts of appeals are in conflict regarding the standard to be applied in awarding attorneys' fees. *Compare* Jeanty v. McKee & Poague, Inc., 496 F.2d 1119 (7th Cir. 1974) (liberal award) *with* Fort v. White, 530 F.2d 1113 (2d Cir. 1976) (fees should be awarded only if defendant showed bad faith).

of the permissibility of using collateral estoppel offensively.[58] By refusing the district court's damage remedy, the *Long* court has possibly created a circuity of action and allowed protracted litigation even though Congress authorized the Attorney General to seek to diminish discriminatory acts.[59] Although private suits and suits by the Justice Department rest on different considerations,[60] the intent of the legislation is to eliminate racial discrimination by the most effective means.[61]

D. Rights to Privacy

Private Hospital's Liability for Refusal to Give Abortion

In *Doe v. Charleston Area Medical Center, Inc.*,[1] the Fourth Circuit sought to define state action as it applies to a private hospital[2] that receives federal funds. Plaintiff sought an abortion at the medical center after a physician with staff privileges agreed to perform the operation. The hospital, however, refused her request on the basis of a West Virginia criminal statute[3] which proscribed elective abortions, allowing the procedure only to protect the health of the mother. Plaintiff sought an injunction under the Civil Rights Act of 1871,[4] alleging state action based upon the medical center's receipt of large public grants for hospital construction. These grants, known as Hill-

[58] *See* note 56 *supra.*

[59] *See* note 44 *supra.*

[60] *See* notes 43 & 44 *supra.*

[61] 42 U.S.C. § 3602 (1970).

[1] 529 F.2d 638 (4th Cir. 1975).

[2] Public hospitals may not ban the use of their facilities for all abortions. Nyberg v. City of Virginia, 495 F.2d 1342 (8th Cir.), *appeal dismissed*, 419 U.S. 891 (1974). While the Eighth Circuit suggested following the tripart test in Roe v. Wade, 410 U.S. 113, 163 (1973), the court did not fashion a specific order. 495 F.2d at 1345.

[3] W. VA. CODE ANN. 61-2-8 (1966) provides that commission of abortion, or assisting in such an act, is a felony. If the woman dies in the course of an abortion, the actor shall be guilty of murder. Actors who, in good faith, attempt to save the life of the mother or child by such a procedure are excluded.

[4] 529 F.2d at 640; 42 U.S.C. § 1983 (1970). Plaintiff brought a class action suit. The court noted that the fact that members of the class were not specifically identified supported, rather than undercut, class action status, *citing* Jack v. American Linen Supply Co., 498 F.2d 122, 124 (5th Cir. 1974) (class action involving employment discrimination against blacks permitted although plaintiff could not identify all members of the class because the class existed and needed protection), *and* Yaffe v. Powers, 454 F.2d 1362, 1367 (1st Cir. 1972) (class action to enjoin police from interfering with demonstrators not foreclosed because class action was a better avenue than individual suit to pursue this claim).

Burton funds,[5] are given to private hospitals by the federal government, in return for a comprehensive health services delivery plan which the hospital must submit to the United States Surgeon General.[6] Unless this plan meets minimum standards for an out-patient facility[7] the government may withhold funds for non-compliance.[8]

The West Virginia criminal abortion statute,[9] which makes aiding an abortion a felony, was declared unconstitutional by the *Charleston Area* court[10] in light of the Supreme Court's decisions in *Roe v. Wade*[11] and *Doe v. Bolton.*[12] In those cases, the Texas[13] and Georgia[14] statutes respectively were held unconstitutional because they interfered with a woman's right to choose to terminate a pregnancy during the first trimester.[15] The *Charleston Area* court also relied on *Roe* to hold that the irreparable injury prerequisite for the issuance of an injunction existed, and that mootness was not an issue,[16] even though plaintiff procured an abortion outside of West Virginia before judgment in the district court, but after institution of suit.[17]

In its review of the state action issue, the *Charleston Area* court held that the medical center acted under color of state law by its receipt of Hill-Burton funds.[18] Further, the defendant was affiliated with a state university, received Medicare and Medicaid funds,[19] and

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[5] 42 U.S.C. §§ 291-291o (1970). The legislative history is found in H.R. REP. 2519, 79th Cong., 2d Sess. 1558 (1946), *reprinted in* [1946] U.S. CODE CONG. SERV. 1558.

