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XI. Employment Discrimination

The *Goucher* decision highlights the need for placing a financial exigency provision in the faculty tenure agreements of a college or university.[61] If an institution wishes to modify existing tenure contracts to include a financial exigency provision, *Goucher* suggests that such a provision may be placed in the school's by-laws as a codification of a pre-existing, yet unwritten, contract term.[62] The abrogation of tenure rights, however, should be permitted only as a last resort in order to maintain a viable educational program.[63] The unfavorable economic prospects for higher education are generating increasing tension between the faculties and administrations of American colleges and universities.[64] The Fourth Circuit's decision in *Goucher* may have the effect of accelerating the current trend towards collective bargaining in higher education.[65]

JAMES S. MCNIDER, III

XI. EMPLOYMENT DISCRIMINATION

A. *Substantive, Procedural and Remedial Issues in Title VII Litigation*

Persons aggrieved by racial discrimination in private employment may sue for relief under Title VII of the Civil Rights Act of 1964.[1] In

note 17 *supra*, was properly upheld by the Fourth Circuit because funding appellant's economics education would only exacerbate the college's financial troubles.

[61] *See* note 6 *supra*.

[62] *See* 585 F.2d at 679-80.

[63] *See* Levitt v. Board of Trustees, 376 F. Supp. 945, 950 (D. Neb. 1974).

[64] *See* Tucker, *supra* note 6, at 113.

[65] *See* text accompanying note 42 *supra*.

[1] 42 U.S.C. § 2000e (1976) [hereinafter cited as Title VII]. Title VII prohibits discrimination based upon race, color, religion, sex or national origin by public employers, 42 U.S.C. § 2000e(h) (1976), labor organizations, 42 U.S.C. § 2000e(d) (1976), or private businesses having fifteen or more employees, 42 U.S.C. § 2000e(b) (1976). A claimant proceeding under Title VII first must file an administrative charge of discrimination with the Equal Employment Opportunity Commission (EEOC) within 180 days of the alleged discriminatory act. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973); 42 U.S.C. § 2000e-5(e) (1976). A claimant may sue under Title VII only if he receives a notice of his right to sue from the EEOC. Local 179, United Textile Wkrs. v. Federal Paper Stock Co., 461 F.2d 849, 851 (8th Cir. 1972). The EEOC issues a notice of the right to sue if the administrative charge is dismissed, if conciliation discussions with the defendant are terminated, or if the EEOC has not filed a civil suit within 180 days of the filing of the charge. 42 U.S.C. § 2000e-5(f)(1). Once the plaintiff receives his right to sue notice, he has ninety days within which to file suit in federal district court. *Id. See generally* Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824 (1972).

Victims of racial discrimination in public and private employment may also seek redress under 42 U.S.C. § 1981 (1976). *See* Long v. Ford Motor Co., 352 F. Supp. 135, 140 (E.D. Mich. 1972), *modified on other grounds*, 496 F.2d 500 (6th Cir. 1974). Section 1981 grants to "[a]ll persons" within the United States the same rights to "make and enforce contracts" as are enjoyed by white citizens. 42 U.S.C. § 1981 (1976). Title VII and § 1981 are distinct and independent causes of action, *see* Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 461 (1975), and § 1981 plaintiffs enjoy several advantages not allowed Title VII claimants. A plaintiff prodeeding under § 1981 alone or under both Title VII and § 1981 need not first submit to the delay ridden administrative procedures of the EEOC. *Id.* Back pay awards

determining a plaintiff's rights under Title VII, trial courts must resolve complex substantive, procedural and remedial questions.[2] Courts first must ascertain the standards necessary to prove the plaintiff's theory of racial discrimination.[3] Class actions pose the additional issues of whether the named plaintiff is the proper class representative[4] and whether a bifurcated trial is proper.[5] In fashioning the remedial decree, courts must address the imposition of rigid racial quotas,[6] the extent of any classwide back pay award,[7] and the validity of provisions which displace or demote non-minority employees.[8] In *Sledge v. J.P. Stevens & Co.*,[9] the Fourth Circuit addressed these important issues in employment discrimination litigation.

In *Sledge*, the named plaintiffs sued individually and on behalf of all past and present black employees and unsuccessful job applicants at J.P. Stevens' Roanoke Rapids textile plants.[10] The plaintiffs alleged that Stevens unlawfully discriminated in hiring, job assignments, promotions, layoff recalls and compensation.[11] At the conclusion of the non-jury trial, the district court, finding that the named plaintiffs failed to prove that they were victims of discrimination, dismissed their individual claims.[12] The court, however, allowed the named plaintiffs to remain as representatives of the class.[13] The court then found that Stevens' reliance on the subjective

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under § 1981 are not limited to two years prior to the filing of the EEOC charge as they are in Title VII cases. *Id.* at 460; *see* note 117 *infra*. Furthermore, a plaintiff can obtain compensatory and punitive damages under § 1981, Johnson v. Railway Express Agency, Inc., 421 U.S. at 460, but the weight of authority holds both to be unavailable under Title VII. *See, e.g.*, EEOC v. Detroit Edison Co., 515 F.2d 301, 309 (6th Cir. 1975), *vacated on other grounds* 431 U.S. 951 (1977); Howard v. Lockheed-Ga. Co., 372 F. Supp. 854, 856 (N.D. Ga. 1974). Finally, since § 1981 applies to all contractual relationships, it is potentially much broader than the 1964 Civil Rights Act which is limited to employment relationships. *See* Heiser, *Intent v. Impact: The Standard of Proof Necessary to Establish a Prima Facie Case of Race Discrimination Under 42 U.S.C. § 1981*, 16 SAN DIEGO L. REV. 207, 213 (1979) [hereinafter cited as Heiser]. *See generally* Note, *Title VII and 42 U.S.C. § 1981: Two Independent Solutions*, 10 U. RICH. L. REV. 339 (1976).

[2] *See generally* Jones, *Development of the Law Under Title VII Since 1965: Implications of the New Law*, 30 RUTGERS L. REV. 1 (1976).

[3] *See* text accompanying notes 23-28 *infra*.

[4] *See* text accompanying notes 57-65 *infra*.

[5] *See* text accompanying notes 66-81 *infra*.

[6] *See* text accompanying notes 96-114 *infra*.

[7] *See* text accompanying notes 115-21 *infra*.

[8] *See* text accompanying notes 122-29 *infra*.

[9] 585 F.2d 625 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979).

[10] *Id.* at 630. The *Sledge* plaintiffs brought suit under Title VII and § 1981. *Id.* at 631. The trial court certified a class which included all blacks who were employed at any of J.P. Stevens' Roanoke Rapids, N.C. plants on or after October 2, 1967 and all blacks who applied for employment at those plants subsequent to October 2, 1967 and who claimed to have been affected by the challenged discriminatory employment practice. *See* Sledge v. J.P. Stevens & Co., 10 Empl. Prac. Dec. ¶ 10,585, at 6438 (E.D.N.C. 1975).

[11] 585 F.2d at 631. The plaintiffs contended that while Stevens' employment practices were not intentionally discriminatory, they disproportionately affected minorities. *Id.* at 635; *see* note 24 *infra*.

[12] 585 F.2d at 631; 10 Empl. Prac. Dec. ¶ 10,585, at 6417-21.

[13] 585 F.2d at 632; 10 Empl. Prac. Dec. ¶ 10,585, at 6438. The *Sledge* district court

opinions of white supervisors, its non-objective hiring guidelines, and its failure to post vacancies affected disproportionately the hiring, promotional and job assignment opportunities of blacks.[14] The court enjoined all racially discriminatory employment acts, omissions and practices;[15] ordered back pay to members of the class;[16] and awarded reasonable attorney's fees.[17] The remedial decree prescribed strict racial quotas for future hiring, job placement, and promotions[18] and provided that departmental seniority for blacks be replaced by a constructive seniority system.[19] On

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characterized the Fourth Circuit practice of allowing dismissed plaintiffs to continue as class representatives as "[a]n apparent anomaly in practice and procedure in employment discrimination class actions. . . ." *Id.*

[14] 585 F.2d at 632; 10 Empl. Prac. Dec. ¶ 10,585, at 6421-36. Based upon comparisons of hiring figures of blacks and whites from May, 1969 to June 30, 1972 which showed a steadily decreasing hiring rate for blacks, the court found that the defendant had discriminated in hiring new employees. *Id.* at 6423. The district court further found that Stevens' policies had the effect of reserving certain job categories for whites and other categories for blacks. The court placed particular emphasis on the minimal number of blacks in clerical jobs, supervisory positions and skilled occupations which paid the highest wages. *Id.* at 6424-25. Racial disparities in pay rates among all male employees and male employees with comparable employment qualifications also helped to confirm discriminatory employment practices. *Id.* at 6426-32. The court further based its findings of discrimination on Stevens' department seniority system for layoffs and recalls which effectively continued discriminatory hiring practices and department assignments. *Id.* at 6435-36. Finally, the court found that the waiting period from application for employment to actual hiring was almost twice as long for black females as white females. *Id.* at 6436.

[15] 585 F.2d at 632; 12 Empl. Prac. Dec. ¶ 11,047, at 4877 (E.D.N.C. 1976) (remedial decree provisions issued in separate opinion).

[16] 585 F.2d at 633; 10 Empl. Prac. Dec. ¶ 10,585, at 6439. The district court limited the back pay award in *Sledge* to a period beginning three years prior to the institution of the class action suit. The district court concluded that the North Carolina Statute of Limitations, N.C. GEN. STAT. § 1-52 (1977), governed back pay awards in both Title VII and § 1981 litigation. *Id.; see* text accompanying notes 115-22 *infra.*

[17] 585 F.2d at 633; 10 Empl. Prac. Dec. ¶ 10,585, at 6439. In Title VII litigation, attorney's fees are awarded to the prevailing party at the trial court's discretion. 42 U.S.C. § 2000e-5(k) (1976). Prevailing parties may also recover attorney's fees in § 1981 litigation. 42 U.S.C. § 1988 (1976). *See generally Employment Discrimination, Fourth Circuit Review,* 36 WASH. & LEE L. REV. 443, 454-58 (1979). When the plaintiff prevails in employment discrimination litigation, attorney's fees must be awarded unless special circumstances are present. *See* Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 416-17 (1978). However, district courts may only award legal expenses to prevailing defendants if the plaintiff's suit was "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Id.* at 421. *See generally* Heinsz, *Attorneys Fees for Prevailing Title VII Defendants: Toward a Workable Standard,* 8 U. TOL. L. REV. 259 (1977). Because the discretion of the trial court governs both the awarding and amount of attorney's fees, such an award should not be reversed on appeal unless the trial judge clearly abused his discretion. *See* Weeks v. Southern Bell Tel. & Tel. Co., 467 F.2d 95, 97 (5th Cir. 1972), *rehearing denied,* 471 F.2d 650 (5th Cir. 1973); Lea v. Cone Mills Corp., 438 F.2d 86, 88 (4th Cir. 1971).

