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Vi. Employment Discrimination

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VI. EMPLOYMENT DISCRIMINATION

A. Class Action Suits

People aggrieved by racial discrimination in employment can sue for relief under both Title VII of the Civil Rights Act of 1964[1] and section 1981 of the Civil Rights Act of 1866.[2] Individual discriminatory acts are recog-

[1] 42 U.S.C. § 2000e *et. seq.* (Supp. V 1975) [hereinafter referred to as Title VII]. In addition to prohibiting racial discrimination in employment, Title VII also prohibits discrimination against persons because of their color, religion, sex, or national origin. *Id.* at § 2000e-2(a).

In order for a person to file suit under Title VII, he must first file with the Equal Employment Opportunity Commission (EEOC) a charge that he has been discriminated against by a respondent. *Id.* at § 2000e-5(b). Filing of a charge with EEOC is an absolute prerequisite before an individual may later sue under Title VII. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973). The EEOC is empowered to investigate the charge, 42 U.S.C. § 2000e-5(b) (Supp. V 1975); *see* 29 C.F.R. § 1601.14 (1976), to determine whether reasonable cause exists to believe the change is true, 42 U.S.C. § 2000e-5(b) (Supp. V 1975); *see 29 C.F.R. § 1601.19b (1976);* EEOC COMPL. MAN (CCH) ¶ 311 (1976), and, if reasonable cause does exist, to attempt to secure conciliation with Title VII from the respondent. 42 U.S.C. § 2000e-5(b) (Supp. V 1975); *see* 29 C.F.R. § 1601.22 (1976). The charging party may institute suit under Title VII only after he receives a notice of his right to sue from the EEOC. Such notice is issued by the Commission only if the EEOC determines reasonable cause to believe the charge is true does not exist, if concilliation discussions with the respondent are terminated, or if the charging party requests such notice within 180 days of filing his charge. 42 U.S.C. § 2000e-5(f) (1) (Supp. V 1975).

[2] 42 U.S.C. § 1981 (1970). Section 1981 grants to "[a]ll persons" within the United States the same rights "to make and enforce contracts" as are enjoyed by white citizens. *Id.* This section and other related sections of the Civil Rights Act of 1866 had long been dormant in the area of private discrimination until revived by the Supreme Court in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). In *Jones,* the Court rejected the argument that individuals could sue under the 1866 Act only when there was government action involved in discriminatory acts, and held that 42 U.S.C. § 1982 (1970), which concerns property rights, prohibits private racially discriminatory refusals to sell real estate property. 392 U.S. at 426, 437. In dictum, the Court indicated that § 1981 could be applied similarly in private employment discrimination cases. *See id.* at 441-42, n.78. On the authority of *Jones,* several commentators argued that § 1981 could be applied to private employment discrimination, *see, e.g.,* Kohl, *The Civil Rights Act of 1866, Its Hour Come Round at Last* Jones v. Alfred H. Mayer Co., 55 VA. L. REV. 272 (1969) [hereinafter cited as Kohl]; Larson, *The Development of § 1981 as a Remedy for Racial Discrimination in Private Employment,* 7 HARV. CIV. RTS.—CIV. LIB. L. REV. 45 (1972); Note, *Is § 1981 Modified by Title VII of the Civil Rights Act of 1964?,* 1970 DUKE L.J. 1223, and every circuit court that addressed the issue held that § 1981 applies to private discrimination. Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments,* 74 COLUM. L. REV. 449, 478 (1974) [hereinafter cited as *Federal Power]; see, e.g.,* Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (4th Cir.), *cert. denied* 409 U.S. 982 (1972); Caldwell v. National Brewing Co., 443 F.2d 1044 (5th Cir. 1971), *cert. denied* 405 U.S. 916 (1972); Young v. I.T.&T., 438 F.2d 757 (3d Cir. 1971). Any doubts that § 1981 prohibits private racial discrimination in employment were later extinguished by the Supreme Court. In Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975) the Court expressly held that § 1981 applied to private racial discrimination. *Id.* at 459-60. For discussions of the historical bases supporting the conclusion that provisions of the 1866 Act can be applied to private discrimination, see Kohl, *supra;* Note, *Section 1981 and Private Discrimination: An Historical Justification for*

nized, however, as manifestations of a more general wrong against society.[3] An individual suffers discrimination not because of his peculiar characteristics as an individual, but because he is a member of a societal class defined by possession of a racial characteristic.[4] Consequently, the use of class action suits against persons who discriminate is viewed as an efficacious means of effectuating the congressional policy directed toward eliminating discrimination generally.[5]

Because public policy favors class action suits against employment discrimination, courts became lenient in permitting such suits under Federal Rule of Procedure 23.[6] Several courts began certifying "across the board" class action suits[7] in which named plaintiffs were allowed to repre-

