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Lisa A. Jensen

Jeffrey R. Patt

LABOR LAW: RECENT DEVELOPMENTS IN THE SEVENTH CIRCUIT

LISA A. JENSEN*
JEFFREY R. PATT**

During the 1984-85 term the United States Court of Appeals for the Seventh Circuit decided a substantial number of labor law cases. The court addressed significant issues concerning fair share fee clauses, superseniority, and the preemptive power of the NLRA. The court also addressed several significant employment discrimination issues involving actions brought under Title VII, section 1983, section 1981, and section 504 of the Rehabilitation Act. This article will briefly address some of the significant cases decided during the 1984-85 term and examine the impact of these cases on the labor law field.

HUDSON: THE RIGHT OF NONUNION MEMBERS OF A BARGAINING UNIT PURSUANT TO A FAIR SHARE FEE CLAUSE

"Fair share fee" clauses have long been an accepted means of distributing the costs of collective bargaining among those who benefit from collective bargaining.[1] A fair share fee clause generally requires nonunion members of the collective bargaining unit to contribute a proportionate amount of the anticipated collective bargaining costs for the forthcoming year. Though such clauses require nonunion members to contribute to organizations which they may politically or ideologically oppose, the United States Supreme Court has upheld the constitutionality of fair share fee clauses in order to avoid the inequity of allowing nonunion members to enjoy free union representation.[2] In *Hudson v. Chicago Teachers Union*,[3] the Seventh Circuit Court of Appeals limited the control of unions over appropriated fair share fee amounts.

* B.S., Political Science, Illinois State University, 1984; Candidate for J.D., IIT Chicago-Kent, 1987.

** B.S., Business Administration, University of Illinois, 1984; Candidate for J.D., IIT Chicago-Kent, 1987.

1. In Railway Employees' Dep't v. Hanson, 351 U.S. 225 (1956), the Supreme Court held that union-shop agreements between railroads and unions did not violate the first amendment or due process clause.

2. International Ass'n of Machinists v. Street, 367 U.S. 740, 761-63 (1961).

3. 743 F.2d 1187 (7th Cir. 1984), *aff'd*, 106 S. Ct. 1066 (1986).

The Supreme Court's Treatment of Fair Share Fee Clauses

Although a union may use fair share fees collected from nonunion members for those costs which are germane to collective bargaining, a union may not use such funds for political or ideological activities.[4] In *International Association of Machinists v. Street*,[5] the Supreme Court held that a nonunion member's grievance arose upon the union's expenditure of appropriated fair share fees on political or ideological activities.[6] According to the Supreme Court, the nonunion member's grievance did not arise upon the mere collection of fair share fees.[7] The Supreme Court further stated that if the union used the appropriated dues for activities germane to collective bargaining, then the nonunion members would have no grievance against the union.[8]

While *Street* dealt with railway employees subject to the provisions of the Railway Labor Act ("RLA"),[9] the Supreme Court has held that *Street* and its RLA progeny apply to cases involving public employees as well.[10] Thus, in *Abood v. Detroit Board of Education*,[11] the Court held that the Constitution did not bar a fair share fee clause in a collective bargaining agreement between a municipality and a teachers' union.[12]

In implementing fair share fee clauses applicable to public employees, unions are subject to the due process clause.[13] Any grievance procedure provided to nonunion members must not infringe such members' right to due process. The Supreme Court's holding that no grievance arises until the union spends the fair share fees on political or ideological activities implies that nonunion members may not challenge the constitutionality of a grievance procedure until the union spends the fair share

4. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235 (1977). Such use of appropriated funds would violate the nonunion members' free speech right.

5. 367 U.S. 740 (1961).

6. 367 U.S. at 771. The nonunion members had a duty to pay the fair share fee; the union had a duty to spend the appropriated funds on activities germane to collective bargaining. In *Street*, several railway employees challenged a union-shop agreement entered pursuant to the Railway Labor Act, 45 U.S.C. § 152, Eleventh (1982), on the grounds that the union's expenditure of such dues on political activities against the employees' dissent violated their constitutional rights.

7. 367 U.S. at 771.

8. *Id.*

9. 45 U.S.C. §§ 151 *et seq.* (1982).

10. *Abood*, 431 U.S. 209, 226 (1977).

11. 431 U.S. 209.

12. *Id.* at 225. The Court stated that "[t]he same important government interests recognized in the *Hanson* and *Street* cases presumptively support the impingement upon associational freedom created by the agency shop here at issue."

13. *Hudson*, 743 F.2d at 1191. The court stated that when a private entity and a public agency act together to deprive people of their federal constitutional rights, the private entity acts under color of state law. *See also* Tower v. Glover, 104 S. Ct. 2820, 2824-25 (1984); Dennis v. Sparks, 449 U.S. 24, 27-28 (1980).

fees. In *Hudson*, the Seventh Circuit held that nonunion members have a due process right to an adequate grievance procedure prior to the union's expenditure of the fair share fees.[14]

The Facts in Hudson

Pursuant to a fair share fee clause contained in the collective bargaining agreement between the Board of Education ("Board") and the Chicago Teacher's Union ("Union"), nonunion members were required to contribute 95% of the union dues charged union members.[15] The Union also provided a grievance procedure for challenging expenditures of the fair share fees for political or ideological activities.[16] The procedure for challenging such expenditures contained the following features:

> (1) An arbitration proceeding would follow the exhaustion of union remedies,[17] and the CTU president would select the arbitrator from a list maintained by the Illinois State Board of Education of accredited arbitrators;[18]
>
> (2) The arbitrator would decide whether the union used the fees for political or ideological activities and such decision would be final; and
>
> (3) A successful challenge would entitle the nonunion member to a rebate of the excess fee, and a future reduction of the fee.[19]

Several nonunion members brought a section 1983 civil rights action against the Union and the Board.[20] The nonunion members argued that the grievance procedure itself violated their free speech and due process rights. The nonunion members made no claim concerning any Union

14. 743 F.2d at 1192.

15. The clause stated in pertinent part that nonunion members must "pay to the UNION each month their proportionate share of the cost of the collective bargaining process and contract administration measured by the amount of dues uniformly required by members of the UNION." Hudson v. Chicago Teachers Union Local No. 1, 573 F. Supp. 1505 (N.D. Ill. 1983) (citing Articles 1, § 8.2 of the one-year collective bargaining agreement between the Union and the Board, effective September 1, 1982). Prior to the enactment of legislation permitting the Board to agree to "fair share fee" clauses, Ill. Rev. Stat. ch. 122, ¶ 10-22.40a *repealed by* Illinois Educational Labor Relations Act, Ill. Rev. Stat. ch. 48, ¶¶ 1701 *et seq.* (1984), the nonunion members were not required to contribute to collective bargaining costs despite the fact that they were covered by the terms of the collective bargaining agreement. *Hudson*, 573 F. Supp. at 1507.

16. 743 F.2d at 1194.

17. *Id.* Prior to arbitration, an aggrieved nonunion member was entitled to review by the union's executive committee and a personal appeal before the committee.

18. *Id.* In addition, the union paid the arbitrator's fee.

19. *Id.* The rebate remedy was only available to the successful challenger, while the future reduction remedy was available for all nonunion members.

20. 42 U.S.C. § 1983 (1982). The court stated that, while a § 1983 suit was not the usual means of challenging a fair share fee dispute, such a challenge was nevertheless proper. Although the union is a private entity, the Board of Education acted as the union's agent, and § 1983 covers the situation where "a public employer assists a union in coercing public employees to finance political activities. . . ." 743 F.2d at 1191.

expenditure of appropriated dues.[21] The district court held that the grievance procedure was constitutionally adequate.[22] The court of appeals held that the procedure was constitutionally inadequate, reversing the district court's decision and remanding the case for further proceedings consistent with the opinion.[23] The Supreme Court has subsequently affirmed the Seventh Circuit's decision.[24]

The Seventh Circuit's Reasoning

The Seventh Circuit held that the nonunion members had valid grounds on which to bring a section 1983 action because an inadequate grievance procedure would violate their right to both free speech and due process.[25] According to the court, a procedure which merely threatens the deprivation of free speech violates the first amendment even if the procedure does not in fact result in such deprivation.[26] Thus, the nonunion members could bring suit without alleging any wrongful Union expenditures. The fair share fees, including those which covered negotiating and collective bargaining expenses, violated the nonunion members' right to free association because they required nonunion members to contribute to an organization which they might politically or ideologically oppose.[27] Such violations were lawful, however, to the extent they were necessary to avoid the inequity of allowing nonunion members to enjoy free union representation.[28] Due process requires that procedures must be implemented to, "assure that the deprivation [of first amendment rights] will go no further than is necessary. . . ."[29]

The court held that the Union's grievance procedure did not ade-

21. 743 F.2d at 1192.
22. 573 F. Supp. at 1513.
23. 743 F.2d at 1197.
24. 106 S. Ct. 1066 (1986).
25. 743 F.2d at 1192.
26. *Id.* The court cited several Supreme Court decisions in accord. *See, e.g.*, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 552-62 (1975); Freedman v. Maryland, 380 U.S. 51, 58 (1965). The court regarded the nonunion members' decision to not join the union as an exercise of their freedom to associate—an ancillary freedom to free speech. 743 F.2d at 1193 (citing L. TRIBE, AMERICAN CONSTITUTIONAL LAW 700-10 (1978)). The freedom to associate implies the freedom to not associate. *Abood*, 431 U.S. at 235. *See also* Robinson v. New Jersey, 741 F.2d 598 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 1228 (1985); Roberts v. United States Jaycees, 104 S. Ct. 3244, 3252 (1984).
27. 743 F.2d at 1192-93. The court's fourteenth amendment analysis also revolved around the nonunion members' freedom of association. Due process requires timely and adequate notice and hearing concerning an impending deprivation of liberty. The liberty threatened in *Hudson* was the freedom of association.
28. 743 F.2d at 1193. The necessity, in *Hudson*, arose because prior to the institution of the agency fee, the nonunion members were receiving the benefits of collective bargaining without contributing to the costs.
29. *Id.*

quately ensure that fair share fees would only be used for activities germane to collective bargaining. The first inadequacy was the Union's sole control over the procedure and selection of an arbitrator. The court analogized the Union's selection of an arbitrator to an adverse party in a lawsuit selecting the judge.[30] In addition, the court held that the arbitrator would have an interest in the arbitration's outcome under the procedure because the Union paid the arbitrator's fee.[31] Thus, the court held that there was "a sufficient residue of adverseness" between the parties which entitled the nonunion members to a procedure over which they exerted more control.[32]

Furthermore, the arbitrator was required to determine whether the fair share fees exceeded those which were necessary pursuant to the nonunion members' right to due process without a provision for judicial recourse. The Supreme Court has implied that arbitrators are not competent to make first amendment determinations.[33] Thus, the Union's grievance procedure failed to provide for an adequate determination of the constitutionality of the fair share fees.

