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VIII. Employment Discrimination & Affirmative Action

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VIII. EMPLOYMENT DISCRIMINATION AND AFFIRMATIVE ACTION

A. *Affirmative Action Requirements for Government Subcontractors: Statutory Authority for Executive Order 11,246*

Presidents of the United States have issued executive orders to prevent companies that perform work for the federal government from using discriminatory hiring practices.[1] President Johnson issued Executive Order 11, 246 (the Order) to forbid government contractors and subcontractors from using discriminatory hiring practices and to require contractors to take affirmative action to ensure equal employment opportunities for minorities.[2] Since the President cannot legis-

[1] Exec. Order No. 8802, 3 C.F.R. 957 (1938-1943 Compilation). President Franklin D. Roosevelt issued an anti-discrimination Executive Order during World War II. Exec. Order No. 8802, 3 C.F.R. 957 (1938-1943 Compilation). The order required all defense contractors to include in government contracts a covenant not to discriminate against employees because of race, color, creed, or national origin. *Id.* In 1943, Roosevelt ordered that all government contracts include the anti-discrimination clause. Exec. Order No. 9346, 3 C.F.R. 1280 (1938-1943 Compilation). In 1951, President Truman created the Committee on Government Contract Compliance to enforce the non-discrimination contract provisions. Exec. Order No. 10,308 3 C.F.R. 837 (1949-1953 Compilation). In 1954, President Eisenhower extended the provisions imposed on government contractors to government subcontractors. Exec. Order No. 10,557, 3 C.F.R. 203 (1954-1958 Compilation). President Kennedy expanded the anti-discrimination Executive Order program by requiring contractors to include affirmative action clauses in government contracts. Exec. Order No. 10,925, 3 C.F.R. 448 (1959-1963 Compilation). In 1963, Executive Order 11,114 expanded the Executive Order program to include all federally assisted contracts. Exec. Order No. 11,114, 3 C.F.R. 774 (1959-1963 Compilation).

[2] Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965 Compilation), *reprinted in* 42 U.S.C. § 2000e (1976) [hereinafter cited as Exec. Order 11,246]. Executive Order 11,246 cites no express statutory authority for its issuance. *See* Exec. Order 11,246 *supra*. The preface to the Order states the Order was issued by virtue of the authority vested in the President of the United States through the Constitution and statutes of the United States. *Id.*

Executive Order 11,246 regulates employment practices concerning federal employees, federal contracts, and federally assisted contracts. *Id.* The regulations promulgated pursuant to the Order require all contractors to include an equal employment opportunity clause in each government contract and in each contract with a subcontractor. *Id.* The equal employment opportunity clause provides that the employer will not discriminate against any employee or applicant regarding race, color, religion, or national origin, and that the employer shall take affirmative action to ensure minority hiring. *Id.* Executive Order 11,375 expanded the equal employment opportunity clause to include a prohibition against sex discrimination. Exec. Order 11,375, 3 C.F.R. 684 (1966-1970 Compilation), *reprinted in* 42 U.S.C. § 2000e (1976).

Under Executive Order 11,246 federal contractors and subcontractors must report their hiring practices to the government. Exec. Order 11,246 *supra*. Bidders on federal contracts state affirmative action goals in their bids. *Id.* Contractors and subcontractors with a government contract of more than $10,000 also are subject to the affirmative action regulations. *See* 41 C.F.R. § 60-1.5 (1980). Failure to comply with the Executive Order can result in severe sanctions. Exec. Order 11,246 *supra*. The Secretary of Labor may publish the names of contractors and subcontractors that have failed to comply, may enjoin violations, and may

late,[3] the Supreme Court has stated that application of Executive Order 11,246 to a particular contractor or subcontractor requires a Congressional grant of authority.[4] In *Liberty Mutual Insurance Co. v. Friedman*,[5] the Fourth Circuit addressed the issue whether an insurance company for government contractors is a subcontractor required to compy with the affirmative action provisions of Executive Order 11,246.

Liberty Mutual Insurance Company (Liberty) underwrote workmen's compensation insurance for several companies that performed government contracts.[6] Liberty provided blanket coverage for all employees of the insured companies whether or not the employees performed work under a government contract or subcontract.[7] In October 1977, the Department of Labor informed Liberty that as a subcontractor within

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recommend that the Equal Employment Opportunity Commission institute an action under the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e17 (1976). Exec. Order 11,246 *supra*. In addition, the Secretary has authority to prosecute offenders for furnishing false information, to cancel, terminate, or suspend any contract, and to prohibit other federal agencies from contracting with the non-complying contractors. *Id.*

The Department of Labor has proposed regulations that would keep the affirmative action program intact, but would change several procedures under the Order. *See* 46 FED. REG. 42968 (1981). The regulation would consolidate Executive Order 11,246 with other programs which the Office of Federal Contract Compliance administers. *Id.* at 42968. The Labor Department proposes to raise the threshold contract size which triggers written affirmative action requirements to $50,000. *Id.* at 42979. The purpose of the proposals is to reduce government paperwork and to save taxpayer dollars. *Id.*

[3] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588 (1952) (Congress has exclusive lawmaking power under Constitution).

[4] *See* Chrysler Corp. v. Brown, 441 U.S. 281, 304 (1979). In *Chrysler*, the Chrysler Corporation, as a party to numerous government contracts, was required to comply with Executive Order 11,246. *Id.* at 286. The Department of Labor's Office of Federal Contract Compliance Programs (OFFCP) ordered Chrysler to furnish to the Defense Logistics Agency (DLA) information regarding the status of the Chrysler affirmative action program. *Id.* The DLA was the designated agency that monitored Chrysler's employment practices. *Id.* As Executive Order 11,246 permits, OFFCP made available for public inspection records of Chrysler discovered pursuant to the Order. *Id.* at 287. Third parties, through the Freedom of Information Act (FOIA), 5 U.S.C. 552 (1976), requested the DLA to release information pertaining to Chrysler's Newark, Delaware assembly plant. *Id.* The Chrysler Corporation objected to the disclosure because the information involved trade secrets and confidential business data. *Id.* at 294-95. Chrysler argued that the Trade Secrets Act, 78 U.S.C. § 1905 (1976), protected disclosure unless the disclosure was authorized by law. *Id.* The government argued that the OFFCP regulations had the force and effect of law and permitted disclosure. *Id.* at 303. The Supreme Court looked to the Federal Property & Administrative Services Act, 40 U.S.C. §§ 471 to 493 (1976), Titles VI & VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-6 (1976), and 42 U.S.C. §§ 2000e to 2000e-17 (1976), the Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e-4 to 2000e-17 (1976) (amending Title VII), and general executive authority to find statutory authority for the OFFCP regulations issued pursuant to Executive Order 11,246. *Id.* at 304-06. The Court held that no federal statute reasonably contemplated the release of the trade secrets or confidential business data. *Id.* at 306.

[5] 639 F.2d 164 (4th Cir. 1981).

[6] *Id.* at 166.

[7] *Id.*

the meaning of Executive Order 11,246, Liberty was subject to the affirmative action requirements of the Order.[8] Liberty sought a declaratory judgment in federal district court contesting the company's classification as a subcontractor subject to the affirmative action regulations.[9] The district court held that Liberty was a subcontractor within the meaning of Executive Order 11,246[10] and found statutory authority for application of regulations promulgated under the Order to Liberty.[11] Liberty appealed to the Fourth Circuit.[12]

The Fourth Circuit reversed the district court because the court found no statutory authority for application of Executive Order 11,246 to Liberty.[13] Although the Fourth Circuit concluded that Liberty was a subcontractor,[14] the court did not find congressional approval for application of the Order to an insurance company that underwrote workmen's compensation policies for federal contractors.[15] Since Executive Order 11,246 had no express congressional authorization,[16] the Fourth Circuit[17] sought

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[8] *Id.* Under Executive Order 11,246, the Secretary of Labor can take necessary steps to enforce the Order. Exec. Order 11,246, *supra* note 2. The Secretary of Labor has delegated his authority to enforce the Order to the OFFCP. 41 C.F.R. § 60-1.2 (1980).

[9] *See* Liberty Mutual Insurance Co. v. Friedman, 485 F. Supp. 695, 697-98 (D. Md. 1977).

[10] *Id.* at 703-08. The district court noted the issue whether a workmen's compensation insurer was a government subcontractor was an issue of first impression. *Id.* at 700. In *Liberty Mutual*, the district court stated that the term "subcontractors" has been construed liberally to include a research laboratory, a company which provided security services and transfer funds for government contractors, and a company which provided training films and other materials and services used to meet the affirmative action requirements imposed on all government contractors. *Id.* at 707-08. The district court stated that other "subcontractors" included a title insurance company, a company which assembled computers and trained programmers to facilitate the performance of government contracts, and a company which obtained mortgages and commercial loans necessary to enable the prime contractor to have the financing needed to perform a government contract. *Id.* at 708.

[11] *Id.* at 716. The district court in *Liberty Mutual* found statutory authority for application of Executive Order 11,246 in the Federal Property & Administrative Services Act, 40 U.S.C. §§ 471 to 493 (1976), Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1976), and the Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e-4 to 2000e-17 (1976). 485 F. Supp. at 708-16.

[12] 639 F.2d at 166.

[13] *Id.* at 166-68.

[14] *Id.* at 167.

[15] *Id.* at 166, 168.

[16] *See* note 2 *supra.*

[17] 639 F.2d at 168-72. The Fourth Circuit in *Library Mutual* did not decide whether Congress could require insurance companies providing workmen's compensation insurance to federal contractors to comply with the affirmative action requirements of Executive Order 11,246. *Id.* The Court did decide, however, whether Congress had extended to the executive branch the authority to apply the Order to Liberty. *Id.* The Fourth Circuit followed the Supreme Court decision in *Chrysler Corp. v. Brown* for possible statutory authority for Executive Order 11,246. *Id.* at 168-69 n.10; *see* note 4 *supra.* The government contended that it had no burden to identify a specific statutory source for Executive Order 11,246 because Congress generally had approved the Executive Order Program. 639 F.2d at 168-69 n.10. The Fourth Circuit concluded that a specific congressional grant was necessary to authorize application of the Order to Liberty. *Id.*

but could not find legislation that reasonably contemplated the regulations issued pursuant to Executive Order 11,246.[18]

The Fourth Circuit rejected Liberty's argument that Liberty was not a government subcontractor.[19] Liberty contended that the regulations apply to a particular subcontractor only when a contractor has no alternative but employ that subcontractor.[20] Since contractors can self-insure their projects, Liberty contested its subcontractor status because no company was required to use Liberty's services.[21] The Fourth Circuit disagreed with Liberty's argument and held that a company was a subcontractor if the company's services were legally necessary.[22] Since all states statutorily require workmen's compensation insurance,[23] the

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[18] 639 F.2d at 172. Since the Fourth Circuit in *Liberty Mutual* did not find statutory authority for application of the Order to Liberty, the court did not address Liberty's alternative contentions. *Id.* at 166. Liberty had asserted that the government could not bind Liberty to a contractual obligation without Liberty's consent, and that even if the Executive Order applied to Liberty the Order constituted an unlawful delegation of legislative authority to the executive branch. *Id.* Liberty probably would not have prevailed on the consent argument because the government has broad authority to determine the conditions of government contracts. *See, e.g.*, Perkins v. Lukens Steel Co., 310 U.S. 113, 127 (1940) (government has power to fix terms and conditions of contract with contracting party); Southern Illinois Builders Ass'n v. Ogilvie, 327 F. Supp. 1154, 1161 (S.D. Ill. 1971), *aff'd*, 471 F.2d 680, 687 (7th Cir. 1972) (government has unrestricted power to determine conditions of federal contracts). Once a party contracts with the government that party becomes subject to the government's conditions. United States v. New Orleans Public Serv., Inc., 553 F.2d 459, 469 (5th Cir. 1977), *vacated*, 436 U.S. 942 (1978) (lack of consent to government contract provisions no defense for failure to fulfill obligations of government regulations).

[19] 639 F.2d at 167.

[20] *Id.* The regulations promulgated pursuant to Executive Order 11,246 define subcontract as:

> [A]ny agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee):
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> (1) For the furnishing of supplies or services or for the use of real or personal property, including lease arrangements, which, in whole or in part, is necessary to the performance of any one or more contracts; or
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> (2) Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken, or assumes.

41 C.F.R. § 60-1.3 (1980).

Liberty argued that the term "is necessary" referred to "any agreement" under the regulations. 639 F.2d at 167. Thus, Liberty asserted that the agreement with the subcontractor had to be necessary to constitute a subcontract. *Id.* The *Liberty Mutual* court interpreted "is necessary" to refer to "for the furnishing of supplies and services" because a contractor rarely is forced to hire a particular subcontractor. *Id.*

[21] 639 F.2d at 167; *see* note 20 *supra.*

[22] 639 F.2d at 167.

[23] *Id.* The states within the Fourth Circuit statutorily require workmen's compensation insurance. *See* W. VA. CODE § 23-2-1 (1981) (employers are required to provide workmen's compensation insurance); MD. CODE ANN. art. 101, § 15 (1979) (employer must provide workmen's compensation insurance); N.C. GEN. STAT. § 97-3 (1979) (presumption that all employers and employees are under Workmen's Compensation Act); S.C. CODE § 65.1-23 (1980) (employers presumed to accept provisions of Workmen's Compensation Act); VA. CODE § 65.1-23 (1980) (employers presumed to accept provisions of Workmen's Compensation Act).

Fourth Circuit concluded that Liberty was providing a legally necessary service subject to the regulations.[24]

After concluding that Liberty was a subcontractor, the Fourth Circuit sought statutory authority for application of the Order to Liberty.[25] Since Executive Order 11,246 has no express congressional authorization,[26] the Fourth Circuit considered whether the Federal Property & Administrative Services Act (the Procurement Act) implied authority for application of the Order to Liberty.[27] The Fourth Circuit examined

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[24] 639 F.2d at 167.

[25] *Id.*

[26] *See* note 2 *supra.*

[27] 639 F.2d at 169-71. Congress' purpose under the Procurement Act is to provide the federal government an economical and efficient system for the procurement and supply of personal property and non-personal services. 40 U.S.C. § 471 (1976). The Procurement Act also provides for the economic and efficient use of available government property, surplus property, and government records. *Id.* The President has the power to carry out the provisions of the Act. *Id.* § 486(a).

In addition to considering the Procurement Act as sufficient statutory authority for Executive Order 11,246, the Fourth Circuit in *Liberty Mutual* considered Titles VI and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-6 (1976) and 42 U.S.C. §§ 2000e to 2000e-17 (1976), and the rejection of amendments to the Equal Employment Opportunity Act of 1972 as possible statutory authority for application of the Order to Liberty. 639 F.2d at 172. Title VI of the Civil Rights Act of 1964 prohibits employment discrimination under any program or activity receiving federal financial assistance. 42 U.S.C. § 2000d (1976). Presidential action under Title VI of the Civil Rights Act of 1964 is subject to congressional approval. *Id.* Executive Order 11,246 has no similar provision for congressional review of presidential action. Exec. Order 11,246, *supra* note 2. In *Chrysler Corp. v. Brown*, the Supreme Court concluded that Title VI of the Civil Rights Act of 1964 did not offer statutory authority for Executive Order 11,246 because Title VI placed a congressional check on presidential power and Executive Order 11,246 did not. 441 U.S. at 305-06 n.35; *see* notes 2 & 4 *supra.* Title VII of the Civil Rights Act of 1964 prohibits discriminatory hiring practices and discriminatory work practices by public employers, labor organizations, or private businesses having fifteen or more employees. 42 U.S.C. § 2000e(a) & (b) (1976). Title VII does not require an employer to initiate affirmative action hiring practices. *Id.* § 2000e-2(j). Executive Order 11,246 requires the contractor to take affirmative action to employ minorities. Exec. Order 11,246, *supra* note 2. The Fourth Circuit in *Liberty Mutual* correctly held that Title VII of the Civil Rights Act of 1964 does not provide statutory authority for Executive Order 11,246 because the Order requires affirmative action and Title VII does not. *See* 639 F.2d at 172; notes 2 & 4 *supra.* As the Fourth Circuit noted, the real issue is whether Title VII is the exclusive federal remedy in the employment discrimination area and thus pre-empts Executive Order 11,246. *See* 639 F.2d at 172. Courts do not view Title VII as the exclusive federal remedy in the employment discrimination area. *See, e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36, 48-49 (1974) (Title VII supports existing employment discrimination laws); United States v. New Orleans Public Serv., Inc., 553 F.2d 459, 467 (5th Cir. 1977) (Title VII not exclusive federal remedy for employment discrimination); United States v. Duquesne Light Co., 423 F. Supp. 507, 509 n.3 (W.D. Pa. 1976) (Title VII not exclusive remedy for employment discrimination).

Another source of congressional authority that the Fourth Circuit considered for application of the Order to Liberty was the ratification of the Executive Order Program in the debates surrounding adoption of the Equal Employment Opportunity Act of 1972. *See* 639 F.2d at 172. Congress rejected amendments which would have made the Civil Rights Act of 1964 the exclusive federal remedy in the employment discrimination area and would have

whether a sufficient nexus existed between the economy and efficiency goals of the Procurement Act and the non-discrimination objectives of the Executive Order.[28] The *Liberty Mutual* court also inquired whether application of the Order to Liberty would promote the economy and efficiency purposes of the Procurement Act.[29] The Fourth Circuit held that the Procurement Act did not provide adequate statutory authority for application of the Order to Liberty.[30]

The Fourth Circuit followed the Third Circuit's decision in *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*[31] to determine whether a sufficient nexus existed between the goals of the Procurement Act and the application of the Order to Liberty.[32] In *Contractors Association*, the Assistant Secretary of Labor required bidders on federally assisted government construction projects to submit affirmative action plans with their bids in accordance with Executive Order 11,246.[33] Before issuance of the Order, factual findings indicated that labor unions had used discriminatory hiring practices against Blacks.[34] The Order required bidders to commit themselves to specific goals for minority hiring.[35] Following issuance of the Order, the contractors involved in the project sought injunctive relief against inclusion of the affirmative action requirements in their bids.[36] The Third Circuit held that

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transferred enforcement of Executive Order 11,246 to the Equal Opportunity Employment Commission. H.R. Rep. No. 92-238 92nd Cong. 2nd Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2137, 2176-77 (1972). Some courts have argued that the rejection of the proposed amendments to the Equal Opportunity Employment Act demonstrated congressional endorsement of the Executive Order Program. *See* Legal Aid Society v. Brennan, 608 F.2d 1319, 1329-30 n.14 (9th Cir. 1979) (Congress' rejection of attack on Executive Order Program constituted ratification of Program); United States v. New Orleans Public Serv., Inc., 553 F.2d 459, 467 (5th Cir. 1977) (Congress has given longstanding recognition to Executive Order 11,246). The *Liberty Mutual* court found no negative ratification of Executive Order 11,246 in order to extend the Program to Liberty. 639 F.2d at 172. The Supreme Court disfavors negative ratification theories. *See* Zuber v. Allen, 396 U.S. 168, 185-86 n.21 (1969) (legislative silence poor way to determine legislative purpose); United States v. Price, 361 U.S. 304, 310-11 (1960) (congressional non-action is dubious foundation for drawing positive inferences).

[28] 639 F.2d at 169-71. The House Report concerning the Procurement Act noted the need for an improved and efficient federal property management program. H.R. Rep. No. 670, 81st Cong., 1st Sess. 207 (1949), *reprinted in* [1949] U.S. CODE CONG. & AD. NEWS 1475, 1476 (1949). The Commission on Organization of the Executive Branch of the Government (the Hoover Commission) reported that the government needed centralization of records, management, and maintenance of public buildings. H.R. Rep. No. 670, 81st Cong., 1st Sess. 207 (1949), *reprinted in* [1949] U.S. CODE CONG. & AD. NEWS 1475, 1476 (1949).

[29] 639 F.2d at 169.

[30] *Id.*

[31] 442 F.2d 159 (3rd Cir.), *cert. denied*, 404 U.S. 854 (1971).

[32] 639 F.2d at 170.

[33] 442 F.2d at 163.

[34] *Id.*

[35] *Id.*

[36] *Id.* at 165.

contractors' bids must include the affirmative action provisions.[37] The Third Circuit limited the holding in *Contractors Association* by noting that all federal procurement contracts must include the affirmative action provision, while the coverage on federally assisted contracts extends only to construction contracts.[38] The *Contractors Association* court noted that the President was not attempting to use the Order to impose his notions of desirable social legislation on the states wholesale.[39] Rather, the Third Circuit concluded that the President acted in an area where racial discrimination would affect government contract costs.[40] The court noted that the federal government had a vital interest in assuring selection of workers from the largest labor pool to minimize federal contract costs.[41]

In *Liberty Mutual*, the Fourth Circuit concluded that Liberty, in contrast to the labor union in *Contractors Association*, did not have a direct connection to federal procurement since Liberty was a subcontractor and not a contractor.[42] In the absence of findings indicating the percentage of government costs attributable to workmen's compensation insurance, the *Liberty Mutual* court could not determine whether application of the Order to Liberty would promote the government efficiency in contract procurement that the *Contractors Association* court found.[43] Furthermore, the Fourth Circuit noted the lack of evidence that insurers practiced the deliberate discrimination that the labor unions in *Contractors Association* had practiced.[44] Thus, the Fourth Circuit concluded that no sufficient factual nexus existed between application of the Order and promotion of government economy and efficiency that could justify application of the Order to Liberty.[45]

The Fourth Circuit refused to accept the proposition that equal employment opportunities alone enabled the government to rely upon the Procurement Act to justify application of the Order to Liberty.[46] The

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[37] *Id.* at 171.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] 639 F.2d at 171.

[43] *Id.*

[44] *Id.* at 170.

[45] *Id.* at 171.

[46] *Id.* The Fourth Circuit in *Liberty Mutual* rejected the notion that broad social and economic objectives enable the government to use the Procurement Act to justify application of Executive Order 11,246. *Id.* Other courts, however, have permitted broad social and economic goals to justify application of the Order. *See* Rossetti Contracting Co. v. Brennan, 508 F.2d 1039, 1045 n.18 (7th Cir. 1974) (government procurement policies expanded to include social and economic objectives only indirectly related to conventional procurement considerations); Northeast Constr. v. Romney, 485 F.2d 752, 760-61 (D.C. Cir. 1973) (social and economic objectives sufficient to validate use of the Procurement Act for application of Executive Order 11,246).

Liberty Mutual court held that application of the Order solely to promote national or social policies would violate the separation of powers doctrine.[47] The court rejected the proposition that the President could apply the Order through inherent presidential powers,[48] and noted that the application of the Order must be pursuant to legislative authority.[49] The Fourth Circuit held that a nexus between the goals of the Procurement Act and the application of the Order constituted the only possible basis of authorization for the Order.[50]

In *Liberty Mutual*, the Fourth Circuit correctly held that Liberty was a subcontractor subject to the regulations of Executive Order 11,246.[51] Under the regulations issued pursuant to Executive Order 11,246, "subcontractor" includes any service necessary to the performance of the contract.[52] Insurance is a service under the regulations,[53] and state law requires workmen's compensation insurance.[54] Thus, the insurance Liberty provided was a necessary service.[55] Since a reviewing court must grant deference to an administrative agency's interpretation of its own regulations,[56] the Fourth Circuit correctly sustained Liberty's classification as a subcontractor.

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[47] 639 F.2d at 171. The *Liberty Mutual* court found a violation of the separation of powers doctrine in applying the Order to Liberty because application of the Order to a workmen's compensation insurance company was not within the contemplation of the Procurement Act. *Id. See* note 28 *supra*. Since no statutory authority existed for application of the Order to Liberty, the Fourth Circuit concluded that the President would violate the separation of powers doctrine if the President legislated without authority. 639 F.2d at 171; *see* note 3 *supra*.

[48] 639 F.2d at 172 n.13. The *Liberty Mutual* dissent argued that the President had authority to apply the affirmative action provisions of the Order to Liberty. *Id.* at 173. Dissenting Judge Butzner asserted that the fifth amendment to the Constitution mandated that the President prevent employment discrimination, and noted that the Procurement Act granted the President authority to enforce the constitutional mandate. *Id.* Judge Butzner stated that Executive Order 11,246 provided a means of achieving both the constitutional and statutory objective. *Id.*

[49] *Id.* at 172 n.13; *see* note 3 *supra*.

[50] 639 F.2d at 171. The *Liberty Mutual* court noted that cases upholding broad social procurement authority under the Procurement Act might satisfy the factual nexus test because those cases involved contractors and not a subcontractor. *Id.* at 171 & n.11; *see* note 46 *supra*. The factual nexus test requires a nexus between government economy and efficiency and application of Executive Order 11,246. *See* text accompanying note 32 *supra*. The *Liberty Mutual* court concluded that an increased labor pool could lower a contractor's costs but not the costs of an insurer subcontractor. 639 F.2d at 171 n.11.

[51] 639 F.2d at 167.

[52] 41 C.F.R. 60-1.3 (1980); *see* note 20 *supra*.

[53] *See* note 20 *supra*.

[54] *See* note 23 *supra*.

[55] 41 C.F.R. 60-1.3 (1980); *see* note 20 *supra*.

[56] *See, e.g.*, Thorpe v. Housing Auth. of Durham, 393 U.S. 268, 281-82 (1969) (reviewing court grants deference to administrative agency's interpretation of own regulation); Unemployment Compensation Comm'n v. Aragon, 329 U.S. 143, 153-54 (1946) (agency interpretation of own regulation need not be only reasonable interpretation to be sustained on review).

Although the Fourth Circuit correctly classified Liberty as a subcontractor, the *Liberty Mutual* court misapplied the *Contractors Association* factual nexus test.[57] The *Liberty Mutual* court required a showing of prior discrimination by insurers to authorize application of the Order to Liberty since the court in *Contractors Association* noted the findings of prior discrimination by the labor unions in upholding the Order.[58] Executive Order 11,246 does not require previous discrimination,[59] however, and previous discrimination by the labor unions was not determinative in *Contractors Association*.[60] In *Contractors Association*, the Third Circuit conceded the irrelevance of previous discrimination by the labor unions in determining the validity of the Order.[61] Furthermore, the Fourth Circuit declined to apply Executive Order 11,246 to Liberty absent evidence of the percentage of government costs attributable to workmen's compensation insurers.[62] In *Contractors Association*, the court did not mention findings regarding costs attributable to workers of the labor unions.[63] In addition, the *Contractors Association* court's analysis did not demonstrate that the Order would save costs in contract procurement.[64] The Third Circuit merely assumed that the increased labor pool resulting from application of the Order would lower government construction costs.[65] Thus, the Fourth Circuit's application of the *Contractors Association* court's analysis places an unrealistic burden on the government to apply Executive Order 11,246 because the government must demonstrate past discrimination and future cost savings.[66] Moreover, the *Liberty Mutual* holding will create difficulty for future courts in determining when to apply Executive Order 11,246 because the *Liberty Mutual* court did not state the extent of discrimination and cost savings necessary to apply the Order.[67]

Although the *Liberty Mutual* court misapplied the factual nexus test of *Contractors Association*,[68] the Fourth Circuit correctly stated that a nexus must exist between the goals of the Procurement Act and application of Executive Order 11,246 to a government subcontractor.[69] Broad social and economic goals alone do not justify application of the Order through the Procurement Act.[70] Congress passed the Procurement Act

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[57] *See* 639 F.2d at 170.
[58] *Id.*; *see* 442 F.2d at 175-77.
[59] *See* Exec. Order 11,246, *supra* note 2.
[60] 442 F.2d at 175.
[61] *Id.*
[62] 639 F.2d at 171.
[63] 442 F.2d at 175.
[64] *Id.*
[65] *Id.*
[66] 639 F.2d at 171.
[67] *Id.*
[68] *See* text accompanying notes 57-67 *supra*.
[69] *See* text accompanying note 4 *supra*.
[70] *See* note 46 *supra*.

to promote government economy and efficiency, rather than to further broad social and economic goals.[71] The Supreme Court has stated, however, that government economy and efficiency are promoted if application of the Order is reasonably related to promotion of government economy and efficiency.[72] The *Liberty Mutual* court's requirement of factual findings of past discrimination and future government cost savings goes beyond the Supreme Court's requirement that a reviewing court find that the regulations are reasonably related to the enacting legislation.[73] The *Liberty Mutual* court's application of the nexus standard, therefore, severely restricts the government's freedom to apply Executive Order 11,246.

JOHN PALMER FISHWICK, JR.

B. Allocation of Burdens of Proof and Persuasion in Disparate Treatment Cases of Title VII Litigation

Title VII of the Civil Rights Act of 1964[1] (Title VII) prohibits employment discrimination by public[2] and private[3] employers on the basis of race, color, sex, religion, or national origin.[4] A person adversely affected by an alleged unlawful employment practice may sue for relief under either of two theories of Title VII discrimination, the disparate impact or the disparate treatment theory.[5] The disparate impact theory proscribes

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[71] *See* text accompanying notes 27-28 *supra.*

[72] *See* text accompanying note 4 *supra.*

[73] *See* text accompanying note 4 *supra.*

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[1] 42 U.S.C. §§ 2000e-2000e-17 (1976 & Supp. III 1979).

