Washington and Lee Law Review

Volume 42 | Issue 2 Article 10

Spring 3-1-1985

IV. Employment and Labor Law

with decisions in other circuits recognizing an appellate court's inherent power to grant a party leave to file an untimely motion to rehear.[77] However, *Black* does not state upon what grounds a court will grant leave to file an untimely motion,[78] although the principles in other circuits governing grounds for recall would appear to apply in the Fourth Circuit.[79] The *Black* court also showed that the Fourth Circuit is willing to grant leave to file an untimely motion to rehear without close scrutiny of the reason for untimeliness.[80] In holding that section 3161(h)(l)(J) encompasses untimely motions, however, *Black* indicates that subsequent untimely motions will be considered on both the merits of the motion and the absence of dilatory motives.[81] The *Black* court refused to construe section 3161(h)(l)(J) in a way that would force courts and prosecutors to choose between an untimely, but sound, attack on a mandate and imminent dismissal of charges under the Act.[82] Instead, the court adopted an approach that has the effect of tying the section 3161(h)(l)(J) exclusion to the substance of the rehearing motion.[83]

FRANCIS MIKE SHAFFER

IV. EMPLOYMENT AND LABOR LAW

A. Associated Dry Goods Corp. v. EEOC: *EEOC Special Disclosure Rules—Support or Undermine the Provisions of Title VII?*

Title VII of the Civil Rights Act of 1964 (Title VII)[1] established and

77. *See* 733 F.2d at 351; *supra* note 53 (listing decisions in which courts allowed late petition for rehearing after issuance of mandate).

78. *See* 733 F.2d at 351-352, 352 n.1 (§ 3161(h)(l)(J) excludes any "proceeding," timely or untimely, from computation of delay allowed under Act).

79. *See supra* note 53 (citing decisions in other circuits discussing recall of mandate).

80. *See* 733 F.2d at 351 (citing district court finding in *Black* that government delayed in good faith); *cf. id.* at 352 n.1 (Winter, J., dissenting) (citing absence of good grounds for duplicative filing). *But see supra* note 42 (under new Fourth Circuit internal procedures, government attorneys may receive special extension of time in which to file petition for rehearing, in order to allow Solicitor General to review merits of petition prior to filing).

81. *See* 733 F.2d at 351 (citing district court finding that government acted in good faith); *cf. id.* at 353 (Winter, J., dissenting) (procedural abuse by government mandates dismissal of indictment to enforce defendant's sixth amendment speedy trial right embodied in Act's time limit).

82. *See* 733 F.2d at 351-52 & n.1; *supra* note 76 and accompanying text (failure to treat untimely petition as "proceeding" could result in unmerited grant of rehearing).

83. *See supra* notes 61-63 and accompanying text (court will take petition for rehearing under advisement, and will thus toll Act time limit for an extended period, only when sufficient grounds warrant consideration of petition).

1. The Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (1964) (codified at 42

empowered the Equal Employment Opportunity Commission (EEOC)[2] to prevent discriminatory employment practices.[3] An employee claiming to be injured as a result of discrimination in employment must file a charge with the EEOC before the employee can maintain a cause of action in federal court.[4] After the party files the charge, Title VII gives the EEOC time to notify the employer of the charge and to investigate the alleged discriminatory employment practice.[5] If the EEOC finds that the charge has merit, the

---

U.S.C. § 1981-2000h-6 (1982)). The Civil Rights Act of 1964 banned discrimination based on race, color, religion, sex, or national origin in a wide variety of areas that affect individual activity. 42 U.S.C. § 2000a-2000e-2 (1982). Specifically, the Civil Rights Act of 1964 provided federal protection from discrimination in public accommodations and publicly owned or managed facilities, in programs receiving federal funding, and in employment affecting interstate commerce. *Id.* Title VII of the Civil Rights Act of 1964 (Title VII) prohibited employers, labor organizations, and employment agencies from discriminating in their employment practices. *Id.* at § 2000e-2. *See generally* Note, *The Civil Rights Act of 1964*, 78 HARV. L. REV. 684, 684 (1965) (general discussion of Civil Rights Act of 1964).

2. 42 U.S.C. § 2000e-4(a) (1982). Congress established the Equal Employment Opportunity Commission (EEOC) as the agency responsible for the administration of Title VII. *Id.* Congress created the EEOC as a permanent body composed of five members, no more than three of whom may be members of the same political party. *Id.* Title VII also authorized the President to appoint EEOC members, subject to the confirmation of the Senate, to staggered five year terms. *Id.*

3. 42 U.S.C. § 2000e-5(a) (1982). Congress empowered the EEOC to prevent any person from engaging in employment discrimination on the basis of race, color, religion, sex, or national origin. *Id.* Congress did not provide the EEOC with independent enforcement powers, but rather authorized the EEOC to investigate charges of employment discrimination and to seek resolution of charges through the informal means of mediation and conciliation. *See id.*

4. 42 U.S.C. §§ 2000e5(a)-2000e-5(f) (1982). If the EEOC determines that a charge of discriminatory employment practices has merit the EEOC must endeavor to eliminate the alleged unlawful employment practice by the informal methods of mediation and conciliation. *Id.* § 2000e-5(b). If the EEOC is unable to negotiate a conciliation agreement within 30 days after an aggrieved party files a charge, the EEOC may file suit against the employer charged with using discriminatory employment practices. *Id.* § *2000e-5(f).* If the EEOC dismisses the charge or for any reason fails to negotiate a settlement or file suit within 180 days after the charge is filed, the EEOC must issue a right to sue notice to the charging party. *Id.* Within 90 days after receiving the EEOC's right to sue notice, the charging party may file suit against the charged employer. *Id.*

5. *Id.* § 2000e-5(b). When the EEOC receives a charge of employment discrimination, the EEOC must serve a notice of the complaint to the charged employer within 10 days after the charge is filed. *Id.* The EEOC must indicate in the notice the circumstances of the alleged discriminatory employment practice. *Id.* After the EEOC serves notice of the complaint to the charged employer, the EEOC then investigates the charge to determine if reasonable cause exists to support the allegations. *Id.* An EEOC investigation generally begins when an Equal Opportunity Specialist (EOS) is assigned to investigate the charge of employment discrimination. *See* Note, *The Use of EEOC Investigative Files In Title VII Actions*, 61 B.U. L. REV. 1245, 1247 (1981) (discussion of EEOC investigative procedures). The EOS may interview parties, request information through interrogatories, and issue subpoenas for the production of evidence or the attendance and testimony of witnesses. *Id.* The scope of an EEOC investigation is not limited however, to the specific circumstances alleged in a charge of employment discrimination, but may include discrimination issues that the charging party did not allege. *Id.* at 1248. In addition, the EEOC may seek other information that may assist in resolving other charges of employment discrimination. *Id.* The evidence contained in an EEOC investigative file may include statements

EEOC may negotiate a conciliation agreement between the employer and the employee to eliminate the challenged employment practice.[6] Title VII prevents the EEOC from making public the contents of a charge[7] or the information obtained by the EEOC during an investigation.[8] In addition, Title VII prohibits the EEOC from revealing any information about the EEOC's informal endeavors to negotiate a conciliation agreement.[9]

To implement the provisions of Title VII, Congress granted the EEOC authority to establish procedural regulations.[10] The EEOC subsequently issued disclosure regulations that permit presuit disclosure to a charging party of materials contained in the charging party's investigative file.[11] In

---

by the employee, the employer, witnesses of the employer and the employee, the investigator's recommendations, and the employer's records. *Id.* at 1250.

6. 42 U.S.C. § 2000e-5(b) (1982). If after investigation the EEOC finds that an employee's complaint has merit, the EEOC must endeavor to eliminate the alleged discriminatory employment practice through the informal means of conciliation and negotiation. *Id.* If the EEOC is unable to negotiate a conciliation agreement within 30 days after an aggrieved party files a charge, the EEOC may file suit against the charged employer. *Id.* § 2000e-5(f). If after investigation the EEOC does not have reasonable cause to believe that the allegations in the charge are true, the EEOC may dismiss the charge. *Id.* § 2000e-5(b).

7. 42 U.S.C. § 2000e-5(b) (1982). Section 2000e-5(b) of Title VII prohibits the EEOC from making public the contents of a charge of employment discrimination. *Id.* Senator Hubert Humphrey, cosponsor of the Civil Rights Act of 1964, stated during debate on the Act that the disclosure provisions of Title VII were intended to prevent public dissemination of unproven charges. *See* 110 CONG. REC. 12,723 (1964) (statement of Senator Humphrey).

