1973

Recent Developments in Equal Employment Opportunity Litigation

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THE 1964 CIVIL RIGHTS ACT[1], enacted on July 2nd of that year, represented an attempt by the federal government to deal with unlawful discrimination in many fields of endeavor, including housing, employment, public accommodations and facilities, federally assisted and federally funded programs, voting rights, etc. . Title VII of that Act is specifically concerned with equal employment opportunity and creates the Equal Employment Opportunity Commission to carry out the functions of the law.

Most of the decisional law under Title VII of the 1964 Civil Rights Act, has concerned issues that might be properly titled "procedural." William Brown, Chairman, of the Equal Employment Opportunity Commission (EEOC) pointed out that it was not surprising in light of the relative youth of the agency that much of the litigation in which EEOC participated during its first five years involved procedural aspects of the law.[2] He further stated:

> Between 1965 and 1970, most defendants in Title VII suits have been willing to bear the expense of litigating procedural issues. These defendants have not been deterred, even though the cases dragged on for years through appellate courts and they bore the risk of paying plaintiff's attorney's fees.[3]

The federal government through the EEOC and the Justice Department has ultimately prevailed in many, if not most of the procedural issues that have been litigated. For example, in *Bowe v. Colgate-Palmolive Company,*[4] the court of appeals stated that the court's remedial power under Title VII should be read quite broadly and went on to indicate that the clear purpose of the Act was to bring an end to the proscribed discriminatory practices and to make whole in a pecuniary fashion those who have suffered because of such practices. The *Bowe* court stated that to permit only injunctive relief in the class action therein filed would have frustrated the implementation of the strong congressional purposes expressed in the Act and went on to hold that compensatory action was clearly called

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[1] CIVIL RIGHTS ACT OF 1964, 42 U.S.C. §§ 2000-e et seq. (1970).

[2] Address by William Brown, Chairman of the Equal Employment Opportunity Commission, at Northwestern University Law School, Oct. 6, 1971.

[3] *Id.*

[4] 416 F. 2d 711 (7th Cir. 1969).

for, to those individuals who had suffered from prior discrimination and that a class action could be maintained seeking monetary relief for all of the members of a class, whether or not they had individually filed complaints with the agency.[5]

The Application and Mis-application of the Doctrine of Election of Remedies

The court in the *Bowe* case also indicated the right of the charging party to pursue both contractual and statutory remedies where statutory remedies provided by Title VII overlapped with those provided by a collective bargaining agreement.[6]

In this regard, the question of "choice of remedies" or "election of remedies" has often arisen under Title VII. in other words, the question broadly stated is whether or not the invocation of a private grievance procedure underneath a union collective bargaining agreement would either be a bar to a further court action under Title VII or would in some means estop someone from invoking a Title VII action. In the *Bowe* decision, Circuit Judge Kerner indicated that:

> The situation facing the Trial Court was one in which there exists concurrent jurisdiction under the statutory scheme and under the grievance and arbitration process for the resolution of claims against an employer and a union. The analogy to labor disputes involving concurrent jurisdiction of the N.L.R.B. and the arbitration process is not merely compelling, we hold it conclusive.[7]

Accordingly, *Bowe* held that it was error not to permit the plaintiffs to utilize dual prosecution both in court and through arbitration as long as the election of remedy was made after an adjudication so as to preclude duplicate relief which would result in either unjust enrichment or a windfall to the plaintiffs.[8]

Bowe was quickly followed by the Fifth Circuit Court of Appeals decision in the case of *Hutchings v. U.S. Industries, Inc.*,[9] wherein the court first determined that an individual employee's action in federal court alleging racial discrimination in a denial of promotion was not barred for failure to file a charge of discrimination with the agency within the then-prescribed period of 90 days since the period under the Act for a statute of limitations was tolled when the em-

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[5] Bowe v. Colgate-Palmolive Co., 416 F. 2d 711, 720 (7th Cir. 1969).

[6] *Id.* at 714.

[7] *Id.*

[8] *Id.* at 715. *See also, Batiste v. Furnco Construction Co.*, 5 E. P. D. ¶ 8098, (N. D. Ill., Dec. 30, 1972), which adopted the *Bowe* approach in denying the relief already secured via a state agency and instead awarded only attorney fees which were not authorized by the state law.

[9] 428 F. 2d 303 (5th Cir. 1970).

ployee invoked his contractual grievance remedies in an effort to seek private settlement of this complaint, citing an earlier Fifth Circuit opinion in *Culpepper v. Reynolds Metals Company.*[10] The court went on to hold that the unsuccessful resort to the grievance procedure was not to be regarded as a bar to the institution of the Title VII litigation.[11] The court indicated that the determinations under a contract grievance-arbitration process involved rights and remedies very separate and distinct from those involved in judicial proceedings under the statute and that any application of the doctrine of election of remedies to suits brought under the Act must be limited to those situations which would result in an unjust enrichment or a windfall.[12] In reversing the district court determination that the plaintiff in pursuing his contractual remedies to a final unfavorable determination under the contract was bound by that adverse determination in the Title VII action, the court of appeals indicated that:

> An arbitration award, whether adverse or favorable to the employee, is not *per se* conclusive of the determination of Title VII rights by the federal courts, nor is an intermediate grievance determination deemed "settled" under the bargaining contract to be given this effect.[13]

For these conclusions, the court relied substantially upon the *Culpepper* and *Bowe* decisions.

Unfortunately, this area of law becomes somewhat clouded as a result of the Sixth Circuit Court of Appeals decision in *Dewey v. Reynolds Metals Company.*[14] In what has become one of the most widely written about decisions under Title VII, Judge Weick indicated that the plaintiff could not maintain an action in court for being discharged after refusing to work overtime on Sundays, following the resort by the parties to an arbitration determination which concluded that the discharge was proper under the terms of the collective bargaining agreement.[15]

The court first determined that the Equal Employment Opportunity Commission was without authority to adopt regulations which would compel an employer to accede to or accommodate the religious beliefs of all of his employees since the first amendment's establishment clause deprives the government of the power to support or assist any religion; further the regulations could not in any event be

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[10] 421 F. 2d 888 (5th Cir. 1970).

[11] Hutchings v. United States Industries, Inc., 428 F. 2d 303, 313 (5th Cir. 1970).

[12] *Id.*

[13] *Id.* at 311.

[14] 429 F. 2d 324 (6th Cir. 1970) *rehearing denied*, 429 F. 2d 324, (6th Cir. 1970), *aff'd per curiam*, 402 U.S. 689 (1971).

[15] *Id.*

retroactively applied to the discharge of an employee occurring prior to their issuance.[16] Judge Weick saw the question as whether the plaintiff had the right to impose his religious beliefs on the employer and interfere with the operation of the plant.[17] Further, "The fundamental error of *Dewey* and the Amici Curiae is that they equate religious discrimination with failure to accommodate. We submit these two concepts are entirely different."[18]

The Judge continued by indicating the importance of the voluntary settlement of labor disputes through collective bargaining and indicated that once the grievance was submitted to arbitration, the arbitrator's award was to be as final, binding and conclusive as a judgment of a court.[19] It was his feeling that "The purpose of arbitration is thwarted if the awards are held by the courts to be binding on employers only and not on employees."[20]

Because the United States Supreme Court in a 4-4 divided opinion[21] affirmed the circuit decision, *Dewey* has had a tremendous effect upon this area of the law. In the numerous law review articles[22] concerning the case, it has variously been concluded that the decision turns upon the theories of collateral estoppel, res judicata and election or choice of remedies. In any case, because of the decision, the result on this question of law tended and to a degree still tends to depend on the geographic area in which the affected individuals reside.[23]

Three additional Sixth Circuit determinations merit consideration because of the effect they have had upon the *Dewey* question. In *Newman v. Avco Corp., Aerospace Structures Division*,[24] the Sixth

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[16] *Id.* at 335.

[17] *Id.*

[18] *Id.* The Sixth Circuit Court of Appeals, relying upon a recent EEOC regulation concerning religious discrimination, 29 C. F. R. §1605.1, and upon *Griggs v. Duke Power Co.*, 401 U.S. 425 (1971), has recently indicated that an employer does indeed have a duty to attempt to make reasonable accommodations to a job applicant's religious preferences, unless a business hardship exists. Reid v. Memphis Publishing Co., 5 E. P. D. ¶ 8013, (6th Cir. Dec. 18, 1972).

[19] *Id.* at 337.

[20] *Id.*

[21] Dewey v. Reynolds Metals Co., 402 U.S. 689 (1971).

[22] Comment, *Civil Rights — Civil Rights Act of 1964 — Employer Held To Have Engaged In Religious Discrimination Under Title VII Without Proof Of Discriminatory Intent*, 44 N.Y.U. L. REV. 1147 (1969); Comment, *Dewey v. Reynolds Metals Co.: Labor Arbitration and Title VII*, 119 U. PENN. L. REV. 684 (1971); Comment, *Religious Discrimination In Employment — Dewey v. Reynols Metals Co., 429 F. 2d 324 (6th Cir. 1970)*, 1971 U. TOL. L. REV. 423 (1971); Note, *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 (1969).

[23] *See also*, Spann v. Joanna Western Mills Co., 446 F. 2d 120 (6th Cir. 1971). *See also*, Corey v. Avco Corp., 4. E. P. D. ¶ 7912 (Conn. Sup. Ct. 1972), *cert denied*, 5 E. P. D. ¶ 8099 (Jan. 8, 1973) indicating that recourse to arbitration, which had concluded that the employer had no obligation to accommodate the religious preferences of employees, barred further access to the courts.

[24] 451 F. 2d 743 (6th Cir. 1971).

Circuit Court of Appeals stated that an action brought by a discharged Black employee claiming discrimination and being discharged from a position for inefficiency without being afforded a training period and further alleging a conspiracy on the part of his employer and the union to maintain a racially discriminatory system was held not to be barred by a prior determination of the arbitrator that the discharge was justified.[25] The two factors which the court deemed sufficiently different from *Dewey* were: (1) That the so-called "choice" of resorting to arbitration was not a voluntary one, since the contract in question had a mandatory arbitration clause (in apparent exchange for a no-strike clause) and required the plaintiff to proceed through each step of the machinery, the last of which was arbitration. Failure to pursue each step to final conclusion would automatically have rendered the discharge final. (2) That there was nothing in the union contract giving the arbitrator authority to decide the issue of race discrimination and further that it was not clear that he had actually done so. Nowhere in the agreement was there a prohibition against race discrimination in hiring or employment.[26]

Having made the above distinction, Judge Peck indicated that Congress employed no language in Title VII which even intimates support for the election of remedies doctrine and cited the earlier decisions[27] which declined to apply that doctrine to Title VII law suits:

> Private parties cannot by private contract deprive the district court of jurisdiction thus conferred by federal statute.
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> Further, we do not read *Dewey* as based upon the doctrine of election of remedies. [Citing numerous articles]. The majority opinion in this Court in *Dewey* did not so characterize its reasoning. On the contrary, as has been indicated it seems apparent that the second ground relied on for the Decision in *Dewey* was the doctrine of estoppel.[28]

The court saw no reason to apply the estoppel doctrine in the *Newman* case because of the aforementioned distinctions.[29] To further muddy the waters, on March 3, 1972, the Sixth Circuit handed down the per curiam decision in *Thomas v. Philip Carey Manufacturing Company*,[30] which determined that an employee was not entitled

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[25] Newman v. Avco Corp., 451 F. 2d 743 (6th Cir. 1971).

[26] *Id.* at 748.

[27] *Id.* at 747.

[28] *Id.* at 746, 747.

[29] *See also*, the opinion in *Parmer v. National Cash Register Co.*, 346 F. Supp. 1043 (S.D. Ohio 1972), where Judge Carl M. Rubin indicated that "... the doctrine of election of remedies does not exist in the area of Title VII complaints."

[30] 455 F. 2d 911 (6th Cir. 1972).

to maintain an action against the employer and the union because he had previously filed and processed a grievance on the same claim to arbitration, seeking reinstatement to his former job and classification with no loss in seniority and back pay, with all of the relief except for back pay being granted. The court considered the case "Clearly indistinguishable" from the *Spann* determination which relied upon *Dewey*.[31]

Last, but certainly not least in this area of Sixth Circuit law, the court handed down an opinion replete with obiter dicta in *Cooper v. Philip Morris Inc.*[32] The strict holding in *Cooper* was that a group of Black employees was not considered to be barred from proceeding under Title VII because they had previously chosen to litigate before a *state agency* to a final determination on their claims, where the state agency granted class relief to essentially the same class represented by plaintiffs in federal court and ordered restoration to jobs, but denied back pay and attorneys' fees.[33]

The defendant-appellees contended before the Sixth Circuit that the judge's grant of summary judgment should be affirmed on grounds of (guess what) res judicata and collateral estoppel.[34] The district judge had concluded that the plaintiff's choice to litigate the charges to a final adjudication under the state act was an election of remedies binding upon the parties and precluding them from maintaining the action under Title VII.[35] He relied substantially upon *Dewey*. The court of appeals indicated "that the alternative holding in *Dewey* [that a final arbitration award barred relief] may be argued in support of the district judge's holding. But, of course, we do not deal here with arbitration or the great federal interest in strengthening and maintaining its effectiveness."[36]

The circuit opinion then went on to indicate that the doctrine of election of remedies was "squarely rejected" in *Newman v. Avco Corp.*

> We also agree with the conclusion of the Fifth, Sixth and Eighth Circuits that the doctrines of res judicata and collateral estoppel do not bar appellant as a matter of law. [Citing *Hutchings* and *Tipler v. E. I. DuPont et al*, 443 F. 2d 125 (6th Cir., 1971) and other cases] . . . but see *Dewey v. Reynolds Metals Company*. . . .[37]

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[31] Thomas v. Philip Carey Mfg. Co., 455 F. 2d 911, 912 (6th Cir. 1972).

[32] 464 F. 2d 9 (6th Cir. 1972).

[33] Cooper v. Phillip Morris, Inc., 464 F. 2d 9, 14 (6th Cir. 1972).

[34] *Id.* at 10.

[35] *Id.*

[36] *Id.*

[37] *Id.* at 11.

The Court wrapped up by indicating the basis of its conclusion:

> By what we have said to this point we do not mean to suggest that our reversal and remand of this case is an obvious conclusion or to deny that there is dictum in some case law which may be cited as persuasive of a contrary result. Cf Dewey, supra; Spann v. Kaywood Division, Joanna Western Mills Company.[38]

Admittedly, the *Cooper* case deals not with a "choice" between private contract-grievance procedures and Title VII, but rather with two statutory remedies provided by state and federal law. Unfortunately, it does not appear to this writer that we have seen the last of the implications of *Dewey v. Reynolds Metals* and its progeny, at least in the Sixth Circuit.

A presentation of the logical considerations on these issues may be found in the Fifth Circuit decision in *Rios v. Reynolds Metals Company*,[39] where the court held that an arbitration award upholding the denial of a promotion to a Mexican-American employee could not bar the employee's suit claiming that the denial was due to national origin basis.[40] The *Rios* Court held that a federal district court was the final arbiter in cases involving Title VII rights, but that it could under limited circumstances exercise its discretion to defer to a prior arbitration award.[41] Such deferral was to be made only if the contractual rights coincide with rights under Title VII and the arbitration decision was not violative of the private rights guaranteed by that law. In addition, the appellate court indicated that the trial court must be satisfied that:

> (1) the factual issues before it are identical to those decided by the arbitrator; (2) the arbitrator had power under the collective agreement to decide the ultimate issue of discrimination; (3) the evidence presented at the arbital hearing dealt adequately with all factual issues; (4) the arbitrator actually decided the factual issues presented to the Court; (5) the arbitration proceeding was fair and regular and free of procedural infirmities.[42]

The burden of proof in establishing these conditions of limitation was to be upon the defendant although the *Rios* tribunal indicated in a footnote that its holding "may be somewhat in line" with the cases evolving in the Sixth Circuit and citing particularly *Newman*

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[38] *Id.*

[39] 332 F. Supp. 1209 (S.D. Tex. 1971), *rev'd & remanded* 467 F. 2d 54 (5th Cir. 1972).

[40] Rios v. Reynolds Metals Co., 467 F. 2d 54 (5th Cir. 1972).