[2] *Id.* § 2000e(h). Title VII applies to public employers including persons engaged in running any activity, business or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce. *Id.*

[3] *Id.* § 2000e(b). Title VII applies to private employers including persons who have fifteen or more employees engaged in an industry affecting commerce. *Id.*

[4] Congress enacted Title VII to remove artificial and arbitrary barriers that restrict equal employment opportunities. Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971). In addition to prohibiting employment discrimination against minority groups, Title VII established the Equal Employment Opportunity Commission (EEOC) to aid in the administration of provisions of the Act. *See* 42 U.S.C. §§ 2000e-4, 2000e-5 (1976).

[5] An aggrieved plaintiff may sue under Title VII on the disparate impact or disparate treatment theories of discrimination. Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). To take advantage of either of these theories of discrimination protection, a claimant must file a charge of discrimination with the EEOC within 180 days of the alleged unlawful employment act. 42 U.S.C. § 2000e-5(e) (1976); *see* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973). The claimant's right to sue under Title VII arises only after the EEOC has issued a notice of the right to sue. Local 179, United Textile Workers v. Federal Paper

employment practices that are facially neutral but discriminatory in operation.[6] Plaintiffs in disparate impact cases need prove only that challenged employment practices disproportionately harm a protected minority group.[7] The disparate treatment theory, however, protects individuals from overtly discriminatory employment policies.[8] Plaintiffs in disparate treatment actions must show that an employer's actions toward the employee were motivated by discrimination.[9] The issue of the employer's intent distinguishes disparate impact from disparate treatment cases. Aggrieved employees must prove an employer's intent to discriminate in disparate treatment actions.[10] In disparate impact actions, discriminatory intent is irrelevant.[11]

While employee-plaintiffs bring disparate treatment claims more

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Stock Co., 461 F.2d 849, 850 (8th Cir. 1972). If the EEOC finds reasonable cause to believe that discrimination is present in the challenged act, the EEOC will attempt to stop the unlawful practice through informal methods of conference, conciliation, and persuasion. *Id.* If the EEOC has not reached a conciliation agreement with the employer within 180 days of the filing of the charge, or has not filed a civil suit based on the charge within the same time limit, or has dismissed the claim, the EEOC must issue a notice to the claimant of the right to sue. 42 U.S.C. § 2000e-5(f)(1) (1976). After receiving notice of the right to sue, the employee has ninety days in which to bring suit on his own behalf in federal district court. *Id.*

For a discussion of the disparate impact and disparate treatment theories under which a claimant may invoke Title VII protections, see Pennsylvania v. Local 542, Int'l Union of Operating Eng'rs. 469 F. Supp. 329, 398-99 (E.D. Pa. 1978), *aff'd per curiam*, 648 F.2d 922 (3d Cir. 1981). *See generally* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1-12, 14-17, 73-75 (1976) [hereinafter cited as SCHLEI & GROSSMAN].

[6] The Supreme Court formulated the disparate impact theory in Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). Plaintiffs in disparate impact cases must show that the effects of employment practices, however unobjectionable in form, disproportionately harm protected minority groups. *See* Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). Protected minority groups under Title VII include ethnic, racial and religious minorities and women. *See* 42 U.S.C. § 2000e-2 (1976). Proof of discriminatory intent on the part of the employer is irrelevant in disparate impact cases. *See* 401 U.S. at 432. *But cf.* Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 259 (1977) (discriminatory intent in zoning decisions may be inferred from overwhelming showing of disparate impact). *See generally* Blumrosen, *Strangers in Paradise*: Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972).

[7] Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); *see* note 6 *supra.*

[8] The Supreme Court formulated the disparate treatment theory in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). When an employer denied an employee reemployment because of his race, the Court sought to prohibit the employer's action on the grounds of disparate treatment in violation of Title VII. *Id.* at 795-98. Plaintiffs in disparate treatment cases must show that discriminatory intent on the part of the employer has affected their individual status as employees adversely. *Id.* at 805-06. Unlike the disparate impact theory, the disparate treatment theory requires that a plaintiff prove an employer's discriminatory motive. *See* Board of Trustees v. Sweeney, 439 U.S. 24, 26-27 (1978) (per curiam) (Stevens, J., dissenting). *See generally* SCHLEI & GROSSMAN, *supra* note 5, at 1144.

[9] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973); *see* note 8 *supra.*

[10] Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

[11] Griggs v. Duke Power Co., 401 U.S. 424, 431-33 (1971).

frequently than disparate impact claims under Title VII,[12] application of Title VII protections has proven especially troublesome in disparate treatment actions.[13] Direct evidence of an employer's discriminatory motive is difficult for plaintiffs to produce.[14] Additionally, courts have had to reconcile the congressional policy of elimination of employment discrimination with fair allocation of the evidentiary burdens of the parties in cases involving disparate treatment.[15] The United States Supreme Court and the circuit courts have had difficulty in achieving consistent application of the burdens of proof in disparate treatment cases.[16] In

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[12] *See* Friedman, *The Burger Court and the Prima Facie Case in Employment Discrimination Litigation: A Critique*, 65 CORNELL L. REV. 1, 3 (1979) [hereinafter cited as Friedman].

[13] *See* Friedman, *supra* note 12, at 3-11.

[14] Gates v. Georgia-Pacific Corp., 326 F. Supp. 397, 398-99 (D. Or. 1970), *aff'd*, 492 F.2d 292 (9th Cir. 1974). A disparate treatment plaintiff may prove an employer's discriminatory motive through the use of circumstantial evidence. 2 A. LARSON, EMPLOYMENT DISCRIMINATION § 50.10 (1981). The use of circumstantial evidence to prove motive is particularly important at the pretext stage of disparate treatment analysis. *See* note 42 *infra*. Oftentimes, a plaintiff may not have equal access to the evidence pertaining to the defendant's articulated reasons for the challenged employment decision. *See* Turner v. Texas Instruments, Inc., 555 F.2d 1251, 1255 (1977) (discussing advantages to plaintiff if defendant required to prove nondiscriminatory motive by preponderance of evidence). Thus, the plaintiff is at a disadvantage in trying to gather direct evidence regarding an employer's motive. Allowing the plaintiff to produce circumstantial evidence, such as comparative statistical data and records of hiring and discharge procedures, alleviates the plaintiff's disadvantage in proving discriminatory intent. *See* Mayor of Phila. v. Educational Equality League, 415 U.S. 605, 620 (1974) (statistical analyses serve important role as indicator of discrimination in Title VII suits); text accompanying notes 90-97 *infra*.

[15] *See generally* Jones, *The Development of the Law Under Title VII Since 1965: Implications of the New Law*, 30 RUTGERS L. REV. 1, 6-7, 59-61 (1976) (discussing implications of order and allocation of proof in discrimination litigation for elimination of discriminatory practices); *Fourth Circuit Review—Substantive, Procedural and Remedial Issues in Title VII Litigation*, 37 WASH. & LEE L. REV. 604, 614 (1980).

[16] *See* Friedman, *supra* note 12, at 4-11. The Supreme Court's reluctance to define clearly the burdens of proof in disparate treatment actions resulted in a split in the lower courts. Application of the *McDonnell Douglas* disparate treatment formula among the circuits has been far from uniform. *See* Rodriguez v. Taylor, 569 F.2d 1231, 1239 n.14 (3d Cir. 1977) (noting split in circuit court interpretation of *McDonnell Douglas*), *cert. denied*, 436 U.S. 913 (1978). The Supreme Court's use of imprecise terms such as "articulate" and "prove" in its leading opinions on disparate treatment actions failed to clarify the burden of proof issue. *See* Board of Trustees v. Sweeney, 439 U.S. 24-25 (1978) (per curiam); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577-78 (1978); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973). The majority of circuits, including the Fourth Circuit, have held that a defendant-employer need only articulate a nondiscriminatory reason for an employment decision to rebut a prima facie case of discrimination. *See, e.g.*, Powell v. Syracuse Univ., 580 F.2d 1150, 1154-55 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978); Flowers v. Crouch-Walker Corp. 552 F.2d 1277, 1282 (7th Cir. 1977); Harper v. Trans World Airlines, Inc., 525 F.2d 409, 411 (8th Cir. 1975); Sabol v. Snyder, 524 F.2d 1009, 1012 (10th Cir. 1975); Gates v. Georgia-Pacific Corp., 492 F.2d 292, 296 (9th Cir. 1974). Other courts, however, have concluded that once a disparate treatment plaintiff has established a prima facie case, the burden of persuasion shifts to the defendant. *See, e.g.*, Turner v. Texas Instruments, Inc., 555 F.2d 1251, 1255 (5th Cir. 1977); Ostapowica v. Johnson Bronze Co., 541 F.2d 394, 399 (3d Cir. 1976), *cert.*

Page v Bolger,[17] the Fourth Circuit recently reviewed the standards of proof applicable under a disparate treatment claim of racial discrimination in promotion procedures.

Carl F. Page was a black employee of the United States Postal Service.[18] In January 1976, Page sought promotion to a supervisory position within the Richmond Post Office.[19] The district manager of the post office appointed a review committee of three white males to screen the applicants for the position.[20] The committee recommended three applicants, including Page, for the job.[21] The postmaster of the Richmond Post Office (postmaster) promoted the top-ranked candidate, a white male, to the position.[22] Later, in August 1976, Page sought promotion to a different supervisory position.[23] A new review committee, formed in compliance with postal service personnel guidelines, convened to screen the applicants.[24] A committee found that Page was qualified for the position,

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denied, 429 U.S. 1041 (1977); Randolph v. United States Elevator Corp., 452 F. Supp. 1120, 1126 (S.D. Fla. 1978). The defendant then must prove by a preponderance of the evidence legitimate reasons for the challenged employment decision. *See* Cross v. United States Postal Service, 639 F.2d 409, 414 (8th Cir. 1981) (defendant bears burden of showing by preponderance of evidence that legitimate factual reasons for employment decisions exist); *accord*, Loeb v. Textron, Inc. 600 F.2d 1003, 1012 n.5 (1st Cir. 1979). The Supreme Court's most recent opinion on the burden of proof issue is *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). In *Burdine*, the Supreme Court states that the defendant's burden in disparate treatment actions is one of production, not persuasion. *Id.* at 252-53. The *Burdine* opinion reaffirms the holdings of the majority of circuits on the burden of proof issue and should settle the controversy between circuits on the evidentiary burden issue. *See* text accompanying notes 56-73 *infra*.

[17] 645 F.2d 227 (4th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3269 (U.S. Oct. 13, 1981).

[18] *Id.* at 228.

[19] *Id.* Page sought promotion from mail foreman to general foreman of the mails, an executive postal service job designated at postal executive salary level 17 (PES-17). *Id.*

[20] *Id.* at 229. The appointment of three white males to the review committee responsible for screening the candidates for promotion violated internal fair hiring guidelines of the Postal Service. *See id.* at 228. The internal guidelines govern all promotions and reassignments within the United States Postal Service. *Id.* at 235 (Butzner, J., dissenting). The guidelines are an effort by the Postal Service to comply with the Congressional mandate embodied in §§ 720.201 to 720.207 of Volume 5 of the Code of Federal Regulations promoting affirmative action policies within the federal government. 5 C.F.R. §§ 720.201-720.207 (1978). Section 544.2 of the Postal Service's *Personnel Handbook* provides, in pertinent part, that a postal official shall appoint a review committee responsible for screening and recommending applicants interested in promotion to vacant positions. 645 F.2d at 228. The guidelines state that the appointing official should make "every effort to select at least one woman and/or minority group member" for the review committee. POSTAL SERVICE, PERSONNEL HANDBOOK P-11, C(4), § 544.2 (1975) [hereinafter cited as PERSONNEL HANDBOOK].

[21] 645 F.2d at 229.

[22] *Id.*

[23] *Id.* Page sought a second promotion to the position of postal operations specialist, designated at postal executive salary level 18 (PES-18). *Id.*

[24] *Id.* The district manager appointed a black postal employee to serve on the second review committee. *Id.* The black representative, however, could not serve on the committee because of an appointment to a new assignment in Philadelphia. *Id.* Consequently, three white males also composed the second review committee. *Id.*

but recommended two white male applicants as better qualified.[25] The postmaster did not promote Page and chose the top-ranked white applicant for the position.[26] Page subsequently filed a racial discrimination suit against the Postmaster General of the United States (Postmaster General)[27] under section 717[28] of Title VII.[29] Page argued that the repeated refusals to promote him constituted discrimination under the disparate treatment theory.[30]

Following a plenary trial, the district court dismissed Page's action on the merits.[31] Page appealed the dismissal to the Fourth Circuit.[32] The Fourth Circuit reversed the district court's dismissal and remanded with directions to award Page compensatory and injunctive relief.[33] The Postmaster General petitioned the Fourth Circuit for a rehearing.[34] On rehearing en banc, the Fourth Circuit concluded that the defendant's reasons for not promoting Page were legitimate and not merely a pretext for actual discriminatory motives, thereby rebutting Page's prima facie showing of disparate treatment.[35] The circuit court affirmed the district court's ruling and dismissed Page's claim.[36]

The Fourth Circuit relied upon the Supreme Court's opinion in *McDonnell Douglas Corp. v. Green*[37] to reject Page's disparate treat-

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[25] *Id.*

[26] *Id.*

[27] Page filed suit against William F. Bolger, the Postmaster General of the United States (Postmaster General). *Id.* at 228. As the head of the agency, Bolger is the statutory defendant in a Title VII action against the Postal Service. 42 U.S.C. § 2000e-16(c) (1976); *see* Hackley v. Roudebush, 520 F.2d 108, 116 (D.C. Cir. 1975).

[28] Page brought suit under section 717(c) of Title VII. 645 F.2d at 228. Section 717(c) applies the antidiscrimination provisions of Title VII to the Postal Service and other federal agencies. 42 U.S.C. § 2000e-16 (1976). In pertinent part, § 717 provides "All personnel actions affecting employees or applicants for employment . . . in the United States Postal Service and the Postal Rate Commission . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin." *Id.* Prior to bringing suit, Page had filed two complaints with the EEOC contesting the postal promotion procedures. 645 F.2d at 229. The EEOC, however, decided both claims against Page. *Id.* at 229 n.6. Section 717 of Title VII permits federal agency employees to bring suit on allegations of employment discrimination following exhaustion of administrative procedures. 42 U.S.C. § 2000e-16(c) (1976).

[29] 645 F.2d at 228; *see also* notes 1-8 *supra.*

[30] *Id.* at 231; *see* note 8 *supra.*

[31] *Id.* at 228. The district court held that Page failed to establish a claim of discrimination under the disparate treatment theory of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). 645 F.2d at 228; *see* note 7 *supra*; text accompanying notes 35-60 *infra.*

[32] 645 F.2d at 228.

[33] *Id.* A divided panel of the Fourth Circuit held that the postmaster's use of all-white review committees constituted discrimination violating § 717 of Title VII. Page v. Bolger, No. 78-1792 (4th Cir. Dec. 19, 1979).

[34] 645 F.2d at 228.

[35] *Id.*

[36] *Id.* at 234; *see* text accompanying notes 39-55 *infra.*

[37] 411 U.S. 792 (1973); *see* note 8 *supra.* While *McDonnell Douglas* is the leading case on standards of proof in disparate treatment actions, some commentators have criticized the lack of clarity in the Supreme Court's opinion. *See, e.g.*, Mendez, *Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases*, 32 STAN. L. REV. 1129, 1130-33

ment claim.[38] In applying the *McDonnell Douglas* analysis, the Fourth Circuit found that Page satisfied his initial burden of establishing a prima facie case of disparate treatment.[39] The court also concluded that the defendant carried the burden of production necessary to rebut the inference of discriminatory intent.[40] Page then attempted to establish that the defendant's stated reasons for non-promotion were merely a pretext covering up a racially motivated decision.[41] Page claimed that the all-white review committees were the source of discrimination against him.[42] Page alleged that due to the racial imbalance of the review

(1980) [hereinafter cited as Mendez]; Friedman, *supra* note 12, at 2-3. The Supreme Court has attempted to resolve the ambiguities of *McDonnell Douglas* in later cases. *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-56 (1981) (employer does not have burden of proving absence of discriminatory intent); Furnco Constr. Corp. v. Waters, 438 U.,S. 567, 574 (1978) (employer must prove that employment decision based on legitimate consideration).

[38] 645 F.2d at 229-34.

[39] Under *McDonnell Douglas*, a plaintiff may establish a prima facie case of discrimination by satisfying four requirements. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The plaintiff must show that he was a member of a racial minority, that he sought and was qualified for a position for which the employer was taking applications, that the employer rejected him despite his qualifications, and that after the employer rejected him, the position remained available to others with similar qualifications. *Id.*; *see* SCHLEI & GROSSMAN, *supra* note 5, at 1155 (plaintiff has fairly easy burden of establishing prima facie case in disparate treatment cases).

[40] 645 F.2d at 230. The members of the promotion review committees testified that they found Page to be subjectively and objectively less qualified than the other candidates for the jobs. *Id.* The EEOC appeals examiner who conducted the initial administrative hearings on Page's complaint concluded from the record of the committee selection procedures that the postmaster's articulated reason of better qualifications of others was consistent with the objective indicators of Page's performance in relation to other applicants. *Id.* at 230 n.8. The postmaster's practice was to select the most qualified candidate to fill vacant positions. *Id.* at 229. n.5.

The Fourth Circuit views the defendant's rebuttal burden as one of production and not persuasion, thus the Postmaster General's reasons satisfied the court that no discriminatory motive existed. *Id.* at 230. *See* Wright v. National Archives & Records Serv. 609 F.2d 702, 714 (4th Cir. 1979) (defendant's burden in disparate treatment action one of production not persuasion); *Fourth Circuit Review—Standards of Proof in Title VII Litigation*, 38 WASH. & LEE L. REV. 645, 650 (1981).

[41] 645 F.2d at 231. The defendant's rebuttal may neutralize the plaintiff's prima facie case in disparate treatment actions. *See id.* at 230. Therefore, the pretext stage of proof becomes the most important stage of analysis. Smith v. University of N.C., 18 Fair Empl. Prac. Cas. 913, 916 (M.D.N.C. 1978). *See also* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978); text accompanying notes 92-97 *infra*.

[42] 645 F.2d at 231. Page attempted to substantially alter the focus of the suit by alleging that the source of the discrimination was the formation of the review committee. *Id.* at 232. The thrust of Page's argument was that the postal authorities' failure to appoint a member of a minority group to the review committees was the result of discriminatory motives. *Id.* In essence, Page argued that but for the absence of a minrority member on the review committee, the postmaster would have promoted him.

Page's argument contained several logical fallacies. First, Page challenged only the racial imbalance of the committees. *Id.* The appointment of a woman to the committees, however, would have satisfied the postal guidelines concerning committee composition. PER-

committees responsible for promotion recommendations, the postmaster repeatedly denied him promotion.[43] Accordingly, Page urged the Fourth Circuit to redirect its analysis under *McDonnell Douglas*.[44] Page requested that the court explore the reasons behind the personnel actions that led to racial imbalance on the review committees and not merely focus on the asserted reasons underlying the postmaster's ultimate promotion decisions.[45]

The Fourth Circuit rejected Page's proposed modification of *McDonnell Douglas*.[46] The court maintained that the proper focus in all disparate treatment actions is whether discrimination occurred in ultimate employment decisions such as hiring, discharging, or promoting employees.[47] Section 717 of Title VII under which Page brought his claim is aimed at the abolition of discrimination in personnel actions affecting federal employees.[48] The Fourth Circuit construed the term "personnel

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SONNEL HANDBOOK, *supra* note 20, § 544.2. For Page to assert that the absence of a black on the committees constituted discrimination against him in particular was to ask for special treatment, which is not consistent with Title VII. *See generally* Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824 (1972). Second, Page asserted that the racial imbalance of the committees should result automatically in a ruling of discrimination. Brief for Appellee at 19, Page v. Bolger, 645 F.2d 227 (4th Cir. 1981). No law, however, requires that postal review be balanced racially. 645 F.2d at 231. *Cf.* Frink v. United States Navy, 16 Fair Empl. Prac. Cases, 67, 70-71 (E.D. Pa. 1977) (use of all white supervisors to supervise black employees not racial discrimination). If Page wanted to prove that use of all-white postal review committees unfairly discriminated against blacks, the best recourse would have been to bring a disparate impact action. In a disparate impact action, if Page had proved that all-white review committees disproportionately harmed minority promotion in the post office, then he would have substantiated his claim that the committees were the source of discrimination in his case. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). *See also* note 6 *supra*. Third, Page contended that a violation of the postal guidelines constituted a direct violation of Title VII provisions, a proposition that the Fourth Circuit was unwilling to accept because the guidelines were not mandatory affirmative action regulations and, thus, did not have the force of law. 645 F.2d at 232 n.10. Last, the Fourth Circuit acknowledged that the postal authorities made "every effort" to satisfy that the postal authorities made "every effort" to satisfy the review committee guidelines. *Id.* at 231. Therefore, the court recognized no violation of the guidelines. *Id.*

[43] 645 F.2d at 232.

[44] *Id.* Page brought suit under § 717 of Title VII, which applies specifically to discrimination in personnel actions of federal agencies. 42 U.S.C. § 2000e-16 (1976); *see* note 28 *supra*. Thus, Page asked that the court refocus its analysis under *McDonnell Douglas* to concentrate on the mid-level personnel actions of the Post Office. 645 F.2d at 232. Page's proposed analysis would shift the focus of the defendant's burden of proof from why the postmaster did not promote Page to why the postal review committees contained no minority members.

[45] 645 F.2d at 232.

[46] *Id.*

[47] *Id.* at 233; *see, e.g.*, Board of Trustees v. Sweeney, 439 U.S. 24, 29 (1978) (per curiam) (failure to promote); Albemarle Paper Co. v. Moody, 422 U.S. 405, 409-11, 439 (1975) (failure to hire); James v. Stockham Valves & Fittings Co., 559 F.2d 310, 334 (5th Cir. 1977) (failure to transfer) *cert. denied*, 434 U.S. 1034 (1978).

[48] 42 U.S.C. § 2000e-16 (1976). The basic purpose of § 717 is to eliminate every vestige of employment discrimination within the federal government. Hackley v. Roudebush, 520

actions" in the language of section 717 to mean the final decisions of federal agencies as employers.[49] The court refused to extend the antidiscrimination provisions of section 717 to personnel actions that have no immediate effect on final employment decisions.[50] The *Page* majority adopted the standard disparate treatment approach of *McDonnell Douglas* to find that section 717 did not govern the actions concerning constitution of the postal review committees.[51]

Examining the specific facts in *Page*, the Fourth Circuit determined that the personnel actions in question were the refusals to promote Page.[52] The court noted that the Postmaster General's burden of proof was only one of production concerning the final decisions not to promote Page.[53] Since the defendant offered a legitimate, nondiscriminatory reason for the decision not to promote Page, the Fourth Circuit concluded that the reason stated was not a pretextual cover for discriminatory motives.[54] The court held that Page had failed to establish his discrimination claim and affirmed the district court's dismissal on the merits.[55]

The Fourth Circuit's approach in *Page* is consistent with the Supreme Court's recent decision in *Texas Department of Community Affairs v. Burdine*.[56] In *Burdine*, the Court addressed the issue of the defendant's evidentiary burden in disparate treatment actions.[57] The Court quickly disposed of the issue of whether a community labor bureau sufficiently rebutted a prima facie case of discrimination through testimony that the challenged employment decisions were based on reasons other than gender.[58] The *Burdine* Court stated that the defen-

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F.2d 108, 136 (D.C. Cir. 1975). *See also* SUBCOMM. ON LABOR ON THE COMM. ON LABOR AND PUBLIC WELFARE, LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, 92d Cong., 2d Sess. 83 (1972) (compendium of bills, committee reports, and congressional debate that resulted in passage of Equal Employment Opportunity Act of 1972).

In *Page*, the Fourth Circuit stated that § 717 coverage refers to personnel actions in terms of ultimate employment decisions such as hiring, granting leave, promoting, and compensating. 645 F.2d at 233. Pragmatism supports attempts to identify the standard of what is and what is not a personnel action subject to coverage of Title VII. Difficulties arise, however, in trying to separate intermediate steps in the employment process from a final decision. *Id.* The Fourth Circuit recognized the problem and stated that the holding in *Page* is not a general test for defining which employment decisions § 717 covers. *Id.*

[49] *Id.*

[50] *Id.*; *see* text accompanying notes 88-89 *infra*.

[51] 645 F.2d at 233.

[52] *Id.*

[53] *Id.* at 230; *accord*, Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) (in disparate treatment action plaintiff bears burden of persuasion, defendant bears burden of production).

[54] 645 F.2d at 230.

[55] *Id.* at 234.

[56] 450 U.S. 248 (1981).

[57] *Id.* at 250.

[58] In *Burdine*, a female employee of the Texas Department of Community Affairs (TDCA) challenged employment decisions failing to promote her and subsequently terminating her as sex discrimination in violation of Title VII. *Id.* at 250-52. The main issue in the case was whether, after a plaintiff has proven a prima facie case of disparate treatment,

dant's burden in disparate treatment cases is one of production.[59] A Title VII defendant need not ultimately persuade the court that the employment action in question was lawful but need only produce evidence that the action was the result of nondiscriminatory reasons.[60] The Court noted, however, that a defendant may not rebut a presumption of discrimination merely by pleading that his action were legitimate, but must present admissable evidence that would allow the court rationally to conclude that his actions were lawful.[61]

The Postmaster General's burden of proof in *Page* was similar to that of the labor bureau in *Burdine*.[62] The employers in both *Page* and *Burdine* refused to promote their respective employees.[63] The employers in both cases offered the better relative qualifications of other applicants to justify the promotion decisions.[64] The *Page* and *Burdine* courts were satisfied, however, with the defendant's proferred justifications despite the absence of a preponderance of the evidence proving these reasons.[65] The Fourth Circuit held that the Postmaster General adequately dispelled the prima facie inference of discrimination by articulating legitimate reasons for the decisions not to promote Page.[66] The Fourth Circuit's holding that the defendant's evidentiary burden in disparate treatment actions is one of production and not persuasion is proper in that it is consistent with *Burdine*.

The dissent in *Page* argued that *Burdine* requires highly specific proof from a defendant to rebut the alleged discriminatory actions.[67] The dissent maintained that the Postmaster General's reliance upon the

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the burden that shifts to the defendant is to prove by a preponderance of the evidence that legitimate reasons for the employment decisions existed. *Id.* at 250. The Fifth Circuit upheld the defendant's burden as one of persuasion by a preponderance of the evidence. *Id.* at 252; *see* Burdine v. Texas Dept. of Community Affairs, 608 F.2d 563, 565-67 (5th Cir. 1979). On certiorari, the Supreme Court vacated the judgment of the Fifth Circuit, holding that the defendant bears only the burden of production in rebutting a prima facie case of disparate treatment. *Id.* at 260. The TDCA offered the legitimate reasons of better qualifications of other workers and inability to get along with other employees to justify Burdine's non-promotion and discharge. *Id.* at 251, 257 n.11.

[59] *Id.* at 260.

[60] *Id.*

[61] *Id.* at 255 n.9. In an effort to clarify the requirements of the defendant's burden of production in disparate treatment actions, the Supreme Court distinguished mere pleading from the presentation of admissible evidence. *Id.* The *Burdine* Court reasoned that requiring the defendant to provide specific evidence aids the plaintiff in demonstrating intentional discrimination far better than a burden of production satisfied by mere articulation or pleading would. *Id.* at 255-56; *see* note 88 *infra*.

[62] *Compare* Texas Dept. of Community Affairs v. Burdine 450 U.S. 248, 254-56 *with* Page v. Bolger, 645 F.2d at 230 (defendants bear burden of production on issue of non-promotion in disparate treatment actions).

[63] *See* 450 U.S. at 250; 645 F.2d at 229.

[64] *See* 450 U.S. at 251; 645 F.2d at 229.

[65] *See* 450 U.S. at 254-56; 645 F.2d at 230.

[66] 645 F.2d at 230-31.

[67] *Id.* at 238-39 (Butzner, J., dissenting) (employer required to articulate justification for his actions that does not rest on tainted procedure).

recommendations of the review committees as justification for the nonpromotion of Page did not rebut Page's prima facie case.[68] The dissent argued that because the review committees were formed in violation of postal regulations the Postmaster General could not rely on their recommendation to justify the promotion actions.[69] The *Page* dissent viewed the defendant's burden as one of providing legitimate nondiscriminatory reasons for the absence of a minority member on the review committees.[70]

The Supreme Court consistently has held that defendants in disparate treatment actions bear a burden of production to rebut inferences of discrimination.[71] The Supreme Court's interchangeable use of imprecise terms such as "articulate" and "prove" in its leading opinions on standards of proof in disparate treatment actions, however, has given rise to uncertainty among the circuits in applying these standards.[72] Consequently, *Burdine* is an attempt by the Supreme Court to reiterate and clarify its previous holdings limiting the defendant's burden to one of

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[68] *Id.* at 238. The *Page* dissent relied on *Burdine* in determining what the defendant's burden of proof should be in disparate treatment actions. *Id.*

The dissent quoted a portion of *Burdine* that it thought to be controlling concerning the defendant's burden of proof. *Id.* The quoted passage states that the defendant satisfies his burden of proof if he clearly sets forth the reasons for the plaintiff's rejection, which raises a genuine issue of fact whether the defendant did in fact discriminate. *Id.* The Postmaster General satisfied both of these requirements by offering the review committee recommendations as the reason for the decisions not to promote Page. *Id.* at 231. Significantly, the dissent rejected the Postmaster General's evidence, although his evidence satisfied the *Burdine* test the dissent cited as controling. *Id.* at 238.