[6] 42 U.S.C. § 291d.(a)(1) (1970).

[7] 42 U.S.C. § 291d.(a)(6) (1970).

[8] 42 U.S.C. § 291g. (1970).

[9] *See* note 3 *supra.*

[10] 529 F.2d at 645.

[11] 410 U.S. 113 (1973).

[12] 410 U.S. 179 (1973). *See generally* Cane, *Whose Right to Life? Implications of Roe v. Wade,* 7 FAM. L.Q. 413 (1973); Vieira, *Roe and Doe: Substantive Due Process and the Right of Abortion,* 25 HASTINGS L.J. 867 (1974); Note, 87 HARV. L. REV. 75 (1973); Note, Roe v. Wade *and* Doe v. Bolton: *The Compelling State Interests Test in Substantive Due Process,* 30 WASH. & LEE L. REV. 628 (1973).

[13] TEX. PENAL CODE Arts. 1191-1195 (1948) (unconstitutional, Roe v. Wade, 410 U.S. 113 (1973)).

[14] GA. CODE § 26-1202A (1972) (current version at GA. CODE § 26-1201 (1975)).

[15] 410 U.S. at 154 (*Roe*), 195 (*Doe*).

[16] 529 F.2d at 644. The Supreme Court described such legal actions as "'capable of repetition yet evading review'" 410 U.S. at 125, *quoting* Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911).

[17] 529 F.2d at 644.

[18] *Id.*

[19] Medicare and Medicaid are federal programs providing reimbursement to medical facilities and personnel for services rendered to certain needy persons. 42 U.S.C. § 1395 *et seq.* (1970).

received state subsidies in support of its maternity clinic. The court declared that the district court ignored a clear line of Fourth Circuit decisions when it dismissed the suit.[20] Particularly applicable was an employment discrimination case, *Duffield v. Charleston Area Medical Center, Inc.*,[21] where the Fourth Circuit held that the same defendant was involved sufficiently with state action by receipt of Hill-Burton funds.[22] In addition to the financial nexus, the Fourth Circuit noted that the hospital's refusal was motivated primarily by attempted compliance with a state criminal statute.[23] Recognizing that the Supreme Court had found state involvement in a custom that has the force of law,[24] the court of appeals held that an actual statute necessarily meets the requirement of state action.[25]

The Fourth Circuit also recognized that its policy was contrary to that reached in other circuits dealing with Hill-Burton funds.[26] The

[20] 529 F.2d at 642. The court cited Duffield v. Charleston Area Medical Center, Inc., 503 F.2d 512 (4th Cir. 1974), *see* text accompanying notes 21-22 *infra*; Christhilf v. Annapolis Emergency Hosp. Assn., 496 F.2d 174, 178 (4th Cir. 1974) (Hill-Burton funds inextricably tied private hospital to state, which imposed due process obligations on hospital in its discharge of a physician); Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964), *see* text accompanying notes 30-35 *infra*.

[21] 503 F.2d 512 (4th Cir. 1974).

[22] *Id.* at 515.

[23] 529 F.2d at 643.

[24] Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970). In *Adickes*, plaintiff, a white, was refused service at a defendant's lunch counter when she appeared with a number of black persons. Defendant acknowledged that service to blacks as well as whites was required by the law, but insisted that, by local custom, a white person accompanying a black person would not be served. The Supreme Court held that plaintiff's action under 42 U.S.C. § 1983 (1970) stated a cause of action and that the recognized custom had the force of law.

[25] Most courts have not assumed that a statute meets the state action requirement under *Adickes*, requiring state involvement in addition to, or in lieu of, a custom. *See, e.g.*, Turner v. Impala Motors, 503 F.2d 607 (6th Cir. 1974); Lucas v. Wisconsin Elec. Power Co., 466 F.2d 638 (7th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973). Arguably, one court has made the same attempt as the Fourth Circuit in *Charleston Area* to assume that a statute satisfies the state action requirement. In Jennings v. Patterson, 460 F.2d 1021 (5th Cir. 1972), the Fifth Circuit held a motion to dismiss a private race discrimination action improper, as there was a possibility that state action could be found in the putatively private actions. In a later appeal, Jennings v. Patterson, 488 F.2d 436 (5th Cir. 1974), no mention of state action was made.

