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Tests For Discrimination In Employment

an interest in the future.[72] Invalidity, even under cy pres, would result when the essential purpose of the creator is a perpetuity,[73] and intestacy under cy pres would result in the not inconceivable case where intestacy would most closely appropriate the creator's intent.[74]

The judicial adoption of complete cy pres, as well as the better method of legislative enactment,[75] is a major advance in relegating the Rule Against Perpetuities to its proper function. "It should be a check on vain, capricious action by wealthy empire-builders. But it should not be a constantly present threat to reasonable dispositions which slightly overstep a technical line."[76] Cy pres may require a case by case determination of the validity of an interest when a perpetuities problem is presented,[77] but can it be said that the gift of one testator is any less important to him or his intended beneficiaries than is the gift of another? "People do not intentionally violate the Rule; they stumble into it, and if a court saves them from their own ineptitude it is doing a good thing, not a bad thing."[78] By a frank acknowledgment of reformation in the courts through cy pres, the absence of obviously artificial constructions will be missed by no one and undoubtedly more gifts will be saved from harsh applications of the Rule Against Perpetuities.

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TESTS FOR DISCRIMINATION IN EMPLOYMENT

At common law and until recent years, an employer's discriminatory hiring practices were entirely free from legal restrictions.[1] The employer-employee relationship was considered a contractual matter, requiring the assent of both parties and was limited only by the con-

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[72]469 P.2d 183, 185 n.4 (Hawaii 1970).

[73]J. MORRIS & W. B. LEACH, THE RULE AGAINST PERPETUITIES 36 (2d ed. 1962); *cf.* St. Amour v. Rivard 2 Mich. 293 (1852); Clayton v. Burch, 239 N.C. 386, 80 S.E.2d 29 (1954).

[74]*Cf.* Fletcher, *A Rule of Discrete Invalidity: Perpetuities Reform Without Waiting*, 20 STAN. L. REV. 459, 469 (1968).

[75]Leach, *Perpetuities: The Nutshell Revisited*, 78 HARV. L. REV. 973, 983 (1965). Legislative enactments of complete cy pres alone include: CAL. CIV. CODE § 715.5 (West Supp. 1970); MO. ANN. STAT. § 442.555 (Supp. 1969); TEX. REV. CIV. STAT. ANN. art. 1291b, §§ 1-4 (Supp. 1969).

[76]J. MORRIS & W. B. LEACH, THE RULE AGAINST PERPETUITIES 36 (2d ed. 1962).

[77]R. LYNN, THE MODERN RULE AGAINST PERPETUITIES 121 (1966).

[78]Leach, *Perpetuities: What Legislatures, Courts, and Practitioners Can Do About the Follies of the Rule*, 13 U. KAN. L. REV. 351, 356 (1965).

[1]*See* Coppage v. Kansas, 236 U.S. 1 (1915); Mitchell v. Stanolind Pipe Line Co., 184 F.2d 837 (10th Cir. 1950); People v. Chicago, Minn. & St. P. Ry., 306 Ill. 486, 138 N.E. 155 (1923) (dictum); Avins, *Toward Freedom of Choice in Employment*, 13 N.Y.L.F. 213, 237-41 (1967).

tract itself.[2] The employer had a right to hire only those employees he desired, and the employee, likewise, had a right to choose the employer for whom he would work.[3] Moreover, equity courts would not order specific performance of an employment contract and would not order reinstatement even if the employee were wrongfully discharged.[4] In short, both the employer and the employee had an absolute right to freedom of choice in employment.[5]

Although the employee's right to choose his employer has not been hampered, the employer's discretion in hiring has been sharply curtailed[6] by the enactment of the Federal Civil Rights Act of 1964[7] and various state civil rights acts of similar impact.[8] New York was the

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[2]*See* Gunther v. San Diego & Ariz. E. Ry., 198 F. Supp. 402, 408 (S.D. Cal. 1961); Electricians Local 205 v. General Elec. Co., 172 F. Supp. 53, 56 (D. Mass. 1959); *cf.* Fersing v. Fast, 121 F.2d 531, 536 (C.C.P.A. 1941).

[3]*See Van Zandt v. McKee*, 202 F.2d 490 (5th Cir. 1953) (where the court stated, "One man's right to work stops short of the other fellow's right not to hire him." 202 F.2d at 491); People v. Chicago, Minn. & St. P. Ry., 306 Ill. 486, 138 N.E. 155 (1923). *Cf.* Jones v. American Pres. Lines, 308 P.2d 393 (Cal. Dist. Ct. App. 1957). Note that the various labor laws did nothing to control discrimination on the part of the private employer.

[4]Avins, *Toward Freedom of Choice in Employment*, 13 N.Y.L.F. 213, 242 (1967). *See, e.g.*, Stevenot v. Norberg, 210 F.2d 615 (9th Cir. 1954); Shubert v. Woodward, 167 F. 47 (8th Cir. 1909).