Finally, the court held that the "rebate and reduction" remedy available upon a successful challenge was inadequate because it would allow the Union to obtain "an involuntary loan for purposes to which the employee objects."[34] The Supreme Court, in *Ellis v. Brotherhood of Railway Clerks*,[35] held that such a remedy would be constitutionally inadequate even if the union paid interest on the excess fair share fee because the union was free to use the fee as it saw fit prior to the rebate, and the nonunion members were deprived of their right to use the money as they chose.[36] In *Hudson*, the Seventh Circuit established the requirement that the Union place the fair share fees in an escrow account, preferably one in which management, as well as custody, is turned over to the escrow

30. *Id.*

31. *Id.* at 1195. The Supreme Court had held that "no man is permitted to try cases where he has an interest in the outcome." *Id.* (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)).

32. 743 F.2d at 1193.

33. 743 F.2d at 1195-96 (citing McDonald v. City of West Branch, 466 U.S. 284 (1984)). In *McDonald*, the Supreme Court refused to collaterally estop a civil rights action where an arbitrator had earlier held that a public employee had been discharged for just cause. Arbitrators are experts at interpreting contracts, not the Constitution. 466 U.S. at 287-89.

34. 743 F.2d at 1196 (quoting Ellis v. Brotherhood of Ry. Clerks, 446 U.S. 435, 442 (1984)). In addition to the fact that the union was free to use the fees prior to the rebate for political or ideological purposes to which the nonunion members might object, the nonunion members were deprived of their right to use the money as they chose.

35. 446 U.S. 435 (1984).

36. *Id.* at 442. In *Hudson*, the union did not pay the successful challenger interest on the rebated excess, nor did the union pay any excess to those nonunion members not a party to the challenge.

agent.[37]

The court further held that, prior to the Union's expenditure of appropriated dues, due process requires that a collective bargaining agreement provide a grievance procedure which includes at least "fair notice, a prompt administrative hearing before the Board of Education or some other state or local agency—the hearing to incorporate the usual safeguards for evidentiary hearings before administrative agencies—and a right of judicial review of the agency's decision."[38]

Analysis of Hudson

Despite the inference in *Street* that nonunion member grievances may only arise subsequent to union expenditure, more recent Supreme Court decisions have paved the way for nonunion member grievances prior to union expenditure. According to the Supreme Court in *Ellis*, the "rebate and reduction" remedy violated the due process rights of nonunion members.[39] Such violation occurred when the involuntary loan began, *i.e.* when the Union assessed the fair share fees.

While the Seventh Circuit relied on *Ellis* in holding the Union's rebate and reduction remedy constitutionally inadequate,[40] the court failed to consider two other recent cases which the Supreme Court summarily dismissed.[41] In *Jibson v. White Cloud Education Association*,[42] and *Kempner v. Dearborn Local 2077*,[43] the Supreme Court dismissed appeals from decisions entered by the Michigan Court of Appeals. In *White Cloud*, the Michigan Court of Appeals held that a nonunion member could bring an action for a declaratory judgment provided that he had paid the fair share fee.[44] In *Kempner*, the Michigan Court of Appeals held that placement of the entire fair share fee in escrow was improper because such remedy impaired the union's right to contribution to collec-

37. 743 F.2d at 1196.

38. *Id.*

39. 446 U.S. at 442. The Court reasoned that such a result would be justifiable if no readily available alternative existed.

40. 743 F.2d at 1196.

41. Summary dismissals by the Supreme Court are dispositions on the merits and are binding on lower courts. Mandel v. Bradley, 432 U.S. 173, 176 (1977); Hicks v. Miranda, 422 U.S. 332, 344-45 (1975).

42. 105 S. Ct. 236 (1984).

43. 105 S. Ct. 316 (1984).

44. 101 Mich. App. 309, 300 N.W.2d 551, 555 (1980), *appeal dismissed sub nom.* Jibson v. White Cloud Educ. Ass'n, 105 S. Ct. 236 (1984). The court reasoned that this allowed the nonunion members to seek timely vindication of his constitutional rights, while not crippling the union by nonaccess to those fees germane to collective bargaining.

tive bargaining costs from every employee.[45] The Supreme Court's summary dismissals in these cases stand as precedent for the recognition of such nonunion member grievances prior to union expenditure.

Abood, Ellis, White Cloud and *Kempner* suggest that the Supreme Court continues to seek a balance between the nonunion member's right to due process and free speech, and the union's right to proportionate contribution for collective bargaining costs.[46] Clearly, the Supreme Court's approval of the escrow remedy[47] and declaratory judgment remedy[48] indicates that nonunion members have a cause of action available prior to union expenditure. The Seventh Circuit's recognition of the right of nonunion members to bring a due process challenge directed at the grievance procedure prior to union expenditure is consistent with the Supreme Court trend toward recognizing the right to bring a grievance prior to expenditure. The Seventh Circuit's suggestion, however, of placing the entire fair share fee in escrow is inconsistent with the purpose of fair share fee clauses and with established precedent. Placement of the entire fair share fee in escrow runs directly counter to *Kempner.* A large portion of the fair share fee is undisputably legitimate. As long as the legitimate portion of the fair share fee remains in escrow, the Union remains deprived of proportionate contribution from nonunion members.

EMPLOYMENT DISCRIMINATION

Several of the Seventh Circuit's decisions in the 1984-85 term involved issues of employment discrimination. This section will examine some of the more significant decisions this term involving issues of employment discrimination.

Successor Doctrine: Section 1981

When a business which has participated in discriminatory employment practices subsequently transfers ownership or a significant amount of its assets to another entity, a question arises as to whether the succeeding entity is liable for the discriminatory practices of the business which it has succeeded. A finding of liability would reflect application of the successor doctrine to discrimination cases. The Seventh Circuit had the opportunity in the 1984-85 term to address this issue of first impres-

45. 337 N.W.2d 354, 358 (Mich. App. 1983), *appeal dismissed sub nom.* Kempner v. Dearborn Local 2077, 105 S. Ct. 316 (1984).

46. San Jose Teachers Ass'n v. Superior Court, 38 Cal. 3d 839, 700 P.2d 1252, 1264, 215 Cal. Rptr. 250 (1985).

47. *Ellis*, 104 S. Ct. at 1890.

48. *White Cloud*, 105 S. Ct. 236.

sion. Specifically, in *Musikiwamba v. ESSI*,[49] the court considered whether the successor doctrine should apply in employment discrimination actions brought under section 1981.[50] To place the case in its relevant legal context, the development of the law regarding the successor doctrine will be discussed prior to presentation of the case.

Background

The Supreme Court first considered the successor doctrine in the context of NLRA violations. The Court's first decision in the area was *John Wiley & Sons, Inc. v. Livingston*.[51] There, the Court held that a successor company which is engaged in substantially the same type of business as the company it succeeded must bargain with the union recognized by the preceeding company. The successor company must also arbitrate under the collective bargaining contract to which the preceding company had agreed.

The Court based its holding in *Wiley* on the furtherance of federal labor policy. It recognized that arbitration plays a key role in promoting the federal labor policy of peaceful settlement of labor disputes. Hence, the arbitration process should not be hindered by sudden changes in employment relations brought on by a change in company ownership.[52]

This focus on federal labor policy was also incorporated in the Supreme Court's next major decision involving the successor doctrine. In *Goldenstate Bottling Co. v. NLRB*,[53] the Supreme Court held that an employer who acquires substantial assets of a predecessor, and continues the predecessor's business without interruption or substantial change, and who has notice of an unfair labor practice charge against the predecessor, can be required under the successor doctrine to remedy that unfair practice.

Finally, the most recent Supreme Court case involving the successor doctrine enunciated the limitations of the doctrine. In *Howard Johnson Co. v. Hotel Employees*,[54] the Court held that a successor employer was

49. Musikiwamba v. ESSI, 760 F.2d 740 (7th Cir. 1985).
50. Section 1981 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 white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

42 U.S.C. § 1981 (1982).
51. 376 U.S. 543 (1964).
52. *Id.* at 549.
53. 414 U.S. 168 (1973).
54. 417 U.S. 249 (1974).

not required to hire any of the predecessor's employees. The Court went on to hold that when the successor only hired a few of the predecessor's employees, the successor was similarly not required to arbitrate with the incumbent union.