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a Judicial Trend, 40 GEO. WASH. L. REV. 1024 (1972). The *Johnson* Court also rejected the argument that Title VII preempts § 1981 and constitutes the exclusive remedy for employment discrimination. The Court held that the two civil rights acts augment each other, and that merely because a plaintiff initially sues under Title VII, he is not foreclosed from pursuing § 1981 or other available remedies for private discrimination. 421 U.S. at 459; *see* Alexander v. Gardner-Denver Co., 415 U.S. 36, 48 (1974); Caldwell v. National Brewing Co., 443 F.2d 1044, 1046 (5th Cir. 1971), *cert. denied* 405 U.S. 916 (1972); *Federal Power, supra* at 478-80. *See generally* Note, *Title VII and 42 U.S.C. § 1981: Two Independent Solutions*, 10 U. RICH. L. REV. 339 (1976) [hereinafter cited as *Independent Solutions*]. The Court's view that passage of Title VII did not preempt § 1981 is supported by the legislative history of Title VII. *See* H.R. REP. No. 914, 88th Cong. 2d Sess. 108 *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2391, [hereinafter cited as H.R. REP. No. 914]. Further support may be found in the fact that while drafting the Equal Employment Opportunity Act of 1972, the Senate rejected an amendment that would have made Title VII and § 1981 mutually exclusive remedies. 118 CONG. REC. 3371-73 (1972); *see* Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 461 (1975).

[3] Albemarle Paper Co. v. Moody, 422 U.S. 405, 413-22 (1975); EEOC v. General Elec. Co., 532 F.2d 359, 372-73 (4th Cir. 1976); *see* H.R. REP. No. 238, 92d Cong., 2d Sess. 12 (1971), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2137, 2139.

[4] Note, *The Class Action Device in Title VII Suits*, 29 S.C.L. REV. 639, 644-45 (1977) [hereinafter cited as *Class Action Device*]; *see* Comment, *The Class Action and Title VII—An Overview*, 10 U. RICH. L. REV. 325 (1976) [hereinafter cited as *An Overview*]. *See generally* Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235 (1971) [hereinafter cited as Fiss].

[5] 118 CONG. REC. 7168 (1972) (statements of Senator Williams); *see* 7 C. WRIGHT & R. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1771, at 662 (1972) [hereinafter cited as WRIGHT & MILLER]; *Class Action Device, supra* note 4, at 644-45. In a class action suit, the representatives of the class can seek to eliminate a discriminatory practice as it applies to all employees, and to obtain relief for all employees aggrieved by the practice. Note, *Civil Procedure—Class Action Suits—Class Wide Awards of Back Pay in Suits Under Title VII of the Civil Rights Act of 1964*, 35 OHIO ST. L.J. 1027, 1039 (1974) [hereinafter cited as *Class Wide Awards*]. When Rule 23, which governs certification of class actions, was redrafted in 1966, the drafters made a special effort to accommodate more easily class action suits in discrimination cases. 7 WRIGHT & MILLER, *supra* § 1771, at 662; *see* Advisory Committee's Notes, FED. R. CIV. P. 23.

[6] *See generally* 7 WRIGHT & MILLER, *supra* note 5, § 1771, at 662-63; *Class Wide Awards, supra* note 5 at 1032; *An Overview, supra* note 4 at 326; Comment, *Class Actions and Title VII of the Civil Rights Act of 1964: The Proper Class and the Class Representative*, 47 TULANE L. REV. 1005 (1973).

[7] B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1095 (1976) [hereinafter cited as SCHLEI & GROSSMAN]; *see e.g.*, Barnett v. W. T. Grant Co., 518 F.2d 543 (4th Cir.

sent persons aggrieved by employment practices that had not affected the plaintiffs personally, and sue to eliminate all of an employer's discriminatory practices.[8] Theoretically, the wrongs suffered by the plaintiffs were merely indicia of the more general wrong against the societal class, and, therefore, the societal wrong, and not the personal injury, was the subject of such suits.[9] Permitting such suits apparently conflicted with the minimal requirements of Rule 23.[10] Recently, however, the Fourth Circuit decided *Roman v. ESB, Inc.*,[11] in which the court indicated its disfavor of certification of "across-the-board" class action suits in employment discrimination cases.

In *Roman*, the plaintiffs were black, former employees who had been laid off by the defendant company.[12] Alleging that ESB had discriminated in hiring, firing, compensating, and promoting black employees, the plaintiffs sought to bring their suit on behalf of all black applicants for employment by ESB, and all present and former employees of the company.[13]

1975); Long v. Sapp, 502 F.2d 34 (5th Cir. 1974).

[8] *See e.g.*, Barnett v. W. T. Grant Co., 518 F.2d 543 (4th Cir. 1975); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969).

[9] *See generally*, SCHLEI & GROSSMAN, *supra* note 7 at 1088-95; *Class Action Service*, *supra* note 4, at 644-45, 655.

[10] *See* East Tex. Motor Freight Sys., Inc. v. Rodriguez, 97 S. Ct. 1891, 1896-98 (1977); 7 WRIGHT & MILLER, *supra* note 5, § 1771 at 663; *Class Wide Awards*, *supra* note 5, at 1033-34; *An Overview*, *supra* note 4, at 329.

FED. R. CIV. P. 23(a) sets forth the prerequisites which plaintiffs must satisfy before they can be permitted to bring their suit as representatives of a class.

[11] 550 F.2d 1343 (4th Cir. 1976), *aff'g* 7 Empl. Prac. Dec. ¶ 9416 (D.S.C. 1973).

[12] 550 F.2d at 1345-46.