[5]*See, e.g.*, cases cited note 1, *supra.*

[6]*See, e.g.*, N.Y. EXEC. LAW § 296 (McKinney Supp. 1970). States have enacted these anti-discrimination laws under the authority of their police power. Thus, N.Y. EXEC. LAW § 290 (McKinney Supp. 1970) reads

> 1. This article shall be known as the "Human Rights Law".
> 2. It shall be deemed an exercise of the police power of the state for the protection of the public welfare, health and peace of the people of the state....

Although the constitutional validity of the state employment discrimination laws has not been decided by the United States Supreme Court, the Court has indicated that they would be upheld by its decision in two cases. *See* Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945); Truax v. Raich, 239 U.S. 33 (1915).

The state's discretion in hiring has been curtailed from the beginning by the first amendment which reads in part, "Congress shall make no law respecting an establishment of religion..." and by the fourteenth amendment which reads in part, "No state shall...deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amends. I, XIV.

[7]42 U.S.C. § 2000e-2 (1964) reads in part, that

> It shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual... because of such individual's race, color, religion, sex, or national origin....

[8]*See* Garfinkel and Cahn, *Racial-Religious Designations, Preferential Hiring and Fair Employment Practices Commissions*, 20 LAB. L.J. 357, 363 (1969); Hill, *Twenty Years of State Fair Employment Practices Commissions: A Critical Analysis with Recommendations*, 14 BUFF. L. REV. 22 (1964); Rosen, *The Law and Racial Discrimination in Employment*, 53 CAL. L. REV. 729, 775 (1965).

N.Y. EXEC. LAW § 296 (McKinney Supp. 1970) is typical; "It shall be an un-

first state to enact a law prohibiting discrimination by private employers,[9] and at the present time approximately seventy-five percent of the states have similar civil rights acts in effect.[10] Under these civil

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lawful discriminatory practice: (a) For an employer, because of the age, race, creed, color, national origin or sex of any individual, to refuse to hire or employ... such individual...."

[9]Garfinkel and Cahn, *Racial-Religious Designations, Preferential Hiring and Fair Employment Practices Commissions*, 20 LAB. L.J. 357, 363 (1969). The New York Civil Rights Law, (N.Y. CIVIL RIGHTS LAW §§ 40-c to 44-a (McKinney Supp. 1970) originally enacted as Act of February 17, 1909 §§ 1-612), which preceded the Human Rights Law (N.Y. EXEC. LAW §§ 290-301 (McKinney Supp. 1970) (originally enacted as Act of March 12, 1945, ch. 118 §§ 125-136, 168 Stat. 457)), barred discrimination in employment only in the case of public employees, public utility employees, labor organizations and defense contractors. The private employer in New York, on the other hand, was not barred from discrimination until the enactment of the Human Rights Law in 1945. Nevertheless, since the Federal Civil Rights Act and many other states' civil rights laws do prohibit discrimination by a private employer, the anti-discrimination laws will be referrred to throughout the text as "civil rights laws".

Note that the New York Law does refer to the right to employment without discrimination as a civil right.

> The opportunity to obtain employment without discrimination because of race, creed, sex, color or national origin is hereby recognized as and declared to be a *civil right* (emphasis added).

N.Y. EXEC. LAW § 291 (McKinney Supp. 1970).

Compare N.Y. EXEC. LAW §§ 292, 297 (McKinney Supp. 1970) *with* 42 U.S.C. §§ 2000, 2000e-5 (1964). Note that the New York Law, upon which the Federal Law was modeled, is more favorable to the employee. Under the New York Law, the employee has the choice of taking his case before the Division of Human Rights or filing a civil action in the courts. However, under the Federal Law an employee must first file his complaint with the Equal Employment Opportunity Commission (EEOC). The New York Law also has a more favorable statute of limitations—one year—as opposed to the federal statute of limitations of ninety days. Moreover, the Division of Human Rights in New York has power to issue court enforceable cease and desist orders, whereas the EEOC powers are limited to conference, conciliation and persuasion. Note also that the definition of "employer" in the New York Law is broader than that in the Federal Law. "The term 'employer' does not include any employer with fewer than four persons in his employ." N.Y. EXEC. LAW § 292 (McKinney Supp. 1970). "The term 'employer' means a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year...." 42 U.S.C. § 2000e (b) (1964). Moreover, when an alleged discriminatory hiring practice is prohibited by a state or local law, the EEOC must defer to the local agency which will have sixty days to act. For a discussion of the differences between state and federal employment discrimination laws, see Barone, *The Impact of Recent Development in Civil Rights on Employers and Unions*, 17 LAB. L.J. 413 (1967).