[69] *Id.* The dissent characterized the Postmaster General's reliance on the recommendations of the postal review committees as, in effect, reliance on unlawful conduct. *Id.* The dissent viewed the postal guidelines as having the force of law with regard to postal employment actions. *Id.* at 236. The absence of a minority member on the postal review committees in violation of the guidelines therefore constituted a violation of the law. *Id.* Thus, the dissent rejected the contention that the defendant could justify his decision not to promote Page on the basis of a recommendation from an unlawful review committee. *Id.* at 238. The *Page* majority accepted the proposition that the postal guidelines have the force of law. *Id.* at 232 n.10; *see* United States v. Caceres, 440 U.S. 741, 749 (1979) (recognizing federal court's duty to enforce agency regulations). The majority made the distinction, however, between vioaltion of agency regulations and violations of Title VII. 645 F.2d at 232 n.10. The majority held that violations of agency regulations do not constitute violations of Title VII and thus, cannot be redressed as Title VII violations. *Id.* For this reason, the majority was willing to allow the Postmaster General to rely on the review committee recommendations as rebuttal evidence to Page's Title VII claim even though the composition of the review committees violated agency regulations. *Id.* at 231-32.

[70] 645 F.2d at 236.

[71] *See* Board of Trustees v. Sweeney, 439 U.S. 24, 25 (1978) (per curiam); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973). *See generally* Friedman, *supra* note 12, at 4.

[72] *See* Rodriguez v. Taylor, 569 F.2d 1231, 1239 n.14 (3d Cir. 1977) (split in circuit court interpretation of *McDonnell Douglas*). *See generally* Mendez, *supra* note 37, at 1135-39; Friedman, *supra* note 12, at 2-11.

production concerning the underlying reasons for an employment decision.[73]

Fair allocation of the burdens of proof and production is critical to the outcome of Title VII disputes.[74] Prior to *Burdine*, circuit courts that imposed the burden of persuasion on the defendant in disparate treatment actions lessened the burden on the plaintiff to prove that the employer acted with discriminatory intent.[75] Arguably, imposition of only the burden of production on Title VII plaintiffs fosters more vigorous eradication of employment discrimination. Thus, the Fourth Circuit's allocation of the burden of persuasion to the plaintiff, although consistent with *Burdine*, appears facially inconsistent with Title VII's goal of eliminating discrimination.[77] In enacting Title VII, however, Con-

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[73] *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 249-53, 256-60 (1981). (Supreme Court readdresses issue of defendant's evidentiary burden in employment discrimination suits).

[74] *See* Mendez, *supra* note 37, at 1130. Mendez recognizes that the allocation of the risk of nonpersuasion in a disparate treatment action may be critical to the outcome of the case. *Id.* For example, if the risk of nonpersuasion remains with the plaintiff, the defendant employer may be entitled to a directed verdict without having presented any evidence, in the event the plaintiff fails to prove a prima facie case of discrimination. *Id.* at 1148-49. Conversely, if the risk of nonpersuasion remains with the defendant, the plaintiff may not have to proceed to the pretext stage of the proof if the defendant fails to produce satisfactory rebuttal evidence. *Id.* Mendez notes, then, that the crucial issue in *McDonnell Douglas* is whether the court intended to place the risk of nonpersuasion on the plaintiff or defendant in disparate treatment actions. *Id.* at 1149-50. Mendez argues that the Supreme Court intended that the plaintiff retain the risk of nonpersuasion and the defendant retain the burden of production. *Id.* at 1150. Mendez presents an interesting analysis of the effect that Federal Rule of Evidence 301 would have on clarifying the evidentiary burdens of the parties in disparate treatment actions. *See id.* at 1151; FED. R. EVID. 301.

[75] The rationale for requiring a defendant to prove nondiscriminatory motives by a preponderance of the evidence in disparate treatment cases is that the plaintiff cannot be expected to disprove a defendant's reasons unless the defendant has stated the reasons with specificity. Loeb v. Textron, Inc., 600 F.2d at 1003, 1011-12 n.5 (1st Cir. 1979). *Cf.* Alexander v. Louisiana, 405 U.S. 625, 631-32 (1972) (defense of good faith concerning subjective employer decisions not sufficient to rebut inference of discrimination in jury selection case).

[76] Title VII legislation is remedial in nature. *See* 42 U.S.C. § 2000(a) & (b) (1976). To encourage plaintiffs to bring discrimination suits that in effect broaden the court's opportunity to abolish discrimination, the plaintiff's prima facie burden is not onerous. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

[77] The *Page* majority refused to modify the *McDonnell Douglas* analysis by shifting the defendant's burden of proof to the issue of the composition of the promotion review committees. 645 F.2d at 232-33. If the Fourth Circuit had shifted the defendant's burden, Page might have been able to establish the postmaster's liability more easily. With an increased burden of proof concerning review committee composition, the defendant would have had to produce evidence concerning the particular procedures related to committee formation. Plaintiff Page, therefore, would not have had to attempt to prove that the absence of a black on the committees was due to discriminatory design as the pretext portion of his proof. If Page did not have to proceed to the pretext stage of proof as he did in the original action, his burden of proof on the issue of the postmaster's liability would be less complicated. Had the Fourth Circuit decided to modify the defendant's burden of proof under *McDonnell*

gress also was aware of the need to avoid stringent proscription of employer conduct.[78] Congress carefully designed Title VII to avoid curtailing traditional employer perogatives in the management of employees unless the decisions were discriminatory in nature.[79]

The *Page* court's standard of employer liability under section 717 of Title VII provides for the protection of legitimate employer interests. The *Page* majority refused to extend the liability of federal employers to cover routine personnel actions that are only one component of ultimate employment decisions.[80] The Fourth Circuit limited the employer's burden of production to the final employment decisions such as hiring, promotion, and discharge for which the employer alone is responsible.[81] Expansion of the employer's burden to include the reasons behind subordinate personnel actions under section 717 would pose serious practical problems. The sheer number of mid-level personnel actions that occur in federal agencies would be difficult for the Equal Employment Opportunity Commission to police. Similarly, enforcement of all the increased claims drastically would increase the workload of the courts. Finally, had the Fourth Circuit in *Page* allowed Title VII protections to include compliance with internal affirmative action guidelines like those of the Post Office, the high standard of employer liability would discourage employers' voluntary efforts to initiate antidiscrimination policies.[82] In light of these considerations, the Fourth Circuit in *Page* prudently recognized the interests of employers under section 717 of Title VII.

The *Page* court also complied with the congressional intent to equalize private sector rights and remedies with those of federal employees under section 717 by refusing to increase a federal employer's

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Douglas, the court would have eased the plaintiff's burden by eliminating the pretext stage of the proof. Nonetheless, the Fourth Circuit's decision has overall positive ramifications. Refusal to increase the defendant's burden of proof protects employer-defendants from excess time and expense associated with obtaining sufficient information to challenge a § 717 claim against them. Additionally, in cases similar to *Page* where increasing the defendant's burden would eliminate a portion of the plaintiff's proof, refusal to increase the defendant's burden guards employers from specious claims, and similarly prevents overburdening of courts with § 717 suits. These protections enable courts to devote their time to hearing substantial and serious Title VII actions, fostering vigorous elimination of patterns and practices of discrimination in accordance with the legislative intent underlying Title VII. *See* notes 4 & 76 *supra*.

[78] Congress did not intend to eliminate employee qualification, skill, and merit as valid reasons for differences in treatment by an employer. *See* S. REP. No. 91-1137, 81st Cong., 2d Sess., 110 CONG. REC. 14270 (1964) (remarks of Senator Humphrey indicating that employers free to choose employees on basis of qualifications).

[79] *See* 42 U.S.C. § 2000e-2(h) (1976) (not unlawful for employers to apply different privileges of employment pursuant to bona fide seniority, merit, or production systems).

[80] 645 F.2d at 233.

[81] *Id.*

[82] *Id.* at 233-34; *see* Wright v. National Archives & Records Serv., 609 F.2d 702, 718 (4th Cir. 1979) (heavy burden on employers under Title VII will limit employer efforts to administer affirmative action programs).

burden of proof in disparate treatment actions.[83] Prior to the enactment of section 717, federal employees aggrieved by discriminatory employment practices could seek relief only through the administrative channels of the particular agency in which they worked.[84] The basic purpose of section 717 is to extend Title VII protections governing private sector employees to public sector employees.[85] By applying the tripartite disparate treatment analysis of *McDonnell Douglas* to federal employee actions, the Fourth Circuit equalized the evidentiary burdens of federal and non-federal employees and employers. The dissent in *Page* suggested that federal employers should be subject to a more stringent burden of proof because they work in the higher levels of government service.[86] The *Page* majority rejected the imposition of a stringent burden of proof and subjected federal employers to the same burden of production as private sector employers.[87] By placing the same burden of proof on federal and non-federal employers, the Fourth Circuit advanced procedural equality under Title VII among all types and levels of work forces consistent with the design of section 717.

Although the Fourth Circuit's decision in *Page* is sound in light of Supreme Court precedent and the particular goals of section 717, the *Page* decision failed to address some important aspects of section 717 disparate treatment litigation. The Fourth Circuit, by limiting the defendant's burden to production and not persuasion, ensured that section 717 did not become a device to stifle federal employer's perogatives in

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[83] *See* note 28 *supra.*

[84] Title VII did not protect federal employees from discrimination until Congress amended the Act in 1972. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. §§ 2000e, 2000e(b) (1976 & Supp. III 1979)). Although federal employment discrimination violated the Constitution, before the 1972 amendments judicial relief was uncertain. Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (school desegregation case). Prior to 1972 each federal agency handled its own charges of discrimination. Gnotta v. United States, 415 F.2d 1271, 1275 (8th Cir. 1969). Section 717 of the Civil Rights Act of 1964 now proscribes federal employment discrimination and establishes an administrative and judicial enforcement system. 42 U.S.C. § 2000e-16 (1976).

[85] Hackley v. Roudebush, 520 F.2d 108, 142 (D.C. Cir. 1975).

[86] *See* 645 F.2d at 238 (Butzner, J., dissenting). The *Page* dissent suggested that courts should protect federal employees who work in the higher levels of government service by imposing a strict standard of liability on federal employers. *Id.* The dissent stated that the Fourth Circuit should treat the violations of federal agency guidelines as violations of Title VII in order to protect federal employees. *Id.*; *see* note 69 *supra.* The dissent's attempt to equate violations of agency guidelines with Title VII violations necessarily imposes a higher standard of liability on employers. *See* text accompanying notes 80-82 *infra.* Since an employer-defendant would be subject to liability for violations of agency guidelines, his overall exposure for Title VII liability would be greatly increased under the dissent's analysis. Employers would not only have to refrain from discriminatory employment practices under Title VII, but also would have to take positive action in hiring minorities to satisfy agency guidelines. An employer's liability is increased then by having to satisfy two sets of anti-discrimination regulations rather than Title VII alone.

[87] *See* 645 F.2d at 233. The majority rejected the dissent's suggestion of a more onerous burden of proof for federal employers. *See* note 86 *infra.*

management decisions. The court failed to consider, however, whether its liberal application of section 717 protections diminished the value of the section as a source of remedial redress for federal employees.[88] Because the Fourth Circuit construed the term "personnel actions" as the ultimate decisions of an employer, the question of whether a federal employee who was discriminated against at the bottom or intermediate levels of a decisionmaking hierarchy could demonstrate intentional discrimination under the *Page* framework is doubtful.[89]

In balancing the interests of employers and employees, the *Page* court failed to weigh sufficiently the importance of Title VII as remedial legislation. The court upheld the plaintiff's initial, easy burden of establishing a prima facie case, which facilitates bringing a Title VII claim.[90] The *Page* court, however, imposed an equally light burden on the defendant to rebut the prima facie inference of discrimination.[91] When the defendant need only articulate a legitimate reason on which he

[88] The Supreme Court in *Burdine* addressed the question of whether the *McDonnell Douglas* framework allows a plaintiff meriting relief to demonstrate intentional discrimination. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256-58 (1981). The Court's discussion of the issue, however, was largely cosmetic. The Court cited the defendant's incentive in presenting clear and factual evidence to rebut the inference of discrimination as well as the plaintiff's access to the defendant's and the EEOC's evidence concerning the issue of discrimination as factors that ease the plaintiff's burden in proving discriminatory intent. *Id.* at 257-58. The Court underestimated, though, the ingenuity of the bad faith defendant. Such a defendant, without presenting clear and factual evidence, is able to escape Title VII liability since he sustains only a burden of production concerning a single legitimate reason for an employment decision and thus may not be required to present the actual reason behind his decision. Similarly, the Court disregarded the fact that many Title VII plaintiffs, especially if they are out of work, may not have the financial leverage to engage in liberal discovery using methods of statistical proof of comparative evaluation of employer's hiring, discharge, and promotion processes. Another basic problem in *Burdine* was the Court's assumption that some factual evidence exists by which a plaintiff meriting relief will be able to prove discriminatory intent. This premise contains an inherent fallacy. Intent as a form of subjective *mens rea* is rarely susceptible to factual proof. A plaintiff may never be able to demonstrate this type of discriminatory intent no matter how much factual evidence he or she has access to. While the *Burdine* Court discused the issue of remedial effectiveness that the *Page* court ignored, the Supreme Court's discussion is nonetheless superficial and unpersuasive.

[89] *Page* limits the thrust of a section 717 disparate treatment action to the ultimate decisions of employers. 645 F.2d at 233. The Fourth Circuit left the question of how a federal plaintiff pursues redress for discriminatory intermediate personnel actions unanswered. Arguably, the Fourth Circuit in *Page* may be implying that plaintiffs should challenge the intermediate level actions within agency channels. A return to intra-agency remedies, such as administrative hearings, however, would force federal employees back to the parochial position they were in prior to the 1972 amendments to Title VII and would negate the purpose of § 717. *See* note 84 *supra.*

[90] 645 F.2d at 229-30. The *Page* court limited the plaintiff's prima facie burden to the simple standard of *McDonnell Douglas*. 645 F.2d at 233. The *McDonnell Douglas* burden of establishing a prima facie case is a relatively easy one that promotes the remedial aspects of Title VII. *See* Friedman, *supra* note 12, at 4 n.17; Comment, *Applying the Title VII Prima Facie Case to Title VII Litigation*, 11 HARV. C.R.-C.L. L. REV. 128, 163-177 (1976) (remedial aspects of Title VII and allocation of evidentiary burdens in other contexts).

[91] 645 F.2d at 230.

might have based his employment decision, that reason alone extinguishes the inference of discrimination and the plaintiff bears the burden of persuasion at the pretext stage of the proof.[92] The Fourth Circuit did not address the issue of what problems the defendant's rebuttal evidence presents for plaintiffs seeking to prove pretextual discrimination on the part of employers. The rebuttal evidence may suggest that the employer's motives were legitimate, when in fact they were not. This presumption of validity may force a plaintiff to prove that a reason presumed true, but without factual foundation, was a pretext for discrimination.[93] The task of proving pretext in this situation is formidable.[94] The defendant often has superior access to any evidence that is relevant to the proof of pretext.[95] Additionally, plaintiffs similar to Page are allowed to prove discrimination only in the final employment decision.[96] By limiting the applicability of section 717 to ultimate management decisions, the Fourth Circuit effectively foreclosed federal employees from raising evidence of arbitrary discrimination at lower levels of the decision process, even in the pretext stage of proof.[97]

The Fourth Circuit's decision in *Page* is consistent with established precedent that places the burden of production on defendants in disparate treatment actions. The court considered the interests of employers and employees in applying the standard *McDonnell Douglas* disparate treatment analysis to achieve administrative equality in section 717 discrimination litigation.[98] In accordance with the aim of section 717, *Page* equalized a federal employer's burden of proof with the burden that private sector employers bear in Title VII actions. *Page*, therefore, is a procedurally sound decision on the facts. Although the Fourth Circuit carefully considered the procedural burden of proof issue in *Page*, the court ignored the substantive questions concerning the problems that the defendant's evidence presents for plaintiffs in disparate treatment actions. Proper consideration of the inferences and evidence that disparate treatment litigation raises it the only way to effectuate the statutory guarantees of Title VII.[99] The Fourth Circuit's failure to address these issues adequately in *Page* may have dealt a severe blow to the potency of section 717 as a source of remedial relief for federal employees.

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[92] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805 (1973).

[93] Turner v. Texas Instruments, Inc., 555 F.2d 1251, 1255 (5th Cir. 1977); *accord* Loeb v. Textron, Inc. 600 F.2d 1003, 1011-12 (1st Cir. 1979).

[94] Turner v. Texas Instruments, Inc. 555 F.2d 1251, 1255 (5th Cir. 1977).

[95] *Id.*

[96] 645 F.2d at 233.

[97] *See* note 89 *supra.*

[98] 645 F.2d at 233.

[99] *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255 n.8 (1981) (noting that allocation of burdens and creation of presumptions intended to sharpen inquiry into discrimination questions).

C. *Class Action Certification in Title VII Litigation*

Congress enacted Title VII of the Civil Rights Act of 1964[1] in an effort to achieve equality in employment opportunities by eliminating any employment practice which discriminates against any individual on the basis of race, color, religion, sex or national origin.[2] Title VII's prohibition of discriminatory business practices prevents not only overt discrimination but also those facially neutral employment practices that are discriminatory in operation.[3] Consequently, courts generally construe Title VII liberally in an effort to give effect to Congress' remedial intent.[4] Under Title VII, Congress created the Equal Employment Opportunity Commission (EEOC), which possesses central administrative

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[1] Civil Rights Act of 1964, Title VII, Pub. L. 88-352, 78 Stat. 253 (codified at 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. III 1979)).

[2] 42 U.S.C. § 2000e-2 (1976 & Supp. III 1979). Section 2000e-2 makes unlawful any actions by employers in refusing to hire or discharging any individual, or otherwise discriminating against any individual with respect to compensation, terms, or privileges of employment on the basis of race, color, sex, religion or otherwise discriminating against any individual with respect to compensation, terms, or privileges of employment on the basis of race, color, sex, religion or national origin. *Id.* Section 2000e-1 states that Title VII's provisions shall not apply to the employment of aliens outside any State, or to any individuals performing work connected with religious corporations, associations, educational institutions or societies. *Id.* at § 2000e-1 (1976 & Supp. III 1979). *See* Fekete v. United States Steel Corp., 424 F.2d 331, 336 (3d Cir. 1970) (purpose of Title VII). *See generally* J. COOPER, DEFINING DISCRIMINATION, EQUAL EMPLOYMENT OPPORTUNITY—RESPONSIBILITIES, RIGHTS AND REMEDIES 75-76 (1976) (employment discrimination may exist as result of disadvantages resulting either from past general practices of society or from past general practices of particular employer).

[3] *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (to establish prima facie case of discrimination, plaintiff need only show that employer has used facially neutral standards to select applicants for hire in significantly discriminatory pattern); General Elec. Co. v. Gilbert, 429 U.S. 125, 137 (1976) (plaintiff can establish prima facie violation of Title VII upon proof that effect of otherwise facially neutral plan or classification is to discriminate against members of one class or another); Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971) (employers cannot maintain practices neutral on their face if they operate to freeze status quo of prior discriminatory employment practices).

[4] *See, e.g.*, United States v. Price, 383 U.S. 787, 801 (1966) (courts must accord civil rights legislation sweep as broad as statute's language); Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 716 (5th Cir. 1974) (courts have obligation to ensure that Title VII works); Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970) (courts, to avoid hampering congressional intent, should give Title VII liberal construction); Jones, *The Development of the Law Under Title VII Since 1965: Implications of the New Law*, 30 RUTGERS L. REV. 1, 12 (1976) (Supreme Court clearly stated that remedial power under Title VII is power to make injured party whole, that courts are to place injured party in approximate position he would have occupied had his employer not committed the wrong); Miller, *Class Actions and Employment Discrimination Under Title VII of the Civil Rights Act of 1964*, 43 MISS. L.J. 275, 275-76 (1972) (liberal construction of Title VII by courts has short-circuited system in which Congress envisioned conciliatory efforts between Equal Employment Opportunity Commission (EEOC) and employers as primary enforcement device, and courts consequently have become champions of aggrieved).

authority for the administration of Title VII.[5] The EEOC is empowered to prevent any person from engaging in any unlawful employment practice.[6]

Through its procedural provisions, Title VII specifically grants individual employees the right to bring civil actions in federal district courts against their employers who commit discriminatory employment practices.[7] Courts have recognized the class action as the most useful and effective device for handling Title VII litigation.[8] Rule 23 of the Federal Rules of Civil Procedure provides express requirements for

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[5] 42 U.S.C. § 2000e-4 (1976 & Supp. III 1979).

[6] 42 U.S.C. § 2000e-5(a) (1976 & Supp. III 1979). See 42 U.S.C. § 2000e-4(g) (1976 & Supp. III 1979). Section 2000e-4(g) empowers the EEOC to cooperate in the enforcement and administration of Title VII with state and local agencies, both public and private, as well as with individuals. *Id.* The EEOC further is authorized to furnish technical assistance to persons subject to compliance with Title VII and to assist employers and labor unions in effectuating Title VII by conciliation or other remedial action. *Id.* Under Title VII Congress empowered the EEOC to make technical studies, and to publicize the results of those studies. *Id.* Moreover, Congress authorized the EEOC to intervene in civil actions brought under Title VII against private defendants. *Id.*

[7] 42 U.S.C. § 2000e-5 (1976 & Supp. III 1979). To gain the right to bring a civil action, an aggrieved employee first must file a complaint with the EEOC. *Id.* The EEOC then must serve notice of the complaint on the respondent. *Id.* at 42 U.S.C. § 2000e-5(b). After investigation, if the EEOC determines that reasonable cause exists to believe the charge is true, the Commission will try to eliminate the alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. *Id.* If within 180 days from the filing of the charge the EEOC has not been able to secure a conciliation agreement between the respondent and the aggrieved employee, and the EEOC or the Attorney General has not filed a civil action against the respondent employer, the Commission or the Attorney General must notify the aggrieved employee. *Id.* at 42 U.S.C. § 2000e-5(f)(1). Receipt of the notice, commonly called the "right to sue" notice, gives the aggrieved employee the right to bring a civil action against the respondent named in his EEOC complaint, provided he takes such action within 90 days of receipt of the notice. *Id. See generally* Galvan, *Handling Title VII Charges Before The Equal Employment Opportunity Commission*, 16 ARIZ. B.J. 16 (Aug. 1980); Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824 (1972).

[8] *See generally* Stastny v. Southern Bell Tel. & Tel. Co., 628 F.2d 267, 273 (4th Cir. 1980) (court noted fitness and utility of class action device for many Title VII actions); Hall v. Werthan Bag Corp., 251 F. Supp. 184, 186 (M.D. Tenn. 1966) (racial discrimination is by definition class discrimination); S. REP. NO. 415, 92d Cong., 1st Sess. 27 (1971) *reprinted in* SENATE COMM. ON LABOR AND PUBLIC WELFARE, 92d Cong., 2d Sess., LEGISLATIVE HIST. OF THE EQUAL EMP. OPP. ACT OF 1972 at 436 (1972) (Senate Committee on Labor and Public Welfare agreeing with courts that Title VII actions are class complaints, and that any restrictions on class actions would undermine Title VII's effectiveness); Miller, *Class Actions and Employment Discrimination Under Title VII of the Civil Rights Act of 1964*, 43 MISS. L.J. 275, 276 (1972) (most effective device for achieving result sought by Title VII is class action). *But see* Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375, 377 (1973) (author argues that class actions lead to waste of judicial resources, reduce federal courts to small claims courts, and provide windfalls for unscrupulous attorneys); *see also* Blecher, *Is the Class Action Rule Doing the Job?* (plaintiff's viewpoint), 55 F.R.D. 365, 374 (1973) (class action is only viable procedure to redress series of relatively small injustices).

class certification.[9] Nevertheless, the rule 23 commonality requirement that a class action must involved questions of law or fact common to the class, and the typicality requirement that the claim of the class representative must be typical of the claims of the entire class have received inconsistent treatment from the courts.[10] In the context of Title VII litigation, courts often must consider whether the typicality and commonality requirements prohibit an employee who has suffered a particular harm as a result of an employer's discriminatory business practices from representing as named plaintiff a class of fellow employees who have been harmed by different discriminatory practices by the same employer.[11] In *Abron v. Black & Decker, Inc.*,[12] the Fourth Circuit considered whether the peculiar injury suffered by the plaintiff could support a broad-based class action under rule 23.[13]

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[9] FED. R. CIV. P. 23. Subsection (a) of rule 23 requires that the class must be so numerous that joinder of all members is impractical. *Id.* Rule 23(a) further requires that questions of law or fact common to the entire class exist. *Id.* Moreover, the claims of the class representative must be typical of claims of the class, and the class representative must fairly and adequately protect the interests of the class. *Id. See* notes 70-81 *infra* (courts have applied varying interpretations to rule 23 commonality and typicality requirements).

To find an action certifiable as a class action, the district court must satisfy itself that the action is maintainable under one of the divisions of rule 23(b). *Id.* at 23(b). The first of the divisions allows class certification where prosecution of separate actions by or against separate members of the class would create the risk of inconsistent or varying adjudiciations with repsect to the individual members of the class establishing incompatible standards of conduct for the party opposing the class. *Id.* Under the first division, the district court may certify an action as a class action if adjudication with respect to the individual members would, as a practical matter, be dispositive of the interests of other class members not parties to the adjudication, or would substantially impair or impede their ability to protect their interests. *Id.* Alternatively, the district court may hold an action maintainable as a class action under the second division of rule 23(b) if the party opposing the class has acted or refused to act on grounds generally applicable to the class, making appropriate final injunctive relief with respect to the class as a whole. *Id.* Finally, under the third division of rule 23(b), an action is maintainable as a class action if the district court finds that questions of law or fact common the members of the class outweigh any question affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjuciation of the controversy. *Id.*

[10] *See* notes 70-81, *infra* (cases in which courts have given diverse interpretations to rule 23 commonality and typicality requirements).

[11] *See, e.g.*, Scott v. University of Del., 601 F.2d 76, 87 (3d Cir.), *cert. denied*, 444 U.S. 931 (1979) (court considered whether plaintiff challenging discriminatory promotion may represent class including frustrated job applicants); Donaldson v. Pillsbury Co., 554 F.2d 825, 831 (8th Cir.), *cert. denied*, 434 U.S. 856 (1977) (court considered whether class action treatment is precluded by factual variations when claim arises out of same legal or remedial theory); Slover, *Appeal of Class Certification Denial, Reconciling* United States Parole Commission v. Geraghty *with* East Texas Motor Freigh Systems, Inc. v. Rodriguez, 1 REV. LITIGATION 231, 232 (1981) [hereinafter cited as Slover] (certification is watershed of class action because prior to certification defendant faces single plaintiff interested in individual claim, while after certification defendant's potential liability and litigation expenses skyrocket).

[12] 654 F.2d 951 (4th Cir. 1981).

[13] *Id.* at 953.

Plaintiff, Sarah Abron, was an assembly line worker at defendant Black & Decker's Hampstead, Maryland assembly plant.[14] Because she suffered a miscarriage, Abron was absent from work on medical leave twice between the fall of 1971 and the summer of 1972.[15] Upon her return to work following each absence, the plaintiff presented her supervisor with a letter from her doctor requesting that Abron be assigned to lighter work.[16] In situations where employees requested temporary reassignment due to medical reasons, Black & Decker's policy was to direct the employee to make an informal request to his or her immediate supervisor to seek reassignment.[17] If the supervisor was unable to fulfill the request, he was to refer the employee to the company's Safety and Health Department.[18] In Abron's case, however, her supervisor neither reassigned her nor referred her to the Safety and Health Department.[19] Instead, following Abron's return to work after her second absence, her supervisor assigned her to a more physically demanding position.[20] Abron subsequently gave her supervisor notice of her intention to quit because of the strenuous nature of her job and her supervisor's refusal to refer her to the Safety and Health Department.[21] Her supervisor again refused to either reassign her or refer her to the Safety and Health Department.[22]

Abron quit her job shortly thereafter and filed a charge with the EEOC pursuant to the procedural requirements of Title VII.[23] Abron received notice from the EEOC giving her the right to sue Black & Decker because the Commission had been unable to secure a voluntary conciliation agreement with her former employer.[24] After receiving the "right to sue" notice, Abron filed a complaint with the United States District Court for the District of Maryland alleging racial discrimination.[25] Abron sought relief both individually and on behalf of a class which the district court certified to include all past, present and future black

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[14] Abron v. Black & Decker Mfg. Co., 439 F. Supp. 1095, 1112 (D. Md. 1977).