[13] *Id.* at 1346. All claims originally brought by the black employees were dismissed when the district court limited the class to employees who were laid off, and dismissed any claims not relating to the layoffs. *See* text accompanying notes 14-17.

The decisions by the *Roman* courts do not reveal under which Civil Rights Act the action was brought. The Fourth Circuit states in its opinion that the 42 U.S.C. § 1981 (1970) claims were dismissed by the district court. 550 F.2d at 1346. In the district court opinion, however, the court does not mention whether the § 1981 claim was dismissed, but refers to the action as being maintained under both § 1981 and Title VII. *See* 7 Empl. Prac. Dec. ¶ 9416, at 7832, 7846. Furthermore, there is no indication in the district court opinion that the plaintiffs ever filed charges before the EEOC, *see id.*, which is an absolute prerequisite for maintaining a suit under Title VII. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973); *see* note 1 *supra*. Whether the action was brought under either statute alone would have little effect on the course and conduct of the case. Although Title VII and § 1981 are not coextensive, Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 460 (1975), both statutes prohibit racially discriminatory employment practices, *see id.* at 459, require satisfaction of the same burden of proof by plaintiffs, *see Independent Solutions*, *supra* note 2, at 347, and provide virtually the same remedies. *Federal Power*, *supra* note 2, at 480; *see* H.R. REP. No. 914, *supra* note 2, at 274-78 (remarks of Representatives Poff and Cramer). Title VII, however, provides plaintiffs with assistance in investigating and conciliating claims, and enables plaintiffs to obtain additional awards, such as attorney's fees, which are unavailable under § 1981. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 460 (1975); *cf.*, Note, *Is § 1981 Modified by Title VII of the Civil Rights Act of 1964?* 1970 DUKE L.J. 1223 (arguing that plaintiffs under § 1981 should be required to attempt conciliation of grievances before proceeding with court suits).

After the trial was concluded, the district court found that the evidence presented by the plaintiffs primarily concerned the layoff of the black employees, and consequently limited composition of the class to those black employees who were laid off during the time period that was the subject of the complaint.[14] The court then dismissed the class action suit on the grounds that plaintiffs had failed to satisfy the requisites of Rule 23,[15] and on the further ground that the plaintiffs had failed to prove a prima facie case on the merits.[16] In a split en banc decision, the Fourth Circuit affirmed.[17]

By affirming the district court's defining of the class as including only those blacks affected by the layoff, the Fourth Circuit implicitly applied the Rule 23 prerequisite that representative plaintiffs in a class action must fairly and adequately protect the interests of the class.[18] A corrollary

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[14] 7 Empl. Prac. Dec. ¶ 9416, at 7846-47.

[15] *Id.*

[16] *Id.* at 7847-48.

[17] 550 F.2d 1343 (1976). Judges Winter, Butzner, and Craven dissented from the majority opinion. *See id.* at 1357-62 (Winter, J., dissenting).

After defining the class, the *Roman* district court dismissed the class action on the grounds the plaintiffs failed to meet two of the Rule 23 prerequisites. The first ground concerned the "numerosity" prerequisite, that the class be "so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1). Fourty-four plaintiffs had joined in the complaint against ESB. The court found that there were only eleven more members of the class aggrieved by the layoffs, and that, consequently, the prerequisite had not been satisfied. 7 Empl. Prac. Dec. ¶ 9416, at 7846-47.

The determination whether the numerosity requirement is satisfied involves more than a test of numbers. 1 H. NEWBURG, CLASS ACTIONS, § 1105 (1977). Rather, the principle determination is whether joining all members of the class will result in litigational hardships or inconvenience. *Id.* at § 1105a; *see e.g.*, Doe v. Charleston Area Medical Center, Inc., 529 F.2d 638, 645 (4th Cir. 1975). Such a determination must be made on the facts and circumstances of each particular case. 3B J. MOORE'S FEDERAL PRACTICE, ¶ 23.05, at 23-277 to 280; (2d ed. 1977); *see* Seay v. McDonnell Douglas Corp., 533 F.2d 1126 (9th Cir. 1976); Swain v. Brinegar, 517 F.2d 766, 780 (7th Cir. 1975). In determining whether a class meets the "numerosity" requirement, courts consider, in addition to the size of the class, the nature of the action, the size of the individual claims, and the location of both defendants and potential plaintiffs. *See generally* 7 WRIGHT & MILLER, *supra* note 5, § 1762, at 594-600. Because they possess potentially greater access to such facts and circumstances of cases, district judges are afforded wide latitudes within which to exercise their discretion in determining whether a class satisfies the "numerosity" requirement, and are not overturned unless their determination constitutes an abuse of discretion or an impermissible application of law. 3B J. MOORE'S FEDERAL PRACTICE, ¶ 23.05, at 23-280 (2d ed. 1977); *see* 7 WRIGHT & MILLER, *supra* note 5, at § 1759; *see e.g.*, Polin v. Conduciron Corp., 552 F.2d 797, 802 (8th Cir. 1977); Peterson v. Oklahoma City Hous. Auth., 545 F.2d 1270, 1273 (10th Cir. 1976). Furthermore, plaintiffs have the burden of showing that the class satisfies the numerosity requirement. 3B J. MOORE'S FEDERAL PRACTICE, ¶ 23.05, at 23-278 (2d ed. 1977); *see e.g.*, Afro America Patrolmens League v. Duck, 503 F.2d 294, 298 (6th Cir. 1974). In consideration of these factors, the *Roman* court found the determination that the class failed to meet the "numerosity" requirement was "so apparently correct as to require no discussion." 550 F.2d at 1349.