[10]ALASKA STAT. § 18.80.220 (Supp. 1970), *amending* §§ 18.18.200 -.280 (1969); ARIZ. REV. STAT. ANN. §§ 41-1461 to -1466 (Supp. 1969); CAL. LABOR CODE §§ 1410-1433 (West Supp. 1970); COLO. REV. STAT. ANN. §§ 80-21-2, -4, -6 (Supp. 1969), *amending* §§ 80-21-1 to -8 (1963); CONN. GEN. STAT. ANN. §§ 31-122 to -128 (Supp. 1970), *amending* §§ 31-122 to -128 (1958); DEL. CODE ANN. tit. 19, §§ 710-712 (Supp. 1968); HAWAII REV. STAT. §§ 378-1 to -38 (1968); IDAHO CODE ANN. §§ 44-1701 to -1704; 67-5901 to -5912 (Supp. 1969); ILL. ANN. STAT. ch. 48, §§ 852, 853, 855, 856, 859

rights laws, a private employer's discretion in hiring has become circumscribed to the extent that he must be prepared to justify any decision he makes concerning hiring or firing.[11]

In *Eastern Greyhound Lines Division of Greyhound Lines, Inc. v. New York State Division of Human Rights ex rel. Ibrahim*,[12] an action based upon an alleged violation of the New York Human Rights Law,[13] a New York appellate court unanimously annulled the determination of the State Human Rights Appeal Board that Greyhound had violated section 296[14] of that law by refusing to employ a bearded Muslim as a baggage clerk. The court held that Greyhound's failure to offer employment was justified and legal. The facts of the case reveal the fine line between an illegal discriminatory hiring practice and a "practical business policy".[15]

(Supp. 1970), *amending* ch. 48, §§ 851-67 (Smith-Hurd 1966); IND. ANN. STAT. §§ 40-2308 to -2310, -2312, -2317 (a) (Supp. 1970), *amending* §§ 40-2301 to -2328 (1965); IOWA CODE ANN. §§ 105 A.1-A.14 (Supp. 1970); KAN. STAT. ANN. §§ 44-1001 to -1005, -1009, -1011 to -1013 (Supp. 1969), *amending* §§ 44-1001 to -1014 (1964); KY. REV. STAT. ANN. §§ 344.510, .520, .530 (Supp. 1970), *amending* §§ 344.010 -.990 (1969); ME. REV. STAT. ANN. tit. 26, §§ 861-64 (Supp. 1970); MD. ANN. CODE art. 49B, §§ 17-19 (Supp. 1969), *amending* art. 49B, §§ 17-20 (1968); MICH. STAT. ANN. §§ 17.458(1) -(11) (1968); MINN. STAT. ANN. §§ 363.01 -.06, .071-.073, .091, .10, .101, .115, .116, .12, .121, .122 (Supp. 1970), *amending* §§ 363.01-.13 (1966); MO. ANN. STAT: §§ 296,010, :020, .050 (Supp. 1970), *amending* §§ 296.010 -.070 (1965); MONT. REV. CODES ANN. §§ 64-301 to -303 (1970); NEB. REV. STAT. §§ 48-1101 to -1125 (1968); NEV. REV. STAT. §§ 613.310 -.430 (1967); N. H. REV. STAT. ANN. §§ 354-A:3, 354-A:8 (1969), *amending* §§ 354-A:1 to -A:14 (1966); N.J. STAT. ANN. § 18:25-1 (Supp. 1957); N.M. STAT. ANN. §§ 4-33-1 to -13 (Supp. 1969), *formerly* §§ 59-4-1 to -14 (1960); N.Y. EXEC. LAW §§ 290-299 (McKinney Supp. 1970), *amending* §§ 290-301 (McKinney 1951); OHIO REV. CODE ANN. §§ 4112.01 to .07, 4112.09 to .11, 4112.99 (Baldwin Supp. 1969), *amending* §§ 4112.01 to .08, 4112.99 (1964); OKLA. STAT. ANN. tit. 25, §§ 1101-1802 (Supp. 1970); ORE. REV. STAT. §§ 649.010 -.990 (1969); PA. STAT. tit. 43, §§ 952-55, 955.1, 957, 958.1, 959, 959.1, 960, 962, 962.1 (Supp. 1970), *amending* tit. 43 §§ 951-63 (1969); R.I. GEN. LAWS ANN. § 28-5-8 (Supp. 1969), *amending* §§ 28-1-5 to -39 (1968); UTAH CODE ANN. §§ 34-35-1 to -8 (Supp. 1969), *formerly* §§ 34-17-1 to -8 (1966); VT. STAT. ANN. tit. 21, §§ 495-495(c) (1967); WASH. REV. CODE ANN. §§ 49.60.010, .030, .040, .180, .190, .200, .216, .217, .222 -.226, .310 (Supp. 1970), *amending* §§ 49.60.010 -.320 (1958); W. VA. CODE ANN. §§ 5-11-1 to -16 (Supp. 1970), *formerly* §§ 5-11-1 to -.6 (1966); WIS. STAT. ANN. §§ 111.31, 111.32, 111.325, 111.33, 111.35, 111.36, 111.37 (Supp. 1970), *amending* §§ 111.31-.36 (1957); WYO. STAT. ANN. §§ 27-257 to -264 (1967).

[11]*See* Gregory v. Litton Systems, Inc., 316 F. Supp. 401 (C.D. Cal. 1970); Dewey v. Reynolds Metals Co., 300 F. Supp. 709 (W.D. Mich. 1969).

[12]34 App. Div. 2d 916, 311 N.Y.S.2d 465 (Sup. Ct. 1970).