[18] 12 Empl. Prac. Dec. ¶ 11,047, at 4878-83; *see* note 94 *infra.*

[19] 12 Empl. Prac. Dec. ¶ 11,047, at 4879-81. The district court directed Stevens to institute a system which computes the black employee's constructive seniority by adjusting his application date by the average waiting period of white applicants during the year the black employee sought employment. *Id.* at 4880. The district court also prescribed job bidding and red circling provisions. Job bidding is a system whereby the employer posts job vacancies and the employee submits his name for consideration. The vacancy is filled by the best qualified

appeal to the Fourth Circuit, Stevens contended that the trial court improperly allowed the class action to proceed after dismissal of the named plaintiffs' individual claims,[20] erroneously found that Stevens had engaged in discriminatory employment practices,[21] and abused its discretion in the provisions of the remedial decree.[22]

In assessing Stevens' Title VII liability, the Fourth Circuit applied the disparate impact test promulgated by the Supreme Court in *Griggs v. Duke Power Co.*[23] Under the disparate impact test, proof of discriminatory employment practices does not require a showing of discriminatory intent, but merely a showing that an employer's facially neutral policies disproportionately affected minorities.[24] A three step analysis governs the proof

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bidder or, in the event of equal qualifications, by the employee with the most plant seniority. *Id.* at 4881. Red circling permits blacks to change jobs or departments without suffering a decrease in pay. Once the black employee transfers, he continues to earn his old wage rate and receives general increases applicable to that rate until such time as more pay may be earned in the new job classification. *Id.* at 4882.

In fashioning its remedial decree, the district court imposed "bumping" provisions. Under these provisions, any black employee who is about to be laid off, is entitled to "bump" any other employee with less plant seniority if the job of the junior employee can be performed with reasonable training. *Id.* at 4883; *see* text accompanying notes 122-29 *infra.*

[20] 585 F.2d at 633; *see* text accompanying notes 64-65 *infra.*

[21] 585 F.2d at 633; *see* text accompanying notes 29-34 *infra.*

[22] 585 F.2d at 633; *see* text accompanying notes 93-114 *infra.* The plaintiffs in *Sledge* cross-appealed, challenging the dismissal of their individual claims and the claim filing requirements necessary to collect back pay. 585 F.2d at 633. Plaintiffs also contested the limitation of Stevens' liability for back pay to a period beginning three years prior to the filing of the class action. *Id.*

[23] 401 U.S. 424 (1971). In *Griggs,* the employer required candidates seeking to transfer to skilled line jobs to either pass two standardized intelligence tests or have a high school education. *Id.* at 427-28. The Court found that these requirements, while not purposefully discriminatory, had the effect of rendering ineligible a disproportionate number of black transfer applicants. The Court held that the disparate impact of this employment practice established à prima facie violation of Title VII and that the requirements were not "job related." *Id.* at 431-36. Since *Griggs,* the Supreme Court has applied the disparate impact, or "effects," test in several cases, *see, e.g.,* International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), and has affirmed the use of the test in Title VII actions most recently in New York Transit Auth. v. Beazer, 440 U.S. 568, 584 (1979).

Prior to *Griggs,* recovery for discrimination was difficult because of the formidable task of proving discriminatory intent. *See* Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co., *and the Concept of Employment Discrimination,* 71 MICH. L. REV. 59, 70 (1973). However, since the institution of the disparate impact test as the prevailing liability standard, courts have found violations of Title VII in numerous cases that previously would not have been provable. *See, e.g.,* Dothard v. Rawlinson, 433 U.S. 321 (1977) (disparate impact of minimum height and weight requirements); Johnson v. Pike Corp., 332 F. Supp. 490 (C.D. Cal. 1971) (disparate impact of disqualifying employment applicants with more than one wage garnishment).

[24] *See* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). Disparate impact cases are distinguishable from disparate treatment cases. In the former, the employment practices are facially neutral in their treatment of minority groups but in fact affect more adversely the interests of these minorities. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). Disparate treatment, by contrast, involves practices which on their face treat some individuals less favorably than others because of their religion, sex, national origin or color. Proof of discriminatory intent is essential. *Id.*

Prior to the Supreme Court's decisions in Washington v. Davis, 426 U.S. 229 (1976), and

of disparate impact claims.[25] The plaintiff establishes a prima facie case by showing that an employment practice has the effect of denying equal employment opportunities to members of a protected class.[26] The defendant may rebut this prima facie case by proof that its employment practices are job related.[27] If the employer's rebuttal succeeds, the plaintiff still may establish liability by suggesting alternative selection techniques which would advance the defendant's legitimate business interests without disproportionately affecting minorities.[28]

In *Sledge,* the Fourth Circuit affirmed the district court's holding that plaintiffs may use statistical evidence to establish a prima facie case of employment discrimination.[29] The panel further ruled that when a statisti-

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Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977), most courts considering the issue held that § 1981, like Title VII, did not require proof of discriminatory intent. *See* Heiser, *supra* note 1, at 221. Subsequent to those decisions, however, many courts reevaluated their position and held that the plaintiff must prove discriminatory motive to establish a § 1981 prima facie case. *See* Williams v. DeKalb County, 582 F.2d 2, 2-3 (5th Cir. 1978); City of Milwaukee v. Saxbe, 546 F.2d 693, 705 (7th Cir. 1976). For a good discussion of the merits of this issue see Heiser, *supra* note 1, at 221-48; Note, *Burden of Proof in Racial Discrimination Actions Brought Under the Civil Rights Act of 1866 and 1870: Disproportionate Impact or Discriminatory Purpose?,* 1978 B.Y.U.L. REV. 1030, 1043-58.

[25] *See* Dothard v. Rawlinson, 433 U.S. 321, 329 (1977).

[26] *Id.;* International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 (1977); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). Plaintiffs proceeding under the disparate impact test must show a pattern or practice of discrimination in order to establish a prima facie Title VII violation. *See* International Bhd. of Teamsters v. United States, 431 U.S. at 335. A single instance of discrimination, even though directly traceable to a particular employment practice, does not establish a pattern or practice of discrimination and thus may not be adjudicated under the effects test. *See* Miller v. Bank of America, 418 F. Supp. 233, 234-35 (N.D. Cal. 1976). *See generally* Hsia, *The Effects Test: New Directions,* 17 SANTA CLARA L. REV. 777, 780-82 (1977).

[27] *See* Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Albermarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). In the Fourth Circuit, employment practices are job related if an overriding business purpose exists which is essential to the safe and efficient operation of the business. *See* Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971), *cert. dismissed,* 404 U.S. 1006 (1971). In order to rebut a Title VII prima facie case, a particular policy must carry out effectively the business purpose it purportedly serves, be sufficiently compelling to override any racial impact and be the least discriminatory alternative for accomplishing the business purpose advanced. *Id. See generally* Note, *Employment Testing and Proof of Job Relatedness: A Tale of Unreasonable Constraints,* 52 NOTRE DAME LAW. 95 (1976); Note, *Business Necessity Under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach,* 84 YALE L.J. 98 (1974).

[28] *See* Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Albermarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

[29] 585 F.2d at 635. Statistics alone may be used to establish a prima facie case of employment discrimination. *See* New York Transit Auth. v. Beazer, 440 U.S. 568, 584 (1979). While statistical proof of disparities between blacks and whites are compelling, plaintiffs must direct their charges of discrimination to specific employment practices. *See* Harper v. Mayor and City Council of Baltimore, 359 F. Supp. 1187, 1193 (D. Md. 1973), *aff'd sub nom.* Harper v. Kloster, 486 F.2d 1134 (4th Cir. 1973). Mere evidence of a racially imbalanced workforce is insufficient to establish liability under Title VII. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 339 n.20 (1977); Lewis v. Tobacco Wkrs. Int'l Union, 577 F.2d 1135, 1141 (4th Cir. 1978), *cert. denied sub nom.* Lewis v. Philip Morris, Inc., 439 U.S. 1089 (1979).

cal demonstration of disparate impact accompanies evidence that the defendant bases his employment decisions on the subjective opinions of white supervisors, a court need not assess the independent sufficiency of the statistics but may infer that the defendant sanctioned racially discriminatory employment practices.[30] Since Stevens based all its hiring and promotional decisions on subjective opinions, the panel concluded that the plaintiffs had established a prima facie case of illegal discrimination.[31] The defendant offered no evidence that these employment practices were job related, but asserted the consistent increase in the percentage of blacks in its work-force during the period in controversy as its only defense.[32] The panel characterized this defense as irrelevant to the issue of liability in a disparate impact suit[33] and held that Stevens' promotional, hiring and job assignment practices violated Title VII.[34]

The Fourth Circuit's approach to subjective employment criteria is consistent with the majority of circuits that have considered the issue.[35] Although prior to *Sledge* no court had stated expressly that statistical disparities combined with subjectivity in hiring or promotions automatically establish a prima facie case of Title VII liability, the majority of circuits, including the Fourth Circuit, had held that subjective employment criteria constituted strong additional evidence of discrimination.[36] Since every case dealing with subjective employment practices has ultimately found the overall evidence sufficient to establish the defendants' liability,[37] the *Sledge* court's express creation of a presumption of discrimination is the de jure expression of a de facto rule. Title VII plaintiffs should be able to establish liability more easily because under this presumption even statistically insignificant disparities may be used in proving disparate impact.[38]

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[30] 585 F.2d at 635. Subjective employment criteria are used to infer discrimination in Title VII cases because of their capacity for masking racial bias. *See* Parson v. Kaiser Alumn. & Chem. Corp., 575 F.2d 1374, 1384-85 (5th Cir. 1978), *cert. denied*, 99 S. Ct. 2417 (1979); Brown v. Gaston County Dyeing and Mach. Co., 457 F.2d 1377, 1382-83 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972). *See generally* Stacy, *Subjective Criteria in Employment Decisions Under Title VII*, 10 GA. L. REV. 737 (1976).

[31] 585 F.2d at 635.

[32] *Id.* at 636. Stevens offered no business necessity justification in the district court proceeding, 10 Empl. Prac. Dec. ¶ 10,585, at 6439, and advanced none in its brief submitted to the Fourth Circuit, *see* Brief for the Defendant at 16, Sledge v. J.P. Stevens & Co., 585 F.2d 625 (4th Cir. 1978).

[33] 585 F.2d at 636. *See also* International Bhd. of Teamsters v. United States, 431 U.S. 324, 341-42 (1977). An increase in the percentage of blacks in an employer's work force during the controverted period is relevant to the fashioning of remedial decrees. *See* text accompanying note 101 *infra*.

[34] 585 F.2d at 636.

[35] *See, e.g.*, Rogers v. International Paper Co., 510 F.2d 1340, 1349 (8th Cir.), *vacated on other grounds*, 423 U.S. 809 (1975); Rowe v. General Motors Corp., 457 F.2d 348, 358-59 (5th Cir. 1972).

[36] *See, e.g.*, Barnett v. W.T. Grant Co., 518 F.2d 543, 549 (4th Cir. 1975); United States v. N.L. Indus., Inc., 479 F.2d 354, 368 (8th Cir. 1973).

[37] *See* notes 35 & 36 *supra*.

[38] *See* text accompanying note 30 *supra*.

Although plaintiffs generally can establish a prima facie case of discrimination through a showing of disparate impact, section 703(h) of Title VII[39] creates an exception for seniority systems which are bona fide and not purposely discriminatory.[40] Section 703(h), however, is a narrow exception which does not protect employment practices peripherally related to the operation of a seniority system.[41] Thus, when an entire promotional system is intertwined with a seniority system, section 703(h) protects only the seniority provisions.[42]

In *Sledge,* the panel reversed the district court's finding that Stevens' departmental seniority system violated Title VII.[43] The Fourth Circuit has ruled that a seniority system is bona fide if it applies equally to all employees and was negotiated and maintained free of any discriminatory animus.[44] The fact that a bona fide seniority system perpetuates the effects of pre-Act discrimination is insufficient to create Title VII liability.[45] Because the plaintiffs did not challenge the bona fides of Stevens' system,[46] the panel concluded that the defendants were not liable for the discrimination inherent in the operation of that system.[47]

The Fourth Circuit's standard for determining a bona fide seniority system accords with other circuits. The Supreme Court has not defined specifically a bona fide seniority system. The Court, however, has approved as bona fide a seniority system which applied equally to all employ-

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[39] 42 U.S.C. § 2000e-2(h) (1976) [hereinafter cited as § 703(h)].