[41] *Id.* at 58.

[42] *Id.*

v. Avco Corp.[43] It is to be hoped that the common sense approach of the Fifth Circuit will have some more definite influence upon further decisions out of this circuit.[44]

Despite *Dewey*, the Sixth Circuit has ruled in *Tipler v. DuPont Company*,[45] that in an action under Title VII against an employer by a discharged Black employee who earlier had unsuccessfully litigated before the NLRB the issue of whether or not he had been discharged in violation of the Labor Management Relations Act, that the federal district court had properly refused to reconsider its denial of the employer's motion for summary judgment, notwithstanding arguments that the action was barred by collateral estoppel, res judicata or judicial estoppel. The court concluded it would be inappropriate to apply collateral estoppel or res judicata since because of differences between the Taft-Hartley Act and Title VII, the NLRB hearing did not adequately consider all of the factors necessary for a Title VII violation.[46] Further, the court concluded that the legislative history of the Acts supports the conclusion that an individual may proceed under both Acts.[47]

Concurrent Jurisdiction With General Civil Rights Acts

In line with the theory employed in *Tipler v. DuPont*,[48] the courts are now also holding that it is possible to challenge the denial of federally protected rights, such as those under Title VII in the federal courts, independently of the complex requirements of Title VII. The Civil Rights Acts of the years 1866 and 1871 have been held to create causes of action to redress deprivations concerning denials of equal employment. A part of the Civil Rights Act of the year 1866 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property *as is enjoyed by*

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[43] *Id.* at 59.

[44] For a case holding to the contrary and adopting "in their entirely" the views of Judge Weick expressed in *Dewey, see* Alexander v. Gardner Denver Co., 346 F. Supp. 1012 (D. Col. 1971), *aff'd per curium* 466 F. 2d 1209 (10th Cir. 1972).

[45] 443 F. 2d 125 (6th Cir. 1971).

[46] Tipler v. DuPont Co., 443 F. 2d 125, 129 (6th Cir. 1971).

[47] *Id.* at 128. In *Boles v. Union Camp Corp.*, 5 E. P. D. ¶ 8051 (Nov. 10, 1972), the Southern District of Georgia ruled, *inter alia*, that a Title VII action was not pre-empted by the National Labor Relations Act's jurisdiction and that no remedy under that Act precludes resort to any civil rights enactment. The court also determined that defendant company's agreement with the Office of Federal Contract Compliance on disciminatory practice elimination was not a defense to the Title VII action by employees.

[48] *Id.*

> *White citizens* and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to no other.[49] [Italics added]

The courts, in construing this statute, relied heavily upon the determination of the United States Supreme Court in *Jones v. Alfred H. Mayer Company*,[50] in which the court concluded that 42 U.S.C. §1982 (concerning the right of all citizens to have the same right to inherit, lease, sell, and convey real property as is enjoyed by white citizens) was based not upon the fourteenth amendment, but the thirteenth amendment and therefore, did not require state action; accordingly, the statute applied to private, as well as public, discrimination in the rental and sale of housing. Further, the *Jones* Court determined that the Fair Housing Title of the Civil Rights Act, Title VIII, did not pre-empt or preclude the use of §1982.[51]

The Seventh Circuit Court of Appeals in the case of *Waters v. Wisconsin Steel Works of International Harvester*,[52] analogized §1981 to its sister statute and the determination in the *Jones* case, since both were derived from section I of the Civil Rights Act of the year 1866 and accordingly valid exercises of Congressional power under the thirteenth amendment. The court indicated that §1981 was intended to prohibit private racial discrimination in employment and further that Title VII of the 1964 Civil Rights Act did not repeal §1981 by implication.[53] However, the *Waters* Court indicated that the parties were required to exhaust their administrative remedies with EEOC before proceeding to litigate under 42 U.S.C. §1981 unless they could provide a reasonable excuse for their failure to do so.

> Because of the strong emphasis which Congress placed upon conciliation, we do not think that aggrieved persons should be allowed intentionally to by-pass the Commission without good reason. We hold, therefore, that an aggrieved person may sue directly under §1981 if he pleads a reasonable excuse for his failure to exhaust EEOC remedies. We need not define the full scope of this exception here.[54]

Other circuit courts of appeal have followed the essential line of the *Waters* decision without holding that there is a need to exhaust the administrative remedy under Title VII to bring a private civil

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[49] CIVIL RIGHTS ACT OF 1866, 42 U.S.C. §1981 (1964).

[50] 392 U.S. 409 (1968).

[51] Jones v. Alfred M. Mayer Co., 392 U.S. 409, 415 (1968).

[52] 427 F. 2d 476 (7th Cir. 1970), *cert. denied* 400 U.S. 911 (1970).

[53] Waters v. Wisconsin Steel Works of Int'l. Harvester, 427 F. 2d 476, 485 (7th Cir. 1970), *cert. denied* 400 U.S. 911 (1970).

[54] *Id.* at 487.

rights action under §1981 or to show a reasonable excuse for the failure to do so. As the Third Circuit indicated in *Hackett v. McQuire Brothers*:[55]

> The national public policy reflected both in Title VII of the Civil Rights Act of 1964 and in §1981 may not be frustrated by the development of overly technical judicial doctrines of standing or election of remedies.[56]

One district court, in concluding that a §1981 suit could be brought without prior resort to Title VII litigation, commented that:

> According to defendant's argument, in order for the plaintiff to preserve both claims, she would have had to commence two separate prosecutions when she was informed that she would not be fired. She would have had to file a charge with the EEOC and a lawsuit under section 1981. Certainly this sort of prosecutorial redundancy is not what Congress intended. Congress has provided several methods for the vindication of claims of racial discrimination. Allowing defendant to parry plaintiff's effort for redress via litigation with the latter's prior attempt at administrative relief is simply contrary to our national commitment to end racial discrimination.[57]

Essentially then, these courts have held that §§1981 and 1983 create parallel remedies to Title VII and that the enactment of Title VII in no way repealed the previously existing "general" Civil Rights Acts of the years 1866, 1870 and 1871.

In October 1971 the Sixth Circuit ruled in *Johnson v. Cincinnati*[58] that an action brought by a female applicant for city employment alleging sex discrimination in being refused an opportunity to make application for an advertised position as housing inspector and seeking relief under the Civil Rights Statutes of 1866 and 1871 (42 U.S.C. 1981 and 1983 respectively) should not have been dismissed on the ground that the 1964 law (Title VII) pre-empted the discrimination in employment field and, because Title VII at that time excluded states and their political subdivisions, the municipality was not required to answer in court for any alleged discrimination in employment. Rather, the court indicated that enactment of Title VII

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[55] Sanders v. Dobbs Houses, 431 F. 2d 1097 (5th Cir. 1970), *cert. denied* 401 U.S. 948 (1971); Boudreaux v. Baton Rouge Marine Contracting Co., 437 F. 2d 1011 (5th Cir. 1971); Young v. I. T. T., 438 F. 2d 757 (3d Cir. 1971); Hackett v Mcquire Bros., 445 F. 2d 442 (3d Cir. 1971); Brady v. Bristol Myers, 459 F. 2d 621 (8th Cir 1972); Payne v. Ford Motor Co., 461 F. 2d 1107 (8th Cir. 1972).

[56] 445 F. 2d 442, 447 (3d Cir. 1971).

[57] Henderson v. First National Bank of Montgomery, 5 E. P. D. ¶ 8055, (M.D. Ala. May 29, 1972).

[58] 450 F. 2d 796 (6th Cir. 1971).

does not preclude an action for discrimination under the previously existing statutes,[59] citing *Jones v. Alfred H. Mayer Co.*[60] and the above mentioned circuit courts of appeal decisions.[61] As the case indicates these §1981 and §1983 actions have been especially valuable to those who were formerly not covered by Title VII, such as educational employees, state and local government employees, or those employed by an employer of fewer than 25 employees. They continue to be valuable in instances where for some reason the plaintiff is unable to satisfy the jurisdictional requirements or prerequisites to a Title VII action.[62]

Unfortunately, due to the wording of §1981 of Title 42 U. S. C., several courts[63] have held that it clearly does not state a claim for relief in cases involving sex discrimination in employment. They have relied substantially upon the wording of the statute and the decision of the United States Supreme Court in *Georgia v. Rachel,*[64] in which Mr. Justice Stewart discussed the legislative history of the Civil Rights Act of 1866.[65]

It seems fairly certain, despite the numerous attempts of EEOC and other interested parties to apply §1981 to employment discrimination cases on the basis of sex in private employment, that the statute will not be interpreted by the courts to provide a remedy other than in race discrimination cases. Interestingly enough, however, in the case of *Marlowe v. Fisher Body Division of General Motors Corporation,*[66] the District Court for the Eastern District of Michigan concluded that an employee claiming he was discriminated against in employment because he was Jewish was entitled to bring court action under the 1866 Civil Rights law despite the employer's claim that the employee had alleged only religious bias.[67] The court indicated that the thirteenth amendment extends not only to Negroes:

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[59] Johnson v. Cincinnati, 450 F. 2d 796 (6th Cir. 1971).

[60] 392 U.S. 409, 415 (1968).

[61] Johnson v. Cincinnati, 450 F. 2d 796, 797 (6th Cir. 1971).

[62] *See also,* the opinion and order in Parmer v. National Cash Register Co., 346 F. Supp 1043 (S. D. Ohio 1972), opinion of Judge Rubin dated Feb. 9, 1972, p. 4; Sharma v. Opportunities Indus. Center, 341 F. Supp. 209 (D. Wis. 1972).

[63] League of Academic Women v. Regents of Univ. of Calif., 343 F. Supp. 636 (N. D. Cal. 1972); Williams v. San Francisco Unified Public School Dist., 340 F. Supp. 438 (N. D. Cal. 1972); Braden v. Univ. of Pitt., 343 F. Supp. 836 (W. D. Pa. 1972); Fitzgerald v. United States Methodist Community Center, 335 F. Supp. 965 (D. Neb. 1972); Forst v. First Nat'l Bank of Wash., 5 E. P. D. ¶ 8063 (D. D. C. Dec. 5, 1972).

[64] 384 U.S. 780 (1966).

[65] *See also,* Dubose v. Kenton County Airport Bd., Inc., 4 E. P. D. ¶ 7910 (E. D .Ky. 1972) (denying jurisdiction under §1983 on a complaint by a male employee alleging discrimination on the basis of sex, essentially on the theory that nothing in said statute proscribes wage discrimination on account of sex).

[66] 5 E. P. D. ¶ 7963 (E. D. Mich. 1972).

[67] Marlowe v. General Motors Corp., 5 E. P. D. ¶ 7963 (E. D. Mich. 1972).

> General Motors argues that the plaintiff has alleged only religious discrimination. Without entering too far into the rather esoteric dispute as to whether discrimination against Jews is on account of race or religion, this Court is satisfied that when dealing with the prejudices of man against his fellows, the broadest possible meaning should be accorded to those statutes designed to remedy such inequities. It has been argued that prejudice against Jews is of necessity religious prejudice. But this runs counter to experience. Its virulence is so strong that it extends to such attitudes well beyond religious beliefs and thus its epithets have become racial also.[68]

Class Actions and Standing

It is well settled that in this area of civil rights litigation the complaint often goes beyond direct and immediate injury to an individual and therefore could, and in some cases should, lead to relief for all of those who are similarly situated. Indeed, as has been remarked in the opinion in *Parmer v. National Cash Register Company*,[69] the availability of class action suits under Title VII is no longer subject to question.[70] In addition, numerous suits have explicitly indicated that class actions are appropriate in *sex* discrimination suits under Title VII.[71] Although Rule 23 of the Federal Rules of Civil Procedure requires that the scope of the class be determined as soon as practicable in order to allow a full defense, the *Sprogis* Court held that the determination that the discrimination alleged is based on a class characteristic can be made in an individual case and class relief can be fashioned later, even if the suit was not pleaded as a class action.[72] Relief was therein found to be available to all those stewardesses terminated because of United Airline's illegal no-marriage rule and the Seventh Circuit held that the effect of Title VII is not diluted when only a portion of a protected class is discriminated against.[73]

In *Bowe v. Colgate-Palmolive Company*[74] the Seventh Circuit determined that it was not necessary for each member of a class of

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[68] *Id.*

[69] 346 F. Supp. 1043 (S. D. Ohio 1972).

[70] Parmer v. Nat'l Cach Register Co., 346 F. Supp. 1043 (S. D. Ohio 1972). The cases cited in *Parmer* as support for this conclusion are Griggs v. Duke Power Co., 401 U.S. 424, 426 (1971); Tipler v. E. I. Du Pont & Co., 443 F. 2d 125, 130 (6th Cir. 1971); Jenkins v. United Gas Co., 400 F. 2d 28 (5th Cir. 1968); Mack v. General Electric Co., 329 F. Supp. 72 (E. D. Pa. 1971).

[71] *See* Sprogis v. United Airlines, Inc., 444 F. 2d 1194, 1201 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971); Rosenfeld v. Southern Pacific Co., 444 F. 2d 1219 (9th Cir. 1971); Bowe v. Colgate-Palmolive Co., 416 F. 2d 711 (7th Cir. 1969).

[72] Sprogis v. United Airlines, Inc., 444 F. 2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971).

[73] *Id. See*, 56 F. R. D. 420 (N. D. Ill. 1972), where the district court, on remand, held that class relief was not appropriate in the individual circumstances therein stated.

[74] 416 F. 2d 711 (7th Cir. 1969).

employees complaining of unlawful employment discrimination to file charges with EEOC as a prerequisite to a civil suit and further that a suit of employment discrimination based on sex could be treated properly as a class action as to all forms of relief to which any of the members of the class were entitled:

> A suit for violation of Title VII is necessarily a Class action as the evil sought to be ended is discrimination on the basis of a Class characteristic, i.e. race, sex, religion or national origin. In our view, it is indistinguishable on this point from actions under Title II relating to discrimination in public accommodations.[75]

This approach has not been adopted by all of the district courts that have considered the opinion.[76]

In *Cox v. Babcock & Wilcox Co.*,[77] the Fourth Circuit Court of Appeals has recently held that the dismissal of an individual litigant's complaint where class relief had been sought did not require dismissal of the class action, even though there was no proper representative to maintain the suit. Rather, the court remanded the class action to the trial court for it to be maintained on the docket "for a reasonable time" to permit the presentation of any proper claims for relief under the class action.

On the issue of standing, the Fifth Circuit concluded in *Johnson v. Georgia Highway Express, Inc.*,[78] that the trial court had improperly ruled that a complainant seeking relief from alleged employment discrimination could only represent in a class action other discharged Negro employees. The appellate court indicated that since the complainant had sought relief "across the board" against unequal employment practices alleged to have been committed by the employer pursuant to a policy of race discrimination, a class action *on behalf of all Black workers* was appropriate.[79] In addition, the trial court had committed error in refusing to allow the individual to represent the class until he had proved his own right to relief. It was sufficient that the complainant was a member of the class, that is a discharged Black employee, and his claim of race discrimination was typical of the claims of the class.[80]

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[75] Bowe v. Colgate-Palmolive Co., 416 F. 2d 711, 719 (7th Cir. 1969).

[76] *See* Parmer v. National Cash Register Co., 346 F. Supp. 1043 (S. D. Ohio 1972).

[77] 5 E. P. D. ¶8093 (4th Cir. Dec. 29, 1972).

[78] 417 F. 1122 (5th Cir. 1969).

[79] Johnson v. Georgia Highway Express, Inc., 417 F. 2d 1122, 1224-25 (5th Cir. 1969).

[80] A contrary approach has admittedly been followed by a district court ruling in Forst v. First Nat'l Bank of Wash., 5 E. P. D. ¶8063 (D. D. C. Dec. 5, 1972). There Judge Gasch, recognizing case law to the contrary, stated that a former bank teller could not adequately represent the class of female tellers because she had resigned prior to the litigation and moved several hundred miles away.