[18] *See* FED. R. CIV. P. 23(a)(4). The *Roman* court explicitly mentioned the representation requirement in affirming dismissal of the class action, *see* 550 F.2d at 1349, but did not discuss the requirement in connection with defining the class representative by plaintiffs. The Fourth Circuit did not conceptually bifurcate their analysis of the action as did the district

of this prerequisite requires that class action plaintiffs must be members of the class they purport to represent.[19] The reason for the requirement is that all members of the class are bound by final judgment in a case,[20] and, consequently, all issues affecting any member should be prosecuted fully. A plaintiff, however, is most likely to prosecute fully only those issues in which he has a personal interest. By requiring that plaintiffs generally have interests comprehensive of those of the class they represent, the rule insures that members of the class will not be bound by determinations on issues the plaintiffs are unlikely to litigate fully in court.[21] In affirming the district court's limiting the class to include only those persons aggrieved by the layoff, the *Roman* court indicated that in discrimination cases plaintiffs are likely to represent adequately only interests arising out of actions by which they are personally aggrieved,[22] and consequently class action plaintiffs should be permitted to represent only other persons similarly affected by the same or similar actions by a defendant.

The *Roman* court's view conflicts with that of courts permitting "across the board" suits in discrimination cases. Courts permitting such suits have adopted the notion that a particular action by a defendant affecting representative individuals is merely an indicium of discrimination against a class defined by race,[23] and that the actual wrong committed is defendant's effectuation of a general policy of race discrimination.[24] Consequently, any individual affected in any way by that policy may qualify as a representative adequately representing the interests all members of the class affected in any way for purposes of eliminating the general policy of discrimination.[25] The *Roman* court's decision accords, however, with the recent Supreme Court decision in *East Texas Motor Freight System, Inc. v. Rodriguez,*[26] which may sound the death knell for "across-the-board" suits

court in first defining the class, then dismissing the action on behalf of that defined class; rather, the court treated the issues the district court considered in defining the class as pertaining to the issue whether the initial class action was maintainable. *See* 550 F.2d at 1348-49, 1355-57.

[19] *See* Bailey v. Patterson, 369 U.S. 31 (1962); Hernandez v. Gray, 530 F.2d 858 (10th Cir. 1976); Wright v. Stone Container Corp., 524 F.2d 1058, 1062 (8th Cir. 1975). The requirement is often stated in the terms that the representatives must have standing to raise the issues they seek to raise. *See* 7 WRIGHT & MILLER, *supra* note 5, at § 1761; *Class Action Device, supra* note 4 at 649.

[20] See *Class Wide Awards, supra* note 5, at 1033-34. *See generally,* 7 WRIGHT & MILLER, *supra* note 5, at §§ 1761, 1771.

[21] *See* 1 H. NEWBURG, CLASS ACTIONS § 1062 (1977).

[22] *See* 550 F.2d 1248-49. The fact that the evidence presented by the named plaintiffs in *Roman* generally concerned only the layoffs, *id.* at 1348, provides an example that plaintiffs usually fully litigate only those claims concerning actions by which they are personally aggrieved.

[23] *See* SCHLEI & GROSSMAN, *supra* note 8, at 1095.

[24] *Id.*; *see, e.g.*, Rich v. Martin Marietta Corp., 522 F.2d 333 (10th Cir. 1975); Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (4th Cir.), *cert. denied,* 409 U.S. 982 (1972); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969).

[25] *See* cases cited note 24 *supra.*

[26] 431 U.S. 395 (1977).

in discrimination cases. The *Rodriguez* Court held that to qualify as a class representative in discrimination cases,[27] a plaintiff must be a member of the class he attempts to represent and "possess the same interest and suffer the same injury" as other class members.[28] Noting that the mere fact a complaint alleges discriminatory practices does not insure the named plaintiffs will adequately protect class interests, the Court stated that Rule 23 must be carefully applied in discrimination cases,[29] and held that because the named plaintiffs had not personally suffered injuries as a result of the practices they sought to challenge, they were ineligible to represent a class of persons who did suffer injuries as a result of those practices.[30]

Affirming the district court's definition of the class represented by plaintiffs in *Roman,* the Fourth Circuit also upheld the dismissal of the action on the ground that plaintiffs had failed to prove a prima facie case of employment discrimination against ESB.[31] Plaintiffs had attempted to rely principally on statistical evidence[32] indicating that the ratio of blacks

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[27] In *Rodriguez,* the court found the named plaintiffs had not been discriminated against, and were therefore not members of the class they sought to represent. *Id.* at 403-06. Consequently, the court did not address the issue current in "across the board" suits whether a person who has been discriminated against in one practice can represent others affected by other practices. The court, however, emphatically emphasized that Rule 23 requirements must be strictly applied in discrimination cases, *id.* at 405, and indicated that the controlling consideration should be whether named plaintiffs will adequately represent all the interests of the alleged class. *Id.* at 403.