[26] 529 F.2d at 642. Ascherman v. Presbyterian Hosp., 507 F.2d 1103 (9th Cir. 1974); Jackson v. Norton-Children's Hosp., Inc., 487 F.2d 502 (6th Cir. 1973), *cert. denied*, 416 U.S. 1000 (1974); Doe v. Bellin Memorial Hosp., 479 F.2d 756 (7th Cir. 1973); Barrett v. United Hosp., 376 F. Supp. 791 (S.D.N.Y.), *disposition recorded* 506 F.2d 1395 (2d Cir. 1974).

Seventh Circuit, in *Doe v. Bellin Memorial Hospital,*[27] arrived at the opposite conclusion on facts similar to those of *Charleston Area.* In *Bellin Memorial,* a physician with staff privileges at the hospital agreed to perform an abortion but the hospital refused to allow the use of its facilities. The Seventh Circuit reversed the injunction granted below, holding that absent state influence over hospital policy, the hospital retained its right to refuse abortions despite financial aid.[28]

The Seventh Circuit found unpersuasive plaintiff's argument that receipt of Hill-Burton funds, and operation of the hospital under the attendant regulations, was sufficient state action to characterize the defendant's acts as "under color of law."[29] Plaintiff in *Bellin Memorial* particularly relied on a Fourth Circuit decision, *Simkins v. Moses H. Cone Memorial Hospital,*[30] which held that a hospital receiving Hill-Burton funds acted under color of law when it racially discriminated in hiring.[31] The *Bellin Memorial* court distinguished *Simkins* by noting that *Simkins* was decided on the ground of government involvement at the policy level in the activity challenged.[32] The court found no such involvement in *Bellin Memorial,* noting that the state neither encouraged nor discouraged elective abortions, and this fact precluded a finding of "joint participation."[33]

Bellin Memorial, however, while conflicting with the Fourth Circuit's *Charleston Area* decision in its ultimate conclusion, is not inapposite. In addition to the receipt of Hill-Burton funds, *Charleston*

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[27] 479 F.2d 756 (7th Cir. 1973). *See* Note, *Constitutional Law—State Action—Private Hospitals Receiving Hill-Burton Funds Do Not Act Under Color of State Authority in Denying Access to Their Facilities for Abortions,* 62 GEO. L.J. 1783 (1974); Note *Constitutional Law—State Actions—Denial of Abortion by Private Hospital Receiving Federal Financial Support Under the Hill-Burton Program Does Not Constitute State Action,* 2 FORDHAM L.J. 611 (1974); Note, *Constitutional Law—Abortion—Private Hospital May Refuse To Perform Abortion,* 18 ST. L.L.J. 440 (1974).

[28] 479 F.2d at 761.

[29] *Id.*

[30] 323 F.2d 959 (4th Cir. 1963).

[31] *Id.* at 966.

[32] In *Simkins,* the Fourth Circuit found involvement of the United States Surgeon General at the policy level. He approved the hiring practices of the hospital, by way of certifying that the facility's "separate but equal" status satisfied the Non-Discrimination Report required by 42 C.F.R. § 53.112 (1963). 323 F.2d at 965. In *Bellin Memorial,* the Seventh Circuit found no involvement, federal or state, in the policy decision regarding abortions. 479 F.2d at 761.

[33] *Cf.* Burton v. Wilmington Parking Auth., 365 U.S. 715, 724-25 (1961) "joint participation" found when restaurant was located in a state-operated parking garage).

Area involved reliance on a state criminal statute.[34] The hospital's relationship with the state also included state financial support and alliance with a state university. Thus the Fourth Circuit decision in *Charleston Area* rests upon a greater quantum of state involvement than does *Bellin Memorial*.[35]

The Fourth Circuit would not likely find state action in the absence of the Hill-Burton funds. Courts have held that both significant control of policy by the state[36] and cloaking a private agency with the appearance of state authority[37] was sufficient state action. One court has held that the state's support must be affirmative and significant, as measured by the effectiveness of the defendant's conduct.[38] In *Charleston Area,* the court did not assess the amount of control retained by West Virginia in its supervision of the maternity clinic and affiliation with the state university. If direct policy-making control were found, or if the public were led to equate the facility with the state, the state action requirements would apparently be met. The Fourth Circuit's decision leaves this question of alternative defenses unclear, as it rests on the cumulative effect of affiliation and funding.