[13]The action was based upon an alleged violation of N.Y. EXEC. LAW § 296 (McKinney Supp. 1970), which provides in part: "It shall be an unlawful discriminatory practice: (a) for an employer, because of the ... creed ... of any individual, to refuse to hire or employ ... such individual ...."

[14]N.Y. EXEC. LAW § 296 (McKinney Supp. 1970).

[15]311 N.Y.S.2d at 466.

The respondent,[16] Abdullahi Ibrahim, wore a beard in accordance with his religious beliefs under the Orthodox Muslim faith. He applied for a position with Greyhound and was refused the job solely because he wore a beard, inasmuch as Greyhound's hiring practices include a uniformly applied, nation-wide policy that all employees be clean-shaven. Ibrahim, thus, charged Greyhound with an unlawful discriminatory hiring practice prejudicial to his Muslim faith. The case arose before the court on a petition to review the determination of the Human Rights Appeal Board.

In deciding *Greyhound,* the court was faced with the difficulty of determining what hiring discrimination on the part of an employer constitutes a violation of a civil rights act.[17] The court upheld petitioner's refusal to hire. In doing so, it relied on several mitigating factors.[18] In the first place, Greyhound's hiring policy is uniformly applied and adhered to by all of its nation-wide divisions. Secondly, Greyhound's purpose in refusing to hire Ibrahim seemed to the court to have been in accord with a practical business policy, rather than an unlawful discriminatory practice. Thirdly, (and this was emphasized by the court), Greyhound, as a private employer, is not required to make exceptions to its established and uniformly applied personnel policies in order to accommodate the religious practice of a potential employee. Finally, Greyhound could not be charged with lack of good faith.

Despite the enactment of the civil rights laws revising the common law on the employer-employee relationship,[19] the courts have been hard-pressed to discover a satisfactory, uniform test for determining when discrimination in hiring has in fact occurred.[20] Thus, a number of different tests have been used.

The simplest test, and the one often advocated by employers, may be referred to as the *per se* test since it examines the alleged discriminatory practice of the employer to determine whether in itself it constitutes a violation of the law. Thus, in *Phillips v. Martin Marietta Corp.*,[21] a case involving alleged discrimination in employment in that

[16]Actually the Division of Human Rights was acting as respondent but inasmuch as the action was in behalf of Abdullahi Ibrahim and it was he who was allegedly discriminated against, for the sake of clarification he will be referred to as respondent.

[17]N.Y. EXEC. LAW § 296 (McKinney Supp. 1970).

[18]311 N.Y.S.2d at 466.

[19]Notes 2 through 8 and accompanying text *supra.*

[20]*Compare* Gregory v. Litton Systems, Inc., 316 F. Supp. 401 *and* Dewey v. Reynolds Metals Co., 300 F. Supp. 709 (W.D. Mich. 1969) *with* Phillips v. Martin Marietta Corp., 411 F.2d 1 (5th Cir. 1969).

[21]411 F.2d 1 (5th Cir. 1969).

females with pre-school children were not considered for employment although males were, the company defended on the premise that its hiring practice was not "per se discrimination on the basis of 'sex'."[22] The court agreed inasmuch as "[a] per se violation of the Act can only be discrimination based solely on one of the categories i.e., in the case of sex; women vis-à-vis men."[23] However, it went on to say that "[w]hen another criterion of employment is added to one of the classifications listed in the Act," the court must look further "to determine if any individual or group is being denied work due to his race, color, religion, sex, or national origin."[24] But after stating that the *per se* test would not be sufficient in this case, the court in essence reverted to it. By holding that the hiring practice in question was not illegal since it was based on a "coalescence of two elements,"[25] sex and pre-school children, the court implied that the practice was allowed to stand since it was not based upon sex alone. The court failed to examine the fact that whether the position applied for was filled by another female without pre-school children or by a male with or without pre-school children, had the plaintiff not been a female, she would have been considered. Thus, regardless of the fact that the employer's hiring practice was based on a coalescence of two elements, it resulted in discrimination against the applicant because she was a female.

However, other courts have looked beyond the employer's alleged discriminatory act to its impact to determine whether discrimination has in fact occurred.[26] The test utilized under this approach may be referred to as the *final impact* test. Under this approach the questioned act itself is no longer the controlling factor—the court also examines the result. Thus, in *Dewey v. Reynolds*,[27] a case involving discharge of an employee for his refusal to work or find a replacement for Sunday overtime shifts, both of which were forbidden by his religious beliefs, the court said, "The . . . rule is not discriminatory on its face, but this is only the first step. Is the rule discriminatory in its impact?"[28] Therefore, an employer must be prepared to defend the final impact as well as the practice itself.