[40] *Id.; see* International Bhd. of Teamsters v. United States, 431 U.S. 324, 352 (1977). Section 703(h) does not protect seniority systems which are the product of intentional discrimination, even if that discrimination occurred prior to the effective date of Title VII. *Id.* at 353. The immunization of "bona fide" seniority systems from the other requirements of Title VII only applies to systems that perpetuate the effects of pre-Act discrimination. *Id.* The Supreme Court in *Teamsters* did not define a "bona fide" seniority system and thus left to the lower courts the development of their own standards. *See* Firefighters Inst. for Racial Equality v. City of St. Louis, 588 F.2d 235, 242 (8th Cir. 1978), *cert. denied,* 99 S. Ct. 3096 (1979) (system of basing promotions on seniority begun after commencement of Title VII litigation not bona fide); James v. Stockham Valves & Fittings Co., 559 F.2d 310, 352-53 (5th Cir. 1977), *cert. denied,* 434 U.S. 1034 (1978) (company's unlawful employment practices and adherence to segregationist policies during collective bargaining considered in determining whether seniority system is bona fide); text accompanying note 48 *infra.*

[41] *See* Patterson v. American Tobacco Co., 586 F.2d 300, 303 (4th Cir. 1978).

[42] *Id. See* Parson v. Kaiser Alumn. & Chem. Co., 583 F.2d 132, 133 (5th Cir. 1978) (10 day bottom entry requirement held to be condition upon transfer rather than part of departmental seniority system).

[43] 585 F.2d at 636. Stevens' departmental seniority system related to layoffs and recalls, but not to promotions. *Id.* Under this system, seniority is based on the amount of time a particular employee has worked in a department. Any transfer from one department to another results in the forfeiture of accumulated seniority. 10 Empl. Prac. Dec. ¶ 10,585, at 6435.

[44] *See* Patterson v. American Tobacco Co., 586 F.2d 300, 303 (4th Cir. 1978); 585 F.2d at 635; note 40 *supra.*

[45] *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 353 (1977).

[46] 585 F.2d at 636; *see* Brief for the Plaintiff at 44, Seldge v. J.P. Stevens & Co., 585 F.2d 625 (4th Cir. 1978).

[47] 585 F.2d at 636.

ees, was maintained free of discriminatory purpose, accorded with industry practice and NLRB precedent, and did not have its genesis in racial discrimination.[48] While these characteristics have provided an analytical base for lower courts,[49] the Supreme Court has given no guidance concerning which of these specific elements are required and the relative weight to be accorded to each element. The Fourth Circuit, in *Sledge*, adopted the "totality of the circumstances" approach in which these elements are considered as a whole to assess the presence of discriminatory intent in the seniority system.[50]

The Fourth Circuit's approach, however, differs from that adopted by the Equal Employment Opportunity Commission. The EEOC not only examines the circumstances surrounding adoption of the seniority system in determining bona fides, but also presumes discriminatory intent in two situations.[51] If an employer institutes a departmental seniority system when departments have been segregated in the past, discriminatory purpose is presumed.[52] Similarly, the EEOC implies discriminatory animus when an employer knows that his departmental seniority system has the effect of preventing minority advancement, yet the system is maintained in the face of other non-discriminatory alternatives.[53] Although the facts of *Sledge* fell into the latter situation,[54] the panel nevertheless held Stevens' seniority system to be bona fide.[55] This *sub silentio* rejection of the EEOC guidlines makes it more difficult for Title VII plaintiffs to successfully challenge a seniority system, but is consistent with the Supreme Court's strict construction of section 703(h). The Fourth Circuit's interpretation of the seniority system exemption as only a narrow exception to Title VII standards,[56] however, helps to ameliorate this potentially harsh result. By strictly limiting the applicability of section 703(h), the Fourth Circuit reconciled the competing interests of protecting seniority rights and the elimination of discriminatory effects in employment.

After the *Sledge* court found Stevens liable for class-wide violations of Title VII,[57] it reversed the trial court's dismissal of the named plaintiffs' claims.[58] In Title VII class action suits, plaintiffs must satisfy all of the

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[48] *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 355-56 (1977).

[49] *See* James v. Stockham Valves & Fittings Co., 559 F.2d 310, 351-52 (5th Cir. 1977); Sears v. Atchison, Top. & S.F. Ry., 454 F. Supp. 158, 177 (D. Kan. 1978).

[50] *See* Note, *Title VII in the Supreme Court: Equal Employment Opportunity Bows to Seniority Rights*, 1978 UTAH L. REV. 249, 263. *See, e.g.*, Acha v. Beame, 570 F.2d 57, 64 (2d Cir. 1978).

[51] EEOC COMPL. MAN. (CCH) ¶ 6500 (July 14, 1977).

[52] *Id.*

[53] *Id.*

[54] *See* note 43 *supra*.

[55] 585 F.2d at 636. The plaintiffs did not challenge the bona fides of Stevens' seniority system. *Id.*

[56] *See* Patterson v. American Tobacco Co., 586 F.2d 300, 303 (4th Cir. 1978); text accompanying notes 41 & 42 *supra*.

[57] *See* text accompanying notes 29-34 *supra*.

[58] 585 F.2d at 638.

prerequisites necessary for class certification.[59] One of these prerequisites, the designation of the proper class representative, poses particular problems in employment discrimination litigation.[60] In order to be a class representative, one must have identical interests in being free from job discrimination and have suffered injury in prescisely the same manner as class members.[61] Thus, named plaintiffs who are employed by the defendant may not represent a class of unsuccessful job applicants.[62] A plaintiff injured by discriminatory practices in one department, however, may represent a class injured by similar practices in other departments of the same facility.[63] Once the district court finds that the named plaintiffs qualify as

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[59] *See* East Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 405 (1977); Roman v. ESB, Inc., 550 F.2d 1343, 1349 (4th Cir. 1976) (en banc). In order to certify a suit as a class action, the court must determine that the class is so numerous that joinder of all its members is impracticable, common questions of law and fact exist as to the class, the claims of the representative parties are typical of the class, and the representative parties will adequately protect the interests of the class. FED. R. CIV. P. 23(a). The district court must make the certification "as soon as practicable after the commencement of an action." FED. R. CIV. P. 23(c)(1). This determination may be made on the pleadings, but often discovery and preliminary evidentiary hearings are employed. *See* Huff v. N.D. Cass Co., 485 F.2d 710, 713 (5th Cir. 1973). If the court so chooses, the class certification may be conditional and thus subject to amendment prior to a decision on the merits. FED. R. CIV. P. 23(c)(1). The trial court's failure to enter a class certification order results in implied certification on appeal if all the parties and the court treated the suit as a class action. *See* Bing v. Roadway Express, Inc., 485 F.2d 441, 446-47 (5th Cir. 1973).

[60] *See generally* Shawe, *Processing the Explosion in Title VII Class Action Suits: Achieving Increased Compliance With Federal Rule of Civil Procedure 23(a),* 19 WM. & MARY L. REV. 469 (1978).

[61] *See* East Tex. Motor Freight Sys., Inc., v. Rodriguez, 431 U.S. 395, 403 (1977); Hill v. Western Elec. Co., 596 F.2d 99, 102 (4th Cir.), *cert. denied,* 100 S. Ct. 271 (1979). Prior to *Rodriguez,* many courts, in order to effectuate Title VII's goal of eliminating employment discrimination, relaxed the procedural requirements of FED. R. CIV. P. 23(a) and allowed named plaintiffs to challenge all of an employer's discriminatory employment practices, even though they had been injured by only one such practice. This approach is known as an "across-the-board" class action. *See* Rich v. Martin Marietta Corp., 522 F.2d 333, 340-41 (10th Cir. 1975); Barnett v. W.T. Grant Co., 518 F.2d 543, 547 (4th Cir. 1975). *See also* 3B MOORE'S FEDERAL PRACTICE ¶ 23.06-2, at 23-195 to 196.

In *Rodriguez,* the Supreme Court ruled that since the named plaintiffs lacked the requisite qualifications for the positions they sought and were not victims of hiring discrimination, they could not represent the class of unsuccessful job applicants. 431 U.S. at 404. The court held that the plaintiffs were not members of the class and did not suffer the same injury as class members. *Id.* at 403-04. Subsequent to *Rodriguez,* the Fourth Circuit reversed its previous allowance of "across-the-board" class actions and required that class representatives possesses precisely the same injury and interest as class members. Roman v. ESB, Inc., 550 F.2d 1343, 1348-49 (4th Cir. 1976) (en banc). *See generally* Comment, *Proper Scope of Representation in Title VII Class Actions: A Comment on* East Texas Motor Freight System, Inc. v. Rodriguez, 13 HARV. C.R.-C.L. L. REV. 175 (1978).

[62] *See* Hill v. Western Elec. Co., 596 F.2d 99, 102 (4th Cir. 1979) (named plaintiffs denied class representative status in hiring discrimination claims as they had never been denied employment on basis of race).

[63] *Id.* The *Hill* panel noted that employees in different departments of the same facility, who are affected by the same employment practices have the same interests and have suffered the same injuries. *Id.* The court concluded that East Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395 (1977), does not destroy the usefulness of the class action device by

representatives and certifies the class,[64] dismissal of the plaintiffs' individual claims will not destroy their representative status and the class action may continue unimpeded.[65]

Many courts have adopted a bifurcated approach in Title VII class actions as a compromise between competing views as to the propriety of using Federal Rule of Civil Procedure 23(b)(2) in these suits.[66] Title VII plaintiffs prefer to proceed under Rule 23(b)(2), which is restricted to actions involving injunctive or declaratory relief, because no notice need be sent to class members.[67] However, since back pay awards are commonplace in employment discrimination litigation, some courts have held that individual questions are presented which require the class action to proceed under Rule 23(b)(3).[68] In Rule 23(b)(3) class actions, due process considerations demand that notice be given each individual class member.[69] Since the plaintiffs must bear the cost of sending such notice,[70] prosecution of class actions under Rule 23(b)(3) has a chilling effect on employment discrimination suits.[71] Faced with this dilemma, most courts have held that the back pay award is merely one element of the total equitable relief rather than a claim for damages, and therefore Rule 23(b)(2) should

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requiring "separate suits on an episodic basis." 596 F.2d at 102. However, the court further held that a named representative may not represent a class which has suffered the same injuries, but is employed at different facilities. *Id.* The *Hill* panel noted that while all the employees at the several Western Electric plants involved in the litigation lived in the same geographical area, they are not drawn from the same labor market and thus are not employed at the same facility. The job requirements of some of the departments require skilled workers, while other departments do not. *Id.*; *cf.* Patterson v. American Tobacco Co., 535 F.2d 257, 266 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976), *modified on rehearing*, 586 F.2d 300 (4th Cir. 1978) (separate plants considered as single facility because located in same geographical area and employed only unskilled workers).

[64] *See* note 62 *supra*.

[65] *See, e.g.*, East Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 406 n.12 (1977); Franks v. Bowman Transp. Co., 424 U.S. 747, 753 (1976). When the class has not been certified, the dismissal of the named plaintiffs' claims should be considered in deciding whether they should remain as class representatives. *See* East Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. at 406 n.12.