After the Supreme Court's handling of the successor doctrine in *Wiley, Golden State*, and *Howard Johnson*, lower courts began to explore the possibility of applying that doctrine to non-NLRA situations. Many of these courts followed the lead that the Supreme Court laid out in *Wiley* and asked whether the application of the successor doctrine to these new areas would further federal labor policy.[55]

The Sixth Circuit was the first circuit to hold the successor doctrine applicable to employment discrimination cases. In *MacMillan v. Board Bloedel Container Corp.*,[56] the Sixth Circuit held that the successor doctrine applied to Title VII actions.[57] The majority of the circuits followed suit.[58] However, very few courts have discussed the applicability of the successor doctrine to employment discrimination cases brought under section 1981.[59] Hence, the Seventh Circuit was faced in *Musikiwamba v. ESSI*, with an issue that not only was one of first impression in the Seventh Circuit, but was a question virtually unexamined by other circuits.[60]

Musikiwamba v. ESSI

In *Musikiwamba*, Muswamba Musikiwamba, filed a section 1981 employment discrimination suit against his employer, Electronic Support Systems (Electronic).[61] Prior to this suit coming to trial, Electronic noti-

55. *See, e.g.*, EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086 (6th Cir. 1974); Trujillo v. Longhorn Mgf. Co., 694 F.2d 221 (10th Cir. 1982); *In re* National Airlines, Inc., 700 F.2d 695 (11th Cir.), *cert. denied sub nom.* Gardner v. Pan Am. Airways, 464 U.S. 933 (1983).

56. 503 F.2d 1086 (6th Cir. 1974).

57. In *Bloedel* the court laid down nine criteria that should be examined to determine whether successor liability may be imposed. These criteria are: (1) whether the successor company had notice of the change; (2) the ability of the predecessor to provide relief; (3) whether there has been a substantial continuity of business operations; (4) whether the new employer uses the same plant; (5) whether he uses the same or substantially the same work force; (6) whether he uses the same or substantially the same supervisory personnel; (7) whether the same job exists under substantially the same working conditions; (8) whether he uses the same machinery, equipment and methods of production; (9) whether he produces the same product. *Id.* at 1094.

58. *See supra* note 55.

59. It appears that only three cases have raised the question of applying the successor doctrine to § 1981 suits. Trujillo v. Longhorn Mfg. Co., No. 80-089-M Civil (D.N.M. 1980), *aff'd*, 694 F.2d 221 (10th Cir. 1982) (the court of appeals was not asked to reach the § 1981 question, but the district court held that the successor doctrine does not apply in § 1981 suits); Howard v. Penn Central Transp. Co., 87 F.R.D. 342 (N.D. Ohio 1980) (the court applied the successor doctrine to § 1981 suits); Escamilla v. Mosher Steel Co., 386 F. Supp. 101 (S.D. Tex. 1975) (the court applied the doctrine to Title VII and assumed, without discussion that it applied to § 1981 also).

60. *See supra* note 59.

61. Plaintiff also brought suit against the officer of the successor corporation who was primarily

fied Musikiwamba that it was transferring substantially all of its assets to ESSI, Inc. Consequently, Musikiwamba filed a petition to restrain the transfer and a motion to add ESSI as an additional defendant. Musikiwamba claimed that ESSI was a successor to Electronic and as such was liable to him for Electronic's discrimination.[62]

ESSI filed a motion to dismiss the action, claiming that as mere purchasers of the assets of Electronic, ESSI could not be held liable for the debts of Electronic.[63] The district court granted the motion, holding that the successor doctrine does not apply to section 1981 suits due to the substantial differences between section 1981 suits and suits brought under Title VII.

The district court felt that the principal difference was the fact that section 1981 suits require the plaintiff to prove that the employer intended to discriminate, while in a Title VII action proof of intent is not required.[64] The district court felt that if a court could find a successor company liable for a section 1981 violation merely on the basis that it acquired substantially all the assets of the preceding company, then the intent requirement would be meaningless. The party being held liable would be someone with no intent at all to discriminate against the plaintiff. The district court felt that this would be antithetical to section 1981 suits.[65]

The Seventh Circuit reversed the district court decision, holding that the successor doctrine is applicable to section 1981 cases.[66] It relied, as did the Supreme Court in its earlier decisions, on federal labor policy. The court found an overriding federal policy against discrimination. This policy existed regardless of whether the cause of action was brought under Title VII or section 1981. It coupled this justification with two other factors. First, the victim of employment discrimination is helpless to protect his rights against an employer's change of business. Hence, the successor doctrine should be applied to help protect the victim. Secondly, the successor business can often provide relief at minimum costs. Thus, there is no strong reason for not applying the successor doctrine.

responsible for negotiating the transfer of assets. The court held as to this claim that the successor doctrine does not extend to imposing liability on an officer of the successor for a predecessor's § 1981 violation. *Musikiwamba*, 760 F.2d at 753.

62. *Id.* at 743.

63. *Id.* at 744.

64. For the entire discussion of the differences between Title VII and § 1981 that the district court felt warranted the decision not to apply the successor doctrine to § 1981 suits, *see* Musikiwamba v. ESSI, No. 81 C 6788, Civil (N.D. Ill. 1983).

65. *Musikiwamba*, 760 F.2d at 744.

66. The court indicated, however, that its holding was only that the successor doctrine can be applied to § 1981 cases. *Musikiwamba*, 760 F.2d at 755.

The court found these three justifications equally applicable to section 1981 claims as to Title VII claims.[67]

The court also rejected the district court's argument that section 1981's requirement that a plaintiff prove intentional discrimination has any bearing on whether the successor doctrine applies. The court based this decision on cases from the Seventh, as well as other circuits, holding that intent no longer is a pivital factor when deciding whether to impose liability on an innocent party for another's discrimination.[68]

The decision in *Musikiwamba* was qualified by the court. The court stated that its holding that the successor doctrine may apply to section 1981 cases does not mean that it will always be applied.[69] Its application will be determined on a case by case basis.[70]

The court's decision in *Musikiwamba*, however, seemed to have overlooked some very important questions raised by the district court. The Seventh Circuit easily dismissed the lower court's finding that because section 1981 cases require a showing of intent, the successor doctrine should not apply. The court merely recited cases that indicate that intent is irrelevant in deciding whether to impose the successor doctrine.[71]

This response seems to miss the central argument against successor liability. Musikiwamba and the lower court attempted to indicate that the intent requirement set down by the Supreme Court for section 1981 suits makes such actions special. The Supreme Court held in *General Building Contractors Association v. Pennsylvania*,[72] that, unlike Title VII, intent to discriminate *must* be proven by the plaintiff in section 1981 cases.

In *General Building Contractors*, the Supreme Court indicated that Congress' intent in passing section 1981 was to eradicate those practices aimed at resurrecting slavery.[73] The Court indicated: "Congress . . .

67. *Id.* at 746.

68. *Id.* at 746-47. The court cited Horn v. Duke Homes, 755 F.2d 599 (7th Cir. 1985); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Bundy v. Jancson, 641 F.2d 934 (D.C. Cir. 1981).

69. 760 F.2d at 750.

70. The court ultimately held that the plaintiff's complaint failed to adequately allege a case of successor liability. In doing so, it examined the nine point test laid out in *Bloedel*, *see supra* note 57. It held that the first two *Bloedel* factors were critical to the imposition of successor liability. It felt that *Bloedel's* seven other factors provided merely a foundation for analysis. The court added a tenth criteria—whether the predecessor could have provided any or all relief prior to the transfer of assets. These ten criteria were then applied and the court found Musikiwamba's complaint insufficient to assert successor liability. It granted them leave, however, to amend their complaint. *Musikiwamba*, 760 F.2d at 750-53.

71. *Id.* at 747.

72. 458 U.S. 375 (1982).

73. *Id.* at 388.

acted to protect the freed men from intentional discrimination by those whose object was to make their former slaves dependent serfs, victims of unjust laws . . . . "[74] The Court wanted to protect blacks from those who would discriminate against them. Thus, the Seventh Circuit's indication that intent is irrelevant to the successor doctrine avoids the fact that it is *relevant* to section 1981 cases. The Seventh Circuit's decision in *Musikiwamba* seems to have overlooked the Supreme Court's intent requirement laid down in *General Building Contractors.*

THE REHABILITATION ACT: SECTION 503

In the 1984-85 term the Seventh Circuit addressed whether a party has an implied private right of action as a third party beneficiary under section 503 of the Rehabilitation Act.[75] The court denied such an implied action. It refused to except third party beneficiaries from its previous holding that no private right of action exists under section 503.[76]

Background

The Rehabilitation Act was passed by Congress in 1972, and repassed in 1973, in order to create a federal rehabilitation program for the handicapped that would "make employment and participation in society more feasible for handicapped individuals."[77] Section 503 of the Rehabilitation Act requires affirmative action plans to be implemented in favor of handicapped individuals in all contracts in which federal funds have been expended. The Act provides an administrative remedy for vio-

74. *Id.*

75. Section 503 of the Rehabilitation Act provides in pertinent part:

(a) Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 706(7) of this title. The provisions of this section shall apply to any subcontract in excess of $2,500 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for the United States. The President shall implement the provisions of this section by promulgating regulations within ninety days after September 26, 1973.

(b) If any handicapped individual believes any contractor has failed or refuses to comply with the provisions of his contract with the United States, relating to employment of handicapped individuals, such individual may file a complaint . . . and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto.

29 U.S.C. § 793 (1982).

76. Ernst v. Indiana Bell Tel. Co., 717 F.2d 1036 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 707 (1984); Simpson v. Reynolds Metals Co., 629 F.2d 1226 (7th Cir. 1980).