[28] *Id.* at 405.

[29] *Id.*

[30] *Id.* at 403-04.

[31] 550 F.2d at 1352. The Fourth Circuit also evaluated the evidence presented concerning whether ESB engaged in discriminatory practices other than those alleged in connection with the layoffs. *See id.* at 1352-1355. Such an endeavor was unnecessary since by limiting the class involved to only those persons affected by the layoffs, the court removed issues not concerning the layoffs from consideration. The *Roman* court indicated that such issues had been removed from consideration by later acknowledging that the district court decision dismissing the class action bound only the named plaintiffs. *Id.* at 1355-56.

Since the class action suit was dismissed, judgment was entered against only the joined plaintiffs in the action. *See* 550 F.2d at 1355-56. Judgment against all the joined parties in *Roman* necessarily required a determination that the layoff was not discriminatory as to any of the plaintiffs. *See* McNellis v. Mechanics Nat'l. Bank & Trust Co., 385 F.2d 916 (2d Cir. 1967); Tire Sales Corp. v. Cities Serv. Oil Co., 410 F. Supp. 1222 (N.D. Ill. 1976). The district court decision clearly indicates that findings of fact concerning each plaintiff had been made. *See* 7 Empl. Prac. Dec. ¶ 9416 at 7837-45.

[32] Statistics are the evidence most commonly used to prove discrimination against a class. 1 EMPL. PRAC. GUIDE (CCH) ¶ 2330 (1977). When there is no specific evidence of racial animus, statistics showing that an employment practice, although facially neutral, such as layoffs according to a seniority system, has a significantly racially disproportionate result may be sufficient to show the practice is discriminatory. *See* Griggs v. Duke Power Co., 401 U.S. 432 (1971); King v. Yellow Freight Syst., Inc., 523 F.2d 879 (8th Cir. 1975); Barnett v. W. T. Grant Co., 518 F.2d 543 (4th Cir. 1975); SCHLEI & GROSSMAN, *supra* note 8, at 1154; *Federal Power, supra* note 5 at 479.

If a plaintiff proves his prima facie case that an employment practice or requirement has a discriminatory impact, the employer may escape liability if he proves the practice was essential to his business. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 805-06 (1973);

to whites laid off was disproportionate to the ratio of blacks to whites employed by the company.[33] Courts presented with the issue have consistently held that statistical evidence revealing disproportionate racial impact of employment practices may be competent for proving a prima facie case of employment discrimination, but have reached varying results concerning how statistically disproportionate the impact of an employment practice must be before the practice can be held discriminatory on the basis of statistical evidence alone.[34] The *Roman* court, determining that the evidence in the case revealed an insignificant statistical imbalance,[35] derived a minimal standard which statistical evidence must meet, and held that absent supporting evidence of specific discriminatory acts, evidence revealing an insignificant statistical imbalance is not sufficient to establish a prima facie case case of employment discrimination.[36]

The *Roman* court's decision is consistent with recent Supreme Court decisions concerning the use of such evidence in discrimination cases. Plaintiffs in employment discrimination cases are not required to prove a defendant intended to discriminate;[37] rather, they need only prove that a practice or requirement had a significant discriminatory effect.[38] Because, however, plaintiffs must prove a practice or requirement has discriminatory effects by a preponderance of the evidence,[39] something more than a

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Day v. Matthews, 530 F.2d 1083 (D.C. Cir. 1976). If the employer sustains this burden of proof, the plaintiff can rebut by showing some other practice or requirement with significantly less discriminatory effects would serve the business purpose as well. Dothard v. Rawlinson, 433 U.S. 321, 329 (1977). The allegedly discriminatory activity in *Roman* was the layoff of employees. *See* 550 F.2d at 1345-46. Although the layoff had some racially disproportionate effects, the Fourth Circuit found the layoffs were a business necessity because of the then current financial condition of the company. *Id.* at 1346-47.

[33] 550 F.2d at 1348. The court first found that the company had not discriminated in hiring prior to the layoff, and that the proportion of blacks employed by the company was similar to the proportion of blacks in the community. *Id.* at 1353. Consequently, black employees had not been locked into the seniority system, which determined the order of layoffs, as a result of discriminatory practices. The court further found that after the layoff, the proportion of blacks in the affected seniority categories had remained virtually the same, and that similar percentages of blacks and whites in each category were laid off. *Id.* at 1352.

[34] SCHLEI & GROSSMAN, *supra* note 8, at 1161-62; *see e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971); Brown v. Gaston County Dyeing & Machine Co., 457 F.2d 1377 (4th Cir. 1972); *see* Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971) (en banc), *cert. denied*, 406 U.S. 950 (1972).

[35] 550 F.2d at 1350-52.

[36] *Id.* at 1351.

[37] Note, *Employment Discrimination: Statistics and Preferences Under Title VII*, 59 VA. L. REV. 463, 464-65 (1973). Title VII is directed towards discriminatory effects of employment practices, and not the motivation behind such practices. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). Courts generally apply the same principle in § 1981 cases, and plaintiffs are seldom required to show a defendant acted with discriminatory intent. *See* Sapol v. Snyder, 524 F.2d 1009 (10th Cir. 1975); Long v. Ford Motor Co., 496 F.2d 500, 506 (6th Cir. 1974); Jimerson v. Kisco Co., 404 F. Supp. 338 (E.D. Mo. 1975).