The Charleston Area Medical Center raised the alternative defense of Congress's recent policy statement in the Health Programs Extension Act of 1973,[39] that a hospital regulation regarding elective abortions is not state action merely because of federal aid, if the regulation is based on religious beliefs or moral convictions. This "conscience clause" provides that receipt of funds empowers neither the courts nor public officials to require a facility to perform abortions.[40] One court has held that this policy precludes the decision that

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[34] The *Charleston Area* court did not discuss the significance of the hospital's alleged good faith reliance on the statute, holding only that the statute was unconstitutional because it was irreconcilable with *Roe.* The court ordered an injunction to require the hospital to ignore the statute. 529 F.2d at 645.

[35] *But cf.* Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963), where the only state involvement cited was the receipt of Hill-Burton funding and compliance with the required comprehensive plan. *Id.* at 967. The court characterized the hospital's operation as an integral part of a joint effort involving state and federal planning to insure promotion and maintenance of public health. *Id.* Because the *Charleston Area* court relied heavily on *Simkins* to conclude that the facility could not refuse abortions, the court possibly would have found state action on Hill-Burton funding alone.

[36] *See, e.g.,* Reitman v. Mulkey, 387 U.S. 369 (1967); Pennsylvania v. Board of Trusts, 353 U.S. 230 (1957).

[37] Lucas v. Wisconsin Elec. Power Co., 466 F.2d 638 (7th Cir. 1972), *cert. denied,* 409 U.S. 1114 (1973).

[38] *Id.*

[39] 42 U.S.C. § 300a-7(a)(2) (Supp. III, 1973).

[40] *Id.*

the use of Hill-Burton funds creates state action.[41] The Sixth Circuit, however, invalidated a Kentucky conscience clause[42] allowing public facilities to be held harmless for refusal to terminate a pregnancy on demand. In *Wolfe v. Schoering,*[43] the Sixth Circuit declared that the Kentucky statute unconstitutionally allowed a hospital to circumvent *Roe* by permitting a hospital to refuse to terminate a first trimester pregnancy.[44] The *Wolfe* court did, however, suggest that a more narrowly drafted conscience clause would be constitutional if limited to second and third trimester pregnancies.[45]

In *Charleston Area,* the hospital argued that the enactment of the congressional conscience clause required dismissal of the suit. The Fourth Circuit, however, found that the hospital's motivation and its justification for refusal rested on the criminal statute alone, and not on a religious belief or moral conviction.[46] Thus, the conscience clause defense as preclusive of a finding of state action is apparently still a viable defense for hospitals in the Fourth Circuit. Because the court found only that the conscience clause statute was inapplicable to the *Charleston Area* facts,[47] there was no intimation of what action the court would take when a facility relied solely on such a clause. Consequently, a private hospital placing primary reliance on a conscience clause to excuse restriction on abortions may succeed in avoiding judicial intrusion by removing the state action association.

Employer Has Right to Enforce Hair Length Standards

While hair style regulation has been upheld in four circuits,[48] four

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[41] Watkins v. Mercy Medical Center, 364 F. Supp. 799, 801 (D. Idaho 1973).

[42] KY. REV. STAT. ANN. § 311.800 (1974).

[43] Civ. No. 75-1318 (6th Cir. Sept. 18, 1976).

[44] *Id.* at 4, *citing* Roe v. Wade, 410 U.S. 113, 163-65 (1973).

[45] Civ. No. 75-1318, slip op. at 9. The court refused to address the issue of when a public hospital may refuse to perform abortions for non-ethical reasons, suggesting that lack of personnel or facilities might foreclose a hospital from performing abortions. The court did not require a hospital to perform the procedures, but held only that the state may not ban abortions for ethical reasons. *Id.* at 7 n.6.

[46] The court concluded that the medical center did not base its refusal on moral grounds because no trial testimony was adduced to that effect. 529 F.2d at 642 n.7, 643 n.11.

[47] *Id.* at 642 n.7.