In a similar vein, the District Court for the Northern District of Mississippi concluded in *Carr v. Conoco Plastics, Inc.*,[81] that plaintiffs bringing a class suit alleging that the employer had discriminatorily refused to hire them were also entitled to allege and seek to enjoin unlawful employment practices in the internal operations of the employer, even though such practices were not directly injurious to them at the time of their application for employment. Requiring plaintiffs to start anew to remove racial discriminatory internal practices after they had removed those "at the door" would result in a multiple number of suits and a waste of time and money for all parties.[82]

In *Hackett v. McGuire Brothers, Inc.*,[83] the Third Circuit concluded that a former employee who had received a deferred pension was nonetheless a "person claiming to be aggrieved" within the Act, 42 U.S.C. §2000-e-5 and was not deprived of standing to bring an action in his own right and as a class representative, even though he did not fall under the definition of employee within §701(f) of the Act, 42 U.S.C. §2000-e(f) as "an individual employed by an employer."[84]

Agency Investigatory Powers and Scope of Complaint as Affecting Same

Several cases[85] have held that the Equal Employment Opportunity Commission has a very wide use of its investigatory powers and various circuit courts of appeals have held that a Commissioner Charge need not detail the evidence on which it was based in order to support a commission investigation, but rather need only allege

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[81] 295 F. Supp. 1281 (N. D. Miss. 1969), *aff'd*, 423 F. 2d 57 (5th Cir.), *rehearing denied without opinion* (5th Cir. 1970), *cert. denied*, 400 U.S. 951 (1970).

[82] Carr v. Conoco Plastics, Inc., 295 F. Supp. 1281 (N.D. Miss. 1969), *aff'd*, 423 F. 2d 57 (5th Cir.), *rehearing denied without opinion*, 2 E. P. D ¶ 10162 (5th Cir. 1970), *cert. denied*, 400 U.S. 951 (1970).

[83] 445 F. 2d 442 (3d Cir. 1971).

[84] Hackett v. McGuire Brothers, Inc., 445 F. 2d 442, 445 (3d Cir. 1971). *See also*, Arkansas Educ. Ass'n v. Bd. of Educ. of Portland, Arkansas, 446 F. 2d 763 (8th Cir. 1971) indicating that although an association of public school teachers was not technically itself an individual member of a class of Black teachers who were allegedly discriminated against on the basis of race, it still had standing as a proper party to bring a suit seeking relief for the class of Black teachers; Parmer v. Nat'l Cash Register Co., 346 F. Supp. 1043 (S. D. Ohio 1972) (former employee plaintiff has standing to represent class of women which includes present employees of defendant company and present members of defendant local union).

[85] Bowaters Southern Paper Corp. v. EEOC, 428 F. 2d 799 (6th Cir., 1970), *rehearing denied without opinion*, 2 E. P. D. ¶ 10240, *cert. denied*, 400 U.S. 942 (1970); Blue Bell Boots v. EEOC, 418 F. 2d 355 (6th Cir. 1969); Sheet Metal Workers v. EEOC, 439 F. 2d 239 (9th Cir. 1971); United Nuclear-Homestake Partners v. EEOC, 461 F. 2d 1055 (10th Cir. 1972); Adolph Coors v. EEOC., 4 E. P. D. ¶ 7932 (10th Cir. Aug. 7, 1972), *cert. filed*, (U.S. Dec. 7, 1972), Civil No. 72-845; Mountain States T & T Co. v. EEOC., 4 E. P. D. ¶ 7933, (10th Cir. Aug. 8, 1972).

the practices believed to be unlawful.[86] Further, the district court in *Ostapowicz v. Johnson Bronze Company*,[87] held that employment practices predating the enactment of Title VII by as much as five years and those practices maintained in departments of the employer other than the one in which the complainant worked, were properly subject to EEOC's inquiry into alleged sex discrimination and the employer may be made to answer interrogatories seeking information on such practices.[88]

In *Sanchez v. Standard Brands, Inc.*,[89] the Fifth Circuit Court of Appeals, after finding that an individual was not barred from including in her court complaint national origin discrimination allegations despite the facts that her original charge specified sex discrimination and that amendment of the charge to so specify was made after the then statutory period for filing charges, went on to discuss the scope of the EEOC complaint and stated that it should not be strictly limited.[90] In citing an earlier Georgia district court opinion, *King v. Georgia Power Company*,[91] the *Sanchez* Court stated that the allegations in a Court Complaint filed pursuant to Title VII:

> Many encompass any kind of discrimination *like or related* to allegations contained in the charge and *growing out of such allegation* during the pendency of the case before the Commission. (Citation omitted). In other words the scope of the Judicial Complaint is limited to the "scope" of the EEOC investigation *which can reasonably be expected to grow out of the Charge of discrimination.*[92] [Italics added]

This question of the scope of the EEOC investigation as based upon charges filed was questioned initially in the more recent opinion from the same circuit in *Tedford v. Airco Reduction, Inc.*,[93] where the appeals court stated that the trial court had no legal jurisdiction to consider allegations *newly* advanced before the court concerning discriminatory seniority systems and preferential driver's lists, since those allegations went far beyond the scope of the charge of discrimination in *hiring* that was filed with EEOC. The court reasoned that it was the intent of Congress that EEOC be given the chance to investigate and conciliate charges as a prerequisite to litigation in

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[86] *Id.*

[87] 54 F. R. D. 465 (W. D. Pa. 1972).

[88] Ostapowicz v. Johnson Bronze Co., 54 F. R. D. 465 (W. D. Pa. 1972).

[89] 431 F. 2d 455 (5th Cir.), *rehearing denied per curiam*, 431 F. 2d 455 (5th Cir. 1970).

[90] Sanchez v. Standard Brands, Inc., 431 F. 2d 455 (5th Cir.) *rehearing denied per curiam*, 431 F. 2d 455 (5th Cir. 1970).

[91] 295 F. Supp. 943 (N. D. Ga. 1968).

[92] Sanchez v. Standard Brands, Inc., 431 F. 2d 455, 466 (5th Cir.), *rehearing denied per curiam*, 431 F. 2d 455 (5th Cir. 1970), *See also*, Jones v. Still-Man Mfg., Inc., 5 E. P. D. ¶ 8020 (S. D. N. Y. Oct. 16, 1972) (amendment of complaint of race discrimination to include an allegation of retaliation — harassment concerning opposition to unlawful practices involving sex discrimination).

[93] 4 E. P. D. ¶ 7654 (5th Cir. 1972).

court and therefore the charging party could not by-pass the agency on these allegations.[94] The court at that time found nothing inconsistent in that holding with the *Sanchez* decision.

Two months later in the same case, the court handed down a two paragraph per curiam decision stating that the earlier decision had been based on incomplete argument and that since there was no longer a controversy between the original parties the determination was vacated and the earlier opinion withdrawn.[95] The Department of Justice had urged reconsideration of the decision because it had asserted that the decision restricted EEOC's investigative authority. The court concluded that the original decision "May be of questionable precedential value" because it was based on incomplete arguments that did not fully articulate the government interest.[96] It would appear that the effect of the latter determination is to keep intact the *Sanchez* holding as the EEOC's expanding role in investigating complaints.

Prerequisites to Title VII Action

In another much-litigated area of procedural technicalities, several courts have held that there are only two prerequisites to the filing of a Title VII action in federal court, namely: (1) The timely filing with the commission of a charge within the time period provided by law under former §706(d), 90 days on non-deferrable issues and 210 days after the alleged unlawful practice last occurred or within 30 days of the state or local agency termination of proceedings, whichever is earlier (changed by amended §706(e) to 180 days after the alleged unlawful practice on non-deferrable issues or 300 days on deferrable issues or 30 days after the state has terminated its proceedings, whichever is earlier); (2) and secondly, the timely filing of a court action upon receipt of the notice by the Charging Party from the commission authorizing him or her of his or her right to sue (under former §706(e), a period of 30 days, which is changed by newly enacted §706(f) (1) to a period of 90 days from the receipt of the notice). One of the fairly recent decisions analyzing these prerequisites and rejecting other so-called prerequisites to a Title VII action was the decision of *Watson v. Limbach Company*.[97]

In the opinion by Judge Carl B. Rubin,[98] there is considerable discussion of the case law concerning the various contentions raised by defendant therein, which included an allegation that a finding of "reasonable cause" by the EEOC under §706(a) was a jurisdictional

[94] Tedford v. Airco Reduction, Inc., 4 E. P. D. ¶ 7654 (5th Cir. 1972).

[95] Tedford v. Airco Reduction, Inc., 4 E. P. D. ¶ 7776 (5th Cir. 1972).

[96] *Id.*

[97] 333 F. Supp. 754 (S. D. Ohio 1971).

[98] Watson v. Limbach Co., 333 F. Supp. 754 (S. D. Ohio 1971).

prerequisite for the filing of a civil suit. In that case, the agency had made no such finding prior to the time that plaintiff had filed the complaint and defendant moved for dismissal on that basis. The court cited numerous Title VII cases[99] for the proposition that a finding of reasonable cause by the agency is not a prerequisite to the institution of a private action under the Act.

Defendants in the *Watson* case also asserted as a ground for a motion to dismiss that the court lacked jurisdiction over the action because the agency had not been given a chance to obtain "voluntary compliance," as indicated by §§706(a) and 706(e).[100] The court indicated that such assertion was incorrect both as an issue of fact in that case and as a matter of law.[101] The defendants were in effect arguing that the plaintiffs should not have been allowed to file suit until the agency had completed its conciliation efforts and informed the plaintiff that it had been unable to obtain voluntary compliance.[102] Citing *Dent v. St. Louis-San Francisco Railway Company,*[103] and *Miller v. International Paper Company,*[104] the *Watson* decision rejected this view.[105] The court in *Johnson v. Seaboard Airline Railroad Company,*[106] concluded that these sections mean only that the Commission must be given an opportunity to persuade before an aggrieved person may resort to court action. In *Johnson,* the court further concluded that an aggrieved individual may file a suit in federal court when he has received the statutory notice from the Commission and need not await an actual attempt by the Commission to achieve voluntary compliance.[107]

One trial court determination seems to place a more exacting standard on this question of administrative prerequisites to action upon EEOC itself when it seeks to employ its newly acquired power to directly litigate. In *EEOC v. Container Corporation of America,*[108] District Judge Tjoflat concluded that the Commission must satisfy

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[99] Dent v. St. Louis — San Francisco Ry., 406 F. 2d. 399 (5th Cir. 1969); Miller v. Int'l Paper Co., 408 F. 2d 282 (5th Cir. 1969); Culpepper v. Reynolds Metals Co., 421 F. 2d 888 (5th Cir. 1970). *See also,* Beverly v. Lone Star Lead Constr. Co., 437 F. 2d 1136 (5th Cir. 1971); Flowers v. Laborer's Local 6, 431 F. 2d 205 (7th Cir. 1970); Fekete v. United States Steel Corp., 424 F. 2d 331 (3d Cir. 1970); Robinson v. Lorillard Corp., 444 F. 2d 791 (4th Cir. 1971).

[100] Watson v. Limbach Co., 333 F. Supp. 754 (S. D. Ohio 1971).

[101] *Id.* at 761.

[102] *Id.* at 762.

[103] 406 F. 2d 399 (5th Cir. 1969).

[104] 408 F. 2d 282 (5th Cir. 1969).

[105] Watson v. Limbach Co., 333 F. Supp. 754 (S. D. Ohio 1971).

[106] 405 F. 2d 645 (4th Cir. 1968), *cert. denied,* 394 U.S. 918 (1969).

[107] Johnson v. Seaboard Airline R. R., 405 F. 2d 645 (4th Cir. 1968), *cert. denied,* 349 U.S. 918 (1969). *Accord,* Jefferson v. Peerless Pumps Hydrodynamic, 456 F. 2d 1359 (9th Cir. 1972).

[108] 5 E. P. D. ¶ 8014, (M. D. Fla. Oct. 13, 1972).

all of the steps in the administrative process prior to litigation and that a mere statement in the complaint that all conditions precedent had been satisfied justified dismissal of the action. Whether other courts will adopt this approach and thus place a higher standard upon the agency than upon private litigants on this question remains to be seen.

Statutes of Limitations on the Filing of a Charge and Filing of Court Action

A substantial number of Title VII decisions have dealt with the problem of the statutory periods for the filing of charges with the agency and for the filing of court action. As above indicated, until the March 24-25, 1972 amendments, the period of time for filing a charge with the agency was 90 days after the last known act of discrimination in the case of matters which were not deferrable to a state or local agency and 180 days after such period on deferrable issues or 30 days after the state or local agency had terminated its proceedings, whichever came earlier.[109] The amendments under §706(e),[110] changed this to 180 days (non-deferrable issues) and 300 days after the alleged practice, or within 30 days after receiving notice that the state or local agency has terminated its proceedings, whichever is earlier (on deferrable issues).

Several cases have held that the statute of limitations as above set out for filing of charges could be expanded or tolled when dealing with continuing acts of discrimination. In *Cox v. United States Gypsum Company*,[111] the appellate court concluded that a layoff, as opposed to a discharge or quitting, suggested a possibility of re-employment and the filing of a charge claiming "continuing" discrimination suggested a claim there had been subsequent recall or new hiring which discriminated against the charge maker.[112] These factors, among others, militated determination that the charges, being of a continuing nature, were timely filed under the circumstances in that case.[113] The well reasoned commentary in *Watson v. Limbach*,[114] discusses various cases which have held that Title VII actions may not be dismissed on the grounds that the charges were untimely filed where the suit challenges the maintenance of an allegedly discriminatory *system* rather than one isolated instance

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[109] *See* former § 706 (d), CIVIL RIGHTS ACT OF 1964, 42 U. S. C. §2000-e-5 (d) (1970).

[110] PUB. L. NO. 92-261, §4(a) (Mar. 24, 1972).

[111] 409 F. 2d 289 (7th Cir.), *rehearing denied*, 409 F. 2d 289 (7th Cir. 1969).

[112] Cox v. United States Gypsum Co., 409 F. 2d 289 (7th Cir.), *rehearing denied*, 409 F. 2d 289 (7th Cir. 1969).

[113] *Accord*, Boudreaux v. Baton Rouge Marine Contracting Co., 437 F. 2d 1011 (5th Cir. 1971); Richard v. McDonnell Douglas Corp., 5 E. P. D. ¶ 8059, (8th Cir. Dec. 4, 1972).

[114] 333 F. Supp. 754, 765 (S. D. Ohio 1971).

citing *Cox* and other cases, including Ohio cases such as *EEOC v. United Association of Journeymen and Apprentices*,[115] and *Dobbins v. Local 212 IBEW*.[116]

An overly large number of cases have concerned themselves with the statute of limitations concerning filing of a Title VII complaint in federal court. Many, if not most, have dealt with the issue of whether the filing of the notice of right to sue received from the agency and an affidavit-application *in forma pauperis* (requesting that the court appoint counsel and authorize institution of litigation without pre-payment of costs, fees, or security) are sufficient activities on the part of the plaintiff to toll the statute of limitations for filing the complaint. Many cases[117] have held that such action constitutes sufficient compliance with the requirement of the Act for timely filing or, in the alternative, that such action tolls the statute of limitations.

The Seventh Circuit Court of Appeals in *Harris v. National Tea Company*[118] affirmed the dismissal under circumstances where the trial court had, after two applications for appointment of counsel, finally made the appointment for the pauper, but the complaint when finally filed was 85 days after the receipt of the notice of right to sue and the appeals court held that the 30 day period for filing after receipt of the right to sue notice then provided for by §706(e) must be strictly construed and that the petition to the district court for appointment of counsel and waiver of costs, being filed along with the right to sue notice, did not satisfy the requirement of filing within 30 days. Fortunately, the Sixth Circuit in the case of *Harris v. Walgreen's Distribution Center*,[119] held that the Act authorizes federal courts to appoint counsel and may authorize commencement of an action without payment of fees or costs. Plaintiff, like *Harris* in the Seventh Circuit case, had applied twice for appointment of counsel, but he had been denied appointment twice. The appeals court held that the district court apparently took into account the Commission finding of no probable cause and that such had been a

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[115] 311 F. Supp. 464 (S. D. Ohio 1970), *rev'd on other grounds*, 438 F. 2d 408 (6th Cir. 1971), *cert. denied*, 404 U.S. 832 (1971).

[116] 292 F. Supp. 413 (S. D. Ohio 1968).

