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or abuse, it should approve the settlement and dismiss the action.[79] The Fourth Circuit therefore succeeded in limiting the district court's ability to inhibit precertification settlements by insuring that adequate reasons exist to notify a putative class of a proposed settlement. Concurrently, the court enhanced the policy of approval of valid precertification settlements through a procedural device which avoids the complexities involved in holding a certification hearing as a prerequisite to dismissal of the suit.[80]

THOMAS H. JUSTICE, III

V. CIVIL RIGHTS

A. Disclosure of Investigatory Records Under the Freedom of Information Act

The Freedom of Information Act[1] (FOIA) was enacted to assure public access to records held by the federal government.[2] The Act restricts the

[79] 582 F.2d at 1316.

[80] On remand from the Fourth Circuit, the district court in *Shelton* criticized the Fourth Circuit's holding on several grounds. The district court asserted that the Fourth Circuit's opinion provided little guidance regarding the method by which a trial court should make findings concerning abuse of the class action device or prejudice to the putative class without notice that their case is being heard. Shelton v. Pargo, Inc., No. 76-069, slip op. at 3 (W.D.N.C., filed Feb. 12, 1979). The district court reasoned that the Fourth Circuit's restriction on routine notice, *see* text accompanying notes 29-40 *supra*, forced the trial court to rely on the representations of the settling lawyers that the settlement is not prejudicial or collusive. No. 76-069, slip. op. at 4-5. Rather than placing reliance on the settling counsel, the district court stated that notice of the settlement would allow the trial court to better protect the claims of the putative class by allowing them to file their own claims. *Id.* After conducting a careful hearing, however, the district court found collusion in the unsolicited promise of Shelton's counsel not to pursue any more claims against Pargo on behalf of the putative class. *Id.* at 6. Pargo therefore was ordered to mail notice of the settlement to the putative class. *Id.* at 7.

[1] 5 U.S.C. § 552 (1976).

[2] The drafters envisioned the Act as a means of ensuring an informed electorate through broad public access to executive department records. H.R. REP. No. 1497, 89th Cong., 2d Sess., *reprinted in* [1966] U.S. CODE CONG. & AD. NEWS 2418, 2429. *See* N.L.R.B. v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978). "Disclosure, not secrecy, is the dominant objective of the Act." Department of the Air Force v. Rose, 425 U.S. 352, 362 (1976).

The FOIA contains three basic subsections. The first establishes an affirmative obligation of each agency to make information available to the public, either by publication or by making the information available for public inspection upon specific requests. 5 U.S.C. § 552(a) (1976). The second subsection contains exemptions to mandatory disclosure. *Id.* § 552(b). The third subsection limits exemptions only to that which is "specifically stated" in the FOIA and provides that information may not be withheld from Congress. *Id.* § 552(c). *See generally* Cox, *A Walk Through Section 552 of the Administrative Procedure Act; The Freedom of Information Act; The Privacy Act; and the Government in the Sunshine Act*, 46 U. CINN. L. REV. 969 (1978); Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761 (1967); *see also* HOUSE COMM. ON GOV'T OP., FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974 (P. L. 93-502), 94th Cong., 1st Sess. 157-58 (Joint Comm. Print 1975) [hereinafter cited as SOURCEBOOK].

availability of government-held documents, however, by authorizing secrecy for sensitive information.[3] For instance, the disclosure provisions of the FOIA do not apply to government records of law enforcement investigations if their release would result in one of six enumerated harms or if a federal statute prohibits release of information to the public.[4]

Two recent Fourth Circuit cases considered the validity of requests for information contained in investigatory records held by the Equal Employment Opportunity Commission (EEOC) and by the FBI. In *Charlotte-Mecklenburg Hospital Authority v. Perry*,[5] an employer requested that the

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[3] 5 U.S.C. § 552(b) (1976). There are nine categories of exemption from FOIA disclosure. *Id.* Congress did not intend requested information falling within an exemption to be prohibited from disclosure, but rather the intention was to allow agencies to withhold information if they so choose. SOURCEBOOK, *supra* note 2, at 158. Nevertheless, the Fourth, Fifth and Ninth Circuits have held that the FOIA does prohibit disclosure through its exemptions. Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190, 1197 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977); Union Oil Co. of Calif. v. FPC, 542 F.2d 1036, 1044 (9th Cir. 1976); Continental Oil Co. v. FPC, 519 F.2d 31, 35 (5th Cir.), *cert. denied*, 425 U.S. 971 (1975); *cf.* Associated Dry Goods Corp. v. EEOC, 419 F. Supp. 814, 821-22 (E.D. Va. 1976) (FOIA exemptions not a bar to voluntary disclosure of information). The circuits which confer prohibitory power upon exemptions have been criticized for being inconsistent with the language and history of the FOIA. K.C. DAVIS, ADMINISTRATIVE LAW TREATISE § 5.9 (1978) [hereinafter cited as DAVIS].

[4] 5 U.S.C. § 552(b)(3), (7) (1976). Investigatory records are exempt from production to the extent their disclosure would constitute:

(A) interference with enforcement proceedings; or
(B) deprivation of a person's right to a fair trial or impartial adjudication; or
(C) an unwarranted invasion of personal privacy; or
(D) the disclosure of the identity of a confidential source, and in a criminal or national security intelligence investigation, a disclosure of confidential information furnished only by the confidential source; or
(E) disclosure of investigative techniques and procedures; or
(F) endangerment of the life or physical safety of law enforcement personnel.

Id. at § 552(b)(7)(A)-(E). Exemption 3 prevents application of the FOIA to items specifically exempted from disclosure by other federal statutes. *Id.* at § 552(b)(3). The exempting statute must establish particular criteria for withholding or refer to particular types of material to be withheld. *Id.* It must not allow any federal agency discretion on matters to be withheld. *Id.*

Typical of the kind of statute preventing disclosure through exemption 3 are 35 U.S.C. § 122 (1976) (applications for patent shall be kept in confidence by the Patent Office) and 50 U.S.C. § 403(d)(3) and (g) (1976) (mandating withholding of CIA information by its director). Exemption 3 would not operate where a statute requiring the Secretary of Health, Education and Welfare to withhold Social Security reports allows him to release reports where he, in his discretion, prescribes release by regulation. 42 U.S.C. § 1306 (1976).

Exemption 3 was totally revised in a 1976 amendment to the FOIA. The previous text of that exemption specified that the FOIA did not require disclosure of matters "specifically exempted from disclosure by statute." 80 Stat. 250, 251 (1966). The Supreme Court in FAA Adm'r v. Robertson, 422 U.S. 255 (1975), held that the term "specific" in exemption 3 could not be read as meaning the exemption applied only where statutes named documents precisely or described specifically the category in which they fall. *Id.* at 265. When Congress amended exemption 3, the House Report said the exemption does require specificity and that the amendment was drafted to overrule *Robertson*. H.R. REP. No. 94-880, 94th Cong., 2d Sess. 22, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183, 2205.

[5] 571 F.2d 195 (4th Cir. 1978).

EEOC supply copies of complaints of discrimination and supporting affidavits filed by its employees.[6] The Fourth Circuit, relying on FOIA exemptions 3 and 7(A),[7] held that charges and affidavits filed by present employees were nondisclosable under the act.[8] Sworn statements of past employees, however, were ordered released.[9] The Fourth Circuit employed exemption 7(D) in *Nix v. United States*[10] when it refused to allow disclosure of information in FBI investigatory files obtained from confidential sources.[11] The court also held that exemption 7(C) protected from disclosure information that, if released, would invade individual privacy.[12] To determine the scope of disclosure, the *Nix* court engaged in a balancing of interests which, although not authorized by the language of the FOIA itself, is countenanced by case law.[13] However, the Fourth Circuit in *Charlotte-Mecklenburg* lacked both statutory and case support for its case-by-case approach to FOIA exemptions and its consideration of the requesting party's special ability to obtain information outside the FOIA in order to determine its rights under the act.

In *Charlotte-Mecklenburg,* the Charlotte-Mecklenburg Hospital Authority (Authority) filed an FOIA request with the EEOC to receive sworn statements of parties charging the Authority with employment discrimination.[14] The EEOC denied the request, stating that it was statutorily prohibited from releasing the requested information by Title VII of the Civil Rights Act of 1964.[15] The Commission first relied on FOIA exemption 3 which provides that where a statute prohibits disclosure, the FOIA will not apply.[16] The EEOC also maintained that production of requested information would interfere with its pending employment discrimination proceedings.[17] Under exemption 7(A), potential interference with an enforcement proceeding is a basis for withholding investigatory records.[18]

After the agency denied the Authority's request, the Authority filed suit to compel disclosure of the information.[19] The district court ordered the affidavits of former Authority employees released but upheld the nondisclosure of present employees' affidavits.[20] The court determined that re-

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[6] *Id.* at 197.

[7] 5 U.S.C. § 552(b)(3), (7)(A) (1976); *see* note 4 *supra.*

[8] 571 F.2d at 202.

[9] *Id.*

[10] 572 F.2d 998 (4th Cir. 1978).

[11] *Id.* at 1004-06.

[12] *Id.* at 1005-06.

[13] *See* text accompanying notes 74, 78 *infra.*

[14] 571 F.2d at 197.

[15] *See* text accompanying notes 34-40 *infra.*

[16] 571 F.2d at 197.

[17] *See* note 4 *supra*; text accompanying notes 41-46 *infra.*

[18] *See* note 4 *supra.*

[19] 571 F.2d at 197. A party is entitled to bring an FOIA law suit in federal district court only after exhausting his administrative remedies. 5 U.S.C. § 552(a)(6)(C) (1976). In addition to seeking a disclosure order, the Hospital sought unsuccessfully to enjoin the EEOC enforcement proceeding until the requested information was released. 571 F.2d at 197.

[20] 571 F.2d at 198.

lease of information supplied by present employees would have a chilling effect on the willingness of those employees to make further statements to the EEOC, for fear of reprisals.[21] Thus, the district court concluded that interference with an enforcement proceeding was likely and, while failing to address the exemption 3 issue, held that exemption 7(A) warranted nondisclosure.[22]

The Fourth Circuit, in affirming the district court,[23] found that exemption 7(A) was properly invoked[24] and that exemption 3 was inapplicable to the facts of the case.[25] The Fourth Circuit endorsed the district court's application of exemption 7(A), including its analysis of the specific content of the requested records and the potential effect of disclosure.[26] Agreeing with the lower court, the circuit court refused to find that records were per se disclosable or nondisclosable solely on the basis of the type of request made and type of enforcement proceeding involved.[27] The court thus explained its rationale for an exemption 7(A) case-by-case analysis.[28]

The Fourth Circuit improperly relied on the legislative history to the 1974 FOIA amendment, which added exemption 7(A), to justify the case-by-case analysis.[29] The amendment was drafted to overrule cases which held that all files of investigations were nondisclosable.[30] However, the Fourth Circuit viewed that amendment as an absolute bar to all per se interpretations of exemption 7.[31] As a result of the 1974 amendment, files cannot be withheld simply because they are investigatory, but there seems to be no prohibition against granting a blanket exemption for certain types of investigatory files.

At the time of the *Charlotte-Mecklenburg* decision, a majority of circuits had rejected the exemption 7(A) case-by-case analysis used by the Fourth Circuit in favor of the per se rule, which allows an inquiry into the

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[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.* at 199.

[25] *Id.* The district court's finding, affirmed by the Fourth Circuit, followed an in camera examination of the requested affidavits. *Id.* at 202.

[26] *Id.* at 202.

[27] *Id.*

[28] *Id.*

[29] *Id.* at 201-02.

[30] Prior to 1974, a number of courts ruled that if a file was investigatory in nature, regardless whether it was open or closed, its contents were nondisclosable. *E.g.*, Center for Nat'l Pol. Rev. on Race and Urban Issues v. Weinberger, 502 F.2d 370, 374 (D.C. Cir. 1974); Weisberg v. Department of Justice, 489 F.2d 1195, 1197 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 993 (1974); Frankel v. SEC, 460 F.2d 813, 817 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972). Congress sought to overrule those broad interpretations of exemption 7 providing that a specific harm must be found to justify nondisclosure under exemption 7. SOURCEBOOK, *supra* note 2, at 333-34; *see* text accompanying note 33 *infra*. *See also* Ellsworth, *Amended Exemption 7 of the Freedom of Information Act*, 25 AM. U. L. REV. 37, 37 (1975); Note, *The Investigatory Files Exemption to the FOIA: The D.C. Circuit Abandons* Bristol-Myers, 42 GEO. WASH. L. REV. 869 (1974).

[31] 571 F.2d at 202.

type of information requested rather than the specific facts involved.[32] Subsequent to the Fourth Circuit's decision in *Charlotte-Mecklenburg*, the Supreme Court settled the conflict between the exemption 7(A) per se approach and the Fourth Circuit's case-by-case analysis in favor of the per se rule. In *NLRB v. Robbins Tire and Rubber Co.*,[33] the Supreme Court held that statements by NLRB witnesses could be withheld since disclosure of such statements would, generally, interfere with enforcement proceedings.[34] Consequently, the *Robbins* per se rule for exemption 7(A)

[32] NLRB v. Hardeman Garment Corp., 557 F.2d 559, 562 (6th Cir. 1977); Harvey's Wagon Wheel, Inc. v. NLRB, 550 F.2d 1139, 1142 (9th Cir. 1976); New England Med. Ctr. Hosp. v. NLRB, 548 F.2d 377, 385-86 (1st Cir. 1976); Climax Molybdenum Co. v. NLRB, 539 F.2d 63, 64-65 (10th Cir. 1976); Roger J. Au & Son, Inc. v. NLRB, 538 F.2d 80, 83 (3d Cir. 1976); Title Guarantee Co. v. NLRB, 534 F.2d 484, 490-92 (2d Cir.), *cert. denied*, 429 U.S. 834 (1976). *See generally* Note, *Developments Under the Freedom of Information Act—1976*, 1977 DUKE L.J. 532; Note, *The Title Guarantee Theory And Related Decisions: Are The Courts Interfering With Exemption 7 of the FOIA?*, 23 N.Y.L. SCH. L. REV. 275 (1977). The case first establishing the per se rule was Title Guarantee Co. v. NLRB, 534 F.2d 484 (2d Cir.), *cert. denied*, 429 U.S. 834 (1976). *Title Guarantee* involved a request by a defendant in an unfair labor practice action for access to statements and affidavits taken during NLRB investigations. The Second Circuit held that disclosure of information obtained in connection with an NLRB enforcement proceeding would interfere with enforcement proceedings under the terms of exemption 7. *Id.* at 492. The court cited the possible intimidating effects disclosure would have upon employees if information was released to employers. *Id.* at 491. Rather than look at the potential for intimidation in the facts of the case before it, the court looked at NLRB discovery rules reflecting the overall potential for harm disclosure would have in labor enforcement cases generally. *Id.* The rule was thereby established requiring nondisclosure of NLRB open investigatory files because disclosure per se would intimidate employees and interfere with enforcement proceedings.