[48] Knott v. Missouri Pac. R.R., 527 F.2d 1249 (8th Cir. 1975) (unless pretextual, hair regulations for males when none exist for females not sex discrimination); Brown v. D.C. Transit System, Inc., 523 F.2d 725 (D.C. Cir.), *cert. denied,* 423 U.S. 862 (1975) (no denial of due process to discharge an employee for failing to follow hair restrictions); Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084 (5th Cir. 1975) (firing employee for failure to conform to hair regulations when local population upset by long

circuits have recorded opposing judgments.[49] The Supreme Court's recent decision in *Kelley v. Johnson,*[50] holding that a police department may regulate hair styles, has not ended this circuit conflict, as the Court founded its decision on the ground that a state may require its police officers to be readily identifiable and uniform in appearance.[51] The Fourth Circuit, in *Earwood v. Continental Southeastern Lines, Inc.,*[52] upheld the right of an employer to enforce hair grooming standards, relying in part on *Johnson.*

Continental's bus drivers, who were all male,[53] were required to wear their hair so that it would not touch the shirt or fall over the ears.[54] Plaintiff Earwood's hair style was described as "combed over his ears . . . thick upon his neck."[55] Plaintiff's employment was suspended until he complied with the regulations, so Earwood filed suit under Title VII of the Civil Rights Act of 1964,[56] alleging that the regulations were the result of sexual stereotyping.[57] The district court granted injunctive and restitutionary relief,[58] but the Fourth Circuit reversed.

The Fourth Circuit proposed a two-step analysis to determine the existence of sex discrimination.[59] The first step was to identify non-

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hair on males not sex discrimination); Baker v. California Land Title Co., 507 F.2d 895 (9th Cir. 1974), *cert. denied,* 422 U.S. 1046 (1975) (EEOC regulations addressed sex per se, and not grooming standards, as qualifications for employment).

[49] Stull v. School Bd., 459 F.2d 339 (3d Cir. 1972); Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971); Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1971); Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. denied,* 398 U.S. 937 (1970).

[50] 425 U.S. 238 (1976).

[51] *Id.* at 248.

[52] 539 F.2d 1349 (4th Cir. 1976).

[53] At the time of the suit only men were employed as bus drivers. Women were not barred from employment with Continental, and no claim of sex discrimination against women was advanced. *Id.* at 1350 n.1.

[54] *Id.* at 1350 n.2.

[55] *Id.* at 1350.

[56] 42 U.S.C. § 2000e-2 (1972) provides:

> (a) It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or to otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

[57] The term "sexual stereotyping" appears in the district court's holding that Continental discriminated illegally against Earwood. 539 F.2d at 1350. The term was also used in Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir.), *cert. denied,* 404 U.S. 999 (1971). *See* note 62 *infra.*

[58] 539 F.2d at 1350. Plaintiff left Continental's employ instead of complying with the regulations. Thus back pay was the only issue in the suit. *Id.* at 1350 n.3.

[59] *Id.* at 1350. The *Earwood* court relied on Dodge v. Giant Food, Inc., 488 F.2d

compliance with the statute. In the event of non-compliance, the second step would be to inquire into the existence of a justifying "bona fide occupational qualification."[60] The *Earwood* court concluded that the hair length standards were not used as a pretext for sex-based exclusion from employment.[61] In addition, the court held that hair length is not an immutable characteristic[62] that demands protection of the law, because it is changeable at will. The employer's compliance with the statute made analysis of the second step unnecessary.

Following the "sound reasoning" of four courts of appeals,[63] and citing *Kelley v. Johnson*,[64] which sustained police department hair regulations, the majority based its reasoning on an inspection of whether employment opportunity was impaired. Although Earwood could not continue employment with Continental because of his hair style, the court concluded that no irrationality was involved[65] and sustained the company regulations.[66]

Judge Winter argued in dissent that the case was not ripe for final adjudication. He noted the absence of a claim of sex discrimination in hiring and stated that whether defendant would treat male and female drivers differently regarding hair length was unclear.[67] The dissent further stated that the possibility of alternate methods of compliance was uncertain. Suggesting that women might meet the grooming standards by wearing their hair "upswept," Judge Winter questioned whether Earwood might satisfy the rule by securing his hair underneath his cap. Concluding that grooming standards are

1333 (D.C. Cir. 1973), which involved a claim by male employees that the employer's hair regulations discriminated against them, for the two-step analysis.

[60] 539 F.2d at 1350, *citing* 42 U.S.C. § 2000e-2(e) (1970).

[61] 539 F.2d at 1351.

[62] *Id.* Immutable characteristics are those that belong to a person and cannot be overcome. Accordingly, they may not be used by an employer as an occupational qualification, unless it is a bona fide occupational qualification. An example of immutable characteristics given protection is found in Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (employer could not refuse to hire women with pre-school age children when accepting men with such children); *see also* Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 999 (1971) (airline's no-marriage rule for stewardesses invalid).

[63] *See* note 48 *supra*.