8. 42 U.S.C. § 2000e-8(e) (1982). Section 2000e-8(e) of Title VII prohibits the EEOC from making public in any manner whatsoever any information obtained by the EEOC during the investigation of a charge. *Id.* Section 2000e-8(e) further states that any officer or employee of the EEOC who makes public any information obtained by the EEOC during an investigation is guilty of a misdemeanor. *Id.; see supra* note 5 (contents of EEOC investigative file may include statements by employer and employees, investigator's recommendations, and employer's records); *see also supra* note 7 (disclosure provisions of Title VII were intended to prevent public dissemination of unproven charges).

9. 42 U.S.C. § 2000e-5(b) (1982). Section 2000e-5(b) of Title VII prohibits the officers and employees of the EEOC from making public anything said or done during the EEOC's informal endeavors to negotiate a conciliation agreement to eliminate an alleged discriminatory employment practice. *Id.* Section 2000e-5(b) of Title VII states that any officer or employer of the EEOC who makes public the matters discussed in a conciliation meeting is guilty of a misdemeanor. *Id.; see supra* note 7 (disclosure provisions of Title VII intended to prevent public dissemination of unproven charges).

10. 42 U.S.C. § 2000e-12(a) (1982). Congress authorized the EEOC to establish procedural regulations to enable the EEOC to carry out the provisions of Title VII. *Id.; see also* EEOC v. Raymond Metal Products Co., 530 F.2d 590, 593 (4th Cir. 1978) (acknowledging EEOC's authority to make procedural rules). In *EEOC v. Raymond Metal Products, Co.*, the United States Court of Appeals for the Fourth Circuit acknowledged that Congress had empowered the EEOC to make suitable procedural regulations to carry out the provisions of Title VI. 530 F.2d at 592-93.

11. 29 C.F.R. § 1601.22 (1984). The EEOC's general policy on disclosure states that the EEOC shall not make public charges, investigative information, or records and reports filed by the EEOC. *Id.* The EEOC has stated, however, that disclosure to charging parties is not prohibited when disclosure is necessary to secure appropriate relief. *Id.* In fact, the EEOC has created special disclosure rules pertaining to charging parties. *See* 29 C.F.R. § 1610.17(d) (1984) (EEOC's special disclosure rules for disclosure of information to charging parties are contained

Associated Dry Goods Corp. v. EEOC,[12] the United States Court of Appeals for the Fourth Circuit addressed the issue whether the EEOC's disclosure rules were valid and enforceable.[13]

In *Associated Dry Goods*, several employees and former employees of the Joseph Horne Company (the Company), a subsidiary of the Associated Dry Goods Corporation,[14] filed charges against the Company with the EEOC.[15] The charging parties alleged that the Company engaged in discriminatory employment practices in violation of Title VII.[16] The EEOC began investigating the charges of employment discrimination in 1974.[17] A short time later, the Pittsburgh district office of the EEOC served interrogatories on the Company.[18] Before answering the interrogatories the Company requested assurances that the EEOC would not disclose the answers to the interrogatories to the charging parties.[19] The EEOC, however, refused to

---

in EEOC Compliance Manual); *see also EEOC Compliance Manual* §§ 83.3-83.5(e) (1975). According to the EEOC, the charging party is not a member of the public to whom disclosure of information regarding the charge, investigation, or negotiation is prohibited. *EEOC Compliance Manual* § 83.5(e) (1975). The special disclosure rules permit disclosure to the charging party if the charging party has received a right to sue notice or has demonstrated a compelling need for disclosure. *Id.* §§ 83.3(a)-83.5(a). Before the charging party may receive information contained in the EEOC case files, the charging party must agree in writing not to make the information public. *Id.* § 83.3(b). The special disclosure rules permit disclosure to a charged employer and the attorneys representing the charged employer after the charging party files suit under Title VII. *Id.* §§ 83.3(a)-83.5(a). After the charging party receives a right to sue notice under Title VII, the information contained in the charging party's case file may be disclosed to the charging party and the attorneys representing the charging parties on request. *Id.*

12. 720 F.2d 804 (4th Cir. 1983).

13. *Id.* at 808.

14. *See* Associated Dry Goods Corp. v. EEOC, 419 F. Supp. 814, 816 (E.D. Va. 1976). In *Associated Dry Goods v. EEOC*, the Associated Dry Goods Corporation was a Virginia corporation that owned numerous retail department stores across the United States. *Id.* The Joseph Horne Company was a subsidiary of the Associated Dry Goods Corporation and operated retail stores in the Pittsburgh, Pennsylvania area. *Id.*

15. *See* 720 F.2d 804, 806 (4th Cir. 1983).

16. 454 F. Supp. 387, 389 (E.D. Va. 1978). In *Associated Dry Goods*, several employees and former employees of the Joseph Horne Company (the Company) filed charges alleging that the Company had engaged in discriminatory employment practices on the basis of race or sex. *Id.*; *see* 42 U.S.C. § 2000e-4-2000e-5 (1982) (prohibiting discriminatory employment practices).

17. 454 F. Supp at 389.

18. 419 F. Supp. at 817. The interrogatories at issue in *Associated Dry Goods Corp. v. EEOC* sought a wide range of information relating to the business and employment practices of the Joseph Horne Company, a subsidiary of the Associated Dry Goods Corporation. *Id.* The EEOC requested the employment records of the employees who filed charges along with statistics and documents describing the general personnel practices of the Company. *Id.*

19. *Id.* In *Associated Dry Goods*, the Joseph Horne Company refused to answer the interrogatories without an assurance of nondisclosure. *Id.* The reluctance of the Company to answer the requested interrogatories stemmed from a previous incident in which the EEOC revealed the Company's answer to a February, 1974 interrogatory to an attorney for one of the charging parties. *Id.; see Brief for Appellee* at 3 n.2, Associated Dry Goods Corp. v. EEOC, 720 F.2d 804 (4th Cir. 1983). The interrogatory disclosed by the EEOC contained the names of all the charging parties and questions from which the substance of the charges could be inferred. *Brief for Appellee* at 3 n.2. The attorney who received the interrogatory represented the

provide any assurance that the Company's responses would not be disclosed to the charging parties.[20]

Without an assurance of nondisclosure, the Company refused to answer the EEOC's interrogatories.[21] The EEOC subsequently issued a subpoena to compel the Company to produce the requested information.[22] In response, the Company petitioned the United States District Court for the Eastern District of Virginia to enjoin the enforcement of the EEOC's subpoena, but the district court denied the petition.[23] Rather than comply with the subpoena, the defendant's parent company, Associated Dry Goods Corporation (Associated), filed suit in the United States District Court for the Eastern District of Virginia.[24] Associated alleged that the EEOC's disclosure rules violated sections 706(b) and 709(e) of Title VII which prohibit public disclosure of investigative materials.[25] In addition, Associated asserted that the EEOC's disclosure rules were substantive in nature and, therefore, exceeded the EEOC's statutory authority to issue procedural rules and regulations.[26] Associated also contended that as substantive rules, the EEOC's disclosure rules were not issued in accordance with the notice and comment requirements of the federal Administrative Procedure Act.[27]

Company's business competitors and labor unions that had collective bargaining agreements with the Company. *Id.*

20. 454 F. Supp. 387, 389 (E.D. Va. 1978). In *Associated Dry Goods*, the EEOC explained that the EEOC would disclose to any charging party any information compiled during the investigation concerning both the party's case and related cases involving the same employer. *Id.* The EEOC acknowledged, however, that the EEOC had no means of assuring that the charging parties would not transmit the disclosed information to others. *Id.*

21. *Id.*

22. *Id.; see* 42 U.S.C. § 2000e-9 (1982) (applying the National Labor Relations Act, which authorizes NLRB to issue subpoenas requiring testimony and attendance of witnesses or production of evidence to all EEOC investigations and hearings); 29 U.S.C. § 161 (1982) (codifying NLRA and authorizing NLRB to issue subpoenas requiring attendance and testimony of witnesses or production of evidence). Congress has authorized the EEOC to issue subpoenas requiring the attendance and testimony of witnesses or the production of any evidence applicable to the proceedings or investigation. *See* 42 U.S.C. § 161(1) (1982). Employers may challenge an EEOC subpoena and if the evidence requested is irrelevant or if the subpoena is not sufficiently specific the EEOC will revoke the subpoena. *Id.* If an employer fails to comply with an EEOC subpoena the EEOC can petition for enforcement of the subpoena in federal district court. *Id.* § 161(2) (1982).

23. 454 F. Supp. 387, 389 (E.D. Va. 1978).

24. 720 F.2d at 806.

25. *Id.; see* 42 U.S.C. §§ 2000e-5(b), 2000e-8(e) (1982) (prohibiting EEOC from making public contents of a charge, investigative information, or anything said or done during EEOC conciliation endeavors); *see also supra* notes 7-9 and accompanying text (discussion of disclosure provisions of Title VII).