Although the *Title Guarantee* decision was expressly limited to files of ongoing NLRB enforcement proceedings, *id.* at 492, the per se rule of open file nondisclosure has been applied in cases not dealing with the NLRB. *See, e.g.*, United States v. Murdock, 546 F.2d 599 (5th Cir. 1977) (defendant in a criminal tax prosecution denied use of the FOIA); National Pub. Radio v. Bell, 431 F. Supp. 509 (D.D.C. 1977) (exemption given Department of Justice investigatory files labeled active). Deering Milliken, Inc. v. Irving, 548 F.2d 1131 (4th Cir. 1977) is noteworthy because the Fourth Circuit, in dictum, endorsed the per se rule for records relating to unfair labor practice proceedings. *Id* at 1136.

[33] 437 U.S. 214 (1978).

[34] *Id.* at 243. The Supreme Court adopted a generic exemption for all open NLRB investigatory files identical to the per se exemption rule of *Title Guarantee*. *See* note 32 *supra*. The Court held that since exemption 7(A) was written in the plural voice ("interference with enforcement proceedings"), generic determinations were contemplated by the drafters of that exemption. *Id.* at 234. The court stated that a determination by federal courts that particular kinds of investigatory records would interfere with particular kinds of enforcement proceedings was appropriate. *Id.* at 236. Although possibly distinguishable from *Charlotte-Mecklenburg* on its facts, *Robbins* clearly repudiates a case-by-case approach to exemption 7(A).

The concerns with retaliation by an employer against a complaining employee are logically the same in unfair labor practice cases like *Robbins* and employment discrimination cases like *Charlotte-Mecklenburg*. The Supreme Court did not limit its analysis of exemption 7(A) to NLRB cases nor did it equivocate in the statement of its holding. *Id.* at 235-36. The generic exemption approach was adopted even by the dissenters in *Robbins* who agreed with the *Charlotte-Mecklenburg* conclusion that disclosing current employees' statements was potentially more harmful than releasing those of former employees. *Id.* at 252 (Powell, J., dissenting).

avoids judicial determination of specific needs, status and potential conduct of parties requesting information. That rule is consistent with the principle underlying the FOIA that all citizens are equally entitled to government held information.[35] The Fourth Circuit's case-by-case approach to exemption 7(A) violated that principle of equality.

The Fourth Circuit similarly overlooked the equality principle when it considered the requesting party's status as a party to an EEOC suit in applying the facts of *Charlotte-Mecklenburg* to FOIA exemption 3.[36] The exemption 3 question resolved by the Fourth Circuit was whether Title VII of the Civil Rights Act of 1964 should prevent operation of the FOIA.[37] Title VII criminalizes public disclosure by the EEOC of information relating to pending actions.[38] Since exemption 3 protects information from FOIA disclosure when a statute bars public access,[39] the Title VII prohibition should trigger exemption 3.[40] However, there is case law declaring that information requested by a party to an action is not subject to nondisclosure because of Title VII.[41] In fact, the EEOC has recognized the ability of a

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[35] All members of the public have equal FOIA rights to documents. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143 n.10 (1975) (rights of a litigant no greater than an average member of the public); Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971) (Act precludes consideration of the interests of the party seeking relief); 5 U.S.C. § 552(a)(3) (1976) (agencies shall make records available to "any person"). *See also* SOURCEBOOK, *supra* note 2, at 13; DAVIS, *supra* note 3, at § 5.6; O'REILLY, FEDERAL INFORMATION DISCLOSURE § 9.07 (1978) [hereinafter cited as O'REILLY]. Needs of particular parties do become relevant, however, to justify a waiver of search fees, to justify an overburdened agency to answer a request out of turn, to get one's own files or if an invasion of privacy would be unwarranted under exemption 6 and 7(C). CENTER FOR NAT'L SEC. STUDIES, LITIGATION UNDER THE AMENDED FREEDOM OF INFORMATION ACT 8-9 (1978).

[36] 571 F.2d at 199.

[37] *Id.*

[38] 42 U.S.C. § 2000e-5(b), 8(e) (1976) (Sections 706(b) and 709(e) of Title VII). Title VII states that "[c]harges [filed with the EEOC] shall not be made public by the Commission" and "it shall be unlawful for any officer or employee to make public . . . any information obtained by the Commission . . . prior to the institution of any proceeding." *Id.*

[39] *See* note 4 *supra.*

[40] The legislative history of exemption 3 indicates congressional intent to classify Title VII as a statute barring FOIA disclosure through exemption 3. H.R. REP. No. 94-880, 94th Cong., 2d Sess. 23, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183, 2205.

[41] *See, e.g.*, H. Kessler & Co. v. EEOC, 472 F.2d 1147, 1152 (5th Cir.), *cert. denied*, 412 U.S. 939 (1973); *accord*, Sears, Roebuck & Co. v. EEOC, 435 F. Supp. 751, 756 (D.D.C. 1977). The *Kessler* decision was based on the legislative history of Title VII which demonstrated that the Act was never intended to apply to immediate parties to an action. 472 F.2d at 1150; *see* 110 CONG. REC. 12723 (remarks of Sen. Humphrey). Three recent cases repudiated *Kessler* to the extent that it granted a number of parties access to EEOC files. The Seventh Circuit, the District of Columbia Circuit and the district court for the Eastern District of Virginia maintained that disclosure of information surrounding discrimination charges would provide the impetus for private lawsuits which would overlap and interfere with EEOC enforcement proceedings. *See*, Burlington Northern, Inc. v. EEOC, 582 F.2d 1097 (7th Cir. 1978); Sears, Roebuck & Co. v. EEOC, 581 F.2d 941 (D.C. Cir. 1978); Associated Dry Goods Corp. v. EEOC, 454 F. Supp. 387 (E.D. Va. 1978).

party to receive information immune from public disclosure under Title VII.[42]

The *Charlotte-Mecklenburg* court held that exemption 3 did not bar disclosure of the EEOC files requested by the hospital authority.[43] The court found that the Title VII prohibition relied on by the EEOC was inapplicable because the Authority as a party to an EEOC action, was not subject to its provisions.[44] The court found determinative the fact that Title VII prohibitions against disclosure of EEOC files relevant to current investigations forbids disclosure to the public generally but not to parties to an EEOC action.[45] Had a member of the general public made an FOIA

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[42] The EEOC promulgated regulations implementing Title VII which allowed, but did not mandate, release of employment discrimination charges and records to a party. 29 C.F.R. § 1601.20 (1977). The current EEOC regulations only state that, as to parties, "special disclosure rules apply" and that such rules are on file at the EEOC for public inspection. 29 C.F.R. § 1610.17 (1978). Under the regulations in force at the time of the *Charlotte-Mecklenburg* case, the EEOC had discretion regarding the release of information to the charging party, respondent, witnesses or government agencies. 29 C.F.R. § 1601.20 (1977). The Fifth Circuit upheld that discretionary right of release. H. Kessler & Co. v. EEOC, 472 F.2d 1147 (5th Cir.), *cert. denied,* 412 U.S. 939 (1973). *See generally* Connolly & Fox, *Employer Rights And Access to Documents Under the Freedom of Information Act,* 46 FORD. L. REV. 203 (1977).

[43] 571 F.2d at 200-01. *Charlotte-Mecklenburg* was a case of first impression on the issue of Title VII, exemption 3 and EEOC disclosure. A number of FOIA exemption 3/Title VII cases have been litigated, but they have involved requests to reporting committees outside the EEOC for equal employment opportunity reports filed by employers. The reports are sent to a non-EEOC reporting committee, rather than directly to EEOC employees. Courts have found that this places any disclosure outside the coverage of Title VII, which by its terms applies only to EEOC employees. Exemption 3 therefore does not bar disclosure. Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190, 1199 & n.21 (4th Cir. 1976), *cert. denied,* 431 U.S. 924 (1977); Sears, Roebuck & Co. v. GSA, 509 F.2d 527, 529 (D.C. Cir. 1974); Crown Cent. Petrol. Corp. v. Kleppe, 424 F. Supp. 744, 750-51 (D.Md. 1976); Robertson v. DOD, 402 F. Supp. 1342, 1347-48 (D.D.C. 1975); Legal Aid Soc. v. Schultz, 349 F. Supp. 771, 775-76 (N.D. Cal. 1972).

[44] 571 F.2d at 200; *see* text accompanying note 38 *supra.* The EEOC contended that the Authority could not receive information through the FOIA which the EEOC initially withheld in its discretion granted by 19 C.F.R. § 1601.20 (1977). In effect, the EEOC argued that since the Authority was not excluded from the prohibitions of Title VII, the Authority was therefore subject to the effect of Title VII. Brief for Appellants at 23, Charlotte-Mecklenburg Hosp. Auth. v. Perry, 571 F.2d 195 (4th Cir. 1978). In dictum the Fourth Circuit noted that if the Authority had been denied access through an exercise of EEOC discretion, exemption 3 would not operate as a bar to disclosure since by its terms, statutes allowing discretion do not bar operation of the FOIA. 571 F.2d at 199.

[45] *Id.* at 200. The court held that to bar access in this case, a statutory prohibition against disclosure, as required by exemption 3, must be more than simply a prohibiton against disclosure to the public generally but must cover disclosure to the specific requesting party. *Id.* In Associated Dry Goods Corp. v. EEOC, 454 F. Supp. 387 (E.D. Va. 1978), the district court contended that *Charlotte-Mecklenburg* did not stand for the principle that parties are not subject to Title VII, because both the EEOC and the hospital authority stipulated that principle. *Id.* at 391-92. The district court found that the Fourth Circuit made no explicit finding as to the propriety of releasing information to parties since the parties did not contest the inapplicability of Title VII to the Authority. *Id.* The Fourth Circuit did, however, refer to *Kessler* and EEOC regulations, both of which recognize a party's access to information despite Title VII prohibitions. 571 F.2d at 199; *see* text accompanying notes 37-38 *supra.*

request for the same information requested by the Authority, it seems clear that the court would have recognized exemption 3, effectuated by Title VII, as a bar to FOIA release.[46] The Fourth Circuit stated it would not consider the Authority's status[47] yet made a determination of the applicability of exemption 3 based on the fact that the Authority was a party to an EEOC action. Since the Authority, as a party, could have obtained the same information under Title VII, the court granted FOIA access.[48] The holding was an apparent reaction to the incongruity of Title VII prohibiting disclosure to a party requesting under the FOIA, when by itself Title VII would permit disclosure to that party.

The court declared that its treatment of exemption 3 was consistent with two important goals of the FOIA: that requesting parties have a prima facie right to information since disclosure is the dominant purpose of the Act;[49] and if disclosure is restricted by exemptions, those exemptions are to be construed narrowly.[50] The court overlooked, however, an equally important FOIA goal of equal treatment for those requesting information.[51] Since Title VII prohibits disclosure to the public through exemption 3, Title VII should apply universally to prohibit disclosure to any FOIA requester. The fact that the party suing for information in *Charlotte-Mecklenburg* was a defendant in a civil rights action for employment discrimination should have been of no importance in applying a statute that on its face applies uniformly to all who invoke its provisions.

The Supreme Court's adoption in *Robbins*[52] of the per se exemption rule for exemption 7(A) cases reflects the view that, absent clear congressional intent to the contrary, exemptions should be construed without regard to

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[46] "Title VII . . . will not, therefore, defeat the Hospital's 'prima facie right' to disclosure, even though it may prohibit disclosure to some other [FOIA] requesting party." 571 F.2d at 200-01.

[47] The *Charlotte-Mecklenburg* court remarked that: "[t]he Hospital in this case, has no greater rights under the Act than any other member of the public. . . ." *Id.* at 199.

[48] *Id.* at 199-200.

[49] *Id.* at 200. The concept of a prima facie right to disclosure follows from the principle that exemptions are to be construed narrowly. Kent Corp. v. NLRB, 530 F.2d 612, 617-18 (5th Cir.), *cert. denied,* 429 U.S. 920 (1976). There is a legal presumption in favor of disclosure and the burden of proof is on federal agencies if they withhold information, to show that specific exemptions protect information from disclosure. *See* note 2 *supra. See also* SOURCEBOOK, *supra* note 2, at 10; O'REILLY, *supra* note 35, at § 9.01.

[50] 571 F.2d at 200. The FOIA contains a provision declaring that exemptions are limited to materials specifically stated. 5 U.S.C. § 552 (c) (1976). Exemption from disclosure depends entirely on statutory language. Department of the Air Force v. Rose, 425 U.S. 352, 361 (1976). Therefore, FOIA exemptions have been construed very narrowly to ensure the fullest public access. Vaughn v. Rosen, 523 F.2d 1136, 1149 (D.C. Cir. 1975) (strict construction implicit in FOIA clause which allows exemptions only for that which is "specifically stated" in the act); Stretch v. Weinberger, 495 F.2d 639, 641 (3d Cir. 1974) (disclosure sections to be read broadly, exemptions narrowly); Wellman Indus., Inc. v. NLRB, 490 F.2d 427, 429 (4th Cir.), *cert. denied,* 419 U.S. 834 (1974) ("specifically stated" clause italicized for emphasis); *see* DAVIS, *supra* note 3, at § 5.28; O'REILLY, *supra* note 35, at § 9.01.

[51] *See* text accompanying note 35 *supra.*

[52] 437 U.S. 214 (1978).

the particular facts underlying requests for information.[53] The *Charlotte-Mecklenburg* treatment of exemption 3 requires an inquiry into the status of requesting parties and an evaluation of their coverage under federal exempting statutes. In addition to violating the equality principle, the Fourth Circuit's approach would burden an already overtaxed bureaucracy handling FOIA requests.[54] Moreover, that approach seems contrary to the philosophy expressed in *Robbins*.

Subjective analysis of underlying facts, however, is sometimes possible under the FOIA. A balancing of interests, which weighs the public's need for information and the government's need for secrecy, and an inquiry into promises of confidentiality given informers are clearly allowed under certain sections of the Act, as evidenced by the legislative history and case interpretation of the Act.[55] Such a subjective analysis was properly exercised by the Fourth Circuit in *Nix v. United States*.[56]

In *Nix*, the purported beating of a prisoner by guards resulted in an FBI criminal investigation into possible civil rights violations.[57] The FOIA request of the prisoner, Nix, to obtain the report of the FBI investigation from the Civil Rights Division of the Department of Justice was denied.[58] Nix then brought a FOIA suit to force disclosure by the Justice Department.[59] The district court dismissed Nix's complaint and was affirmed by

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[53] *Id.* at 236.