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.* The *Abron* court opinion is silent both regarding why the defendant corporation required an employee to be referred to the Safety and Health Department and regarding what action that department subsequently would take.

[19] *Id.* The *Abron* district court opinion presents no justification for the supervisor's refusal to refer Abron to the company's Safety and Health Department.

[20] *Id.*

[21] *Id.* at 1112-13.

[22] *Id.* at 1113.

[23] *Id.* at 1098. *See* text accompanying note 7 *supra* (procedural aspects of filing EEOC charge).

[24] 439 F. Supp. at 1098. *See* text accompanying note 7 *supra* (Title VII specfically gives individual employees right to bring civil actions against their employers).

[25] 439 F. Supp. at 1098. *See* note 7, *supra* (right to sue notice). The district court opinion is silent regarding why Abron did not claim sexual discrimination, given that her problems were the result of a miscarriage.

employees and black job applicants at defendant's Hampstead plant.[26] The district court held that Black & Decker had violated the civil rights of both Abron and the class in the areas of hiring, recruitment, assignment and classification of jobs, promotions, transfers, and selection of candidates for the company's apprenticeship program.[27] Consequently, the district court permanently enjoined Black & Decker from continuing to discriminate against current and future black employees and job applicants in both company-wide employment and the apprenticeship program.[28] The district court ordered extensive class-wide relief and awarded Abron back pay, benefits, attorney's fees and court costs on her individual claim.[29] Black & Decker subsequently appealed the district court's decision to the Fourth Circuit.

On appeal, the Fourth Circuit found the relief awarded Abron was not clear error and thus affirmed the district court's action regarding her individual claim.[30] Nevertheless, the Fourth Circuit did consider whether the district court erred by certifying the class.[31] The *Abron* court considered the governing principles on the right of a plaintiff to maintain a class action to be stated in a Supreme Court decision, *East Texas Motor Freight Systems, Inc. v. Rodriguez*.[32] *Rodriquez* involved the claims of three minority delivery drivers who complained that the defendant company's refusal to transfer them to positions as over-the-road drivers was racially discriminatory in violation of Title VII.[33] The

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[26] 439 F. Supp. at 1098.

[27] *Id.* at 1117. In addition to the areas of discrimination found by the *Abron* district court, the plaintiff class alleged the defendant company discriminated in benefits, compensation, terms, conditions and privileges of employment. *Id.* at 1098.

[28] *Id.* at 1117.

[29] *Id.* The *Abron* district court ordered Black & Decker to develop a program of affirmative action designed to increase the number and percentage of qualified blacks employed at the Hampstead plant. *Id.* The court further ordered Black & Decker to develop a system of regular and intensive recruiting at high schools and vocational schools in the Baltimore area. Furthermore, the district court required the defendant to consult with employment agencies specializing in minority placement in an effort to fill clerical, office, and supervisory positions with qualified blacks. *Id.* Moreover, the district court directed the defendant to provide all future job applicants with a list of all job openings and provide all employees with detailed job descriptions of all positions at the plant. *Id.* In addition, the court required Black & Decker to provide postings of all job openings as they became available, and to develop and make available to all employees a list of the criteria governing performance evaluations, promotions, transfers, the selection of supervisors, and the selection of apprentices. *Id.* The district court appointed a Special Master to establish the proper measure of equitable relief in the form of back pay and benefits for individual members of the class. *Id.* at 1117-1118.

[30] 654 F.2d at 953.

[31] *Id.* at 953-54.

[32] *Id.* at 954. *See* East Texas Motor Freigh Sys., Inc. v. Rodriguez, 431 U.S. 395 (1977). *See generally* Slover, note 11 *supra*; Case Comment, *Scope of Representation in Title VII Class Actions, A Comment on East Texas Motor Freight Systems, Inc. v. Rodriguez*, 13 HARV. CIV. RIGHTS L. REV. 175 (1978).

[33] 431 U.S. at 398-399.

Supreme Court held that the plaintiffs, as employees denied promotion, were not adequate class representatives for a class of employees who suffered discrimination in hiring, benefits, and other areas.[34] The Fourth Circuit interpreted *Rodriquez* to require that class representatives must have suffered the same injury and must share the same interests as the class members.[35] The *Abron* court further relied on the prior Fourth Circuit decision in *Hill v. Western Elec. Co.*[36] In *Hill*, six black plaintiffs brought a class action alleging a pattern of discrimination against blacks in hiring, job assignments, and promotions by defendant corporation.[37] Reversing the district court's award of class relief, the *Hill* court held that plaintiffs complaining of racial discrimination in assignments and promotions could not act as class representatives for persons denied employment on racial grounds.[38] Accordingly, the *Abron* court interpreted *Hill* to preclude the certification of any class other than a class based on claims similar to Abron's claim of discrimination in temporary reassignment for medical reasons.[39] The Fourth Circuit reasoned that because Black & Decker had not discriminated against Abron in the apprenticeship program, hiring, recruitment, promotion or transfers beyond the temporary transfer she asserted in her complaint, her claim was a solitary one that could not support class certification.[40] The *Abron* court therefore reversed the district court's class certification and set aside the class relief.[41]

In the *Abron* dissent, Judge Murnaghan asserted that the majority's reading of the rule 23 commonality and typicality requirements was overtechnical and would rob Title VII of its efficacy.[42] Contending that the majority identified differences of degree and not kind between the class and Abron, the dissent argued that the majority misread the judicial precedents.[43] Judge Murnaghan argued that *Rodriguez* supported the proposition that the named plaintiff must not have suffered

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[34] *Id.* at 403-404. *See* note 54 *infra* (*Rodriguez* Court's holding that plaintiffs were inadequate class representatives premised on plaintiffs' failure to move for class certification). *See generally* Note, *The Importance of Being Adequate: Due Process Requirements on Class Actions Under Federal Rule 23*, 123 U. PA. L. REV. 1217 (1975).

[35] 654 F.2d at 954-955. *See* notes 44-46 *supra* (*Rodriguez* Court's analysis); note 68 *infra* (*Abron* class members shared common interests and injuries).

[36] 654 F.2d at 954. *See* Hill v. Western Elec. Co., 596 F.2d 99, 101 (4th Cir.), *cert. denied*, 444 U.S. 929 (1979).

[37] 596 F.2d at 100.

[38] *Id.* at 101-02.

[39] 654 F.2d at 954-55.

[40] *Id.* at 955.

[41] *Id.* at 953-954.

[42] *Id.* at 957 (Murnaghan, J., dissenting). *See* Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1126 (5th Cir. 1969) (overtechnical limitations on representative status will drain life out of Title VII). *See* text accompanying notes 9-11 *supra* (rule 23 typicality and commonality requirements).

[43] 654 F.2d at 957. *See* East Texas Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 399 (1977); Hill v. Western Elec. Co., 596 F.2d 99, 102 (4th Cir. 1979).

the "same injury" as the class members but merely "some injury" at the hands of the employer alleged to have injured the class.[44] The dissent reasoned that the district court in *Rodriguez* premised its refusal to certify the class not on the belief that the named plaintiffs had suffered a dissimilar injury from that suffered by the class, but on the belief that the named plaintiffs had suffered no injury at all at the defendant's hands.[45] Moreover, the dissent argued that the majority could not rely on *Hill* to support reversal of class certification in the instant case.[46] Judge Murnaghan argued that *Hill* held only that the named plaintiffs, as existing employees, lacked the link of sameness with job applicants necessary to support certification of a class made up of hires and nonhires.[47] The dissent further argued that the majority's strict reliance on its interpretation of the "same interest, same injury" language found in *Rodriguez* and *Hill* is inconsistent with the Fourth Circuit's prior decision in *Stastny v. Southern Bell Tel. & Tel. Co.*[48] The *Abron* dissent read *Stastny* as recognizing that the question of the proper scope of representation in Title VII suits depends upon substantive considerations that abstractions like "same injury, same interest" cannot supplant.[49] The dissent reasoned that, because of the *Stastny* decision, the *Abron* court should make a principled decision concerning the proper scope of class representation only after reviewing judicial precedents concerning rule 23, Supreme Court decisions concerning the nature of employment dis-

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[44] 654 F.2d at 958. *See* East Texas Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403-04 (1977) (trial court proceedings made clear that named plaintiffs were not members of class of discriminatees they purported to represent because they had suffered no discrimination).

[45] 654 F.2d at 958 (*citing* East Texas Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403 (1977)). *See* Bridgesmith, *Representing the Title VII Class Action: A Question of Degree* 26 WAYNE L. REV. 1413, 1431-1432 (1980) [hereinafter cited as Bridgesmith] (weakness of *Rodriguez* is that standing analysis adopted by Supreme Court, by prohibiting attack on any employment practice which has not affected named plaintiffs individually, fails to resolve conflict between interest of individual Title VII litigant and interests of represented but absent class members). *See generally* Slover, note 11 *supra*.

[46] 654 F.2d at 960-61. *See* Hill v. Western Elec. Co., 596 F.2d 99, 102 (4th Cir. 1979) (the interest of named, employed plaintiffs in being free of discrimination in job assignments and promotions is so different in kind from that of people who were denied employment that named plaintiffs may not properly maintain an action for redress of discrimination in hiring); text accompanying notes 36-38 *supra* (*Hill* facts and holding).

[47] 654 F.2d at 960-61.

[48] *Id.* at 962 (*citing* Stastny v. Southern Bell Tel. & Tel. Co., 628 F.2d 267, 272-80 (4th Cir. 1980)). *See* East Texas Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403 (1977); Hill v. Western Elec. Co., 596 F.2d 99, 101 (4th Cir. 1979).

[49] 654 F.2d at 962. *See* Stastny v. Southern Bell Tel. & Tel. Co., 628 F.2d 267, 273 (4th Cir. 1980). In *Stastny*, the Fourth Circuit reasoned that neither the Supreme Court's admonitions in *Rodriguez* nor the utility of the class action device for many Title VII actions should relieve courts of their obligations under Federal Rule of Civil Procedure 23. *Id. See* East Texas Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403 (1977). The *Stastny* court relied on *Rodriguez* only to the extent that *Rodriguez* emphasized the Supreme Court's belief that Title VII cases are not automatically class actions. 628 F.2d at 273 n.7.

crimination injury, and congressional statements concerning broad representation in Title VII class actions.[50] Judge Murnaghan argued that the *Abron* majority, through its reliance on the "same interest, same injury" holding in *Rodriguez*, ignored the broad congressional policy behind Title VII.[51] Thus, the *Abron* dissent argued that the majority's strict reliance on the *Rodriguez* "same interest, same injury" language was premised on a faulty understanding of judicial precedents, and produced a result contrary to the purpose Congress intended with the passage of Title VII.

In interpreting the rule 23 commonality and typicality requirements to require that the class representative possess the same interest and suffer the same injury as the putative class members for the class to exist, the *Abron* court duly applied what the Fourth Circuit considered to be the correct reading of *Rodriguez*. Nevertheless, by ruling that the district court must dismiss the class claim if the defendant has not injured the class representative in the same way as the class members, the *Abron* court arguably misread *Rodriguez*. The controlling factor in *Rodriguez* was not that the class members had dissimilar injuries and interests from the named plaintiffs, but that the plaintiffs never sought to certify the class.[52] Absent certification the class had no separate legal entity capable of withstanding the failure of the named plaintiffs' individual claims.[53] The *Rodriguez* opinion states that the court would have reached a different decision had the district court certified the class.[54] Unlike the plaintiffs in *Rodriguez*, Sarah Abron sought and received district court certification of the class.[55]

Given the fact that the district court in *Abron* properly certified the class, the Fourth Circuit's dismissal of the class claim upon finding Abron an inadequate class representative is inconsistent with the Supreme Court's decision in *Franks v. Bowman Transportation Co.*[56] The *Franks* Court concluded that a class, once certified by the district court, acquires a legal status separate from the interest advanced by the named

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[50] 654 F.2d at 962-63.

[51] *Id.* at 966-67. *See* Bridgesmith, *supra* note 45, at 1436 (consistent attention to rule 23 requirements will serve to promote ends and purposes of Title VII in most equitable and efficient manner).

[52] *See* East Texas Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 399 (1977).

[53] *Id.* at 406 n.12. *See* Vun Cannon v. Breed, 565 F.2d 1096, 1099 (9th Cir. 1977) (in absence of properly certified class, representative plaintiff whose claims has become moot is himself without litigable grievance, and class on whose behalf he seeks to continue litigation has or have not yet achieved jurisprudential existence); Slover, *supra* note 11, at 252, 255-56 (failure to move for class certification explains *Rodriguez* in light of subsequent decisions).

[54] East Texas Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 406 n.12 (1977). The *Rodriguez* Court reasoned that the plaintiffs' failure to protect the interests of other class members by moving for class certification indicated that the class members might receive less than adequate representation in other aspects of the action. *Id.* at 405.

[55] 439 F. Supp. 1095, 1098 (D. Md. 1977).

[56] 424 U.S. 747 (1976).

plaintiff.[57] In *Franks*, the named plaintiff, representing a class of minority applicants for positions as over-the-road drivers, alleged that defendant's discriminatory hiring and discharge policies limited access to over-the-road positions in violation of Title VII.[58] Because the defendant company discharged the plaintiff for cause subsequent to class certification, defendant's counsel argued that the named plaintiff lacked a personal stake in any possible relief, thereby making the class claim moot.[59] The Supreme Court found that the class had assumed a legal status of its own upon certification by the district court.[60] Moreover, the Court concluded that unnamed class members' interest in securing the employment benefits that the defendant employer allegedly had denied them was sufficient to satisfy the "case or controversy" requirement of article III of the Constitution.[61] The Supreme Court based its decision that a certified class has a separate legal identity capable of surviving dismissal of the class representative's individual claim on the Court's prior decision in *Sosna v. Iowa*.[62] In *Sosna*, the Court upheld the validity of a class challenge to the residency requirement of the Iowa divorce statute despite the fact that the named plaintiff secured a divorce elsewhere subsequent to class certification.[63] The Court held that, because Iowa undoubtedly would continue enforcement of the divorce statute to the detriment of the unnamed class members, the putative class members acquired a legal status separate from the interest of the named plaintiff once the district court certified the class.[64] In *Abron*, the majority failed to recognize that, because Black & Decker's discriminatory business practices will continue to affect the unnamed members of the class regardless of the disposition of Abron's individual claim, the class has a legal interest

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[57] *Id.* at 753.

[58] *Id.* at 750-751.

[59] *Id.* at 752-753.

[60] *Id.* at 753.

[61] *Id.* at 756. Article III of the Constitution provides that the judicial power of the federal courts shall extend to active cases or controversies as specified in § 2 of the article. U.S. CONST. art. III § 2. In the context of class actions, the Supreme Court has interpreted the "case or controversy" requirement to mandate not only that a named plaintiff have a case or controversy at the time the complaint is filed and at the time the class is certified by the district court, but also a live controversy must exist at the time the Supreme Court reviews the case. Sosna v. Iowa, 419 U.S. 393, 402 (1975).

[62] 424 U.S. at 753. *See* Sosna v. Iowa, 419 U.S. 393, 399 (1975).

[63] Sosna v. Iowa, 419 U.S. 393, 398 n.7 (1975). In *Sosna*, appellant sought certification of a class including all residents of Iowa who had resided therein for less than one year and who desired to initiate actions for dissolution of marriage or legal separation. *Id.* at 397. By the time the case reached the Supreme Court on an appeal of the propriety of the district court's class certification, the appellant had not only long since satisfied the statutory residency requirement but had obtained a divorce in New York. *Id.* at 398 n.7.

[64] *Id.* at 388-401. *See* United States Parole Commission v. Geraghty, 445 U.S. 388, 404 (1980) (action brought on behalf of class does not become moot upon expiration of named plaintiff's substantive claim).

capable of withstanding the Fourth Circuit's holding that Abron was an unsatisfactory class representative.

Because the specific injury alleged by Abron, discrimination in temporary transfer for medical reasons, as not a part of the class complaint before the district court, the Fourth Circuit held that the rule 23 commonality and typicality requirements, according to its interpretation of *Rodriguez*, precluded her representing the class.[65] In instances when courts have limited the permissable scope of class representation in a manner similar to the *Abron* court, they consistently have done so on the theory that the named plaintiffs were never members of the class they sought to represent.[66] A number of courts have held, however, that a pattern of racial discrimination creates a class made up of victims of racial discrimination, with the employer's discriminatory intent, not factually identical injuries, operating as the basis of the class claim.[67] The *Abron*

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[65] 654 F.2d at 955.

[66] *See, e.g.*, DeGrace v. Rumsfeld, 614 F.2d 796, 809-11 (1st Cir.), *cert. denied*, 101 S. Ct. 1988 (1981) (district court correctly held named plaintiff who alleged discriminatory hiring and discharge to be inadequate class representative where class would benefit only if plaintiff sought end to on-going job-related practies); Patterson v. General Motors Corp., 631 F.2d 476, 480 (7th Cir. 1980) (named plaintiff's complaint alleged facts that related solely to his personal grievances, not facts challenging general employment policy); Scott v. University of Delaware, 601 F.2d 76, 87 (3d Cir. 1979) (plaintiff challenging discriminatory promotion may not represent class contesting defendant's hiring practices); Johnson v. American Credit Card Co., 581 F.2d 526, 532 (5th Cir. 1978) (fundamental requirement is that representative plaintiff be member of class she claims to represent); Bridgesmith, *supra* note 45, at 1436 (courts serve interest to neither class members nor defendant employers by allowing overbroad, unrepresentative class actions); *but see* Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 937 (2d Cir. 1968) (named plaintiffs, as members of association whose purpose is to represent class, are not precluded from representing class simply because they are not class members).

[67] *See, e.g.*, Payne v. Travenol Laboratories, Inc., 565 F.2d 895, 900 (5th Cir.), *cert. denied*, 439 U.S. 835 (1978) (named plaintiffs, allegedly aggrieved by some employment practices, have demonstrated sufficient nexus to enable them to represent other class members suffering from different discriminatory practices); Alexander v. Aero Lodge No. 735, 565 F.2d 1364, 1372-1373 (6th Cir.), *cert. denied*, 436 U.S. 946 (1978) (class is homogenous as discrimination in employment is claimed by all members of class to be on basis of one common characteristic, race of employee); Alliance to End Repression v. Rockford, 565 F.2d 975, 979 (7th Cir. 1977) (once common issue of law or fact is alleged by class representative, immaterial that plaintiff complains of variety of specific activities); Donaldson v. Pillsbury Co., 554 F.2d 825, 831 (8th Cir.), *cert. denied*, 434 U.S. 856 (1977) (when claim arises out of same legal or remedial theory, presence of factual variation normally is not sufficient to preclude class action treatment); Gibson v. Local 40, Supercargoes and Checkers of the International Longshoreman's and Warehousemen's Union, 543 F.2d 1259, 1264 (9th Cir. 1976) (class action proper which alleges general course of racial discrimination manifested in variety of practices affecting different members of class in different ways at different times); Crockett v. Green, 534 F.2d 715, 717-18 (7th Cir. 1976) (named plaintiff's claims are typical of class because they present questions of law or fact regarding existence of racial discrimination common to class); Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 246 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975) (class representative may bring action on behalf of those who have claimed no injury and have not filed EEOC complaints, but rule 23 precludes class representative from representing those who could not have filed EEOC complaints).

court failed to recognize that, although the alleged unlawful employment practices were diverse factually, they all were focused against black employees and black job applicants, which created a class of victims of racial discrimination.[68] Sarah Abron clearly was a member of that class, a fact reinforced by the Fourth Circuit's affirmation of her individual recovery.[69]

Other Fourth Circuit decisions considering whether the rule 23 requirements permit a named class member suffering a peculiar injury to represent a broad-based class challenging a variety of employment practices do not support the *Abron* court's decision.[70] In *Barnett v. W.T. Grant Co.*,[71] the Fourth Circuit considered a class challenge to a variety of employment practices in which the named plaintiff alleged he was injured only by the employer's discriminatory promotion policies.[72] The *Barnett* court held that the broad-based class challenge fit within the requirements of rule 23 despite the factual variations between the claims of the named plaintiff and the class members.[73] The *Barnett* decision is harmonious with the Fourth Circuit's decision in *Russell v. American Tobacco Co.*[74] The *Russell* court held that an individual plaintiff may represent a class of fellow employees who have suffered racial discrimination, even though the class members may have worked in different departments and may have suffered injuries which were not identical.[75]

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[68] Abron v. Black & Decker Mfg. Co., 439 F. Supp. 1095, 1117 (D. Md. 1977). *Cf.* text accompanying note 44 *supra* (Supreme Court premised its decision in *Rodriguez* on theory that plaintiffs were not members of the class because they had suffered no discrimination).

[69] 654 F.2d at 953.

[70] *See, e.g.*, Stastny v. Southern Bell Tel. & Tel. Co., 628 F.2d 267, 278 (4th Cir. 1980) (deficiencies in district court record warrant remand because *Rodriguez* precludes certification on basis of speculation or inference); Hill v. Western Elec. Co., 596 F.2d 99, 101 (4th Cir. 1977) (named plaintiff alleging discrimination in job assignments and promotions may not represent class alleging discrimination in hiring); Russell v. American Tobacco Co., 528 F.2d 357, 365 (4th Cir.), *cert. denied*, 425 U.S. 935 (1976) (named plaintiff may represent class despite fact class members worked in different departments and did not suffer identical injuries); Barnett v. W.T. Grant Co., 518 F.2d 543, 548 (4th Cir. 1975) (named plaintiff alleging only discrimination in promotion may represent class members who suffered different kinds of injury at hands of same employer).

[71] 518 F.2d 543 (4th Cir. 1975).

[72] *Id.* at 546.

[73] *Id.* at 547. *See* Hill v. Western Elec. Co., 596 F.2d 99, 101 (4th Cir. 1977). In *Hill*, the Fourth Circuit held that the named plaintiff, who alleged discrimination in job assignments and promotions could not represent a class of job applicants alleging discrimination in hiring. *Id.* The Fourth Circuit thus limited its holding in Barnett to its facts, reasoning that *Rodriguez* precluded that any wider application. *Id.* The *Hill* court noted that although *Rodriguez* limited *Barnett*, *Rodriguez* did not destroy completely *Barnett's* efficacy. *Id.* at 102. The *Hill* court held that, under *Barnett*, a plaintiff suffering a particular injury as a result of a particular employment practice such as discriminatory promotion policy within one department of a single facility could represent a class of fellow employees from other departments of the same facility that the defendant employer had injured in the same way. *Id.*

[74] 528 F.2d 357 (4th Cir. 1975).

[75] *Id.* at 365.

In a more recent Fourth Circuit decision, *Stastny*, the court warned against uncompromising reliance on abstractions like the *Rodriguez* "same interest, same injury" language.[76] The *Stastny* court concluded that the *Rodriguez* Court's strict language regarding rule 23, given the undoubted utility and attractiveness of the class action device for Title VII litigation, was not intended to relieve the courts of their obligation to examine the facts of every case to determine their fitness for class certification.[77] The *Stastny* court held that the rule 23 commonality and typicality requirements compel the trial court to conduct specific inquiries on the record into the nature of the unlawful employment practice charged, the extent of the employment practice, the extent of the membership of the class, the nature of the employer's management organization and the time span covered by the allegations.[78] Thus the *Abron* majority, by relying on the *Rodriguez* "same injury, same interest" language, ignored the analytical framework the Fourth Circuit had established for determining the proper scope of class representation.

A number of federal circuit courts have approved across-the-board class challenges to a variety of unlawful employment practices on the theory that the federal appellate courts must not permit district courts to frustrate the broad national policy of Title VII through the use of overtechnical procedural requirements.[79] In addition, other circuit court decisions have held that the procedural safeguards of subclassification[80] and decertification make across-the-board class challenges possible even when the class representative and the unnamed class members com-

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[76] 628 F.2d at 273. *See* text accompanying notes 48-50 *supra* (*Abron* dissent relied on *Stastny*).

[77] 628 F.2d at 273. *See, e.g.*, Shelton v. Pargo, Inc., 582 F.2d 1298, 1312 (4th Cir. 1978) (careful attention to requirements of rule 23 remains indispensable in cases alleging racial or ethnic discrimination); Belcher v. Bassett Furniture Indus. Inc., 588 F.2d 904, 906 (4th Cir. 1978) (courts should not grant class certification on basis of boiler-plate allegations); Doctor v. Seaboard Coast Line R. Co., 540 F.2d 699, 760-707 (4th Cir. 1976) (suits involving racial discrimination lend themselves to class treatment, but plaintiff does not qualify as class representative merely because of his or her race or because he designates action as class action).

[78] 628 F.2d at 277.

[79] *See, e.g.*, Senter v. General Motors Corp., 532 F.2d 511, 524 (6th Cir.), *cert. denied*, 429 U.S. 870 (1976) (although employer's business decisions involve individual considerations, when decision is part of class-wide discriminatory practice, courts bear responsibility to vindicate policies of Title VII regardless of position of individual plaintiff); Rich v. Martin-Marietta Corp., 522 F.2d 333, 341 (10th Cir. 1975) (limitation of class would make rule 23 nullity, so long as rule is on books courts should give rule effect); Hackett v. McGuire Bros., 445 F.2d 442, 446-447 (3d Cir. 1971) (courts may not frustrate public policy of Title VII and § 1981 by development of overly technical judicial doctrines of standing); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1126 (5th Cir. 1969) (overtechnical limitations on representative status will drain life out of Title VII).

[80] Federal Rule of Civil Procedure 23(c)(4)(B) provides that, when appropriate, courts may divide a class into subclasses, with each subclass treated as a class. FED. R. CIV. P. 23(c)(4)(B).

plained of dissimilar injuries.[81] Moreover, the Supreme Court has interpreted the rule 23 commonality and typicality requirements to permit a named plaintiff who has been subjected to a discriminatory work environment to represent a broad-based class, regardless of whether the defendant employer ever denied the named plaintiff in employment opportunity or a specific entitlement.[82] The lower federal courts, interpreting the Supreme Court's broad reading of rule 23 to establish as a matter of policy the right of every citizen to live and work in a discrimination free environment, have followed the Supreme Court decisions.[83]

The Fourth Circuit's holding that the district court's class certification was reversible error threatens the utility of the class action for Title VII purposes. The *Abron* court's decision to reverse the district court's class certification and vacate the class relief seems unlikely to promote either the discrimination free work environment mandated by the courts or the remedial goals congress expressed with the passage of Title VII.[84] Even if the Fourth Circuit was correct in its holding that Sarah Abron was an inadequate class representative, the court should have remanded the case to the trial court to allow the intervention of a suitable named plaintiff.[85] The Supreme Court has held that in Title VII

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[81] *See, e.g.*, United States Fidelity and Guar. Co. v. Lord, 585 F.2d 860, 865 (8th Cir.), *cert. denied*, 440 U.S. 913 (1979) (no abuse of district court's discretion in certifying class of national scope given possiblity of subclassification or decertification); Lamphere v. Brown Univ., 553 F.2d 714, 718-19 (1st Cir. 1977) (discretion of court to decertify class and possibility of appellate review are safeguards against across-the-board abuse).

[82] *See, e.g.*, International Brotherhood of Teamsters v. United States, 431 U.S. 324, 365 (1977) (effects and injuries suffered from discriminatory employment practices are not confined always to those persons expressly denied requested employment opportunity). *Accord*, Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 111-115 (1979) (deprivation of benefits of interracial association constitutes sufficient injury to afford plaintiffs, who suffered no discrimination, class standing); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 212 (1972) (courts can give vitality to § 810(a) of Civil Rights Act only through generous construction of standing requirements); Rogers v. Paul, 382 U.S. 198, 200 (1965) (per curiam) (minority students have standing to challenge school policies allocating faculty on basis of race).

[83] *See, e.g.*, Waters v. Heublein, Inc., 547 F.2d 466, 469 (9th Cir.), *cert. denied*, 433 U.S. 915 (1977) (white plaintiff has standing under Title VII to sue employer who discriminates against minorities, since she had right to work environment free of racial prejudice); Gray v. Greyhound Lines, East, 545 F.2d 169, 176 (D.C. Cir. 1976) (black employee may challenge discriminatory hiring policies on grounds that policies violate Title VII right to nondiscriminatory work environment); Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972) (hispanic employee has standing to challenge employer's discriminatory service to hispanic patients because such service violates employee's right to discrimination free work place); United States v. City of Buffalo, 457 F. Supp. 612, 631-35 (W.D.N.Y. 1978) (black employees entitled to work environment free of racial abuse and insult); Hall v. Werthan Bag Corp., 251 F. Supp. 184, 186 (M.D. Tenn. 1966) (whether Damoclean threat of racially discriminatory policy hangs over racial class is quetion of fact common to all members of class).

[84] *See* text accompanying notes 2-3 *supra* (purposes of Title VII).