26. 720 F.2d at 806; *see* 42 U.S.C. § 2000e-12(a) (1982) (authorizing EEOC to establish procedural regulations to carry out provisions of Title VII).

27. 720 F.2d at 806-07; *see* Administrative Procedure Act 5 U.S.C. § 553 (1982) (requiring notice and comment procedures for proposed rule making). The Administrative Procedure Act (APA) requires each administrative agency to publish general notice of a proposed rulemaking in the Federal Register. 5 U.S.C. § 553(b) (1982). The notice must include the time, place, and nature of the rule making proceedings along with information describing the substance of the

The district court ruled only on Associated's allegation that the EEOC's disclosure rules violated Title VII's prohibition against public disclosure of investigative materials.[28] The district court ruled that section 709(e) of Title VII specifically prohibited disclosure of the EEOC's investigative files to anyone outside of the federal government, including charging parties.[29] The district court therefore held that the EEOC's rules permitting pretrial disclosure of investigative materials to charging parties violated section 709(e).[30] The EEOC appealed the district court's ruling to the United States Court of Appeals for the Fourth Circuit.[31] The Fourth Circuit affirmed the district court's determination by stating that sections 709(e) and 706(b) of Title VII necessarily prohibit disclosure of investigative materials to charging parties prior to suit.[32]

On a writ of certiorari the United States Supreme Court reversed the Fourth Circuit's ruling in *Associated Dry Goods,* holding that Congress did not intend section 706(b) and 709(e) of Title VII to prohibit disclosure of confidential information to charging parties.[33] The Supreme Court stated, however, that a charging party must be considered a member of the public to whom disclosure is prohibited with respect to related charges filed by

---

proposed rules and the subjects or issues involved. *Id.* §§ 553(b)(1)-553(b)(3). After an administrative agency publishes notice of a proposed rule making, the agency must provide interested parties with an opportunity to participate in the rule making. *Id.* § 553(c). The hearing enables interested parties to submit written data or arguments concerning the proposed rule making with or without an opportunity for oral presentation. *Id.* Section 553(c) of the APA requires administrative agencies to consider all relevant matter presented and to produce a general statement of the basis and purpose of the adopted rules. *Id.* Interpretive rules and rules of agency procedure are exempted from the notice and comment provisions of the Administrative Procedure Act. *Id.* § 553(b)(A).

28. 720 F.2d at 807.

29. *Id.; see* 42 U.S.C. § 2000e-8(e) (1982) (prohibiting EEOC from making public any information obtained during EEOC investigation); *see also supra* note 8 (Title VII prohibits disclosure of investigative materials to the public).

30. *Id.; see* 42 U.S.C. § 2000e-8(e) (1982) (prohibiting EEOC from making public any information obtained during EEOC investigation); *see also supra* note 8 (Title VII prohibits disclosure of investigative materials to the public).

31. EEOC v. Joseph Horne Co., 607 F.2d 1075, 1077 (4th Cir. 1979).

32. *Id.; see* 42 U.S.C. § 2000e-5(b), 2000e-8(e) (1982) (prohibiting EEOC from making public contents of a charge, investigative information, and anything said or done during EEOC conciliation efforts); *see also supra* notes 7-9 and accompanying text (discussion of disclosure provisions of Title VII).

33. EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 598 (1981). The United States Supreme court in *EEOC v. Associated Dry Goods Corp.* held that the legislative history and policy of Title VII supported the EEOC's rules authorizing disclosure of materials contained in the charging parties investigative files to charging parties. 449 U.S. 598; *see* 42 U.S.C. § 2000e-5(b), 2000e-8(e) (1982) (prohibiting EEOC from making public contents of a charge, investigative information, and anything said or done during EEOC conciliation efforts); *see also* 110 CONG. REC. 12,723 (1964) (statement of Senator Humphrey regarding Title VII). Senator Humphrey, cosponsor of the Civil Rights Act of 1964, stated that the disclosure provisions of Title VII were intended to prevent public dissemination of unproven charges, but not to prevent limited disclosures necessary to carry out the EEOC's functions. 110 CONG. REC. 12,723 (1964).

other parties.[34] The Supreme Court did not rule on whether the disclosure rules exceeded the EEOC's statutory authority or violated the notice and comment provisions of the Administrative Procedure Act because the lower courts had not decided these issues.[35] The Supreme Court, therefore, remanded the case to the district court for further proceedings consistent with the Court's opinion.[36]

On remand, the district court in *Associated Dry Goods* again found the EEOC's disclosure rules invalid.[37] The district court determined first that the disclosure rules were substantive and therefore exceeded the EEOC's limited authority to issue procedural rules.[38] The district court stated, however, that if an agency promulgates a substantive rule that exceeds the agency's statutory authority, the rule necessarily must be considered a nonbinding interpretive rule.[39] The district court recognized that the EEOC's disclosure rules could be considered nonbinding interpretive rulings of the EEOC.[40] As a result, the district court did not rest its holding solely on the ground that the

---

34. 449 U.S. at 603. In *Associated Dry Goods*,, the Supreme Court invalidated the EEOC's practice of disclosing information in related case files to the charging parties. *Id.* The Supreme Court's opinion, however, emphasized that permitting limited disclosure to the charging parties may assist the EEOC's investigation by providing specific information for the parties to corroborate or rebut. *Id.* at 600-01. The Supreme Court also stated that limited disclosure may enhance the EEOC's ability to resolve the allegedly unlawful employment practice through negotiation and conciliation. *Id.* at 601. The Court noted that disclosure may encourage litigation in some instances, but emphasized that Congress intended charging parties to act as private attornies general enforcing the ban on discrimination. *Id.* at 602.

35. *Id.* at 594 n.4.

36. *Id.* at 604.

37. Associated Dry Goods Corp. v. EEOC, 543 F. Supp. 950, 967 (E.D. Va. 1982).

38. 543 F. Supp. at 953. In *Associated Dry Goods*, the district court, on remand, emphasized that the procedural label attached by the EEOC to the EEOC's disclosure regulations did not prevent the district court from making an alternative finding. *Id.* The district court stated that the disclosure rules did more than merely regulate the procedure for handling disclosure requests. *Id.* at 956. The district court stated that the impact of the EEOC's disclosure rules substantively affected the rights of the parties. *Id.* at 954. The district court found that the EEOC's disclosure rules substantively affected the parties because under the rules a charging party would receive access to information 180 days after filing a charge with the EEOC, but the charged employer would receive access only after the charging party filed suit in federal district court. *Id.* at 957. The district court in *Associated Dry Goods* recognized that granting charging parties access to the EEOC's investigative files before allowing access to the charged employer could have a profound impact upon the ultimate disposition of the charges of employment discrimination. *Id.* at 954. The district court stated that both parties involved in the suit would be better able to assess the feasibility of litigation and would be more likely to settle the dispute if the EEOC's investigative files were disclosed to both parties at the same time. *Id.* The district court concluded that the substantive impact of the disclosure regulations indicated that, in issuing the disclosure rules, the EEOC had exceeded its statutory authority to issue procedural rules. *Id.* at 957.

39. *Id.* at 958; *see* Batterton v. Marshall, 648 F.2d 694, 705 (D.C. Cir. 1980). In *Batterton v. Marshall*, the United States Court of Appeals for the District of Columbia Circuit held that a rule which exceeds an agency's statutory authority must be considered an interpretive rule regardless of the rule's form or scope. 648 F.2d at 705.

40. 543 F. Supp. at 958. The district court in *Associated Dry Goods* acknowledged that

disclosure regulations exceeded the EEOC's statutory authority, but considered the validity of the disclosure regulations as interpretive rules.[41] The district court acknowledged that although courts generally should give some deference to the interpretive rulings of an administrative agency,[42] courts need not give deference to the EEOC's disclosure regulations since a confusing inconsistency surrounded the development of the rules.[43] The district court also held that even if the EEOC's disclosure regulations could be considered nonbinding interpretive rules, the substantial impact of the disclosure rules on the substantive rights of the parties required the EEOC to follow the Administrative Procedure Act's notice and comment provisions in promulgating the rules.[44]

In reviewing the *Associated Dry Goods* case, the Fourth Circuit reversed

---

even a finding that the disclosure rules were substantive would not render the regulations necessarily invalid. *Id.* The district court stated that courts could regard the EEOC's regulations on disclosure as interpretive rules that, although not binding on the courts, would be entitled to some judicial deference. *Id.; see* General Electric Co. v. Gilbert, 429 U.S. 125, 141-42 (1976) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)). In *General Electric Co. v. Gilbert*, the United States Supreme Court stated that the EEOC's interpretations of Title VII are not controlling upon the courts, but constitute a body of expertise and informed judgment that the courts may rely upon for guidance. *Id.* at 141-42. The *Gilbert* Court further stated that the particular weight a court should give an agency's interpretive regulations will depend upon the consistency of the regulations, the agency's earlier pronouncements, and the validity of the agency's reasoning in establishing the regulations. *Id.* at 142 (quoting Skidmore v. Swift & Co., 323 U.S. at 140).