[66] *See, e.g.*, Bing v. Roadway Express, Inc., 485 F.2d 441, 448 (5th Cir. 1973). *See generally*, Edwards, *The Back Pay Remedy in Title VII Class Actions: Problems of Procedure*, 8 GA. L. REV. 781, 797-807 (1974); Davidson, *Back Pay Awards Under Title VII of the Civil Rights Act of 1964*, 26 RUTGERS L. REV. 741, 750 (1973); Comment, *The Class Action and Title VII—An Overview*, 10 U. RICH. L. REV. 325, 337-38 (1976) [hereinafter cited as *Class Action*].

[67] *See Class Action, supra* note 66, at 336. Rule 23(b)(2) was amended during the 1966 Revisions of the Federal Rules of Civil Procedure specifically to make it more conducive to use in employment discrimination suits. *See* Advisory Committee Notes on Rule 23, 28 U.S.C., at 7766-67 (1970).

[68] *See, e.g.*, Alexander v. AVCO Corp., 380 F. Supp. 1282, 1286 (M.D. Tenn. 1974) (6th Cir. 1977), *modified on appeal*, 565 F.2d 1364, *cert. denied*, 436 U.S. 946 (1978); Bormann v. Long Island Daily Press Publishing Co., 379 F. Supp. 951, 954 (E.D.N.Y. 1974).

[69] *See* FED. R. CIV. P. 23(c)(2); Advisory Committee Notes on Rule 23, 28 U.S.C., at 7768 (1970).

[70] *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974).

[71] *See* Wetzel, v. Liberty Mut. Ins. Co., 508 F.2d 239, 253 (3d Cir. 1975), *vacated on other grounds*, 424 U.S. 737 (1976).

be used in Title VII litigation.[72] An increasing number of courts, however, have adopted the bifurcated trial as a means of satisfying due process requirements without deterring employment discrimination suits.[73]

Under the bifurcated trial procedure, the first, or liability, stage proceeds under Rule 23(b)(2), while the remedial stage incorporates the notice aspects of Rule 23(b)(3).[74] In the liability stage, the court determines whether the defendant utilized illegal employment practices.[75] If the court finds the employer liable for class-wide Title VII violations, individual employment decisions are presumed to have been tainted and each class member thus is entitled to compensation.[76] In the remedial stage of the trial, a three part process is used to calculate individual back pay awards.[77] Each individual must affirmatively establish his membership in the class by showing that he is a member of the protected class and that, for example, during the controverted period he sought employment with the defendant and was not hired.[78] The claimant must also provide any requested information necessary to determine his specific financial loss caused by the discrimination.[79] In response, an employer may demonstrate by a preponderance of the evidence that the individual class member was not employed because of a lawful consideration.[80] If the employer carries this

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[72] *See, e.g.*, Bing v. Roadway Express, Inc., 485 F.2d 441, 447 (5th Cir. 1973); Robinson v. Lorillard Corp., 444 F.2d 791, 801-02 (4th Cir. 1971).

[73] *See* note 66 *supra.*

[74] *See* Freeman v. Motor Convoy, Inc. 8 Empl. Prac. Dec. ¶ 9798, at 6339 (N.D. Ga. 1974).

[75] 585 F.2d at 637; *see* text accompanying notes 23-28 *supra.*

[76] 585 F.2d at 637.

[77] *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 361-62 (1977). If the individual claimant sustains his claim in the remedial stage, his back pay claim will be denied only for reasons which would not frustrate the legislative purposes of Title VII. *See* Albermarle Paper Co. v. Moody, 422 U.S. 405, 416 (1975). Although this standard creates a presumption in favor of awarding back pay, such an award is not mandatory. *Id.* at 415. Back pay is an equitable remedy left to the discretion of the trial court. *Id.* at 415-16. Once back pay is awarded, the amount of the award may be reduced by the amounts the claimant earned during the period in question or received in unemployment compensation. *See* Diaz v. Pan Am. World Airways, 5 Fair Empl. Prac. Dec. 13, 15 (S.D. Fla. 1972). The award also may be reduced by the amount the claimant could have earned with "reasonable diligence." *Id.*

[78] *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 362 (1977). In *Sledge*, the district court ordered a copy of the back pay order and a back pay questionnaire and claim form sent to each class member. 12 Empl. Prac. Dec. ¶ 11,251, at 5782. The back pay questionnaire and claim form asked whether the individual claimed that Stevens failed to hire, place or promote him on the basis of race. The form also asked if the claimant would submit to questions by attorneys or the court. 585 F.2d at 633 n.10. If a class member did not affirmatively express a desire to be included in the back pay award and supply the necessary information, he waived his entitlement. *Id.* at 633. The Fourth Circuit affirmed this claim filing procedure, holding it to be an appropriate first step towards ultimate resolution of all back pay claims. *Id.* at 652.

[79] *See* United Transp. Local 974 v. Norfolk & W. Ry., 532 F.2d 336, 341 (4th Cir. 1975), *cert. denied*, 425 U.S. 934 (1976).

[80] *See* International Bhd. of Teamsters, 431 U.S. 324, 362 (1977); Franks v. Bowman Transp. Co., 424 U.S. 747, 773 n.32 (1976). Demonstrations by an employer that some factor other than race was responsible for the decision attacked must be made by a preponderence of the evidence. 585 F.2d at 637. Examples of such exculpatory reasons are no job vacancies

burden, the court will deny the back pay award unless the claimant can demonstrate that the lawful factor asserted by the employer was a "mere pretense."[81]

In *Sledge,* the Fourth Circuit reversed the district court's dismissal of the named plaintiffs' individual claims during the liability stage of the bifurcated process.[82] The panel held that although dismissal at that point was not error per se, only two situations justify such a course of action.[83] Dismissal is proper, the court ruled, if the evidence introduced at the liability stage conclusively shows that the individual will be unable to prove his class membership[84] or that the employer had a viable and incontrovertible reason for its actions against that individual.[85] The court reasoned that named plaintiffs should not be expected to prove at the liability stage factors which other claimants are not required to prove until the back pay stage.[86] The panel also ruled that claimants who elect to testify on the liability issue should not be held to a more rigorous standard of proof on their back pay claims than those not testifying.[87] Because the evidence adduced by the trial court did not fall into either of the categories that sanction dismissal, the panel remanded the individual claims for consideration during the back pay proceedings.[88]

Although the Fourth Circuit has previously held that Title VII class actions may proceed solely under Rule 23(b)(2),[89] *Sledge* strongly encourages district courts to adopt the bifurcated process when trying employment discrimination litigation. While the Fourth Circuit's decision does not require lower courts to utilize the bifurcated trial procedure,[90] the *Sledge* panel's approval of rigorous claim filing requirements clearly indicates that notice should be given in back pay proceedings.[91] The Fourth Circuit's procedural approach in *Sledge* is in accordance with recent Supreme Court directives requiring strict compliance with the requirements of Rule 23 in Title VII class actions.[92]

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or promotions for which the claimant qualifies. *See* Franks v. Bowman Transp. Co., 424 U.S. at 773 n.32.

[81] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973). "Mere pretense" would be found if white applicants were assigned the job in question even though their qualifications were only equal to or even inferior to those of the minority applicant. 585 F.2d at 637.

[82] 595 F.2d at 638.

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.* The district court judge in *Sledge* stated in his opinion that whenever named plaintiffs testify, they should give some testimony that substantiates the charges of discrimination. *Id.* at 638. Most of the plaintiffs in *Sledge* merely verified their employment records and testified as to the authenticity of exhibits. *Id.* at 638 & n.26.

[88] *Id.* at 643.

[89] *See* Robinson v. Lorillard Corp., 444 F.2d 791, 801-02 (4th Cir. 1971).

[90] *See* 585 F.2d at 637; MANUAL FOR COMPLEX LITIGATION (CCH) § 4.12 (1973).

[91] 585 F.2d at 652-53; *see* note 78 *supra.*

[92] *See* East Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403 (1977).

Upon concluding that Stevens had violated Title VII, the district court instituted a broad remedial decree which included injunctive relief,[93] rigid racial quotas[94] and back pay awards.[95] While expressly leaving unresolved the permissibility of quotas under Title VII,[96] the Fourth Circuit reversed the affirmative action portion of the remedial decree, holding that "compelling circumstances" must be present to invoke racial quotas.[97] The court held quotas inappropriate where effective relief[98] for the aggrieved

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[93] 12 Empl. Prac. Dec. ¶ 11,047, at 4877. The district court enjoined Stevens from engaging in any employment practice which purposely or effectively discriminates against any employee or job applicant on the basis of race. *Id. See* text accompanying note 14 *supra.*

[94] *Id.* at 4878-79. The district court directed Stevens to make bona fide offers of employment to an equal ratio of black and white applicants. *Id.* at 4787. The remedial decree further mandated that blacks and whites be assigned in equal proportion to fill weaving and clerical vacancies until forty percent of the employees in those departments are black. *Id.* at 4878-79. Once Stevens meets this requirement in the clerical department, it must make bona fide assignment offers to an equal ratio to blacks and whites for two years. *Id.* at 4879. Other high paying jobs which the district court found had been reserved for whites, *see* note 14 *supra,* were to be filled by an equal ratio of blacks and whites until blacks held a third of those jobs. *Id.*

Quotas are defined as "mandatory percentages of minority employment representation." 30 CONG. Q. 3092 (Dec. 2, 1972). While the district court termed its racially preferatory remedial provisions "ratios", *see* 12 Empl. Prac. Dec. ¶ 11,047, at 4878, semantical distinctions have no bearing on the issues raised by racial and ethnic classifications. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289 (1978).

[95] 10 Empl. Prac. Dec. ¶ 10,585, at 6439. The district court held that conditions later promulgated by the court would govern individual back pay awards. *Id.; see* note 78 *supra.*

[96] 585 F.2d at 646-47. While the Fourth Circuit has never imposed racial quotas, a majority of other circuits have expressly approved their use as a remedy for racial discrimination. *See, e.g.,* NAACP v. Beecher, 504 F.2d 1017, 1027 (1st Cir. 1974), *cert. denied,* 421 U.S. 910 (1975); United States v. N.L. Indus., Inc., 479 F.2d 354, 377 (8th Cir. 1973). Subsequent to the Supreme Court's decision in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), most courts considering the issue of quotas have held that the *Bakke* decision allows quotas when used to remedy judicial or legislative findings of discrimination. *See, e.g.,* Morrow v. Dillard, 580 F.2d 1284, 1294 (5th Cir. 1978). *Contra,* Associated Gen. Contractors v. Secretary of Commerce, 459 F. Supp. 766, 780 (C.D. Cal. 1978) (rigid racial quotas are unconstitutional after *Bakke*).

The plaintiffs in *Sledge* contended that the Fourth Circuit approved the use of racial quotas in Patterson v. American Tobacco Co., 535 F.2d 257, 273-74 (4th Cir. 1976). Brief for Plaintiff at 57, Sledge v. J.P. Stevens & Co., 585 F.2d 625 (4th Cir. 1978). In *Sledge,* however, the panel made it clear that the plaintiff's reading of *Patterson* was too broad and that the issue is still open in the circuit. 585 F.2d at 646 n.34; *see* White v. Carolina Paperboard Corp., 564 F.2d 1073, 1091 (4th Cir. 1977). Recently the Fourth Circuit held that *Bakke* permits racial preferences upon a finding of statutory violation so long as third parties are not prejudiced by the preferences adopted. *See* Uzzell v. Friday, 591 F.2d 997, 1000 (4th Cir. 1979) (en banc).