[85] *See* Franks v. Bowman Transportation Co., 424 U.S. 747, 752-56, 780 (1976) (class members retain personal stake in class action despite satisfaction of named plaintiff's individual claim, making remand appropriate). *Accord*, Deposit Guar. Nat. Bank v. Roper, 445

actions the duty of the courts is to render decrees which will assist in eliminating the discriminatory effects of the past.[86] By vacating the district court's class certification without remanding the case in order to permit a suitable class representatives to come forward, the Fourth Circuit in *Abron* has failed to live up to the Supreme Court's mandate.

TOM GRUENERT

D. Proper Methods of Statistical Proof in Disparate Impact Cases of Title VII Litigation.

Congress enacted Title VII of the Civil Rights Act of 1964[1] (Title VII) to assure equality of employment opportunities.[2] Title VII proscribes

U.S. 326, 331, 339 (1980) (since district court has obligation to protect rights of absent class members and integrity of judicial process, early dismissal of class claim fulfills neither, therefore court should allow satisfactory class representative to come forward on remand); United States Parole Comm'n v. Geraghty, 445 U.S. 388, 407-08 (1980) (class representative's claim becoming moot should not moot class claim); Muskelly v. Warner and Swasey Co., 653 F.2d 112, 113 (4th Cir. 1981) (intervention of class member after certification to preserve rights and interests of putative class members held permissable); Hill v. Western Elec. Co., No. 80-1279 (4th Cir. 1981) (Hill II) (remand appropriate with instruction to district court to permit intervention of proper class representative to remedy headless class created by Fourth Circuit's earlier ruling in *Hill*); Ford v. United States Steel Corp., 638 F.2d 753, 754-55 (5th Cir. 1981) (because decertification of class and dismissal of action may work injustice on those who may have relied on certification court should allow satisfactory class representative to come forward); Goodman v. Schlesinger, 584 F.2d 1325, 1332 (4th Cir. 1978) (premature dismissal of class action by district court justifies remand to allow proper class representative to come forward); Cox v. Babcock and Wilcox Co., 571 F.2d 13, 16 (4th Cir. 1972) (dismissal of action because named plaintiff was not member of class does not foreclose subsequent prosecution of class action by party with proper standing). *Cf.* Vun Cannon v. Breed, 565 F.2d 1096, 1099 (9th Cir. 1977) (in absence of properly certified class, representative plaintiff who claim has become moot is himself without litigable grievance and class on whose behalf he seeks to continue litigation has not yet achieved jurisprudential existence, making remand improper). *See generally* Note, 38 WASH. & LEE L. REV. 275 (1980); Slover, note 11 *supra*.

[86] *See* Albermarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975).

[1] 42 U.S.C. §§ 2000e-2000e-17 (1976 & Supp. III 1979). Under Title VII, Congress intended to destroy artificial and arbitrary barriers that restrict equal employment opportunities. Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971). Title VII elevated the promise of equal opportunity to a national commitment. Senator Humphrey, a strong proponent of Title VII, stated:

> What the bill does . . . is simply to make it an illegal practice to use race as a factor in denying employment. It provides that men and women shall be employed on the basis of their qualifications, not as Catholic citizens, not as Protestant citizens, not as Jewish citizens, not as colored citizens, but as citizens of the United States.

S. Res. 287, 93d Cong., 2d Sess., 110 CONG. REC. 13088 (1964); *see* Edwards & Zaretsky, *Preferential Remedies for Employment Discrimination*, 74 MICH. L. REV. 1, 2 (1975) (equal employment opportunity an essential national goal).

[2] *See generally* Sape & Hart, *Title VII Reconsidered: The Equal Employment Oppor-*

practices that discriminate on the basis of race, color, religion, sex, or national origin in both public and private employment.[3] Under Title VII, plaintiffs must file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) before pursuing direct legal recourse.[4] Section 706(c) of Title VII establishes an administrative procedure whereby the EEOC has an opportunity to settle employment disputes through conference, conciliation, and persuasion before the aggrieved party may bring a lawsuit.[5] The EEOC, however, does not function simply as a vehicle for conducting litigation on behalf of private parties. The legislative purpose underlying the formation of the EEOC suggests that the Commission bears the primary responsibility for eradicating systematic discrimination.[6]

Most discrimination in employment results not from random acts, but rather from institutionalized practices and policies.[7] Courts have

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tunity Act of 1972, 40 GEO. WASH. L. REV. 824 (1972) (detailed analysis of legislative history of Title VII).

[3] 42 U.S.C. § 2000e-2(a) (1976). Title VII applies to public employers whose industry operates in the flow of commerce or in whose industry a labor dispute would disrupt the flow of commerce. *Id.* § 2000e(h). Title VII applies to private employers including persons who employ fifteen or more employees. *Id.* § 2000e(b).

[4] *Id.* § 2000e-5(e); *see* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973). To take advantage of Title VII protections, a claimant must file an administrative charge of discrimination with the Equal Employment Opportunity Commission (EEOC) within 180 days of the alleged discriminatory act. 42 U.S.C. § 2000e-5(e) (1976). If the EEOC finds reasonable cause to believe that discrimination is present, the EEOC will attempt to stop the unlawful practice through informal methods of conference, conciliation, and persuasion. *Id.* § 2000e-5(b); *see* Local 179, United Textile Workers v. Federal Paper Stock Co., 461 F.2d 849, 850 (8th Cir. 1972). The employee's right to sue under Title VII arises only after the EEOC has issued a notice of the right to sue. *Id.* The EEOC issues notice of the right to sue after dismissing the administrative charge, terminating conciliation discussions with the defendant, or failing to bring suit within 180 days of the filing of the charge. 42 U.S.C. § 2000e-5(e) (1976); *see* note 3 *supra*.

[5] 42 U.S.C. 2000e-5(b) (1976). A plaintiff may file suit under two distinct theories of Title VII discrimination, disparate treatment and disparate impact. *See generally* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 90 (1976) [hereinafter cited as SCHLEI & GROSSMAN]; Lopatka, *A 1977 Primer on the Federal Regulation of Employment Discrimination*, 1977 U. ILL. L.F. 69, 72 (1977).

Disparate treatment involves employer treatment of one individual less favorably than another. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973). The plaintiff in a disparate treatment case must prove discriminatory intent on the part of the employer. *See id.* at 803. Disparate impact claims challenge specific employment practices which, while facially netural, nonetheless affect one minority group more harshly than other groups. *See* Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971). Disparate impact cases do not require proof of an employer's discriminatory motive. *Id. See also* Note, *Disparate Impact and Disparate Treatment: The Prima Facie Case Under Title VII*, 32 ARK. L. REV. 571 (1978) [hereinafter cited as *Disparate Impact*].

[6] *See* E.E.O.C. v. E.I. duPont de Nemours & Co., 516 F.2d 1297, 1299, 1301 (3d Cir. 1975) (EEOC created as federal agency to enforce congressional policy against discriminatory employment practices).

[7] *See* Copus, *The Numbers Game is the Only Game in Town*, 20 How. L.J. 374, 375-377 (1977) (increasing use of statistics in accordance with growth of institutionalized as opposed to individual instances of discrimination) [hereinafter cited as Copus].

recognized that employment practices, policies, and patterns, even though neutral on their face, often segregate and classify employees on the basis of race as effectively overt instances of racial discrimination.[8] The elimination of systematic discriminatory practices, therefore, is a significant means of achieving the Title VII objectives promoting equal employment opportunities.[9] EEOC pattern and practice suits provide an important solution to the problem of institutionalized employment discrimination.[10]

Systematic employment discrimination is often difficult to prove.[11] Evidence concerning individual instances of discrimination will not always reveal the subtle discriminatory effects of facially neutral employment practices.[12] The United States Supreme Court has recognized that statistical analyses play an important role in establishing the existence of a pattern or practice of discrimination.[13] Thus, the increased use of pattern and practice suits in Title VII litigation poses important procedural and substantive questions for the courts.[14] In *Equal Employ-*

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[8] *See* United States v. Dillon Supply Co., 429 F.2d 800, 804 (4th Cir. 1970) (promotion, transfer, and reassignment employment practices, though presently non-discriminatory, held violative of Title VII due to past discriminatory effects); United States v. Ironworkers Local 86, 443 F.2d 544, 551 (9th Cir. 1971) (though statistics alone failed to show union employment practices discriminatory, overt acts of discrimination and facially neutral practices had differential effect on blacks violative of Title VII), *cert. denied*, 404 U.S. 984 (1971).

[9] *See* Copus, *supra* note 7, at 376.

[10] *Id.* at 376 n.11. In suits alleging a pattern or practice of racial discrimination in employment procedures such as hiring, firing, and promotion, the Government is the plaintiff. Teamsters v. United States, 431 U.S. 324, 360 (1977). The Government bears the burden of establishing that a discriminatory employment practice existed and that an employer has discriminated as a regular policy. *Id.* Once the government has established a claim of discrimination, the employer must rebut the plaintiff's showing. *Id.* Employers often resort to statistical evidence to refute claims of discriminatory practices. *Id.* at 340 n.20. Employers must resort to statistical proof in many cases because of the complex nature of discriminatory employment practices. *See* Mayor of Phila. v. Educational Equality League, 415 U.S. 605, 620 (1974).

[11] Statistics related to racially discriminatory employment practices can be the only available method of proof to uncover clandestine or covert discrimination. United States v. Ironworkers Local 86, 443 F.2d 544, 551 (9th Cir. 1971), *cert. denied*, 404 U.S. 9814 (1971).

[12] *Id.* at 551.

[13] Mayor of Phila. v. Educational Equality League, 415 U.S. 605, 620 (1974) (statistical analyses serve important role as indicator of racial discrimination in Title VII suits).

[14] *See* text accompanying notes 36-127 *infra*. Commentators have supported the use of EEOC pattern and practice suits as an effort to combat discrimination. One commentator notes that pattern and practice suits by the Government are the best means to penetrate the interlocking nature of employment discrimination as opposed to individual claims of discrimination. 2 LYLE, FEDERAL CIVIL RIGHTS ENFORCEMENT POLICY FOR THE SEVENTIES, PATTERNS OF RACIAL DISCRIMINATION, EMPLOYMENT AND INCOME 51 (1974). Another study indicates that individual charges of discrimination are more cumbersome and inefficient than pattern and practice suits. SURVEY RESEARCH CENTER, UNIV. OF MICH., SURVEY OF WORKING CONDITIONS, A71, at 280-81, 420-A1 (1970). Another commentator, however, recognizes that government suits designed to attack discrimination in the private sector have been unsuccessful. The private sector traditionally was immune from judicial eradication of discriminatory employment practices, which resulted in pervasive patterns of discrimina-

ment Opportunity Commission v. American National Bank,[15] the Fourth Circuit recently examined the permissible scope of an EEOC investigation and the proper methods of statistical proof in a suit involving a pattern and practice of racial discrimination.

In *American National Bank*, the EEOC brought suit against the American National Bank (ANB) alleging that the bank had engaged in racially discriminatory hiring practices from 1969 to 1975.[16] An unsuccessful black job applicant filed the initial charge with the EEOC.[17] The complainant claimed that the Suffolk, Virginia branch of the ANB had denied her a job because of her race.[18] The EEOC investigated the charge and found reasonable cause to believe that the bank had discriminated.[19] Subsequently, the complainant chose not to proceed with the action.[20] The EEOC then filed suit against the Suffolk and Portsmouth bank branches, charging a pattern and practice of racial discrimination in hiring procedures.[21]

To establish a prima facie case of discrimination the EEOC presented a combination of statistical and nonstatistical evidence.[22] The evidence included static work force data,[23] information concerning

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tion. Government antidiscrimination suits nonetheless, effectively can nullify discriminatory practices in both private and public areas. Lytle, *Resurrecting the 1866 Civil Rights Act: Outlawing Discrimination in the Private Sector*, 9 CIV. RIGHTS DIG. 28 (Sum. 1977). *See also* UNITED STATES COMMISSION ON CIVIL RIGHTS, STATEMENT ON AFFIRMATIVE ACTION FOR EQUAL EMPLOYMENT OPPORTUNITIES, at 2-6 (1973); Brown, *Statistics and the Law: Hypothesis Testing and Its Application to Title VII Cases*, 32 HASTINGS L.J. 59 (1980); Hay, *The Use of Statistics to Disprove Employment Discrimination*, 29 LAB. L.J. 430 (1978); Hill, *The New Judicial Perception of Employment Discrimination—Litigation Under Title VII of the Civil Rights Act of 1964*, 43 U. COLO. L. REV. 243, 245-46 (1972).

[15] 652 F.2d 1176 (4th Cir. 1981).

[16] *Id.* at 1180-81.

[17] *Id.* at 1181.

[18] *Id.*

[19] *Id.*; *see* note 4 *supra*.

[20] 652 F.2d at 1181.

[21] *Id.*

[22] *Id.* at 1181-82.

[23] *Id.* Static work force data compares the racial composition of the particular work force in question with the general available work force in relevant market areas. *Id.* at 1182. *See also* Teamsters v. United States, 431 U.S. 324, 339 n.20 (1977). Static work force statistics are probative of discrimination because nondiscriminatory hiring practices usually will result in a work force representative of the racial and ethnic composition of the population in the employees community. 431 U.S. at 339. Evidence of a longlasting and gross disparity between composition of a given work force and that of the general population is not a violation of Title VII by itself, but may be probative of employment practices of purposeful discrimination. *Id.*

In *American National Bank*, the EEOC presented evidence concerning the racial composition of ANB's work force at both its Suffolk and Portsmouth branches. 652 F.2d at 1181. The EEOC compared the figures to the relevant market areas of the City of Suffolk and Nansemond County and the City of Portsmouth and the Norfolk-Portsmouth Standard Metropolitan Statistical Area (SMSA) respectively. *Id.* at 1182 n.1; *see* Taylor v. Safeway, 365 F. Supp. 468, 475-76 (D. Colo. 1973), *modified*, 524 F.2d 263 (10th Cir. 1975) (SMSA ap-

ANB's specific hiring policies from 1969 to 1975, and testimony regarding individual instances of discrimination.[24] In rebuttal, ANB sought to demonstrate that the Government's evidence was not sufficiently probative to establish a prima facie case.[25] ANB argued that under a standard deviation analysis,[26] the EEOC's statistical data was not sufficient to show a policy of purposeful discrimination.[27] In addition, ANB submitted applicant flow data[28] to show that its hiring decisions during the seven year period were not discriminatorily motivated.[29]

The district court excluded the evidence relating to discrimination at the Portsmouth bank branches.[30] The court noted that because the ac-

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propriate measure of geographic area in Title VII litigation). The EEOC compared the racial composition of the bank to the specialized labor force in the relevant areas, including persons skilled enough to perform bank tasks. *Id.* at 1189-90; *see* EEOC v. United Va. Bank/Seaboard Nat'l, 615 F.2d 147, 150 (4th Cir. 1980) (general work force statistics not appropriate statistical group for comparison with bank employees; specialized work force figures required for comparison). *See generally Fourth Circuit Review—Statistical Evidence in Title VII Litigation*, 38 WASH. & LEE L. REV. 652 (1982).

[24] 652 F.2d at 1181.

[25] *Id.* at 1188. An employer may rebut a plaintiff's statistical evidence establishing a prima facie case of discrimination by demonstrating that the proof is either inaccurate or insignificant. Teamsters v. United States, 431 U.S. 324, 360 (1977). An employer may show that statistics are insignificant by showing that they are mainly attributable to pre-Act employment discrimination actions. Hazelwood School Dist. v. United States, 433 U.S. 299, 309 (1977).

[26] Standard deviation analysis is a type of statistical analysis that measures the difference between the actual numbers of a protected minority group in a given sample of minority and non-minority employees and the number that would be expected in a perfectly proportional process of selection. 652 F.2d at 1191. *See generally* Castaneda v. Partida, 430 U.S. 482 (1977). The standard deviation measures the degree of fluctuation in a random selection process. 652 F.2d at 1191. Generally, as standard deviations increase numerically the probability that the number of minorities represented in a given sample is due to chance decreases. *Id.* The legal inference that the Supreme Court has drawn from standard deviation analyses is that standard deviations greater than two or three necessarily exclude chance as a cause of minority underrepresentation in a work force. 430 U.S. at 497; n.17. A fluctuation of more than two or three standard deviations concerning minority representation in a work force implies discriminatory design. Hazelwood School Dist. v. United States, 433 U.S. 299, 311 n.17 (1977). *See generally* J. FREUND, MODERN EXAMPLES OF ELEMENTARY STATISTICS 3-4 (4th ed. 1973) (examples and definition of various statistical inferences).

[27] 652 F.2d at 1188, 1190-93; *see* Castenada v. Partida, 430 U.S. 482, 496 n.17 (1977) (no exploration of statistical significance of standard deviation in range of two or three); text accompanying notes 120-23 *supra*.

[28] Applicant flow data contrasts the number of minority and non-minority applicants for given jobs with the numbers in each category that an employer actually hired. Copus, *supra* note 7, at 401. Title VII litigants translate these comparative numbers into percentages and often tabulate them to indicate general patterns of minority and non-minority hiring preferences. 652 F.2d at 1193-95. As a method of statistical proof in discrimination cases, applicant flow data is speculative and may not indicate patterns of discrimination. *Id.* at 1193-94. Since absolute proof of discriminatory design is absent to differing degrees in all statistical analyses, however, courts have found applicant flow data sufficiently reliable as probative evidence of discrimination. *Id.*

[29] *Id.* at 1193-95.

[30] *Id.* at 1183.

tivities of the Portsmouth branches were not part of the original complaint or the subject of the EEOC's investigation, the court had no jurisdiction in the matter.[31] Addressing the merits of the case, the district court found that the EEOC's work force statistics constituted prima facie proof of a pattern or practice of ANB's discrimination against blacks.[32] After analyzing the defendant's applicant flow data and applying a standard deviation analysis to the EEOC's statistics, the court concluded that ANB's rebuttal evidence neutralized the inference of discrimination.[33] The court then independently evaluated the EEOC's nonstatistical evidence.[34] Finding no evidence of discrimination in either the hiring practices or individual claims of discrimination, the court dismissed the suit.[35]

On appeal, the Fourth Circuit first addressed the issue of jurisdiction.[36] The Fourth Circuit reversed the findings of the district court concerning jurisdiction over the Portsmouth claims.[37] Although the complainant filed the original charge specifically against the Suffolk branch, the Fourth Circuit held that the EEOC properly could bring suit against all of the bank's branches.[38] The court noted that the 1972 amendments to Title VII broadened the EEOC's investigative powers in an effort to eliminate employment discrimination on a national scale.[39] The Fourth Circuit reasoned that the permissible scope of the complaint in an EEOC action should not frustrate the overriding goals of eradication of unfair employment practices.[40] The court stressed that the charge against the Portsmouth bank branches reasonably grew out of the investigation of the Suffolk claim and thus constituted a single charge of discrimination against a single employer.[41] The Fourth Circuit held that jurisdiction over the Portsmouth claims was valid because the same hiring practices

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[31] *Id.* Jurisdiction to hear an EEOC claim of discrimination follows from specific allegation of the claim in the original complaint. Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 719 (7th Cir. 1969). Proper investigation and conciliation are jurisdictional prerequisites to an EEOC suit on a particular claim. See EEOC v. E.I. dePont de Nemours & Co., 373 F. Supp. 1321, 1336 (D. Del. 1974) (each step in EEOC administrative process prerequisite to suit), *aff'd*, 516 F.2d 1297 (3d Cir. 1975).

[32] 652 F.2d at 1184.

[33] *See id.* at 1187.

[34] *See id.* at 1189.

[35] *See id.* at 1187.

[36] *See id.* at 1184.

[37] *Id.*

[38] *Id.* at 1185.

[39] *Id.* at 1184; *see* EEOC v. Kimberly-Clark Corp., 511 F.2d 1352, 1355 (6th Cir. 1975), *cert. denied*, 433 U.S. 994 (1976) (1972 amendments to Title VII designed to expand EEOC's power to vindicate discrimination).

[40] 652 F.2d at 1184; *see* EEOC v. General Elec. Co., 532 F.2d 359, 368 (4th Cir. 1976) (EEOC has standing to bring suit on claim of discrimination stated in charge or developed in course of reasonable investigation).

[41] 652 F.2d at 1186.

were involved, and the defendants had adequate notice of the investigation and opportunity to conciliate.[42]

After resolving the jurisdiction issue, the Fourth Circuit addressed the issue of the use of statistical and nonstatistical evidence in disparate impact claims of discrimination.[43] The Fourth Circuit relied on *Teamsters v. United States*[44] and subsequent Supreme Court decisions to determine the validity of the statistical and nonstatistical evidence in *American National Bank*.[45] The *Teamsters* decision allows a plaintiff to prove unlawful discrimination by a statistical analysis of the effect of the challenged employment practices without requiring inquiry into an employer's intent.[46] The plaintiff must show that certain employment practices have a disparate impact on a protected class under Title VII.[47] To establish disparate impact, the statistical disparity between success rates of minority job applicants and white job applicants must be sub-

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[42] *Id.*

[43] *Id.* at 1186-87.

[44] 431 U.S. 324 (1977). The Supreme Court in *Teamsters v. United States* developed the basic mode of analysis for determining the role of statistics used to prove the existence of discriminatory recruitment, transfer, and promotion practices in violation of Title VII. *Id.* at 334-42. In Teamsters, the Court held that a motor freight company engaged in a pattern and practice of discrimination when blacks and Spanish-surnamed Americans were hired, transferred, and promoted to line driver positions less often than non-minorities. *Id.* at 342-43. Statistical proof showed that 83% of black employees and 78% of Spanish-American employees held low paying positions while only 39% of non-minority employees held comparable jobs. *Id.* at 337-38. The Supreme Court found that such a statistical disparity in minority employment practices constituted a prima facie case of systematic and purposeful discrimination. *Id.* at 342; *see* Griggs v. Duke Power Co., 410 U.S. 424, 430-31 (1971) (22% difference in minority/non-minority success rates in satisfying non-business related diploma requirement supports prima facie case of discrimination); Note, *Employment Discrimination: Statistics and Preferences Under Title VII*, 59 VA. L. REV. 463, 465-70 (1973) [hereinafter cited as *Employment Discrimination*].

[45] 652 F.2d at 1187; *see* New York City Transit Auth. v. Beazer, 440 U.S. 568, 584 (1979) (general population statistics fail for non-specificity); Hazelwood School Dist. v. United States, 433 U.S. 299, 308 (1977) (correct statistical comparison between composition of school teaching staff and qualified public school teachers in relevant market area).

[46] Teamsters v. United States, 431 U.S. 324, 336 n.15, 340 n.20 (1977); *see* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1974). The Supreme Court in *Griggs* noted that absence of discriminatory intent on the part of employers does not redeem employment practices that have a disparate impact on minority job applicants. *Id.* at 432. The Court recognized that Congress directed the Equal Employment Opportunity Act to the consequences of employment practices, not simply the motivation behind the practices. *Id.* Accordingly, the *Griggs* Court eliminated the need for plaintiffs to prove an employer's discriminatory intent in disparate impact actions. *Id. See generally* Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 79-80 (1973).

[47] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1974); *see* Teamsters v. United States, 431 U.S. 324, 336 n.15 (1974) (disparate impact claims concern employment practices that fall more harshly on one group than another and that are not justified by business necessity). Title VII protections extend to ethnic, racial, and religious minorities and women. *See* 42 U.S.C. § 2000e-2 (1976).

stantial.[48] Since the EEOC's static work force data comparing the percentage of ANB's black work force with the percentage of qualified blacks in the specialized work force showed sizable and consistent underrepresentation of blacks in the bank offices, the Fourth Circuit found that the EEOC's statistical evidence was probative.[49] The court assessed the statistical evidence without the nonstatistical evidence of discrimination and held that the EEOC established a prima facie case of disparate impact.[50]

The Fourth Circuit then examined the defendant's rebuttal evidence.[51] ANB presented the court with two types of statistical analyses in an attempt to prove that the Government's data was insignificant.[52] First, ANB applied a standard deviation analysis to the EEOC's work force data.[53] ANB argued that the deviations in the EEOC figures fell predominantly within the range of chance and not within the range that gives rise to an inference of discrimination.[54] The Fourth Circuit rejected ANB's standard deviation analysis as unpersuasive rebuttal evidence.[55] The court noted that although standard deviations above the range of three exclude random chance as a cause of minority underrepresentation, ANB's deviations below the range of three did not necessarily exclude the possibility of discriminatory design in bank hiring practices.[56]

ANB also offered applicant flow data to rebut the EEOC's prima facie case.[57] The Fourth Circuit found that ANB's applicant flow data was incomplete.[58] The applicant flow data covered only one of the seven relevant years and the data reflected less than half of the actual bank ap-

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[48] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1974); *see Employment Discrimination, supra* note 44, at 477-80 (statistical dispartiy in Title VII cases must be substantial and large enough for courts to draw meaningful inference). Most courts do not find discrimination based on small samples or minor disparities. *See, e.g.*, Mayor of Phila. v. Educational Equality League, 415 U.S. 605, 611 (1974) (15% black representation of school board panel not violative of Title VII where black percentage in population was 34% and not all blacks in population qualified to serve on the panel); Morita v. Southern Cal. Permanente Med. Group, 541 F.2d 217, 220 (9th Cir. 1976) (failure to promote minority employee nondiscriminatory where eight persons comprised the statistical sample), *cert. denied*, 429 U.S. 1050 (1977). Taylor v. Safeway Stores, Inc., 365 F. Supp. 468, 475-76 (D. Colo. 1973) (employer's average yearly hiring of 18% blacks does not indicate discriminatory practice where blacks comprise 4.1% of relevant SMSA). *But see* New York City Fire Dep't v. Civil Serv. Comm'n, 490 F.2d 387, 392 (2d Cir. 1973) (ratio of 2.8 White to 1 Hispanic satisfied disparity requirement to show Title VII violation).

[49] 652b F.2d at 1189-91; *see* note 23 *supra*.

[50] 652 F.2d at 1189.

[51] *Id.* at 1193-97.

[52] *Id.* at 1193.

[53] *Id.* at 1191; *see* note 26 *supra*.

[54] 652 F.2d at 1190-91; *see* note 26 *supra*.

[55] 652 F.2d at 1190-91; *see* note 26 *supra*.

[56] 652 F.2d at 1190-92; *see* note 120 *infra*.

[57] 652 F.2d at 1193; *see* note 28 *supra*.

[58] 652 F.2d at 1195-96; *see* note 28 *supra*.

plicants from 1969 to 1975.[59] The court held, therefore, that the applicant flow data was insufficient to rebut the Government's statistics.[60] The Fourth Circuit found ANB's evidence concerning managerial hiring decisions over the seven year period inadequate to rebut the EEOC's evidence with regard to this category of employee.[61] The full range of ANB's evidence, however, did not rebut the inferences of discrimination raised by the EEOC's prima facie case.[62] The court concluded that since ANB failed to rebut the prima facie case of discrimination, the EEOC successfully established a pattern or practice of discrimination in violation of Title VII.[63]

The Fourth Circuit's decision in *American National Bank*, upholding the EEOC's jurisdiction to include the Portsmouth bank charges, is consistent with prior decisions concerning the scope of EEOC investigations.[64] The EEOC may bring suit on any claim that reasonable investigation of the stated claim produces.[65] Proper investigation, notice of the charge, and opportunity to conciliate are the only jurisdictional prerequisites to an EEOC suit.[66] In *America National Bank*, the investigation of the hiring procedures at the Portsmouth branch reasonably stemmed from investigation of the same procedures at the Suffolk branch.[67] Additionally, the officers of ANB were fully aware of the charges brought against them and had the opportunity to conciliate with the EEOC prior to suit.[68] The Fourth Circuit, therefore, was correct in asserting jurisdic-

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[59] 652 F.2d at 1195-96; *see* text accompanying notes 93-102 *infra*.

[60] 652 F.2d at 1197. The Fourth Circuit also found the applicant flow data insufficient because the data included the employee category "service workers." *Id.* at 1196. ANB's inclusion of service workers in its applicant flow rebuttal data was misleading and incorrect. *Id.* Since all of the service workers that ANB hired in the bank branches were black, inclusion of the service worker category in the data distorted ANB's minority hiring statistics/data in the contested managerial/clerical categories. *Id.* When the Fourth Circuit excluded the service worker category from the ANB's applicant flow data, the data failed to dispel the EEOC's prima facie inference of discrimination. *Id.* at 1196-97. Accordingly, the court rejected ANB's applicant flow data as incomplete and unpersuasive. *Id.* at 1197; *see* text accompanying notes 100-102 *infra*.

[61] *Id.* at 1194.

[62] *Id.*

[63] *Id.* at 1201.