77. Simpson v. Reynolds Metals Co., 629 F.2d 1226, 1240-41 (7th Cir. 1980), (citing S. Rep. No. 318, 93d Cong., 1st Sess., *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 2076, 2092).

lations of section 503,[78] but courts have split over whether a private plaintiff may also bring a cause of action.[79] The Seventh Circuit has held that there is no private cause of action under section 503.[80] In *D'Amato v. Wisconsin Gas Co.*,[81] the Seventh Circuit was asked to create an exception to its previous holding by allowing a plaintiff to pursue a private cause of action as a third party beneficiary under section 503.

D'Amato v. Wisconsin Gas Co.

In *D'Amato*, Joseph D'Amato claimed that Wisconsin Gas Company violated section 503 of the Rehabilitation Act by firing him from his job because he suffered from acrophobia. D'Amato contended that he had enforceable rights under the company's federal contracts, and inherent section 503 requirements because the contracts were made for his benefit.[82] Essentially, D'Amato argued he could sue the company under section 503 as a third party beneficiary[83] to the company's government contracts.

The court rejected this argument. The court examined the third party beneficiary theory and concluded that the capacity to sue as such existed only if the government contracts were made for D'Amato's direct benefit. If the contracts were made for other reasons, then D'Amato was a mere "incidental" beneficiary and could claim no legal right to sue under the contract.[84]

By analyzing the government contracts that the gas company entered into, the court concluded that the parties did not intend to make handicapped persons direct beneficiaries of their contracts because the contracts were not designed to serve the interests of the handicapped. The contracts merely required the gas company to take affirmative action as a promise incidental to a contract to provide goods and services. Thus, since the *main* purpose of the contract was unrelated to affirmative

78. *See supra* note 75.

79. Those finding no right of action include: Simon v. St. Louis County, 656 F.2d 316 (8th Cir. 1980), *cert. denied*, 455 U.S. 976 (1981); Anderson v. Erie Lackawanna Ry., 468 F. Supp. 934 (E.D. Ohio 1979); Wood v. Diamond State Tel. Co., 440 F. Supp. 1003 (D. Del. 1977). Those finding a right of action by implication include: Hart v. County of Alameda, No. C-79-0091, *WHO* (N.D. Cal. Sept. 10, 1979); Duran v. City of Tampa, 430 F. Supp. 75 (N.D. Fla. 1977); Drennon v. Philadelphia Gen. Hosp., 428 F. Supp. 809 (E.D. Pa. 1977).

80. *See supra* note 76.

81. 760 F.2d 1474 (7th Cir. 1985).

82. *Id.* at 1479.

83. "[U]nless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties." RESTATEMENT (SECOND) OF CONTRACTS § 302(1) (1981).

84. *D'Amato*, 760 F.2d at 1479.

action, no third party beneficiary capacity existed.[85]

The court further justified its decision by indicating that the existence of administrative remedies[86] supports the conclusion that Congress intended no private right of action *of any kind* under section 503.[87] Similarly, the court rejected D'Amato's argument that Congress' enactment in 1978 of section 504,[88] allowing attorney's fees to prevailing private parties, implied that a private cause of action existed under section 503. The court viewed this provision as too vague, and its implications too ambiguous, to infer a private right of action under section 503.[89] Hence, the court concluded that no private cause of action exists for a third party beneficiary under section 503 of the Rehabilitation Act.

The court's decision was consistent with its previous holding that no party can bring a private cause of action under section 503. In fact, in *Simpson v. Reynolds Metal Co.*, the Seventh Circuit examined the legislative history of section 503.[90] It concluded that Congress intended that no private cause of action exist. The court based this decision primarily on the existence of administrative remedies.[91] Given its rationale in *Simpson*, it appears that the Seventh Circuit was very limited in its ability to allow a cause of action for third party beneficiaries in *D'Amato*. If Congress intended to exclude private causes of action from allowable section 503 remedies, as the Seventh Circuit contended in *Simpson*, then that intent would apply equally to third party beneficiaries.[92] Thus, it seems that the only consistent way to provide D'Amato with a private cause of action would have been to overrule *Simpson*; something the Seventh Circuit was not willing to do.[93]

85. *Id.* at 1479-80.

86. *See supra* note 75.

87. *D'Amato*, 760 F.2d at 1481.

88. Section 504 of the Rehabilitation Act provides in part: (b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion may allow the prevailing party, other than the United States, a reasonable attorneys fee as part of the costs. 29 U.S.C. § 794.

89. *D'Amato*, 760 F.2d at 1483.

90. 629 F.2d 1226, 1240-43.

91. 629 F.2d 1226, 1243-44.

92. If Congress intended to deny a private cause of action to handicapped individuals under § 503, such a denial would logically apply to all handicapped individuals regardless of their standing, unless otherwise indicated by Congress.

93. For other decisions consistent with *D'Amato see* Hooper v. Equifax, Inc., 611 F.2d 134 (6th Cir. 1979); Hodges v. Atchison, T & SF. Ry., 728 F.2d 414, 416 (10th Cir.), *cert. denied*, 105 S. Ct. 97 (1984); Chaplin v. Consol. Edison, 579 F. Supp. 1470 (S.D.N.Y. 1984); Davis v. United Air Lines, Inc., 575 F. Supp. 677 (E.D.N.Y. 1983); Stephens v. Roadway Express Co., 29 Empl. Prac. Sec. (BNA) 32, 41 (N.D. Ga. 1982); Coleman v. Noland Co., 21 Fair Empl. Prac. Cas. (CCH) 1248 (W.D. Va. 1980).

PROCEDURAL ISSUES UNDER SECTION 1983

In the 1984-85 term the Seventh Circuit had the opportunity to refine two procedural issues relevant to section 1983.[94] In *Malcak v. The Westchester Park District*,[95] the court held that whether a public employee has a property interest in his job is not necessarily a factual issue. In *Soderbeck v. Burnett County*,[96] the court established the plaintiff's burden of proof in a section 1983 case where punitive damages are sought.

Property Interests Under Section 1983: Malcak v. Westchester Park District

Section 1983 protects persons against state infringement of personal constitutional rights. Where a state employee is discriminatorily fired, a section 1983 claim might arise if the job that was taken was somehow constitutionally protected. One argument which attempts to afford particular state jobs constitutional protections is that a particular state job constitutes property which is protected under the fourteenth amendment.[97] However, several questions arose concerning this approach. Those questions included, how does one prove a property interest? More recently, the questions have concerned whether a property interest in employment is a question of fact or one of law.

In *Board of Regents v. Roth*,[98] the Supreme Court discussed the requirements for proving a property interest in future employment. In *Roth*, David Roth obtained a one year teaching contract at a state university. After his one year contract expired, the University refused to hire him for an additional year. Roth brought suit against the University, claiming that its refusal to provide reasons for not rehiring him deprived him of procedural due process. The Court held, however, that in order

94. Section 1983 provides in part:

> Every person who, under color of any statute, ordinance, regulation custom or usage, or any state or territory of the District of Columbia, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit or equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1982).

95. Malcak v. Westchester Park Dist., 754 F.2d 239 (7th Cir. 1985).

96. Soderbeck v. Burnett County, Wis., 752 F.2d 285 (7th Cir. 1985).

97. The fourteenth amendment provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law . . . .

U.S. CONST. amend. XIV.

98. 408 U.S. 564 (1972).

to be protected by the fourteenth amendment, Roth's job must constitute a property interest.[99] In order for such a property interest to exist, the Court explained, "a person must have more than an abstract need or desire for it. He must instead have a legitimate claim of entitlement to it."[100] The Court concluded that since Roth had no contract entitling him to another year of employment, no mutual understanding with the University upon which he could rely for future employment, nor any tenure rights entitling him to future employment, he had no property interest in his future employment.[101]

In a companion case, *Perry v. Sinderman*,[102] the Court found a property interest in a teacher's continued employment based on a binding understanding between the teacher and the college that he would not be fired as long as his teaching was satisfactory. The Court held that even though there was no contract for reemployment, or any formal contractual tenure policy, the mutual understanding between the teacher and the college constituted a legitimate claim or entitlement to his job as long as he performed satisfactorily.[103]

Against the background of these Supreme Court cases, in 1983 the Seventh Circuit decided *Vail v. Board of Education of Paris Union School District No. 98*.[104] In *Vail*, Jesse Vail accepted a position as coach with the Paris Union School District. The school district offered him only a one year contract, but insisted they could assure him of extending the contract for a second year. Upon the school district's failure to renew his contract at the end of the first year he sued under section 1983 claiming deprivation of a property interest without due process of law.[105] Citing *Perry* to support its decision, the district court ruled in favor of Vail.[106]

On appeal, the School Board argued that under Illinois law there was no evidence of an implied contract for two years of employment. The Seventh Circuit held, however, that Illinois law was sufficient in this case to create a property interest protectable under section 1983. The court pointed out that what the School Board was really challenging was the district court's finding of fact surrounding the representations made by the Board to Vail. The court concluded that these findings of fact were not erroneous and thus the district court's decision could not be

99. *Id.* at 571.
100. *Id.* at 577.
101. *Id.* at 578.
102. 408 U.S. 593 (1972).
103. *Id.* at 600-01.
104. 706 F.2d 1435 (7th Cir. 1983), *aff'd per curiam*, 466 U.S. 377 (1984).
105. *Id.* at 1436.
106. *Id.* at 1437.

overruled.[107]

Malcak v. Westchester Park District

In *Malcak v. Westchester Park District*, the Seventh Circuit was asked to clarify its holding in *Vail*, specifically in respect to whether the question of a property interest in section 1983 cases is always a question of fact. The plaintiff in *Malcak* was an employee of the Illinois Park District. Malcak was terminated from his employment, and as a consequence, he filed a section 1983 suit alleging that he was wrongfully terminated for political reasons.[108]

The Park District filed a motion for summary judgment. The district court denied the motion. In holding that Malcak was entitled to a hearing on the termination, the district court cited *Vail* for the proposition that "the property interest necessary for a § 1983 and Fourteenth Amendment [sic] due process claim, posed in public employment situations like that alleged by Malcak, is a factual issue."[109] Thus, the district court held that a material factual issue remained for trial and the claim could not be disposed of by summary judgment.