[97] 585 F.2d at 646-47. The *Sledge* court did not define "compelling circumstances", but implied that such circumstances would be present if the employer's discrimination was flagrant and quotas were the only effective means of redressing this discrimination. *Id.* at 647. *See* Patterson v. American Tobacco Co., 535 F.2d 257, 277 (4th Cir. 1976) (Widener, J., concurring and dissenting) ("exaggerated facts" must be present for imposition of remedial quotas).

[98] The *Sledge* panel emphasized that in considering whether quotas should be imposed as elements of a comprehensive remedial decree, "nothing less than 'the most relief possible' under the circumstances would fulfill that obligation." 585 F.2d at 664; *see* Franks v. Bowman

plaintiffs can be achieved through less racially-conscious means[99] or where an employer has made substantial and convincing progress since the effective date of Title VII[100] in eradicating the effects of discriminatory employment practices.[101] Furthermore, district courts should not impose racially preferential relief if the discrimination sought to be remedied has not been "egregious, purposeful, or blatant."[102]

In *Sledge*, the Fourth Circuit affirmed the district court's finding that Stevens' employment practices were neither intentionally nor overtly discriminatory[103] and concluded that the racial discrimination involved was not egregious.[104] The court noted that during the pendency of the litigation the racial disparities in both hiring and promotions had been almost totally eliminated.[105] In light of these factors and because other parts of the remedial decree directly addressed the causes of the illegal discrimination,[106] the court held that effective remedial relief was possible without

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Transp. Co., 424 U.S. 747, 764 (1976). *See also* Albermarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975).

[99] 585 F.2d at 647; *see* Harper v. Kloster, 486 F.2d 1134, 1136 (4th Cir. 1973) (quotas not imposed because effective relief afforded by injunctive provisions alone); *cf.* United States v. City of Chicago, 549 F.2d 415, 437 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977) (quotas imposed because defendant's reluctance to adopt voluntary measures made them only effective relief possible).

[100] Title VII became effective on July 2, 1965. Civil Rights Act of 1964, Pub. L. No. 88-352 § 716(b).

[101] 585 F.2d at 646-47; *see* Patterson v. American Tobacco Co., 535 F.2d 257, 275 (4th Cir. 1976) (defendant's recent appointments of qualified blacks and women to supervisory positions at rate exceeding their ratio in work force sufficient to deny imposition of quotas).

[102] 585 F.2d at 647; *see, e.g.*, Kirkland v. New York St. Dep't of Correctional Serv., 520 F.2d 420, 427 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976) (limited scope of challenged employment practice coupled with defendant's good faith sufficient to demonstrate the absence of egregious discrimination).

The Second Circuit considers an additional factor, not adopted in *Sledge*, in deciding whether racial quotas are appropriate. If the effects of the affirmative action will be concentrated on a small, easily identifiable group of persons rather than spread among an unidentifiable group of potential applicants, racial quotas may not be imposed. *See* EEOC v. Local 638, Sheet Metal Wkrs., 532 F.2d 821, 828 (2d Cir. 1976). Thus, in the Second Circuit, quotas may be imposed with regard to hiring procedures but may not be prescribed for promotions. *See* Kirkland v. New York St. Dep't. of Corrections Serv., 520 F.2d at 429; Local 35, IBEW v. City of Hartford, 462 F. Supp. 1271, 1281 (D. Conn. 1978).

[103] 585 F.2d at 647. While the absence of discriminatory purpose is significant in designing a remedial decree, it is not a defense to a disparate impact action. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971); *see* note 24 *supra*.

[104] 585 F.2d at 647.

[105] *Id.* at 648. During the years 1972-75, 50% of the new employees hired were black, raising the total number of blacks in Stevens' workforce to 37.1% as compared with 19.4% in 1970. *Id.* Between 1967 and 1972, blacks were promoted by Stevens in four of its Roanoke Rapids plants in higher percentages than whites were promoted. The percentage of blacks promoted was lower than the number of whites promoted in two plants. *Id.* at 649.

[106] Stevens' failure to post job vacancies, its policy of relying upon the subjective conclusions of white officials and its failure to establish objective hiring guidelines caused the disproportionate rejection of blacks in *Sledge*. 585 F.2d at 648. These policies coupled with Stevens' practice of reserving its better jobs for whites were responsible for the disproportionate promotion rate of blacks. *Id.* at 649. The remedial decree requires the defendant to exhaustively post job vacancies and develop objective hiring and promotional criteria. 12

imposing quotas.[107] The district court's ability to monitor compliance with the remedial decree[108] was also an important factor in the Fourth Circuit's decision to deny racially preferential relief.[109] The court noted that if the prescribed relief does not fully eliminate the discriminatory impact of Stevens' policies, the district court can modify the decree or even impose quotas if "compelling circumstances" become apparent.[110]

The Fourth Circuit's refusal to prescribe quotas except in exigent circumstances is consistent with Supreme Court directives that remedial decrees should not exceed the bounds of fundamental fairness[111] and with holdings in other circuits.[112] Quotas should be limited to situations in which no alternative relief would be effective since they penalize innocent parties in the process of increasing employment opportunities for protected classes.[113] By outlining the factors to be considered before prescribing remedial quotas,[114] the Fourth Circuit has provided the district courts with a workable, analytical framework which insures that remedial decrees will render the least possible harm to innocent third parties.

In addition to striking racial quotas from the remedial decree, the *Sledge* panel further modified the decree by lengthening the back pay liability period.[115] The court held that the district court erred in limiting the potential back pay liability of Stevens to a period commencing three years prior to the filing of the class action.[116] Noting that the 1972 Amend-

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Empl. Prac. Dec. ¶ 11,047, at 4877-78. Furthermore, the court enjoined the use of subjective opinions of white supervisors in employment decisions and the reservation of job classifications for members of a certain race. *See* 10 Empl. Prac. Dec. ¶ 10,585, at 6438, 6439.

[107] 585 F.2d at 648-50.

[108] *See* 12 Empl. Prac. Dec. ¶ 11,047, at 4883. Retention of jurisdiction by a district court to monitor compliance with that court's remedial decree is often employed in Title VII cases. *See, e.g.*, Reed v. Arlington Hotel Co., 476 F.2d 721, 726 (8th Cir.), *cert. denied*, 414 U.S. 854 (1973); Brown v. Gaston County Dyeing Mach. Co., 457 F.2d 1377, 1383 (4th Cir. 1972). In *Sledge* the district court appointed a Special Master to assist the court in monitoring Stevens' compliance with the decree. 12 Empl. Prac. Dec. ¶ 11,047, at 4883.

[109] 585 F.2d at 649.

[110] *Id.*

[111] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 308 (1978); Franks v. Bowman Transp. Co., 424 U.S. 747, 784-85 (1976) (Powell, J., concurring and dissenting).

[112] *See, e.g.*, United States v. City of Chicago, 549 F.2d 415, 437 (7th Cir. 1977); Kirkland v. New York St. Dep't of Correctional Serv., 520 F.2d 420, 427 (2d Cir. 1975); NAACP v. Allen, 493 F.2d 614, 621-22 (5th Cir. 1974).

[113] *See* NAACP v. Allen, 493 F.2d 614, 621-22 (5th Cir. 1974); Associated Gen. Contractors of Mass., Inc. v. Altshuler, 490 F.2d 9, 17-18 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974). In addition to adversely affecting whites, racial quotas tend to reinforce prejudices confirming perceived differences between races. *Id.* at 18. Moreover, racial preferences for members of one minority group might result in discrimination against other minorities. *Id. See generally* Blumrosen, *Quotas, Common Sense, and Law in Labor Relations: Three Dimensions of Equal Opportunity*, 27 RUTGERS L. REV. 675 (1974).

[114] 585 F.2d at 647; *see* text accompanying notes 97-102 *supra.*

[115] 585 F.2d at 650-51. The Fourth Circuit ruled that the defendant's monetary liability should extend back to September 5, 1966, which is three years prior to the filing of administrative charges with the EEOC. *Id.* at 650. Under the district court's ruling, Stevens liability for back pay would have begun on October 2, 1967. *Id.*

[116] *Id.* at 650.

ments to Title VII[117] were inapplicable because *Sledge* was filed prior to their effective date,[118] the panel held that the state statute of limitations governs potential back pay liability.[119] The panel further noted that other courts uniformly have held such statutes to be tolled from the filing of administrative charges with the EEOC[120] rather than from the date of the filing of the class action.[121]

The *Sledge* panel also struck the "bumping" provisions from the remedial decree.[122] The panel reversed the district court's order that Stevens institute a system whereby a black employee in one department scheduled for layoff may displace an employee in another department with less plant seniority, as long as the black employee can perform his new job with reasonable training.[123] Noting that the circuits agree that Title VII does not require an employer to demote white workers,[124] the panel reasoned that the bumping provisions would penalize white workers and potentially harm other victims of past discrimination, as one black employee may "bump" another.[125] Additionally, the court concluded, the bumping provisions would require significant alteration of a seniority system that does not violate Title VII.[126] While the court expressly left open the question of whether bona fide seniority systems may ever be altered in a remedial decree,[127] it held that where other portions of the decree adequately redress the condemned discrimination, legislatively protected seniority systems should remain unchanged.[128] The panel concluded that, on the facts of *Sledge,* allowing black employees to retain their seniority upon transferring from one department to another adequately insulates them from layoffs.[129]

The Fourth Circuit's holdings in *Sledge* accord with the Supreme

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[117] 42 U.S.C. § 2000e-5(g). The 1972 Amendments to Title VII became effective on March 24, 1972. Amendments to the Civil Rights Act of 1964, Pub. L. No. 92-261 § 14. These amendments expressly limit liability for back pay under Title VII to two years prior to the filing of the EEOC charge. 42 U.S.C. § 2000e-5(g) (1976). Where the EEOC administrative investigation reveals evidence of a type of discrimination not alleged in the charge, the employer's back pay liability for that discrimination should be measured from the time the employer received notice of the results of the investigation rather than from the filing of the charge. Patterson v. American Tobacco Co., 535 F.2d 257, 276 (4th Cir. 1976); *accord,* EEOC v. General Elec. Co., 532 F.2d 359, 371-72 (4th Cir. 1976).

[118] 585 F.2d at 651; *see* note 100 *supra.*

[119] 585 F.2d at 651.

[120] *See* note 1 *supra.*

[121] 585 F.2d at 651; *see, e.g.,* EEOC v. Enterprise Assoc. Steamfitters Local No. 638, 542 F.2d 579, 590 (2d Cir. 1976), *cert. denied,* 430 U.S. 911 (1977); United States v. Georgia Power Co., 474 F.2d 906, 925 (5th Cir. 1973).

[122] 585 F.2d at 651-52.

[123] *Id.*

[124] *Id.; see, e.g.,* Patterson v. American Tobacco Co., 535 F.2d 257, 267 (4th Cir. 1976); EEOC v. Detroit Edison Co., 515 F.2d 301, 316 (6th Cir. 1975).

[125] 585 F.2d at 652.

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.; see* 12 Empl. Prac. Dec. ¶ 11,047, at 4879-81.

Court's employment discrimination holdings[130] and the legislative purpose of Title VII.[131] Congress, in enacting Title VII, sought to achieve equality in employment by removing artificial barriers that prevent blacks from achieving economic success.[132] In order for Title VII to be effective, however, enforcement must come predominately from private plaintiffs.[133] *Sledge's* flexible interpretation of the disparate impact analysis makes it easier for plaintiffs to establish liability.[134] While this easier liability standard encourages Title VII suits, *Sledge* ensures that defendants are protected from specious claims.[135] The Fourth Circuit's formal adoption of the bifurcated class action process[136] means that only those who were genuinely injured by discriminatory employment practices will be compensated. Furthermore, the Fourth Circuit's reservation of quotas for only compelling circumstances enhances the personalized relief afforded by Title VII.[137] This flexible remedial posture encourages employers to mend their ways and provide the equal employment opportunities that the authors of Title VII envisioned. The Fourth Circuit's decision, therefore, adheres to procedural necessities, while advancing Title VII's goal of eliminating employment discrimination.