41. 543 F. Supp. at 958; *see supra* note 10 and accompanying text (Congress authorized EEOC to issue procedural rules to carry out provisions of Title VII).

42. 543 F. Supp. at 958; *see supra* note 40 and accompanying text (courts generally give some deference to interpretive rulings of administrative agency).

43. 543 F. Supp. at 962. In *Associated Dry Goods*, the district court remarked that the EEOC's persistent lack of clarity provided the only consistent aspect of the EEOC's regulations regarding disclosure. *Id.* The district court noted that in 1965 the EEOC issued its primary regulation governing disclosure. *Id.* at 959; *see* 29 C.F.R. § 1601.20 (1965). The regulation permitted disclosure to a charging party if necessary or appropriate to carry out the EEOC's function. 29 C.F.R. § 1601.20 (1965). In 1977, the EEOC changed its initial disclosure regulation to permit disclosure to charging parties if necessary to secure appropriate relief. *See* 29 C.F.R. § 1601.22 (1977). The EEOC first issued the special disclosure rules for charging parties and charged employers in 1975. *See* 29 C.F.R. 1610.17(d) (1975) (referring to special disclosure rules embodied in § 83 of the EEOC Compliance Manual); *see supra* note 11 and accompanying text (discussion of EEOC's special disclosure rules). The district court in *Associated Dry Goods* held, therefore, that the EEOC's special disclosure rules lacked a contemporaneous interpretation from Title VII and merited little judicial deference. 543 F. Supp. at 962.

44. 543 F. Supp. at 967. In *Associated Dry Goods*, the district court held that since the EEOC's disclosure regulations had such significant impact and effect on the rights and obligations of charging parties and charged employers the EEOC should have provided notice and comment in promulgating the disclosure rules. *Id.; see* 5 U.S.C. § 553 (1982) (requiring notice and comment of a proposed rule making); *supra* note 27 (discussion of notice and comment provision of Administrative Procedure Act); *see also* Asimow, *Public Participation In The Adoption Of Interpretive Rules And Policy Statements*, 75 MICH. L. REV. 520, 552 (1977) (substantial impact of interpretive regulation may require notice and opportunity to be heard).

45. *See* 720 F.2d 804, 812 (4th Cir. 1983).

the district court's ruling and held that the EEOC's disclosure regulations were valid procedural rules.[45] The Fourth Circuit emphasized that Congress had not empowered the EEOC with the authority to impose binding substantive obligations upon the parties.[46] After examining the function and effect of the EEOC's disclosure regulations the Fourth Circuit stated that the disclosure rules were not substantive in nature but were valid procedural regulations.[47] Furthermore, contrary to the district court's holding in *Associated Dry Goods*, the Fourth Circuit found that the EEOC's disclosure rules, even if considered as interpretive rules, were valid and entitled to judicial deference.[48]

The Fourth Circuit also disputed the district court's contention that the EEOC's disclosure rules substantially disadvantaged the charged employer.[49]

---

46. *Id.* at 809. In a 1976 case, *EEOC v. Raymond Metal Products Co.*, the Fourth Circuit noted that Congress has mandated that the EEOC may issue only procedural rules. 530 F.2d 590, 593 (4th Cir. 1976); *see* 42 U.S.C. § 2000e-12(a) (1982). The Fourth Circuit stated that Congress specifically denied the EEOC the power to make substantive rules that create rights and obligations. 530 F.2d at 593. The Fourth Circuit in *Raymond Metal Products* further noted that the administrative actions of the EEOC do not in themselves create any rights or impose any obligations on the parties. *Id.; see* Georator Corp. v. EEOC, 592 F.2d 765, 768 (4th Cir. 1979) (EEOC has no adjudicative powers and thus EEOC's proceedings are not binding on employers); *supra* note 10 and accompanying text (Congress authorized EEOC to establish procedural rules to carry out provisions of Title VII).

47. 720 F.2d at 809. The Fourth Circuit in *Associated Dry Goods* emphasized that courts generally consider regulations relating to disclosure of information in administrative proceedings to be procedural rules. *Id.* Moreover, the United States Supreme Court in *Columbia Broadcasting System, Inc. v. United States* stated that the particular label placed on an administrative agency's regulation is not dispositive on the regulation's function. 316 U.S. 407, 416 (1942). Only the actual substance and the purported function of the agency's regulation is dispositive of whether the rule is substantive or procedural. *Id.* For example, in *FCC v. Schreiber*, the United States Supreme Court upheld a Federal Communications Commission regulation authorizing disclosure of financial information as a valid procedural rule. 381 U.S. 279, 288 (1965). In *Associated Dry Goods*, the Fourth Circuit stated that it perceived no distinction between the function of the FCC procedural rule in *Schreiber* and the EEOC disclosure regulations in *Associated Dry Goods*. 720 F.2d at 809.

48. 720 F.2d at 811. The Fourth Circuit stated in *Associated Dry Goods* that the EEOC's disclosure rules had remained consistent over a long period of time and were entitled to judicial deference. *Id.; see* American Trucking Ass'n v. United States, 688 F.2d 1337, 1341 (11th Cir. 1982). In *American Trucking Ass'n v. United States*, the petitioners brought an action challenging the validity of an Interstate Commerce Commission regulation that governed the antitrust exemption of motor carrier rate bureaus. 688 F.2d at 1341. The United States Court of Appeals for the Eleventh Circuit stated that an agency necessarily possesses the implied authority to issue interpretive rules to enforce the terms of the agency's governing statute. *Id.* The Eleventh Circuit also stated that courts generally will give great deference to an agency's interpretive rules as long as the rules are consistent and reasonable. *Id.* at 1342; *see also supra* note 40 and accompanying text (courts generally give deference to interpretive rules of administrative agencies).

49. *Associated Dry Goods*, 720 F.2d at 811. In *Associated Dry Goods*, the Fourth Circuit stated that the EEOC's disclosure regulations would not provide a substantive advantage to charging parties. *Id.* The Fourth Circuit emphasized that a charging party's right to disclosure did not occur until 180 days following the filing of a complaint of employment discrimination. *Id.* The Fourth Circuit stated that after 180 days, the charging party's right to sue already had

The Fourth Circuit noted that allowing disclosure of investigative materials to the charging party 180 days after the charge is filed would not provide the charging party with a substantive advantage in any subsequent suit.[50] Finally, the Fourth Circuit held that section 553 of the Administrative Procedure Act exempted the EEOC's disclosure rules, whether labeled as procedural or interpretive, from notice and comment prior to the rules promulgation.[51] Thus, the Fourth Circuit, in *Associated Dry Goods*, held that the EEOC's disclosure regulations were valid procedural rules.[52]

The Fourth Circuit in *Associated Dry Goods* noted that Congress granted the EEOC authority to issue procedural regulations to carry out the provisions of Title VII.[53] The provisions of Title VII establish an enforcement scheme that directs the EEOC to eliminate discriminatory employment practices through the use of informal methods such as negotiation and conciliation.[54] As a secondary method of enforcement Title VII also provides that the EEOC may bring a civil action against the charged employer if the EEOC's endeavors to negotiate an acceptable conciliation agreement fail.[55] Title VII further provides that the charging party may bring a civil action against the charged employer if the EEOC dismisses the charge or fails to negotiate a conciliation agreement within 180 days after the charging party files the complaint.[56] Congress, therefore, specified that the EEOC's endeavors to eliminate discriminatory employment practices through the informal methods of negotiation and conciliation would be the preferred means of assuring equality in employment practices.[57]

---

accrued and the conciliation period presumably had expired. *Id.* The Fourth Circuit further noted that since a charged employer is entitled to immediate disclosure when the charging party files suit, the charged employer would not suffer substantial prejudice from the lack of access during the presuit phase. *Id.*

50. *Id.; see supra* note 49 and accompanying text (Fourth Circuit stated EEOC's disclosure rules would not provide charging party with substantive advantage).

51. 720 F.2d at 812; *see* 5 U.S.C. § 553 (1982) (requiring notice and comment of proposed rule making); *see also supra* note 27 and accompanying text (discussion of notice and comment provision of Administrative Procedure Act).

52. 720 F.2d at 809.

53. *Id.* at 807; *see* 42 U.S.C. § 2000e-12(a) (1982) (Congress authorized EEOC to issue procedural rules to carry out provisions of Title VII); *see also supra* note 10 and accompanying text (EEOC has no power to issue substantive rules creating rights and obligations).