The Seventh Circuit held that the district court's interpretation of *Vail* was erroneous. It indicated that *Vail* involved a situation where the facts supporting the existence of an employment contract were in dispute. In holding that the plaintiff in *Vail* had a property interest in his job, the court examined the facts of the case because the facts were specifically in dispute. But, the court in *Malcak* indicated that if the facts in *Vail* had not been disputed, the determination of whether a contract existed would have been a matter of law.[110]

Thus, in *Malcak*, the Seventh Circuit clarified its holding in *Vail*. The court held that *Vail* does not stand for the proposition that the existence of a property interest is always a factual determination. Rather, *Vail* held that "the determination of whether a plaintiff has a property interest protected by the due process clause may be made by the courts as a matter of law if the state law from which the interest derives would allow the determination to be made as a matter of law."[111]

The court's decision in *Malcak* was much needed. Without *Malcak*,

107. *Id.* at 1438.
108. *Malcak*, 754 F.2d 239 (7th Cir. 1985).
109. *Id.* at 241.
110. *Id.* at 242-43.
111. *Id.* at 243. Under Illinois law, if there is no dispute over the relevant facts, the question of the existence of a contract is solely a matter of law determined by the court. Bank of Benton v. Cogdill, 118 Ill. App. 3d 280, 454 N.E.2d 1120, 1125 (1983).

other courts may have misinterpreted *Vail*, and based a finding of a property interest exclusively on facts. This would be contrary to the Supreme Court's directions in *Roth*, where the Supreme Court indicated that the existence of a property interest depends upon many factors including state law.[112] Thus, *Malcak* provided the clarification needed to show that *Vail* was not contrary to *Roth*.

Punitive Damages Under Section 1983: Soderbeck v. Burnett County

A plaintiff who brings an action under section 1983 is entitled to punitive damages.[113] In *Smith v. Wade*,[114] the Supreme Court held that punitive damages may be awarded for "intentional" as well as "reckless" violations of section 1983, but the Court left unclear the precise definitions of these terms. In *Soderbeck v. Burnett County*, the Seventh Circuit attempted to clarify the reckless conduct which might support a section 1983 claim for punitive damages.

In *Soderbeck*, Arline Soderbeck was fired by the newly elected sheriff from her job as the sheriff's bookkeeper. Soderbeck filed suit under section 1983 against the new sheriff and the county claiming that she was wrongfully fired solely as a result of her political affiliations.[115] The jury held in favor of Soderbeck and awarded her compensatory and punitive damages.[116] The district court judge limited the judgment to the compensatory damages, and both sides appealed.[117]

The Seventh Circuit held that the jury instructions in the *Soderbeck* case were not specific enough to insure finding the state of mind necessary for punitive damages.[118] The court reasoned that instructing a jury to award punitive damages if the defendants acted with "reckless indifference" would leave the jury free to award punitive damages if it found that the sheriff or the county was merely careless in firing Soderbeck.[119]

Carelessness, the court reasoned, is not enough to establish reckless-

112. *Roth*, 408 U.S. at 577.

113. Carlson v. Green, 446 U.S. 14, 22 (1980) (citing Carey v. Piphus, 435 U.S. 247, 257 n.11 (1978)).

114. 103 S. Ct. 1625 (1983).

115. *Soderbeck*, 752 F.2d 285 (7th Cir. 1985).

116. The jury awarded $33,375 in compensatory damages and $5,000 in punitive damages. *Id.* at 287-88.

117. *Id.* at 288.

118. The instructions to the jury were:

> In terminating plaintiff Arline Soderbeck's employment with the Burnett County Sheriff's Department, did defendant Robert Kellberg act with reckless indifference to the plaintiff's rights not to be terminated for her association or political activity?

Id. at 290.

119. *Id.*

ness. Since the purpose of punitive damages is to deter,[120] a defendant must *know* that the conduct which resulted in the plaintiff's injury was forbidden. Otherwise, an award of punitive damages will have no deterrent effect.[121] Thus, the court set down as a condition for awarding punitive damages the requirement that a plaintiff show that the defendant "almost certainly knew" that what he was doing was wrongful and subject to punishment.[122] The court indicated that some action is so contrary to basic ethics that knowledge can be presumed.[123]

This requirement was then applied to the *Soderbeck* facts. The Seventh Circuit found that the discharge of public employees on political grounds is not yet regarded as something contrary to natural law. Thus, knowledge that such firing is forbidden cannot be imputed to those responsible for plaintiff's discharge. The court felt this was especially true when the defendant is a minor rural official with no legal training.[124] Hence, punitive damages could not be awarded.

The Seventh Circuit's decision in *Soderbeck* considerably narrowed the Supreme Court's ruling in *Smith v. Wade*.[125] In so doing, it may have put to rest some fears surrounding the *Smith* decision. The biggest fear that resulted from the Supreme Court's decision in *Smith* was that allowing punitive damages for less than intentional conduct would open the floodgates of litigation.[126] This fear may have been due in part to the Supreme Court's failure to clearly define recklessness. The Seventh Circuit's decision in *Soderbeck*, by defining recklessness, may have put some of those fears to rest.[127] The Seventh Circuit's requirement that a plaintiff prove knowledge of a wrongful act is a very demanding requirement,

120. The following cases have held that the primary purpose of punitive damages, both generally and in § 1983 cases, is to deter: Smith v. Wade, 103 S. Ct. 1625, 1636 (1983); City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 266-67, 269-70 (1981).

121. *Soderbeck*, 752 F.2d at 290.

122. *Id.* at 291.

123. The court gave as examples, conduct that has come to be regarded as morally wrong including conduct contrary to modern civil rights, as well as the older personal liberties of Americans. *Id.*

124. *Id.*

125. In *Smith*, the court distinguished between evil motive or intent and reckless indifference. It found that either, however, was an appropriate basis for an award of punitive damages. 103 S. Ct. at 1640. The Seventh Circuit in *Soderbeck* seems to indicate that intent is the only basis for punitive damages (*i.e.* knowledge of the act is required or almost certain knowledge), and hence restricts the Supreme Court's broad holding in *Smith*.

126. Three Justices dissented in *Smith* (Rehnquist, Burger and Powell). They felt that Section 1983 requires proof of intentional injury before punitive damages are appropriate and based this relief in part on the potential increase in federal cases if a less strict standard were allowed. 103 S. Ct. at 1651 (Rehnquist, J., dissenting). Justice O'Connor wrote a separate dissent and she too expressed this concern. *Id.* at 1659 (O'Connor, J., dissenting).

127. With this tougher burden, the flood of litigation expected after *Smith* may be decreased, or at least the fear of it may be put to rest.

and one not easily met. This strict definition of recklessness will likely deter frivolous suits under section 1983.

TITLE VII

Employment discrimination which supports a claim under Title VII[128] can arise in two forms: (1) individual, nonclass discrimination—where an employer intentionally discriminates against a specific individual employee; and (2) class discrimination—where an employer engages in a pattern or practice of discriminatory treatment of a protected class of employees. In its recent term, the Seventh Circuit addressed issues related to each of these forms of Title VII discrimination. In *Jayasinghe v. Bethlehem Steel Corp.*,[129] the court held that a claimant in an action for individual discrimination need not prove his subjective qualifications for the position which he was denied. In *Coates and EEOC v. Johnson*,[130] the court ruled on the burdens of persuasion where parties to a class discrimination action use statistical evidence to prove or disprove such discrimination.

Subjective Qualifications: Jayasinghe v. Bethlehem Steel Corp.

The United States Supreme Court, in *McDonnell Douglas v. Greene*,[131] articulated the elements of a prima facie case for individual discrimination under Title VII. A claimant must prove that he was intentionally discriminated against by establishing that he was a member of a protected class, that he applied and was qualified for a job for which the employer was seeking applicants, that he was rejected despite his qualifications, and that the employer either filled the position or continued to seek applications for persons of plaintiff's qualifications.[132] In *Jayasinghe*, the Seventh Circuit specifically considered whether the second prima facie element, proof of the claimant's qualifications, requires proof of the claimant's subjective as well as objective qualifications for the position which he was denied.

Rajapakse Jayasinghe, a chemist, brought an action against his em-

128. Title VII provides in part:

> 703(a) It shall be an unlawful employment practice for any employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin.

42 U.S.C. § 2000(e)-(z)(1982).

129. 760 F.2d 132 (7th Cir. 1985).

130. 756 F.2d 524 (7th Cir. 1985).

131. 411 U.S. 792 (1973).

132. *Id.* at 802.

ployer, Bethlehem Steel, alleging that he was denied a promotion based on his national origin in violation of Title VII. At trial, Jayasinghe established that he was objectively more qualified for the new position than two chemists actually promoted. Nevertheless, the district court found that Jayasinghe failed to establish that he possessed the specific personality characteristics required for the position,[133] and he therefore failed to establish a prima facie case of discrimination.

On appeal, the Seventh Circuit held that the district court erred in defining a prima facie case of discrimination to include such subjective qualifications as personality characteristics. The court based its holding that subjective qualifications are excluded from a plaintiff's prima facie case in part on the reasoning behind the Supreme Court's decision in *Greene*. The Seventh Circuit examined the policy reasons the Supreme Court identified in *Greene* for requiring a plaintiff to prove a prima facie case. It then discussed whether requiring a plaintiff to prove subjective qualifications would further those policies.

First, the requirement that plaintiff prove a prima facie case, which includes showing that a plaintiff was qualified for the job, provides a useful barrier to unsubstantiated claims of discrimination. That is, by requiring a plaintiff to prove such things as being in a protected class, being qualified for the job, and having applied for the job which was open or available when he applied for it, the court can screen out those cases where an employee is denied a job based on legitimate reasons.[134] The Seventh Circuit explained that proof of subjective qualifications would not serve this policy goal. This is true, the court stated, because it is uncommon for an employer to reject applicants with superior objective qualifications.[135]

The second policy reason behind requiring a prima facie case is that it offers a plaintiff the chance to prove discriminatory intent indirectly. Thus, a plaintiff who cannot directly prove that an employer intended to discriminate against him can create the inference of such intent by establishing a prima facie case.[136] This policy would not be served by requiring a plaintiff to prove that he was subjectively qualified in order to establish a case. This is true because the employer is in a better position

133. The position Jayasinghe sought required the employee to work closely with others. The district court found, however, that the "overwhelming preponderance of evidence established that Jayasinghe was secretive, asocial and occasionally quarrelsome, and that Jayasinghe was not promoted to a supervisory position because of the reasonable prevailing perception of him as one who did not work well with others." *Jayasinghe*, 760 F.2d 132, 132 (7th Cir. 1985).

134. *Id.* at 134.

135. *Id.*

136. *Id.*

to come forward with his own subjective job requirements. The prospective employee could not know what subjective qualifications were being sought by the employer. Thus, it would be unreasonable to require a plaintiff to anticipate and try to prove that he meets those qualifications at the outset. Such a requirement would make it nearly impossible for a plaintiff to correctly present a prima facie case, and thus the goal of allowing a plaintiff to create an inference of discrimination would not be met. Thus, the court held that the policies behind *Greene* would be better served by limiting a plaintiff's prima facie burden to showing that he meets the objective qualifications for the job.[137]

Despite its holding that proof of subjective qualifications are unnecessary in a Title VII case, the Seventh Circuit found that the error was harmless in the context of the district court's entire analysis. Because the district court addressed and resolved the ultimate question of whether Bethlehem Steel intentionally discriminated against Jayasinghe, the Seventh Circuit deemed the district court's error harmless to the outcome of the case.[138]

The court's decision in *Jayasinghe*, appears upon close examination to add little to "intentional discrimination" analysis. In fact, after *Jayasinghe*, many questions remain. First, while the court determined that subjective qualifications play no part in a plaintiff's prima facie case, they did not define subjective qualifications.[139] What are subjective qualifications? Are they those qualifications that the employer does not express? Or, are they those express qualifications for which there is no objective measurement such as personality characteristics? If a qualification is reasonably inferable from the job description, is it an objective or subjective qualification?

Secondly, may a qualification be objective in one case and subjective

137. Of those circuits that have removed subjective qualifications from the prima facie case, most require a showing of only minimum objective qualifications. *See, e.g.*, Burrus v. United Tel. Co. of Kansas, Inc., 683 F.2d 339, 342-43 (10th Cir.), *cert. denied*, 459 U.S. 1071 (1982); Lynn v. Regents of the Univ. of Cal., 656 F.2d 1337, 1344-45 (9th Cir.), *cert. denied*, 459 U.S. 823 (1981).

The Seventh Circuit, however, has held that in order to show objective qualifications, plaintiff must show his *relative* qualifications at the prima facie level. Judge Posner felt that the court's decision in *Jayasinghe* was opposite of its decision in Holder v. Old Ben Coal Co., 618 F.2d 1198 (7th Cir. 1980). *Jayasinghe*, 760 F.2d 132, 137 (7th Cir. 1985) (Posner, J., concurring). The court explained, however, that its decision in *Jayasinghe* adopts the *Holder* requirement of relative qualifications and takes it a step further by holding that relative qualifications do not include subjective qualifications at the prima facie level. *Id.* at 136 n.4.

138. *Id.* at 136-37. The Seventh Circuit based this holding on the Supreme Court's decision in United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714-15 (1983), where the Court noted that prima facie burdens are no longer relevant once the defendant has introduced evidence that would rebut plaintiff's prima facie showing of discrimination.

139. The court's only indication was its example of personality characteristics. *Jayasinghe*, 760 F.2d 132, 135 (7th Cir. 1985).

in another? For example, are personality characteristics objective qualifications for certain public relations jobs and subjective qualifications for jobs that require less public contact? These questions are significant because under *Greene* a plaintiff is still required to prove objective qualifications. By eliminating the need to prove subjective qualifications without defining what this includes, a plaintiff may fail to plead facts essential under *Greene* based on an erroneous belief that the qualifications are subjective and thus need not be proven according to *Jayasinghe*.

Additionally, the court deemed the inclusion of subjective qualifications in the prima facie case a harmless error. This seems to indicate that the Seventh Circuit views the prima facie requirements of *Greene* as relatively meaningless,[140] and merely an alternative to other analyses of intentional discrimination. Given this interpretation, a potential plaintiff filing a discrimination case under Title VII may be confused concerning the elements of a prima facie case. Should the plaintiff plead all qualifications, objective and subjective, in order to assure that he has not miscategorized or omitted a qualification and thus failed to fulfill the second requirement of *Greene*? Or, is the *Greene* prima facie requirement a mere formality that may be taken lightly such that any proof of intentional discrimination is sufficient? The Seventh Circuit's decision in *Jayasinghe* thus left many questions unanswered.

STATISTICAL EVIDENCE UNDER TITLE VII: *Coates and EEOC v. Johnson*

In addition to individual discrimination, class discrimination is actionable under Title VII where an employer engages in a pattern or practice of discrimination against a protected group of employees. As the United States Supreme Court observed in *International Brotherhood of Teamsters*,[141] proof of unlawful class discrimination will usually consist of statistical evidence showing a disparity between the employer's treatment of a protected group and an unprotected group.[142] Similarly, a defense to class discrimination is often comprised of statistical proof of the employer's nondiscriminatory treatment of a protected class of employees. The Seventh Circuit in *Coates v. Johnson* dealt with this statistical

140. By excluding subjective qualifications from the prima facie requirement and then holding the prima facie requirements irrelevant once the defendant introduces rebuttal evidence, the court seems to seriously weaken *Greene* and confuse the importance of a prima facie showing in a Title VII action.

141. 431 U.S. 324 (1977).

142. *Id.* at 337-39.

evidence and attempted to define the burdens of proof where both parties offer statistical evidence.

In *Coates*, Wesley Coates, a black man, filed suit against Midwest Diaper Plant alleging individual and class discrimination in violation of Title VII and section 1981.[143] At trial, Coates attempted to prove a pattern or practice of racial discrimination by introducing statistical evidence showing that Midwest discharged more blacks than nonblacks.[144] In response, Midwest introduced statistics to prove that there was an independent factor other than race, namely Midwest's disciplinary procedures, that could explain the statistical disparity in discharge rates. Coates then claimed that Midwest's statistics on this point were tainted because Midwest also discriminated in discipline. The district court found that Midwest adequately rebutted Coates' statistical and non-statistical evidence of a pattern or practice of discrimination.[145]

The Seventh Circuit affirmed the district court's decision, and seized an opportunity to clarify the burdens of proof where competing statistics are offered; a question virtually unexplored by other courts.[146] The court determined that once a defendant introduces statistical evidence which the plaintiff claims is biased, the plaintiff bears the burden of persuasion on the issue of discrimination.[147] Consistent with the general theory behind Title VII actions, complainants retain the ultimate burden of persuasion on the issue of discrimination.[148] The court felt that it would be unfair to allow plaintiffs to shift that burden merely by alleging the evidence the defendant seeks to introduce is discriminatory.[149]

The court's decision in *Coates* presents a potentially troublesome problem. The court seems to be saying that in every instance where a defendant introduces statistical evidence to prove that his allegedly discriminatory policies are legitimate, and the plaintiff alleges that those sta-

143. Coates contended that he and more than 200 other blacks were discharged "as a consequence of a uniform policy and practice to reduce black employment and discriminatorily discharge black employees at defendant's plant." *Coates*, 756 F.2d 524, 530 (7th Cir. 1985).

144. *Id.* at 536.

145. *Id.* at 530.

146. The court indicated that it had many concerns with the district court's treatment of the statistical evidence. It limited its analysis to three issues, however: (1) whether pooling of the data was appropriate; (2) which party bears the burden of persuasion on the issue of whether a variable is tainted by past discrimination; and (3) what is the appropriate measure for discipline. *Id.* at 540. This Comment deals only with the second issue. A few other courts have touched on this issue. *See, e.g.*, Presseisen v. Swarthmore College, 442 F. Supp. 593 (E.D. Pa. 1977), *aff'd without opinion*, 582 F.2d 1275 (3d Cir. 1978); Agarwal v. Arthur G. McKee & Co., 19 Fair Empl. Prac. Cas. (BNA) 503, 512 (N.D. Cal. 1977).

147. *Coates*, 756 F.2d at 544.

148. *Id.*

149. *Id.*

tistics are biased, the plaintiff bears the burden of proving that those statistics are biased.

While this placement of the burden may be justified in some instances, it is not justified in all instances. Proving that one particular set of statistics is biased is often very difficult to do.[150] Thus, a *de facto* placement of the burden of proof on the plaintiff to prove bias would mean that a defendant may introduce any set of statistics, even those the defendant knows are biased, and under the *Coates* rule the defendant has a good chance of winning. Just as the court found it unfair to allow a plaintiff to shift the burden to the defendant merely by questioning the defendant's statistics, it is also unfair to allow the defendant to place the onerous burden of proving bias on the plaintiff merely by introducing statistics that the defendant knows are biased.[151]

In his concurring opinion, Judge Cudahy presented a potential solution to this problem. Once a defendant introduces statistics to prove that his practices were justified or nondiscriminatory, he should bear the burden of articulating a reason for thinking that those statistics are not biased.[152] If a defendant fails to do so, such failure would result in shifting the burden to defendant.[153] This approach appears to be fairer to both parties.

OTHER SEVENTH CIRCUIT LABOR LAW CASES IN BRIEF

The Court of Appeals for the Seventh Circuit addressed several other labor law issues during the 1984-85 term. Cases of note addressed superseniority clauses and a state recidivism statute.

Ex-Cell-O: Necessity Required For Superseniority Clauses

Pursuant to sections 8(a)(3) and 8(b)(2) of the NLRA,[154] it is an unfair labor practice for an employer or a union to grant employment privileges based on union participation.[155] The courts, however, have

150. Judge Cudahy articulated this difficulty in his concurring opinion. *Id.* at 554 (Cudahy, J., concurring).

151. The automatic shifting of the burden of proof could in fact encourage a defendant to introduce unsupportable evidence, because, under *Coates*, a plaintiff would bear the burden of proving bias. In view of this difficulty, a defendant would almost certainly win.

152. Judge Cudahy indicated that the burden should not always be on the plaintiff to prove that defendant's statistics are biased. Rather, defendant must articulate a reason why he believes the factor to be unbiased. If such an articulation is not made, plaintiff would not have the burden of proof. *Id.* at 554 (Cudahy, J., concurring).

153. *Id.*

154. 29 U.S.C. § 158 (1982).

155. Section 8(a)(3) of the National Labor Relations Act provides in pertinent part:

It shall be an unfair practice for an employer . . . by discrimination in regard to hire or

recognized a limited exception for superseniority privileges conferred by a collective bargaining agreement.[156] In *Gulton Electro-Voice*,[157] the NLRB held that superseniority may only be granted to those union officers whose on-the-job presence at specific times is necessary to administer the collective bargaining agreement.[158] In *Local 1384, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW v. NLRB* ("Ex-Cell-O"),[159] the Seventh Circuit upheld the *Gulton* rule because it was rational and consistent with the NLRA.[160] To more clearly place the *Ex-Cell-O* decision in its proper legal context, a review of NLRB decisions concerning superseniority prior to *Gulton* will precede the detailed presentation of *Ex-Cell-O*.

Prior to *Gulton*, in *Dairylea Cooperative*,[161] the NLRB approved superseniority only for union stewards in layoff and recall because the steward's continued presence on the job effectuated the administration of collective bargaining agreements.[162] The NLRB presumed all other superseniority clauses to be unlawful. Subsequently, in *United Electrical, Radio and Machine Workers of America, Local 623* ("Limpco"),[163] the NLRB held that *Dairylea* should not be construed narrowly, but should be interpreted to permit superseniority for union officers whose responsibilities "bear a direct relationship to the effective and efficient representa-

> tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

29 U.S.C. § 158(a)(3) (1982).

> Section 8(b)(2) provides in pertinent part:
>
> It shall be an unfair labor practice for a labor organization or its agents . . . to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section.

29 U.S.C. § 158(b)(2) (1982).

156. A superseniority clause in a collective bargaining agreement ensures that specified union officers will receive "certain seniority-linked benefits, . . . regardless of their natural seniority." Local 1384, United Auto., Aerospace and Agricultural Implement Workers of Am., UAW v. NLRB, 756 F.2d 482, 488 (1985).

157. 266 N.L.R.B. 406 (1983), *enforced sub nom.* Local 900, IUE v. NLRB, 727 F.2d 1184 (D.C. Cir. 1984).

158. 266 N.L.R.B. at 409.

159. 756 F.2d 482 (1985).

160. 756 F.2d at 494. Board rulings are subject to limited judicial review of rationality and consistency with the NLRA. Beth Israel Hosp. v. NLRB, 437 U.S. 483, 501 (1978). Upon review, a court of law must uphold a rational and consistent Board ruling, regardless of how it might have decided the case on its merits. Local 900, IUE v. NLRB, 727 F.2d at 1189; NLRB v. Niagara Mach. and Tool Works, 746 F.2d 143, 148 (2nd Cir. 1984).

161. 219 N.L.R.B. 656 (1975), *enforced sub nom.* NLRB v. Milk Drivers & Dairy Employees Local 338, 531 F.2d 1162 (2d Cir. 1976).

162. 219 N.L.R.B. at 658. The court held that the discrimination created was "simply an incidental side effect of a more general benefit accorded all employees." *Id.*

163. Limpco Mfg. Inc., 230 N.L.R.B. 406 (1977), *petition for review denied sub. nom.* D'Amico v. NLRB, 582 F.2d 820 (3d Cir. 1978).

tion of unit employees."[164] Following *Limpco*, unions were able to contrive a superseniority by appointing unlimited numbers of members as "officials."[165]

Gulton, the NLRB's first unanimous superseniority decision, expressly overruled *Limpco*.[166] According to the Seventh Circuit in *Ex-Cell-O*, the only sufficient justification under *Gulton* for an employer granting transfer privileges to a union official would be the necessity of the official's on-the-job presence.[167] If the employer grants such privileges, however, with an intent to encourage or discourage union participation, then the employer commits an unfair labor practice under section 8(a)(3) of the NLRA.[168] The court will presume improper intent where the practice is inherently discriminatory.[169] Because superseniority privileges are inherently discriminatory,[170] a union must prove the necessity of an official's on-the-job presence in order to overcome the presumption of improper intent.[171]

In *Ex-Cell-O*, the court reviewed two cases. In the first case, the employer transferred the union recording secretary from the night shift to the day shift, resulting in the involuntary transfer of a day-time employee with greater seniority.[172] In the second case, the employer, facing a reduction of the work force, demoted an employee with greater seniority than the union's financial secretary-treasurer.[173] The NLRB held that neither union official's presence was necessary to administer their

164. 230 N.L.R.B. at 407-08. In *Limpco*, the employer retained the employment of the union recording secretary while employees with greater seniority were laid off.

165. *Superseniority: Post-Dairylea Developments*, 29 CASE W. RES. 499, 517 (1979). *See, e.g.*, Otis Elevator, 231 N.L.R.B. 1128 (1977). The dissent of Members Jenkins and Penello, in *Limpco*, foresaw this occurrence. 230 N.L.R.B. at 409 (Jenkins and Penello, dissenting).

166. 266 N.L.R.B. at 406. The *Limpco* dissent laid the foundation for *Gulton*, stating that a standard based on efficiency, rather than necessity, benefitted only the immediate beneficiary and not all union members. 230 N.L.R.B. at 409 (Jenkins and Penello, dissenting). In *Ex-Cell-O*, the court upheld the NLRB's freedom to "change its mind on matters of law." even following enforcement of the previous rule in a court of appeals. 756 F.2d at 492. Furthermore, the *Gulton* decision should not have been unexpected given the strong dissents which preceded it and the changes in the NLRB's composition. NLRB v. Ensign Elec. Div. of Harvey Hubble, 767 F.2d at 1101-02.

167. 756 F.2d at 488.

168. *Id.* at 487-88. *See also* Radio Officers' Union v. NLRB, 347 U.S. 17, 42-44 (1954).

169. NLRB v. Great Dane Trailers, 388 U.S. 26, 33-34 (1967). The Supreme Court distinguished two types of discriminatory conduct: (1) inherently discriminatory, and (2) marginally discriminatory.

170. 756 F.2d at 494. The court further stated that *Gulton* is compatible with *Great Dane*.

171. *Id.* at 488 (citing *Great Dane*, 388 U.S. at 33-34). *See also Radio Officers'*, 347 U.S. at 45 (General Counsel need not prove improper intent "when such encouragement or discouragement is a natural consequence of the discriminatory action").

172. *Ex-Cell-O*, 756 F.2d at 484. The president and recording secretary had previously missed deadlines and had difficulty communicating because they worked different shifts. *Id.* at 485.

173. *Id.* at 485-86.

respective collective bargaining agreements as required by *Gulton*.[174] Therefore, neither union official was entitled to superseniority.[175]

The Seventh Circuit's affirmance of the *Gulton* rule as rational and consistent with the NLRA is consistent with the decisions of other circuits which have recently considered *Gulton*.[176] In *NLRB v. Niagara Machine and Tool Works*,[177] the Second Circuit noted that "the Board in *Gulton* fashioned a clear-cut rule that resolved the uncertainty created by its earlier decisions."[178] In *Gulton*, the NLRB unanimously recognized the inherently discriminatory nature of superseniority clauses and restricted their invocation to situations in which such discrimination was necessary. The NLRB has preserved the separation of employment privileges and union participation in all but the most extraordinary instances. Clearly, the *Gulton* rule is rational and consistent with the NLRA.