[54] *See* SOURCEBOOK, *supra* note 2, at 15-17. The costs in money and time imposed on the FBI by Freedom of Information requests are similar to those felt by many federal agencies. In 1977, acording to a General Accounting Office report, the FBI spent $13.8 million in complying with the FOIA. GAO Report No. LCD-78-119, June 16, 1978. The Justice Department, within which the FBI operates, reported 14,437 FOIA requests in 1977, of which 13,528 were processed. 4 ACCESS REPORTS (No. 2) 21 March 1978.

[55] *See* text accompanying notes 74-80 *infra*.

[56] 572 F.2d 998 (4th Cir. 1978).

[57] *Id.* at 1000-01.

[58] *Id.* The prisoner presumably sought the FBI reports in anticipation of litigation, in order to discover the names of the officials who allegedly beat him. The Fourth Circuit noted that the FOIA was not designed to supplement standard discovery procedures, but added that Nix's right to obtain information was neither enhanced nor diminished because of his needs as a litigant. *Id.* at 1003; *see* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143 (1975) (status as a litigant does not affect FOIA rights); DAVIS, *supra* note 3, at § 5.7. For a discussion of the policies behind the FOIA and discovery, see Project, *Government Information and the Rights of Citizens*, 73 MICH. L. REV. 971, 1150 (1975).

[59] 572 F.2d at 1001. After commencement of the FOIA suit, Nix received a small portion of the materials he requested from the Civil Rights Division of the Justice Department. The information Nix did receive was altered through deletion of administrative markings such as file numbers, routing stamps and cover letters. *Id.* at 1001. The deletions were made pursuant to FOIA exemption 2, the agency internal practices exemption. 5 U.S.C. § 552(b)(2) (1977). Exemption 2 allows nondisclosure of materials related solely to the internal personnel rules and practices of an agency. *Id.* The Fourth Circuit found the deletions proper. 572 F.2d at 1005. That determination comports with the current interpretation of exemption 2. *See* Department of the Air Force v. Rose, 425 U.S. 352, 369-70 (1976) (exemption 2 applies to matters of internal significance in which the public could not possibly have an interest); Maroscia v. Levi, 569 F.2d 1000, 1002 (7th Cir. 1977) (FBI properly deleted file numbers, initials, signatures and mail routing stamps from information given a requesting party).

the Fourth Circuit.[60] The *Nix* court reasoned that exemption 7(D), which protects confidential sources and the information they provide in criminal investigations,[61] justified withholding reports produced from letters received by the FBI and FBI interviewers.[62] Reviewing the facts, the appellate court determined that the sources of information, as well as the reports compiled from their letters and interviews, were intended to be confidential.[63] The court declared that implied assurances of confidentiality were given to the individuals interviewed by the FBI during its investigation.[64] Thus, the court determined that confidentiality need not be expressly agreed upon between informers and investigators but may be implied from the circumstances of the investigation.[65] The court's finding of implied confidentiality, sufficient to justify nondisclosure of the reports under exemption 7(D), stemmed from the court's examination of FOIA law at the time the FBI interviews were conducted and letters were received.[66] The FBI reports were composed of information gathered prior

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[60] 572 F.2d at 1001. The Fourth Circuit ordered the release of Nix's own medical report, contained in the FBI report, as well as information deleted from a report released with the consent of Nix's fellow inmate. *Id.* at 1001-02.

[61] *See* note 4 *supra.*

[62] 572 F.2d at 1004. The court also found that reports from non-federal law enforcement sources contained in the FBI report on the alleged beating were free from FOIA disclosure on the basis of exemption 7(D). *Id.* at 1005. The court found that release of the information provided by other law enforcement agencies would inhibit the FBI's relationship with non-federal law enforcement personnel. *Id.* The court relied on Church of Scientology v. United States Dep't of Just., 410 F. Supp. 1297 (C.D. Cal. 1976), to find that the materials provided by the non-FBI law enforcement officials were supplied in confidence and thus subject to exemption 7(D). 572 F.2d at 1005. In *Church of Scientology,* a California district court examined the legislative history of the FOIA and found no legal support for the proposition that information supplied by law enforcement agencies was less important to law enforcement than information provided by ordinary citizens. 410 F. Supp. at 1303. The court concluded that if confidentiality was assured to a source, whether an individual or a law enforcement agency, information subsequently provided by that source should not be released. *Id.* Thus, information provided by a law enforcement agency under an assurance of confidentiality, implied from the importance of the agency-FBI relationship, was protected by exemption 7(D). *Id.* The Fourth Circuit recognized that the legislative history of exemption 7(D) spoke of sources in terms of human beings rather than organizations, but it found that the underlying rationale of exemption 7(D) supported the concept of confidentiality for non-federal law enforcement agencies and the information they provide. 572 F.2d at 1004.

[63] 572 F.2d at 1004; *see* Deering Milliken, Inc. v. Irving, 548 F.2d 1131, 1137 (4th Cir. 1977) (confidentiality a question of fact).

[64] 572 F.2d at 1004.

[65] *Id.* at 1003. The legislative history behind exemption 7(D) suggested that confidentiality may arise from express assurances or in circumstances from which such assurances can reasonably be inferred. *See* S. CONF. REP. No. 93-1380, 93d Cong., 2d Sess. *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6267, 6291.

Some courts disfavor implied promises of confidentiality and require a higher standard of proof. *See, e.g.,* Title Guarantee Co. v. NLRB, 534 F.2d 484, 489 n.11 (2d Cir. 1976) (criticizing implied assurances of confidentiality given NLRB witnesses); *accord,* Local 30 v. NLRB, 408 F. Supp. 520, 527 (E.D. Pa. 1976) (implied assurances invalid basis for finding confidentiality). *See also* O'REILLY, *supra* note 35, at § 17.10.

[66] 572 F.2d at 1003-04.

to the 1974 amendment of the exemption.[67] The *Nix* court observed that prior to the 1974 amendment, all investigatory files compiled for law enforcement purposes were exempt from FOIA disclosure.[68] Therefore, the court concluded, there was reason for the FBI sources to believe that the information they provided would be confidential and not be subject to FOIA disclosure.[69]

The court found further support for its finding of implied confidentiality in the hostile prison environment in which the FBI investigation took place.[70] Both prisoners and guards involved in the altercation leading to Nix's alleged beating were sources for the FBI report.[71] The Fourth Circuit reasoned that the fear of retribution or retaliation would have silenced the sources of information unless they believed the FBI report would be confidential.[72] Thus, the court determined that the environment in which the information was gathered also strongly suggested an expectancy of confidentiality.

The Fourth Circuit also affirmed the denial of Nix's FOIA request to obtain the names of the FBI agents and assistant U.S. attorney involved in the investigation into Nix's alleged beating.[73] The court held that nondisclosure of the names was justified on the basis of exemption 7(C),[74] which sanctions nondisclosure of investigatory records where interests of personal privacy would be violated unnecessarily.[75] The court noted that FBI agents generally have only a minimal privacy interest,[76] yet in this case

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[67] *Id.* at 1003; *see* note 4 *supra.*

[68] 572 F.2d at 1003. Exemption 7 previously allowed non-disclosure of law enforcement investigatory records unless a statute specifically allowed disclosure. 81 Stat. 54, 55 (1967). This is in marked contrast to the present codification of exemption 7 which requires a finding of specific harm enumerated in one of the exemption's subsections to justify nondisclosure. *See* note 4 *supra.*

[69] 572 F.2d at 1004. It is surprising that the court would justify a belief that all investigatory files were exempt under the previous codification of exemption 7. The Fourth Circuit did not find that the pre-amendment exemption 7 precluded disclosure of information in investigatory files in every instance. *See, e.g.*, Moore-McCormack Lines, Inc. v. I.T.O. Corp., 508 F.2d 945 (4th Cir. 1974); Wellford v. Hardin, 444 F.2d 21 (4th Cir. 1971). The court's analysis, however, may simply be a recognition that the prevailing state of the law when the interviews were conducted held all investigatory files exempt. *See* Note, *The Freedom Of Information Act—A Potential Alternative To Conventional Criminal Discovery,* 14 AM. CRIM. L. REV. 73, 112 (1976).

[70] 572 F.2d at 1004.

[71] *Id.*

[72] *Id.* The recent testimony of a convict before a Senate sub-committee demonstrated that fear of retribution following FOIA release of law enforcement investigatory information is well founded. 4 ACCESS REPORTS (No. 111) 5 September 1978. The convict reported that he had filed 100 FOIA requests for himself and other inmates. Often, he would file the same requests several times. Each time deletions in the information he received would be somewhat different. By piecing together the documents, he could learn the names of informers. In at least one case, the convict said, a confidential informant was identified and possibly murdered as a result of a report received from the Drug Enforcement Administration. *Id.*

[73] 572 F.2d at 1005-06.

[74] *Id.* at 1006.

[75] 5 U.S.C. § 552(b)(7)(C) (1976); *see* note 4 *supra.*

[76] 572 F.2d at 1006. For a general discussion of the privacy interests of government employees, see REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, PRIVACY AND PUBLIC DISCLO-

the privacy of those individuals to be named outweighed the public interest in learning the names of the agents.[77] The court made that determination by balancing the public and private interests.[78] The balancing was not supported by the text of the FOIA itself,[79] but was clearly justified under case law.[80]

The Supreme Court has declared the need for a balancing of potentially conflicting interests where there are questions of "clearly unwarranted invasions" of personal privacy under FOIA exemption 6.[81] Both exemptions 6 and 7(C) bar FOIA disclosure where there might be an unwarranted invasion of privacy.[82] Exemption 6 applies to medical and personnel files, while exemption 7(C) deals with investigatory files.[83] Both exemptions are designed to protect personal privacy. The similarity of purpose behind the exemptions provides the basis for employing a balancing of interests analysis in exemption 7(C) cases. Although the Fourth Circuit in an earlier decision became the first circuit to establish a balance of

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SURE UNDER THE FREEDOM OF INFORMATION ACT 31 (1976).

[77] 572 F.2d at 1006. The court was concerned that public identification of the federal employees could have conceivably resulted in their harassment or could have interfered with their official duties and private lives. *Id.* It also found the public interest in disclosure insufficient to override the privacy interest in nondisclosure. *Id. But see* Ferguson v. Kelley, 448 F. Supp. 919, 923 (N.D. Ill. 1977) (FBI agents have no privacy interest in the release of their identities). The Fourth Circuit's opinion noted that the potential harassment or interference was not severe enough to justify reliance on exemption 7(F), which shields information in investigatory files which, if released, would endanger the life or physical safety of law enforcement personnel. 572 F.2d at 1006 n.8, *citing* 5 U.S.C. § 552(b)(7)(F) (1976).

[78] 572 F.2d at 1006.

[79] Disclosure under the FOIA must be made to any person regardless of his interest. 5 U.S.C. § 552(a)(3) (1976). The language of the act's disclosure provisions does not explicitly authorize balancing of interests. *Id.; see* DAVIS, *supra* note 3, at § 5.6.

[80] Department of the Air Force v. Rose, 425 U.S. 352, 373 (1976); Deering Milliken, Inc. v. Irving, 548 F.2d 1131, 1136 (4th Cir. 1977); Ditlow v. Shultz, 517 F.2d 166, 171 (D.C. Cir. 1975); Rural Housing Alliance v. Department of Agri., 498 F.2d 73, 77 (D.C. Cir. 1974); Getman v. NLRB, 450 F.2d 670, 674 (D.C. Cir. 1974); Congressional News Synd. v. Department of Justice, 438 F. Supp. 538, 542 (D.D.C. 1977). *See generally* Note, *Invasion Of Privacy And The Freedom Of Information Act:* Getman v. NLRB, 40 GEO. WASH. L. REV. 527 (1972).

[81] Department of the Air Force v. Rose, 425 U.S. 352 (1976). Plaintiffs in *Rose,* law review editors, sought access to files containing summaries of actions by Air Force Academy disciplinary boards in connection with trials for honor code violations. *Id.* at 355. The Supreme Court relied on the legislative history of FOIA exemption 6 to articulate the need for a balancing of interests test. *Id.* at 372. Under the balancing test adopted in *Rose,* the public interest in Air Force Academy discipline exceeded privacy rights of former cadets and disclosure was allowed. *Id.* at 381. *See also* H. R. REP. NO. 1497, 89th Cong. 1st Sess. 11, *reprinted in* [1966] U.S. CODE CONG. & AD. NEWS 2418, 2428.

[82] 5 U.S.C. § 552(b)(6), (7)(C) (1976). To prevent FOIA disclosure, exemption 6 requires a potential invasion of privacy to be clearly uwarranted, rather than simply unwarranted, the standard of exemption 7(C). The "clearly" requirement makes nondisclosure harder to justify under exemption 6. Department of Air Force v. Rose, 425 U.S. 352, 378-79 & n.16; O'REILLY, *supra* note 35, at § 17.09.

[83] 5 U.S.C. § 552(b)(6), 7(C). Exemption 6 was included in the original enactment of the FOIA in 1966 while exemption 7(C) resulted from the 1974 amendment of the investigatory files exemption. O'REILLY, *supra* note 35, at §§ 16.02, 17.09.

interests approach to exemption 7(C) cases,[84] the balancing approach is now well settled.[85]

Nix's FOIA suit to receive investigatory files failed when he was denied the names of federal officers involved in the investigation of his alleged beating and denied the reports the officers produced.[86] Yet in *Charlotte-Mecklenburg,* the court ordered the release of the requested information.[87] Despite difference in outcome, both *Nix* and *Charlotte-Mecklenburg* reveal the Fourth Circuit's preference for subjective analysis of underlying facts in applying FOIA exemptions 3, 7(A), 7(C) and 7(D) to requests for investigatory files. The status of informers and requesting parties, the express or implied promises of confidentiality given informers, and the public and governmental interests in disclosure are all factors the Fourth Circuit considered important. These two Fourth Circuit cases are consistent with each other, yet only the court's subjective analysis in connection with exemption 7(C) and 7(D) in *Nix* is supported by case law. By contrast, the Supreme Court in *Robbins* rejected the case-by-case approach to exemption 7(A), thereby impliedly overruling the subjective analysis of the Fourth Circuit in *Charlotte-Mecklenburg.*[88] There was also an absence of any statutory or judicial support for the Fourth Circuit's treatment of exemption 3, which violated the equality principle. The status of a requesting party cannot prevent the uniform application of exemption 3 when an agency processes a Freedom of Information Act request.[89]

CHRISTOPHER WOLF

B. Employment Discrimination

Claims of job discrimination can be brought under both Title VII of the Civil Rights Act of 1964[1] (Title VII) and the equal protection clause of the

[84] Deering Milliken, Inc. v. Irving, 548 F.2d 1131, 1136 & n.7 (4th Cir. 1977). The balancing of interests in *Deering Milliken* resulted in the Fourth Circuit allowing disclosure of workers' private financial records in NLRB investigatory files to a corporation involved in a suit for back pay. 548 F.2d at 1136. The court found that the interest law students and labor lawyers had in the release of the records was more important than the protection of the workers' privacy through exemption 7(C) nondisclosure. *Id.*

[85] Providence Journal Co. v. FBI, 460 F. Supp. 778 (D.R.I. 1978); Congressional News Synd. v. Department of Justice, 438 F. Supp. 538, 542 (D.D.C. 1977). *Providence Journal* and *Congressional News Syndicate* both employ a balancing of interests test and are noteworthy for elaborate discussions of privacy interests and the FOIA.