[64] 425 U.S. 238 (1976). *See* Note, 62 A.B.A.J. 782 (1976).

[65] The *Earwood* court drew the irrationality standard from Kelley v. Johnson, 425 U.S. 238, 247 (1976). The *Johnson* Court suggested that police officers are subject to hair regulations unless the rule is arbitrary and thus a denial of the employee's liberty to choose personal habits. *Id.* at 248.

[66] 539 F.2d at 1351.

[67] *Id.* at 1353 (Winter, J., dissenting).

clearly "terms and conditions"[68] of employment, the dissent read the language of the statute, which is notably without legislative history,[69] as plainly rejecting the sex-differentiated application of employment qualifications.

Judge Winter's conclusion agrees with the ruling of the Equal Employment Opportunity Commission (EEOC) that sex-based enforcement of hair length is contrary to the Civil Rights Act.[70] The EEOC has also ruled that an employer may not defend regulations by suggesting that customer preference demands stereotypical grooming.[71] Normally, especially where legislative history is scant or non-existent,[72] the regulatory agency's decisions are to be granted deference,[73] but in *Earwood* the majority failed to mention the EEOC guidelines. If the court had deferred to the EEOC, the opposite conclusion would have been reached in *Earwood.* The majority's failure to do so casts doubt on the decision, as it rests on an incomplete inspection of precedent.

The divergence of opinion among the circuits is less obvious than that between the Fourth Circuit and the EEOC, as the appellate decisions holding hair regulation violative of the statute all involve high school students and not employees.[74] The overall conflict of opinion, however, suggests that review and resolution by the Supreme Court may be necessary. If the intent of the statute is to deprive employers of the ability to prescribe sex-differentiated job qualifications, then clearly the deprivation of employment in *Earwood* is discriminatory. If the intent of the statute is to prevent only pretextual job discrimination, the Fourth Circuit's decision appears proper. Supreme Court determination of this intent, or an appropriate congressional declaration, would serve to clarify the purpose of the legislation.

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[68] *Id.* at 1352 (Winter, J., dissenting), *citing* 42 U.S.C. § 2000e-2 (1972). *See* note 56 *supra.*

[69] The inclusion of the sex discrimination sections in the Civil Rights Act of 1964 was an attempt by opponents of the bill to defeat the Act. 110 CONG. REC. 2577 (1964). *See also* Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084, 1090 (5th Cir. 1975).

[70] The EEOC, in decision No. 71-1529 (CCH EEOC DEC. ¶ 6231 (1971)), held that differing regulation of hair length on a male/female basis was contrary to the Act.

[71] In decision No. 71-2343 (CCH EEOC DEC. ¶ 6256 (1971)), the EEOC declared that customer preference is irrelevant as a concern of employers in formulating grooming standards. The Commission reaffirmed that preferential hair regulations are a per se violation in decision No. 72-1380 (CCH EEOC DEC. ¶ 6364 (1972)).

[72] *See* note 69 and accompanying text *supra.*

[73] Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971); *see also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975).

[74] *See* note 49 *supra.*

Presence of Onlooker Dissolves Right of Sexual Privacy

The Fourth Circuit, in *Lovisi v. Slayton,*[75] recently decided that a married couple waived their right to privacy[76] when an onlooker was invited to witness the couple's sexual conduct. Aldo and Margaret Lovisi placed advertisements in "Swinger's Life" magazine, seeking to contact third parties interested in sharing sexual experiences. Earl Romeo Dunn answered one of the solicitations, and met with the Lovisis. At one encounter, Margaret Lovisi performed fellatio on her husband and on Dunn,[77] and these acts were photographed. One of the Lovisis' minor daughters, present in the bedroom during the acts, displayed one of the photographs at her school. The Lovisis were subsequently convicted of sodomy.[78]

In denying the plaintiffs' habeas corpus petitions, the Fourth Circuit held that the presence of an onlooker dissolved the reasonable expectation of privacy they would have had if alone.[79] The court declared that the admission of Dunn precluded the Lovisis from selectively excluding the state as an unwelcome intruder. Based on this waiver, the court denied relief and upheld the convictions.[80]

The majority described situations in which sexual intimacy would be protected outside the confines of the marital bedroom, such as detailed recounting of the intimacies in conversation or books. The dissent by Judge Winter attacked this as inconsistent with the holding.[81] Suggesting that the majority would agree that the Lovisis have a constitutionally protected right to practice fellatio in private,[82] the

[75] 539 F.2d 349 (4th Cir.), *cert. denied,* 45 U.S.L.W. 3395 (U.S. Nov. 30, 1976) (No. 76-184).