[64] EEOC v. General Elec. Co., 532 F.2d 359, 366 (4th Cir. 1976) (test allowing EEOC to file new charges of discrimination is whether new charge reasonably grows out of investigation of initial charge); EEOC v. Chesapeake & Ohio Ry., 577 F.2d 229, 233-34 (4th Cir. 1978) (EEOC has power to expand investigation of filed charges of discrimination to reasonably related claims). *See also* EEOC v. Bailey Co., Inc., 563 F.2d 439, 446 (6th Cir. 1977), *cert. denied*, 435 U.S. 915 (1978); Jenkins v. Blue Cross Mut. Hosp., 538 F.2d 164, 167 (7th Cir. 1976), *cert. denied*, 429 U.S. 986 (1976); EEOC v. Kimberly-Clark Corp., 511 F.2d 1352, 1363 (6th Cir. 1975); Oubichon v. North Am. Rockwell Corp., 482 F.2d 569, 571 (9th Cir. 1973); EEOC v. Sears, Roebuck & Co., 490 F. Supp. 1245, 1253 (M.D. Ala. 1980).

[65] EEOC v. General Elec. Co., 532 F.2d 359, 366 (4th Cir. 1976).

[66] EEOC v. E. I. duPont de Nemours & Co., 516 F.2d 1297, 1301 (3d Cir. 1975).

[67] 652 F.2d at 1186.

[68] *Id.* at 1185.

tion over the Portsmouth charges when the EEOC satisfied the procedural requirements necessary to establish a proper claim of jurisdiction over the Portsmouth bank branch.

The issue concerning the scope of EEOC jurisdiction in *American National Bank* raises substantive as well as procedural problems. Since the EEOC originally investigated the hiring practices of the Suffolk branch only, the officers of ANB did not feel that preservation of the Portsmouth bank branch hiring records after the statutorily required period of six months was necessary.[69] The Portsmouth branch's discarding of employment applications from 1969 through 1975 precluded the branch from presenting sufficient applicant flow data to rebut the prima facie inference of discrimination.[70] The majority in *American National Bank* found no unfairness in this result.[71]

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[69] *Id.* at 1195; *see* 29 C.F.R. § 1602.14(a) (1981) (statutory obligation of employer to preserve employment records for six months to protect Title VII plaintiffs from destruction of relevant evidence).

[70] 652 F.2d at 1195.

[71] *Id.* The Fourth Circuit paid particular attention to the fact that the Portsmouth bank branch, as a result of discarding employment records, did not have a sufficient amount of applicant flow data to rebut the EEOC's claim of discrimination. *Id.* The majority focused upon ANB's data deficiency in stressing the critical importance of the Title VII requirement that an employer preserve business records going back to the effective date of the legislation. *Id.* Title VII requires that an employer preserve business records for a minimum period of six months to prevent hardship on possible Title VII plaintiffs who may need access to the records in support of their claim. *See* 29 C.F.R. § 1602.14(a) (1981). Policy considerations concerning employment discrimination litigation favor the majority's position advocating record preservation. Preservation of business records prevents defendant employers from self-serving destruction of incriminating data. 652 F.2d at 1195. Additionally, when an employer maintains control over applicant information, Title VII litigants can rely on statistical data gathered from these records as a valuable tool in establishing or rebutting claims. EEOC v. Cook Paint & Varnish Co., 24 Fair Empl. Prac. Cas. 51, 55 (W.D. Mo. 1980). The majority's position, however, is not without problems. The dissent in *American National Bank* criticized the majority's advocacy of business record retention. 652 F.2d at 1224 (Russell, J. dissenting). The dissent noted that requiring an employer to retain employment records dating back to 1965 innundates employers with an unnecessary amount of data. *Id.* Additionally, the dissent argued that for courts to infer that an employer disposed of potentially damaging employment records for self-protective purposes when sound business judgment dictated that the employer keep the records is unfair. *Id.* The dissent's criticisms raise valid considerations. Lengthy retention of employment records poses practical problems for employers. Applicant data may be in bulk form and, therefore, employers may face costly storage problems due to retention. If a business seeks to diminish the bulk of data it keeps, employers will incur costs to have personnel tabulate the data or to computerize it. While these problems may be relatively minor to large businesses with modern facilities, record retention may prove to be an expensive burden for thousands of individual employers and small businesses across the country.

The Fourth Circuit's opinion in *American National Bank* concerning preservation of employment records is, however, consistent with the Supreme Court's treatment of an analogous question. In *Occidental Life Ins. Co. v. EEOC*, the Supreme Court considered whether the EEOC may bring an enforcement suit at any time after the agency has filed an initial charge of discrimination or whether a time limitation for bringing suit exists. 432 U.S. 355, 357 (1977). The Court upheld the policy of "no time limit" on the EEOC's power to bring suit. *Id.* at 366. The *Occidental* Court concluded that the "no time limit" provision for bring-

The majority noted that the Portsmouth branch should have retained its hiring records when its sister branch, which used the same hiring practices, was under investigation for those practices.[72] The court stressed that although the EEOC's statutory requirement of six month employment record preservation had passed, the Portsmouth branch should he maintained the records that might have been relevant in any litigation to which the bank stood exposed.[73]

The Fourth Circuit's decision, holding ANB strictly responsible for the production of ANB's employment records, can be viewed as an expansion of Title VII's statutory requirement of employment record preservation.[74] The Fourth Circuit implied that the ANB acted unreasonably in allowing the Portsmouth branch to dispose of applicant records when the potential threat of Title VII litigation was imminent.[75] The court noted that holding ANB to the normal litigation consequences of the absence of necessary applicant flow data imposed no undue hardship on the bank when sound business judgment dictated that the Portsmouth branch retain its records.[76] The Fourth Circuit concluded that if sound judgment suggests that an employer's records may have importance in any aspect of forthcoming litigation, the employer should retain the records.[77] Since Title VII's affirmative obligation of record retention was designed to protect plaintiffs, the Fourth Circuit's decision holding the Portsmouth branch responsible for the destruction of relevant employment records is sound in light of the general policies of the act.[78]

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ing suit worked no unfairness on defendant employers since the EEOC alerts them to the possibility of an enforcement suit within ten days after filing a charge of discrimination. *Id.* at 372. Similar to the holding of the *Occidental* Court, the Fourth Circuit in *American National Bank* held that expecting an employer to retain business records in excess of the six month statutory requirement imposes no unfair burden on employers when business judgment dictates that the records may be potentially relevant to both plaintiffs and defendants in future Title VII litigation. 652 F.2d at 1196. Although the majority failed to give adequate consideration to the practical problems extensive record retention may engender, the majority's conclusion is consistent with *Occidental* and, therefore, theoretically correct.

[72] 652 F.2d at 1195.

[73] *Id.* at 1195-96.

[74] *Id.* at 1196. *Cf.* Russell v. American Tobacco Co., 528 F.2d 357, 362-63 (4th Cir. 1975), *cert. denied*, 425 U.S. 955 (1975) (identity of labor market does not treat two branches of business as one; branch should not have to retain records when another branch under investigation). *See also* note 71 *supra* (benefits and drawbacks of strict requirement of record retention).

[75] 652 F.2d at 1196. In *American National Bank*, the Fourth Circuit viewed ANB's disposal of the Portsmouth branch bank records as an unreasonable exercise of business judgment when the Suffolk branch was undergoing investigation for the very hiring policies that the Portsmouth branch used. *Id.* at 1185, 1195.

[76] *Id.* at 1196. The Fourth Circuit held that the Portsmouth branch must suffer the consequences of inadequate rebuttal data stemming from ANB's disposal of the employment records. *Id.* at 1195; *see* notes 90-100 *infra*.

[77] 652 F.2d at 1195-96.

[78] *Id.* at 1195. According to the Fourth Circuit, a defendant employer may not destroy damaging records concerning discriminatory hiring practices free from liability even though the statutory retention period has expired. *Id.* at 1195-96. The requirement of employer

The Fourth Circuit also required satisfaction of stringent standards concerning the burdens of proof necessary to prove and rebut a prima facie inference of discrmination by statistical analyses.[79] The court's evaluation of the use of statistical evidence in *American National Bank* is consistent with recent United States Supreme Court decisions that encourage close judicial scrutiny of methods of statistical proof in disparate impact cases.[80] The Supreme Court eased the burden of Title VII plaintiffs by allowing them to prove unlawful discrimination by statistical analysis.[81] The Court consistently has been cautious, however, in accepting the logical inferences that statistical evidence presents.[82] The Supreme Court has suggested that comparative statistics[83] are more probative evidence of discriminatory employment practices than demographic statistics.[84] Additionally, the Fourth Circuit consistently has im-

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record retention extends the statutory protection for Title VII plaintiffs in accordance with the remedial nature of the legislation. *See id.*; note 1 *supra*.

The dissent in *American National Bank* argued that holding the Portsmouth branch responsible for the diminished value of its rebuttal evidence was fundamentally unfair. 652 F.2d at 1210, 1224-25 (Russell, J., dissenting). Employers face the problem of either indefinitely maintaining employment records since the effective date of Title VII or risk the possibility that destruction of the records will result in an inference of self-serving concealment against them at trial. *Id.* The dissent argued that failure to preserve employment records should not give rise to the inference of an employer's suspect motivation. *Id.* Thus, incorporation of a principle of sound business judgment into the statutory interpretation of Title VII forces employers to make a choice between the equally costly alternatives of record retention or running the risk of the inference of bad motive. Arguably, such incorporation is at odds with the congressional intent not to burden unduly employer prerogatives in Title VII legislation. *See* S. REP. No. 91-1137, 91st Cong., 2d Sess., 110 CONG. REC. 14270 (1964) (remarks of Senator Humphrey indicating purpose of Title VII not to discourage management perogatives).

[79] 652 F.2d at 1186-97; *see* text accompanying notes 80-124 *infra*.

[80] *See* New York City Transit Auth. v. Beazer, 440 U.S. 568, 584 (1979) (general population statistics fail for nonspecificity); Teamsters v. United States, 431 U.S. 324, 340-41 (1977) (statistics based on insufficient work force sample non-probative). *But see* Dothard v. Rawlinson, 433 U.S. 321, 325 (1977) (specific applicant data not necessary to establish showing of disparate impact).

[81] *See* Griggs v. Duke Power Co., 401 U.S. 424, 430 n.6 (1971). The Supreme Court in *Griggs* abolished the requirement that a disparate impact plaintiff prove discriminatory intent. *Id.* at 432; *see* Montlack, *Using Statistical Evidence to Enforce the Law Against Discrimination*, 22 CLEV. ST. L. REV. 259, 261, 269 (1973) (documenting courts increased reliance on statistical data in absence of intent requirement in disparate impact litigation).

[82] *See* note 85 *infra*.

[83] Title VII litigants use statistics that are either comparative or demographic. *See Disparate Impact, supra* note 4, at 578. Comparative statistics compare the success of actual minority and non-minority applicants to prove that the protected class is disproportionately discriminated against. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 409 (1975) (comparative data concerning percentages of white and non-white job applicants establishes prima facie case of disparate impact).

[84] Demographic statistics compare the racial composition of the general population to the labor force in question as evidence of discriminatory employment practices. *See* United States v. Hayes Int'l Corp., 456 F.2d 112, 116 (5th Cir. 1972) (use of demographic statistics to establish disparate impact claim).

posed a heavy burden of proof on plaintiffs to establish prima facie claims of discrimination by comparative data.[85]

In *American National Bank*, the EEOC presented static work force statistics to show discriminatory hiring patterns or practices in the Suffolk and Portsmouth bank branches.[86] The EEOC used specialized work figures as opposed to general labor force statistics in accordance with Fourth Circuit precedent.[87] The EEOC's data showed consistent underrepresentation of blacks in various employee categories in both bank branches for most years from 1969 to 1975.[88] According to the Supreme Court, statistical disparities in static work force data during a period relevant to the plaintiff's claim constitute prima facie proof of discriminatory practices.[89] Thus, the Fourth Circuit properly concluded that the EEOC established a prima facie case of discrimination when its specialized static work force data evidenced statistical disparity in ANB's hiring of black employees.

The Fourth Circuit weighed the defendant's statistical rebuttal evidence with equally strict scrutiny. The court found ANB's applicant flow data too unreliable to rebut the EEOC's prima facie case of discriminatory bank hiring practices.[90] The court identified three deficiencies in the data that undercut its reliability.[91] First, the applicant flow data concerning the Portsmouth branch pertained to only one of the seven relevant years under investigation.[92] The Portsmouth branch argued that it

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[85] *See* United States v. County of Fairfax, Va., 629 F.2d 932, 940 (4th Cir. 1980) (applicant flow data highly probative evidence of discriminatory employment practices), *cert. denied*, 449 U.S. 1078 (1980); EEOC v. United Va. Bank/Seaboard Nat'l, 615 F.2d 147, 585-86 (4th Cir. 1980) (plaintiff must produce statistical evidence demonstrating employment practice's impact on actual applicants).

[86] 652 F.2d at 1189-90; *see* note 23 *supra*.

[87] In *EEOC v. United Va. Bank/Seaboard Nat'l*, the Fourth Circuit held that general labor force statistics were not an appropriate statistical group for comparison with bank employees who possessed special skills to perform their jobs. 615 F.2d 147, 154 (4th Cir. 1980). *See also* EEOC v. Radiator Specialty Co., 610 F.2d 178, 185-86 (4th Cir. 1979) (where manufacturing company's professional positions required uncommon qualifications general population statistics inappropriate to demonstrate prima face case of discrimination); Roman v. ESB, Inc., 550 F.2d 1343, 1355 (4th Cir. 1976) (percentage of skilled black craftsmen that battery company employed must be measured against percentage of qualified blacks in general labor market to assess whether discriminatory hiring occurred).

[88] 652 F.2d at 1190, 1202-04 Appendix B.

[89] Hazelwood School Dist. v. United States, 433 U.S. 299, 307-08 (1977). *See also* Teamsters v. United States, 431 U.S. 324, 335 n.15, 339 n.20 (1977); Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265-66 (1977).

[90] 652 F.2d at 1197.

[91] *Id.* at 1195.

[92] *Id.* The Portsmouth branch presented applicant flow data for the single year of 1975. *Id.* The EEOC instituted the pattern and practice suit against the bank in January 1976. *Id.* at 1181. The Portsmouth branch had retained its 1975 records in accordance with Title VII's six month requirement of business record retention, but had discarded employment records for the six years prior to 1975. *Id.* at 1195; *see* 29 C.F.R. § 1602.14(a) (1981) (six month requirement of record retention); notes 71-78 *supra* (implications of Portsmouth branch's lack of record retention).

had destroyed the data for the other six years because the branch was unaware that it was under formal EEOC investigation.[93] Aside from questions of the bank's lack of knowledge, the Fourth Circuit held that data for one year could not rebut data that objectively indicated racial hiring disparities over a period of seven years.[94] Additionally, the court found that ANB's data reflected only 45% of the actual applicants from 1969 to 1975.[95] The figure was insubstantial not only because it reflected less than half of the applicants, but also because the numbers of actual black applicants may have been unrepresentative of discrimination due to a process of self-selection.[96] The Fourth Circuit noted that the bank's discriminatory hiring practices may have been such common knowledge throughout the Suffolk and Portsmouth communities that potential black employees were reluctant to apply to the banks.[97] Finally, the court found the applicant flow data deficient because it included service workers in its analysis.[98] In light of the strict standards for statistical proof that the Supreme Court has enunciated, the Fourth Circuit correctly concluded that ANB's applicant flow data was not probative due to the number of deficiencies in the data.[99]

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[93] 652 F.2d at 1195.

[94] *Id.*

[95] *Id.* at 1196, 1204-05 Appendix C.

[96] *Id.* at 1195 n.14. The Supreme Court has recognized that the variable of "self-selection" may taint the applicant flow data that Title VII litigants use as probative evidence of discrimination. *See* Teamsters v. United States, 431 U.S. 324, 365-67 (1977) (minorities recognize employment application futile due to challenged discriminatory hiring practices of a business). Self-selection is best explained as the inaction of minorities to apply for certain jobs because the hiring practices of the given employers over a period of years suggest that minority application for the jobs is futile. Lea v. Cone Mills Corp., 301 F. Supp. 97, 102 (M.D.N.C. 1969), *aff'd in relevant part per curiam*, 438 F.2d 86 (4th Cir. 1971); *see, e.g.*, East Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 399 (1977); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 236 (5th Cir. 1974), *cert. denied*, 439 U.S. 1115 (1978); United States v. Chesapeake & Ohio Ry. Co., 471 F.2d 582, 587 (4th Cir. 1972), *cert. denied*, 411 U.S. 939 (1973). As a result of minority job seekers' "self-selecting" themselves out of some applicant pools entirely, applicant flow data may not represent potential applicant pools accurately. *See* Teamsters v. United States, 431 U.S. at 365-67.

[97] 652 F.2d at 1195 n.14; *see* text accompanying notes 103-06 *infra*.

[98] 652 F.2d at 1196-97; *see* note 60 *supra*. Since the original EEOC work force statistics did not contain the category of service workers, the Fourth Circuit purged ANB's applicant flow data of the category of service workers. 652 F.2d at 1196-97. The court divided the remaining categories of workers the ANB's data represented between managerial employees and clerical employees. *Id.* at 1197. The court found that ANB's evidence concerning the total number of hiring decisions affecting managers at the Suffolk branch rebutted the EEOC's inference of discrimination. *Id.* at 1194. The court, therefore, limited its consideration to the clerical category for the Suffolk branch and the managerial categories for the Portsmouth branch. *Id.* at 1196. The Suffolk clerical applicant pool was composed of 24.8% blacks, and the data showed that the ANB hired only 14.2% blacks. *Id.* at 1197. Similarly, the date showed that out of an applicant pool of 23.1% black clerical workers, the Portsmouth branch hired only 4.3% blacks. *Id.* The Fourth Circuit held that the ANB's applicant flow data failed to rebut the inference of discrimination based on these statistical disparities. *Id.*

The Fourth Circuit's in-depth consideration of ANB's data, however, raises important questions regarding the proper role of the court in evaluating statistical proof.[100] The court's role as fact-finder requires it to use its own knowledge, competence, and reasoning ability.[101] Detailed evaluations of statistical data, as the Fourth Circuit undertook in *American National Bank*, however, present certain dangers. In evaluating statistical data, the court risks making errors.[102] Few judges have formal training in statistics and mathematical analysis.[103] The court may apply limited statistical knowledge to solve the problems in a case without a full appreciation of the risks and limitations of the techniques

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[99] *See, e.g.*, New York City Transit Auth. v. Beazer, 440 U.S. 568, 584 (1979) (general population statistics failed to support showing of discriminatory hiring practices); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 579-80 (1978) (statistics concerning racial mix of work force insufficient to show employer actions discriminatory); Hazelwood School Dist. v. United States, 433 U.S. 299, 308 (1977) (proper statistical comparison requires contrast between racial composition of teachers in private school and racial composition of qualified public schools teachers in relevant labor market); Teamsters v. United States, 431 U.S. 324, 339 n.20 (1977) (evidentiary showing that general statistics might not reflect pool of qualified job applicants accurately).

[100] One group of commentators suggests that courts should supplement statistical analysis in discrimination cases with objective principles of economic theory. Gwartney, Asher, Haworth & Haworth, *Statistics, the Law and Title VII: An Economist's View*, 54 NOTRE DAME LAW. 633, 634 (1979) [hereinafter cited as Gwartney]. These commentators argue that application of principles of economic theory to Title VII statistical analyses would sharpen the inquiry in discrimination cases by separating differentials in earnings, and promotional and hiring opportunities due to different skill qualifications of minorities and non-minorities from the differentials solely attributable to employment discrimination. *Id.* at 633-36. The economic theory approach to statistical analysis is positive because it would help courts to isolate the true impact of discrimination in Title VII cases. *Id.* at 638. A major drawback of the economic approach, however, is that few judges have training in detailed economic analysis, a criticism already leveled at basic Title VII statistical analysis. *Id.* at 634.

Another commentator advocates the formulation of precise standards for statistical analysis in employment discrimination cases. Dorsaneo, *Statistical Evidence in Employment Discrimination Litigation: Selection of the Available Population, Problems, and Proposals*, 29 SW. L. J. 859, 861 (1975) [hereinafter cited as Dorsaneo]. Dorsaneo maintains that the reason courts face so many problems in properly treating statistics in Title VII cases is because courts have failed to establish particular standards of statistical uniformity to aid them in evaluating comparative numerical evidence. *Id.* at 874-75. Dorsaneo suggests that to achieve workable solutions to the problems statistics pose, courts determine what relevant geographic area best reflects actual hiring practices and how much disparity between minority and non-minority employment patterns is acceptable. *Id.* at 861-73. Dorsaneo's uniformity solution to the problems of statistical proof is workable and eliminates the need for extra-judicial training in various sorts of analysis. Practical concerns regarding the differences in job markets, skill factors, and applicant pools, however, defy uniform approaches to case-by-case variations in the types of cases that come within the broad ambit of Title VII.

[101] D. LEMMON, THE JUDGES ROLE IN THE AMERICAN TRIAL SYSTEM 16 (1975) [hereinafter cited as LEMMON].

[102] *See* Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1372 (5th Cir. 1974) (reversal of Title VII case on grounds of statistical error).

[103] Gwartney, *supra* note 100, at 655.

it is using and without assurance of their suitability for judging the merits of the case.[104] For example, the Fourth Circuit found that the process of applicant self-selection may have tainted applicant statistical data, contributing to the data's unreliability.[105] The court footnoted the problem but did not assess whether applicant flow data was an appropriate method of proof as a result of problems similar to self-selection.[106]

In addition, a court may rely too heavily on statistical data in judging the merits of a case.[107] Undue reliance on statistical evidence may result in decisional inconsistency when two courts evaluate the same statistical and nonstatistical evidence to reach different results.[108] Because of the facts that ANB's applicant flow data covered only one of the seven relevant years in question, the Fourth Circuit held that the data could not rebut statistics showing racial hiring disparities for all seven years purely in terms of mathematical probability.[109] The court primarily relied on the implications of the Portsmouth branch's routine disposal of employment records over the seven year period, whereas another court might have excused ANB's failure to preserve its employment records and discounted the statistical implications of the data altogether.[110] Absent a neutral and consistent approach to judicial reliance on statistics and what they prove, courts risk the accusation that they have correctly or incorrectly assigned the proper weight to the data to achieve a fair result.

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[104] The problems judges may encounter in sophisticated statistical Title VII litigation are analogous to the problems that juries face in complex civil litigation cases. *See* Note, *The Right to a Jury Trial in Complex Civil Litigation*, 92 HARV. L. REV. 898, 899-900 (1979) (danger of misapplication of justice if juries render judgment in overly complex cases). With increasing use of statistics, scientific analyses, and highly technical disputes, the proof process involved in civil litigation may be so complex that it exceeds the capacity of a jury to decide the issues rationally. *Id.* Similarly, judges in Title VII cases may encounter problems in rendering verdicts when the bulk of the evidence is statistical. *See* Gwartney, *supra* note 100, at 655. The question remains whether judges unfamiliar with quantitative methods are doing a greater disservice to Title VII litigants in hearing or in rejecting their statistical claims.

[105] 652 F.2d at 1195 n.14; *see* notes 99 & 100 *supra* (general problems with reliability of data).

[106] 652 F.2d at 1195 n.14.

[107] *See* Pennsylvania v. O'Neill, 473 F.2d 1029, 1031 (3d Cir. 1973) (district court found disparate rejection rate based solely on statistical data absent supporting evidence of discrimination).

[108] *See* Dorsaneo, *supra* note 103, at 874-75 (only de minimus deviation should be permitted in judiciary's approach to statistical analysis in Title VII cases).

[109] 652 F.2d at 1193-95.

[110] The district court in *American National Bank* primarily relied on the non-statistical aspects of the Portsmouth branch's failure to retain hiring records from 1969 to 1975. *Id.* at 1193. The district court's reliance on the policy aspects of Title VII record retention is in opposition to the Fourth Circuit's reliance on the paucity of ANB's statistical data. *Id.* at 1193-95. Consequently, *American National Bank* is one example of the different approaches that courts take when evaluating Title VII statistics in the absence of a consistent standard of evaluation.

Finally, Title VII litigants should not rely on the court to perform various technical computations merely because the parties introduced certain amounts and types of statistical analyses into evidence during trial. While a court cannot shirk its duty to review the evidence and decide the case carefully, the burden should not be on the court to perform calculations helpful to the determination of the case.[111] In evaluating the applicant flow data concerning ANB's number of racial hirees, the Fourth Circuit performed its own calculations to exclude the number of blacks hired for service worker positions, a misleading component of ANB's data.[112] Although the calculation was fairly simple, problems may arise when a court must perform complex statistical analyses to uncover probative evidence.[113] In *American National Bank*, the court squarely and correctly assessed the applicant flow data that ANB presented to rebut the prima facie case of discrimination. The court neglected, however, to confront significant problems that face the judiciary in translating the evidentiary burdens of Title VII litigants into quantitative terms.

The second area in which the Fourth Circuit found the defendant's rebuttal evidence unpersuasive involved standard deviation analysis.[114] ANB argued that because the standard deviation in the EEOC's work force data was in the general range below three deviations, the court could infer no discriminatory design in bank hiring policies.[115] The Fourth Circuit rejected the bank's argument on the grounds that even below two standard deviations, the probability of chance as the reason for underrepresentation of blacks in the ANB work force was only 5%.[116] The court relied on the Supreme Court's opinion in *Castaneda v. Partida*[117] to support its conclusion.[118] In *Castaneda*, the Supreme

[111] Limited statistical calculations may enable the court to rework the parties statistical data into a manageable form that affords greater insight into the discrimination issues of a case. Just as a judge does not fill in the missing gaps of evidence in a criminal proceeding, however, a judge in a Title VII action should not have to perform statistical calculations to unearth comparative evidence germane to the issues at trial. *See* Lemmon, *supra* note 104, at 63. The expectation that a judge will or should perform additional statistical calculations in Title VII actions places the judge in the role of a litigating attorney who is responsible for presentation of probative evidence. Also, because judicial calculations are not subjected to expert scrutiny at trial the implications drawn from such calculations are of diminished value. *Cf.* L.C.L. Theatres, Inc. v. Columbia Pictures Indus., Inc., 421 F. Supp. 1090, 1103 n.9 (N.D. Tex. 1976) (post trial summaries of evidence by judge permissible when underlying data in evidence), *rev'd in part on other grounds*, 566 F.2d 494 (5th Cir. 1978); 75 AM. JUR. 2d, *Trial* § 991 (1974) (jury experimentation permissible if effect not to introduce extraneous evidence).

[112] 652 F.2d 1196-97; *see* note 60 *supra*.

[113] *See* text accompanying notes 102-11 *supra*.

[114] 652 F.2d at 1191-93; *see* note 26 *supra*.

[115] 652 F.2d at 1190-91.

[116] *Id.* at 1192.

[117] 430 U.S. 482 (1977).

[118] 652 F.2d at 1191-92.

Court noted that standard deviations of two or three necessarily exclude chance as a cause of underrepresentation of minorities in a given work force.[119] The *Castaneda* Court did not imply that standard deviations less than two or three necessarily exclude discrimination as a reason for the underrepresentation of minorities.[120] Additionally, the Fourth Circuit refused to accord statistical significance to ANB's standard deviations in the range of two or three because of the relation this percentage bore to the amount of nonstatistical evidence necessary to rebut an inference of discrimination.[121] The court noted that in the range of two and three standard deviations the probability that chance was the cause of black underrepresentation at the bank branches was still between 1 and 5 chances in 100.[122] Since such a small percentage did not constitute the greater weight of the evidence in nonstatistical terms required to rebut an inference of discrimination,[123] the Fourth Circuit correctly refused to assign evidentiary significance to ANB's standard deviation analysis.[124]

Although reaching the correct result on the question of standard deviation analysis, the Fourth Circuit again sidestepped an important issue that the evidence presented. The court ignored the issue of what level of statistical significance courts require to rebut an inference that discrimination has occurred. By ignoring the problem, the Fourth Circuit provided little guidance for the Title VII defendant in determining whether standard deviation statistics in the range of two to three will help a case of discrimination or hurt it. As long as the Supreme Court and the circuit courts avoid addressing the evidentiary problems that quantitative methods of proof pose, the Title VII defendant faces problems in choosing between various methods of statistical analysis.

The net effect of *American National Bank* is to advance the goals of Title VII in eliminating discriminatory employment practices. The court's holding that the EEOC may broaden the scope of its investigations to include charges that reasonably stem from initial claims of

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[119] Castenada v. Partida, 430 U.S. 482, 496 n.17 (1977).

[120] *Id.* The *Castenada* Court explored the levels of probability of chance or discriminatory design that exist in the range greater than standard deviations of two or three. *Id.* The Court in *Castenada* was careful to concern itself with the range in which the standard deviations clearly suggested discriminatory design as the reason for underrepresentation of minorities in the work force. *Id.* The *Catenada* Court made no findings concerning the implications drawn from the range of one to three standard deviations. *Id.*

[121] *Id.* at 1192.

[122] *Id. See generally* W. HAYS & R. WINKLER, STATISTICS: PROBABILITY, INFERENCE AND DECISION 218-19, 381-82 (1971).

[123] The defendant in a pattern and practice suit under Title VII must rebut the inference of discrimination that the plaintiff's prima facie case raised by a preponderance of the evidence. Teamsters v. United States, 431 U.S. 324, 336 (1977). A preponderance of the evidence translates into greater weight of the evidence. *See* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 275 (2d ed. 1972); Hallock, *The Numbers Game—The Use and Misuse of Statistics in Civil Rights Litigation*, 23 VILL. L. REV. 5, 13 (1977) (5% level in employment discrimination cases considered greater weight of evidence).

[124] 652 F.2d at 1193.

discrimination facilitates the eradication of unfair employment practices. By rejecting incomplete applicant flow data and questionable standard deviation analysis to rebut a prima facie case of discrimination, the Fourth Circuit has taken steps to equalize the defendant's burden of rebuttal with the heavy burden of the plaintiff in establishing a claim of discrimination. Close judicial scrutiny of the reliability of statistical evidence repeatedly has frustrated plaintiffs in their efforts to establish a prima facie case of disparate impact.[125] In *American National Bank*, however, the court has imposed an equally rigorous standard on the employer for judging the validity of the rebuttal evidence. The court, however, left several important questions unanswered regarding the role of the judiciary in adapting the traditional burdens of proof in Title VII actions to quantitative terms. Nonetheless, the Fourth Circuit in *American National Bank* reaffirmed the viability of Title VII in fashioning procedural and substantive standards that are consistent with the congressional goal of elimination of patterns and practices of employment discrimination.

PAMELA ANN HASENSTEIN

E. Title VII Safeguards for Employee Opposition to Employment Discrimination

Title VII of the Civil Rights Act of 1964[1] provides a comprehensive body of law designed to combat various forms of discrimination which have infected American employment practices.[2] Title VII prohibits

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[125] *See* New York City Transit Auth. v. Beazer, 440 U.S. 568, 583-87 (1979) (general population statistics fail on grounds of over- and under-inclusiveness); Teamsters v. United States, 431 U.S. 324, 340-41 (1977) (statistics based on insufficient work force sample nonprobative); United States v. County of Fairfax, Va., 629 F.2d 932, 940 (4th Cir. 1980) (applicant flow data highly probative evidence of discriminatory employment practices); EEOC v. United Va. Bank/Seaboard Nat'l, 615 F.2d 147, 585-86 (4th Cir. 1980) (plaintiff must produce statistical evidence demonstrating employment practice's impact on actual applicants). *But see* Dothard v. Rawlinson, 433 U.S. 321, 325-27 (1977) (specific applicant data not necessary to establish showing of disparate impact).

[1] 42 U.S.C. §§ 2000e-2000e-17 (1976 & Supp. III 1979).

[2] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973) (Title VII designed to end discriminatory employment practices aimed against any group); Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971) (Title VII designed to end favoritism toward whites); Diaz v. Pan American World Airways, Inc., 442 F.2d 385, 386 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971) (Title VII creates equal access to job market regardless of sex). *See generally* Gitt & Gelb, *Beyond the Equal Pay Act: Expanding Wage Differential Protection Under Title VII*, 8 LOY. CHI. L.J. 723, 751-52 (1978) [hereinafter cited as Gitt & Gelb]; Hunter & Branch, *Equal Employment Opportunities: Administrative Procedures and Judicial Developments Under Title VII of the Civil Rights Act of 1964 and the Equal Employment Opportunity Act of 1972*, 18 HOW. L.J. 543, 544-51 (1975).

employer practices that discriminate against workers in hiring, discharge, compensation or terms of employment because of the worker's race, religion, sex, or national origin.[3] Title VII also makes unlawful employer segregation or classification of workers by race, religion, sex, or national origin in any manner that adversely affects the employees' job status.[4] The protections afforded by Title VII reach almost every aspect of the business community,[5] although the law does recognize cer-

[3] 42 U.S.C. § 2000e-2(a)(1) (1976). The legislative history of Title VII deals almost exclusively with racial discrimination. *See generally* Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431 (1966). The addition of sex discrimination to the civil rights bill occurred the day before final passage and, therefore, evidence of the congressional purpose underlying this portion, which could provide guidance for the courts, does not exist. *See* Sale v. Waverly-Shell Rock Bd. of Educ., 390 F. Supp. 784, 787 (N.D. Iowa 1975) (legislative history of Title VII unclear); Rosen v. Pub. Serv. Elec. and Gas Co., 328 F. Supp. 454, 462 (D.N.J. 1970), *remanded on other grounds*, 477 F.2d 90 (3rd Cir. 1973) (Title VII legislative history not helpful in establishing intent of Congress regarding sex discrimination). Commentators have advanced two theories for the absence of legislative history and debate. One theory holds that the addition of sex discrimination to Title VII's coverage was an act of attempted sabotage by an opponent of the civil rights bill and therefore deserved little legislative discussion. *See* Kanowitz, *Sex Based Discrimination In American Law III, Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963*, 20 HASTINGS L.J. 305, 311 (1968). The better reasoned theory holds that Congress recently had given extensive study to sex discrimination in connection with the Equal Pay Act of 1963 and had no need to review the relevant material. *See* 29 U.S.C. § 206(d) (1976), *amending* Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-19 (1970); Berger, *Equal Pay, Equal Employment Opportunity and Equal Enforcement of the Law for Women*, 5 VAL. L. REV. 326, 335-38 (1971). *See generally* Jenkins, *Study of Federal Effort to End Job Bias: A History, A Status Report, and A Prognosis*, 14 HOW. L.J. 259, 264-82 (1968) (history of attempts to end job discrimination).

[4] *See* 42 U.S.C. § 2000e-2(a)(2) (1976). The employment protections guaranteed by Title VII expanded in 1972 with the passage of the Equal Employment Opportunities Act. *See* Pub. L. No. 92-261, 86 Stat. 103 (1972). The 1972 amendments extended Title VII's coverage to non-religious educational institutions previously exempt from this law. *See* 42 U.S.C. § 2000e-1 (1976), Pub. L. No. 92-261, 86 Stat. 103 (1972) (amending 42 U.S.C. § 2000e-1 (1970)). Furthermore, Congress extended the definition of employer to encompass governmental as well as private employers. *See* 42 U.S.C. § 2000e-(a), (b) (1976), Pub. L. No. 92-261, § 3(1), 86 Stat. 111-13 (1972) (amending 42 U.S.C. § 2000e-(a), (b) (1970)). Enforcement of prohibitions against employment discriminations by the federal government, however, rest exclusively with the United States Civil Service Commission rather than with the administrative body responsible for other enforcement efforts, the Equal Employment Opportunity Commission (EEOC). *See* 42 U.S.C. § 2000e-5(f)(1), Pub. L. No. 92-261, § 4(a), 86 Stat. 111-13 (1972) (amending 42 U.S.C. § 2000e-5(e) (1970)). The Supreme Court recognizes Title VII as the exclusive remedy for federal employees aggrieved by discrimination. *See* Brown v. General Services Administration, 425 U.S. 820, 829 (1976). *See generally* Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824 (1972).

[5] *See* 42 U.S.C. §§ 2000e-2000e-17 (1976). Title VII reaches employment practices of any private employers or governmental units employing 15 or more workers. *See id.* § 2000e-(a), (b); text accompanying notes 3 & 4 *supra*. Title VII also forbids discriminatory employment practices by labor unions, employment agencies, and worker training programs affecting 15 or more workers. *See id.* § 2000e-2(b)-(d) (1976). Title VII does not extend to employment practices of religious organizations. *See id.* § 2000e-1 (1976).

tain limited exceptions that may justify some types of differential treatment when characteristics of the worker relate directly to the necessities of the job.[6] To encourage victims of employment discrimination to seek vindication of their rights, Title VII forbids employer retaliation against workers who oppose discrimination in employment or who participate in any proceeding authorized by Title VII.[7] The Fourth Circuit

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[6] *See* 42 U.S.C. § 2000e-2(e) (1976). Title VII provides an exception from its coverage for jobs where sex, religion, or national origin constitutes a "bona fide occupational qualification" (BFOQ) for the position. *See* 42 U.S.C. § 2000e-2(e) (1976). Race, however, can never serve as the basis of a valid BFOQ defense. *See id.* BFOQ claims have arisen almost solely in the field of sex discrimination since the innate physical differences between males and females often relate to occupational qualifications. *See* Belton, *Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Developments*, 20 ST. LOUIS U. L.J. 225, 278 (1976). *See generally Developments, Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1176-86 (1971). The Supreme Court has adopted a narrow definition of the BFOQ exception, requiring that the defendant employer show a factual basis for believing that all or substantially all of the excluded sex could not perform the job in question safely or efficiently. *See* Dothard v. Rawlinson, 433 U.S. 321, 334 (1977); *see also* Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969) (first statement of BFOQ test); *see generally* Comment, *Title VII: Sex Discrimination and a New Bona Fide Occupational Qualification—How Bona Fide?*, 30 U. FLA. L. REV. 466 (1978). Title VII also denies protection to workers with communist affiliations or when national security concerns appear. *See* 42 U.S.C. § 2000e-2(f)-(g) (1976).

[7] *See* 42 U.S.C. § 2000e-3(a) (1976). Protection against employer retaliation extends to both informal opposition to discrimnation and participation in formal administrative or judicial proceedings. *See id.* Opposition to alleged discrimination merits protection even if the questioned practice later is ruled non-discriminatory. *See* Sias v. City Demonstration Agency, 588 F.2d 692, 695 (9th Cir. 1978). Similarly, participation in formal discrimination proceedings deserves protection from employer retaliation even if the charge has no merit. *See* Pettway v. American Cast Iron Pipe Co., 411 F.2d 998, 1004-07 (5th Cir. 1969).

An aggrieved employee need not show that retaliatory intent constituted the sole or primary reason for the allegedly retaliatory action. The employee need only prove that a desire for retribution contributed to the challenged employment decision. *See* EEOC v. Kallir, Phillips, Ross, Inc., 401 F. Supp. 66, 70-71 (S.D.N.Y. 1975), *aff'd*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977); United States v. Hayes Int'l Corp., 7 Empl. Prac. Dec. 6873, 6879, ¶ 9164 (N.D. Ala. 1973). Title VII offers protection for a wide range of workers subject to employer retaliation. *See, e.g.*, Eichman v. Indiana State U. Bd. of Trustees, 597 F.2d 1104, 1107 (7th Cir. 1979) (worker assisting coworker in filing charges); Pantchenko v. C. B. Dolge Co., 581 F.2d 1052, 1055 (2d Cir. 1978) (protecting former employee); Barela v. United Nuclear Corp., 462 F.2d 149, 155 (10th Cir. 1972) (protecting prospective employee). The rationale underlying protection against retaliation relates to a fear that employer retribution may have a chilling effect on workers seeking vindication of their rights. *See* [1975] EEOC COMP. MAN. (CCH), § 491.2 at 5201, ¶ 6902.

Opposition to discrimination, however, may become too disruptive to deserve protection from employer retaliation. *See, e.g.*, McDonnell Douglas Corp. v Green, 411 U.S. 792, 803 (1973) (illegal or overly disruptive conduct not protected from retaliation); Hochstadt v. Worcester Foundation For Experimental Biology, 545 F.2d 222, 231-32 (1st Cir. 1976) (overly disruptive opposition not protected by Title VII); EEOC v. Kallir, Phillips, Ross, Inc., 401 F. Supp. at 71-72 (opposition calculated to harm employer not protected). *See generally* Kattan, *Employee Opposition To Discriminatory Employment Practices: Protection From Reprisal Under Title VII*, 19 WM. & MARY L. REV. 217 (1977); Spurlock, *Proscribing Retalia-*

Court of Appeals recently decided a case concerning the nature of the safeguards provided by Title VII and the scope of protected employee opposition to employment discrimination.[8]

In *Armstrong v. Index-Journal Co.*,[9] the Fourth Circuit reversed the trial court's findings[10] that the defendant had neither illegally discriminated against the plaintiff nor discharged her for opposing unlawful employment practices.[11] The plaintiff, Martha Armstrong, responded to a female only help-wanted advertisement[12] and subsequently accepted a position as a "special salesman" in the advertising department of a South Carolina newspaper, the *Index-Journal*.[13] No male had ever held the special salesman's position and no female had ever served as a regular salesman.[14] Armstrong's duties closely resembled those of the two regular salesmen[15] and actually included some tasks beyond the duties of the regular salesmen.[16] The ultimate ceiling on a special salesman's base pay, however, which Armstrong had not yet reached at the time of her discharge, amounted to $27 per week less than that possible for a regular salesman.[17] The base pay differential had led the plaintiff's predecessor as special salesman to quit the *Index-Journal* upon learning she could never become, or receive as much salary as, a regular

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tion Under Title VII, 8 IND. L. REV. 453 (1975); Note, *Section 704(a) of the Civil Rights Act of 1964: Should Its Scope Be Defined By Reference To Section 7 of the NLRA*, 10 RUT.-CAM. L.J. 589 (1979) [hereinafter cited as *Scope*]; *see also* text accompanying notes 84-98 *infra*.

[8] *See* Armstrong v. Index-Journal Co., 647 F.2d 441 (4th Cir. 1981).

[9] *Id.*

[10] *Id.* at 443. The district court did not issue a written opinion in the *Armstrong* case, only findings of fact and conclusions of law.

[11] *See id.* at 443.

[12] *See id.* Employment advertising that places a limitation on the race, sex, religion, or national origin of applicants violates Title VII unless the religion, sex, or national origin of potential employees constitutes a bona fide occupational qualification for the position. *See* 42 U.S.C. § 2000e-3(b) (1976); note 6 *supra*; *see generally* Note, *Elimination of Sexually Segregated Employment Ads: A Step Towards Equal Employment Opportunity*, 26 U. FLA. L. REV. 577 (1974); Note, *Sex Discrimination In Help Wanted Advertising*, 15 SANTA CLARA LAW. 183 (1974). The *Armstrong* case did not, however, deal with discriminatory advertising, concentrating solely on the issues of discrimination in compensation and classification and employer retaliation. *See* text accompanying note 8 *supra*.

[13] *See* 647 F.2d at 443.

[14] *See id.*

[15] *See id.* Armstrong's duties included soliciting new advertising accounts, increasing the size of already existing accounts, writing ad copy, and promoting special features. *See id.* The *Index-Journal* placed no limits on the number or type of accounts the plaintiff handled. *See id.* At trial, three customers of the *Index-Journal* testified about the excellence of Armstrong's performance. *See id.*

[16] *See id.* Armstrong's additional duties included assisting with work demanding artistic talent and filling in for other workers during lunch periods. *See id.*

[17] *See id.* at 444. Both regular and special salesmen employed at the *Index-Journal* received the same starting base pay, although the male salesmen received larger raises with increased tenure. *See id.*

salesman.[18] In addition to the base salary that the salesmen received, the *Index-Journal* awarded all advertising salesmen annual commissions computed as a percentage of the net value of increased lineage purchased by each saleman's accounts.[19] Throughout her term of employment, Armstrong received larger amounts in commissions than either of the two regular salesmen.[20]

Armstrong repeatedly protested her inferior job classification and the salary policy of her employer.[21] The complaints intensified after the advertising manager of the newspaper assigned Armstrong a large commercial account that demanded a significant portion of her time, yet afforded her minimal compensation.[22] Her previous complaints had led the publisher of the newspaper to instruct the advertising manager to discharge Armstrong if the complaints continued.[23] Rather than forewarning Armstrong of the consequences of repeated employment complaints, the advertising manager accepted the protests about the new and burdensome account and told Armstrong he would transfer the account to another saleman.[24] The advertising manager immediately relayed Armstrong's complaints about the new account to the publisher, who reiterated his intention to discharge Armstrong if she continued her complaints about the newspaper's policies and practices.[25] Relying on the assurances of the advertising manager, and unaware of the possible ramifications, Armstrong returned the new account file to the advertising manager's desk.[26] Upon learning of Armstrong's apparent refusal to handle the account, the advertising manager followed his publisher's instructions and discharged the female special salesman.[27]

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[18] *See id.* When Armstrong's predecessor as special salesman for the paper quit, the publisher of the *Index-Journal* stated that only a woman would accept a position at the special salesman's lower salary. *See id.*

[19] *See id.* at 445-46.

[20] *See id.* at 446. Armstrong earned a total of $3,440.12 in commissions during her employment with the *Index-Journal* compared with a total of $3,032.85 for one of the male salesmen and $1,876.20 for the other. *See id.*

[21] *See id.* at 444.

[22] *See id.* at 447. The account which aggravated Armstrong's complaints, opened by a new K-Mart variety store, was larger than any other account handled by the newspaper but paid the salesman handling it only $5 per week. *See id.* The advertising manager originally offered the account to a male salesman who considered the offer a joke. *See id.* at 446-47. Recognizing the amount of work entailed by the new account, the advertising manager transferred five of Armstrong's other accounts to male salesmen. *See id.* at 447.

[23] *See id.*

[24] *See id.* The advertising manager at the *Index-Journal* often transferred accounts at salesmen's request. *See id.*

[25] *See id.*

[26] *See id.* Armstrong returned the new account file while the advertising manager conferred with the publisher on the proper response to Armstrong's complaints. *See id.*

[27] *See id.*

Pursuant to the procedures set out in Title VII and the relevant federal regulations,[28] Armstrong forwarded a charge concerning the employment practices of the *Index-Journal* to the Equal Employment Opportunity Commission and brought suit in the federal district court for South Carolina after receiving notice of her right to sue.[29] Armstrong's suit alleged that the disparate treatment[30] accorded her by the

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[28] *See id.* at 444; 42 U.S.C. §§ 2000e-2000e-17 (1976); 29 C.F.R. §§ 1600-1627 (1977). A worker victimized by employment discrimination has 180 days after the discriminatory act in which to file a complaint with the Equal Employment Opportunity Commission (EEOC). *See* 42 U.S.C. § 2000e-5(e) (1976). The charge must be in writing and under oath or affirmation. *See id.* at § 2000e-5(b). Courts have not barred suits initiated in an improper fashion, reasoning that the guidelines are merely directory and not of jurisdictional significance. *See, e.g.*, Russell v. American Tobacco Co., 528 F.2d 357, 364 (4th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976) (sworn complaint technical requirement not mandatory); Blue Bell Boots, Inc. v. EEOC, 418 F.2d 355, 357 (6th Cir. 1969) (EEOC investigation may proceed on unsworn complaint); Georgia Power Co. v. EEOC, 412 F.2d 462, 466-67 (5th Cir. 1969) (method of making charge irrelevant to charging party's rights). The EEOC will serve notice on the charged party within 10 days of the filing of charges. *See* 42 U.S.C. § 2000e-5(b) (1976); *see also* 29 C.F.R. § 1601.14 (1977) (guidelines for notice procedures). Courts have not barred private suits in cases where the EEOC has failed to give the charged party the required notice or has failed to follow proper procedures. *See, e.g.*, Russell v. American Tobacco Co., 528 F.2d at 365 (complainant not charged with EEOC failure to give notice); Johnson v. Seaboard Air Line R. Co., 405 F.2d 645, 650-51 (4th Cir. 1968), *cert. denied*, 394 U.S. 918 (1969) (private suit not barred by EEOC failure to quickly attempt conciliation). After investigating the charges, the EEOC will determine if reasonable cause exists to believe that employment discrimination exists. *See* 42 U.S.C. § 2000e-5(b) (1976); *see also* 29 C.F.R. § 1601.21 (1977) (guidelines for reasonable cause determination). The Fourth Circuit has held that investigation of complaints may lead to Title VII actions by the EEOC on discriminatory practices not mentioned in the original charge. *See* EEOC v. General Elec. Co., 532 F.2d 359, 364 (4th Cir. 1976) (reasonable investigation may lead to charges beyond original complaint). The EEOC may compel production of any relevant evidence during this investigation. *See* 42 U.S.C. § 2000e-8(a) (1976); *see also* 29 C.F.R. § 1601.16 (investigative authority and methods). If the EEOC does find reasonable cause, the Commission must seek conciliation between the parties and an end to discrimination. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) (conciliation and voluntary compliance preferred to litigation); 42 U.S.C. § 2000e-5(b) (1976) (mandating conciliation efforts by EEOC); *see also* 29 C.F.R. § 1601.24 (1977) (guidelines for EEOC conciliation attempts). If no finding of reasonable cause issues, or if conciliation attempts fail, the EEOC will send a "right to sue" letter to the complaining party which authorizes the initiation of a private action against the charged party. *See* 42 U.S.C. § 2000e-5(f)(1) (1976); *see also* 29 C.F.R. § 1601.28 (guidelines on issuance of right to sue letters). *See generally* L. MODJESKA, HANDLING EMPLOYMENT DISCRIMINATION CASES 82-112 (1980). Although theoretically an impartial body, one critic charges that the EEOC overly favors plaintiffs in Title VII actions. *See* Gardner, *The Development of the Substantive Principles of Title VII Law: The Defendant's View*, 26 ALA. L. REV. 1, 1 (1973) [hereinafter cited as Gardner].

[29] *See* 647 F.2d at 444.

[30] *See id.* at 443. The Supreme Court has recognized two different contexts in which employment discrimination may occur. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977); Friedman, *The Burger Court and the Prima Facie Case in Employment Discrimination Litigation: A Critique*, 65 CORNELL L. REV. 1, 3 (1979) [hereinafter cited as Friedman]. An employer can violate Title VII by utilizing an employment practice that gives "disparate treatment" to individuals or groups on account of race,

Index-Journal, and her discharge for opposing this treatment, violated her right to work in a discrimination-free environment.[31]

In deciding the issues presented by Armstrong's claims, the district court initially focused on the differences in salary between the regular and special salesmen.[32] Following the ill-defined procedures which the

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sex, religion, or national origin. *See* McDonnell Douglas v. Green, 411 U.S. 792, 801 (1973) (recognizing disparate treatment violations). A successful disparate treatment case must prove that the defendant had some discriminatory motivation in following the challenged practice. *E.g.*, Furnco Construction Corp. v. Waters, 438 U.S. 567, 575 (1978); International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977); McDonnell Douglas Corp. v. Green, 411 U.S. at 804. Armstrong alleged that the *Index-Journal* had discriminated against her through disparate treatment. *See* 647 F.2d at 443.

The other recognized form of employment discrimination involves facially neutral practices that have a "disparate impact" on protected groups. *See* Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971) (facially neutral employment testing with disparate impact violates Title VII). In disparate impact cases the plaintiff does not have to prove discriminatory intent. *E.g.*, Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); International Bhd. of Teamsters v. United States, 431 U.S. at 335-36 n.15; Albemarle Paper Co. v. Moody, 422 U.S. 405, 422 (1975). *See generally* Connally and Connally, *Equal Employment Opportunities: Case Law Overview*, 29 MERCER L. REV. 677, 728-32 (1978).

An employment practice with a disparate impact on a protected group does not violate Title VII if the employer can justify the practice as a business necessity. *See* Griggs v. Duke Power Co., 401 U.S. at 431 (invalidating employment test unrelated to job). To pass Title VII scrutiny, an alleged business necessity must do more than merely relate to a legitimate management concern. *See* United Papermakers and Paperworkers v. United States, 416 F.2d 980, 989 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970) (striking company seniority system with disparate impact). A valid business necessity defense must show that the challenged policy represents a compelling, irresistible demand on the employer. *See* United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971) (invalidating nonessential transfer and seniority policies). For a business necessity defense to stand, there must exist no alternative methods that would reach the desired goal with less discriminatory impact. *See* Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971) (invalidating discriminatory seniority system). *See generally* McCallie, *Business Necessity Under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L.J. 98 (1974). Also, facially neutral employment practices with a disparate impact that operate to perpetuate the consequences of past discrimination violate Title VII. *See* Griggs v. Duke Power Co., 401 U.S. at 430 (employment testing which continues past discrimination unlawful); Quarles v. Phillip Morris, Inc., 279 F. Supp. 505, 516 (E.D. Va. 1968) (forbidding perpetuation of previous discrimination).

[31] *See* 647 F.2d at 443.

[32] *See* 647 F.2d at 444. Until recently, in determining whether a discriminatory pay differential existed, courts tended to utilize the standards for comparing jobs set out by the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1976), *amending* Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-19 (1970). *E.g.*, Christensen v. State of Iowa, 563 F.2d 353, 355 (8th Cir. 1977); Orr v. Frank R. MacNeill & Son, Inc., 511 F.2d 166, 170-71 (5th Cir.), *cert. denied*, 423 U.S. 865 (1975); Ammons v. Zia Co., 448 F.2d 117, 119 (10th Cir. 1971). Under the Equal Pay Act, equal work consists of jobs which are done under similar conditions and which require equal skill, effort, and responsibility. *See id.* at 120. Courts have interpreted the equal work standard to apply in cases where the jobs under comparison are substantially similar. *See* Shultz v. Wheaton Glass Co., 421 F.2d 259, 265 (3rd Cir.), *cert. denied*, 398 U.S. 905 (1970). The Equal Pay Act provides exceptions from its coverage where the pay differential arises from legitimate seniority, merit, or production systems or any factor other than sex.

Supreme Court has set out for allocating the burden of proof in Title VII cases,[33] the trial court ruled that even assuming, arguendo, that Arm-

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See 29 U.S.C. § 206(d) (1976). The relationship between the Equal Pay Act and Title VII has caused considerable confusion, due to the Bennett Amendment to Title VII. *See* 42 U.S.C. § 2000e-2(h) (1976) (Bennett Amendment). The Bennett Amendment allows pay differentials if the differential is allowable under the Equal Pay Act. *See id.* The Supreme Court recently ruled that the Bennett Amendment does not incorporate the equal work standards of the Equal Pay Act. *See* County of Washington v. Gunther, 452 U.S. 161, 170 (1981). Rather, the Court ruled that the Bennett Amendment merely adopts the four exceptions provided by the Equal Pay Act. *See id.* The *Gunther* opinion does not delineate the exact boundaries of Title VII protection against salary discrimination. *See id.* at 181. Possibly, the Court is moving toward an acceptance of the "comparable worth" theory put forth by commentators that would demand equal pay for work of comparable value to the employer, regardless of substantive conditions or requirements of the job. *See* Comment, *Civil Rights: Relationship of Title VII and the Equal Pay Act—New Muscle for the Struggle Against Sex Discrimination*, 19 WASHBURN L.J. 554, 562-64 (1980). Although such a theory would present tremendous difficulties in administration and evaluation, a comparable worth analysis would provide a much easier means for erradicating discrimination in employment. *See generally* Comment, *The Comparable Worth Theory: A Critical Analysis*, 32 BAYLOR L. REV. 627 (1980). Under a comparable worth theory, Armstrong would have had little problem in proving a case of discrimination in salary. *See also* note 136 *infra*.

[33] The Supreme Court initially spelled out the allocation of the burden of proof in Title VII cases in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The plaintiff has the initial burden of establishing a prima facie case. *See id.* at 802. The establishment of a prima facie case creates a presumption of discrimination, which if not satisfactorily explained, will result in a victory for the plaintiff. *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253-54 (1981); Furnco Construction Co. v. Waters, 438 U.S. 567, 577 (1978). If the plaintiff succeeds in making out a prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason underlying the employment decision. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973). Careful cross-examination of an attempted defense rebuttal can expose underlying employment discrimination and end the analysis at this point in the plaintiff's favor. *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981). If the employer succeeds in rebutting a prima facie case, the plaintiff then has the opportunity to show that the legitimate reasons stated by the defendant on rebuttal amounted to mere pretext, designed to mask the discrimination. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973).

The seemingly easy allocation of proof set out by the Supreme Court has caused considerable confusion in application. *See* Friedman, *supra* note 30, at 4-5. Some circuit courts have placed a more substantial burden on the defendant's attempted rebuttal than called for by *McDonnell Douglas*. *See* 411 U.S. at 802-04. The courts required the defendant to prove by a preponderance of the evidence that the reasons stated in the rebuttal actually motivated the employer. *See, e.g.*, Williams v. Bell, 587 F.2d 1240, 1245 n.45 (D.C. Cir. 1978) (defendant must establish justification for challenged action); Turner v. Texas Instruments, Inc., 555 F.2d 1251, 1255 (5th Cir. 1977) (defendant must show non-discrimination by preponderance of evidence); Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 399 (3rd Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977) (defendant must rebut by preponderance of evidence). Other circuit courts only have demanded that the defendant articulate, with some credible evidence, a legitimate reason for the challenged practice. *E.g.*, Barnes v. St. Catherine's Hospital, 563 F.2d 324, 329 (7th Cir. 1977); Harper v. Trans World Airlines, Inc., 525 F.2d 409, 411 (8th Cir. 1975); Sabol v. Snyder, 524 F.2d 1009, 1012 (10th Cir. 1975). The Supreme Court added to this confusion in Furnco Construction Co. v. Waters, 438 U.S. 567 (1978), by using both "prove" and "articulate" in a single paragraph when describing the defendant's burden on rebuttal. *See id.* at 577. In the spring of 1981, before the Fourth Cir-

strong had made out a prima facie case of employment discrimination, the *Index-Journal* had rebutted her charges.[34] The rebuttal amounted to a showing by the defendant that significant differences, either in terms of experience or job responsibility, justified the differences in compensation paid to the regular and special salesman and did not amount to unlawful discrimination.[35] The district court went on to rule that Armstrong's termination resulted not from unfair employer retaliation for Armstrong's opposition to discrimination but rather from a justifiable and nonpretextual determination by the publisher that Armstrong's refusal to complete her assigned tasks demanded her dismissal.[36]

In analyzing Armstrong's allegations that the *Index-Journal* had engaged in unlawful retaliation, the district court utilized the reasoning developed by the Fifth Circuit Court of Appeals in *Turner v. Texas Instruments, Inc.*[37] In *Turner*, the defendant discharged a black worker and two white employees for violations of company policy.[38] A similarly situated white worker guilty of violating the same policy did not face discharge.[39] The *Turner* court held that even though these employment decisions smacked of procedural unfairness, the plaintiff had not shown that the company's action resulted from discriminatory motivation or improper animus toward black employees.[40] Applying the *Turner* rationale, the district court examined the circumstances leading up to Armstrong's discharge and ruled that her insubordination constituted sufficient independent grounds for her termination while negating any retaliatory intent on the part of the *Index-Journal*.[41]

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cuit issued the *Armstrong* opinion, the Supreme Court issued an opinion which purports to settle this issue by demanding only that the defendant meet a burden of production on rebuttal. *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). Under this analysis, the burden of persuasion remains always with the plaintiff who must meet the defendant's rebuttal by persuading the court that the reasons stated by the defendant are mere pretext. *See id.* at 253. Although an admirable step toward clearing up the confusion on this issue, the *Burdine* decision still leaves considerable ambiguity on the nature of a suitable defense rebuttal. *See* text accompanying notes 127-30 *infra*.

[34] *See* 647 F.2d at 444.

[35] *See id.*

[36] *See id.* at 448.

[37] *See id.* Turner v. Texas Instruments, Inc., 555 F.2d 1251 (5th Cir. 1977).

[38] *See* 555 F.2d at 1253. The plaintiff in *Turner* and three other workers stood accused of violating a company policy forbidding any worker from punching another employee's time card. *See id.* at 1254.

[39] *See id.*

[40] *See id.* at 1257. The *Turner* court rejected an attempt by the plaintiff to show discriminatory motivation on the part of the defendant by statistics showing that blacks tended to face discharge for time-clock violations more frequently than whites. *See id.* at 1257. Statistical evidence may serve as a basis for a showing of employment discrimination. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 339 (1977) (statistics important to show discrimination in disputed case). The *Turner* court, however, held that the proferred statistical evidence did not represent a broad enough pattern of discrimination to warrant an implication of discriminatory motive. 555 F.2d at 1257.

[41] *See* 647 F.2d at 448.

Having failed on both her allegations against the *Index-Journal*, Armstrong appealed the district court decision to the Fourth Circuit Court of Appeals.[42] The circuit court, with Judge Butzner writing the majority opinion over the dissent of Judge Russell, initially criticized the trial court for limiting the scope of inquiry.[43] The district court concentrated solely on Armstrong's allegation of discrimination in salary.[44] The circuit court looked not at the equivalence of jobs and the concommitant pay differential but rather at the policies of the defendant that rigidly classified and segregated advertising salesmen by sex.[45] The circuit court held that this discrimination by classification,[46] as opposed to the discrimination in compensation that the district court examined,[47] deserved scrutiny within the *McDonnell Douglas v. Green*[48] framework.[49]

In *McDonnell Douglas*, the defendant company discharged the plaintiff, William Green, a black civil rights activist, as part of a widespread lay-off of company employees.[50] Subsequently, the plaintiff, along with other protesters, engaged in a number of disruptive and illegal demonstrations against McDonnell Douglas to protest the company's allegedly discriminatory employment practices.[51] When McDonnell Douglas later advertised for new employees, the plaintiff applied for reemployment.[52] The company refused to rehire Green, specifically basing the decision on his participation in one prior protest and suspected involvement in another incident.[53] When Green's charges that McDonnell Douglas had discriminated against him in violation of Title VII reached the Supreme Court, Justice Powell spelled out criteria for determining if a plaintiff

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[42] *See id.* at 442-43.

[43] *See id.* at 444.

[44] *See id.*

[45] *See id.* at 444-46.

[46] *See* 42 U.S.C. § 2000e-2(a)(2) (1976) (employer may not classify jobs by race, religion, sex, or national origin). A classification of jobs by sex is justified only if the sex of the employee is a bona fide occupational qualification for the position. *See* Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971); *see also* note 6 *supra*. The BFOQ exception is construed narrowly to further the policies embodied in Title VII. *See* Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 232 (5th Cir. 1969). A BFOQ defense must show that the sex of the employee relates directly to a vital employer interest. *See* Dothard v. Rawlinson, 433 U.S. 321, 334 (1977); note 6 *supra*.

[47] *See* 647 F.2d at 444.

[48] 411 U.S. 792 (1973).

[49] *See* 647 F.2d at 444.

[50] *See* 411 U.S. at 794.

[51] *See id.* at 794-96. The plaintiff in McDonnel Douglas participated in a "stall-in" civil rights protest where parked cars blocked the entry to a McDonnell Douglas factory. *See id.* at 795. The police arrested the plaintiff for obstructing traffic in connection with the stall-in protest. *See id.* McDonnell Douglas also suspected Green of participating in a "lock-in" protest where demonstrators locked the gates of a McDonnell Douglas factory. *See id.*

[52] *See id.* at 796.

[53] *See id.*

has shown a prima facie case of employment discrimination.[54] Under these guidelines, a plaintiff has made out a prima facie case by showing that he, as a member of a minority group, had applied for a job for which he possessed the requisite qualifications and, after his rejection, the employer continued to seek applicants for the position.[55]

While explicitly grounding its ruling on the *McDonnell Douglas* precedent,[56] the circuit court modified the criteria developed in *McDonnell Douglas* for discrimination in hiring to analyze the case of discrimination by classification presented by *Armstrong*.[57] In the context of improper employment discrimination, the court stated that a prima facie case consisted of a showing that a member of a group protected by Title VII faced a strict classification of jobs, on account of her sex, while performing the duties of a superior classification from which an employer excluded her.[58] Judged by these criteria, Armstrong had shown a prima facie case of employment discrimination.[59]

The circuit court proceeded to examine the attempt of the *Index-Journal* to meet the shifted burden of rebutting the plaintiff's prima facie case.[60] In describing the quantum of proof necessary for a sufficient rebuttal, the *Armstrong* court quoted two Supreme Court opinions, one demanding a simple articulation of some non-discriminatory purpose,[61] the other requiring proof of a legitimate reason underlying the challenged employment practice.[62] The Fourth Circuit scrutinized and rejected assertions by the *Index-Journal* that significant differences existed between the regular and special salesmen in terms of required skill and responsibility.[63] The *Armstrong* court noted that all salesmen at the *Index-Journal* handled similar types of accounts[64] and even the publisher of the defendant newspaper testified that one could not really differen-

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[54] *See id.* at 802.

[55] *See id.*

[56] 647 F.2d at 445.

[57] *See id.* at 444. The *McDonnell Douglas* court noted that the specific test developed in the case would not apply in every factual situation. *See* 411 U.S. at 802 n.13. Courts must modify the test of a sufficient prima facie case announced in *McDonnell Douglas* to fit each different case. *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 n.6 (1981); 411 U.S. at 802 n.13.

[58] 647 F.2d at 444.

[59] *See id.*

[60] *See id.* at 445.

[61] *Id., quoting*, McDonnel Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (defendant need only articulate legitimate reason on rebuttal); *see* note 33 *supra.*

[62] 647 F.2d at 455, *quoting*, Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978) (defendant must prove challenged decision based on non-discriminatory reason); *see* note 33 *supra.*

[63] *See* 647 F.2d at 445.

[64] *See id.* at 443. At no time during the plaintiff's term of employment did the *Index-Journal* attempt to limit the types of accounts Armstrong handled. *See id.*

tiate between the two positions.[65] Evidence that the plaintiff consistently earned higher commissions than the regular salesmen,[66] negated claims by the *Index-Journal* that Armstrong handled only small accounts with no real growth potential.[67] Although the plaintiff did lack the higher education and experience possessed by the regular salesmen,[68] the *Armstrong* court found that the *Index-Journal* had no specific pre-requisites for employment.[69] The absence of specific job qualifications diminished the weight of the experience and education factors in the comparison between job classifications.[70] The only qualification the court saw as influencing the defendant in its hiring policies related directly to the sex of the applicant.[71] Retreating from the stated requirement of proof of a legitimate possible reason behind the discriminatory job classifications during the defendant's rebuttal,[72] the *Armstrong* court ruled that the defendant had not articulated a suitable response to the plaintiff's case.[73] The Fourth Circuit, therefore, reversed the trial court and ruled that the *Index-Journal* had violated Armstrong's rights under Title VII.[74]

The court then examined the measure of damages that the plaintiff deserved as recompense for discrimination.[75] Noting that an award of back pay served not only to deter employment discrimination but also to make the victim "whole,"[76] the court ruled that Armstrong should

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[65] *See id.* at 445.

[66] *See id.* at 446; note 20 *supra.*

[67] *See id.*

[68] *See id.* at 445. The two male special salesmen each held college degrees and some years of experience in the advertising field. *See id.* at 450 n.4 (Russell, J., dissenting). The plaintiff possessed only a high school diploma and had no experience in advertising prior to her employment at the *Index-Journal. See id.*

[69] *See* 647 F.2d at 445.

[70] *See id.* at 450 n.4 (Russell, J., dissenting).

[71] *See id.*

[72] *See id;* text accompanying notes 33 & 61 *supra* and 127-30 *infra.*

[73] *See id.* at 446.

[74] *Id.* By ending the analysis at this point, the *Armstrong* court did not need to shift the focus of inquiry back to the plaintiff to show the pretextual nature of the defendant's rebuttal. *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981) (failure of defendant to adequately articulate legitimate rebuttal ends analysis); note 33 *supra.*

[75] *See* 647 F.2d at 446.

[76] *Id. See also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (purpose of back pay remedy to make victim whole and deter violations); United States v. N. L. Industries, Inc., 479 F.2d 354, 379 (8th Cir. 1973) (back pay award deters violations and encourages private remedial efforts). *See, generally* Comment, *Title VII: Making Discrimination Victims Whole,* 13 WILLAMETTE L.J. 109 (1976).

Title VII authorizes a court in its discretion to order injunctive relief, appropriate remedial relief, and the hiring or reinstatement of victimized workers, with or without back pay. *See* 42 U.S.C. § 2000e-5(g) (1976). A finding that the defendant intentionally engaged in discriminatory practices must predicate any grant of relief. *See id.* Courts, however, have held this intent requirement only to demand that the challenged practice be deliberate rather than accidental. *E.g.*, Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 251 n.114 (5th Cir. 1974); Shaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002, 1006 (9th Cir.

receive an award of back pay computed by measuring the difference between her base pay salary and the compensation that a similarly situated and experienced male salesman would have received.[77] In reaching this decision, the majority rejected Armstrong's request for a back pay award commensurate with the differences between her salary and that of the average male salesman.[78] Although this measure of relief would have increased Armstrong's recovery considerably and, theoretically have had greater deterrent value, an award as suggested by the plaintiff would ignore the longer periods of employment of the regular salesmen and their consequently higher rates of pay.[79] The circuit court instructed the district court to add compensation for the commissions that Armstrong lost subsequent to her discharge.[80] The court also ordered the value of Armstrong's unpaid services to her husband's business during the period of her forced unemployment subtracted from the total recovery.[81] The Fourth Circuit demanded that the defendant offer to reinstate the plaintiff[82] with the back pay award to cover the period between her discharge and this offer of reemployment.[83] The *Armstrong* court ordered the plaintiff's reinstatement at a salary comparable to a male salesman with her length of employment, including the period after her

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1972); Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1201 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971); Robinson v. Lorillard Corp., 444 F.2d 791, 796 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006, 1007 (1971, 1972).

[77] *See* 647 F.2d at 446.

[78] *See id.* The average male salesman at the *Index-Journal* earned approximately 20% more in salary than the female salesman. *See id.* The *Armstrong* court found that the pay differential resulted from the longer tenure of the regular salesman rather than from employment discrimination. *See id.* The plaintiff only received recompense for injuries resulting directly from violation of Title VII rights. *See id.*

[79] *See id.* at 446. The court in *Armstrong* recognized that an award equal to the amount that a similarly inexperienced male salesman would have received during Armstrong's term of employment would net the plaintiff very little, given her relatively short tenure. *See id.*

[80] *See id.* at 449. An award of damages for hypothetical wages and commissions is highly speculative. The Fourth Circuit previously has noted, however, that, like an award for pain and suffering in a tort action, the speculative nature of Title VII damages does not prevent such relief. *See* Hairston v. McClean Trucking Co., 520 F.2d 226, 233 (4th Cir. 1975). In *Hairston*, the Fourth Circuit recommended the appointment of a master, pursuant to Federal Rule of Civil Procedure 53, to perform the actual calculation of damages when such calculation proved too complex for the expertise of the judiciary. *See id.* at 233; FED. R. CIV. P. 53. Apparently the *Armstrong* court decided that the computation of damages in this case did not necessitate the appointment of a master. *See generally* Note, *A New Standard To Govern the Discretionary Back Pay Remedy Under Title VII of the Civil Rights Act of 1964:* Albemarle Paper Co. v. Moody, 11 TULSA L.J. 627 (1976).

[81] *See* 647 F.2d at 449.

[82] *See id.* The *Armstrong* court's order of reinstatement for the plaintiff resulted from the finding of illegal employer retaliation. *See id.*, text accompanying notes 84-98 *infra*; *see also* note 7 *supra*.

[83] *See* 647 F.2d at 449.

discharge, would receive.[84] The court also granted costs and a reasonable attorney's fee to the prevailing plaintiff.[85]

The Fourth Circuit based the decision to order the rehiring of the plaintiff on findings that the defendant had retaliated illegally against an employee opposing unlawful discrimination.[86] In determining whether the actions of the *Index-Journal* constituted unlawful retaliation for Armstrong's opposition to the newspaper's employment practices,[87] the Fourth Circuit utilized a balancing test set forth by the First Circuit Court of Appeals in *Hochstadt v. Worcester Foundation for Experimental Biology*.[88] The *Hochstadt* case presented a classic example of employee opposition to discrimination that exceeded the protections of Title VII.[89] The plaintiff in *Hochstadt* chose to express her dissatisfaction with employer policies by circulating false rumors, disrupting other workers' endeavors and threatening legal action against her employer.[90] These disruptive methods seriously hampered the quality of her work product.[91] Seeking to protect both the rights of employees and the business necessities of employers, the *Hochstadt* court balanced the purpose of Title VII's protection of employee opposition[92] against the equally important congressional desire not to overly restrict necessary em-

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[84] *See id.*

[85] *Id.* Title VII authorizes the imposition of attorney's fees in favor of the prevailing party. 42 U.S.C. § 2000e-5(k) (1976). The Fourth Circuit previously has analyzed the provisions concerning attorney's fees in Title VII actions and found an underlying rationale based on a private attorney general theory, encouraging individuals to seek vindication of their rights in an area where governmental resources cannot guarantee a proper enforcement effort. *See* EEOC v. Christiansburg Garment Co., 550 F.2d 949, 951 (4th Cir. 1977), *aff'd*, 434 U.S. 412, 416-17 (1978); Robinson v. Lorillard Corp., 444 F.2d 791, 804 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006, 1007 (1971, 1972). Despite the language of the statute which authorizes attorney's fees for the prevailing party, the Fourth Circuit has tended not to award fees to a victorious defendant absent a clear showing that the plaintiff did not bring suit in good faith. *See* 550 F.2d at 951-52. *See generally* Heinsz, *Attorney's Fees For Prevailing Title VII Defendants: Toward a Workable Standard*, 8 U. TOL. L. REV. 259 (1977).

[86] *See* 647 F.2d at 446-49. *See also* note 7 *supra.*

[87] *See* 42 U.S.C. § 2000e-3(a) (1976); note 7 *supra.*

[88] *See* 647 F.2d at 448; Hochstadt v. Worcester Foundation for Experimental Biology, 545 F.2d 222, 231 (1st Cir. 1976).

[89] *See* 545 F.2d at 230; *see generally* Note, *Section 704(a) of the Civil Rights Act of 1964: Should Its Scope Be Defined By Reference To Section 7 of the National Labor Relations Act*, 10 RUT.-CAM. L.J. 589, 593-96 (1979) (*Hochstadt* analyzed).

[90] *See* 545 F.2d at 226-30.

[91] *See id.* at 228.

[92] *See id.* at 231. The Supreme Court has recognized that the judiciary should give wide ranging protection to employee opposition to discrimination. *See* McDonnell Douglas v. Green, 411 U.S. 792, 796, 798 (1973); *cf.* NLRB v. Scrivener, 405 U.S. 117, 124 (1972) (broad protection from retaliation under National Labor Relations Act). Wide ranging protection remains necessary to encourage workers to seek vindication of their rights without fear of employer retribution. *See* note 7 *supra.*

ployer disciplinary actions.[93] In so doing, the First Circuit emphasized the setting in which the opposition occurred and found that a research laboratory could withstand less disruption than most workplaces.[94] In applying this balancing test to the pertinent facts, the Fourth Circuit had little difficulty in determining that Armstrong's complaints related directly to the unlawful employment practices of the *Index-Journal*.[95] Not finding any of the overly disorderly or disruptive conduct that marked the *McDonnell Douglas*[96] or *Hochstadt*[97] controversies,[98] the Fourth Circuit reversed the trial court and found that the *Index-Journal* unfairly retaliated against an employee opposing employment discrimination.[99] This finding of retaliation led the *Armstrong* court to require the defendant to rehire the plaintiff.[100]

The majority opinion evoked a vehement dissent from Judge Russell.[101] The dissenting Judge initially disagreed with the panel's de novo review of the facts.[102] The dissenter also challenged the allegations that the defendant had in any way wronged the plaintiff.[103] The dissent distinguished the instant case from the *McDonnell Douglas* precedent on which the majority opinion relied.[104] Judge Russell stated that unlike the *McDonnell Douglas* case,[105] *Armstrong* did not involve employer discrimination against a minority worker manifested by a denial of employment followed by the continuation of a job opening.[106] Judge Russell, however, offered no alternative criteria by which to analyze the case.

Other contentions raised by Judge Russell refute any claims of discrimination on the part of the *Index-Journal* and assert that Armstrong,

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[93] *See* 545 F.2d at 231; *see also* McDonnell Douglas v. Green, 411 U.S. 792, 803 (1973) (employer must have discretion to discharge or not rehire disruptive worker); Ammons v. Zia Corp., 448 F.2d 117, 121 (10th Cir. 1971) (discharge for pointlessly repetitious complaints not a Title VII violation); note 7 *supra*.

[94] *See* 545 F.2d at 233.

[95] *See* 647 F.2d at 449. The publisher of the *Index-Journal* testified that Armstrong complained about everything, not just alleged employment discrimination. *See id.* at 447. The Fourth Circuit, however, stated that all of the plaintiff's complaints resulted directly from the illegal policies of the defendant. *See id.* at 449.

[96] *See* 411 U.S. at 794-96; note 51 *supra*.

[97] *See* 545 F.2d at 227-29.

[98] *See* 647 F.2d at 448. Although the balancing approach described in *Hochstadt* takes into account the setting in which the employee opposition occurs, the *Armstrong* court did not discuss the setting from which the *Armstrong* controversy arose. *See* 545 F.2d at 232.

[99] *See* 647 F.2d at 444.

[100] *See id.* at 449.

[101] *See id.* at 449 (Russell, J., dissenting).

[102] *See id.* The *Armstrong* dissent noted that the trial judge had heard the testimony of the witnesses and could better evaluate their credibility. *Id.*

[103] *See id.* The *Armstrong* dissent asserted that a male hired as a special salesman would have received the same salary as the plaintiff. *Id.*

[104] *See id.*

[105] 411 U.S. 792 (1973); see text accompanying notes 48-55 *supra*.

[106] *See* 647 F.2d at 449 (Russell, J., dissenting).

as a woman, enjoyed a preferred position within the employment scheme of the newspaper.[107] The dissenting judge believed that any discrimination involved in the employment selection procedures of the *Index-Journal* worked against males, who were denied the opportunity of competing for the special salesman's position.[108] Judge Russell viewed this case as dissimilar to any other sex discrimination case on record,[109] and found that the only hint of discrimination arose from what he viewed as a mere semantic difference in the actual labels applied to the separate job classifications.[110] This portion of the dissent makes no mention of the based pay ceiling on the special salesman's salary.[111] Instead, the dissent emphasized the hypothetical possibility that a male in Armstrong's position would have received the same pay.[112]

The dissent quickly dismissed any allegations that the *Index-Journal* unjustifiably discharged Armstrong.[113] In Judge Russell's opinion, the record portrayed Armstrong as a nuisance, constantly complaining and guilty of intolerable insubordination for refusing to carry out a direct order.[114] Finally, seizing on the judicial policy not to overturn a lower court's decision absent a clear showing of error,[115] the dissent restated that the circuit court had no authority to reverse the factual findings of the district court.[116]

The dissenting opinion of Judge Russell contains a number of flaws, both factual and legal. The dissent attempted to distinguish the *McDonnell Douglas* case[117] and criticized the majority's modification of the test

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[107] *See id.*; Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1203 (7th Cir. 1971) (Stevens, J., dissenting) (policy limiting females to stewardess positions actually favors women). Judge Russell, in dissent, wrote that Armstrong's higher earnings from commissions evidenced some form of favoritism toward the plaintiff by the *Index-Journal*. 647 F.2d at 450 (Russell, J., dissenting).

[108] *See id.* at 449; note 107 *supra*.

[109] *See* 647 F.2d at 451. According to the *Armstrong* dissent, a legitimate claim of sex discrimination must entail concrete injury to the plaintiff in terms of compensation, tenure, or terms of employment. *See id.* The dissenter saw no real injury to the plaintiff in the instant case, since Armstrong received the same salary a male in the special salesman's position would have received. *See id.*

[110] *See id.*

[111] *See id.* at 449-51.

[112] *See* 647 F.2d at 451 (Russell, J., dissenting). The dissent in *Armstrong* emphasized that all of the salesmen had identical starting salaries and, therefore, the plaintiff could only suffer injury at some hypothetical future point. *See id.* One commentator has objected to the hypothetical nature of Title VII damages, which must rely on assumptions that the plaintiff would have stayed on the job and received regular promotions and raises. *See* Gardner, *supra* note 28, at 108.

[113] *See* 647 F.2d at 451 (Russell, J., dissenting). Judge Russell, in his dissent to *Armstrong*, viewed the plaintiff's termination as a justifiable employer reaction to disruptive conduct which burdened the employer and Armstrong's coworkers. *See id.*

[114] *See id.*

[115] *See id.*

[116] *Id.* at 452.

[117] *See id.* at 449; text accompanying notes 104-06 *supra*.

for evaluating a prima facie case of discrimination derived from *McDonnell Douglas*.[118] Courts must, however, modify the *McDonnell Douglas* test to analyze situations other than an allegedly discriminatory refusal to rehire a disruptive worker.[119] The *Armstrong* dissent's claim that the plaintiff somehow enjoyed a favored position within the *Index-Journal's* employment scheme[120] ignores the blatant sexual classification of jobs in *Armstrong* and the concommittant differences in salary.[121] Judge Russell stated that the plaintiff faced no "cap" on her right to future pay increases, although the maximum possible salary of the special saleman amounted to $27 per week less than the maximum that a regular salesman could receive.[122] Assertions by the dissenting judge that a male employed as a special salesman would receive the same salary as the plaintiff received[123] ignores the fact that the defendant only hired females for the lower paying position.[124] Apparently, Judge Russell would only find a valid sex discrimination claim where females received less pay than males in the same job classification.[125] Such a theory would allow blatant sexual segregation of jobs and salary discrimination based on the slightest semantic differentiations between male and female jobs.

Although the outcome of the *Armstrong* case serves well the spirit and purpose of Title VII,[126] the majority opinion also merits some criticism. In describing the proper burden of proof during the defendant's rebuttal, the *Armstrong* court mentioned both articulation of a legitimate possible reason for the challenged action and a requirement of proof on the issue.[127] Although some circuit courts have required that the defendant prove the explanations presented on rebuttal,[128] the Supreme Court specifically has stated that the burden that shifts to the defendant after a successful showing of a prima facie case amounts only to a showing putting forth a believable reason that may have motivated the employment practice in question.[129] The Fourth Circuit's statements con-

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[118] *See* 647 F.2d at 449; text accompanying notes 104-06 *supra*.

[119] *See* McDonnell Douglas v. Green, 411 U.S. 792, 802, n.13; note 56 *supra*.

[120] *See* 647 F.2d at 449 (Russell, J., dissenting); text accompanying notes 107-08 *supra*.

[121] *See* 647 F.2d at 444; text accompanying note 17 *supra*.

[122] 647 F.2d at 451 (Russell, J., dissenting); note 119 *supra*.

[123] *See* 647 F.2d at 451 (Russell, J., dissenting); text accompanying note 110 *supra*.

[124] *See* text accompanying notes 12, 14 *supra*.

[125] *See* 647 F.2d at 449-52 (Russell, J., dissenting).

[126] *See* note 2 *supra*.

[127] 647 F.2d at 445; *see* text accompanying notes 60-62 *supra*.

[128] *See, e.g.*, Williams v. Bell, 587 F.2d 1240, 1245, n.45 (D.C. Cir. 1978); Turner v. Texas Instruments, Inc., 555 F.2d 1251, 1255 (5th Cir. 1977); Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 399 (3rd Cir. 1976); note 33 *supra*.

[129] *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); *see* note 33 *supra*. The Supreme Court, in *Burdine* dismissed fears that a requirement of mere articulation on rebuttal would lead to fictitious explanations by defendants. *See* 450 U.S. at 258. Given the liberality of federal discovery rules and the theoretic ease with which a plaintiff can expose a bogus explanation of a challenged business practice, the *Burdine* Court felt that the requirement of articulation on rebuttal sufficiently protects plaintiffs' interests in Title VII cases. *See id.*

cerning the necessity of proof on rebuttal made no difference in *Armstrong*, since the defendant failed even to articulate a credible rebuttal.[130] In future cases, where the defendant may have a stronger argument to rebut the plaintiff's case than in *Armstrong*, the Fourth Circuit will need to take notice of recent Supreme Court precedents defining the scope of defendants' rebuttal and tailor the analysis accordingly.

Another, and perhaps more troubling, aspect of the *Armstrong* opinion rests in the court's unwillingness to accept the case as one dealing with discrimination in salary.[131] Rather than treating the case in the manner in which the plaintiff argued before the trial court and briefed the circuit court,[132] the Fourth Circuit based the decision on discrimination in classification.[133] Considering the almost total congruence between the duties of the two types of salesmen, the court could have based its decision on the discrimination in salary issue presented by the plaintiff and rejected by the trial court.[134] In doing so, the Fourth Circuit would have recognized that women workers often receive lower wages for work of equal or greater value than that which males perform.[135] An adoption of a "comparable worth" theory for salary discrimination claims would represent a quantum leap forward in the struggle against discrimination.[136] Courts must begin comparing the actual value of work performed by males and females and evaluating Title VII suits within such a framework if traditional patterns of employment discrimination are ever going to be eliminated. Instead, the *Armstrong* court first criticized the lower tribunal for overly narrowing the case by concentrating on an allegedly unfair pay difference between almost identical jobs,[137] then proceeded to

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[130] *See* 647 F.2d at 446; text accompanying note 73 *supra*.

[131] *See* 647 F.2d at 444; text accompanying notes 44-48 *supra*.

[132] *See* Brief for Appellant at 30, Armstrong v. Index-Journal Co., 647 F.2d 441 (4th Cir. 1981).

[133] *See* 647 F.2d at 444-46.

[134] *See id.* at 444.

[135] *See* Comment, *Civil Rights: Relationship of Title VII and the Equal Pay Act—New Muscle for the Struggle Against Sex Discrimination*, 19 WASHBURN L.J. 554, 560-64 (1980). As of 1978, the average female in the American work force received 60% of the salary received by the average male worker. *See* Rytina, *Occupational Segregation and Earnings Differences By Sex*, 104 MON. LAB. REV. 49, 49 (Jan. 1981).

[136] *See generally* Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J.L. REF. 399 (1979). A comparable worth theory, demanding equal pay for jobs of comparable worth of employers, regardless of traditional pay scales and job status, could prove quite dangerous. *See* Lemons v. City of County of Denver, 17 LAB. REL. REP. (BNA) Fair Empl. Prac. Cas. 906, 907 (D. Colo., April 28, 1978) (comparable worth theory impractical and disruptive); Nelson, Opton, & Wilson, *Wage Discrimination and the "Comparable Worth" Theory In Perspective*, 13 U. MICH. J.L. REV. 233, 293-94 (1980) (comparable worth theory highly inflationary). Fears that a comparable worth theory, directly comparing the ultimate value of different jobs, could prove disruptive and difficult in application could have motivated the *Armstrong* courts decision to treat the plaintiff's charges in terms of a discriminatory classification scheme instead of a discriminatory compensation analysis. *See* note 32 *supra*.

[137] *See* 647 F.2d at 444-46.