Gould: *Federal Preemption of a State Recidivism Statute*

On May 21, 1980, the State of Wisconsin enacted legislation which barred employers from conducting business with the State for three years if three or more NLRB findings against the employer had been affirmed by a federal court of appeals within a five year period.[179] In *Gould v.*

174. *Id.* The NLRB decided *Gulton* subsequent to the administrative hearings in the two subject cases. Though the issue of retroactivity is not raised in *Ex-Cell-O*, *Gulton*'s retroactivity has been upheld in other jurisdictions. *See* NLRB v. Niagara Mach. and Tool Works, 746 F.2d 143, 151 (2d Cir. 1984); NLRB v. Ensign Elec. Div. of Harvey Hubble, 767 F.2d 1100, 1102 (4th Cir. 1985).

175. In *Ex-Cell-O*, the court also rejected the unions' argument that the unions waived their members' right against unnecessary superseniority. 756 F.2d at 494-95. A union may waive its members' economic rights. Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 705 (1983). The right "to be free of discrimination that encourages union activism" is not an economic right, however, and may not be waived. 756 F.2d at 494. *See also Gulton*, 727 F.2d at 1190; *Niagara Mach. and Tool*, 746 F.2d at 150.

176. *See* Local 900, IUE v. NLRB, 727 F.2d 1184 (D.C. Cir. 1984); NLRB v. Niagara Mach. and Tool Works, 746 F.2d 143 (2nd Cir. 1984); NLRB v. Ensign Elec. Div. of Harvey Hubble, 767 F.2d 1100 (4th Cir. 1985).

177. 746 F.2d 143 (2d Cir. 1984).

178. *Id.* at 151. *Accord Local 900, IUE*, 727 F.2d at 1195.

179. Gould v. Wisconsin Dep't of Indus., Labor and Human Relations, 576 F. Supp. 1290, 1292 (W.D. Wis. 1983). The statutes read in pertinent part:

> The [Department of Industry, Labor and Human Relations] shall maintain a list of persons or firms that have been found by the national labor relations board, and by 3 different final decisions of a federal court within a 5-year period . . . to have violated the national labor relations act . . . . A name shall remain on the list for 3 years.

WIS. STAT. § 101.245 (1981).

> The [department of administration] shall not purchase any product known to be manufactured or sold by any person or firm included on the list of labor law violators . . . under § 101.245.

WIS. STAT. § 16.75(8) (1981).

The list maintained under § 101.245 was referred to as "the labor law violator's list." *Gould*, 576 F. Supp. at 1292.

Wisconsin Department of Industry, Labor and Human Relations,[180] a barred employer challenged the Wisconsin statutes' constitutionality.[181] The United States Court of Appeals for the Seventh Circuit held that, under the Supremacy Clause,[182] the NLRA preempted the Wisconsin statutes.[183]

The United States Supreme Court, in *San Diego Building Trades Council v. Garmon*,[184] held that the NLRA preempted state laws which attempted to regulate activity protected or prohibited by the NLRA.[185] In *Gould*, the State argued that *Garmon* only applies to state attempts to prohibit NLRA-protected activities.[186] The court held, however, that *Garmon* applies to state attempts to prohibit NLRA-prohibited activities as well.[187]

The NLRA, however, does not expressly prohibit recidivism.[188] In *Gould*, the court held that "Congress' failure to [directly prohibit recidivism] does not necessarily imply that the remedy is thereby left to the states."[189] Rather, the court examined the federal and state interests involved and "the potential for interference with federal regulation."[190]

The court's primary objection to the Wisconsin statute was that the recidivism provision was punitive.[191] Congress designed the NLRA as a

180. 750 F.2d 608 (7th Cir. 1984), *aff'd*, 106 S. Ct. 1057 (1986).

181. None of the employer's three divisions which had violated the NLRA were located in Wisconsin. 750 F.2d at 610.

182. U.S. CONST. art. VI, cl. 2.

183. 750 F.2d at 615.

184. 359 U.S. 236 (1959).

185. *Id.* at 244. The Supreme Court held that "to allow the states to control conduct which is the subject of national regulation would create potential frustration of national purposes."

186. 750 F.2d at 612.

187. *Id. See also In re* Sewell, 690 F.2d 403, 408 (4th Cir. 1982) (*Garmon* applies to state statutes which attempt "to redress conduct prohibited by § 8 of the Act"). The court, in *Gould*, also rejected the State's attempt to draw an analogy between the case before it and a dormant commerce clause case, stating that, in *Gould*, Congress had "legislated decisively in the area." 750 F.2d at 613.

188. 750 F.2d at 612.

189. *Id.*

190. *Id.* at 611. The Supreme Court has held that it will sustain a state law which addresses activity "merely peripheral" to a federal law or which concerns interest "deeply rooted in local feeling and responsibility." Belknap v. Hale, 463 U.S. 491, 498 (1983). *See also Garmon*, 359 U.S. at 243; Sears, Roebuck v. San Diego Dist. Council of Carpenters, 436 U.S. 180, 200 (1978); Farmer Special Admin. v. United Bhd. of Carpenters, 430 U.S. 290, 296-97 (1977). The following cases exemplify lawful state regulations under *Garmon*: Linn v. United Plant Guard Workers, 383 U.S. 53 (1966) (slanderous statements made during the course of a labor dispute were actionable); *Farmer*, 430 U.S. 290 (allowed a state action for intentional infliction of emotional distress); *Sears*, 436 U.S. 180 (allowed a state action for trespass).

191. 750 F.2d at 611 n.4, 614. The court rejected the employer's argument that the Wisconsin law unlawfully infringed upon its right to a federal appeal because the employer stood to incur harsher sanctions if it appealed an NLRB decision (the statute only counted NLRB decisions which had been affirmed by a federal court of appeals). *Id.* at 614. The court held that "[t]he possibility of incurring harsher sanctions because of an appeal is not an unheard of event in our system of law."

remedial statute, not as a punitive statute.[192] Furthermore, the Wisconsin statute punished employers for the same conduct prohibited by the NLRA. Repetition does not change the nature of the violative conduct. Thus, the court held that the Wisconsin recidivism statute significantly interfered with the NLRA.[193]

The State has a legitimate interest in choosing those parties with whom it will do business. Thus, the states are generally given a greater range of control as market participants than as market regulators.[194] The State's efforts in *Gould*, however, clearly contradict the nature and purposes of the NLRA. As a result, the court correctly preserved the remedial nature of the NLRA.

CONCLUSION

The Seventh Circuit decided several labor cases during the 1984-85 term. In the area of employment discrimination, the Seventh Circuit decisions reflect the growing need to clarify the law of employment discrimination. In *Malcak v. Westchester Park District*, for example, the court held that whether a public employee has a property interest in his job is not necessarily a factual issue. In *Soderbeck v. Burnett County*, the court established the plaintiff's burden of proof in a section 1983 suit seeking punitive damages. The court held that a plaintiff must prove that the defendant had knowledge of a wrongful act in order to present a prima facie case.

The Seventh Circuit also clarified burden of proof requirements in the Title VII area. In *Jayasinghe v. Bethlehem Steel Corp.*, the court held that in an action for individual discrimination, the claimant need not prove his subjective qualifications for the job in order to present a valid prima facie case. And, in *Coates and EEOC v. Johnson*, the court held that where a defendant introduces statistical evidence to prove that his policies do not constitute class discrimination, and the plaintiff contends that those statistics are biased, the plaintiff has the burden of proving that bias. These cases present refinements to previous Supreme Court cases that have laid down the general prima facie burdens in this area.

This need to refine the law in particular employment discrimination

Id. (citing Chaffin v. Stynchcombe, 412 U.S. 17, 93 (1973)). As a result, the court reversed the district court's award of attorney's fees based on the appeal right claim. 750 F.2d at 617.

192. 750 F.2d at 611. Federal sanctions end upon rectification of the unlawful conduct.

193. *Id.* at 615.

194. *Cf.* Reeves, Inc. v. Stake, 447 U.S. 429 (1980) (dormant commerce clause analysis does not apply where the State acts as a market participant). *See also* White v. Massachusetts Council of Constr. Employers, 460 U.S. 204 (1983); Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976).

contexts was further expressed in *Musikiwamba v. ESSI*. There the court had to determine whether to expand the Supreme Court's application of the successor doctrine in NLRA cases to section 1981 cases. The Seventh Circuit held that such an application should be made and thus applied the successor doctrine to section 1981 cases. Finally, in *D'Amato v. Wisconsin Gas*, the Seventh Circuit held that there is no private cause of action as a third party beneficiary under section 503 of the Rehabilitation Act. Each of these decisions reflects the Seventh Circuit's recognition that employment discrimination law is a complex and rapidly changing area and one that needs clarifying and refining in order to better serve the parties involved.

In *Gould*, the Seventh Circuit held that the federal interest in preserving the remedial nature of the NLRA outweighed the state's interest in choosing those businesses with which it wished to do business as a market participant based on previous NLRA violations. The Seventh Circuit regarded the state's conduct as punitive, and thus preempted by the NLRA. The remainder of the cases herein discussed reflect the Seventh Circuit's continued efforts to balance the often divergent interests of the union, employer, and individual employees represented by the union. In *Hudson* and *Ex-Cell-O*, the Seventh Circuit held that the respective union actions did not warrant the resultant abridgements of the aggrieved individual employee's rights. *Ex-Cell-O* is consistent with Fourth Circuit and Second Circuit decisions upholding the *Gulton* rule. *Hudson*, however, represents a novel approach to the constitutional rights of nonunion members of a bargaining unit. The Supreme Court's affirmance of *Hudson* further reflects a trend toward imposing a greater burden on unions to justify attempts to abridge the rights of employees.