[76] The case was limited to the area of sexual privacy. *See generally* Note, *Extending the Right to Sexual Privacy,* 2 WEST. ST. L. REV. 281 (1975); Note, *Oral Copulation: A Constitutional Curtain Must Be Drawn,* 11 SAN DIEGO L. REV. 523 (1974); Note, *Sodomy and the Married Man,* 3 U. RICH. L. REV. 344 (1969).

[77] The sexual conduct between Margaret Lovisi and Dunn was not in issue. The court considered only the acts of Margaret Lovisi on her husband. 539 F.2d at 350.

[78] VA. CODE ANN. § 18.2-361 (1975) provides in pertinent part:

> [I]f any person shall carnally know in any manner any brute animal, or carnally know any male or female person by the anus or by or with the mouth, or voluntarily submit to such carnal knowledge, he or she shall be guilty of a class 6 felony.

At the trial, Dunn testified for the prosecution. His participation in the acts resulted in his deportation to his native Jamaica. 539 F.2d at 350 n.2.

[79] *Id.* at 351.

[80] *Id.* at 352.

[81] *Id.* at 354-55 (Winter, J., dissenting).

[82] *Id.* The right to sexual privacy between consenting married adults was established in Eisenstadt v. Baird, 405 U.S. 438 (1972) (dissemination of contraceptives and

dissent could not discern why waiver occured by admitting an observer but not by explicit recounting of the acts. The dissent further suggested that application of the majority's reasoning would make a couple criminally liable when seeking medical aid regarding sexual problems[83] or when sharing the bedroom with family members. The dissent cited the constitutional right of a woman, married or not, to seek an abortion[84] and contraceptives[85] as declaring privacy to be independent of both notions of secrecy,[86] and the presence of third parties. The dissent also found a strong argument for privacy between consenting adults regarding sexual activity based upon Supreme Court precedent.[87] The dissent deferred assessment of the Supreme Court's recent affirmance of a homosexual's conviction under the Virginia sodomy statute,[88] stating that the Court obscured the basis for the action by not articulating its reasoning.

In a separate dissent, Judge Craven attempted to define these rights as "personhood" or the "right to be left alone."[89] Stressing that the acts punished were between married persons, he found that only moral repugnance could sustain the convictions, but opined that the court cannot dictate the morals of "a husband and wife so despicably disposed."[90]

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information regarding use protected); Stanley v. Georgia, 394 U.S. 557 (1969) (private possession of erotica protected); Loving v. Virginia, 388 U.S. 1 (1967) (interracial marriage protected); Griswold v. Connecticut, 381 U.S. 479 (1965) (dissemination of contraceptives protected).

[83] 539 F.2d at 355 (Winter, J., dissenting). Apparently the dissent overlooked the right of a patient to invoke the doctor-patient privilege to preserve the confidentiality of information transmitted when seeking medical advice. *See generally* FED. R. EV. 501; C. MCCORMICK, EVIDENCE §§ 98-105 (2d ed. 1972).

[84] Roe v. Wade, 410 U.S. 113, 172 (1973) (Rehnquist, J., dissenting). *See* discussion of Doe v. Charleston Area Medical Center, Inc., 529 F.2d 638 (4th Cir. 1975), in Private Hospital's Liability for Refusal to Give Abortion *supra*.

[85] Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

[86] *See* Roe v. Wade, 410 U.S. 113, 172 (1973) (Rehnquist, J., dissenting).

[87] *See* note 82 *supra*.

[88] Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd* 425 U.S. 901 (1976). Defendant's sodomy conviction was sustained because of the state's right to foreclose deviant sexual behavior. 403 F. Supp. at 1202.

[89] 539 F.2d at 356 (Craven, J., dissenting).

[90] *Id.* In Arizona v. Bateman, 547 P.2d 6 (Ariz. 1976), the Arizona Supreme Court decided that there is no right to sexual privacy except between married persons. Holding that it could not sit as a "super-legislature," the court upheld the state's sodomy law. The Supreme Court affirmed Justice Rehnquist's decision to deny a motion for stay of prison sentence while awaiting certiorari, declaring that grant of certiorari is unlikely. 97 S. Ct. 1 (1976).