54. 42 U.S.C. § 2000e-5(b) (1982) (EEOC must endeavor to eliminate discriminatory employment practices through negotiation and conciliation); *see* Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974). In *Alexander v. Gardner-Denver Co.*, the United States Supreme Court stated that Congress established the EEOC to eliminate discriminatory employment practices. 415 U.S. at 44. The Supreme Court stated that the EEOC's endeavors to achieve voluntary compliance through negotiation and conciliation is the preferred means of achieving this statutory goal. *Id.*

55. 42 U.S.C. § 2000e-5(f)(1) (1982) (EEOC may bring civil action against charged employer if unable to reach conciliation agreement with 30 days after charge is filed).

56. *Id.* § 2000e-5(f)(1)(A) (charging party may bring civil action against charged employer if EEOC dismisses charge or fails to negotiate conciliation agreement within 180 days).

57. *See* S. REP. No. 415, 92d Cong., 1st Sess. 7168 (1971). In enacting Title VII Congress had hoped that recourse to a private civil action would be the exception and that the EEOC's

The EEOC's current disclosure regulations do not support or carry out the enforcement scheme of Title VII, which promotes the use of negotiation and conciliation to eliminate discriminatory employment practices.[58] The EEOC's disclosure rules provide for disclosure of investigative materials to a charging party 180 days after the charging party filed an employment discrimination charge or even earlier than 180 days if the charging party demonstrates a compelling need for access.[59] The charged employer, however, is given access to EEOC investigative materials only after the charging party files suit in federal district court.[60] The one-sided nature of the EEOC's disclosure regulations may encourage the filing of private lawsuits and frustrate the EEOC's investigative efforts.[61] The EEOC's efforts to reach a conciliation agreement are not necessarily exhausted 180 days after a charging party files an employment discrimination complaint. Disclosure of investigative materials to a charging party while the EEOC continues its efforts to reach a conciliation agreement may disrupt the EEOC's endeavors to negotiate a settlement by diminishing the charging party's willingness to settle the dispute.[62] The present disclosure regulations do not support or carry out the provisions of Title VII and therefore are not valid procedural rules.[63]

---

endeavors to reach an acceptable conciliation agreement would be the primary remedy for discriminatory employment practices. *Id.*

58. *See* Burlington Northern, Inc. v. EEOC, 582 F.2d 1097, 1099 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979). In *Burlington Northern, Inc. v. EEOC,* the United States Court of Appeals for the Seventh Circuit held that the EEOC's disclosure regulations were entirely inconsistent with the enforcement scheme of Title VII. *Id.* The Seventh Circuit stated that the enforcement scheme of Title VII emphasized the EEOC's efforts to reach a conciliation agreement as the primary remedy for discriminatory employment practices. *Id.* The Seventh Circuit asserted that the EEOC's disclosure rules would disrupt the enforcement scheme of Title VII because disclosure of investigative materials to charging parties would encourage the filing of private lawsuits. *Id. at 1100; see also* Sears, Roebuck & Co. v. EEOC, 581 F.2d 941, 946 (D.C. Cir. 1978). In *Sears, Roebuck & Co. v. EEOC,* the United States Court of Appeals for the District of Columbia held that the statutory scheme of Title VII promotes cooperation and voluntary compliance as the preferred means of eliminating discriminatory employment practices. 581 F.2d at 946. The District of Columbia Circuit stated that the EEOC's disclosure regulations would encourage private litigation and drastically undermine the EEOC's efforts to eliminate unlawful employment practices through negotiation and conciliation. *Id.* In *Sears, Roebuck,* the EEOC began to disclose investigative information to the charging parties after nearly four years of extensive negotiations with the charged employer. *Id.* The District of Columbia Circuit emphasized that the EEOC's disclosure rules improperly subordinated the EEOC's efforts to achieve a conciliation agreement to enable a few charging parties to file private civil actions. *Id.*

59. *See supra* note 11 and accompanying text (discussion of EEOC's special disclosure rules).

60. *Id.*

61. *See supra* note 58 and accompanying text (EEOC disclosure rules encourage private litigation and undermine enforcement scheme of Title VII).

62. *See supra* notes 54-58 and accompanying text (EEOC disclosure rules undermine EEOC's efforts to eliminate discriminatory employment practices through negotiation and conciliation).

63. *See supra* notes 10, 53 and accompanying text (Congress authorized EEOC to issue procedural rules to carry out provisions of Title VII)

In *Associated Dry Goods*, the Fourth Circuit held that the EEOC's disclosure regulations were valid procedural rules issued to carry out the provisions of Title VII.[64] The Fourth Circuit, however, neglected to consider the adverse effects of disclosure upon the EEOC's endeavors to eliminate unlawful employment practices through conciliation and negotiation. Since the EEOC's disclosure regulations impair the enforcement scheme of Title VII, the regulations cannot be considered valid procedural rules.

ROBERT WALKER HUMPHRIES

B. *Federal Pension Offset Provisions: Minimum Standard or Federal Mandate?*

Title III and Title IX of the Social Security Act of 1935[1] established the first national unemployment insurance program.[2] Congress intended that the unemployment compensation system provide compensation to workers who had become unemployed through no fault of their own.[3] In response to the common state practice of paying unemployment benefits to retired persons who already were receiving retirement pensions, Congress enacted section

64. 720 F.2d at 809.

1. Social Security Act, ch. 531, Title III, 49 Stat. 620, 626-27 (1935) (codified as amended at 42 U.S.C. §§ 501-506 (1982)); Social Security Act, ch. 531, Title IX, 49 Stat. 620, 639-45 (1935) (codified as amended at 26 U.S.C. §§ 3301-3311 (1982)).

2. *See* Steward Machine Co. v. Davis, 301 U.S. 548, 587-88 (1937) (before Congress enacted Social Security Act, only five states had adopted unemployment insurance programs). *See generally*, Witte, *An Historical Account of Unemployment Insurance in the Social Security Act*, 3 LAW & CONTEMP. PROBS. 157 (1936) (historical review of unemployment compensation in United States). In 1932, Wisconsin became the first state in the nation to enact an unemployment compensation program. Witte, *supra*, at 157; *see* 1931-1932 Wis. Laws, ch. 20 (1931) (codified as amended at WIS. STAT. §§ 108.01-108.26 (1981)) (Wisconsin unemployment insurance statute). Congress enacted title III and title IX to encourage the promulgation of state unemployment insurance statutes. Witte, *supra*, at 168-69. Witte notes that Congress passed title III and title IX as a cooperative system, and not as a distinctly federal or state endeavor. *Id.* at 168.

3. *See Report of the Committee on Economic Security: Hearings on S. 1130 before the Senate Comm. on Finance*, 74th Cong., 1st Sess. 1311 (1935) (unemployment insurance envisioned as subsistence benefits to unemployed worker for limited period in expectation he will be reemployed) [hereinafter cited as *Report of the Committee on Economic Security*]; Larson & Murray, *The Development of Unemployment Insurance in the United States*, 8 VAND. L. REV. 181, 186-87 (1955) (discussion of Committee on Economic Security Report); UNITED STATES DEPARTMENT OF LABOR, BUREAU OF ECONOMIC SECURITY, MAJOR OBJECTIVES OF FEDERAL-STATE EMPLOYMENT SECURITY PROGRAM, GENERAL ADMINISTRATION LETTER NO. 305 (1955) (unemployment insurance program provides income maintenance during period of involuntary

3304(a)(15) of title 26 of the United States Code.[4] Section 3304(a)(15), as originally enacted, required the states to offset unemployment compensation payments by the amount of any pension, public or private, that an applicant already was receiving.[5] In 1977, the Virginia General Assembly enacted section 60.1-48.1 of the Virginia Code[6] to conform with section 3304(a)(15) as required by the Federal Unemployment Tax Act.[7] Although Congress subsequently limited section 3304(a)(15) to encompass only pensions received from a base-period employer,[8] the Virginia statute continued to require an

---

unemployment) [hereinafter cited as GENERAL ADMINISTRATION LETTER No. 305]. General Administration Letter No. 305 stated that unemployment compensation provides income maintenance to the jobless without a loss of dignity. GENERAL ADMINISTRATION LETTER No. 305. Furthermore, unemployment benefits not only stabilize the economy and consumer purchasing power, but also provides an incentive to individual employers to stabilize employment by providing a lower tax rate to employers who maintain a regular labor force. *Id. See generally* W. HABER & M. MURRAY, UNEMPLOYMENT INSURANCE IN THE AMERICAN ECONOMY 26-32 (1966) (unemployment insurance stabilizes economy and employment and prevents destruction to businesses during recession).