In examining these two tests, it is important to note both their similarities and differences. If a hiring practice cannot be proved to be

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[22]*Id.* at 3.
[23]*Id.*
[24]*Id.* at 3-4.
[25]*Id.*
[26]*See, e.g.*, Local 189, AFL-CIO v. United States, 416 F.2d 980 (5th Cir. 1969); Dewey v. Reynolds Metals Co., 300 F. Supp. 709 (W.D. Mich. 1969).
[27]300 F. Supp. 709 (W.D. Mich. 1969).
[28]*Id.* at 714.

discriminatory under either the *per se* or the *final impact* test, it will be allowed to stand.[29] Proof that a hiring practice is discriminatory under the *per se* test is prima facie evidence[30] of illegality which can be overcome only by evidence on the part of the employer that his discriminatory practice is based on a bona fide occupational requirement.[31] However, the *final impact* test does not necessarily test illegal discrimination. Many hiring practices will have a discriminatory impact, which may or may not be illegal depending upon the reason for the discrimination.[32] Thus, when a hiring practice is found to be discriminatory under the *final impact* test, it is necessary to proceed further to determine whether the hiring practice is illegal. However, since further inquiry to a certain extent shifts the burden of producing evidence to the employer, it is not to be pursued until the employee has established prima facie evidence of illegality.[33]

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[29]There must be some basis for illegality before a hiring practice is prohibited. Since there are only two ways in which a given action can be illegal—either on its face or in its impact— if the act can withstand a *per se* and a *final impact* test, it would follow that the action would be allowed to stand.

[30]"*Prima facie evidence* is that which, when uncontradicted or unexplained, is sufficient to maintain the proposition affirmed." J. TRACY, HANDBOOK OF THE LAW OF EVIDENCE 7 (1952). Therefore, in the case of an alleged violation of a civil rights law, prima facie evidence would be evidence sufficient to maintain discrimination on the basis of age, race, creed, color, national origin, or sex if uncontradicated or unexplained.

[31]42 U.S.C. § 2000e-2(e)(1) (1964). *See* Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969).

[32]*See* Local 189, AFL-CIO v. United States, 416 F.2d 980 (5th Cir. 1969).

[33]When an employee charges an employer with an illegal discriminatory hiring practice, it is the employee, as complainant, not the employer, who is to bear the burden of proof; he is to produce sufficient evidence to establish that the employer has violated a specific statute. Carter v. McCarthy's Cafe, Inc., 4 RACE REL. L. REP. 641 (Minn. Dist. Ct. 1959). The employee can only relieve himself of this burden by producing sufficient evidence to establish a prima facie case of illegality on the part of the employer. If the employee fails to meet this burden, the case must be dismissed. Nevertheless, when the *final impact* test is used, the employee is often required to prove only the possibility of a cause of action and the burden of producing evidence is in effect shifted to the employer, for the courts through the use of further testing look to the employer's evidence to see if it is sufficient to justify his hiring practice and overcome any implication of illegality. *See* Sherbert v. Verner, 374 U.S. 398, 418 (1963) (dissenting opinion by Harlan, J.); Dewey v. Reynolds Metals Co., 300 F. Supp. 709 (W.D. Mich. 1969); Griggs v. Duke Power Co., 292 F. Supp. 243 (M.D.N.C. 1968); BNA, CIVIL RIGHTS ACT OF 1964: WHAT DISCRIMINATION IS FORBIDDEN (1964); Avins, *Toward Freedom of Choice in Employment*, 13 N.Y.L.F. 213, 253 (1969); *Civil Rights—Civil Rights Act of 1964—Employer Held to Have Been Engaged in Religious Discrimination Under Title VII Without Proof of Discriminatory Intent*, 44 N.Y.U.L. REV. 1147 (1969) [hereinafter cited as *Discriminatory Intent*].

In looking at the reasonableness of the private employer's action, courts become general boards of review, often in effect placing the employer in the same position as the state when it is defendant in a case involving an alleged infringement of constitutional rights. Whenever a question arises concerning the constitutional

In *Dewey*, the court found the act in question to be discriminatory under the *final impact* test.[34] However, to determine whether this discrimination was illegal, the court applied a twofold test established by EEOC[35] guidelines. Under that test, "(1) the employer must make reasonable accommodations to the religious needs of its employees; (2) unless such accommodations will cause *undue hardship* on the conduct of the employer's business."[36] Moreover, under those guidelines it is the employer who has the burden of proving that an undue hardship renders the accommodation unreasonable.[37] Thus, the court showed its concern for the employer's position by use of this *undue hardship* test. On the other hand, it shifted the burden of producing evidence to the employer, which is erroneous unless a prima facie case of illegality has been established.[38]

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validity of state action, the state has the burden of proof to justify its actions by proving a compelling need in the public interest. Likewise, when the courts in utilizing the various corollary tests look at the employer's evidence to see if the action is justified, they are in effect shifting the burden of producing evidence to the employer. But applying this burden to a private employer is an erroneous application. The first and fourteenth amendments to the United States Constitution, under which the states are held accountable, apply only to states, not to private employers. McGowan v. Maryland, 366 U.S. 420 (1961); Civil Rights Cases, 109 U.S. 3 (1883). Moreover, the cases in which the burden of producing evidence is shifted to the employer are cases arising under an alleged violation of a specific statute, not under an alleged breach of constitutional rights. *See* McGowan v. Maryland, 366 U.S. 420 (1961); Civil Rights Cases, 109 U.S. 3 (1883); Gregory v. Litton Systems, Inc., 316 F. Supp. 401 (C.D. Cal. 1970); Dewey v. Reynolds Metals Co., 300 F. Supp. 709 (W.D. Mich. 1969); Johnson v. State, Civil Service Dep't, 280 Minn. 61, 157 N.W.2d 747 (1968); *Discriminatory Intent* 1147.