[117] Witherspoon v. Mercury Freight Lines, Inc., 1 E. P. D. ¶ 9976 (D. Ala. 1968), *aff'd in part rev'd in part on other grounds*, 457 F. 2d 496 (5th Cir. 1972); Prescod v. Ludwig Indus., 325 F. Supp. 414 (N. D. Ill. 1971); Shaw v. Nat'l Tank Co., 3 E. P. D. ¶ 8234 (N.D. Okla. 1971); McQueen v. E. M. C. Plastic Co., 302 F. Supp. 881 (E. D. Tex. 1969); Austin v. Reynolds Metals Co., 327 F. Supp. 1145 (E. D. Va. 1970); Gray v. Wilberforce 3 E. P. D. ¶ 8183 (S. D. Ohio 1971); *contra*, Rice v. Chrysler Corp., 327 F. Supp. 80 (E. D. Mich. 1971); Harris v. Nat'l Tea Co., 4 E. P. D. ¶ 7595 (N. D. Ill. 1971), *aff'd* 454 F. 2d 307 (7th Cir. 1971).

[118] 454 F. 2d 307 (7th Cir. 1971).

[119] 456 F. 2d 588 (6th Cir. 1972).

factor in the denial of counsel by the trial court.[120] The Sixth Circuit indicated that the administrative determination by the agency of no probable cause could not be the sole ground for denial of counsel.[121] Judge George Edwards pointed out that *Harris* was within the 30-day period when he first filed his motion for appointment for counsel:

> There is a conflict between the legislative intent to provide counsel where necessary to justice and the requirement that the complaint be filed within 30 days after the EEOC notice of right to sue. Obviously, a complainant able to hire a lawyer might be able to file suit within the 30 days, while one financially unable to do so was still petitioning the court to appoint a lawyer for him. Obviously, too, the filing, processing and decision of the motion for counsel could consume the entire 30-day period.[122]

The court concluded by indicating that after the decision on the motion for counsel, if the time remaining was unreasonably short for securing the lawyer and filing the complaint, the district court order granting or denying the motion for counsel should set a reasonable time for filing of said complaint.[123] Hopefully, in light of this last named opinion and the fact that the new Act enlarges the period for filing of a complaint after receipt of the notice of right to sue to 90 days, this issue will not continue to take up the amount of time that has been involved in litigation to date.

In *Culpepper v. Reynolds Metals Company*,[124] the Fifth Circuit handed down an opinion now famous in Title VII litigation as the "Culpepper Doctrine." The court concluded that a suit alleging employment discrimination could not be dismissed on the ground that there had been a failure to file charges with the Commission within 90 days from the date the alleged violations occurred when the complainant attempted first in good faith to reach a private settlement without litigation by pursuing contractual grievance procedures.[125] The statute of limitations was held to be tolled once the employee invoked his contractual grievance remedies in a constructive effort to seek a private settlement of his complaint.[126]

It is also interesing to note the discussion in *Torockio v. Chamberlain Mfg. Company*,[127] granting a motion of plaintiffs con-

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[120] Harris v. Walgreen's Distrib. Center, 456 F. 2d 588 (6th Cir. 1972).
[121] *Id.* at 590.
[122] *Id.* at 591.
[123] *Id.* at 592.
[124] 421 F. 2d 888 (5th Cir. 1970).
[125] Culpepper v. Reynolds Metals Co., 421 F. 2d 888 (5th Cir. 1970).
[126] *Id.*
[127] 456 F. 2d 1084 (3d Cir. 1972), *opinion on remand*, 56 F. R. D. 82 (W. D. Pa. 1972).

cerning leave to file an appeal from dismissal due to the failure of their attorney to timely file a notice of appeal within 30 days as required by the Federal Rules of Civil Procedure and holding that same was "excusable neglect" under the federal rules in light of the attendant circumstances.[128]

Procedures of Deferral

Another area of procedural difficulty concerns deferral procedures of the agency in being required to defer cases to state or local agencies dealing with similar types of discrimination.[129] The United States Supreme Court ruled in the case of *Love v. Pullman Company*,[130] that the requirements of the Act were fulfilled by a procedure whereby a charge filed with EEOC previous to the exhaustion of state remedies was referred by the Commission to the state agency and then formally filed once the state agency indicated it would decline to take action or after the expiration of the time period provided by the Act.[131] The contention that such a procedure was a "manipulation" of the filing requirement, not contemplated or permitted by the statute or by the commission regulations, was rejected and the court stated that nothing in the Act suggests that the state proceedings may not be initiated by EEOC acting on behalf of the charging party, rather than by the charging party himself; nor is there any requirement that the complaint to the state agency be made in writing rather than by oral referral.[132] Mr. Justice Stewart stated that the complaint could be held by the Commission "in suspended animation,"[133] automatically filing it upon termination of the state proceedings. To require a second "filing" by the aggrieved person after termination of the state proceedings would serve no purpose other than the creation of an additional procedural technicality. "Such technicalities are particularly inappropriate in a statutory scheme in which laymen unassisted by trained lawyers initiate the process."[134]

Concerning a related question, the Sixth Circuit has very recently ruled that the fact that EEOC had not deferred an employee charge of discrimination to state authorities because EEOC questioned the state agency's ability to provide relief could *not* be used

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[128] *Id.* at 1087.

[129] *See* former §706(b), now §706(c), CIVIL RIGHTS ACT OF 1964, 42 U. S. C. §2000-e-5(c) (1970).

[130] 404 U.S. 522 (1972).

[131] Love v. Pullman Co., 404 U.S. 522 (1972).

[132] *Id.* at 525.

[133] *Id.* at 526.

[134] *Id.* at 527. *See* the similar conclusion reached in Watson v. Limbach, 333 F. Supp. 754 (S. D. Ohio 1971) prior to the Supreme Court's reversal in *Love* of the Tenth Circuit's decision, criticizing said appeals decision as overly restrictive.

as a basis for dismissing the court action for failure to exhaust the state remedies.[135] The court ruled in *Mitchell v. Mid-Continent Spring Company,* that the matter must be sent back to allow the employee to seek redress from state authorities.[136] The employee had never filed a charge with the Kentucky Human Rights Commission after filing her EEOC charge and the agency never referred the matter to any state agency because in its belief, referral was not necessary since EEOC concluded no agency in the state had adequate power to grant relief. The Sixth Circuit ruled that the trial court should retain jurisdiction of the suit to allow the complainant to seek redress under the state statutes and indicated that the complainant ought not to lose her cause of action because EEOC had failed in referring her complaint to the state.[137]

Largely based upon the *Mitchell* decision, Judge Thomas ruled in *Greer v. United Engineering and Foundry Company,*[138] that summary judgment was inappropriate when neither the plaintiff nor EEOC had filed the complaint with the Ohio Civil Rights Commission prior to maintaining the action in court. He indicated that although in *Greer,* EEOC has not contended that the state agency did not have power to obtain relief as in *Mitchell,* that this factor does not sufficiently distinguish that case from *Greer*:

> The EEOC does not have the authority to divest those states whose agencies have remedial powers of the opportunity to seek relief for their citizens. It is further evident that Courts are loathe to deprive a complainant of his cause of action because of the EEOC's failure to comply with Statutory requirements.[139]

The court denied the motion and retained jurisdiction long enough to allow the plaintiff or EEOC to give notice to the state agency to begin an investigation into the matter.

Another related area concerned a claim that a complaint of discrimination should be dismissed because the claimant had filed her charge with EEOC *too soon,* that is before the expiration of the sixty (60) day period prescribed for a deferral to state agencies under § 706(b) of the Act. In *Voutsis v. Union Carbide Corporation,*[140] the appeals court determined that the Title VII provision that no charge could be filed by a complainant with EEOC prior to

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[135] 4 E. P. D. ¶ 7940 (6th Cir. Aug. 11, 1972).

[136] *Id.*

[137] *Id.*

[138] Civil No. 71-908 (N. D. Ohio Sept. 20, 1972).

[139] Greer v. United Engineering and Foundry Co., Civil No. 71-908 (N. D. Ohio Sept 20, 1972), citing *Love, Mitchell* and other cases.

[140] 452 F. 2d 889 (2d Cir. 1971), *cert. denied,* 92 S. Ct. 1768 (1972).

the expiration of the 60-day period allowed for deferral to the state or local agency was intended to require only that EEOC defer to state proceedings for a limited period of time in order to give the state or local agency an opportunity to handle the problem under state or local law and was not intended to be construed literally.[141] Thus, a complaint was properly filed with EEOC four (4) days after the commencement of proceedings on a charge of sex discrimination with a state agency, so long as the state agency was given the opportunity to resolve the problem within the statutory period.

Size of Employer

Certain cases have been concerned with the identity of the respondent and whether the respondent meets the test provided by Title VII. 42 U.S.C. §2000-e(b) formerly indicated that the term "employer" meant a person engaged in an industry affecting commerce who had 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year and went on to indicate certain exceptions, such as the government or private membership clubs. Newly enacted §701(b) will lower the number of employees needed within one year to 15 or more employees and will eliminate the exemption for state or local governments.

The size of the employer has often caused problems for considerations of jurisdiction over a charge. In *Hassell v. Harmon Foods, Inc.*,[142] the court concluded that the Title VII action could not be maintained against a firm that employed fewer than twenty-five persons which did not have the requisite identity with its parent corporation such that they constituted a single employer allowing computation of the number of their employees to satisfy the statutory requirement; the court reasoned that the affairs of the two firms were handled separately and the parent was not liable for the debts of the subsidiary with the subsidiary being recognized as a separate firm for tax purposes.[143]

On the other hand, in *Williams v. New Orleans Steamship Association*,[144] the district court ruled for the purposes of Title VII coverage that individual companies which made up a steamship association of the employers were to be treated as a single employer under the Act, where the association controlled employment on the

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[141] Voutsis v. Union Carbide Corp., 452 F. 2d 889 (2d Cir. 1971), *cert. denied*, 92 S. Ct. 1768 (1972).

[142] 452 F. 2d 199 (6th Cir. 1972).

[143] Hassell v. Harmon Foods, Inc., 452 F. 2d 199 (6th Cir. 1972).

[144] 341 F. Supp. 613 (E. D. La. 1972).

waterfront and established uniform employment policies applicable to all member companies, where it owned and operated the central hiring hall and where it derived its authority by delegation from the member companies.[145]

Declining to rely by analogy upon *Hassell v. Harmon Foods*, the District Court of Florida held in *United States v. Jacksonville Terminal Company*,[146] that a showing by some of the unions involved that each of them represented fewer than twenty-five members [a part of the definition for "labor organization" under 42 U.S.C. §2000-e(e)] did not remove the court's jurisdiction. The court found a "substantial identity" between the defendant union members in the terminal's employ and the various international organizations and therefore determined they were indistinguishable under the act.

Remedies

Section 706(g) of the Act,[147] indicates that if the court finds that the respondent has intentionally engaged in or is engaging in an unlawful employment practice, the court may enjoin said practice and order such affirmative action as is appropriate, which can include but is not limited to reinstatement or hiring, with or without back pay, or any other equitable relief as the court deems appropriate. A new provision in the subsection limits back pay liability so that it shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Further, interim earnings shall operate to reduce the back pay allowable and no order of court shall require the reinstatement of an individual or membership in a union if the individual was refused said hiring or admission for any reason other than discrimination covered by the Act.

The courts have held that all those who are the victims of discriminatory practices are to be included in the class afforded monetary relief whether they have filed a charge with the Commission or not.[148] The rulings have indicated an obligation to provide relief for all who are similarly situated.[149] It has been noted that back pay is not a punitive measure, but rather an equitable measure intended to restore the recipients to their rightful economic status absent the effects of the unlawful discrimination.[150]

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[145] Williams v. New Orleans Steamship Ass'n, 341 F. Supp. 613 (E.D. La. 1972).

[146] 5 E. P. D. ¶ 8066 (M. D. Fla. Nov. 29, 1972).

[147] CIVIL RIGHTS ACT OF 1964, 42 U. S. C. §2000-e-5(g) (1970).

[148] Robinson v. Lorillard Corp., 444 F. 2d 791 (4th Cir. 1971).

[149] Sprogis v. United Airlines, Inc., 444 F. 2d 1194 (7th Cir. 1971).

[150] Robinson v. Lorillard Corp., 444 F. 2d 791 (4th Cir. 1971).

The Commission and the courts have held, in cases such as *Papermakers and Paperworkers, Local 189 v. United States,*[151] that the establishment or maintenance of seniority lists or lists of progression based on minority status or sex, violate the Act where plant wide seniority has been in effect. It may be possible to correct a segregated seniority system merely by integrating the system. However, where departmental or job seniority is a factor in determining transfers and promotions, additional adjustments may be needed so as to eliminate the present effects of past discrimination.[152]

In *Hicks v. Crown Zellerbach Corporation,*[153] the court ordered that Black employees who exercised the right to transfer to previously all-White lines of progression should not be subjected to a reduction in wages because they must accept an entry level position in the previously all-White line. They were allowed to retain present wage levels.[154]

In a suit brought by the U.S. Department of Justice under §707(a) (concerning patterns or practices) the law was used to remedy the discriminatory practices of Bethlehem Steel and the United Steelworkers Union.[155] The Second Circuit ordered that salary retention and seniority carryover be made a part of the remedy so as to provide incentive to transfer and thus eliminate the feature of the present system which perpetuates past discrimination.[156]

Interestingly, in *Local 2111, IBEW, v. General Electric Company,*[157] Judge Kinneary ruled that where injunctive relief was no longer appropriate since the discriminatory practice had been corrected, nonetheless back pay damages could be awarded. The court specifically rejected the contention that the Act does not permit the awarding of damages except in conjunction with reinstatement or hiring[158] and relied upon the district court decision in *Robinson v. Lorillard Corporation.*[159]

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[151] 416 F. 2d 980 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970).

[152] *See,* Robinson v. Lorillard Corp., 444 F. 2d 791 (4th Cir. 1971). *See also* the Fourth Circuit Court of Appeals recently held that the merger of seniority rosters previously segregated on the basis of race could not bar further injunctive relief. Blacks hired into the racially segregated classification system were entitled to use company seniority to bid on vacancies in crafts other than the one to which they were originally assigned; this "cross-craft" relief was not to be denied on the basis that it required restructuring the seniority system. United States v. Chesapeake and Ohio Ry. Co., 5 E. P. D. ¶ 8090(4th Cir. Dec. 26, 1972).

[153] 321 F. Supp. 1241 (E. D. La. 1970).

[154] Hicks v. Crown Zellerbach Corp., 321 F. Supp. 1241 (E. D. La. 1970).

[155] United States v. Bethlehem Steel Corp., 446 F. 2d 652 (2d Cir. 1971).

[156] *Id.*

[157] 4 E. P. D. ¶ 7614 (S. D. Ohio Dec. 3, 1971).

[158] Local 2111, IBEW v. General Electric Co., 4 E. P. D. ¶ 7614 (S. D. Ohio Dec. 3, 1971).

[159] 319 F. Supp. 835 (M. D. N. C. 1970).

A recent ruling indicates that a Black trainee discharged from an entry level management position with Ford Motor Company had not been given adequate training to perform the job in question and accordingly his poor performance was due to the failure in training. The court indicated that under said circumstances, the discharge was improper and discriminatory; at this point in time, the court has not determined a remedy, but conceivably the question of a training program might be involved though the named plaintiff does not seek reinstatement.[160]

As to attorney's fees, since vindication of the rights protected by Title VII depends in large measure on private legal actions, it is necessary to insure adequate legal counsel. Attorneys fees are necessary if private counsel is to be an effective method of enforcement. §706(k)[161] explicitly provides that such fees may be part of a remedy. In *Clark v. American Marine Corporation*,[162] a trial court held that despite the fact that the defendant's good faith precluded plaintiffs' receipt of back pay that plaintiffs were entitled to receive reasonable attorney fees since they had acted as "private attorneys-general" to enforce an important national policy.[163] The Fifth Circuit sustained an award of $20,000 in fees. In a recent case in which it was held that the individual plaintiff did not have a meritorious claim for relief, nonetheless the attorneys representing her were entitled to reasonable attorney fees and costs as authorized by the Act.[164]

In the *Robinson* case,[165] the Fourth Circuit held that attorneys fees are to be imposed not to penalize defendants for pursuing frivolous arguments, but to encourage individuals to vindicate a congressional policy against race discrimination. It has been held that a trial judge was within his discretion in awarding attorneys fees of $15,000 to an attorney for successful representation of a plaintiff on appeal of a significant case alleging sex discrimination.[166]

Admissibility of Commission Files

Early in 1972 the Fifth Circuit Court of Appeals handed down a precedent-shattering opinion in *Smith v. Universal Services Incor-*

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[160] Long v. Ford Motor Co., 5 E. P. D. ¶ 8082 (E. D. Mich. Nov. 9, 1972). For a case concerning required establishment of a training program and other significant relief, *see* EEOC v. Plumbers Local 189, 5 F. E. P. C. 133 (S. D. Ohio Oct. 26, 1972).