WALTER D. KELLEY, JR.

B. *Employee Pregnancies*

Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, religion, sex, or national origin in employment.[1] As a consequence of the expanding role of women in the work force,[2] the

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[130] *See* Dothard v. Rawlinson, 433 U.S. 321 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[131] *See* 110 CONG. REC. 6548 (1964) (remarks of Sen. Humphrey) (Congress' primary concern in enacting Title VII was "the plight of the Negro in our economy"); 110 CONG. REC. 7204 (1964) (remarks of Sen. Clark) (Congress was concerned that blacks be able to secure jobs which have a future).

[132] *See* United Steelworkers v. Weber, 99 S. Ct. 2721, 2728 (1979).

[133] *See* Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968) (private plaintiffs vindicate policies Congress considers of highest priority).

[134] *See* text accompanying notes 35-38 *supra.*

[135] *See* text accompanying notes 77-81 *supra.*

[136] *See* text accompanying notes 89-92 *supra.*

[137] 585 F.2d at 646.

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[1] 42 U.S.C. §§ 2000e to 2000e-17 (1976). Congress enacted Title VII to remove discriminatory barriers which restrict equal employment opportunities. *See, e.g.*, Espinoza v. Farrah Mfg. Co., 414 U.S. 86, 88-89 (1973) (national origin); Redmond v. GAF Corp., 547 F.2d 897, 889-901 (7th Cir. 1978) (religion); DiSalvo v. Chamber of Commerce, 568 F.2d 593, 598 (8th Cir. 1978) (sex); Witherspoon v. Mercury Freight Lines, Inc., 457 F.2d 496, 498 (5th Cir. 1972) (race). In addition to prohibiting employment discrimination against minority groups, Title VII created the Equal Employment Opportunity Commission (EEOC) to help administer the provisions of the Act. *See* 42 U.S.C. §§ 2000e-4, 2000e-5 (1976).

[2] Approximately five times as many mothers are working today as in 1950. *See* Simp-

importance of Title VII's prohibition of sex-based discrimination has increased.[3] Although sex discrimination is clearly illegal under Title VII, the issue of employee pregnancies has generated much uncertainty among courts.[4] In the last decade, the Fourth Circuit has influenced the course of employment practices law concerning sex discrimination claims.[5] A recent

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son, *A Victory for Women*, 11 CIV. RIGHTS DIGEST 12, 17 (Spring 1979) [hereinafter cited as *Victory*].

[3] Title VII sex discrimination adjudication has dealt with a wide spectrum of employment practices. *See, e.g.*, EEOC v. Delta Air Lines, Inc., 578 F.2d 115 (5th Cir. 1978) (no marriage rule); DiSalvo v. Chamber of Commerce, 568 F.2d 593 (8th Cir. 1978) (salary discrimination); Allen v. Lovejoy, 553 F.2d 522 (6th Cir. 1977) (required use of husband's surname); Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084 (5th Cir. 1975) (hair length). For an analysis of the legislative history behind Title VII's sex discrimination provisions, *see generally* Miller, *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 879-85 (1967) [hereinafter cited as Miller]; Comment, *Sex Discrimination in Employment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964*, 1968 DUKE L.J. 671, 672-79 [hereinafter cited as *Sex Discrimination*].

[4] *Compare* Nashville Gas Co. v. Satty, 434 U.S. 136, 139-40 (1977) (invalidating company seniority policy as violative of Title VII) *with* General Elec. Co. v. Gilbert, 429 U.S. 125, 145-46 (1976) (sustaining disability plan under Title VII) *and* Geduldig v. Aiello, 417 U.S. 484, 496-97 (1974) (upholding disability plan as not violative of equal protection).

The uncertainties in the area of pregnancy-related employment discrimination may be attributable to the stereotypes associated with female workers. Many commentators have noted that the notion of women as temporary workers is reflected in the pregnancy discrimination cases. *See, e.g.*, Erickson, *Pregnancy Discrimination: An Analytical Approach*, 5 WOMEN'S R. L. RPTR. 83, 86 (1974); *Victory*, *supra* note 2, at 12; Comment, *Title VII: Are Exceptions Swallowing the Rule?*, 13 TULSA L. REV. 102 (1977). Following this reasoning, the courts have denied women the much needed protection from discrimination in the context of employment relations. *See* General Elec. Co. v. Gilbert, 429 U.S. 125, 158 (1976) (Brennan, J., dissenting); *see, e.g.*, Guse v. J.C. Penney Co., 562 F.2d 6, 7 (7th Cir. 1977) (upholding disability plan excluding pregnancy from coverage); Madrid v. Board of Educ., 429 F. Supp. 816, 817-18 (N.D. Cal. 1977) (pregnancy exclusion sustained).

The confusion surrounding pregnancy discrimination may be further attributable to the absence of legislative history on the sex provisions of Title VII. The paucity of legislative materials is explained by the fact that Congress incorporated the sex provisions into the Civil Rights Act only one day before the House approved Title VII. *See* M. Hill, *Sex Discrimination Under Title VII and the Constitution: A Legal Analysis*, 29 LABOR L.J. 570, 571 (1978) [hereinafter cited as M. Hill]. Commentators have suggested that the sex discrimination provisions of Title VII had been proposed by critics of the Act who believed the incorporation could defeat the Bill. *See Sex Discrimination*, *supra* note 3, at 676. Furthermore, the sex provision met little opposition due to the undesirability of delaying the passage of the Act. *See* Miller, *supra* note 3, at 877, 879-85. Without the guidance of the legislative materials, Congress' intent could be misconstrued. *See generally* Davie, *Pregnancy, A Laborious Issue*, 7 HUMAN RIGHTS 36 (Fall 1978) [hereinafter cited as Davie]; Comment, *Differential Treatment of Pregnancy in Employment: The Impact of* General Electric Co. v. Gilbert *and* Nashville Gas Co. v. Satty, 13 HARV. C.R.-C.L. L. REV. 717 (1978) [hereinafter cited as *Differential Treatment*].

Much of the uncertainty surrounding the relationship between pregnancy related employment practices and sex discrimination will be clarified by a recent amendment to Title VII. *See* Act of Oct. 31, 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (to be codified as 42 U.S.C. § 2000e(k)). *See generally* Blackman, *The Pregnancy Discrimination Act*, 16 GA. ST. B.J. 43 (1979) [hereinafter cited as *Pregnancy Discrimination*]. *See* text accompanying note 63 *infra*.

[5] *See, e.g.*, Mitchell v. Board of Trustees, 599 F.2d 582, 587 (4th Cir.), *cert. denied*, 48

Fourth Circuit opinion, *Mitchell v. Board of Trustees*,[6] exemplifies the attempt by the judiciary to develop a workable standard for determining which employment practices involving employee pregnancies are sexually discriminatory.

Mitchell, a high school Spanish teacher in Pickens County, South Carolina, signed a letter of intent to renew her contract for the upcoming year.[7] Soon after signing, Mitchell discovered that she was pregnant.[8] Complying with school district regulations, Mitchell gave notice of her pregnancy to the school board.[9] As a result of the pregnancy notice, her employment contract was not renewed.[10]

Mitchell challenged the pregnancy notice requirement on constitutional grounds in federal district court.[11] Her objection to the school policy was based on the fact that pregnancy was the only condition that triggered the mandatory notification requirement.[12] Since only women become pregnant, Mitchell maintained that the school board policy discriminated on the basis of sex. Mitchell claimed that the school officials used the information required of the pregnant female teachers as a basis for declining to renew employment contracts.[13]

The district court granted summary judgment for the defendant school board.[14] Mitchell appealed the judgment and simultaneously filed a Title VII suit in the district court based essentially on the original

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U.S.L.W. 3356 (1979) (mandatory pregnancy notification policy); Gilbert v. General Elec. Co., 519 F.2d 661, 668 (4th Cir. 1975), *rev'd*, 429 U.S. 125 (1976) (disability plan excluding pregnancy disabilities); Cohen v. Chesterfield County School Bd., 474 F.2d 395, 397 (4th Cir. 1973) (en banc), *rev'd sub nom.* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (mandatory maternity leave policy). *See also* Griggs v. Duke Power Co., 420 F.2d 1225 (4th Cir. 1970), *rev'd*, 401 U.S. 424 (1971) (race discrimination decision presenting analytic framework used in adjudication of sex discrimination claims).

[6] 599 F.2d 582 (4th Cir. 1979).

[7] *Id.* at 584.

[8] *Id.*

[9] *Id.* Upon discovery of pregnancy, the school board regulation required the pregnant woman to apply for termination of her contract. Although subject to exceptions, the regulation provided that termination should occur at least three months before the anticipated delivery date. *Id.* at 584 n.1.

[10] *Id.* at 584. Although the regulation applied only to the termination of contracts, the Fourth Circuit treated the non-renewal as termination by noting the similar consequences of such actions. *Id.* at 584 n.1. The school board rescinded the regulation during the litigation. *Id.*

[11] *Id.* at 584. Mitchell based her constitutional challenge on 42 U.S.C. § 1983 (1976). Section 1983 recognizes a cause of action when a person deprives another of any rights, privileges or immunities provided by the Constitution. *Id.*

[12] Mitchell v. Board of Trustees, 415 F. Supp. 512, 514 (D.S.C. 1976).

[13] *Id.*

[14] *Id.* at 584. The lower court granted summary judgment on the authority of Cohen v. Chesterfield County School Bd., 474 F.2d 395 (4th Cir. 1973) (en banc). In *Cohen*, the Fourth Circuit rejected a constitutional challenge to a school's mandatory leave policy which required pregnant teachers to terminate employment by the fifth month of pregnancy. *Id.* at 396. The Fourth Circuit held that the policy served a legitimate and reasonable state interest by promoting the continuity of the educational system. *Id.* at 399.

claim.[15] Relying on recent Supreme Court authority, the Fourth Circuit vacated the constitutional decision and remanded the suit to the district court.[16] The district court consolidated both claims and focused primarily on the Title VII challenge.[17]

Finding for plaintiff Mitchell, the district court relied on the Fourth Circuit opinion of *Gilbert v. General Electric Co.*[18] and concluded that the school board policy had a discriminatory effect on women.[19] During the pendency of the plaintiff's appeal, however, the Supreme Court reversed the *Gilbert* decision.[20] Consequently, the district court withdrew judgment for Mitchell in light of the Supreme Court reversal.[21] Mitchell then filed the present appeal.[22]

The Fourth Circuit utilized a disparate impact analysis to find the school board's mandatory notice requirement prima facie violative of Title VII.[23] Although the policy was facially nondiscriminatory in its treatment of the sexes,[24] the Fourth Circuit determined that, in effect, the

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[15] Mitchell v. Board of Trustees, 599 F.2d 582, 584 (4th Cir. 1979). Mitchell complied with the requisite EEOC procedures before filing the Title VII suit. Mitchell v. Board of Trustees, 415 F. Supp. 512, 516 (D.S.C. 1976). The procedures for a Title VII challenge are codified in 42 U.S.C. § 2000e-5 (1976). Initially, the complainant-employee files a charge with the EEOC alleging the existence of an unlawful employment practice. Within ten days, the EEOC serves notice of the charge on the employer, and conducts an investigation. If the EEOC determines that an unlawful employment practice exists, the EEOC will attempt to eliminate the practice through arbitration. The plaintiff may file a civil action upon failure of the EEOC to secure an agreement.