4. Pub. Law 94-566, § 314, 90 Stat. 2680 (1976) (codified at 26 U.S.C. § 3304(a)(15) (1976)). *See* S. REP. No. 1265, 94th Cong., 2d Sess. 21-22 (1976), *reprinted in* 1976 U.S. CODE & CONG. AD. NEWS 5997, 6015-6016 (uniform rule needed to prohibit states from paying unemployment compensation benefits to persons receiving pension or retirement pay); S. REP. No. 472, 96th Cong., 1st Sess. 2-3 (1979) (§ 3304(a)(15) enacted because of congressional concern over situation in which retired individual was receiving both retirement pension and unemployment benefits). Following the initial passage of § 3304(a)(15), Congress changed the effective date of the legislation from September 30, 1979 to March 31, 1980. Pub. Law 95-19, 91 Stat. 39 (1977).

5. *See* 26 U.S.C. 3304(a)(15) (1976) (unemployment compensation shall be reduced by an amount equal to amount of any pension, retirement pay or annuity).

6. VA. CODE § 60.1-48.1 (1983). The Virginia offset provision reduces unemployment benefits by an amount equal to the amount of any retirement payment an individual is receiving. *Id.*

7. *See* 26 U.S.C. § 3304(a) (1982) (Secretary of Labor must approve state unemployment compensation statute before state may receive federal funding).

8. *See* H.R. REP. No. 538, 96th Cong., 1st Sess. 5 (1979) (base-period employer is any employer who paid wages on which unemployment benefits of claimant and amount of duration of benefits are based). Several congressmen believed that the 1976 version of § 3304(a)(15) unduly restricted state discretion in determining an applicant's eligibility for unemployment benefits because the federal offset provision reduced unemployment compensation by the amount of any pension. S. REP. No. 472, 96th Cong., 1st Sess. 11-12 (1979). These congressmen consequently sponsored legislation to limit the impact of the federal offset provision. 125 CONG. REC. 27, 558 (1979). On October 9, 1979, the congressmen introduced H.R. 5507 to amend § 3304(a)(15). *Id.* The House passed an amended version of H.R. 5507 on February 6, 1980. 126 CONG. REC. 2149 (1980). The Senate did not consider H.R. 5507, but instead amended H.R. 4612, a bill providing additional benefits for disabled children, to include the revised federal pension offset provision. 126 CONG. REC. 4572-4575 (1980). Congress did not pass the revised § 3304(a)(15) until September 26, 1980, as an amendment to the Multiemployer Pension Plan Act of 1980. Pub. Law 96-364, 94 Stat. 1310 (1980).

Section 3304(a)(15) currently requires the states to reduce unemployment benefits by pension, retirement, or other similar payments only if the pension or retirement payment is made under a plan maintained or contributed to by a base-period employer. 26 U.S.C. § 3304(a)(15) (1982).

offset by the amount of any pension.[9] In *Watkins v. Cantrell,*[10] the Fourth Circuit Court of Appeals considered whether Congress, by limiting the scope of the federal offset provision, prohibited the states from enacting pension offset statutes broader than those required by federal law.[11]

In *Watkins,* plaintiff Geraldine Watkins retired in 1972 and began to collect a civil service disability retirement pension from the United States Government.[12] In August 1980, Watkins obtained new employment as a nursing assistant because the pension was insufficient to meet her financial needs.[13] Upon her termination as a nursing assistant in June 1981, Watkins filed for unemployment benefits with the Virginia Employment Commission (VEC).[14] The VEC informed Watkins that she was eligible for unemployment compensation, but that the entitlement would be reduced by the amount of her pension payments.[15] Watkins subsequently initiated a class action in the United States District Court for the Eastern District of Virginia against four VEC administrators.[16] Watkins alleged that section 60.1-48.1 of the Virginia Code violated the federal pension provision in section 3304(a)(15) because the Virginia statute reduced her benefits by a pension received from a non-base-period employer.[17] The district court in *Watkins* held that section 60.1-48.1 did not contravene federal law because Congress did not explicitly

---

9. VA. CODE § 60.1-48.1 (1982); *see* Watkins v. Cantrell, 568 F. Supp. 1225, 1227 (E.D. Va. 1983) (Virginia General Assembly did not change § 60.1-48.1 to reflect the revised federal requirement), *aff'd,* 736 F.2d 933 (4th Cir. 1984).

10. 736 F.2d 933 (4th Cir. 1984).

11. *Id.* at 935-36.

12. *Id.* at 936.

13. *Id.*

14. *Id.*

15. *Id.* In *Watkins v. Cantrell,* the VEC determined that Watkins was eligible for $78 per week in unemployment compensation, but, when reduced by the $76 per week she received from her civil service pension, Watkins would have received only $2 per week in unemployment benefits. *Id.*

16. *Id.; see* Watkins v. Cantrell, 568 F. Supp. 1225, 1226 n.1 (E.D. Va. 1983) (discussion of members of class). The trial judge in *Watkins* certified the class pursuant to rules 23(a) and (b)(2) of the Federal Rules of Civil Procedure to include Virginia residents who qualify for unemployment compensation and whose benefits have been or will be reduced by the pension offset provision in § 60.1-48.1 of the Virginia Code where the pension is paid by employers other than a base-period or chargeable employer. 568 F. Supp. at 1226 n.1; *see* FED. R. CIV. P. 23(a), (b)(2) (class certification appropriate if party opposing class has acted toward class in such manner that final injunctive or declaratory relief is necessary to protect class as whole). Additionally, the class included social security beneficiaries who qualified for social security benefits by working for employers other than a base-period or chargeable employer. 568 F. Supp. at 1226 n.1.

17. 736 F.2d at 936. In *Watkins,* in addition to alleging that § 60.1-48.1 violated 26 U.S.C. § 3304(a)(15), Watkins alleged that the Virginia offset provision violated the "when due" clause of 42 U.S.C. § 503(a)(1). *Id; see* 42 U.S.C. § 503(a)(1) (1982) (Secretary of Labor shall not certify state's unemployment insurance program unless program assures payment of benefits when due); *see also* California Dept. of Human Resources v. Java, 402 U.S. 121, 133 (1971) ("when due" is time when payments are first allowed administratively). The *Watkins* court concluded that whether § 60.1-48.1 of the Virginia Code violated the § 503(a)(1) "when

forbid the states from enacting statutes which reduce unemployment benefits by any pension an applicant might be receiving.[18]

The Fourth Circuit affirmed the district court's decision in *Watkins v. Cantrell*,[19] concluding that states may offset unemployment compensation by pension payments in excess of the federal standard because section 3304(a)(15) does not explicitly prohibit the states from considering non-base-period employer sources of pension income.[20] The *Watkins* court further noted that the legislative history of section 3304(a)(15) indicated that Congress established only a minimum standard and that the states were free to reduce unemployment compensation by pensions received from employers who do not qualify as base-period employers.[21] Finally, the Fourth Circuit noted that the Secretary of Labor had interpreted section 3304(a)(15) as allowing the states to reduce unemployment benefits by pensions not governed by the federal statute but prohibiting the states from adopting standards less restrictive than the federal requirement.[22] The *Watkins* court, therefore, held that section 60.1-48.1 of the Virginia Code did not violate federal law.[23]

The Fourth Circuit's holding in *Watkins* is consistent with recognized principles of statutory construction. As a general rule, a court initially must

---

due" clause was dependent upon whether the Virginia pension offset provision violated 26 U.S.C. § 3304(a)(15). 736 F.2d at 936 n.3. The Fourth Circuit never addressed the "when due" clause issue, because the court held that the Virginia pension offset statute did not contravene federal law. *Id.* at 944-45.

18. 568 F. Supp. at 1227-28. The district court in *Watkins* concluded that § 60.1-48.1 of the Virginia Code did not violate federal law because states historically have exercised broad discretion in the formulation of unemployment compensation programs and because § 3304(a)(15) did not explicitly forbid the states from enacting a pension offset provision in excess of the federal requirement. *Id.*

19. 736 F.2d 933, 946 (4th Cir. 1984); *see* 568 F. Supp. 1225, 1228 (E.D. Va. 1983) (district court opinion holding states were free to exceed federal minimum standards).

20. 736 F.2d at 939.

21. *Id.* at 940.

22. *Id.* at 943-44; *see infra* note 4 (Secretary of Labor's interpretation of § 3304(a)(15)).

23. *Id.* at 945. In addition to holding that § 60.1-48.1 did not contravene the federal offset provision in § 3304(a)(15), the *Watkins* court dismissed Watkins' claims that the Virginia pension offset statute violated the equal protection and due process clauses of the fourteenth amendment. *Id.* at 945-46; *see* U.S. CONST. amend. XIV (states shall not deprive any person of life, liberty, or property without due process of law or deny any person equal protection of laws). The Fourth Circuit held that § 60.1-48.1 passed constitutional scrutiny under the rational basis test because the ease of administration and financial integrity of unemployment insurance programs are legitimate state interests that justify the reduction of unemployment benefits in excess of the federal requirement. 736 F.2d at 945-46. *See* Graham v. Richardson, 403 U.S. 365, 371 (1971) (under traditional equal protection principles states retain broad discretion to classify, but classifications must have reasonable basis, especially in areas of economic and social legislation). Simply stated, the rational basis test ensures that state classifications which do not impinge upon fundamental rights must be reasonable, not arbitrary, and must rest on some ground having a fair relation to the object of legislation. *See* F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (classification must be reasonably related to object legislature sought to achieve); Lindsley v. Natural Carbonic Gas Co., 220 US.. 61, 78 (1911) (where classification is an issue, law will be sustained if any set of facts reasonably can be conceived to support that classification).

consider the plain meaning of the statute.[24] In *New York Telephone Co. v. New York State Department of Labor*,[25] the United States Supreme Court considered whether the National Labor Relations Act prohibited the State of New York from paying unemployment compensation to strikers.[26] The Supreme Court noted that the history of title IX of the Social Security Act indicated that Congress intended the states to have broad discretion in establishing unemployment compensation programs.[27] The *New York Telephone* Court further observed that when Congress decided to impose a limitation on state programs, it did so in explicit terms.[28] The Court concluded that the absence of an express limitation or condition imposed on the states indicated that Congress did not restrict state legislative discretion in the area of social security.[29] The Supreme Court, therefore, held that New York could pay unemployment benefits to striking workers because neither the National Labor Relations Act nor title IX of the Social Security Act prohibited such payments.[30] Similarly, the *Watkins* court held that the states could reduce unemployment benefits received by individuals from non-base period employers because section 3304(a)(15) does not explicitly forbid the states from exceeding the federal standard in reducing benefits.[31]

The *Watkins* court's interpretation of section 3304(a)(15) also is consistent with other cases construing the federal offset provision. In *Cabais v. Egger*,[32] the United States Court of Appeals for the District of Columbia Circuit stated that unemployment insurance is a joint federal-state program in which the federal government establishes minimum standards that allow the states considerable flexibility in adopting their own rules.[33] The *Cabais* court determined that section 3304(a)(15) merely established a federal mini-

---

24. *See* Rivera v. Becarra, 714 F.2d 887, 893 (9th Cir. 1983) (plain meaning of words is best indicator of what legislature intended), *cert. denied*, 104 S. Ct. 1591 (1984); Matala v. Consolidated Coal Co., 647 F.2d 427, 429 (4th Cir. 1981) (language of statute is starting point for determining congressional intent).

25. 440 U.S. 519 (1979).

26. *Id.* at 522.

27. *Id.* at 536-37. In *New York Telephone Co. v. New York State Dept. of Labor*, the Supreme Court, after reviewing the legislative history of title IX, concluded that Congress generally has allowed states the discretion to fashion their own unemployment insurance programs and eligibility criteria. *Id.* at 539.

28. 440 U.S. at 537-38.

29. *Id.* at 538; *see* Ohio Bureau of Employment Serv. v. Hodory, 431 U.S. 471, 488 (1977) (when Congress has imposed or forbidden condition for unemployment compensation, Congress has done so explicitly).

30. 440 U.S. at 545-46. The *New York Telephone* Court, in holding that the states may pay unemployment benefits to strikers, concluded that the State of New York did not usurp the powers of the National Labor Relations Board. *Id.* at 546. Rather, the Court found that New York administered its unemployment program in a manner consistent with the state's fiscal policies. *Id.*

31. 736 F.2d at 939. The *Watkins* court concluded that Congress did not forbid the states from enacting an offset provision in excess of that mandated by federal law because Congress did not include such an express prohibition in § 3304(a)(15). *Id.*

32. 690 F.2d 234 (D.C. Cir. 1982).

33. *Id.* at 235, 240.

mum standard and that the states could offset unemployment benefits not governed by the federal statute.[34] The *Cabais* court thus concluded that a state's pension offset provisions may produce a greater impact upon unemployment beneficiaries than would be produced under the federal standard because a state may choose to exceed the section 3304(a)(15) requirement.[35] Likewise, in *McKay v. Horn*,[36] the United States District Court for the District of New Jersey addressed the constitutionality of section 3304(a)(15) and the New Jersey pension offset provision, section 43:21-5(a) of the New Jersey Statutes.[37] In *McKay*, the plaintiffs contended that the reduction of unemployment benefits by the amount of a pension received from a base-period employer or by Social Security payments violated their equal protection rights guaranteed by the fifth and fourteenth amendments.[38] The *McKay* court held that the offset statutes did not violate the United States Constitution because the reduction in benefits bore a rational relation to the legitimate governmental purposes of preventing duplicative benefits and maintaining the financial integrity of the unemployment insurance system.[39] The *McKay* court noted further, however, that unemployment compensation is a federal-state cooperative program in which the federal government establishes certain minimum criteria governing the eligibility for and distribution of benefit payments.[40] The *McKay* court concluded that section 3304(a)(15) constituted one of these minimum requirements.[41]

---

34. *Id.* at 240.

35. *Id.*

36. 529 F. Supp. 847 (D.N.J. 1981).

37. *Id.* at 849; *see* N.J. STAT. ANN. § 43:21-5(a) (West 1980) (New Jersey pension offset statute).

38. 529 F. Supp. at 849. In *McKay v. Horn*, the plaintiffs alleged that federal and state pension offset statutes treated persons who receive pension income more harshly that those unemployment applicants who receive supplemental income from other sources. *id. at 859; see* U.S. CONST. amend. V (federal government shall not deprive citizens of property without due process of law); U.S. CONST. amend. XIV (states shall not deprive citizens of equal protection of law); *see also* Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976) (concept of equal justice found in fifth amendment guarantee of due process). The *McKay* plaintiffs also alleged that § 3304(a)(15) impaired their right to contract in violation of article I, section 10 of the United States Constitution because the federal offset provision disrupted the contract between the State of New Jersey and the workers which obligated the state to pay benefits to the unemployed. 529 F. Supp. at 865; see U.S. CONST. art. I, § 10 (Congress shall pass no law impairing freedom of contract).

39. 529 F. Supp. at 863-64. In *McKay*, the district court applied the rational basis test to determine whether the pension offset provisions violated the plaintiff's equal protection rights. *Id.* at 860; *see* Ohio Bureau of Employment Serv. v. Hodory, 431 U.S. 471, 489 (1977) (minimal scrutiny applied to unemployment insurance amendments because statutes do not involve fundamental interests or create suspect classifications); *supra* note 23 (discussion of rational basis test). Thus, the *McKay* court upheld both offset statutes because Congress and the New Jersey legislature reasonably could conclude that duplicative benefits overburden the unemployment insurance program. 529 F. Supp. at 864. The district court noted that Congress enacted § 3304(a)(15) to eliminate windfalls to persons receiving both pensions and unemployment benefits. *Id.* at 863.

40. 529 F. Supp. at 850.

41. *Id.* at 850 n.4.

In addition to case precedent, as exemplified in *Cabais* and *McKay*, the legislative history of section 3304(a)(15) supports the Fourth Circuit's decision in *Watkins*.[42] In challenging the validity of section 60.1-48.1, Watkins relied heavily upon statements made during congressional debates over the federal pension offset provision.[43] The *Watkins* court, however, found no explicit statement in the debate transcripts which would indicate that Congress prohibited the states from enacting pension offset provisions in excess of the federal requirement.[44] The Fourth Circuit noted, rather, that one congressman explicitly stated that section 3304(a)(15) allows states the option of adopting the federal standard or enacting statutes which reduce unemployment benefits by pensions received from non-base-period employers.[45] The *Watkins* court also referred to statements made throughout the congressional debates which indicate that section 3304(a)(15) merely imposed a federal minimum standard and that the states are free to enact statutes which offset unemployment benefits by pensions not governed by the federal offset provision.[46] Finally, a report from the House Ways and Means Committee expressly stated that the treatment of pension or retirement income received

---

42. *See infra* notes 43-47 and accompanying text (legislative history indicates Congress only established federal minimum standard).

43. 736 F.2d at 939-40. In *Watkins*, Watkins relied upon statements by various senators made during debates over a proposal to amend H.R. 4612, a bill designed to provide benefits to disable children, to include a revised version of § 3304(a)(15). *Id.* at 940. For example, one senator stated that the proposed federal pension offset provision would assure that persons actually unemployed, but not retired, would not be penalized for receiving pension payments. 126 CONG. REC. 4562 (1980) (statements of Sen. Dole). Also, another senator stated that Congress enacted the 1976 pension offset to prevent serious abuses in the unemployment insurance program, such as the payment of benefits to a retiree who had completely withdrawn from the labor force. *Id.* at 20, 238 (statements of Sen. Bradley). Senator Bradley concluded that Congress did not intend for section 3304(a)(15) to punish retirees who are seeking a second job to supplement an inadequate pension. *Id. See* 736 F.2d at 940 (*Watkins* court's discussion of statements purporting to limit power of states to enact broader pension offsets).

44. 736 F.2d at 940.

45. *Id.* The Fourth Circuit in *Watkins* determined that the legislative history of § 3304(a)(15) indicated that Congress fully recognized that the states could enact pension offset statutes that would reduce unemployment benefits by pensions paid by non-base-period employers. *Id.* at 942-43. Representative James Corman, a sponsor of the revised federal pension offset statute, concluded that a state could, in its discretion, adopt a broader offset affecting private pension plans or social security. 126 CONG. REC. 2144 (1980) (statement of Rep. Corman). Corman warned, however, that if Congress did not pass H.R. 5507 (a bill to revise § 3304(a)(15)), the 1976 act would require that all pension or social security payments reduce unemployment benefits on a pro rata basis. *Id.*

46. 736 F.2d at 941-42. In *Watkins*, the Fourth Circuit cited various statements made during congressional debates that the court interpreted as allowing the states to enact broader pension offset provisions. *Id.* at 941; *see* 126 CONG. REC. 2145 (1980) (if present law is changed some states may eliminate or reduce their present offset statutes) (statement of Rep. Hopkins); 126 CONG. REC. at 2144 (price of bill is $585 million for present fiscal year if states follow most liberal course) (statement of Rep. Rousselot); 126 CONG. REC. at 23,049 (states only required to reduce unemployment compensation when applicant is receiving pension from base-period employer) (statement of Rep. Ullman).

from an employer, other than a base-period employer, is a matter left to the discretion of state legislatures.[47]

The *Watkins* decision is also consistent with the Secretary of Labor's interpretation of section 3304(a)(15).[48] In Unemployment Insurance Program Letter (UIPL) No. 7-81, the Secretary specifically stated that the federal pension offset provision established only a minimum requirement.[49] Notably, the Secretary issued UIPL No. 7-81 contemporaneously with the promulgation of section 3304(a)(15),[50] and has adhered to the opinion that section 3304(a)(15) allows the states to offset benefits paid by non-base-period employees.[51] Additionally, the administrative opinion expressed in UIPL No. 7-81 is consistent with the legislative history and statutory language of section 3304(a)(15).[52] UIPL No. 7-81, therefore, further supports the *Watkins* decision, particularly in view of the principle that an agency's interpretation of a statute is entitled to considerable weight.[53]

The *Watkins* court was the first federal circuit court to consider specifically whether section 3304(a)(15), which requires the states to offset unemployment payments by pensions paid by a base-period employer, established

---

47. H.R. REP. No. 538, 98th Cong., 1st Sess. 4 (1979).

48. *See* Unemployment Insurance Program Letter (UIPL) No. 7-81, 47 Fed. Reg. 29,906 (1982) (UIPL No. 7-81 informs states of 1980 amendment to § 3304(a)(15) restricting application of pension offset to base-period employers) [hereinafter cited as UIPL No. 7-81].

49. 736 F.2d at 943; UIPL No. 7-81, *supra* note 48, 47 Fed. Reg. at 29,906. In UIPL No. 7-81, the Secretary of Labor indicated that state laws passed in compliance with the 1976 act did not have to be revised in order to satisfy the current offset provision's requirements. UIPL No. 7-81, *supra* note 48, 47 Fed. Reg. at 29,906; *see* 26 U.S.C. § 3304(a)(15) (1976) (1976 pension offset provision requiring reduction of unemployment benefits by any pension). The Secretary stated that § 3304(a)(15) established only a minimum standard and that the states were free to consider additional sources of income in offsetting unemployment benefits. UIPL No. 7-81, *supra* note 48, 47 Fed. Reg. at 29,906. The Secretary, however, encouraged the states to follow the less stringent pension offset standard. *Id.*

50. 736 F.2d at 944; *see, e.g.*, E.I. DuPont de Nemours & Co. v. Collins, 432 U.S. 46, 55 (1977) (agency's contemporaneous construction of statute entitled to great weight); Power Reactor Dev. Co. v. International Union of Electrical, Radio, and Machine Workers, 367 U.S. 396, 408 (1961) (court deference to administrative agency due when administrative practice in issue involves contemporaneous construction of statute); FTC v. Mandel Bros., Inc., 359 U.S. 385, 391 (1959) (court should defer to agency's contemporaneous construction of statute).

51. 736 F.2d at 944; *see, e.g.*, General Electric Co. v. Gilbert, 429 U.S. 125, 142 (1976) (consistency is significant factor in determining weight accorded to agency interpretation); Cory Corp. v. Sauber, 363 U.S. 709, 712 (1960) (agency's adherence to construction is important factor in weighing deference due agency interpretation of statute); *see* UIPL No. 7-81, *supra* note 48, 47 Fed. Reg. at 29,906 (1982) (§ 3304(a)(15) established only minimum standard leaving states free to offset unemployment benefits by pensions not governed by federal offset provision); UIPL No. 7-81, *supra* note 48, Change 2, 48 Fed. Reg. 37,741 (1983) (Secretary of Labor encourages states to carry out congressional intent by offsetting pension benefits under § 3304(a)(15)(B) in excess of mandated requirement).

52. 736 F.2d at 944. *See, e.g.*, Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 107 (1979) (court deference to agency appropriate where legislative history does not require contrary interpretation); Teamsters v. Daniel, 439 U.S. 551, 566 n.20 (1979) (court deference to agency constrained by duty to honor statutory language).

53. 736 F.2d at 944.

a minimum standard or mandatory federal requirement that the states could not exceed.[54] Congress structured the unemployment insurance program as a joint federal-state endeavor to provide benefits to the unemployed.[55] Under the cooperative system, the federal government establishes minimum standards to which the state laws must conform in order for the states to receive certification of and funding for their programs.[56] Basing its decision on the federal offset provision's statutory language,[57] legislative history,[58] and administrative interpretation,[59] the *Watkins* court correctly determined that section 3304(a)(15) only established a minimum federal standard and that the states are free to exceed the federal requirement.[60] The *Watkins* decision thus accords with the congressional policy of allowing the states great discretion in the formulation of benefit structures and eligibility criteria for their individual unemployment programs.[61]

KEITH B. BROOKS

---

54. *See* Mayberry v. Adams, 745 F.2d 729, 730 (1st Cir. 1984), (First Circuit summarily held that *Watkins v. Cantrell* had decided that states may offset unemployment compensation by applicant's government pension); *Watkins*, 736 F.2d at 945.

55. *See* Ohio Bureau of Employment Serv. v. Hodory, 431 U.S. 471, 483-84 (1977) (federal involvement in unemployment insurance exists through tax incentives to encourage state programs); Cabais v. Egger, 690 F.2d 234, 234-35 (D.C. Cir. 1982) (unemployment insurance is joint federal-state program in which employers receive 90% credit against federal tax liability under Federal Unemployment Tax Act, if state law complies with federal standards). *See also* W. HABER & M. MURRAY, *supra* note 3, at 79 (Committee on Economic Security determined that unemployment insurance would be cooperative federal-state program).

56. *See* Steward Mach. Co. v. Davis, 301 U.S. 548, 593 (1937) (Social Security Act establishes minimum requirements to which state unemployment compensation statutes must conform); Brown v. Porcher, 660 F.2d 1001, 1004 (4th Cir. 1981) (Congress required states to comply with limited number of fundamental standards in order to receive federal approval of state law), *cert. denied*, 459 U.S. 1158 (1983).

57. *See supra* notes 25-41 and accompanying text (statutory language does not forbid states from enacting broader pension offsets).

58. *See supra* notes 43-47 and accompanying text (legislative history indicates § 3304(a)(15) only established minimum standard).

59. *See supra* notes 48-53 and accompanying text (courts should defer to agency interpretation of statute).

60. 736 F.2d at 944-45; *see supra* notes 20-24 and accompanying text (statutory language, legislative history, and administrative interpretation indicate § 3304(a)(15) establishes minimum standard).

61. *See* New York Tel. Co. v. New York State Dept. of Labor, 440 U.S. 519, 537-40 (1979) (history of Social Security Act clearly indicates Congress intended states to have broad freedom in establishing type of unemployment insurance system each state desired); *supra* notes 26-31 and accompanying text (discussion of *New York Telephone*); *see also Report of the Committee on Economic Security, supra* note 3, at 1326 (Committee contemplated states would have broad discretion to establish type of program each state desired).