Note that even the states can infringe upon the constitutional rights of citizens if it furthers an important or substantial governmental interest, unrelated to the suppression of free expression, and if the incidental restriction is no greater than is essential to the furtherance of that interest. Thus, in *Farrell v. Smith*, 310 F. Supp. 732 (S.D. Me. 1970), a state vocational school was upheld in requiring that its pupils be clean-shaven where it was proved that this requirement was to further a legitimate interest—obtaining jobs for the students. In upholding the state action the court looked to see if the state had acted reasonably, if its economic purpose was legitimate and if the interest of the state in requiring clean-shaven pupils outweighed the right of the student to wear a beard.

[34][P]laintiff has been forced to choose between his religion and his job. Such a choice limits plaintiff's free exercise of his religion, and is thereby discriminatory in its *effect*." 300 F. Supp. at 714 (emphasis added).

[35]Note 9, *supra*.

[36]300 F. Supp. at 714 (emphasis added).

[37]The court in *Dewey* stated that

> Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

Id. at 712.

[38]Note 33 *supra*.

In *Local 189, United Papermakers & Paperworkers v. United States*,[39] an action arising from alleged discrimination resulting from a seniority system, a court again found discrimination under the *final impact* test. It applied two additional criteria to determine whether the alleged discrimination was illegal. The court required, first, a showing that there was an economic purpose underlying the discriminatory system and, secondly, that the interests of the employer in maintaining the discriminatory system were sufficient to justify the discrimination. Thus, what may be referred to as an *economic purposes* test[40] was used to determine whether the employer had any legitimate management basis for the discriminatory system. An additional test, a *balance of interests* test,[41] was used to weigh the overall interests of the employer in maintaining the discriminatory system against the interests of the employee. In its conclusion the court implied that the employer had either to prove its system necessary or to justify it, but not both.[42] However, the employer failed to do either, and the system was not allowed to stand. Again the court indicated a shift in the burden of producing evidence by stating that, "on a showing by a defendant that the limitation . . . is related to reasonable economic purpose, the limitation . . . is not unlawful."[43] And again it must be noted that the employer bears no burden of producing evidence until the employee has established a prima facie case of illegality.[44]

In briefly reviewing the two previous cases it should be noted that both involved alleged discrimination against those already employed, rather than potential employees. Although the law does not differentiate between the two situations, a court might. Moreover, even though the *undue hardship* test in *Dewey* was burdensome on the employer, the court expressed a desire to apply a *balance of interests* test, but indicated that there was not sufficient evidence on the record to do so.[45]

In attmpting to arrive at the proper conclusion in discrimination cases, the courts can also examine the legislative intent underlying the

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[39]416 F.2d 980 (5th Cir. 1969).

[40]This test is derived from the use of the court's term "economic purpose". 416 F.2d at 992.

[41]For a discussion of this test see Veu Casovis, *Title VII—Religious Discrimination in Employment—Is "Effect on Individual Religious Belief" Discrimination Based on Religion Under the Civil Rights Act of 1964?*, 16 WAYNE L. REV. 327, 331 (1969).

[42]"[T]he imposition of a system that perpetuates and renews the effects of racial discrimination in the guise of job seniority is not necessary *or* justified at Bogalusa." 416 F.2d at 990 (emphasis added).

[43]*Id.* at 992.

[44]Note 33 *supra.*

[45]300 F. Supp. at 711. *See* Veu Casovis, *Title VII—Religious Discrimination in Employment—Is "Effect on Individual Religious Belief" Discrimination Based on Religion Under the Civil Rights Act of 1964?*, 16 WAYNE L. REV. 327, 331 (1969).

civil rights enactments.[46] The intent of the New York Legislature is clearly expressed in the Human Rights Law.[47] It is, among other things, "to eliminate and prevent discrimination in employment . . . ."[48] But the statute spells out that the type of discrimination the legislature wishes to eliminate is discrimination "because of the . . . creed . . . of any individual . . . ."[49] It is this latter type that is made illegal.[50]

Greyhound, in the instant case, based its employment decision on physical appearance, not creed.[51] Discrimination because of physical appearance is not illegal.[52] Therefore, the employer's hiring practice would not be deemed illegal under the *per se* test because the hiring practice itself is not illegal. But the practice could be questioned under the *final impact* test since it did result in discrimination against an individual because of his creed. In further testing to decide whether this discrimination was illegal, the appellate court determined that the policy underlying the hiring practice was a "practical business policy". Thus, Greyhound passed what might be referred to as an *economic purposes* test. The court further noted that Greyhound could not be charged with lack of good faith.[54] However, by discussing the fact that a private employer is not required to make exceptions to its established and uniformly applied personnel policies in order to accommodate the religious practice of a potential employee,[55] the court indicated that it was also utilizing a *balance of interests* test.