[16] Mitchell v. Board of Trustees, 599 F.2d 582, 584 (4th Cir. 1979). The Fourth Circuit vacated the *Mitchell* summary judgment after the Supreme Court reversed the *Cohen* decision *sub nom.* in Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974). *See* note 14 *supra*. In *LaFleur*, the Supreme Court held the challenged school regulation violative of due process since the maternity leave policy unduly restricted the teacher's freedom to bear children. *Id.* at 639.

[17] Mitchell v. Board of Trustees, 415 F. Supp. 512, 514 (D.S.C. 1976); *see* Mitchell v. Board of Trustees, 599 F.2d 582, 584 (4th Cir. 1979).

[18] 519 F.2d 661 (4th Cir. 1975).

[19] Mitchell v. Board of Trustees, 415 F. Supp. at 517-18; *see* Mitchell v. Board of Trustees, 599 F.2d 582, 584; General Electric Co. v. Gilbert, 429 U.S. 125 (1976).

[20] General Elec. Co. v. Gilbert, 429 U.S. 125 (1976).

[21] Mitchell v. Board of Trustees, 599 F.2d 582, 585 (4th Cir. 1979).

[22] *Id.* Subsequent to the filing of the *Mitchell* appeal, the Supreme Court decided Nashville Gas Co. v. Satty, 434 U.S. 136 (1977). *See* Mitchell v. Board of Trustees, 599 F.2d 582, 586-87 (4th Cir. 1979); text accompanying notes 42-53 *infra*.

[23] Mitchell v. Board of Trustees, 599 F.2d 582, 586-87 (4th Cir. 1979). The Supreme Court originally formulated the disparate impact doctrine in Griggs v. Duke Power Co., 401 U.S. 424, 430-32 (1971). Under a disparate impact analysis, a facially nondiscriminatory employment policy is deemed prima facie violative of Title VII if the policy's effects are discriminatory in nature. *See also* Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (disparate impact applied in weight and height requirement challenge). A discriminatory motive need not be proven under a disparate impact analysis. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); Washington v. Davis, 426 U.S. 229, 246-47 (1976). *But see* General Elec. Co. v. Gilbert, 429 U.S. 125, 137 (1976) (implying the necessity to prove intent under § 703(a)(1) of Title VII).

[24] In adopting the District Court's finding of facial neutrality, the Fourth Circuit cautiously observed that the determination hinged on the court's identification of the chal-

regulation imposed a hardship only on female teachers.[25] As a result, the court reversed the district court judgment for the school board and remanded the case for consideration of any business necessity defense that the defendants might assert.[26]

Mitchell, like other Title VII sex-related employment discrimination cases, involved section 703(a) of the Civil Rights Act of 1964.[27] Subsection one of section 703(a) declares unlawful any employment practice which discriminates on the basis of an individual's sex.[28] A violation of subsection two of section 703(a) occurs when an employment practice restricts employment opportunities or affects an employee's status because of the worker's sex.[29]

Two recent Supreme Court opinions interpreting section 703(a), *General Electric Co. v. Gilbert*[30] and *Nashville Gas Co. v. Satty*,[31] illustrate the difficulties faced by the judiciary in developing a workable standard for adjudicating pregnancy discrimination cases under Title VII. *Gilbert* involved a section 703(a)(1) challenge to an employee disability plan. The plaintiffs alleged that the policy discriminated on the basis of sex, since the plan provided nonoccupational sickness and accident benefits but excluded from coverage disabilities resulting from pregnancy.[32] Relying primarily on the dictates of a prior constitutional decision,[33] the Supreme

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lenged policy. Mitchell v. Board of Trustees, 599 F.2d 582, 585 n.4 (4th Cir. 1979). Although realizing that the pregnancy notification requirement lacked neutrality for disparate impact analysis, the *Mitchell* court accepted the lower court's focus on the school's unwritten policy of contract non-renewal where a teacher could not assure a full year's service. *Id.* at 584-85.

[25] *Id.* at 586-87.

[26] *Id.* at 588. Under a disparate impact analysis, an employer must demonstrate business necessity for the implementation of a discriminatory policy. *See* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). To satisfy the business necessity test, an employer must show more than a mere business purpose behind a discriminatory policy. *See id.* (manifest relation to employment); Robinson v. Lorillard Corp., 444 F.2d 791, 798, *cert. dismissed*, 404 U.S. 1006 (1971); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 249 (10th Cir. 1970), *cert. denied*, 410 U.S. 954 (1971) (necessary to safe and efficient operation of business); 29 C.F.R. § 1604.10(c) (1979) (EEOC Guideline).

[27] 42 U.S.C. § 2000e-2(a) (1976); *see* Mitchell v. Board of Trustees, 599 F.2d 582, 583 (4th Cir. 1979).

[28] 42 U.S.C. § 2000e-2(a)(1) (1976).

[29] Id. § 2000e-2(a)(2) (1976).

[30] 429 U.S. 125 (1976).

[31] 434 U.S. 136 (1977).

[32] General Elec. Co. v. Gilbert, 429 U.S. 125, 127-28 (1976).

[33] *Id.* at 132-40. The Supreme Court based the *Gilbert* decision on Geduldig v. Aiello, 417 U.S. 484 (1974). In *Geduldig*, the Supreme Court rejected a constitutional challenge to California's disability program which excluded from coverage certain pregnancy-related disabilities. *Id.* at 486. In refusing to consider pregnancy as a sex-based classification, the Court deemed the exclusion rationally supportable by the state's legitimate interest in the program's fiscal integrity. *Id.* at 495-96. The applicability of *Geduldig* to the *Gilbert* case is questionable since the Supreme Court decided *Geduldig* within a constitutional equal protection analysis requiring a different standard for adjudication than the statutory claim presented in *Gilbert*. *See* Washington v. Davis, 426 U.S. 229, 239 (1976).

Under a constitutional analysis, a discriminatory policy is unassailable so long as there is a reasonable basis for drawing distinctions among classes of individuals. *See* Geduldig v.

Court held that the plan's exclusion of pregnancy-related disabilities did not violate Title VII.[34]

Within a disparate impact framework,[35] the Court viewed the disability plan as facially neutral in its treatment of the sexes.[36] Refusing to recognize differential disability coverage of pregnancy as a distinction based on sex, the Court maintained that the employee plan merely distinguished between pregnant women and non-pregnant persons.[37] Moreover, the Court rejected the claim that the facially neutral policy had a discriminatory effect.[38]

The *Gilbert* decision appeared to conflict with a trend promoting Title VII protection for female workers.[39] The Supreme Court's subsequent decision in *Nashville Gas Co. v. Satty*,[40] however, determined that *Gilbert* limits but does not eliminate Title VII's applicability to pregnancy related discrimination.[41]

In *Nashville Gas Co. v. Satty*, a company employee brought suit under Title VII challenging the validity of the company's sick pay and seniority policies. The plaintiff maintained that the company sexually discriminated against female employees by excluding pregnancy absences from reimbursement under the employee sick leave policy.[42] The Su-

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Aiello, 417 U.S. 484, 495 (1974). A stricter standard, however, controls the statutory analysis under Title VII. *Gilbert*, 429 U.S. 137-40. Within a statutory framework, a policy which has a disparate impact upon a group is prima facie violative of Title VII. A court will sustain the policy only if the defendant can establish business necessity for its implementation. *Id.* *See* Mitchell v. Board of Trustees, 599 F.2d 582, 587 (4th Cir. 1979); note 26 *supra*.

In *Gilbert*, the incorporation of the constitutional standard of *Geduldig* within the traditional statutory analysis caused confusion in deciding what standard determines the outcome of Title VII adjudications. *See Differential Treatment*, *supra* note 4, at 720 n.9. Such confusion is evident in *Mitchell* since the Fourth Circuit decided to remand the case for a hearing on the business necessity defense in view of the School Board's and lower court's mistaken reliance on a constitutionally oriented legitimate state interest standard. Mitchell v. Board of Trustees, 599 F.2d 582, 587-88 (4th Cir. 1979). *See* note 26 *supra*. *See generally* M. Hill, *supra* note 4, at 579-81; Comment, *Sex Discrimination—Distinctions Between Title VII and Equal Protection*—General Electric Co. v. Gilbert, 31 RUTGERS L. REV. 91, 100-05 (1978); Comment, *Proving Discriminatory Intent From a Facially Neutral Decision With a Disproportionate Impact*, 36 WASH. & LEE L. REV. 109 (1979).

[34] General Elec. Co. v. Gilbert, 429 U.S. 125, 145-46 (1976).

[35] *See* notes 23 & 26 *supra*.

[36] General Elec. Co. v. Gilbert, 429 U.S. 125, 135 (1976); *see* Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974); note 62 *infra*.

[37] General Elec. Co. v. Gilbert, 429 U.S. 125, 139-40 (1976).

[38] *Id.* at 138. The court found the policy to be lacking in discriminatory effect since the plaintiffs failed to prove the plan more valuable to men than women. *Id.*

[39] *Gilbert* came as a surprise to many observers because, prior to the decision, distinctions based on pregnancy were seen as violative of Title VII. *See Victory*, *supra* note 2, at 16, 19; Barkett, *Purpose, Effect, and* Nashville Gas Co. v. Satty, 16 J. FAM. L. 401, 413 (1978) [hereinafter cited as *Purpose, Effect*]. Eighteen federal district courts and seven federal courts of appeals have held pregnancy-based employment discrimination violative of Title VII. *See* Somers v. Aldine Independent School Dist., 464 F. Supp. 900, 902 (S.D. Tex. 1979).

[40] 434 U.S. 136 (1977).

[41] *See* Mitchell v. Board of Trustees, 599 F.2d 582, 586-87 (4th Cir. 1979).

[42] Nashville Gas Co. v. Satty, 434 U.S. 136, 138 (1977).

preme Court sustained the policy under section 703(a)(1) by finding the company's program "legally indistinguishable" from the disability plan upheld in *Gilbert*.[43] In challenging the seniority policy, the plaintiff asserted that the company practice adversely affected the job status of female employees in violation of Title VII.[44] Under the challenged policy, the pregnant plaintiff on maternity leave lost any seniority accrued before her leave of absence.[45] The employee did not regain her previously accumulated seniority upon return to work and, thus, became disadvantaged when competing for future positions.[46]

The Supreme Court employed a disparate impact analysis to hold the company seniority policy prima facie violative of section 703(a)(2).[47] The Court conceded that the policy was facially neutral since both men and women retained seniority while on leave for reasons other than pregnancy.[48] However, the *Satty* Court deemed the policy violative of Title VII because the company deprived female employees of job opportunities without placing similar restraints on male workers.[49]

The Supreme Court in *Gilbert* and *Satty* failed to develop a workable rule for handling Title VII pregnancy-related claims.[50] At best, these opinions demonstrate that courts may sustain disability programs excluding pregnant employees while holding seniority policies that treat formerly pregnant employees differently than other workers violative of Title VII. Although the *Satty* Court attempted to distinguish the two employment practices, the Court did not construct a clear and rational distinction.[51]

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[43] *Id.* at 143.

[44] *Id.* at 138.

[45] *Id.* at 138-39.