[161] CIVIL RIGHTS ACT OF 1964, 42 U. S. C. §2000-e-5(k) (1970).

[162] 320 F. Supp. 709 (D. La. 1970), *aff'd per curiam*, 437 F. 2d 959 (5th Cir. 1971).

[163] Clark v. American Marine Corp., 320 F. Supp. 709 (D. La. 1970) *aff'd per curiam*, 437 F. 2d 959 (5th Cir. 1971).

[164] Fogg v. New England Tel. and Tel. Co., 346 F. Supp. 645 (D. N. H. 1972).

[165] Robinson v. Lorillard Corp., 444 F. 2d 791 (4th Cir. 1971).

[166] Weeks v. Southern Bell Tel. & Tel. Co., 408 F. 2d 228 (5th Cir. 1972). *See also* Lea v. Cone Mills Corp., 438 F. 2d 86 (4th Cir. 1972).

porated,[167] which indicated that a report of the EEOC, consisting of a summary of charges filed by the employee in question, a brief review of the facts developed in the investigation and the Commission finding of probable cause, was admissible into evidence in the employee's action in federal court. Since the report was prepared in the regular course of the agency's business and in accordance with the express statutory authority and was not compiled for purposes of litigation only, it was admissible as an exception to the hearsay rule under the Federal Business Records Act.[168] The court reasoned that nothing in Title VII admittedly authorized the admission, but also that nothing in the statute prohibited the use of the report in question. After rejecting a contention that the report was immaterial, the court considered the hearsay question. Citing a largely ignored opinion in the case of *Gillin v. Federal Paper Board Company,*[169] the court agreed with the finding there and the contention of plaintiffs in the *Smith* case that the investigation report is admissible as an exception to the hearsay rule under the federal statute.[170]

In *Heard v. Mueller Company,*[171] the Sixth Circuit ruled that in view of the trial court grant of summary judgment dismissing a portion of the complaint regarding the denial of assignment to a vacant position, there was no abuse of discretion in refusing to admit into evidence an EEOC investigation report pertaining to the charge based on the denial of the position. Such information was held not directly relevant to the remaining issues concerning alleged continuing unfair practices.[172] The court indicated that it was within the sound discretion of the district court whether to accept the final investigation report and analogized to the holding in *Bridger v. Union Railway Company,*[173] where there was a holding that it was within the discretion of the trial court whether to accept an EEOC investigator as an expert witness.

The court indicated that since the contents of the report were not directly relevant to the instant controversy before the court, in that respect the case differed from *Smith v. Universal Services, Inc.*[174]

> Where the report was found to be highly probative of the ultimate issues involved. [citation] Certainly, on the basis

[167] 454 F. 2d 154 (5th Cir. 1972).

[168] 28 U. S. C. §1732 (1964).

[169] 52 F. R. D. 383 (D. Conn. 1970).

[170] Smith v. Universal Services, Inc., 454 F. 2d 154 (5th Cir.), *rehearing denied per curiam,* 4 E. P. D. ¶7704 (5th Cir. 1972).

[171] 462 F. 2d 190 (6th Cir. 1972).

[172] Heard v. Mueller Co., 462 F. 2d 190 (6th Cir. 1972).

[173] 355 F. 2d 382 (6th Cir. 1966).

[174] 454 F. 2d 154 (5th Cir. 1972).

> of the case before us, we are not prepared to hold that all EEOC investigation reports are per se admissible in every Title VII action involving some or all of the same parties. To the extent that the *Smith* case can be read to adopt such a holding, we respectfully decline to adopt that position.[175]

On another front, the Fifth Circuit has ruled in *Kessler v. EEOC*[176] that portions of the Act prohibiting the Commission, prior to the institution of court action, from making public or furnishing to the charging party and his attorney, information obtained as a result of the investigation of the charge are intended to protect the conciliation process, and any information may not be released prior to the institution of court proceedings. *Kessler* has caused a great deal of controversy and some degree of confusion within the Commission as to the release of Commission file data to charging parties and their counsel. Hopefully, that confusion will be alleviated by the January 29, 1973 *en banc* reversal[177] of the earlier decision, wherein the appeals court now concludes that the statute, regulations and a memorandum of the agency's former General Counsel indicate that the charging party and his attorney are not members of the "public" who would be denied access to the data "prior to the institution of any proceeding"; accordingly, the information is available for purposes of preparation of litigation.[178]

In *Legal Aid Society v. Schultz*,[179] in an action brought pursuant to the Freedom of Information Act,[180] to require the Treasury Department to make available EEO-1 reporting forms (which show composition of a company's work force by racial and ethnic minorities) relating to the department's enforcement of Executive Order No. 11246 (requiring affirmative action in minority employment by government contractors), the district court ordered production despite the claim that Title VII specifically exempts EEO-1's from §709(e)[181] production. The court reasoned that the section forbids only officers and employees of EEOC from producing the documents and further that the contractors whose EEO-1's were sought are required to file them by the Executive Order; thus, Title VII does not require the contractors to file the reports and §709(e) is inapplicable.

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[175] Heard v. Mueller Co., 464 F. 2d 190, 194 (6th Cir. 1972); *Accord*, Cox v. Babcock and Wilcox Company, 5 E. P. D. ¶ 8093 (4th Cir. Dec. 29, 1972).

[176] Kessler v. EEOC, 53 F. R. D. 330 (5th Cir. 1972).

[177] Kessler v. EEOC, 5 E. P. D. ¶8423 (5th Cir. 1973).

[178] *Id.*

[179] 5 E. P. D. ¶ 8035, (N. D. Calif. Oct. 19, 1972).

[180] 5 U. S. C. §552 (1964).

[181] CIVIL RIGHTS ACT OF 1964, 42 U. S. C. §2000(e)-8e (1970).

Use of Statistics

The Commission and courts have regularly held that statistics showing that women and minorities are absent from or substantially under represented in certain job classifications establishes a prima facie case of unlawful exclusion. The courts have adopted the Commission analysis and have stressed the importance of statistical proof.[182] Indeed, the Fifth Circuit has held that a statistical showing that Blacks comprise only a small fraction of a company work force and are primarily in menial jobs requires issuance of a preliminary injunction.[183]

In *Mabin v. Lear Siegler, Inc.*,[184] this Sixth Circuit indicated:

> We recognize that statistical information may be an acceptable method for determining the existence or absence or racially prejudicial employment practices, *Jones v. Lee Way Motor Freight, Inc.; Parham v. Southwestern Bell Telephone Company*, 433 F.2d 421 (8th Cir., 1970).[185]

Right of Jury Trial

The courts have uniformly held under Title VII that there is no right to a trial by jury under the Act since the remedies provided are essentially equitable in nature. In *Williams v. Travenal Laboratories, Inc.*,[186] the court determined that an action brought alleging race discrimination and seeking class relief including damages for lost wages did not entitle the employer to a trial by jury. The court reasoned that the demand for back pay under the Act is not in the nature of a claim for damages but rather is a part of the initial statutory equitable remedy to be determined through the court's discretion, and not by a jury,[187] citing *Johnson v. Georgia Highway Express, Inc.*[188] The *Williams* court went on to hold that in view of the fact that the relief sought from alleged race discrimination in employment under a 42 U.S.C. §1981 claim was the same as the remedy available under Title VII, there was no legal issue that would require a trial by jury. Further, the request for

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[182] United States v. Sheet Metal Workers, Local 36, 416 F. 2d 123 (8th Cir. 1969); Jones v. Lee Way Motor Freight, 431 F. 2d 245 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971).

[183] Hutchings v. U.S. Indus., Inc., 428 F. 2d 303 (1970). *See also*, Griggs v. Duke Power Co., 401 U. S. 424 (1971); United States v. Bethlehem Steel Co., 446 F. 2d 652 (2d Cir. 1971); Gregory v. Litton Systems, Inc., 316 F. Supp. 401 (C. D. Calif. 1970).

[184] 457 F. 2d 806 (6th Cir. 1972).

[185] Mabin v. Lear Siegler, Inc., 457 F. 2d 806 (6th Cir. 1972).

[186] 344 F. Supp. 163 (N. D. Miss. 1972).

[187] William v. Travenal Laboratories, Inc., 344 F. Supp. 163 (N. D. Miss. 1972).

[188] 417 F. 2d 1122 (5th Cir. 1969). *See also*, Culpepper v. Reynolds Metals Co., 296 F. Supp. 1232 (N. D. Ga. 1968) *rev'd on other grounds*, 421 F 2d 888 (5th Cir. 1970).

reinstatement and back pay did not present an issue for jury consideration.[189]

Despite the general approach negating the right to a jury panel in Title VII suits, certain courts have authorized the use of an "advisory jury" as provided by Rule 39(c), Federal Rules of Civil Procedure.[190] One appeals panel, which suggesting that the use of such advisory juries "should be sparingly exercised," nonetheless authorized their use in the trial court's discretion and held that the court's exercise of such discretion was not reviewable. "The findings of such a jury are, of course, merely advisory; the court must, as it did in this case, make its own findings . . . ."[191]

Venue

Interpreting, apparently for the first time, the provision of the title dealing with jurisdiction of the courts, the district court for eastern Virginia concluded that the law means what is says, namely that an action may be brought in any judicial district *in the state* where the unlawful employment practice allegedly was committed.[192] Charged with sex discrimination, General Electric asked the court for a change of venue and on May 10, 1972, the court had agreed to transfer the action to the western district of Virginia. The employees, who contended they had a right to pick the eastern district as their forum, went to the appeals court for the district. That court had vacated the order of transfer in an unreported opinion and remanded the matter for a hearing.

On reconsideration the district court[193] concluded it had erred in its initial determination and examined the relevant portion of the law, then §706(f), (now §706(f)(3)), both of which indicate that an action may be brought in any judicial district *in the state* in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained or in the district in which the plaintiff would have worked but for the alleged improper practice, and also that if the respondent is not found with any of these, that such an action may be brought within the district in which the

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[189] Williams v. Travenal Laboratories, Inc., 344 F. Supp. 163 (N. D. Miss. 1972). However, one district level determination has suggested that the right to a jury trial in any employment suit under 42 U.S.C. §1981, as distinguished from one pursuant to Title VII, "is unsettled." Boles v. Union Camp Corporation, 5 E. P. D. ¶ 8051 (S. D. Ga. Nov. 10, 1972). "My present feeling is that the defendants are not entitled to both a non-jury ruling by the chancellor as to injunctive and related relief under Title VII and to a jury consideration of the same issues under §1981."

[190] Logan v. General Fireproofing Co., 5 E. P. D. ¶ 8012 (W. D. N. C. Aug. 17, 1972).

[191] Cox v. Babcock and Wilcox Co., 5 E. P. D. ¶8093, (4th Cir. Dec. 29, 1972).

[192] Gilbert v. General Electric Co., 347 F. Supp. 1058, (E. D. Vir. 1972).

[193] *Id.*

respondent has his principal office. While the court found "disturbing the suggestion that litigants may so blatantly engage in forum shopping, it does not seem inconsistent with Congress' militant approach to affording citizens full redress of civil rights grievances to allow plaintiffs a particularly wide latitude in choosing the situs of their litigation."[194]

Testing

On March 8, 1971, in the area of testing, the United States Supreme Court shattered job screening devices when it handed down the decision of *Griggs v. Duke Power Company.*[195] In *Griggs,* Black employees of the company challenged its right to require either a high school education or the passing of standardized general intelligence tests as conditions for employment or promotion, the challenge being based upon the fact that neither standard had been shown to be related to job performance and further, that both requirements disqualified Blacks at a higher rate than Whites. Chief Justice Burger, writing for a unanimous Court stated:

> The Civil Rights Act proscribes not only overt discrimination, but also practices that are fair in form, but discriminatory in operation. *The touchstone is business necessity.* If an employment practice which operates to exclude Negroes cannot be shown to be related to *job performance,* the practice is prohibited.[196] [Italics added]

The Court concluded that neither of the two "tests" was shown to bear a demonstrable relationship to performance of the jobs for which it was used and that they had been adopted, as the court of appeals had noted, without meaningful study of their relationship to job performance ability.

The Court approved the Commission's guidelines[197] interpreting §703(h) on testing, which indicate that professionally developed tests are permitted only if they test the applicant's *individual ability* to do the work. The Court concluded that the interpretation of the Act by the enforcing agency was entitled to great deference.

The *Griggs* decision is also momentous in that the Court rejected the notion that specific intent to discriminate is necessary to establishing a Title VII violation; the Court held that the only

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[194] *Id.* at 1060; In General Electric Co. v. Merhige, 5 E. P. D. ¶ 8070 (4th Cir. Nov. 20, 1972), the Fourth Circuit denied a writ of mandamus seeking reversal, finding no abuse of discretion.

[195] 401 U.S. 424 (1971); *see.* order on remand, 5 E. P. D. ¶ 8017 (M. D. N. C. Sept. 25, 1972).

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

[197] *Id.* at 436.

relevant consideration is the *consequence* of the employment practice. If that consequence results in discrimination, the Court concluded that the selection devices are proscribed, even in the absence of a showing of intent to discriminate.[198]

Incidently, as has already been briefly mentioned, the Court utilized statistics to show that an employment practice which appears fair on its face can nonetheless have a disparate effect when related to statistics for the state in which the company plant was located,[199] which in that case showed that 34% of the White males from the state had completed high school (one of the company requirements), while only 12% of the Black males had done so.

It is important to point out that the Court indicated that testing or other measuring devices are not barred, nor does the law require that the less qualified be preferred over the better qualified simply because of their minority origin. What the law does require is that tests used must measure the person for the job and not the person in the abstract. The *Griggs* decision has thus effectively ruled out general testing devices and diplomas or degrees as fixed measures of capability, requiring the removal of artificial and arbitrary barriers to employment when these barriers operate unfairly to discriminate on one of the bases covered by Title VII.[200]

Several courts, relying upon the approach militated by *Griggs*, have held that promotion and transfer systems where such promotions were based upon the subjective evaluation and recommendation of the supervisory personnel fell under the Act's ban.[201] These decisions reasoned that the lack of standards in the individual evaluation approach permitted the foremen involved to discriminate in their choices.

Recent Developments in Sex Discrimination

In the first sex discrimination decision under Title VII before the United States Supreme Court, the Court unanimously held in January of 1971 that the law forbids one hiring policy for women

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[198] *Id.* at 432.

[199] *Id.* at 430.

[200] As to the approach utilized by lower courts concerning complaints of discriminatory educational and testing requirements and interpreting *Griggs, see e.g.,* United States v. Georgia Power Co., 3 E. P. D. ¶ 8318 (N. D. Ga. 1971) and cases therein cited. On the question of whether intent is a necessary element to maintain a cause of action under Title VII of the Civil Rights Act, see the opinion in Local 2111 IBEW v. General Electric Co., 4 E. P. D. ¶ 7614 (S. D. Ohio Dec. 3, 1971) wherein Judge Kinneary indicates that *Griggs* makes it clear that proof of discriminatory intent is not necessary for a Title VII action.

[201] Rowe v. General Motors Corporation, 457 F. 2d 348 (5th Cir., 1972); Hester v. Southern Railway Co., 5 E. P. D. ¶ 8046 (N. D. Ga. Oct. 3, 1972); Baxter v. Savannah Sugar Refining Corp., 5. E. P. D. ¶ 8009 (S. D. Ga. Oct. 6, 1972) (authorizing attorney's fees in the amount of $12,500).

with pre-school age children and another for men who are likewise parents of pre-school age children.[202] Specifically, the Court stated that the refusal which was not shown to be related to the job performance to hire women with such children while men in the same circumstances are hired, was a violation of the Act. The case is considered by many to be the first time that the Supreme Court has acknowledged that women encounter discrimination when seeking employment.