[86] 572 F.2d at 1001.

[87] 571 F.2d at 198.

[88] *See* text accompanying note 34 *supra.*

[89] *See* text accompanying note 35 *supra.*

[1] 42 U.S.C. §§ 2000e to 2000e-17 (1976). Under section 2000e-2(a), it is unlawful for an employer:

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or

fourteenth amendment to the United States Constitution.[2] While either may serve as the basis of an individual's claim of discrimination, suits brought under Title VII and the fourteenth amendment differ both substantively and procedurally.[3] An allegation of job discrimination under the equal protection clause must be supported by proof that the employer had an intent to discriminate.[4] In a proceeding under Title VII, however, intent need not be shown.[5] Discrimination, whether intentional or not, is illegal.[6] A claim based on the fourteenth amendment may be filed in federal court as soon as the discrimination occurs. Under Title VII, however, a charge must be filed with and investigated by the Equal Employment Opportunity Commission (EEOC or Commission) before any other legal action may be taken.[7] If, upon investigation, the Commission finds that there is reasonable cause to believe that discrimination has occurred, it must attempt to settle the case out of court.[8] Only when these conciliation efforts fail may the individual or the Commission bring suit.[9]

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national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

Id. at § 2000e-2(a).

[2] The equal protection clause reads in relevant part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The fourteenth amendment was generally used in actions against state agencies until 1972, when Title VII was amended to extend the coverage of the act to the states. *See* 42 U.S.C. § 2000e(a) (1976).

[3] *See* text accompanying notes 4-9 *infra. See generally* Peck, *Remedies for Racial Discrimination in Employment: A Comparative Evaluation of Forums,* 46 WASH. L. REV. 455 (1971); Comment, *Title VII & 42 U.S.C. § 1981; Two Independent Solutions,* 10 U. RICH. L. REV. 339 (1976).

[4] Washington v. Davis, 426 U.S. 229, 239 (1976).

[5] Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971); *see* A. LARSON, EMPLOYMENT DISCRIMINATION § 72.20 (1977) [hereinafter cited as LARSON]; text accompanying note 89 *infra.*

[6] Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

[7] 42 U.S.C. § 2000e-5 (1976). The complainant must file a charge with the Commission within 180 days after the occurrence of the alleged unlawful employment practice. *Id.* at § 2000e-5(e). Charges must be in writing and made under oath. *Id.* at § 2000e-5(b). The Commission then investigates the charge. *Id.* If the Commission finds that there is reasonable cause to believe that the charge of discrimination is true, it must attempt to settle the case with the employer and stop the unlawful practice. *Id.* Only when these efforts fail may the individual or the Commission bring suit. *Id.* at § 2000e-5(f)(1); *see* text accompanying notes 8-9 *infra.*

[8] 42 U.S.C. § 2000e-5(b) (1976); *see* 29 C.F.R. § 1601.22 (1977) (establishing guidelines to be followed by the EEOC during conciliation efforts).

[9] 42 U.S.C. § 2000e-5(f)(1) (1976). When the employer charged is a government, government agency, or political subdivision, the EEOC must refer the case to the Attorney General, who may bring suit. *Id.* In bringing suit, the EEOC is not limited by the initial charge filed with it, according to a recent Fourth circuit case. EEOC v. Chesapeake & Ohio Ry., 577 F.2d 229 (4th Cir. 1978). In *Chesapeake* the original charged filed with the Commission alleged racial discrimination among employees covered by a union agreement. *Id.* at 231. The reasonable cause determination issued by the Commission dealt with both racial and sex discrimi-

In recent decisions, the Fourth Circuit has discussed and defined many elements of Title VII. The net effect of these decisions is to make it easier for a plaintiff to successfully press a job discrimination claim. The court held in *EEOC v. American National Bank*[10] that laches[11] would not bar a suit by the EEOC, although a delay by the Commission in bringing suit[12] could lead to a limitation of the relief granted if the Commission prevails.[13] In another case, *Lewis v. Tobacco Workers' International Union,*[14] the Fourth Circuit concluded that an employer has neither the duty to balance its work force racially[15] nor to inform job applicants that it does not discriminate.[16] The Fourth Circuit, in *Walston v. School Board of Suffolk,*[17] limited the use of a standardized test as a basis for employment.[18] *Walston*

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nation among employees covered by and outside of the union agreement. *Id.; see* note 7 *supra.* The district court had granted a partial summary judgment for the defendant, ruling that some of the allegations made by the EEOC were not the outgrowth of a reasonable investigation of the initial charge. 577 F.2d at 231. The Fourth Circuit reversed, holding that as long as the new allegations are included in the reasonable cause determination sent to the employer and are subject to conciliation, a suit by the EEOC need not be limited by the initial charge filed with the Commission. *Id.* at 232. Thus, the EEOC has wide latitude to investigate and bring suit against an employer once it receives a charge of discrimination.

[10] 574 F.2d 1173 (4th Cir.), *cert. denied,* 99 S. Ct. 213 (1978); *see* text accompanying notes 20-59 *infra.*

[11] Laches is an equitable doctrine stating that when there is an unreasonable delay by the plaintiff in bringing suit and the delay prejudices the defendant, the suit will be barred. Costello v. United States, 365 U.S. 265, 282 (1961); Russel v. Todd, 309 U.S. 280, 287 (1940); Mogavero v. McLucas, 543 F.2d 1081, 1083 (4th Cir. 1976). Since laches is a "creature of equity," each case must be decided on its own facts. Homestake Mining Co. v. Mid-continent Exploration Co., 282 F.2d 787, 797 (10th Cir. 1960).

[12] 574 F.2d at 1174. *American Nat'l Bank* deals only with delay by the EEOC in bringing suit. A private plaintiff must bring suit within 90 days after the Commission has issued a right to sue letter. 42 U.S.C. § 2000e-5(f)(1) (1976). A claimant has the right to sue when the EEOC has finished investigating the charge, whether or not the charge is found to have merit. 29 C.F.R. § 1601.25b(c) (1977); *cf.* 42 U.S.C. § 2000e-12 (1976) (empowering the EEOC to issue regulations). Also, the claimant may demand that the Commission terminate its investigation and issue a right to sue letter if the Commission has had 180 days to investigate the charge. 29 C.F.R. § 1601.25b(c) (1977); *see* text accompanying note 7 *supra.*

[13] 574 F.2d at 1176. In a Title VII case, a court may enjoin the unlawful practice, order the reinstatement or hiring of employees, award back pay, and grant any other equitable relief it finds appropriate. 42 U.S.C. § 2000e-5(g) (1976). The granting of relief is within the discretion of the trial judge. *Id.*

[14] 577 F.2d 1135 (4th Cir. 1978), *cert. denied,* 99 S. Ct. 871 (1979); *see,* text accompanying notes 66-102 *infra.*

[15] 577 F.2d at 1141-42. The *Lewis* court relied on 42 U.S.C. § 2000e-2(j) (1976), which provides in part:

> Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by an employer . . . .

[16] 577 F.2d at 1143.

[17] 566 F.2d 1201 (4th cir. 1977); *see* text accompanying notes 103-33 *infra.*

[18] 566 F.2d at 1203-04; *see* text accompanying notes 103-17 *infra.*

also set guidelines for awarding attorney's fees to prevailing plaintiffs in discrimination cases.[19]

Laches as Defense to Title VII Action

In *EEOC v. American National Bank*,[20] the Commission alleged that the bank had engaged in a pattern of racial discrimination since May 1969 in violation of Title VII.[21] The initial charge of discrimination was filed with the EEOC in June 1969 by a black woman who claimed she had been denied a job because of her race.[22] The Commission investigated the charge and in March 1974, decided that there was reasonable cause to believe that the bank had discriminated.[23] In August 1974, after the EEOC had failed to settle the case with the employer, the complainant was issued a right to sue letter,[24] but she chose not to proceed.[25] In January 1976, almost six and three-quarter years after the original charge was filed, the Commission filed suit.[26]

The district court granted the bank's motion for summary judgment, holding that the suit was barred because of the six and three-quarter year delay by the Commission in bringing the action.[27] The court reasoned that while there was no statutory requirement that the EEOC initiate suit within certain time limits,[28] the Commission could not conduct investigations of indefinite duration or postpone the initiation of suit for an unlimited time after the failure of conciliation.[29] Reasonably prompt action by the Commission, the court stated, is necessary both to serve the policy of ending discrimination and to ensure fundamental fairness to the defendant.[30] The district court, therefore, held that an affirmative defense "in the nature of laches" should be available to the defendant in an action brought by the EEOC.[31] Noting that the elements of a laches defense are

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[19] 566 F.2d at 1204-05; *see* text accompanying notes 118-33 *infra*.

[20] 574 F.2d 1173 (4th Cir. 1978).

[21] *Id.* at 1174; *see* text accompanying note 1 *supra*.

[22] 574 F.2d at 1174.

[23] *Id.*; *see* text accompanying notes 7-9 *supra*. In its reasonable cause determination, the Commission found that most of the bank's black employees held menial jobs, that the percentage of whites employed as tellers greatly exceeded the percentage of whites in the community, that the bank had used an employment test which had a disproportionate impact on blacks, *see* text accompanying notes 85-89 *infra*, and that the bank, without showing business necessity, *see* text accompanying notes 89-91 *infra*, used credit status as an employment criteria even though it had a disproportionate impact on blacks. 574 F.2d at 1174-75.

[24] *See* 42 U.S.C. § 2000e-5(f) (1976); text accompanying note 12 *supra*.

[25] 574 F.2d at 1175; *see* notes 7-12 *supra*.

[26] 574 F.2d at 1175; *see* note 9 *supra*.

[27] EEOC v. American Nat'l Bank, 420 F. Supp. 181 (E.D. Va. 1976).

[28] *Id.* at 185-86. The district court held that the EEOC should not be bound by a statute of limitations and also that there was nothing in Title VII itself which set a time limit within which the EEOC had to bring suit. *See* text accompanying note 42 *infra*.

[29] 420 F. Supp. at 186.

[30] *Id.* at 184-85.

[31] 420 F. Supp. at 185. The district court used the term "in the nature of laches" to refer to both laches itself and to section 706 of the Administrative Procedure Act (APA), 5 U.S.C.

unreasonable delay in bringing suit and resulting prejudice to the defendant, the district court found both elements existed in the case.[32] The only justification for the delay offered by the EEOC was its heavy workload, a justification the court found insufficient.[33] The court also stated that the memories of potential witnesses had dimmed and evidence had been lost during the delay in bringing suit, thus prejudicing the defendant.[34] Therefore, the district court found that the elements of the laches defense were present and the suit was dismissed.[35]

The Commission appealed the dismissal to the Fourth Circuit.[36] While the appeal was pending, the United States Supreme Court decided *Occidental Life Insurance Company v. EEOC.*[37] In *Occidental,* the Court held that Title VII actions brought by the EEOC are not subject to statutory time limitations stemming either from Title VII or from state statutes of limitation.[38] The Court found nothing in Title VII itself which set a time limit within which the Commission must bring suit.[39] The *Occidental*

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§ 706 (1976), and held that the suit could be barred through the application of either one. 420 F. Supp. at 185; *see* note 11 *supra.* Section 706 of the APA, 5 U.S.C. § 706 (1976), reads in part: "To the extent necessary to decision and when presented, the reviewing court shall . . . (1) compel agency action unlawfully withheld or unreasonably delayed. . . ." When this section has been used as an alternative to laches, the same elements of unreasonable delay by the plaintiff coupled with prejudice to the defendant necessary for laches, *see* note 11 *supra,* have been held necessary for this defense. *See* EEOC v. Exchange Sec. Bank, 529 F.2d 1214, 1216 (4th Cir. 1976); EEOC v. Bell Helicopter Co., 426 F. Supp. 785, 792 (N.D. Tex. 1976); EEOC v. Metropolitan Areas Girls' Club, Inc., 416 F. Supp. 1004, 1010 (N.D. Ga. 1976); EEOC v. Moore Group, Inc., 416 F. Supp. 1002, 1004 (N.D. Ga. 1976). For cases under Title VII applying laches, see EEOC v. Bell Helicopter Co., 426 F. Supp. 785, 788-90 (N.D. Tex. 1976); EEOC v. Nicholson File Co., 408 F. Supp. 229, 237 (D. Conn. 1976); EEOC v. J.C. Penney Co., 12 Fair Empl. Prac. 641, 642 (N.D. Ala. 1975).

The use of the APA as a substitute for laches has been criticized on several grounds. The Act was intended to apply to reviews of agency actions and not to trials de novo. *See* Note, *Time Limitations on the Filing of Title VII Suits by the Equal Employment Opportunity Commission,* 35 WASH. & LEE L. REV. 215, 235 (1978) [hereinafter cited as *Time Limitations*]. The APA also was meant to compel agency action when delay was present, not to bar it. *Id.* at 236.

[32] 420 F. Supp. at 186-88; *see* note 11 *supra;* text accompanying note 34 *infra.*

[33] 420 F. Supp. at 186. In 1977, the EEOC had a backlog of 130,000 cases. [1977] 2 EMPL. PRAC. GUIDE (CCH) ¶ 5034 (app. B).

[34] 420 F. Supp. at 187. The original claimant in the action could no longer remember filing an application for employment with the bank. *Id.*

[35] *Id.* at 188.

[36] EEOC v. American Nat'l Bank, 574 F.2d 1173, 1174 (4th Cir. 1978).

[37] 432 U.S. 355 (1977). In *Occidental,* the EEOC was first notified of the alleged discrimination in December 1970, and the claim was referred to a state equal employment opportunity agency. *Id.* at 357. The official charge was filed with the EEOC in March 1971. *Id.* Conciliation efforts were started by the Commission in the summer of 1972 and were terminated in September 1973. *Id.* at 357-58. Suit was filed by the Commission in February 1974, three years and two months after the claimant first contacted the EEOC. *Id.* at 358.

[38] *Id.* at 368.

[39] *Id.* at 360-61. The defendant had argued that 42 U.S.C. § 2000e-5(f)(1) (1976) established a time limit within which the EEOC had to bring suit. This section states that after the Commission has had 180 days to investigate the charge, if it has not acted the individual may bring suit. *See* note 12 *supra.* The Court held that this section was designed to allow

Court also reasoned that state law could not be allowed to interfere with the implementation of national policies.[40] In so holding, the Court pointed out that Title VII included procedural safeguards, in the form of notices to the defendant, to protect the defendant from being prejudiced by any delay in bringing suit.[41]

The Fourth Circuit, applying *Occidental*'s holding, vacated the district court's order of dismissal.[42] The circuit court said that a delay in bringing suit is no bar to an EEOC action, but that the relief granted to the plaintiff can be limited if prejudice to the defendant is found to exist.[43] Any determination of prejudice, the court said, should be made only after the facts are fully developed and if the Commission prevails in the suit.[44] *American National Bank* thus interpreted *Occidental* as excluding laches as a defense to actions brought by the EEOC. Therefore, the defendant's only remedy for prejudicial delay by the Commission is the limitation of the relief granted to the Commission. There is nothing, however, in the Supreme Court's *Occidental* decision that would invalidate the application of laches.

It does not follow that if a statute of limitations is inapplicable laches also cannot be used, since the two defenses are, by their nature, different.[45] A statute of limitations bars delayed actions without considering whether the delay was reasonable or whether it prejudiced the defendant.[46] A fixed time limitation could interfere substantially with the Commission's enforcement of Title VII, given the administrative backlog of the EEOC.[47] Laches, however, as an equitable concept, is flexible.[48] A finding of laches results from proof of unreasonable delay coupled with prejudice to the defendant.[49] Thus, laches must necessarily be applied on a case by case

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the Commission to have a minimum of 180 days to act before the claimant could file suit, but not to require the Commission to act within 180 days. 432 U.S. at 361.

[40] 432 U.S. at 367.

[41] *Id.* at 371-72. The "procedural safeguards" referred to by the Supreme Court are the notices that are required to be sent to the employer when a claim is failed with the EEOC, when the Commission has made a determination of reasonable cause, and when the Commission decides that conciliation efforts have failed. *Id.*; 42 U.S.C. § 2000e-5(b) (1976); 29 C.F.R. § 1601.19(b) (1977). Once a charge has been filed with the Commission, and the employer notified, the employer must keep all relevant personnel records until final disposition of the action. 29 C.F.R. § 1602.14 (1977). While these safeguards protect against the loss of business records, they can do nothing to protect against the dimming of the memories of potential witnesses.

[42] 574 F.2d at 1174.

[43] *Id.* at 1175.

[44] *Id.* at 1175-76.

[45] Laches is an equitable doctrine, while a statute of limitations is a legal defense granted by statute. *See* note 11 *supra.*

[46] To prove that a statute of limitations is applicable, all that need be shown is that the required amount of time has passed before the filing of the suit.

[47] *See* note 33 *supra.*

[48] Homestake Mining Co. v. Mid-continent Exploration Co., 282 F.2d 787, 801 (10th Cir. 1960).

[49] *See* note 11 *supra.*

basis[50] and does not have the broad application of a statute of limitations.[51] The barring of a particular suit because of delay and prejudice to the defendant would not frustrate the national policy of ending discrimination.

In stating that the remedy left to the defendant in cases of delay will be a limitation of the relief granted to the plaintiff, the Fourth Circuit apparently misinterpreted the *Occidental* opinion. The Supreme Court in *Occidental* referred to a Title VII case where backpay relief was denied to the private plaintiffs because of their delay in adding a backpay claim to their action.[52] The *Occidental* Court used this case as an example of the type of action a court can take when a defendant is prejudiced by delay.[53] The Fourth Circuit, however, read *Occidental* as saying that the only power a court will have in the case of unreasonable delay is to limit the relief given to the plaintiff.[54]

American National Bank gives the EEOC a free hand in delaying its enforcement actions.[55] Once a charge is filed and reasonable cause is found, an employer can never know when, or if, a suit will be brought. Delay in bringing suit will lessen the pressure on the Commission to relieve its backlog,[56] and will put additional pressure on the employer to settle the case rather than face the threat of a lawsuit at some indefinite time in the future. Moreover, when suit is filed, the defendant must withstand a full trial and be found in violation of Title VII before he will be able to raise a

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[50] Homestake Mining Co. v. Mid-continent Exploration Co., 282 F.2d 787, 801 (10th Cir. 1960).

[51] *Time Limitations, supra* note 31, at 236-37.

[52] The *Occidental* Court referred to Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), when discussing the defendant's remedy. *See* Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 373 (1977). In *Albemarle,* the plaintiffs added a claim for backpay relief five years after the suit was filed. The Supreme Court held that the trial court was correct in denying the backpay since the awarding of relief to the plaintiff was left to the discretion of the trial judge. 422 U.S. at 424; *see* note 13 *supra;* note 53 *infra.*

[53] The *Occidental* Court stated:

> [A] defendant in a Title VII enforcement action might still be significantly handicapped in making his defense because of an inordinate EEOC delay in filing the action after exhausting its conciliation efforts. If such cases arise the federal courts do not lack the power to provide relief. This court has said that when a Title VII defendant is in fact prejudiced by a private plaintiff's unexcused conduct of a particular case, the trial court may restrict or even deny backpay relief. Albemarle Paper Co. v. Moody, 422 U.S. 405, 424-425. The same discretionary power "to locate 'a just result' in light of the circumstances peculiar to the case," *ibid.*, can also be exercised when the EEOC is the plaintiff.

432 U.S. at 373.

[54] 574 F.2d 1173, 1175 (4th Cir. 1978).

[55] The Fourth Circuit has applied *American Nat'l Bank* in EEOC v. Chesapeake & Ohio Ry., 577 F.2d 229 (4th Cir. 1978). *See* note 9 *supra.* The Fourth Circuit in *Chesapeake* reversed the district court, which had allowed a defense of laches. The Fourth Circuit held that if the defendant had been prejudiced, the relief given to the plaintiff could be limited, but that any finding of prejudice should take place after the trial. 577 F.2d at 234.

[56] The Commission has been making an attempt to eliminate its backlog by establishing new procedures for the handling of complaints. *See* [1977] 2 EMPL. PRAC. GUIDE (CCH) ¶ 5034 (app. B).

claim of prejudice.[57] The fact that the defendant has been prejudiced will not be taken into account in determining whether he will be tried for the alleged violation. Under the laches defense, as demonstrated by the district court in *American National Bank*,[58] a claim of prejudice should be decided before the trial so that if unreasonable delay has prejudiced the defendant, he will not be subjected to a trial and to a possible finding that he has discriminated.[59]

Racial and Sexual Discrimination Under Title VII

Lewis v. Tobacco Workers' International Union[60] is one recent case that will not aid plaintiffs in future employment discrimination actions. In *Lewis*, a class action[61] under Title VII was initiated on behalf of all female and black male employees of Philip Morris, Inc., who had worked in one division of the company's factory, the stemmery,[62] at any time after July 1965.[63] The suit alleged that the company discriminated because members of the class were hired into the stemmery, which consisted of seasonal work, in disproportionate numbers, rather than being given permanent and better paying positions in other departments.[64] The Fourth Circuit reversed the district court's finding of racial discrimination by the company.[65]

The district court held that Philip Morris had no intent to discriminate against blacks.[66] In a Title VII action, however, it is not necessary to show that intent to discriminate exists in order to find a violation of the Act.[67] Using statistical data,[68] the district court found that the plaintiffs had made a prima facie case that the hiring procedures of the company had a

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[57] *See* text accompanying note 43 *supra;* note 54 *supra.*

[58] EEOC v. American Nat'l Bank, 420 F. Supp. 181 (E.D. Va. 1976).

[59] An employer can be damaged not only by the expense of having to go to trial, but also by being found liable, even if no relief is given to the plaintiff. The employer's reputation may be damaged by a finding that he has discriminated.

[60] 577 F.2d 1135 (4th Cir. 1978).

[61] The majority of employment discrimination suits brought by private plaintiffs are initiated as class actions. *See* LARSON, *supra* note 5, at § 49.50.

[62] There were four departments at the Philip Morris plant. 577 F.2d at 1137. The stemmery, where the current tobacco crop is processed, provides seasonal work and is the department with the lowest status in terms of working conditions and pay. *Id.* The other three departments, the fabrication, prefabrication, and warehouse departments, provide permanent employment. *Id.*

[63] *Id.* at 1137 n.1.

[64] *Id.* at 1137.

[65] *Id.* at 1138.

[66] Lewis v. Philip Morris, Inc., 419 F. Supp. 345, 356 (E.D. Va. 1976).

[67] *See* text accompanying notes 5-6 *supra* text accompanying note 89 *infra.*

[68] Statistics can play an important role in proving a prima facie case of discrimination. International Bhd. of Teamsters v. United States, 431 U.S. 324, 339 (1977); *see* LARSON, *supra* note 5, at § 50.30-.32. For example, in *Teamsters* the plaintiffs used statistics in three ways. They showed that only a small percentage of the high paying jobs were held by minorities. 431 U.S. at 337-38. The plaintiffs also used statistics to show that most of the minority employees had low paying jobs. *Id.* Finally, the plaintiffs compared the percentage of minority employees to the percentage of minorities in the workforce. *Id.* at 337 n.17.

disproportionate impact on blacks.[69] Since Philip Morris did not refute the plaintiff's prima facie case, it was found in violation of Title VII.[70]

In order to fashion a remedy for the class, the district court sought to determine why the company's practices led to the hiring of a disproportionate number of blacks into the stemmery.[71] The court found that the disparity was not due to the black applicants being less skilled than the white applicants.[72] It also found no evidence that blacks preferred the seasonal work.[73] The court noted the fact that Philip Morris had, by its own admission, intentionally discriminated against blacks in the past.[74] The district court concluded that blacks applying for jobs believed the company still discriminated and thus applied for and accepted stemmery work because they felt this department was most likely to hire them.[75]

To stop the disproportionate hiring of blacks into the stemmery, the district court ordered the company to advise all job applicants of the positions currently available in all departments and to inform all applicants that the company would assign all new workers to departments without regard to race.[76] The court stated this this would lead to more blacks applying for and receiving jobs in the three permanent departments.[77]

The Fourth Circuit reversed the district court, holding that the company had not violated Title VII.[78] The court reasoned that the trial court's finding of discrimination was based on one of two grounds.[79] Either the company had failed to reassert a balance in its work force to make up for past discrimination or the company had done nothing to dispel the belief of job applicants that it still discriminated.[80] The court found both grounds invalid bases for the lower court's holding.

The Fourth Circuit held that Title VII does not require an employer to balance its work force along racial lines.[81] In fact, the Act forbids preferential treatment of any group solely to achieve a balance.[82] With regard to the claim that the company had done nothing to dispel its reputation as a discriminatory employer, the court decided Title VII does not require a company to announce its nondiscriminatory practices.[83] The court also

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[69] 419 F. Supp. at 353; *see* text accompanying note 89 *infra.*

[70] 419 F. Supp. at 356; *see* text accompanying note 89 *infra.*

[71] 419 F. Supp. at 355-56.

[72] *Id.*

[73] *Id.*

[74] *Id.* Up until 1961, the company maintained segregated departments, the stemmery being all black. *Id.* at 354.

[75] *Id.* at 356.

[76] *Id.* at 357.

[77] *Id.*

[78] Lewis v. Tobacco Workers' Int'l Union, 557 F.2d 1135, 1138 (4th Cir. 1978).

[79] *Id.* at 1141.

[80] *Id.*

[81] *Id.*

[82] *See* note 15 *supra.*

[83] 577 F.2d at 1143. The Code of Federal Regulations requires that employers post notices informing their employees and potential employees that discrimination is prohibited. 29 C.F.R. § 1601.27 (1977). The EEOC has taken the position that an employer has the further

found that there was no substantial evidence that job applicants believed the company still discriminated and, therefore, reversed this finding of fact of the district court as clearly erroneous.[84]

In reversing the district court's finding that Philip Morris had violated Title VII, the Fourth Circuit did not follow the theory of discrimination advanced by the district court. Discrimination in employment can result from either disparate treatment by an employer or from the disparate impact of a neutral selection procedure used by the employer.[85] Disparate treatment occurs when an employer is intentionally discriminating against a certain group protected by Title VII.[86] A violation of Title VII can occur, however, if the employer uses a facially neutral procedure that tends to select one group over another.[87] This is the disparate impact theory.[88]

The disparate impact type violation of Title VII is based on the Supreme Court decision in *Griggs v. Duke Power Co.*[89] Under *Griggs,* the

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duty to take affirmative steps to dispel a reputation in the community that it discriminates. EEOC Dec. 74-41, 7 Fair Empl. Prac. 456 (October 1973). This view has some support in the courts, although no court has found a violation of Title VII solely because an employer has not dispelled his reputation for discrimination. *See* United States v. Sheet Metal Workers' Int'l Ass'n, Local 36, 416 F.2d 123, 137-40 (8th Cir. 1969); United States v. Lee Way Motor Freight, Inc., 7 Empl. Prac. Dec. § 9066 (W.D. Okla. 1973); LARSON, *supra* note 5, at § 82.20. When a violation of Title VII is found to exist, the court can order the employer to take steps to dispel the discriminatory reputation as part of the remedy granted. United States v. Georgia Power Co., 274 F.2d 906, 926 (5th Cir. 1973), *cert. denied,* 419 U.S. 1050 (1974), Franks v. Bowman Transp. Co., 495 F.2d 398, 418 n.19 (5th Cir. 1974); rev'd on other grounds, 424 U.S. 747 (1975).

[84] 577 F.2d at 1143.

[85] Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 355-36 n.15 (1977); *see* EEOC COMPL. MAN. (BNA) §§ 131-35 (1975).

[86] *See* EEOC COMPL. MAN. (BNA) § 131 (1975).

[87] International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977); Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971); Note, *Proving Discriminatory Intent from a Facially Neutral Decision with a Disproportionate Impact,* 36 WASH. & LEE L. REV. 109; *see* note 89 *infra.*

[88] Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971); *see* note 89 *infra.*

[89] 401 U.S. 424 (1971). *Griggs* involved general intelligence and mechanical aptitude tests given to job applicants by the defendant employer, and challenged as discriminatory. *Id.* at 427-28. The Supreme Court held that an intent to discriminate is not necessary under Title VII. *Id.* at 432. An employer who uses a device in the hiring or promotion of employees that is neutral on its face nonetheless violates Title VII if the device is found to have a discriminatory impact. *Id.* at 430. To present a prima facie case of discrimination under *Griggs,* the plaintiff must show that the device in question has a disproportionate impact on one group. *Id.*; *see* LARSON, *supra* note 5, at § 50.31. For example, if applicants for a job are given an aptitude test which is failed by 40% of the blacks who take it and 20% of the whites, assuming the difference to be statistically significant, the test has been shown to have a disproportionate impact on blacks. *See* LARSON, *supra* note 5, at § 50.31. This is true even though the employer has no intent to discriminate and the test was designed to be fair and neutral. *Id.* Once the plaintiff has made a prima facie case of discriminatory impact, the burden shifts to the defendant to show that he has a business necessity for using the device in question. 401 U.S. at 431. The test of business necessity is whether the device has an "overriding legitimate business purpose." Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. dismissed,* 404 U.S. 1006 (1971). The device must be necessary for the safe and efficient operation of the business. *Id.* There must be no alternative device that would serve the

plaintiff can make out a prima facie case of discrimination by proving the procedure under question has a discriminatory impact.[90] The defendant can refute this by showing a business necessity for the procedure.[91] Applying the *Griggs* rationale, the district court in *Lewis* found that the hiring practices of the company had a disproportionate impact on blacks since a greater percentage of black job applicants obtained stemmery jobs than did white applicants.[92] Philip Morris did not prove a business necessity for its hiring methods.[93] The district court then went on to examine why the disparate impact occurred, and found that this was due to the company's reputation for discrimination among black job applicants.[94] Philip Morris was thus ordered to tell applicants that it did not discriminate in order to remedy the flaw in the hiring procedure and thereby end the disparate impact.[95]

The Fourth Circuit in its opinion did not indicate that the district court had approached the case under the disparate impact theory. The appellate court emphasized the fact that the lower court found the defendant had no motive to discriminate,[96] which is necessary for a finding of disparate treatment, but irrelevant in the disparate impact context.[97] The Fourth Circuit correctly held that the failure of the company to announce that it did not discriminate is not a violation of Title VII,[98] but the district court

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business better or serve the business as well and with a lesser racial impact. *Id.*

The *Griggs* rationale was first applied to objective tests. *See* text accompanying notes 103-17 *infra*. The disparate impact theory, however, has been applied to other devices as well. *See* LARSON, *supra* note 5, at § 76.6. In Pennington v. Lexington School Dist. 2, 578 F.2d 546 (4th Cir. 1978), the device in question was a maternity leave policy. School board policy guaranteed that a teacher on maternity leave would be reinstated at the start of the next school year in a position of comparable status and pay. *Id.* at 547. By comparison, teachers absent for other reasons for over twenty consecutive days were not guaranteed reinstatement. *Id.* at 548. The court found, however, that these teachers were generally reinstated as soon as they were able to work and did not have to wait until the next year, putting them in a better position than those teachers on maternity leave. *Id.* The Fourth Circuit found that the maternity policy had a disparate impact on women, and remanded the case for a determination of whether the policy was mandated by business necessity. *Id.*

In *Pennington*, the Fourth Circuit applied Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), which involved a similar maternity policy. In *Nashville Gas*, employees returning to work from maternity leave did not have their acumulated seniority counted when they applied for reinstatement. *Id.* at 139-40. Employees absent because of disease or disability had their seniority considered when the reapplied for a job. *Id.* at 140. The Supreme Court found that the policy, while neutral on its face, was discriminatory in its impact since it imposed a substantial burden on women that men did not suffer. *Id.* at 142. Therefore, the policy could survive only if it were based on business necessity. *Id.* at 143.

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

[91] *Id.*

[92] Lewis v. Philip Morris, Inc., 419 F. Supp. 345, 353 (E.D. Va. 1976).

[93] *Id.* at 354. The district court does not indicate whether Philip Morris made any attempt to prove business necessity.

[94] *Id.* at 354-56; *see* text accompanying notes 71-77 *supra*.

[95] Lewis v. Philip Morris, Inc., 419 F. Supp. 345, 357 (E.D. Va. 1976); *see* text accompanying notes 76-77 *supra*.

[96] 577 F.2d at 1141.

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

[98] 577 F.2d at 1141-42; *see* note 83 *supra*.

had not said this was a violation.[99] Instead, after the district court had found a violation of Title VII by the company, it imposed the duty to announce that it did not discriminate as a remedy.[100]

Even if the Fourth Circuit had followed the district court and treated the case under the disparate impact theory, the case still may not have been affirmed. The Fourth Circuit did not rule on whether, as a matter of law, the plaintiffs had made out a prima facie case of disparate impact. If the Fourth Circuit had found a prima facie case, the reversal of the district court's finding of the fact that the company had a discriminatory reputation must still be dealt with.[101] The district court considered the discriminatory reputation of the company in fashioning a remedy, once it found that the company had discriminated.[102] Since the finding that the company had a discriminatory reputation was overturned by the Fourth Circuit, the district court's remedy cannot stand. Thus, if the Fourth Circuit had agreed that Philip Morris had violated Title VII, the case should nevertheless have been remanded because of the erroneous finding of fact by the district court.

Attorneys' Fees Under Title VII

The third major case in the employment discrimination field to be decided recently by the Fourth Circuit is *Walston v. School Board of Suffolk,*[103] a disparate impact case.[104] At issue was the use of the standard-

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[99] *See* Lewis v. Philip Morris, Inc., 419 F. Supp. 345, 356-57 (E.D. Va. 1976).

[100] *Id.*; *see* note 83 *supra.*

[101] *See* text accompanying notes 94 & 95 *supra.*

[102] 419 F. Supp. at 356-57; *see* text accompanying notes 94 & 95 *supra.*

[103] 566 F.2d 1201 (4th Cir. 1977).

[104] *See* text accompanying note 85-91 *supra. Walston* was brought under the fourteenth amendment rather than Title VII. *See* text accompanying note 2 *supra.* The court, however, used a disparate impact analysis (*see* note 89 *supra*) and the opinion thus reads as a Title VII case.

Courts have been willing to apply legal theories developed in Title VII cases to non-Title VII employment discrimination actions. In Johnson v. Ryder Truck Lines, 575 F.2d 471 (4th Cir. 1978), the plaintiffs argued that a seniority system valid under Title VII could nonetheless be found to be discriminatory under the fourteenth amendment and 42 U.S.C. § 1981 (1976), which guarantees all persons within the jurisdiction of the United States equal protection of the law. *Id.* at 473. The Fourth Circuit held that under 42 U.S.C. § 1988 (1976), the principles of Title VII are applicable to a case brought under § 1981. 42 U.S.C. § 1988 (1976) reads in part:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and

ized National Teachers Examination (NTE)[105] as a criterion of employment. A teacher was required to achieve a minimum score of 500 on the test in order to be hired or retained in the Suffolk school system.[106] In an earlier decision in the lawsuit,[107] the Fourth Circuit had found the use of the test discriminatory since blacks were shown to score lower than whites.[108] The court, therefore, had held that the NTE could not be used unless proper validation studies were made indicating that the test was job related,[109] and remanded the case to the district court with directions to

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disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

The court concluded that the disparate impact theory of discrimination, *see* text accompanying note 89 *supra*, could be applied in a § 1981 suit, but since the defendant's seniority system was valid under Title VII, it could not be found discriminatory under § 1981. 575 F.2d at 474-75.

[105] The National Teachers Examination (NTE) is given by the Educational Testing Service of Princeton, New Jersey. Walston v. County School Ed. of Nansemond County, 492 F.2d 919, 921 (4th Cir. 1974). Normally given to college seniors and recent graduates, the test has two parts. *Id.* The Weighted Common section, at issue in *Walston*, is designed to measure a teacher's basic professional preparation and general academic attainment. *Id.* A second section measures a teacher's knowledge in specific subject areas. *Id.* The use of ability tests is specifically allowed under Title VII which states, in part, that it is not "an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test . . . is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(h) (1976).

[106] Walston v. County School Bd. of Nansemond County, 492 F.2d 919, 921 (4th Cir. 1974).

[107] The first case was Walston v. County School Bd. of Nansemond County, 492 F.2d 919 (4th Cir. 1974). Nansemond County has been merged into the City of Suffolk, which has assumed its obligations. 566 F.2d at 1203.

[108] Walston v. County School Bd. of Nansemond County, 492 F.2d 919, 922, 927 (4th Cir. 1974). By showing that blacks score lower than whites on the NTE, the plaintiffs established that the tests had a disparate impact on blacks. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971); text accompanying note 89 *supra*.

[109] Walston v. County School Bd. of Nansemond County, 492 F.2d 919, 924-27 (4th Cir. 1974). The EEOC has issued guidelines on the procedures to be used in the validation of employment tests to show that they are job related. 29 C.F.R. §§ 1607.1-.14 (1977). While these guidelines are not regulations with the force of law, they are given great deference by the courts. Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971). The EEOC adopted the standards accepted by the American Psychological Association. 29 C.F.R. § 1607.5 (1977). The preferred method is to show criterion-related validity, although content and construct validity can also be tested. *See generally* LARSON, *supra* note 5 at §§ 77.00-.50. Criteron validity compares an individual's score on a test to his actual performance on the job. *Id.* at §§ 77.20-22. Content validity means that the test being used measures the ability to perform skills that will be needed on the job in question. *Id.* at § 77.30. Construct validity is similar to content validity, but rather than measuring specific skills, it measures general traits that are needed for the job. *Id.* at § 77.40-.50. As an example, suppose a test is given to a potential typist. If it can be shown that people with the best scores on the test make the best typists, the test has criterion validity. If it is shown that the test measures speed and accuracy in typing and that these skills are needed for the job then the test has content validity. *Id.* at § 77.30. If, instead, it is shown that a typist needs concentration, perserverence, and an attention to detail and the test measures these traits, it has construct validity. *Id.* at § 77.50. For an actual validation of the NTE, *see* note 112 *infra*.

issue the proper injunction.[110] On remand, the district court entered an injunction ordering that "the defendants [be] . . . enjoined from making use of the National Teachers Examination as a sole basis for employment."[111] The injunction was vacated by the Fourth Circuit in the instant case on the ground that it did not comply with the directive in the first case requiring that the test could not be used at all without proper validation.[112] The court again remanded the case to the district court and ordered a new injunction to comply with this directive.[113]

The second *Walston* decision complies with the reasoning of *Griggs*.[114] The plaintiffs showed that the test had a disproportionate impact on blacks, even though the test was facially neutral.[115] Once this was done, the school board had to show that the test could be used by proving that it was a reasonable measure of job performance.[116] The school board was enjoined from using the test until it could demonstrate through validation studies that the NTE is related to job performance.[117]

In *Walston,* the Fourth Circuit also set guidelines for the district courts to follow when awarding attorney's fees to prevailing plaintiffs in Title VII cases.[118] Plaintiffs' counsel in *Walston* had billed for a total of 984.25

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[110] Walson v. County School Bd. of Nansemond County, 492 F.2d 919, 927 (4th Cir. 1974).

[111] Walston v. School Bd. of Suffolk, 418 F. Supp. 639, 643 (E.D. Va. 1976).

[112] 566 F.2d at 1204. The NTE can be validated, as is shown by United States v. South Carolina Educ. Ass'n, 15 Fair Empl. Prac. 1196 (D.S.C. April 14, 1977). The defendant validated the test by assembling a panel of educators from the 25 teacher training institutions in South Carolina. *Id.* at 1213. These educators established the content validity, *see* note 109 *supra,* of the NTE by showing that each question on the test involved subject matter that was part of the curriculum at the training institution. *Id.* The panel also established the minimum score for the test by estimating the percentage of minimally qualified students at the institutions who would know the correct answers. *Id.* The defendants thus showed that the NTE evaluated what a minimally qualified teacher, trained in South Carolina, would know.

[113] 556 F.2d at 1204.

[114] *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971); text accompanying note 89 *supra.*

[115] Walston v. School Bd. of Nansemond County, 492 F.2d 919, 922 (4th Cir. 1974); *see* text accompanying note 89 *supra.*

[116] Walston v. School Bd. of Nansemond County, 492 F.2d 919, 924 (4th Cir. 1974); *see* text accompanying note 89 *supra.*

[117] 566 F.2d at 1204.

[118] *Id.* at 1204-05, 42 U.S.C. § 2000e-5(k) (1976) provides:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

The award of fees in *Walston* was based on 20 U.S.C. § 1617 (1976), which is a similar provision dealing with attorney's fees in discrimination suits involving elementary and secondary education. The Attorney's Fee Act of 1976, 42 U.S.C. § 1988 (1976), makes the same provision for awarding attorney's fees to the prevailing party at the court's discretion in suits brought under 42 U.S.C. §§ 1981 & 1983 (1976). While the attorney's fee statutes call for fees to be awarded to the prevailing party, courts have not followed the same guidelines in awarding fees to prevailing defendants as they have in awarding fees to plaintiffs. *See* Heinsz, *Attorney's Fees for Prevailing Title VII Defendants: Towards a Workable Standard.* 8 U. TOL. L. REV. 259, 296 (1977) [hereinafter cited as Heinsz]. When the plaintiff prevails, the Su-

hours.[119] The district court, basing its award on a percentage of the total recovery, awarded the plaintiffs' attorneys $10,407.40.[120] In reversing the district court's award, the Fourth Circuit held that an award of attorney's fees is not to be based solely on the amount of monetary recovery.[121] The Fourth Circuit adopted as guidelines the factors set out in Disciplinary Rule 2-106(b) of the American Bar Association Code of Professional Responsibility, used by attorneys to determine their own fees.[122] In *Walston,* the court considered the relevant factors to be time spent and labor expended, the customary fee in the locality, the novelty and difficulty of the questions involved and the skill required to present them properly, the amount of money involved, and the results obtained.[123]

In adopting the ABA standards for determining attorney's fees, the Fourth Circuit aligned itself with several other circuits.[124] Judge Widener, however, dissented.[125] While not objecting to the use of the ABA standards in general, he did not think that the district court's award in *Walston* was so unreasonable as to merit reversal.[126]

Although not stressed by the dissent, both the awarding and amount of attorney's fees in employment discrimination cases is to be left to the discretion of the trial judge.[127] Thus, an award of fees by the trial court should be overturned only if the court has clearly abused its discretion.[128] The Fourth Circuit did not indicate that the trial court abused its discretion, and, therefore, the district court's award of attorney's fees should have been affirmed. Thus, the dissent takes the better view that while an

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preme Court has held that an award of attorney's fees should be made unless special circumstances are present. Christianburg Garment Co. v. EEOC, 434 U.S. 412, 416-17 (1978). When the defendant prevails, courts have held that an award should be made only if special circumstances are present. Heinsz, *supra* at 296. *See also* 434 U.S. at 417-22.

[119] 566 F.2d at 1204.

[120] *Id.*

[121] *Id.*

[122] The factors listed by the ABA to be used in determining an attorney's fee are: (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) The fee customarily charged in the locality for similar legal services; (4) The amount involved and the results obtained; (5) The time limitations imposed by the client or the circumstances; (6) The nature and length of the professional relationship with the client; (7) The experience, reputation, and ability of the lawyer or lawyers performing the services; (8) Whether the fee is fixed or contingent. ABA Code of Professional Responsibility D.R. 2-106(b) (1977); see Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974).

[123] 566 F.2d at 1205; *see* note 122 *supra.*

[124] 566 F.2d at 1204; *see* Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717 (5th Cir. 1974); Waters v. Wisconsin Steel Works, 502 F.2d 1309, 1322 (7th Cir. 1974), *cert. denied,* 425 U.S. 997 (1976).

[125] 566 F.2d at 1206-07 (Widener, J., concurring and dissenting).

[126] *Id.* at 1207.

[127] *See* note 118 *supra.*

[128] Weeks v. Southern Bell Tel. & Tel. Co., 467 F.2d 95, 97 (5th Cir. 1972); *see* Lea v. Cone Mills Corp., 438 F.2d 86, 88 (4th Cir. 1971).

appellate court can provide guidelines to the lower courts, *Walston* was not the proper case in which to impose these guidelines.[129]

The Supreme Court recently held that attorney's fees must be awarded to plaintiffs in Title VII cases, unless special circumstances are present.[130] This result previously had been reached by the Fourth Circuit.[131] *Walston* further limits the discretion of the trial courts in awarding attorney's fees since they now must follow the ABA guidelines.[132] The Fourth Circuit has indicated that it places great weight on the awarding of attorney's fees as an encouragement to the private enforcement of employment discrimination cases.[133] Therefore, the court will not hesitate to review the action of a district court in this matter.

These recent Fourth Circuit decisions in the employment discrimination field have made it easier for plaintiffs to bring suit, while at the same time narrowing the area of potential liability for employers. The Equal Employment Opportunity Commission will not be bound by laches in bringing enforcement actions.[134] Private plaintiffs will be encouraged to bring suits because of the increased likelihood that they will receive attorney's fees.[135] At the same time, an employer will not be in violation of Title VII solely because he has failed to balance his work force or inform job applicants that he does not discriminate.[136] In sum, almost fifteen years after the passage of the Civil Rights Act, many facets of employment discrimination law are still being defined by the courts.

EDWARD K. STEIN

Age Discrimination Prohibited in Municipal Employment

In *Arritt v. Grisell*[1] the Fourth Circuit subjected municipal police hiring practices to congressional anti-discrimination policy. The Fourth Circuit rejected the argument that the tenth amendment bars congressional inter-

[129] 566 F.2d at 1206 (Widener, J., concurring and dissenting).

[130] Christianburg Garment Co. v. EEOC, 434 U.S. 412, 416-417 (1978); *see* note 118 *supra.*

[131] Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971); *see* Heinsz, *supra* note 118, at 263-65.

[132] *See* text accompanying note 122 *supra.*

[133] *See* text accompanying note 130-131 *supra.* Although *Walston* applied Title VII analysis, *see* text accompanying note 104 *supra,* the language of other statutory provisions allowing the award of attorney's fees is similar to the language of the statute involved in *Walston. See* note 118 *supra.* Presumably, then, the Fourth Circuit will order the district court to use the ABA guidelines when applying these provisions as well.

[134] *See* text accompanying notes 20-59 *supra.*

[135] *See* text accompanying notes 118-33 *supra.*

[136] *See* text accompanying notes 60-102 *supra.*

[1] 567 F.2d 1267 (4th Cir. 1977). Grisell was one of three members of the Police Civil Service Commission of Moundsville, West Virginia named as defendants. The city of Moundsville was also named as a defendant. *Id.* at 1269.

ference in state and city governmental functions[2] and held that the Age Discrimination in Employment Act (ADEA)[3] is applicable to the states as a function of congressional power to enforce the fourteenth amendment.[4] The Fourth Circuit also specified the standard to be used in testing age qualifications against the provisions of ADEA.[5]

Plaintiff Arritt, a 40 year old male, challenged a West Virginia statute declaring anyone over 35 ineligible to take preparatory examinations for police training.[6] Arritt contended that the West Virginia statute violated ADEA and the fourteenth amendment.[7] The defendant, Moundsville, West Virginia, denied that Congress could constitutionally infringe its police hiring regulations[8] and denied that its age qualification contravened the provisions of ADEA.[9]

Moundsville argued that the Supreme Court in *National League of Cities v. Usury*[10] prohibited congressional intrusions on state police employment practices under the commerce clause.[11] *National League of Cities* concerned 1974 amendments to the Fair Labor Standards Act (FLSA) subjecting states and their political subdivisions to minimum wage provisions Congress had previously established for private employers.[12] Minimum wage standards curtailed state police hiring and training programs, and the *National League of Cities* decision held that the tenth amend-

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[2] 567 F.2d at 1270; *see* text accompanying notes 10-18 *infra.*

[3] The Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (1976) prohibits the refusal to hire an individual between 40 and 65 because of age. *Id.* § 630(b)(2).

[4] 567 F.2d at 1271; *see* text accompanying notes 19-20 *infra.*

[5] 567 F.2d at 1271-72; *see* text accompanying notes 47-49 *infra.*

[6] *Id.* at 1269. Under West Virginia law, "[n]o application for original appointment (in the police civil service) shall be received if the individual applying is less than eighteen years of age or more than thirty-five years of age . . . " WEST VA. CODE § 8-14-12 (Michie, 1976 Repl. Vol.).

[7] 567 F.2d at 1269.

[8] *Id.* The fourteenth amendment prohibits states from denying to any person within their jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV § 1. The fourteenth amendment is a limitation of state, as opposed to federal, action. *Ex Parte* Virginia, 100 U.S. 339, 346 (1879). The principal purpose of the equal protection clause was to prohibit racial discrimination, but it has since been expanded to cover discrimination against sex, religious preference and national heritage. Buchanan v. Warley, 245 U.S. 60, 76 (1917). *See also* notes 29 & 30 *infra.*

[9] 567 F.2d at 1269; *see* note 1 *supra.*

[10] 426 U.S. 833, 852 (1976).

[11] The commerce clause permits Congress to "regulate commerce . . . among the several states . . . " U.S. CONST. art. I, § 8 cl. 3. Congress may regulate intrastate commerce provided that it might "affect" interstate commerce. Fry v. United States, 421 U.S. 542, 547 (1975) (reaffirmed in National League of Cities v. Usery, 426 U.S. 833, 853 (1976)); *see* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 255 (1964) (discussing breadth of congressional power under commerce clause). Congress may regulate labor and private employment through the commerce clause if an effect on interstate commerce is apparent. United States v. Darby, 312 U.S. 100, 124 (1941).

[12] 426 U.S. 833, 835 (1976); *see* Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 213(a)(1) (Supp. V 1975) *as amended by* Pub. L. No. 93-259, § 2, 93rd Cong. 2d Sess. 55 (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 59.

ment[13] limits congressional authority to use the commerce clause to intrude on such integral state functions.[14] The ADEA age discrimination and FLSA wage and hour provisions extended to state employment under the same 1974 Fair Labor Standards Act amendments.[15] The ADEA, like FLSA, curtailed state discretion in police hiring.[16] In addition, the ADEA and FLSA were originally enacted under congressional power to regulate labor through the commerce clause, with similar statutory language.[17] Consequently, the *National League of Cities* decision called into question the continued applicability of ADEA to the states.[18]

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[13] 426 U.S. 833, 855 (1976). The tenth amendment states that "powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states . . . " U.S. CONST. amend. X. The tenth amendment protects state sovereignty against national encroachment much as the first nine amendments protect individual rights against national power. Fry v. United States, 421 U.S. 542, 553 (1975) (Rehnquist, J. dissenting). *See also* Beaird & Ellington, *A Commerce Power Seesaw: Balancing* National League of Cities, 11 GA. L. REV. 35, 48 (1976) [hereinafter cited as Beaird & Ellington]. The tenth amendment appeared moribund after United States v. Darby, 312 U.S. 100 (1941), when the Supreme Court declared the tenth amendment to be "but a truism." *Id.* at 124; *see* Percy, National League of Cities v. Usery: *the Tenth Amendment is Alive and Well,* 51 TUL. L. REV. 95, 96 (1976). [hereinafter cited as Percy]. In *National League of Cities* the Supreme Court used the tenth amendment as a limitation on the reach of congressional power under the commerce clause for the first time in four decades. *Id.; see, e.g.,* Carter v. Carter Coal Co., 298 U.S. 238 (1936) (Bituminous Coal Conservation Act barred by tenth amendment). *See generally* Barber, *National League of Cities v. Usery, New Meaning for the Tenth Amendment,* 1976 SUP. CT. REV. 161, 161 (1977) [hereinafter cited as Barber]; *see also* Note, *Constitutionality of ADEA After Usery,* 30 ARK. L. REV. 363, 365 (1976) [hereinafter cited as *ADEA After Usery*].

[14] National League of Cities v. Usery, 426 U.S. 833, 851 (1976). The Supreme Court warned that "[i]f Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States' 'separate and independent existence.'" *Id., citing* Coyle v. Oklahoma, 221 U.S. 559, 580 (1911) (Congress may not impose conditions depriving a state of its dignity and power).

[15] *Compare* Fair Labor Standards Amendments of 1974, 29 U.S.C. § 630(b)(2) *as amended by* Pub. L. 93-259, § 28, 93rd Cong. 2d Sess. 55 (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 78 (states included under ADEA as regulated employers) *with* 29 U.S.C. § 203(e)(2)(c) *as amended by* Pub. L. 83-259 § 6, 93rd Cong. 2d Sess. 55 (1974) *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 59 (states included under FLSA as regulated employers).

[16] *See ADEA after Usery, supra* note 13, at 365.

[17] *Compare* 29 U.S.C. § 621(4) (1976) (age restrictions affect commerce), *with* 29 U.S.C. § 202(a) (1976) (wage rates affect commerce). *See also* Usery v. Manchester East Catholic Regional School Bd., 430 F. Supp. 188, 189 (D.N.H. 1977) (scope of term "affecting commerce" in ADEA coextensive with congressional powers under commerce clause); Usery v. Board of Educ., 421 F. Supp. 718, 721 (D. Utah 1976) (ADEA a valid exercise of commerce power).

[18] *See ADEA After Usery, supra* note 13, at 364. The lower court avoided deciding whether *National League of Cities* removed state employment from the province of ADEA by finding West Virginia's age limitation did not violate ADEA. Arritt v. Grisell, 421 F. Supp. 800, 802 (N.D. W.Va. 1976), *rev'd,* 567 F.2d 1267 (4th Cir. 1977). The district court thus avoided an unnecessary conflict between state and federal power. *Id.* at 802 n.2, *citing* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J. concurring) (federal courts should avoid constitutional issues if statutory construction resolves the controvery). Since the Fourth Circuit subjected West Virginia's age limitation to a stricter standard than

The Fourth Circuit decided, however, that the tenth amendment only limits congressional authority under the commerce clause and the *National League of Cities* does not circumscribe legislation under the fourteenth amendment.[19] The Fourth Circuit noted similarities between ADEA and Title VII of the Civil Rights Act of 1964[20] which the Supreme Court held applicable to the states as an exercise of congressional power under the fourteenth amendment.[21] The Fourth Circuit also cited its previous determination that the Equal Pay Act, prohibiting sex discrimination in salaries, is enforceable against the states under the fourteenth amendment[22] even though the Equal Pay Act was originally enacted under the commerce clause and made binding on the states by the 1974 amendments challenged in *National League of Cities.*[23] The Fourth Circuit concluded that ADEA is antidiscrimination legislation supported by the equal protection clause of the fourteenth amendment and that the tenth amendment does not prevent Congress from prohibiting state discrimination against workers on the basis of age.[24]

The Fourth Circuit's holding that ADEA is not subject to tenth amendment limitations on congressional authority may be problematic, since the

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did the district court, the Fourth Circuit anticipated a conflict between West Virginia law and the congressional legislation. 567 F.2d at 1272.

[19] 567 F.2d at 1271. Congress has power to enforce the fourteenth amendment against the states with appropriate legislation. Katzenbach v. Morgan, 384 U.S. 641, 655 (1965); U.S. CONST. amend. XIV § 5. The Fourth Circuit cited Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) in support of the proposition that Congress has greater reach under the fourteenth amendment than through the commerce clause since unlike the commerce clause the fourteenth amendment is not limited by tenth amendment protection of state sovereignty. 567 F.2d at 1271. *But see* Note, *At Federalism's Crossroads:* National League of Cities v. Usery, 57 B. U. L. REV. 178, 185 (1977) [hereinafter cited as *Federalism's Crossroads*]: if this distinction prevails, "courts must always strain to determine whether a statute, invalid under the commerce clause, can be shoehorned into the more potent fourteenth amendment." *Id.* at 191. *See also* Justice Harlan's dissent in Katzenbach v. Morgan, 384 U.S. 641, 659 (1966), concluding that giving Congress the power to impose its interpretation of the fourteenth amendment on the states would allow it to "swallow the States" and "sacrifice fundamentals in the American Constitutional system in the boundaries between federal and state authority." *Id.* at 671.

[20] 567 F.2d at 1270-71. The Fourth Circuit examined legislative history of the ADEA and concluded that the prohibition of age discrimination was similar to antidiscrimination provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-2000e-17 (1976). 567 F.2d at 1270 n.11. *But see* note 25 *infra.*

[21] Fitzpatrick v. Bitzer, 427 U.S. 445, 452 (1976).

[22] Usery v. Charleston County School Dist., 558 F.2d 1169, 1171 (4th Cir. 1977). The Fourth Circuit held in *Charleston County* that its duty in passing on the constitutionality of legislation is to determine whether Congress had the authority to adopt the legislation, "not whether it correctly guessed the source of that power." *Id.* The Fourth Circuit would not frustrate congressional policy against sex discrimination "simply because the legislative history does not contain the magic words, 'Fourteenth Amendment'." *Id.*; *see Fourth Circuit Review*, 35 WASH. & LEE L. REV. 462, 464-68 (1978). *But see* note 19 *supra.*

[23] 558 F.2d at 1170; *see* Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (1970), *as amended* Pub. L. 93-259 § 6, 93rd Cong. 2d Sess. 55, (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 59 (1974).

[24] 567 F.2d at 1271.

analogy to the Equal Pay Act and Title VII of the Civil Rights Act of 1964 seems incomplete.[25] Title VII and the Equal Pay Act address forms of discrimination already cognizable under the equal protection clause of the fourteenth amendment.[26] Age qualifications do not contravene the equal protection clause.[27] The Fourth Circuit, following the Supreme Court's equal protection clause analysis in *Massachusetts Board of Retirement v. Murgia*,[28] conceded that age qualifications do not create a suspect classification[29] and that police employment is not a fundament right.[30] Accord-

[25] *See Federalism's Crossroads, supra* note 19 at 185. Title VII and ADEA are similar enough that courts sometimes use interpretations of Title VII for assistance in defining sections of ADEA. Dartt v. Shell Oil Co., 539 F.2d 1256, 1259 (10th Cir. 1976). However, an important difference between age discrimination and Title VII discrimination is that age restrictions usually address economic or safety concerns, while Title VII counters the social problems of racial prejudice and intolerance. *See* Note, *The Age Discrimination in Employment Act of 1967*, 90 HARV. L. REV. 380, 389 (1976) [hereinafter cited as *Age Discrimination*]. The extreme sensitivity courts display when confronted with a race restriction is inappropriate for an age qualification, since age qualifications often are justifiable. *See* Laugesen v. Anaconda Co., 510 F.2d 307, 312 (6th Cir. 1975) (age discrimination should not automatically be treated like race discrimination); Mastie v. Great Lakes Steel Corp., 424 F. Supp. 1299, 1306 (E.D. Mich. 1976) (age requirements given less careful scrutiny than bars to employment based on race or sex). In interpreting this aspect of the *Arritt* decision, courts should be wary of applying to age regulations the rigorous fourteenth amendment standards developed for social problems like racial prejudice.

[26] The Equal Pay Act is directed toward sex discrimination in hiring. *See* notes 22 & 23 *supra*. The Supreme Court has recognized that gender-based classifications may violate the fourteenth amendment. *See* Frontiero v. Richardson, 411 U.S. 677, 682, 688 (1973) (employment benefit classification having a disproportionate effect on female employees violates equal protection clause). Reed v. Reed, 404 U.S. 77, 78 (1971) (statute preferring male estate administrators over female administrators denies equal protection). Title VII is directed against racial classifications which violate the equal protection clause. Fitzpatrick v. Bitzer, 427 U.S. 445, 452 (1976) (Title VII enacted to enforce the equal protection clause of the fourteenth amendment). Colorado Anti-Discrimination Comm. v. Continental Air Lines, 372 U.S. 714, 721 (1963) (racial bars to employment violate equal protection clause).

[27] 567 F.2d at 1271-72; *see* Massachusetts Bd. of Retirement v. Murgia. 427 U.S. 307, 318 (1976).

[28] 567 F.2d at 1271-72.

[29] 567 F.2d at 1272. A suspect classification is legislation directed against a minority traditionally "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment or relegated to such a position of powerlessness as to command extraordinary protection from the majoritarian political process." Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976). Age is not a suspect classification receiving strict scrutiny by the courts. *Id. Compare* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (unequal distribution of wealth alone does not trigger suspect classification under equal protection clause) *with* Graham v. Richardson, 403 U.S. 365, 376 (1971) (alienage a suspect class); McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (race a suspect class); Oyama v. California, 332 U.S. 633, 646 (1948) (ancestry a suspect class).

[30] 567 F.2d at 1272. A fundamental right is one the courts determine to be implicit in the basic liberty the Constitution is meant to protect. Roe v. Wade, 410 U.S. 113, 152 (1973). The Supreme Court has held that there is no fundamental right to state employment. *Compare* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) *with* Bullock v. Carter, 405 U.S. 134 (1972) (right to vote fundamental); Shapiro v. Thompson, 394 U.S.

ingly the Fourth Circuit recognized that under traditional equal protection clause analysis West Virginia's statute was rationally related to securing public safety and did not contravene the fourteenth amendment.[31]

The Fourth Circuit noted, nonetheless, that state practices which "would pass muster" in the courts under the fourteenth amendment may be prohibited by congressional legislation enforcing the fourteenth amendment.[32] The Fourth Circuit cited Supreme Court decisions to the effect that courts are limited to invalidating state statutes which are applied in bad faith or enacted with discriminatory intent.[33] Congress enjoys broader capacity than the courts to enforce the fourteenth amendment since Congress may supercede state laws regardless of the state's intent to reach the law's discriminatory effects.[34] Since age classifications are not in themselves unconstitutional,[35] the Fourth Circuit's analysis implies that ADEA is legislation countering discriminatory effects neither intended by state age qualifications nor apparent on their face. The discriminatory effect of West Virginia's hiring restriction is difficult to ascertain, however, since everyone ages at the same rate.[36] Accordingly it is doubtful that Congress would have reason to supercede Moundsville's age restriction, since age restrictions do not discriminate against particular minorities.

Although *Arritt* presents a perplexing problem of constitutional analysis,[37] the decision has been cited with approval in another circuit as the

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618 (1969) (right of interstate travel fundamental); Skinner v. Oklahoma *ex. rel.* Williamson, 316 U.S. 535 (1942) (right to procreate fundamental).

[31] 567 F.2d at 1272. By traditional equal protection analysis, if a statute does not involve a suspect classification, *see* note 29 *supra,* or abridge a fundamental right, *see* note 30 *supra,* the statute need only be demonstrably rational to be held constitutional. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312-13 (1976), *citing* San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 16 (1973) (traditional equal protection test reaffirmed). West Virginia's age qualification is rationally related to assuring the physical preparedness of its police, and the Fourth Circuit held that the qualification accordingly did not contravene the fourteenth amendment. 567 F.2d at 1272.

[32] 567 F.2d at 1272. Congress "shall have power to enforce by appropriate legislation the provisions of this article" U.S. CONST. amend. XIV § 5. The Supreme Court in Katzenbach v. Morgan, 384 U.S. 641 (1966), confirmed congressional authority, independent of the judiciary, to enforce the provisions of the fourteenth amendment against the states. *Id.* at 658. *But see* note 21 *supra.*

[33] 567 F.2d at 1272. *Compare* Village of Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 271 (1977) (disproportionate impact of zoning not unconstitutional absent showing of invidious purpose) *and* Washington v. Davis, 426 U.S. 229, 242 (1976) (courts may take into account discriminatory impact, but discriminatory intent is controlling) *with* Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971) (Congress may reach disproportionate impact of employment test regardless of discriminatory intent).

[34] Katzenbach v. Morgan, 384 U.S. 641, 658 (1966); *see* notes 19 & 32-33 *supra.*

[35] Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318 (1976); *see* text accompanying notes 28-31 *supra.*

[36] In Aaron v. Davis, 414 F. Supp. 453 (E.D. Ark. 1976) the Court took judicial notice that regardless of individual differences, the aging process "proceeds inexorably and takes its toll along the way." *Id.* at 462; *accord* Mastie v. Great Lakes Steel Corp., 424 F. Supp. 1299, 1306 (E.D. Mich. 1976), *see Age Discrimination, supra* note 25 at 383.

[37] An alternative approach might be that Congress enacted ADEA to counter blanket age limitations as irrebuttable presumptions denying due process under the fourteenth amend-

first instance of a circuit court holding that states must observe ADEA in the aftermath of *National League of Cities.*[38] The *Arritt* decision also breaks new ground in determining the proper standard for testing age qualifications against the provisions of ADEA.[39]

Since age can be related to capability in some jobs, Congress allows employers to justify an age qualification as an exception to ADEA if it meets the test for a bona fide occupation qualification (bfoq).[40] Congress left to the courts the question of what qualifications meet the bfoq exception.[41] In *Arritt* the lower court followed *Hodgsen v. Greyhound Lines,*[42] a Seventh Circuit decision which held that when a job affects public safety and when eliminating the hiring practice would create "a minimum increase in the risk of harm," an age restriction may be sustained as a bfoq.[43] Moundsville submitted an affidavit describing the rigors of police work

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ment, which prohibits deprivation of "life, liberty or property without due process of law." U.S. CONST. amend XIV § 1. The constraints of *National League* and the tenth amendment are avoided by use of the due process clause since the tenth amendment does not limit congressional power under the fourteenth amendment. *See* notes 13 & 19 *supra.* Likewise, *Murgia* held that age classifications are permissable under the equal protection clause without addressing due process. *See* notes 26-31 *supra.* For ADEA to be supported by the due process clause, Congress would have had to treat employment as an incident of liberty, the freedom to "engage in any of the common occupations of life." Meyer v. Nebraska, 262 U.S. 390, 399 (1923). West Virginia's statutory premise that anyone over 35 is incapable of police work then would be a codified irrebuttable presumption, which is prohibited by the due process clause. United States Dept. of Agriculture v. Murry, 413 U.S. 508 (1973) (irrebuttable presumption denying rational measure of need for public assistance violates due process); Vlandis v. Kline, 412 U.S. 441, 446 (1973) (denial of resident tuition rates to university student unconstitutional irrebuttable presumption); Stanley v. Illinois, 405 U.S. 645, 658 (1972) (statute assuming single father incapable of raising children properly is impermissable presumption). *But cf.* Cleveland Bd. of Educ. v. Lafleur, 414 U.S. 632, 652 (1974) (Powell, J., concurring) (irrebuttable presumption analysis should be sparingly used since legislation invariably classifies and could almost always be termed an 'irrebuttable presumption'). *See also* Note, *Irrebuttable Presumptions: An Illusory Analysis,* 27 STAN. L. REV. 449, 450-58 (1975). The drawback of giving Congress power to supercede any state law it defines as an irrebuttable presumption is that each new definition striking down a state law would expand congressional authority at the expense of state sovereignty. Katzenbach v. Morgan, 384 U.S. 641, 661 (1966) (Harlan, J., dissenting). *See* Cohen, *Congressional Power to Interpret Due Process and Equal Protection,* 27 STAN. L. REV. 603 (1975). *See also* note 19 *supra.*

[38] Marshall v. Philadelphia, [1978] LAB. REL. REP. (BNA) (17 Fair Emp. Prac. Cas.) 869, 870 (E.D. Pa. 1978). *See also* Montgomery County, Md. v. Califano, 449 F. Supp. 1230, 1233 (D. Md. 1978) (*Arritt* cited for upholding ADEA under the fourteenth amendment). *See* text accompanying notes 10-18 *infra.*

[39] 567 F.2d at 1271. *See* 29 U.S.C. § 623(f)(1) (1976) (bona fide occupational qualification is an exception to ADEA's general proscription of age restrictions in hiring).

[40] 567 F.2d at 1271.

[41] *Id.; see* LABOR DEPARTMENT INTERPRETIVE BULLETIN ON ADEA, 29 C.F.R § 860.102(b) (1978) [hereinafter cited as *Department of Labor Bulletin*). The Department of Labor suggests that as an exception to the general proscription of blanket age limitations in ADEA, the bona fide occupational qualification (bfoq) must be construed narrowly and given limited application. *Id.* Justification for the bfoq is to be determined on "all the pertinent facts surrounding each particular situation." *Id.; see ADEA After Usery,* note 13 *supra,* at 372 n.49.

[42] 499 F.2d 859, 863 (7th Cir. 1974), *cert. denied* 419 U.S. 1122 (1975).

[43] 567 F.2d at 1271. Hodgsen v. Greyhound Lines, 499 F.2d 859, 863 (7th Cir. 1974).

and the necessity of physical prowess.[44] The lower court denied Arritt's motion to enter a counter-affidavit, holding that an increased risk in eliminating the age restriction would be incontrovertible. Since Moundsville's age requirement seemed reasonably related to providing a qualified police force, the lower court granted summary judgment for Moundsville.[45]

The Fourth Circuit agreed that facts in the record may have met the lower court's test of a bfoq, but vacated the lower court's judgment, choosing not to follow the *Hodgsen* "minimal increase" test.[46] The Fourth Circuit adopted instead the standard developed by the Fifth Circuit in *Usery v. Tamiami Trail Tours, Inc.*[47] *Tamiami* requires the employer to prove that his age restriction is reasonably necessary to his business and to show a factual basis for believing that all or most people excluded by the restriction would be incapable of performing the job or could not be tested individually.[48] The Fourth Circuit remanded the case for further development of the facts under the *Tamiami* test of a bfoq.[49]

The difference between the "minimal increase" test and the *Tamiami* standard is substantial. Both tests put the burden of justifying an age restriction on an employer, yet the "minimum increase" test would rarely disturb state age qualifications in police hiring.[50] Since police work directly affects the public safety, abrogating even over-exclusive age qualifications would affect police competence to some degree and increase the risk of harm.[51] A police age screen would seldom fail the "minimum increase of risk" test. The *Tamiami* standard, on the other hand, treats public safety as only one of several factors used in evaluating whether the age restriction is reasonable.[52] To meet the *Tamiami* standard, Moundsville must show either that all or most people over 35 are incapable of police work or that

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[44] Arritt v. Grisell, 421 F. Supp. 800, 802 (N.D. W. Va. 1976), *rev'd*, 567 F.2d 1267 (4th Cir. 1977). Moundsville's affidavit, filed by the Chief of Police, recited job requirements including fast driving, accurate shooting, quick reflexes, and physical prowess. *Id.* at 802-03. The affidavit also stated that new recruits receive the most demanding assignments and that the Chief of Police believed that skills necessary for police work decline with age. *Id.*

[45] *Id.* at 803. At a hearing on cross motions for summary judgment the district court declined to consider Arritt's counter affidavit since "the aging process . . . could not be seriously questioned in the plaintiff's proferred affidavit." *Id.*

[46] 567 F.2d at 1271.

[47] 531 F.2d 224, 234 (5th Cir. 1976).

[48] 567 F.2d at 1271, *citing* Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 234 (5th Cir. 1976). The *Tamiami* standard is a synthesis of two Fifth Circuit decisions, Diaz v. Pan Am. World Airways, 442 F.2d 385, 387 (5th Cir.), *cert. denied* 404 U.S. 950 (1971) (requiring a showing of reasonable necessity going to essence of business), and Weeks v. Southern Bell Tel. & Tel., 408 F.2d 228, 235 (5th Cir. 1969) (requiring employer to prove all or most of the restricted class could not perform the job in question or that individual testing is impractical).

[49] 567 F.2d at 1271.

[50] *See Age Discrimination, supra* note 25 at 407.

[51] *Id.*

[52] The Fifth Circuit mentioned in *Tamiami* that it considered adopting the less stringent *Hodgson* "minimal increase in risk of harm" approach to account for jobs affecting the public safety, but decided instead that safety is adequately considered in the *Diaz* part of the two-pronged test, since what is reasonable includes what is safe. Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 234 (5th Cir. 1976); *see* note 48 *supra.*