[38] Note, *Employment Discrimination: Statistics and Preferences Under Title VII*, 59 VA. L. REV. 463, 465 (1973).

[39] Hazelwood School Dist. v. United States, 433 U.S. 299, 307 (1977).

slight discrepancy in figures is necessary to justify imposing liability for discrimination on a defendant.[40] Consequently, the Supreme Court has in several recent cases held that for statistical evidence to alone establish a prima facie case of discrimination, the evidence must reveal gross statistical disparities in terms of the effect of a practice or requirement.[41] The *Roman* court's decision requiring that evidence must show more than an insignificant racially disproportionate impact in order to prove a prima facie cases accords with subsequent Supreme Court decisions.

EDITORIAL STAFF

B. Exhaustion Of Administrative Remedies

The doctrine of exhaustion of administrative remedies is well established and provides that no one is entitled to judicial review of his claims until appropriate administrative remedies have been exhausted.[1] The basic purpose served by the doctrine is to prevent judicial interference with the administrative process and thereby permit agencies to make decisions that are discretionary and entrusted to their special competence.[2] Additionally, judicial review of allegations not first examined by an agency may be difficult because of the absence of a factual record on those claims, developed through the application of the agency's expertise.[3] Finally, judicial review often may be unnecessary when an agency completes its proceedings and is able, therefore, to discover and correct its own errors.[4]

In *Weitzel v. Portney*,[5] the Fourth Circuit applied the doctrine of exhaustion of administrative remedies to refuse judicial review of allegations not pressed during administrative hearings.[6] Weitzel, an Internal Revenue

[40] *See generally*, Fiss, *A Theory of Unemployment Law*, 38 U. CHI. L. REV. 235 (1970).

[41] Hazelwood School Dist. v. United States, 433 U.S. 299, 307-08 (1977); Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); International Brotherhood of Teamsters v. United States, 431 U.S. 324, 336-38 (1977).

[1] Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938).

[2] McKart v. United States, 395 U.S. 185, 194 (1969).

[3] *Id.*

[4] *Id.* at 195.

[5] 548 F.2d 489 (4th Cir. 1977).

[6] 548 F.2d at 492. The Fourth Circuit also applied the doctrine of exhaustion of administrative remedies in Fieldcrest Mills, Inc. v. OSHRC, 545 F.2d 1384 (4th Cir. 1976). The case originated with a citation issued to Fieldcrest Mills by the Secretary of Labor for violation of a safety and health standard protecting employees against dangers resulting from the accumulation of raw cotton dust. The administrative law judge granted Fieldcrest's motion for summary judgment, determining that the OSHA standard was invalid as not properly issued under the authorizing statute. *Id.* at 1384-85. *See* 29 U.S.C. § 655 (1970). The Occupational Safety and Health Review Commission (OSHRC) vacated the administrative order, upheld the standard, and remanded the case to the administrative law judge for a hearing on the merits. 545 F.2d at 1385. Fieldcrest appealed to the Fourth Circuit, claiming that the OSHRC

Service employee, brought an action to redress denial of his application for promotion, alleging sex discrimination. He also alleged that the IRS failed to follow applicable agency regulations, and that the IRS breached its labor contract with the National Association of Internal Revenue Service Employees (NAIRE). The appellate court granted a trial de novo on the sex discrimination claim,[7] but refused jurisdiction over the remaining allegations, stating that Weitzel had failed to exhaust the appropriate administrative remedies and union grievance procedures.

Weitzel failed to obtain a promotion to which he felt himself entitled. Seeking review of the promotion selection proceeding, he filed informal and formal complaints of sex discrimination with the IRS. The IRS conducted an investigation and issued a preliminary report. Weitzel then requested and received a hearing from the IRS, in which he repeated the sex discrimination charge, and in addition alleged that the IRS failed to follow procedures mandated by its own regulations and those of the Civil Service Commission (CSC) in handling the promotion application.[8] Despite finding that sex discrimination was not involved in the promotion denial, the hearing officer who conducted the formal hearing for the IRS recommended that the selection procedure be repeated, because of procedural irregularities.[9] This recommendation was rejected by the IRS.[10] Weitzel then appealed to the CSC Appeal Review Board on the sex discrimination

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order was final, that the company was adversely affected by it, and that the order was therefore ripe for review. *Id. See* 29 U.S.C. §§ 659(c), 660(a) (1970). For purposes of judicial review, a final order is one "affirming, modifying, or vacating the Secretary's [of Labor] citation or proposed penalty." *See* 29 U.S.C. § 659(c) (1970). Because the decision of the OSHRC was not a decision on the merits of the Secretary's citation, the Fourth Circuit held that the order was not final, and therefore not reviewable. 545 F.2d at 1386. The court stated that Fieldcrest's appeal of the Commission's order was an example of failure to exhaust administrative remedies before seeking judicial review. Prior to being allowed recourse to the courts, Fieldcrest was required to pursue the hearing on the merits before the administrative law judge, as ordered by OSHRC. *Id.* The court conditioned Fieldcrest's right to judicial review on its having exhausted the administrative process, in order to permit the agency to complete the proceedings delegated to it by Congress, free from premature interference. *See* 545 F.2d at 1386.