Other recent Supreme Court decisions have left standing appellate determinations concerning sex discrimination in employment. In *Diaz v. Pan American World Airways,*[203] the appellate court barred an airline from discriminating against male flight attendants (stewards). The court ruled that sexual bias against males holding such position was not justified by the fact that airline customers preferred females, since the Commission guidelines on sex discrimination make clear that such customer preference will not be sufficient to justify a bona fide occupational qualification exception to the requirements of the Act.[204]

In the already mentioned *Sprogis* case[205] it was held that a company rule which allowed hiring only of non-married stewardesses and allowed termination of those who subsequently married was unlawful. This result was indicated, according to the appeals court, even though those terminated were offered employment in other jobs upon becoming married and the employer had no intention of discriminating.

The Seventh Circuit Court of Appeals held in the case of *Bartmess v. Drewreys Limited*[206] that a compulsory retirement plan that required female employees to terminate at an earlier age than that for men amounted to unlawful sex discrimination (females required to retire at age 62 while males are allowed to continue working until 65). Recently in northern Ohio, a federal district court in *Fillinger v. East Ohio Gas*[207] without mentioning the *Bartmess* case ruled substantially the same thing. Plaintiff was awarded a judgment in the amount of $10,000 for three years of unpaid wages. In *Peters v. Missouri-Pacific Railroad Company,*[208] the eastern district of Texas ruled in 1971 that a company policy requiring Blacks to retire at 65 while White employees were permitted to work to age 70 constituted

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[202] 400 U.S. 542 (1971).

[203] 442 F. 2d 385 (5th Cir.), *cert. denied,* 404 U.S. 950 (1971).

[204] Diaz v. Pan American World Airways, 442 F. 2d 385 (5th Cir.), *cert. denied,* 404 U.S. 950 (1971).

[205] Sprogis v. United Airlines, 444 F. 2d 1194 (7th Cir.), *cert. denied,* 404 U.S. 991 (1971).

[206] 441 F. 2d 1186 (7th Cir.), *cert. denied,* 404 U.S. 939 (1971).

[207] 4 E. P. D. ¶ 7618 (N. D. Ohio 1971).

[208] 3 E. P. D. ¶ 8274 (E. D. Tex 1971).

illegal race discrimination, entitling the Black employees to reinstatement, back pay awards with interest with no set-off or credit for any amount received from other sources and recovery of attorney fees and litigation costs.[209]

State Protective Laws

An area of recent hot controversy concerns the so-called "state protective laws" established in many states, including Ohio, to protect women from improper working conditions, which is believed at least to have been the initial intent in the enactment of such laws. These laws prohibit the employment of women in certain occupations, limit their hours of work and the weights they may lift and require certain benefits for women workers, such as minimum wages, premium pay for overtime, rest periods, and physical facilities. In light of recent technological improvements in industry, many women now believe that such laws discriminate against them in the regulation of the maximum number of hours in which they can work and in the statutory enactments concerning restriction from jobs requiring the lifting of more than a certain number of pounds. The Commission shares that belief and Commission guidelines specifically provide that state laws restricting the employment of women under such conditions are superceded by Title VII under the supremacy clause of the Federal Constitution and accordingly, do not justify a refusal to employ women.[210]

A trend of federal court decisions has been to support this view. In an early opinion, *Rosenfeld v. Southern Pacific Company*,[211] the plaintiff was denied a financially attractive job as an agent-telegrapher because it would require her to work overtime in excess of the state maximum hours law and lift excess weight in violation of another state law, both of which applied only to women. The court adopted the position of the Commission as expressed in the guidelines that a woman must be allowed the same opportunity as a man to demonstrate her physical ability to perform a job and must not be denied a job on the basis of some sex stereotype, the state law to the contrary notwithstanding.

Rosenfeld was followed very quickly by *Bowe v. Colgate-Palmolive Company*,[212] which adopted a similar approach based upon the Commission guidelines and indicated that the employer must notify its workers that each of them who desired to do so would be given a chance to demonstrate his or her ability to perform more strenu-

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[209] *See also*, Rosen v. Public Service Electric & Gas Co., 409 F. 2d 775 (3d Cir. 1969).

[210] 29 C. F. R. §1604.2.

[211] 293 F. Supp. 1219 (C. D. Cal. 1968).

[212] 416 F. 2d 711 (7th Cir. 1969).

ous jobs and any employee who could so demonstrate would be permitted to bid on and fill any such job to which his or her seniority would entitle him or her. Since the employer 35 pound weight lifting restriction for females was not a bona fide occupational qualification, a layoff of female workers on the basis of that requirement was discriminatory.

In 1971, there were a number of federal district court opinions in the State of Ohio, striking down such laws under Ohio Revised Code Chapter 4107 as being in conflict with Title VII and therefore falling under the supremacy clause of the Constitution, article VI. In *Ridinger v. General Motors Corporation, Frigidaire Division*[213] Judge Weinman concluded that the provisions of Chapter 4107 of the Ohio Revised Code which limited the number of hours women may work, designated certain occupations as prohibited for them and restricted employment in jobs that required lifting of weights over 25 pounds, were invalid because they conflicted with Title VII. Since the state restrictions required employers to discriminate in the employment of women on the basis of a stereotyped characterization as to their capabilities without reference to individual abilities, these laws were unconstitutional. The court concluded that an employer was not liable for back pay to female employees under these circumstances where he had acted "in good faith" in complying with the state restrictive laws.[214] Since the employer had ceased complying with the laws, the court indicated injunctive relief against future violations was not necessary. The northern district ruled essentially the same thing in *Manning v. General Motors Corporation*.[215] The court held that the revised guidelines of the Commission under §1064[216] holding the state laws invalid did not remove the uncertainty placed upon the employer because of the conflict between the state and federal laws and that the employer was entitled to a court determination as to what proper course to follow.[217]

On February 9, 1972, in the already mentioned *Parmer* case[218] in discussing the company good faith reliance on the protective statutes, and after citing *Ridinger*, the court indicated, "in any

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[213] 325 F. Supp. 1089 (S. D. Ohio 1971).

[214] Ridinger v. General Motors Corp., 325 F. Supp. 1089 (S. D. Ohio 1971).

[215] 3 E. P. D. ¶ 8325 (N. D. Ohio 1971).

[216] 29 C. F. R. §1604.

[217] Manning v. General Motors Corp., 3 E. P. D. ¶ 8325 (N.D. Ohio 1971); *See also*, Rinehart v. Westinghouse Electric Corp., 4. E. P. D. ¶ 7520 (N. D. Ohio 1971); Esposito v. General Motors Corp., Civil No. 71-819 (N. D. Ohio 1972); General Electric Co. v. Hughes, 454 F. 2d 730 (S. D. Ohio 1971), *aff'd per curiam* 454 F. 2d 730 (6th Cir. 1972); Jones Metal Products Co. v Walker, 25 Ohio App. 2d 141, 267 N. E. 2d 814 (1971), holding that the state laws were not in conflict with Title VII, *rev'd*, 29 Ohio St. 2d 173, 281 N. E. 2d 1 (1972).

[218] Parmer v. Nat'l Cash Reigster Co., 346 F. Supp. 1043 (S. D. Ohio 1972).

event, this Court is in no position to rule on good faith reliance on a statute at the motion to dismiss stage of these proceedings."[219] The following month in *Czerw v. General Motors Corporation*[220] Judge Walinski indicated:

> With respect to pecuniary relief, the award of back pay, defendant asserts that its reliance in good faith upon the Guidelines promulgated by the Equal Employment Opportunity Commission on December 2, 1965, (wherein the agency's belief was expressed that the Civil Rights Act of 1964 was not intended to disrupt State statutes protecting women employees) constitutes a valid defense under 42 U.S.C. §2000-e-12 to claims arising prior to August 19, 1969, when amended Guidelines were issued. The Courts in *Manning* and *Ridinger* so held, and this Court concurs therein.
>
> However, with respect to claims arising between August 19, 1969, when the EEOC issued its amended Guidelines, and May 1, 1970, when defendant ceased compliance with the protective statutes, this Court has serious doubts as to the validity of the good faith reliance defense. Although the Court appreciates the defendant may have been uncertain and unsure of the effect of the amended Guidelines, the Court is as aware now as the defendant was in November, 1969, at the latest, of a possible solution for defendant's "dilemma" via the declaratory judgment statutes, 28 U.S.C., § §2201, 2202 . . . unlike *Ridinger*, the "record" before this Court does not yet establish defendant's compliance in good faith with the Ohio Statutes . . . . Therefore, this Court cannot now reach the conclusion of *Ridinger* with respect to pecuniary damages, for the period August 19, 1969 through May 1, 1970.[221]

Because of the last two cited opinions and others from other jurisdictions (as will be mentioned below) it appeared that there might be some vitality to the back pay issue in this jurisdiction. However, on September 11, 1972, the Sixth Circuit handed down its opinion in *Manning v. General Motors Corporation*.[222] After summarizing the facts which led the district court in *Manning* to determine that the company was caught between the "rock and the whirlpool" and therefore in good faith in its reliance upon the state protective laws, the court distinguished other circuit opinions which

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[219] *Id.*

[220] Civil No. 71-331 (N. D. Ohio Mar. 26, 1972).

[221] Czerw v. General Motors Corp., Civil No. 71-331 (N. D. Ohio Mar. 25, 1972).

[222] 466 F. 2d 812 (6th Cir. 1972)

had granted back pay in the state protective laws situations, including *Weeks v. Southern Bell Telephone and Telegraph Company*,[223] and *Bowe v. Colgate-Palmolive Company*.[224] Having done so, the appeals court concluded that defendant General Motors did not have the benefit of any judicial determination of the validity of the laws until 1971 and the enforcing agency had not handed down any administrative interpretation which would assist in resolving the conflict until August of 1969.

> Under all the circumstances of this case we cannot conclude that the District Judge abused his discretion in denying back pay to these Plaintiffs.[225]

Obviously, this decision is going to be the cause of substantial argument between those who seek to read it "narrowly" as a mere holding that the trial judge did not abuse his discretion in the immediate case (which might not have the effect of denying back pay under all state protective law situations in the jurisdiction) and those who see the case as a broad denial of back pay in state protective law matters in the Sixth Circuit. The issue is certainly a lively one and one which is going to continue to involve a considerable amount of litigation.

Two cases allowing back pay on state protective law-related situations are *Bowe v. Colgate-Palmolive Company*,[226] and *Schaeffer v. San Diego Yellow Cabs, Inc.*[227] In *Schaeffer* the court concluded that the employee was to be compensated for the extra hours she would have worked except for the discrimination from the date the employer became aware of the November 22, 1968 *Rosenfeld* decision, and the change of the Commission Guidelines in January of 1969:

> We conclude, therefore, that Schaeffer is entitled to receive back pay for the extra hour per day from the date when the Company had knowledge of both the *Rosenfeld* case and the commission's decision in favor of Schaeffer *(i.e.,* on some undetermined date subsequent to 1-22-69, to and including 10-7-69, the date the Company allowed 9 hour daily employment for women.)[228]

The *Weeks* Court indicated that back pay might be appropriate and remanded for determination of the appropriate relief.[229] The

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[223] 408 F. 2d 228 (5th Cir. 1969).

[224] 416 F. 2d 711 (7th Cir. 1969).

[225] Manning v. General Motors Corp., 466 F. 2d 812, 816 (6th Cir. 1972).

[226] 416F. 2d 711 (7th Cir. 1969).

[227] 462 F. 2d 1002 (9th Cir. 1972).

[228] Schaeffer v. San Diego Yellow Cabs, Inc., 462 F. 2d 1002, 1007 (9th Cir. 1972).

[229] Weeks v. Southern Bell Tel. & Tel. Co., 408 F. 2d 228 (5th Cir. 1969).

Manning Court distinguished *Weeks* by indicating that it was a case in which the Georgia rule relating to weights had been repealed before the case was before the court of appeals. On remand, the *Weeks* trial court awarded plaintiff $3761 as back pay.[230]

Maternity Leaves and Terminations

Another area of discrimination on the basis of sex which has come to the fore lately deals with pregnancy leaves or terminations. The Commission has established the principle that in general an employer may not terminate an employee who is compelled to cease work because of pregnancy. Rather, he must offer a leave of absence with the right to reinstatement to the position vacated or an equivalent position at no loss of seniority or any of the other benefits and privileges of employment. In general, pregnancy is to be treated like any other medical disability.

One of the first court determinations involving the employment rights of expectant mothers under Title VII was issued in February of 1971 in *Schattman v. Texas Employment Commission.*[231] The district court found that the policy of requiring all female employees to cease work at the conclusion of their seventh month of pregnancy violated the Act and that such policy did not take into consideration the willingness of the individual female employee to continue work, her rate of performance or her need for personal medical safety. The state agency which was the employer was assessed with damages representing the value of her back wages and with the cost of the action, including attorney fees.

On March 1st, 1972, the Fifth Circuit Court of Appeals reversed the earlier decision and held that the set agency policy did not violate any constitutional rights and further that the employment was not terminated because the employee was a woman nor because she was pregnant, but only because her pregnancy was far advanced. The court held that the pregnancy leave rule, though based on sex, was reasonable and rationally related to the permissible stated objective of providing efficient operations of its employment services.[232]

Shortly after the district opinion in *Schattman,* the district court in Kansas dealt with a similar problem. In *Jane Doe v. Osteopathic Hospital of Wichita,*[233] the *discharge* of a female hospital employee because of her condition of being pregnant and unwed

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[230] *Contra,* Garneau v. Raytheon Co., 341 F. Supp. 336 (D. Mass. 1972); Le Blanc v. Southern Bell Tel. & Tel. Co., 333 F. Supp. 602 (E. D. La. 1971), *aff'd per curiam,* 460 F. 2d 1228 (5th Cir. 1972), *cert. denied,* ____ U.S. ____, 5 E. P. D. ¶ 8021 (Nov. 6, 1972).

[231] 330 F. Supp. 328 (W. D. Tex. 1971).

[232] 459 F. 2d 32 (5th Cir. 1972), *cert. denied,* ____ U.S. ____, 5 E. P. D. ¶ 8099 (Jan 8, 1973).

[233] 333 F. Supp. 1357 (D. Kan. 1971).

amounted to unlawful sex discrimination. The hospital claim that its public image was affected by the continued employment of this unwed, pregnant female was not supported by the evidence and the hospital was held liable for the earnings lost by the employee as a result of her discharge. Essentially, the court rejected the hospital claim by stating that it was not the basis of a justifiable business necessity for the discharge.

LaFleur and Nelson v. Cleveland Board of Education,[234] concerned an action brought under 42 U.S.C. §1983 by school teachers against the Cleveland School Board since at the time of the action Title VII did not cover such state governmental employees. The maternity leave policy in question required a pregnant teacher to take an unpaid leave of absence five months before the expected birth of the child and to continue on such status until the beginning of the first school term following the date when the baby became three months old. The district court judge had concluded that the rule did not discriminate against women and was not unreasonable or arbitrary to the extent that it was unconstitutional, concluding that it was intended to avoid against disruption of the student's education and embarrassment, as well as to protect the health of the mother and child.

The circuit court recognized that the *Schattman* decision dealt with a "distinctly less onerous maternity leave rule"[235] and further that Title VII had since been amended to make it applicable to public school employees, also noting EEOC regulation §1604.10(b). The court indicated that the three month enforced unemployment after birth had no relation to the employer's interest at all. The school superintendent had testified that he thought that without the rule, pregnant teachers would be subjected to "pointing, giggling and snide remarks"[236] by the students. "Basic rights such as those involved in the employment relationship and other citizenship responsibilities cannot be made to yield to embarrassment."[237] The court concluded the rule was inherently based upon a classification by sex and was arbitrary and unreasonable.[238]

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[234] 326 F. Supp. 1208 (N. D. Ohio 1971), *vacated and rev'd,* 465 F. 2d 1184 (6th Cir. 1972).

[235] La Fleur v. Cleveland Bd. of Educ., 326 F. Supp. 1208 (N. D. Ohio 1971), *vacated and rev'd,* 465 F. 2d 1184, 1186 (6th Cir. 1972).

[236] *Id.*

[237] *Id.* at 1187.