The *balance of interests* test is of utmost concern in this employment context because neither the amendments to the United States Constitution nor the civil rights acts offer more protection to the private right of an employee to wear a beard than to the right of a private employer to refuse to hire an employee because of his appearance.[56] There is nothing to indicate that religious reasons for wearing a beard change

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[46]*See* Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921); United States v. Hutcheson, 312 U.S. 219 (1918).

[47]N.Y. EXEC. LAW § 290 (McKinney Supp. 1970).

[48]The other purposes of N.Y. EXEC. LAW § 290 (McKinney Supp. 1970) are

> to insure that every individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the state; to encourage and promote the development and execution by all persons within the state of such state program . . . .

[49]N.Y. EXEC. LAW § 296 (McKinney Supp. 1970).

[50]N.Y. EXEC. LAW § 296 (McKinney Supp. 1970).

[51]311 N.Y.S.2d at 466.

[52]N.Y. EXEC. LAW § 296 (McKinney Supp. 1970).

[53]311 N.Y.S.2d at 466.

[54]*Id.*

[55]*Id.*

[56]Under the amendments to the United States Constitution, only state and federal instrumentalities can be precluded from refusing to hire, and the civil rights acts do not concern themselves with physical appearance.

the result.[57] If the employer is required to hire one who for religious purposes wears a beard, it would follow that he would be deprived of the right to refuse to hire any qualified applicant wearing a beard for secular reasons under the theory of "reverse discrimination".[58] For if an employer hires one applicant because his religious beliefs dictate that he wear a beard, but refuses to hire another bearded applicant who has no religious basis for his beard, he is, in effect, discriminating against the latter because his religious beliefs do not dictate that he wear a beard. This is reverse discrimination because of ones creed and as such is specifically prohibited by law.[59] Furthermore, if an employer were not permitted to refuse to hire an employee because of a beard worn for religious purposes, it would follow that he could not refuse to hire a qualified applicant because of any religiously motivated behavior.[60] Likewise, for reasons of reverse discrimination, he could not refuse to hire other applicants whose identical behavior was not religiously motivated.

The courts in applying the various tests have shown anything but uniformity in application and result.[61] The reason lies in the amount of subjectivity involved in the tests and the inadequate guidelines established by the laws.[62] However, it is important to note one aspect

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[57]*See* Sherbert v. Verner, 374 U.S. 398, 418 (1963) (dissenting opinion by Harlan, J.); *Discriminatory Intent* 1147.

[58]Reverse discrimination is used here to refer to illegal discriminaion directed against a member of a majority as opposed to a minority group. *See* Quarles v. Phillip Morris, Inc., 279 F. Supp. 505, 516 (E.D. Va. 1968); Garfinkel and Cahn, *Racial-Religious Designations, Preferential Hiring and Fair Employment Practices Commissions,* 20 LAB. L.J. 357, 371 (1969); Spitz, *Tailoring the Techniques to Eliminate and Prevent Employment Discrimination,* 14 BUFF. L. REV. 79, 98-99 (1964).

[59]N.Y. EXEC. LAW § 296 (McKinney Supp. 1970). In the principal case respondent is actually seeking preferential hiring (a positive term for reverse discrimination). He does not advocate that the employer hire all applicants with beards. He only advocates that he be employed since he has a religous reason for his beard. This is reverse discrimination because of creed and is forbidden by law. *See* Garfinkel and Cahn, *Racial-Religious Designations, Preferential Hiring and Fair Employment Practices Commissions,* 20 LAB. L.J. 357, 371 (1969); Spitz, *Tailoring the Techniques to Eliminate and Prevent Employment Discrimination,* 14 BUFF. L. REV. 79, 98-99 (1964).

[60]To do otherwise would be inequitable. Of course, the religiously motivated behavior must be legal. If it were not, the employer could not be compelled to hire. *See* Reynolds v. United States, 98 U.S. 145 (1878).

[61]*Compare* Gregory v. Litton Systems, Inc., 316 F. Supp. 401 (C.D. Cal. 1970) *and* Dewey v. Reynolds Metals Co., 300 F. Supp. 709 (W.D. Mich. 1969) *with* Phillips v. Martin Marietta Corp., 411 F.2d 1 (5th Cir. 1969).