[7] In granting the trial de novo, the Fourth Circuit followed the Supreme Court's decision in *Chandler v. Roudebush,* 425 U.S. 840 (1976). The Supreme Court there held that federal employees have a right to a trial de novo under § 717(c), Title VII, Civil Rights Act of 1964 (amended in 1972), 42 U.S.C. § 2000e-16(c) (Supp. V 1975). 425 U.S. at 864. Title VII is directed at preventing discrimination in employment matters. 42 U.S.C. §§ 2000e-2, 2000e-16(a) (1970 & Supp. V 1975).

[8] Weitzel alleged that the IRS ignored his previous "reduction-in-force" demotion. Civil Service Commission regulations require that an agency give persons so demoted preference over all other applicants for promotion. 548 F.2d at 492. *See* 5 C.F.R. § 330.302 (1977).

[9] The Fourth Circuit noted that the hearing officer's re-selection recommendation was dropped from the report prior to submission to the CSC Appeal Review Board, in accordance with 5 C.F.R. § 713.218(g) (1977), as not pertinent to the question of unfair employment practices. 548 F.2d at 492 n.4. Weitzel thus did not learn of the recommendation until after the CSC Appeal Review Board heard and decided his appeal as to the sex discrimination complaint. *Id.*

[10] *Id.* at 492.

charge, but did not appeal on the claim of procedural irregularities.[11] The Board affirmed the finding that no discrimination had occurred in the selection process.[12] Weitzel then sought a de novo hearing in district court of his allegations of sex discrimination, procedural irregularities, and breach of the union contract. The district court denied a trial de novo on the sex discrimination claim and held that the remaining two allegations were barred by Weitzel's failure to exhaust administrative remedies or to use the union grievance procedure.[13] Weitzel then appealed to the Fourth Circuit. Since he failed to raise the procedural irregularities, first alleged before the hearing officer, in his appeal to the Review Board, the Fourth Circuit held that his request for judicial review on those grounds was barred by his failure to exhaust administrative remedies.[14] The court found that administrative remedies were available to Weitzel and that no reasons were given excusing his failure to exhaust them.[15]

The Fourth Circuit also applied the exhaustion doctrine to foreclose Weitzel's appeal on the breach of contract claim.[16] Weitzel alleged that the evaluation of his application for promotion by a person other than his immediate supervisor violated the provisions of the IRS labor agreement with NAIRE.[17] Like the CSC regulation, the NAIRE contract included grievance procedures,[18] which were the first avenue of recourse.[19] Employees of private enterprises have long been required to exhaust contractual grievance procedures before seeking judicial relief for breach of labor-management contracts.[20] The Supreme Court has held that the policy underlying federal labor law requires exhaustion, so that contractual grievance procedures remain the preferred method of settling labor disputes.[21] Since the grievance procedure for federal employees was modeled after existing federal labor law policy, the Fourth Circuit held that the exhaustion doctrine was applicable to public employees' grievances, and dis-

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

[12] 548 F.2d at 492.

[13] *Id.* at 491.

[14] *Id.* at 492. *See* note 9 *supra.*

[15] *Id. See* 5 C.F.R. §§ 771.311 and 300.104(b) (1977), cited by the court as providing general procedures for employee grievances. *See also* text accompanying notes 1-4 *supra* (discussion of the exhaustion doctrine).

[16] 548 F.2d at 493.

[17] *Id.* at 491.

[18] The grievance procedure was included in the labor agreement pursuant to Executive Order No. 11491, 36 Fed. Reg. 17319 (1971), *reprinted in* 5 U.S.C. § 7301 (1976). Section 13 of the Order requires that labor agreements include procedures for consideration of grievances not otherwise governed by statutory appeals procedures. *Id.*

[19] 548 F.2d at 491.

[20] *See* Republic Steel v. Maddox, 379 U.S. 650 (1965).

[21] In Republic Steel v. Maddox, 379 U.S. 650 (1965), the Supreme Court dismissed an employee's suit to enforce a severance pay provision because the contractual grievance procedure was not pursued first. The Court noted congressional approval of such procedures as the preferred method of settling labor disputes, thereby assuring a union's status as exclusive bargaining representative, and limiting the choice of remedies to be applied against employers. *Id.* at 653.

missed Weitzel's breach of contract claim for failure to exhaust the contractual remedies.[22]

The Fourth Circuit found that Weitzel had exhausted the administrative remedies on his allegation of sex discrimination and that a de novo hearing in district court was therefore proper on that claim.[23] The allegations of procedural irregularities[24] and of violation of the labor agreement,[25] however, were barred from examination as independent claims in the trial de novo, even though they arose out of the same incident. The court's refusal to permit examination of these allegations raises the issue of what allegations, arguably related to a sex discrimination claim, should be included in a de novo hearing properly granted on the discrimination claim. Strict application of the exhaustion doctrine and liberal construction of Title VII present alternative approaches to this problem.