[46] *Id.* Rather than return to work without any accumulated seniority, the petitioner in *Satty* found it more advantageous to quit in order to draw unemployment compensation. *Id.*

[47] *See* notes 23 & 26 *supra.*

[48] Nashville Gas Co. v. Satty, 434 U.S. 136, 140 (1977). The policy's neutrality is questionable since the denial of accumulated seniority has only been applied in the context of maternity leave. *See id.* at 140 n.2. Justice Powell, concurring in the result and concurring in part, would not assume the policy's facial neutrality. *Id.* at 152 n.6 (Powell, J., concurring).

[49] *Id.* at 141-43.

[50] *See Differential Treatment*, *supra* note 4, at 742 ("jurisprudential gymnastics" needed to reconcile *Satty* and *Gilbert* decisions). One commentator has suggested that the Court's ineptness is due to the fact that the judiciary is the least equipped of the governmental branches to deal with the pregnancy issue. *See Purpose, Effect*, *supra* note 39, at 406.

[51] Justice Stevens suggested that the distinction between the holdings might hinge on the effects of the policies on the female employees. Stevens proposed that some discrimination would be permissible during the employee's maternity absence. Discriminatory policies, however, are invalid if their effects extend beyond the duration of the leave period. Nashville Gas Co. v. Satty, 434 U.S. 136, 155 (1977) (Stevens, J., concurring).

The Court may have been concerned with the economic implications of their holdings. *See* City of Los Angeles v. Manhart, 435 U.S. 702, 717 (1978); General Elec. Co. v. Gilbert, 429 U.S. 125, 131-32 (1976); Robinson v. Lorillard Corp., 444 F.2d 791, 799 n.8 (4th Cir. 1971); Comment, *Sex Discrimination—Satty Narrows Gilbert—Some Pregnancy Discrimination is Sex Related*, 27 BUFFALO L. REV. 295, 317-18 (1978) [hereinafter cited as *Satty*

In attempting to reconcile the decisions, the Supreme Court in *Satty* distinguished the challenged policies by postulating a benefit-burden distinction between employment practices involving female employees.[52] While viewing the disability plans as merely precluding the extension of greater fringe benefits to women, the Court deemed the seniority policy violative of Title VII since the denial of accumulated seniority proved burdensome to female workers by limiting the availability of employment opportunities.[53]

The *Satty* Court implied that the applicability of sections 703(a)(1) or (a)(2) might be outcome determinative in sex-based employment discrimination cases. The Court stated that the disability plan challenge would be more appropriate under section 703(a)(1) due to the difficulty of proving that the exclusion of disability benefits restricted the employment status of the complainant-employee.[54] Under such an approach, the *Gilbert* analysis becomes relevant to section 703(a)(1) actions, while section 703(a)(2) directly applies to *Satty*-type restrictions on employment opportunities. This distinction becomes crucial to the outcome of the *Satty* decision since the Court implied that intent to discriminate, as opposed to mere proof of discriminatory effect, might be necessary to invalidate an employment policy under section 703(a)(1).[55]

After reviewing the Supreme Court's decisions, the Fourth Circuit found the mandatory notification policy in *Mitchell* more analogous to the seniority policy struck down in *Satty* than to the disability plan upheld in *Gilbert*.[56] *Satty* was more relevant to the *Mitchell* determination because both the school board policy and the seniority challenge effec-

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Narrows Gilbert]; *Differential Treatment, supra* note 4, at 740-42. A decision requiring employee disability plans to include sick pay benefits for women on maternity leave could prove to be excessively expensive for the company concerned. The economic consequences of the elimination of mandatory notification and termination policies, however, could be minimal. Some commentators have suggested that the impetus behind the *Satty* court's rejection of the seniority policy rested with the policy's inequitable effects on pregnant employees. *See Differential Treatment, supra* note 4, at 740-41; *Purpose, Effect, supra* note 39, at 474 n.285.

[52] Nashville Gas Co. v. Satty, 434 U.S. 136, 141-42 (1977).

[53] *Id.* The *Satty* court's benefit-burden distinction has been criticized as unworkable since the imposition of an employment policy may be burdensome to one class of persons and at the same time beneficial to another. *See id.* at 154 n.4 (Stevens, J., concurring). Consequently, the decision provides no guideline as to whether the court will view a challenged policy as beneficial or burdensome. As a result, much uncertainty will surround the outcome of pregnancy discrimination controversies since the Court's characterization of the policy could be outcome determinative. *See* H.R. Rep. No. 95-948, 95th Cong., 2nd Sess., *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 4749, 4751; *Differential Treatment, supra* note 4, at 717, 728, 738, 747 n.122, 748. Comment, *Nashville Gas Co. v. Satty: Pregnancy Classification in Employers* [sic] *Seniority Policy Amounts to Sex Discrimination*, 5 OHIO N.U. L. REV. 506, 509-12 (1978) [hereinafter cited as *Pregnancy Classification*].

[54] Nashville Gas Co. v. Satty, 434 U.S. 136, 144-45 (1977).

[55] *See id.* at 144; General Elec. Co. v. Gilbert, 429 U.S. 125, 136 (1976). The implied adoption of an intent standard in dealing with 703(a)(1), as opposed to the disparate effect guidelines of 703(a)(2), can be traced to the court's controversial adherence to the constitutional analysis of *Geduldig*. *See* note 33 *supra*.

[56] Mitchell v. Board of Trustees, 599 F.2d 582, 586-87 (4th Cir. 1979).

tively burdened the employment status of women.[57] As a result, the *Mitchell* court ruled section 703(a)(2) applicable to the plaintiff's case.[58]

By reinforcing the *Satty* Court's apparent divergence from a broad *Gilbert* rule, the Fourth Circuit in *Mitchell* further promoted Title VII's purpose in eliminating employment discrimination[59] with minimal intrusion into the operability of the school system.[60] The curtailment of *Mitchell*-like school policies will have no adverse economic or educational consequences outweighing the increased job security for women teachers resulting from the eradication of the discriminatory employment practice.

Although the *Mitchell* decision is consistent with the Supreme Court's *Satty* opinion, the Fourth Circuit did not provide a workable standard for handling Title VII claims.[61] This inadequacy reflects the court's conformity with the questionable distinctions made by the Supreme Court when dealing with the relationship between pregnancy related employment policies and sex discrimination under Title VII.[62] Constrained by the availa-

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[57] *Id.*

[58] *Id.* Section 703(a)(1) appears equally applicable for determining the validity of the pregnancy notification requirement since the policy arguably discriminates against female teachers with respect to the terms of employment. 42 U.S.C. § 2000e-2(a)(1). If so, the *Mitchell* challenge illustrates the unworkable distinction made by the Supreme Court between §§ 703(a)(1) & 703(a)(2). *See* text accompanying notes 54-55 *supra.*

[59] *See* McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 800 (1972).

[60] Mitchell v. Board of Trustees, 415 F. Supp. 512, 518 (D.S.C. 1976); *see* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 641-42 (1974). In *Mitchell*, the plaintiff gave school officials seven months advance notice of her anticipated leave of absence and arranged for a substitute teacher to replace her for that period. 415 F. Supp. at 518.

[61] Although *Mitchell* does not reveal a workable standard, the Fourth Circuit ruled consistently with the economic trends in sex discrimination cases, since the invalidation of the school policy will bring about little or no fiscal pressure on the school budget. *See* note 51 *supra.*

[62] *See, e.g.*, Gilbert v. General Elec. Co., 429 U.S. 125, 136, 138-40 (1976); Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974). The judiciary has stubbornly adhered to the view that pregnancy is a voluntary condition which is not a medical disability. Gilbert, 429 U.S. at 136. The Court has steadfastly maintained that distinctions based on pregnancy involve condition-related, rather than sex-based, discrimination. *Geduldig*, 417 U.S. at 496 n.20.

The Court has viewed pregnancy distinctions as merely differentiating between pregnant and non-pregnant persons in spite of the administrative guidelines on Title VII's sex discrimination provisions provided by the EEOC. *See Gilbert*, 429 U.S. at 138-40; *Geduldig*, 417 U.S. at 496-97; 29 C.F.R. §§ 1604.1-.10 (1979). These administrative regulations indicate that pregnancy-related employment distinctions are sex discriminatory in nature. *See* 29 C.F.R. § 1604.10 (1979). Although Congress has not delegated authority to the EEOC to promulgate rules or regulations, all circuits are in agreement that the Guidelines are entitled to great deference. General Elec. Co. v. Gilbert, 429 U.S. 125, 147 (1976) (Brennan, J., dissenting) (Brennan summary of circuit cases); Griggs v. Duke Power Co., 401 U.S. 424, 433 (1971). The *Gilbert* Court's failure to follow the Guidelines because of alleged inconsistencies contained within various EEOC pronouncements created an uncertainty concerning the proper weight the judiciary is to accord the policy statements. *See* General Elec. Co. v. Gilbert, 429 U.S. 125, 141-45 (1976). However, the Supreme Court in Nashville Gas Co. v. Satty reaffirmed the deference owed to the EEOC interpretations. *See* Nashville Gas Co. v. Satty, 434 U.S. 136, 142 n.4 (1977); *Pregnancy Classification*, supra note 53, at 510-12; Act of Oct. 31, 1978, Pub. L. 95-555, 92 Stat. 2076 (1978) (to be codified as 42 U.S.C.

ble precedent, the Fourth Circuit merely classified another employment practice within the Supreme Court's *Gilbert-Satty* framework.

Realizing the uncertainty surrounding the judicial treatment of pregnancy discrimination claims, Congress has amended Title VII to make clear that sex discrimination, as delineated in section 703(a), encompasses all employment distinctions based on pregnancy.[63] The amendment, commonly referred to as "K", provides a much needed and workable guideline which will simplify the identification and termination of sex-based discriminatory practices.[64] "K" will help alleviate the arbitrary line-drawing and unpredictability which characterizes the most recent Court opinions dealing with the rights of women employees by making discrimination based on pregnancy a per se violation of Title VII.[65]

Under amendment "K", the outcome of the *Mitchell* case would be affirmed since "K" makes clear that pregnant women must be treated the same as non-pregnant persons in the employment context. The mandatory notification requirement and the contract termination policy would be found prima facie violative of Title VII. As a result, amendment "K" will shorten the "meandering course"[66] of Title VII pregnancy discrimination adjudication[67] as exemplified by the seven years of 'see-saw' litigation in *Mitchell v. Board of Trustees.*

CHARLES JUSTER

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§ 2000e(k) (adopting the EEOC Guidelines). The Guidelines are applicable in the instant case to establish a prima facie violation of Title VII since the school board's policy excluded Mitchell from employment because of her pregnancy. *See* 29 C.F.R. 1604.10(a), (b) (1979).

[63] The new amendment, Act of Oct. 31, 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (to be codified as 42 U.S.C. § 2000e(k)), provides that:

> The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected to but similar in their ability or inability to work. *Id.* § 2000e(k).

See H.R. Rep. No. 95-948, 95th Cong., 2nd Sess. 2, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 4749, 4750. The amendment will affect women taking maternity leave on or after April 29, 1979. *See generally Pregnancy Discrimination, supra* note 4, at 43; Davie, *supra* note 4; *Victory, supra* note 2, at 12.

[64] *See* H.R. Rep. No. 95-948, 95th Cong., 2nd Sess. 3, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 4749, 4751.

[65] *Id.*

[66] *See* Nashville Gas Co. v. Satty, 434 U.S. 136, 148 (1977) (Powell, J., concurring in the result and concurring in part).

[67] *See, e.g.*, Somers v. Aldine Independent School Dist. 464 F. Supp. 900 (S.D. Tex. 1979) (amendment "K" used to summarily invalidate maternity policy requiring pregnant employees to take mandatory leave following first trimester of pregnancy).