[62]42 U.S.C. § 2000e-2 (1964) prohibits discrimination "because of . . . religion . . . ."; N.Y. EXEC. LAW § 296 (McKinney Supp. 1970) prohibits discrimination "because of . . . creed." However, neither defines exactly what constitutes discrimination because of religion or creed.

that can often reconcile the results. In these decisions courts have attempted to effectuate the principle underlying the civil rights laws, namely that an employee be looked at as an individual, not on the basis of race, creed, color, sex or national origin.[63] Yet at the same time the courts attempt to maintain their policy of interfering as little as possible in the safety and efficiency of an employer's business operations.[64] Thus, the flexibility allowed by the law has been beneficial to both employer and employee in this respect. Nevertheless, in cases involving similar facts, different results have been produced not only by the use of different tests, but by the use of the very same test.[65]

Thus, in *Greyhound* another court might have reached the opposite conclusion. It might have concluded that Greyhound had no reasonable business purpose for its requirement and that the interest of a potential employee to wear a beard far outweighed that of the employer to refuse to hire because of a beard. But the court should never have applied these tests since the employee never established prima facie evidence of illegal discrimination.[66] The only charge made by the employee was that he was not hired because he wore a beard; since that is not prima facie illegal, the court should not then have looked to Grey-

[63]*See* Garfinkel and Cahn, *Racial-Religious Designations, Preferential Hiring and Fair Employment Practices Commissions*, 20 LAB. L.J. 357, 372 (1969).

[64]*See* Local 189, AFL-CIO v. United States, 416 F.2d 980, 992; Quarles v. Phillip Morris, Inc., 279 F. Supp. 505, 519 (E.D. Va. 1968).

[65]*Compare* Sherbert v. Verner, 374 U.S. 398 (1963) *with* Braunfeld v. Brown, 366 U.S. 599 (1961). In *Braunfeld*, the Court ruled that a state may pass legislation depriving some merchants of the Jewish faith of one day of work per week (which totaled one sixth of their working hours since they are constrained to close from sundown Friday to sundown Saturday on account of their religious beliefs) by enacting a Sunday closing law. In upholding Pennsylvania's legislation the Supreme Court applied the *final impact* and the *balance of interests* tests and held that since the act applied equally to all groups and since it was to further a legitimate secular purpose (a day of rest), as opposed to a religious purpose, it did not violate any provision of the Constitution. Moreover, the interest of the state in providing a uniform day of rest outweighed that of the merchants not to have this additional burden on the exercise of their religion. Yet, in *Sherbert*, the Court ruled unconstitutional a South Carolina statute barring anyone who refused to work on Saturday from receiving unemployment compensation benefits. The plaintiff in *Sherbert*, a Seventh Day Adventist, refused to work on Saturday because of religious beliefs. The Court, although stating that it was not overruling *Braunfeld*, applied the *final impact* and *balance of interests* tests and held that although a statute may be fair on its face and apply equally to all, its application might result in discrimination to one group and, thus, deny one his constitutional rights. It held that the interests of the state in having a uniform policy did not outweigh the more direct burden on the employee. Thus, although the discrimination against Jews in *Braunfeld* was not deemed sufficient to render that act unconstitutional, the discrimination against Seventh Day Adventists in *Sherbert* was.

[66]Note 33 *supra*.

hound for evidence to justify its hiring practice.[67] Greyhound's hiring practice might have been the most arbitrary imaginable, but so long as there was no prima facie evidence that it was illegal, Greyhound should not have been required to produce rebuttal evidence.[68]

Thus, because of different tests and the different results produced by the use of the same tests, due to the amount of subjectivity involved, employers are placed in the impossible position of having to read the mind of the court to determine whether their hiring practices are legal. This failure to provide ascertainable standards perpetuates litigation, which effectively counteracts the purpose underlying the entire civil rights scheme.[69] To establish the foundation for an equitable system civil rights legislation must act as a guide, not as a puzzle to the employers who are to work within the system. In the absence of such legislation, the courts should attempt to establish ascertainable standards that will provide the necessary guidelines.

That the *final impact* test is a necessity to courts in ferreting out discriminatory acts that would otherwise go unnoticed can be concluded from the foregoing analysis. However, the test is subject to both abuse on the part of the courts and misinterpretation on the part of employers. For whenever an employer bases a decision concerning employment on a factor that is affected by race, creed, color, sex or national origin, that decision will usually prove to be discriminatory to some group despite his intentions.[70] Therefore, the test must not be used to the extent that it deprives employers of the right to maintain reasonable requirements for employment.[71] Nor should the court in applying corollary tests look to the employer for any evidence justifying his employment practices until the employee has proved a prima facie case of illegality.

Of the corollary tests examined, the *balance of interests* test is the most equitable. Under an *undue hardship* or an *economic purposes* test courts will sometimes examine matters not crucial to the issue in the case.[72] With the *balance of interests* test a court gets to the crux of

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[67]*Id.*

[68]*Id.*

[69]The purpose underlying the civil rights scheme is "to eliminate and prevent discrimination in employment...." N.Y. EXEC. LAW § 290 (McKinney Supp. 1970).

[70]*See Discriminatory Intent* 1147, 1149 n.12.

[71]This was the result of the ruling in *Gregory v. Litton Systems, Inc.*, 316 F. Supp. 401 (C.D. Cal. 1970), where an employer's questioning an employee as to the number of non-traffic arrests was held to be illegal despite the fact that he would be liable for the employee's tortious acts committed within the scope of employment under the theory of respondeat superior.

[72]*See* Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969); Dewey v. Reynolds Metals Co., 300 F. Supp. 709 (W.D. Mich. 1969).