[238] *See also,* Heath v. Westerville Bd. of Educ., 345 F. Supp. 501 (S. D. Ohio 1972) (action under §1983 concerning discharge of nontenured teacher with less than three years service under existing policy during sixth month of pregnancy resulting in striking down of said policy; back pay and reinstatement allowed); Jinks v. Mays, 4 E. P. D. ¶ 7684 (N. D. Ga. Sept. 23, 1971) (untenured-tenured dichotomy unconstitutional under §1983); Williams v. San Francisco Unified School Dist., 340 F. Supp. 483 (N. D. Cal. 1972) (preliminary injunction granted enjoining enforcement of policy requiring leave at least two months before delivery date).

In *Cohen v. Chesterfield County School Board*, an action under 42 U.S.C. §1983, the Fourth Circuit Court of Appeals[239] affirmed a Virginia district court opinion,[240] holding that a school board policy of requiring pregnant teachers to take leaves of absence at the end of the fifth month of pregnancy denied equal protection. The majority found no reason why a pregnant teacher must accept a required leave at that time if she and her physician concluded she could perform the teaching function past that date. The court specifically agreed with the *LaFleur* appeals decision. Chief Judge Haynsworth dissented.

Four months later the appeals bench, sitting *en banc*, by a 4-3 vote reversed its earlier decision.[241] The majority opinion of Chief Judge Haynsworth almost precisely followed his earlier dissent. He concluded therein that the regulation in question was not an invidious discrimination based on sex. "It does not apply to women in an area in which they may compete with men."[242] The majority reasoned that the regulation served a reasonable purpose of maintaining continuity in the classroom, necessitated by the circumstance that 80% of the school system's teachers are women.

The dissent, written by Judge Winter, echoed his earlier majority opinion in the first appeals decision. Holding as self-evident that the regulation is sex discrimination, he noted the fear that if the present majority ultimately prevails, it might have the effect of enervating implementation of Title VII.

At this writing, a petition for certiorari has been filed in *LaFleur*,[243] and it may well require a decision by the Supreme Court before some long-term conclusions in this area can be reached.

"Long Hair" Employment Discrimination

Just as the *Diaz* case[244] involves *males* making a claim of unlawful sex discrimination, another area of similar import involves long hair cases. In a recent Ohio case, *Roberts v. General Mills*,[245] the plaintiff was fired because a hat was not sufficient to cover his hair in the exposed food department of the company and the company would not permit him, as it did women, to wear a hair net. After the individual instituted an action in federal court, the com-

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[239] 5 E. P. D. ¶ 7967, (4th Cir. Sept. 14, 1972).

[240] 326 F. Supp. 1159 (E. D. Va. 1971).

[241] 5 E. P. D. ¶ 8419 (Jan. 15, 1973).

[242] *Id.*

[243] La Fleur v. Cleveland Bd. of Educ., 326 F. Supp. 1208 (N. D. Ohio 1971), *vacated and rev'd*, 465 F. 2d 1184 (6th Cir. 1972), *cert. filed*, Civil No. 72-777 (Nov. 27, 1972).

[244] 442 F. 2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).

[245] 337 F. Supp. 1055 (N. D. Ohio 1971).

pany moved to dismiss and the federal court overruled the motion. Although the defendant argued convincingly for the need for quality control in food processing, Judge Young stated that it was not these reasonable measures of ensuring sanitary conditions which were being attacked by the plaintiff; rather, the complaint was focused on what class of employees could wear the hairnets. According to the court:

> It does not appear that contamination could occur any more easily from a man's hair contained within a hairnet than a woman's.[246]

The court also rejected the defendant's argument that it had the "absolute" right to make such rules as it wished regarding its employees.

Donohue v. Shoe Corporation of America,[247] involved a similar issue. In that case, a former retail shoe salesman litigated under Title VII because of his discharge supposedly due to the length of his hair, arguing that the employer permits females to wear long hair and therefore his termination violated the Act. Citing EEOC interpretations, the court ruled on the motion to dismiss that the claim of a bona fide occupational qualification was not sufficient, since it must be pleaded and proved by the employer as a defense. The court held the agency determination was entitled to deference by the court and refused to dismiss the action against the company.[248]

Arrest And Conviction Records

In *Gregory v. Litton Systems, Inc.,*[249] the court again looked into the consequences of an employment practice and not to the employer

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[246] Roberts v. General Mills Inc., 337 F. Supp. 1055, 1056 (N. D. Ohio 1971).

[247] 337 F. Supp. 1357 (C. D. Cal. 1972).

[248] *See also,* Diddams v. Univ. Hosp., 3 E. P. D. ¶ 8244 (W. D. Wis. 1971) (injunction granted barring suspension from employment of the employees of the state hospital because of the length of their hair); Lindquist v. Coral Gables, 323 F. Supp. 1161 (S. D. Fla. 1971) (in the absence of showing controlling governmental interests essential to the safety of the agency, the rule setting hair styles for fire fighters was invalid and the termination of a fireman violated his rights; reinstatement with full tenure and salary); Ramsey v. Hopkins, 447 F. 2d 128 (5th Cir. 1971) (Black public school teacher discharged for refusing to comply with ban on wearing mustaches was entitled to reinstatement and back wages); Doyle v. Buffalo Sidewalk Cafe, Inc. 333 N. Y. S. 2d 534 (N. Y. Sup. Ct. 1972) (injunction issued directing employer to refrain from discriminating in the employment of busboys on grounds of length of hair of applicant, based on state law); Conrad v. Goolsby, 5 E. P. D. ¶ 8076 (N. D. Miss. Oct. 31, 1972) (discharge of teachers for failure to conform to school "code of conduct" regulating beards, sideburns and mustaches, violated 42 U. S. C. §1983; adults have right to decide own hair styles). *Contra,* Dodge v. Giant Food, Inc., 3 E. P. D. ¶ 8184 (D. D. C. 1971) (employer did not discriminate either on the basis of race or sex in terminations of Black employees for beards and white employees for long hair; Baker v. Calif. Land Title Co., 349 F. Supp. 235 (C. D. Cal. 1972) (granting of motion to dismiss on finding that duel employment policy was not discrimination against males with long hair); Boyce v. Safeway Stores, Inc., 5 E. P. D. ¶ 8077 (D. D. C. Dec. 4, 1972) (not unlawful sex discrimination under Title VII for market to discharge male whose facial hair and hair length violated store's grooming code).

[249] 316 F. Supp. 401 (C. D. Cal. 1970), *aff'd as modified,* 5 E. P. D. ¶ 8089 (9th Cir. Dec. 7 1972).

intent or lack thereof. The court determined that an employer could not refuse to employ applicants with arrest records, as distinguished from conviction records, where the practice had a disparate effect on minorities and was not compelled by business necessity. In *Gregory,* the plaintiff had a record of fourteen different arrests but had never been convicted of any criminal offense.[250] the court found that the company policy was objectively applied and enforced to all without regard to race.[251] Secondly, there was a determination that there was no evidence to support the claim of the company that persons who have suffered no convictions, but have been arrested on a number of occasions, can be expected when employed to perform less efficiently or less honestly than other employees,[252] and that therefore information concerning an employee record of arrests without convictions was held to be irrelevant to his suitability for employment.[253]

The court relied substantially on the proposition that a disproportionate number of Blacks are arrested in proportion to their population and that therefore any policy disqualifying prospective employees because of having been arrested discriminates in fact against Black applicants.

On the question of intent, the court indicated:

> An intent to discriminate is not required to be shown so long as the discrimination shown is not accidental or inadvertent. The intentional use of a policy which in fact discriminates between applicants of different races and can reasonably be seen so as to discriminate, is interdicted by the Statute, unless the employer can show a business necessity for it. In this context "business necessity" means that the practice or policy is essential to the safe and efficient operation of the business. *Paperworkers Local 189 v. United States,* 416 F.2d 980 (5th Cir., 1969). As previously stated, the Court finds that the policy in question is not justified or excused by business necessity in this case.[254]

Accordingly, the court ordered a money judgment by way of compensatory damages for the difference between what the individual earned since the defendant's original offer of employment had been withdrawn (upon learning of his arrest record) and what he would have earned had he been employed by defendant. Punitive damages were denied, but attorney fees in the amount of $5,000 and costs

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[250] Gregory v. Litton Systems, Inc., 316 F. Supp. 401 (C. D. Cal. 1970).

[251] *Id.* at 402.

[252] *Id.*

[253] *Id.* at 403.

[254] *Id.*

were awarded, and the defendant was enjoined from seeking from applicants for employment information concerning prior arrests which did not result in conviction or from utilizing as a factor in determining a condition of employment or promotion any record of arrest not resulting in conviction.[255]

The area of employment discrimination concerned with arrest and/or conviction records has been the source of a good deal of comment in law review articles.[256] In one Note it has been stated:

> Perhaps the greatest inequity caused by arrest records is discrimination in employment practices. In no other private area are such records used so extensively and with such devastating results. Recent surveys have demonstrated more than amply the widespread use of arrest records in the making of employment decisions.[257]

That this is more than a mere academic proposition can be seen by the large number of charges dealing with alleged discrimination because of arrest and/or conviction records and by a substantial number of Commission decisions on the subject. In the case of *Carter v. Gallagher*,[258] the district court had ruled that in view of statistical evidence showing that a greater number of Blacks than Whites are arrested and convicted, a civil service requirement that applicants for the position of city fireman have no conviction record had the unlawful effect of depriving Blacks of job opportunities and was held interdicted by 42 U.S.C. §1981. At the time of the decision, local and state employees were not covered by Title VII. However, on appeal, the Eighth Circuit Court of Appeals, in construing the trial court ruling on this question, indicated as follows:

> The provision of ¶7(a) relating to the elimination of applicant arrest records is approved.
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> The provisions of ¶7(b), particularly subdivision (i) thereof, are too broad. The parties agree that a conviction of a felony or misdemeanor should not per se constitute an

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[255] The court of appeals affirmed the holding that the use of the arrest records, without convictions, as a basis for refusal to hire, was race discrimination, but vacated the injunction issued barring use of the records, since the plaintiff did not want his job back and had agreed to accept damages if he prevailed and the decision reasoned the injunction would benefit no one before the court. 5 E. P. D. ¶ 8089 (9th Cir. Dec. 7, 1972).

[256] *See* Comment, *Arrest Records and Employment Discrimination*, 32 U. OF PITTS. L. REV. 254 (1971); Note, *Title VII, Racial Discrimination in Employment-Employer's Use of Records of Arrests Not Leading to Convictions*. 17 WAYNE L. REV. 228 (1971); Comment, *Arrest Records as a Racially Discriminatory Employment Criterion*, 6 HARV. CIV. RIGHTS — CIV. LIB. L. REV. 165 (1970); Note, *Arrest Records Hiring Policies and Racial Discrimination*, 57 IOWA L. REV. 506 (1971); Comment, *Discriminatory Hiring Practices Due To Arrest Records — Private Remedies*, 17 VILL. L. REV. 110 (1971).

[257] Comment, *Discriminatory Hiring Practices Due To Arrest Records — Private Remedies*, 17 VILL. L. REV. 110, 111 (1971).

[258] 337 F. Supp. 626 (D. Minn. 1971).

> absolute bar to employment. We are persuaded by Defendant's argument that applicants' conviction records, at least in cases of aggravated offenses and multiple convictions, may have a bearing on the suitability of an applicant for a Fire Department position both from the standpoint of protecting fellow firemen and the public. The Trial Court in its discretion may require the Defendant to submit to it for approval a rule with respect to the consideration to be given to an applicant's conviction record, *which at a minimum should not treat conviction as an absolue bar to employment.* We would not consider any rule giving fair consideration to the bearing of the conviction upon applicant's fitness for the Firefighter job to be inappropriate.[259]

The case of *Richardson v. Hotel Corporation of America*,[260] held that a hotel's discharge of a Black bellman after learning of his convictions for theft and receipt of stolen goods was not improper discrimination because the position was properly termed "security sensitive" as the bellman had access to the hotel keys. In essence, defendant made out a business necessity defense and also offered plaintiff another job in a non-security position.

The Equal Employment Opportunity Commission has recently entered as amicus curiae in *Holliday v. Seaway Foods* in the northern district of Ohio, eastern division, which concerns the issue of whether defendant violated the Act by discharging Plaintiff warehouse employee after 5½ years employment upon learning of prior convictions of criminal offenses, the last of which occurred seventeen years prior to discharge.

Garnishments

In an analogous area, another federal trial court[261] in California recently held that a company rule requiring the firing of an employee after several garnishments of his wages results in unlawful discrimination against minorities, even though the rule is "racially neutral" and applied to all. The court indicated that statistics showed that more Blacks than White had their wages garnisheed. Therefore, the *Griggs* and *Gregory* standard was to be applied, unless there could be some justifiable business necessity. Although the company could show that the rule was needed to avoid inconvenience and extra expense, the court rejected this as sufficient business necessity. Again the issue of the employer good faith and

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[259] Carter v. Gallagher, 452 F. 2d 315 (8th Cir. 1971), *modified on other grounds on rehearing* 4 E. P. D. ¶ 7616 (8th Cir. 1972), *cert. denied*, 92 S. Ct. 2045 (1972).

[260] 332 F. Supp. 519 (E. D. La. 1971), *aff'd without opinion*, 5 E. P. D. ¶ 8101 (5th Cir. Nov. 27, 1972).

[261] Johnson v. Pike Corp., 332 F. Supp. 490 (C. D. Cal. 1971).

lack of discriminatory intent was not to be controlling in the Court's judgment, since the effect of the practice was discriminatory.

Conditions of Employment

Many cases have concerned the conditions of the employment relations as possible bases of an action under Title VII. §703(a)(1) makes it an unlawful practice for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment . . . ."[262] §703(a)(2) renders it unlawful "to limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee . . . ."[263] Such cases include the already discussed state protective law decisions due to the nature of the statutes in placing conditions upon the work relationship.

Rogers v. EEOC,[264] concerned an optical services company which was charged by a former employee with discrination against her because of her national origin. As one of the two bases for the alleged discrimination, the charging party indicated the practice of segregating Black patients from White patients. EEOC received the employment records from the employer, who declined to give it the additional records of applications by patients for services. The trial court indicated that the alleged practices regarding the patients could not be viewed as an unlawful employment practice.[265] In the appeals court, one judge indicated that the psychological fringes in the employment relationship were within the area of EEOC investigative authority. He ruled that the practice of the employer in segregating his customers on racial lines affected the sensibilities of employees to the extent of making such biased practice an unlawful employment practice.[266] The second judge concurred in the result of allowing access to the records but only on the ground that requiring the employee to attend such segregated patients would amount to an unlawful practice.[267] The third judge dissented, agreeing with the Trial Court disposition of the matter.[268]

In *Wilson v. Sibley Memorial Hospital,*[269] the district court ruled that a hospital was not entitled to dismissal of an action brought against it by a male professional nurse claiming unlawful sex dis-

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[262] 42 U. S. C. §2000-e-2(a) (1) (1970).

[263] 42 U. S. C. §2000-e-2(a) (2) (1970).

[264] 454 F. 2d 234 (5th Cir. 1971), *cert. denied,* 93 S. Ct. 554 (1972).

[265] Rogers v. EEOC, 454 F. 2d 234 (5th Cir. 1971), *cert. denied,* 93 S. Ct. 554 (1972).

[266] *Id.* at 238-39.

[267] *Id.* at 241.

[268] *Id.* at 243.

[269] 340 F. Supp. 686 (D. D. C. 1972).

crimination in being deprived of job opportunities by the hospital on the ground that he was not its employee since the Act requires only that the charging party be an "aggrieved person." Accordingly, the court ruled that he had standing to file the charge with the agency and the complaint in court.

More importantly, the court ruled that the hospital engaged in an unlawful discrimination against the male nurse on account of his sex when it deprived him of employment opportunities by denying him access to female patients when he arrived at the hospital on assignment by a professional nurse's registry.

Steel Workers Local 1104 v. United States Steel Corporation,[270] dealt with a ruling that an employer did not engage in unlawful sex discrimination by paying male employees for their lunch periods because they were on call during such time, while not paying female employees who were required by state hours laws to have a free time lunch period. The employer was not granting to male employees a lunch hour that it was possible to give female employees under the provisions of state laws as they were then being enforced. Having sought exception to the state laws, the employer had, moreover, an adequate defense in its good faith reliance on the state law. The court reasoned that whichever direction the company turned, it would face a claim of sex discrimination because of the state law as it then existed. Accordingly, the claim for back pay by the females was denied.