Refusal to examine allegations of procedural irregularities in a trial de novo may be in conflict with the purpose of the 1972 amendments to Title VII.[26] Both the broad language[27] and the legislative history[28] of the amendments disclose a congressional intent to eliminate discrimination in federal employment. In addition, employment discrimination claims of public employees are entitled to broad review, which may go beyond the employees' specific allegations.[29] A liberal construction of the procedure established in Title VII for prosecution of federal employee discrimination claims might therefore be justified. Examination of employees' allegations of procedural irregularities could then be allowed in a trial de novo on the discrimination charge, at least to the extent that the allegations evidenced the occurrence of discriminatory practices.[30]

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[22] 548 F.2d at 493.

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

[24] *See* text accompanying notes 8-15 *supra.*

[25] *See* text accompanying notes 18-21 *supra.*

[26] 42 U.S.C. § 2000e-16(a) (Supp. V 1975).

[27] Section 17(a), Title VII, Civil Rights Act of 1964 (as amended in 1972) states that "[a]ll personnel actions affecting employees . . . of the Federal Government . . . shall be made free from any discrimination based on race, color, religion, sex or national origin." 42 U.S.C. § 2000e-16(a) (Supp. V 1975).

[28] Examining the equal employment provisions of the 1964 Civil Rights Act, Congress noted that "an aggrieved Federal employee . . . must overcome a U.S. Government defense of sovereign immunity or failure to exhaust administrative remedies with no certainty as to the steps that must be taken to exhaust such remedies." S. REP. No. 415, 92d Cong., 1st Sess. 15 (1971). *See also* H.R. REP. No. 238, 92d Cong., 1st Sess. (1971), *reprinted in* 2 U.S. CODE CONG. & ADMIN. NEWS 2158 (1972). For such reasons, Congress gave federal employees the option to bring suit in federal court either after a final disposition of the employees' complaints by the agency or the CSC, or after 180 days elapsed from filing of the complaint. 42 U.S.C. § 2000e-16(c) (Supp. V 1975). Administrative remedies were thereby defined and a clear procedure provided for employees.

[29] Civil Service Commission regulations provide that investigations of employee complaints shall include "a thorough review of the circumstances under which the alleged discrimination occurred . . . and any policies and practices related to the work situation which may constitute, or appear to constitute, discrimination *even though they have not been expressly cited by the complainant.*" 5 C.F.R. § 713.216(a) (1977) (emphasis added).

[30] *See* 548 F.2d at 493.

Despite the existence of an argument for inclusion of allegations related to the central sex discrimination claim,[31] courts traditionally have followed the exhaustion doctrine in limiting the scope of inquiry in a Title VII action.[32] While the Supreme Court has found a statutory right to a trial de novo in such actions brought by federal employees, the Court has not required that claims related to the discrimination charge, but not raised at administrative levels, be considered in the trial de novo.[33] The exhaustion doctrine appears to foreclose examination of related claims as independent issues in a de novo hearing granted on a claim of sex discrimination. The Supreme Court has applied the doctrine to deny inclusion of previously unasserted claims, and claims extraneous to a Title VII allegation in a civil action in a federal district court.[34] Several circuits, faced with Title VII claims, have applied the exhaustion doctrine to require plaintiffs to follow the administrative prerequisites provided by Title VII and related regulations.[35] While they do not conclusively answer the question raised by the *Weitzel* decision, the courts' holdings exemplify a judicial preference that all available administrative remedies be utilized before allowing judicial review.

The Fourth Circuit's use of the exhaustion doctrine to bar inclusion in the de novo hearing of Weitzel's separate allegations as bases for independent review is supported by traditional application of the doctrine. Apparently reconciling the goals of Title VII with the strictness of the exhaustion doctrine, though, the *Weitzel* court would still permit the appellant to introduce these allegations as evidence in support of the discrimination claim.[36] The Fourth Circuit's decision therefore prevented circumvention of existing administrative procedures, while advancing the goal of Title VII to prevent employment discrimination.

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[31] *See* text accompanying notes 26-30 *supra.*

[32] *See* text accompanying notes 34-35 *infra.*

[33] *See* Chandler v. Roudebush, 425 U.S. 840 (1976). *See* note 6 *supra.*

[34] Brown v. GSA, 425 U.S. 820 (1976). The Supreme Court stated that "§ 717 [42 U.S.C. § 2000e-16 (Supp. V 1975)], with its rigorous administrative exhaustion requirements . . . would be driven out of currency were immediate access to the courts under other, less demanding statutes permissible." 425 U.S. at 833. This statement is perhaps indicative of judicial desire to preserve the Title VII trial de novo strictly for examination of discrimination allegations.

[35] *See* Ettinger v. Johnson, 518 F.2d 648, 652 (3d Cir. 1975); Brown v. GSA, 507 F.2d 1300, 1307-08 (2d Cir. 1974), *aff'd,* 425 U.S. 820 (1976); Gibson v. Kroger Co., 506 F.2d 647, 650 (7th Cir. 1974), *cert. denied,* 421 U.S. 914 (1975); *cf.* Beale v. Blount, 461 F.2d 1133 (5th Cir. 1972) (federal employee discrimination case involving 42 U.S.C. § 1981, where exhaustion doctrine was applied to require plaintiff to present all claims within agency's jurisdiction to that agency).

[36] 548 F.2d at 493. *See also* text accompanying note 30 *supra.*