Another approach to this area can be seen in *Hays v. Potlatch Forest, Inc.,*[271] where the court of appeals reasoned that any discrimination against male employees could be avoided by extending the daily overtime paid benefits required by state law for women. In this way, the validity of the state law remained intact. The court found support for its solution in the Equal Pay Act[272] which bars the reduction of pay or benefits in equalizing pay among the sexes and in the regulations of EEOC. Additionally, extension of the benefits for the men would not place an unreasonable burden on the employer since he could merely rearrange his working schedules so that no employee worked more than eight hours a day until all employees had worked their first forty hours in a work week.

Lack of Citizenship as a Basis for Discrimination

The Fifth Circuit Court of Appeals ruled in *Espinoza v. Farah Manufacturing Company*[273] that a denial of employment to a Mexican

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[270] United Steel Workers, Local 1104 v. United States Steel Corp., 4 E. P. D. ¶ 7899 (N. D. Ohio 1972).

[271] Hays v. Potlatch Forest, Inc., 465 F. 2d 1081 (8th Cir. 1972).

[272] 29 U. S. C. §206 (d) (1).

[273] Espinoza v. Farah Mfg. Co., 462 F. 2d 1331 (5th Cir. 1972).

alien under a policy of refusing to hire non-citizens did not amount to unlawful discrimination on account of national origin. Although the court held that EEOC guidelines were entitled to deference, the agency determination that discrimination on the basis of citizenship is equivalent to discrimination on the basis of national origin need not be followed where it does not comport with the clear intent of congress to limit the prohibition to discrimination based on the country from which an individual or his forebears came. The court discussed the EEOC regulation and found at 29 C.F.R. ¶1606.1 (d). The court ruled that where the practice of excluding aliens was a mere pretense to camouflage national origin discrimination, the regulation would come into play, but such was not the situation in the instant case. To the extent that such regulation was intended to make such discrimination per se illegal, the court refused to follow the regulation.

On the other hand, in *Guerra v. Manchester Terminal Corporation,*[274] a trial court in the southern district of Texas five days before the *Espinoza* decision in a case brought under both Title VII and §1981 held that the wording of both of those Acts indicated that congress intended to protect all persons within its jurisdiction rather than the narrower classification of all citizens and the grant of preference in the assignment of dock jobs to American citizens unlawfully discriminated against a Mexican national. The same court, after pronouncement of *Espinoza,* held that while that case indicated lack of citizenship was not covered by Title VII, the condition of alienage was within the purview of 42 U.S.C. §1981, granting "all persons" equal protection of the laws and accordingly the action was maintainable under the general civil rights statute.[275]

Lastly, in an action brought under §§1981 and 1983 of Title 42 U.S.C., the District Court in the Southern District of New York had ruled on November 9, 1971 that in the absence of a compelling interest which would justify the restrictions of state civil service laws that conditioned state employment on American citizenship, such laws are invalid as unlawfully denying aliens the equal benefits of the laws.[276] Claims of a need for loyalty and efficiency in employment were insufficient to justify the discharge of aliens by a municipal agency since there was no claim of a security risk. Probable jurisdiction was noted by the United States Supreme Court on June 12, 1972 along with an order granting the motion of the appellees to proceed *in forma pauperis.*[277]

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[274] Guerra v. Manchester Terminal Corp., 350 F. Supp. 529 (S. D. Tex. 1972).

[275] 5 E. P. D. ¶ 8068 (S. D. Tex. Nov. 6, 1972).

[276] Dougall v. Sugarman, 339 F. Supp. 906 (S. D. N. Y. 1971).

[277] Motion of appellees for leave to proceed *in forma pauperis granted* 92 S. Ct. 2434; *See also,* Jalil v. Hampton, 460 F. 2d 923 (D. C. Cir. 1972), *cert. denied,* —U.S.—, 5 E. P. D. ¶ 7994 (Dec. 10, 1972), indicating that a resident alien was entitled to a determination as

(Continued on next page)

The 1972 Equal Employment Opportunity Act

Significant changes were made in Title VII with the enactment in March of 1972 of the Equal Employment Opportunity Act.[278] The goal of this section will be to discuss recent significant changes in the 1964 Act brought about by the amendments of 1972 and by the subsequent revision of certain of the regulations authorized under the Act and amendments. One of the more significant changes authorized by the amendments was the inclusion of state and local governments and political subdivisions within the coverage of the Act by redefining the term "person" in §701(a).[279] The term "employer" in 701(b)[280] has also been changed by the removal of state and local governments from the excepted entities and this class of newly covered public employers includes all state and local governments, governmental agencies and political subdivisions and certain of the departments or agencies of the District of Columbia. Most federal employees are covered by a new section dealing with nondiscrimination in federal employment.[281]

The term "employer" has also been changed to cover employers with fifteen or more employees (for each working day in each of twenty or more calendar weeks in the current or preceding calendar year), as opposed to the present number of twenty-five. (This change will go into effect one year after the enactment of the amendments).

§701(c)[282] has been changed to eliminate the language that provided a partial exception for agencies of the federal government and states or political subdivisions from the definition of "employment agency." The effect of the latest amendments is that state employment agencies are now also subject to the law as employers.

§701(e)[283] concerning the definition of "labor organization" has been altered to expand coverage to organizations with at least fifteen members (one year after the enactment of the amendments), as opposed to the present number of twenty-five.

(Continued from preceding page)

to whether certain federal civil service regulations excluding aliens from consideration are unconstitutional; Faruki v. Rogers, 5 E. P. D. ¶ 8015 (D. D. C. Oct. 6, 1972) where a three judge court struck down as equal protection-violative a ten year durational citizenship requirement for foreign service officers; Herriott v. City of Seattle, 499 P. 2d 101, (Wash. Sup. Ct. 1972) holding that a citizenship requirement for the position of city bus driver in the municipal civil service rules was unconstitutional.

[278] EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, PUB. L. NO. 92-261, 86 STAT. 103.

[279] PUB. L. No. 92-261, §2(1) (Mar. 24, 1972).

[280] PUB. L. No. 92-261, §2(2) (Mar. 24, 1972).

[281] PUB. L. No. 92-261, §11 (Mar. 24, 1972).

[282] PUB. L. No. 92-261, §2(3) (Mar. 24, 1972).

[283] PUB. L. No. 92-261, §2(4) (Mar. 24, 1972).

A major change is in the definition of the term "religion" in §701(j).[284] In this respect, the amendments have broadened a former exemption.[285] The exemption from the ban on religious discrimination allowed religious corporations was formerly restricted to employees working at *religious* activities, but has been broadened by the amendments to cover all secular activities of the religious corporation.[286] Another effect of the changes in §702 is that educational institutions are no longer exempt, except in those cases of institutions maintained by religious corporations and certain elected positions in state and city school systems.[287] Obviously, the effect of this change is going to be monumental in light of the many cases of employment discrimination which have previously been filed under related acts dealing with educational institutions employment practices. This elimination of the exemption applies to both public and private educational institutions. Debate in congress reflects the fact that discrimination against minorities and women in the field of education was found to be as pervasive as discrimination in any other area of employment and the elimination of the exemption will bring approximately 120,000 of such institutions under the law; in terms of employees it's believed the law will apply to approximately 2.8 million teachers and professional staff members and another 1.5 million non-professional staff members.

As to the broadening of the exemption for religious corporations, they are still subject to the ban on discrimination in employment on account of race, color, sex, or national origin.

One important change in §703(a)[288] is to include the words "applicants for employment" to make it very clear that the unfair practices therein proscribed apply to such applicants. The section is really declaratory of present case decisions.[289]

§705[290] sets out changes in the composition of the Commission and appointment procedures for regional directors. See also the changes in 705 (b) (1) and (b) (2) concerning the operations of the Office of General Counsel. Note that under subsection (b) (2), the Attorney General shall conduct all litigation to which the Commission is a party in the U.S. Supreme Court.

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[284] PUB. L. NO. 92-261, §(7) (Mar. 24, 1972).

[285] CIVIL RIGHTS ACT OF 1964, 42 U. S. C. §2000e-1 (1970).

[286] PUB. L. NO. 92-261, §§2(7) and 3 (Mar. 24, 1972).

[287] PUB. L. NO. 92-261, §3 (Mar. 24, 1972).

[288] PUB. L. NO. 92-261, §8(a) (Mar. 24, 1972).

[289] *See* Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

[290] PUB. L. NO. 92-261, §8(d) (Mar. 24, 1972).

§706[291] sets out the enforcement authority of the Agency and one of the significant changes is to allow the filing of a charge not only by aggrieved parties or members of the Commission but also by persons on behalf of such individual. Another important change in §706(b) is that the Commission is required to serve a notice of the charge on the named respondent within ten days. The Commission is required by the section to make its determination on reasonable cause as promptly as possible and "so far as practicable, not later than 120 days from the filing of the charge . . . ." After the charge in writing under oath or affirmation is filed and the Commission has made its determination on reasonable cause, if it finds in the affirmative it is to attempt to conciliate the case. In determining whether or not there is reasonable cause the Commission is to accord "substantial weight" to the findings and orders made by the state or local deferral agencies.

§706(c)[292] continues the system of making deferrals of the charge to any state agency or political subdivision of a state which has a law prohibiting that type of unlawful employment practice. The section provides for deferring the charge to such state or local agency for a period of sixty days unless the agency deferred to terminates the proceedings earlier.

With reference to §706(e)[293] of the amendment, formerly charges had to be filed within 90 days after the alleged unlawful practice occurred in cases where there was no deferral agency qualified to investigate the type of discrimination alleged; in cases where the Commission deferred to a state or local agency, the charge previously had to be filed within 30 days after the charging party received notice that the state agency had terminated its proceedings or within 210 days after the alleged unlawful practice occurred, whichever was earlier. Under the new section, charges must now be filed within 180 days of the alleged unlawful practice in non-deferral circumstances and 300 days after the alleged unlawful practice occurred or 30 days after the state or local agency terminated proceedings on deferrable questions, whichever is earlier. The changes in the law as to the number of days are intended to have no effect on present case law that has determined that certain types of violations are continuing in nature and accordingly toll the statute of limitations on filing charges.

Newly enacted §706(f)(1)[294] authorizes the agency for the first time to bring a civil action against an uncooperative respondent in federal court, except in those instances where that respondent is a

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[291] PUB. L. NO. 92-261, §4(a) (Mar. 24, 1972).
[292] *Id.*
[293] *Id.*
[294] *Id.*

governmental entity. The main condition placed on the agency before instituting court action is that it has attempted but was unable to achieve an acceptable conciliation agreement; the suit may be brought 30 days after the charge has been filed with the agency or 30 days following termination of the state or local agency charge. In cases involving a governmental agency or political subdivision, EEOC cannot litigate in federal court directly but must refer the case to the attorney general who may do so. The section also provides that persons aggrieved shall have the right to intervene in civil actions brought by the Commission or the Justice Department.

The section continues by indicating that if the Commission dismissed a charge or after 180 days have elapsed from the filing of the charge without the Commission or the attorney general having filed a court complaint, or without the Commission having entered into conciliation, that private individuals may initiate court action. Such actions must be brought in the appropriate district court within 90 days after receiving notification of the right to sue. The significant change here is that since the Commission formerly had no right to litigate directly, the individual only had to wait 60 days after the charge was filed by EEOC before asking for a right to sue. In this sense he must "cool his heels" a little longer. Additionally, former §706 gave the charging party only 30 days in which to file his litigation after getting a right to sue. In this respect, the time for litigating has been broadened hopefully sufficiently to allow the attorney to study the case and prepare a court complaint.

The subsection still authorizes the court to appoint an attorney "in such circumstances as the court may deem just" for such complainant and may authorize the commencement of the action without the prepayment of fees or costs. The court may, "in its discretion" permit the Commission or the attorney general to intervene in such civil actions. Under the pre-amended law, only the attorney general could intervene in private suits. Note also that the courts have discretion to stay proceedings for not more than 60 days pending determination of state or local proceedings or efforts of EEOC to obtain voluntary compliance.

Newly enacted §706(f)(2)[295] authorizes the Commission or the attorney general, in cases involving government, to bring actions for temporary or preliminary relief when prompt judicial action is necessary.

New §706(g)[296] (like the former 706(g)) authorizes the court upon finding that the accused party has engaged or is engaging in an unlawful practice to issue an injunction barring the continuance of

[295] *Id.*

[296] *Id.*

same and to order affirmative relief as may be appropriate including, but not limited to, reinstatement or hiring, with or without back pay. The major change here is that under pre-amended law, it was presumably possible to assess back pay for these unlawful acts all the way back to the effective date of the original Act, July 2, 1965. The amendments place a limitation on back pay liability so that they are assessed from a date not more than two years prior to the filing of a charge with the Commission.

§706(k)[297] as before authorizes the court in its discretion to allow the prevailing party other than the government a reasonable attorney's fee as part of the cost.

The major change in §707[298] concerning pattern or practice suits is that such suits could previously be litigated only by the Attorney General of the United States whereas the amendments have given concurrent jurisdiction in this area from the date of enactment to the agency for a period of two years, at which point EEOC shall have sole authority in this regard.[299] §§709[300] and 710[301] deal with investigations and inspections by EEOC and continue to authorize the Commission to have access to the records of persons being investigated under a charge filed. Previously, persons required to keep certain records under the Act could seek an exemption on the grounds of undue hardship either by applying to the agency or bringing a civil action in federal court. However, the law now requires the party seeking such exemption to first make an application to the agency and only if the agency denies the request can the party bring the federal court action. An important change in the law is brought about by the amendment to §710 to the effect that for the purposes of all hearings and investigation, §11 of the National Labor Relations Act,[302] shall apply. The section of the NLRA authorizes the Board or its agents to have access to and the right to copy evidence of persons being investigated or proceeded against. The Board or member thereof is authorized by that Act to issue subpoenaes requiring the attendance and testimony of witnesses or production of any evidence. Within five days after service of such subpoena, persons are authorized to petition the Board to revoke the subpoena if the evidence does not relate to matters under investigation. In cases of an individual's refusal to obey the sub-

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[297] CIVIL RIGHTS ACT OF 1964, 42 U. S. C. §2000e-5 (1970).

[298] PUB. L. No. 92-261, §5 (Mar. 24, 1972).

[299] *Id.*

[300] PUB. L. No. 92-261, §6 (Mar. 24, 1972).

[301] PUB. L. No. 92-261, §7 (Mar. 24, 1972).

[302] 29 U. S. C. §161 (1970); *see also*, 29 C. F. R. §1601.14 et seq.

poena, district courts of the United States upon application by the Board shall have jurisdiction to issue such person an order requiring appearance of the person or production of the evidence.

This "subpoena power" under the Commission's new regulations and new procedures being drafted will apparently authorize district directors or deputy district directors to issue such administrative subpoenaes, putting the burden upon the individual against whom it is issued to seek agency action within five days revoking the subpoena. In cases where there is a refusal to obey the subpoena, the agency will file an action in federal court. Since these procedures have not been finalized at the time of this writing, it is impossible to indicate how effective they will be. This procedure replaces the former "demand for access" procedure which the previous law authorized.

Conclusion

At the time of this writing, the agency has filed less than 30 actions under the amendments of March 24, 1972 and even when fully operational, the Commission does not contemplate filing more than 390 cases a year. Because of this, it is obviously extremely important that the private Bar be concerned with, interested in and educated in Title VII and related litigation matters. Unless the Bar accepts this challenge, in light of the tremendous backlog of cases and the heavily burdened agency, it is going to mean a substantial denial of employment rights for many "aggrieved persons." It is hoped that this paper will in some very small way supply at least some of the information to assist the members of the Bar willing to take up this challenge.

> The right to work, I had assumed, was the most precious liberty that man possessed. Man has indeed as much right to work as he has to live, to be free, to own property . . . it does many men little good to stay alive and free and propertied, if they cannot work. To work means to eat. It also means to live. For many it would be better to work in jail, than to sit idle on the curb . . . .[303]

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[303] Barsky v. Bd. of Regents, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting).