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Filling an Enforcement Void: Using Testers to Uncover and Remedy Discrimination in Hiring for Lower-Skilled, Entry-Level Jobs

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FILLING AN ENFORCEMENT VOID: USING TESTERS TO UNCOVER AND REMEDY DISCRIMINATION IN HIRING FOR LOWER-SKILLED, ENTRY-LEVEL JOBS

Michael J. Yelnosky*

Introduction	404
I. The Enforcement Void	410
II. Employment Discrimination Testers' Standing to Sue	415
III. Remedies Available to Employment Discrimination Testers	429
A. Attorneys' Fees and the Supreme Court	430
B. Injunctive Relief	434
C. Declaratory Relief	439
D. Nominal Damages	441
E. Compensatory and Punitive Damages	442
IV. Possible State Law Restrictions on the Use of Testers by Private Groups or Individuals	446
A. State Law Claims for Breach of Contract or Fraud	446
B. Ethical, Criminal, and Common-Law Proscriptions of Conduct That Stirs Up Litigation	451
C. Ethics Rules Barring Attorneys from Contacting a Represented Party	455
V. The EEOC's Authority to Use Testers to Enforce Title VII	459

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A.	The EEOC's General Investigatory Authority . . .	459
B.	Precharge Investigatory Authority	463
VI.	Advantages to Authorizing the EEOC to Use Testers to Uncover and Remedy Discrimination in Hiring for Lower-Skilled, Entry-Level Positions	469
A.	Relief Available in Tester Litigation Brought by the EEOC	469
B.	Preemption of State Laws That Interfere with Testing	471
VII.	Entrapment	474
	Conclusion	482

INTRODUCTION

In a November 20, 1990 policy guidance, the Equal Employment Opportunity Commission (EEOC) announced that its field offices would accept charges under Title VII of the Civil Rights Act of 1964¹ from testers or organizations filing charges for testers.² The EEOC defined "testers" as "individuals who apply for employment which they do not intend to accept, for the sole purpose of uncovering unlawful discriminatory hiring practices," specifically discrimination based on race, color, religion, sex, or national origin.³

Since then, several organizations have used testers to uncover and to remedy employment discrimination. The Urban Institute utilized testers in a study performed to measure discriminatory hiring practices.⁴ The National Association for

1. 42 U.S.C. §§ 2000e to e-17 (1988).

2. Notice No. N-915-062, [2 Interpretations] EEOC Compl. Man. (CCH) ¶ 2168, at 2314 (Nov. 20, 1990) [hereinafter *EEOC Policy Guidance*]. The Commission first considered accepting charges from testers after an in-depth nationwide investigation of employment agencies revealed widespread Title VII violations in recruitment policies. See *EEOC Chairman Says Agency Receiving Influx of Charges Against Job Agencies*, 1991 Daily Lab. Rep. (BNA) No. 113, at A-1 (June 12, 1991).

3. *EEOC Policy Guidance*, *supra* note 2, ¶ 2168, at 2313-15.

4. MARGERY A. TURNER ET AL., URBAN INST., OPPORTUNITIES DENIED, OPPORTUNITIES DIMINISHED: RACIAL DISCRIMINATION IN HIRING (1991). The Urban Institute pioneered a "hiring audit" methodology using testers in a parallel study measuring employment discrimination against Hispanics in Chicago and San Diego. HARRY CROSS, URBAN INST., EMPLOYER HIRING PRACTICES: DIFFERENTIAL TREATMENT OF HISPANIC

the Advancement of Colored People (NAACP) has used testers to obtain evidence on which to base charges of discrimination,⁵ as have the Fair Employment Council of Greater Washington, a private civil rights advocacy group in Washington, D.C.,⁶ and

AND ANGLO JOB SEEKERS (1990). In its latest study, the Urban Institute recruited college students between the ages of 19 and 24 to be testers. Most were between five-feet, eight-inches and five-feet, ten-inches tall. A black male and a white male then were matched preliminarily on attributes such as age, physical size, education, experience, openness, energy level, and articulateness. TURNER ET AL., *supra*, at 25. If a match of objective educational credentials or job experiences was impossible, Urban Institute personnel created false resumes or job applications for the testers. Most of the testers posed as recent high school graduates with limited work experience. *Id.* at 26.

All testers participated in a training session to make the pairs as similar as possible. They received detailed instructions on how to apply for employment, learned a standardized method for filling out job applications and conducting interviews, completed mock interviews, and observed others in different interview situations. Trainers pointed out and helped to minimize differences in the way the partners reacted to prospective employers in a wide range of circumstances. *Id.* Senior project staff finalized the pairs based on similarities in appearance, mannerisms, personality, and interview style. *Id.*

After the training, openings for entry-level jobs were identified in the help-wanted ads of the local newspaper. Each tester separately pursued the positions. Testers were instructed to withdraw from consideration from a job if they were asked to take a test or to attend training sessions, if they encountered someone at the job site they knew, or if the employer seemed to suspect the test. *Id.* at 20-23.

Urban Institute personnel then compared the experiences and outcomes of the paired testers. The Urban Institute found that young black job seekers were denied jobs offered to similarly credentialed white applicants fifteen percent of the time and that an additional five percent of the time a black applicant did not get as far in the hiring process as the paired white applicant. White job seekers were denied jobs offered to similarly credentialed black applicants only five percent of the time, and the black applicant got farther in the hiring process only an additional two percent. *Id.* at 39.

5. After receiving unsolicited complaints of discrimination in hiring at major Miami department stores, NAACP testers applied for employment at eight stores. In one store, a black female law student was denied a sales position despite extensive work experience and several follow-up efforts. A white female college student with some work experience who applied for the same job on the same day was offered a position immediately. In a second test at the same store, a black college student with work experience was offered a job for two weeks, while a white college student with no work experience who applied for a job the same day was offered work for a month. *NAACP Uses 'Testers' as Basis of Bias Complaint Against Miami Store*, 1990 Daily Lab. Rep. (BNA) No. 247, at A-5 (Dec. 24, 1990). The NAACP also filed complaints in Florida with the EEOC based on a six-month testing program that revealed widespread discrimination in hiring practices by employers in Miami hotels and restaurants. The employers allegedly offered black applicants menial jobs and gave similarly qualified white applicants higher paying positions. *Id.*

6. The Fair Employment Council of Greater Washington (Fair Employment Council) employed two white and two black male testers with similar backgrounds, all of whom were undergraduates at Georgetown University. The testers sought referrals to entry-level jobs through Snelling & Snelling, a national personnel recruitment agency. Snelling & Snelling allegedly sent the white testers but not the black testers on employment interviews. *Washington Civil Rights Group Uses Testers as Basis for Bias Suit Against Personnel Agency*, 1991 Daily Lab. Rep. (BNA) No. 86, at A-3 (May 3, 1991).

the Massachusetts Commission Against Discrimination, a state administrative agency.⁷

In its policy guidance, the EEOC asserted that testers have standing to bring actions under Title VII.⁸ It concluded that every person has a right under Title VII to have an employment application considered without reference to race, color, religion, sex, or national origin, regardless of whether the applicant intends to accept an employment offer. According to the EEOC, the applicant suffers an injury if an employer violates that right, even if the applicant does not lose a real employment opportunity.⁹

In January 1991, the EEOC announced that its Office of Legal Counsel was determining whether the agency had the authority to use its own personnel as testers. In addition, the office was considering "the potential liability the agency could face if it developed an in-house approach."¹⁰

The EEOC's decisions to accept charges from testers and to consider using its own testers have been criticized harshly by employers' groups and others in the business community. In February 1991, the Equal Employment Advisory Council (Advisory Council), an organization representing major companies, urged Evan J. Kemp, then the Chair of the EEOC,¹¹ to reconsider the agency's positions.¹² The Advisory Council

The Fair Employment Council filed a charge of race discrimination in federal court under Title VII, 42 U.S.C. § 2000e-2(b) (1988) and the District of Columbia Human Rights Act, D.C. CODE ANN. §§ 1-2501 to -2557 (replacement vol. 1992 & Supp. 1993), based on evidence obtained by the testers who applied for employment referrals with Snelling & Snelling. *Fair Employment Council v. BMC Mktg. Corp.*, 1993 Daily Lab. Rep. (BNA) No. 118, at E-1 (D.D.C. June 22, 1993).

7. Employment testers hired by the Massachusetts Commission Against Discrimination (the Commission) reported that white applicants at two Boston clothing stores were told of job opportunities while black applicants with the same qualifications were told that no positions were available. The Commission reached settlements with the stores in April 1993, in which the stores agreed to fund Commission programs fostering equal opportunities for blacks in Massachusetts and to participate in minority outreach and management awareness training. *Massachusetts Agency Settles Job Tester Cases*, 1993 Daily Lab. Rep. (BNA) No. 77, at A-18 (Apr. 23, 1993).

8. *EEOC Policy Guidance*, *supra* note 2, at 2313-15.

9. *Id.*

10. *EEOC Is Expanding Look at 'Testers' Issue; Agency May Use Its Own to Investigate Bias*, 1991 Daily Lab. Rep. (BNA) No. 6, at A-9 (Jan. 9, 1991).

11. Mr. Kemp resigned as Chair of the EEOC on April 2, 1993, and President Clinton named Tony Gallegos as Acting Chair effective April 5, 1993. *White House Taps Gallegos as Acting Chairman of EEOC*, 1993 Daily Lab. Rep. (BNA) No. 63, at A-10 (Apr. 5, 1993). The President has not yet named a permanent Chair.

12. Letter from Jeffrey A. Norris, President, Equal Employment Advisory Council, to the Honorable Evan J. Kemp, Chairman, EEOC (Feb. 12, 1991), in *Equal Employment Advisory Council Letter on Proposed Testing Policy at EEOC*, 1991 Daily Lab. Rep. (BNA) No. 31, at E-1 (Feb. 14, 1991).

complained that testers would waste employers' resources,¹³ that testers could be used by private parties to harass employers and extort settlements,¹⁴ and that use of testers by the EEOC would harm the agency's public image and effectiveness.¹⁵ John S. Irving, formerly General Counsel to the National Labor Relations Board (NLRB) and now in private practice representing employers, has also argued that the EEOC's use of testers would be inconsistent with the agency's

13. The Advisory Council complained that law-abiding employers will waste time and money "interviewing, evaluating, testing, and checking the references of persons who have no real interest in employment," and may lose the services of a legitimate prospective employee by offering a job first to a tester. *Id.*

14. The Advisory Council expressed concern that testers could be used for retaliatory and extortionary purposes and that "lawyers seeking to stir up litigation will engage testers to go out looking for incidents they can use as grounds for filing charges of discrimination that can then be made into lawsuits." *Id.* The major concern expressed by the Advisory Council was the absence in the policy guidance of any limits or guidelines for the use of testers. The Advisory Council argued that testers in employment cases must engage in more elaborate deception to appear qualified than testers in housing discrimination cases, where testing is an accepted practice. The Advisory Council worried that:

To "appear qualified," testers might find it necessary to present false credentials, bogus academic transcripts, made-up work histories, forged letters of reference, faked passports or work authorizations, counterfeit licenses, falsified professional ratings, perhaps even false security clearances.

To bring themselves within a protected class, testers might feign disabilities, falsify medical histories, and/or lie about their ability or inability to perform particular job functions

Id. at E-2. The Advisory Council asked the EEOC how far testers could go in using deception to appear qualified and to obtain evidence of discrimination. *Id.* It asked whether the EEOC intends to let

the courts . . . set limits on what testers properly can and cannot do, or [whether] the Commission [will] take a lead in establishing standards [A]ssuming that the Commission does intend that some minimum standards of fairness be observed by testers, is there really any way it can make its "army of citizens" abide by such standards?

Id.

Others are troubled by the notion of the EEOC making misrepresentations to employers in the context of a testing program. During the debates that preceded the passage of the Civil Rights Act of 1991, Senator Alan Simpson introduced an amendment to the act that, *inter alia*, would have prohibited the EEOC, if it ran a testing program, from allowing job applicants to misrepresent their education, experience, or other qualifications. 137 CONG. REC. S15,487 (daily ed. Oct. 30, 1991) (statement of Sen. Simpson).

15. Letter from Jeffrey A. Norris to the Honorable Evan J. Kemp, *supra* note 12, at E-5. The Council suggested that employers would be less likely to comply voluntarily with the EEOC and would not trust reasonable-cause findings by the agency if they believed that the EEOC had deceived them to obtain evidence of discrimination. *Id.*

role as a neutral fact finder in evaluating and investigating discrimination charges.¹⁶

16. Irving predicted that an EEOC tester program would result in a substantial diminution in employer cooperation. Letter from John S. Irving, former General Counsel, National Labor Relations Board, to the Honorable Evan J. Kemp, Chairman, EEOC (Mar. 4, 1991), in *Correspondence Between John Irving and EEOC Chairman Evan Kemp on Use of Testers' by Commission*, 1991 Daily Lab. Rep. (BNA) No. 82, at E-1 (Apr. 29, 1991) [hereinafter *Correspondence*]. Irving argued that

[a]n investigation triggered by the charge or testimony of a tester begins with a lie The tester is a liar and a deceiver from the outset and hardly the type of witness for whose honesty the Commission should want to vouch. It is difficult to see how the Commission would feel confident making investigative determinations in reliance upon deceivers such as testers.

Id. at E-2. Irving continued, "The Agency's case backlog would surge. And settlements, any administrative agency's lifeblood, fostered by respect for Agency fairness and objectivity, would plummet." *Id.*

Irving explained that, in light of the substantial costs and resources involved in evaluating applicants for employment, his clients could require an applicant to certify that he has a genuine interest in employment. Applicants who refused to sign a certification would not receive further consideration. Irving added that the certification would expose "beyond question the willingness of testers to lie and deceive, thus fundamentally undermining their credibility . . . as charging parties and witnesses." *Id.* Irving asked the EEOC to reconsider its position, and he asked for an opinion on the propriety of the use of certifications of a bona fide interest in employment. *Id.*

Then-Chairman Kemp responded to Irving's concern about the potential erosion of public confidence in the EEOC by stating that testing has been used effectively in housing discrimination cases for many years. Letter from the Honorable Evan J. Kemp, Chairman, EEOC, to John S. Irving, former General Counsel, National Labor Relations Board (Apr. 17, 1991), in *Correspondence, supra*, at E-5. Kemp pointed out that Congress has authorized and appropriated funds to the Department of Housing and Urban Development to fund testing by private civil rights groups. The Federal Trade Commission also conducts testing to detect discrimination by creditors and financial institutions. *Id.*

Kemp explained that a tester's certification of genuine interest in employment would not preclude the use of the tester's testimony concerning disparate treatment, because a "finding of bias or improper motivation on the part of the tester . . . would be based on the totality of the evidence." *Id.* Kemp stated that "[m]isrepresentation is integral to any covert law enforcement objective [This] does not diminish the reliability of the evidence . . . obtain[ed]." *Id.* Kemp opined, however, that no federal statutory or regulatory requirement would prohibit an employer from using a certification of genuine interest in employment. *Id.*

In response, Irving criticized Kemp's view that misrepresentations made by testers to secure evidence could be separated neatly from the quality of the evidence obtained by the testers. Letter from John S. Irving, former General Counsel, National Labor Relations Board, to the Honorable Evan J. Kemp, Chairman, EEOC (Apr. 25, 1991), in *Correspondence, supra*, at E-7. He characterized Kemp's position as follows: "[L]ies and misrepresentations are justified when needed to obtain evidence of employment discrimination." Irving suggested that this "ends justifies the means justification" placed the EEOC on "a slippery slope." *Id.* He warned that if EEOC investigative personnel functioned as testers, "the scope of their authority to act as testers in aid of the Commission's policies, instructions from Commission personnel, and even testimony from testers' EEOC supervisors or other principles [sic], could be legitimate subjects for

The EEOC continues to accept discrimination charges from testers, but to date it appears to have decided against implementing its own testing program.¹⁷ This Article argues that Congress should authorize the EEOC to use its own testers and that the EEOC should exercise that authority.

Part I of this Article concludes that the current enforcement scheme under Title VII has resulted in underenforcement of the Act in the context of hiring for lower-skilled, entry-level jobs, and that testers should be used to fill that enforcement void. Part II agrees with the EEOC's conclusion that testers have standing to sue under Title VII.

Parts III and IV assert that the EEOC cannot rely on private testers to fill the enforcement void. First, under current doctrine, prevailing testers can obtain only "de minimis" or "technical" relief from an offending employer and therefore cannot recover attorneys' fees. Moreover, opponents of testing may use state common-law causes of action and attorney disciplinary rules against testers and their counsel to deter the use of testers.

Parts V and VI conclude that the EEOC currently is not authorized to conduct its own testing program, but that the problems associated with the private use of testers would be solved if Congress amended Title VII to give the EEOC the power to use testers to uncover discrimination in hiring for lower-skilled, entry-level positions. State common law and statutory causes of action would be preempted, and Congress could limit the use of testers specifically to remedy discrimination in hiring for lower-skilled, entry-level positions—where the benefits of testing outweigh its potential costs. The EEOC could issue rules and regulations prescribing the methods to be used for testing, including the employer-targeting process. Finally, the Article concludes in Part VII that testing by the EEOC would not constitute entrapment and would not

exploration in discovery and at trial." *Id.* He urged that "the impact of these consequences upon the Commission's law enforcement activities, including the possibility that Commission personnel could be judicially discredited, are important considerations in weighing the usefulness and practicality of the Commission sponsorship of any tester program." *Id.*

17. Kemp seemed to have been persuaded by the numerous complaints from the business community that "direct government involvement would be tantamount to entrapment." Therefore, he led the EEOC away from using testers to conduct its own investigations. See Anne Kornhauser, *Tracking Down Employment Discrimination*, THE RECORDER, May 8, 1991, at 1, 8. Since Kemp's decision to step down as Chair of the EEOC, the Agency has not revisited that issue publicly.

upset the EEOC's relationship with respondent employers or otherwise undermine the agency's effectiveness.

I. THE ENFORCEMENT VOID

Ordinarily, Title VII suits are instituted by individuals who suspect that they were victimized by employment discrimination. If these private actions result in an optimum level of enforcement, then there are few if any benefits to using testers to enforce Title VII. There is reason to believe, however, that the use of testers could fill an existing enforcement void in the private enforcement regime of Title VII.

Much of the original support for employment discrimination laws came from those whose goal was to eliminate barriers in hiring that excluded blacks and others from the labor force.¹⁸ Today, however, discrimination in hiring draws little analytic attention.¹⁹ Studying, understanding, and eradicating hiring discrimination should become a policy priority once again. While progress has been made in reducing wage differentials between white and black workers, there remains a substantial gap in labor-force participation. The joblessness rate for blacks is consistently higher than the rate for whites. The joblessness rate for young black males is over twice the rate for young white males.²⁰

Although some of this gap no doubt is caused by factors other than employment discrimination, a significant amount appears to be attributable to discrimination.²¹ As mentioned previously, a recent study by the Urban Institute using testers applying for low-skilled, entry-level positions concluded that young black jobseekers often were denied jobs offered to similarly credentialed whites and that other times the black applicant did not get as far in the hiring process as the white counterpart.²²

18. John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 984 (1991).

19. Michael Fix & Raymond J. Struyk, *An Overview of Auditing for Discrimination*, in CLEAR AND CONVINCING EVIDENCE: MEASUREMENT OF DISCRIMINATION IN AMERICA 1, 13 (Michael Fix & Raymond J. Struyk eds., 1992).

20. TURNER ET AL., *supra* note 4, at 8.

21. *Id.* at 6-7.

22. *Id.* at 2. For a discussion of the methodology employed in that study and the results, see *supra* note 4. A study using testers conducted by the Fair Employment Council has found similar rates of disparate treatment. MARC BENDICK, JR. ET AL.,

Nonetheless, Title VII increasingly is being invoked to contest discharges from employment rather than to challenge hiring decisions. Discriminatory hiring charges filed with the EEOC in 1966 outnumbered termination charges by fifty percent; by 1985 the ratio was reversed by more than six to one.²³ Title VII now is used predominantly to protect the existing positions of incumbent workers.²⁴

One explanation for this trend is that there is now less blatant discrimination in hiring, which no doubt is true.²⁵ Litigation in the sixties and seventies removed many of the most formidable and blatant employment practices barring the entry of minorities and women into the workforce. Moreover, "disparate impact" litigation challenged facially neutral employment practices, forcing employers to remove many systematic barriers to equal employment opportunity.²⁶

Reduced discrimination, however, cannot explain entirely the disparity between the numbers of Title VII discharge and hiring cases now being filed. It would be irrational for an employer inclined to discriminate to hire a worker from a group the employer disfavored only to fire the worker once on the job, especially in light of the higher penalties for unlawful termination and the greater likelihood of a suit challenging a discharge.²⁷ At least some of the gap must be attributable to the high transaction costs and other disincentives to suits challenging discrimination in hiring for lower-skilled, entry-level positions. These costs and other disincentives probably have led to underenforcement of Title VII in these types of cases.²⁸

FAIR EMPLOYMENT COUNCIL OF GREATER WASH., INC., MEASURING EMPLOYMENT DISCRIMINATION THROUGH CONTROLLED EXPERIMENTS (May 1993) (unpublished manuscript, on file with the *University of Michigan Journal of Law Reform*).

23. Donohue & Siegelman, *supra* note 18, at 1015; see also Minna J. Kotkin, *Public Remedies for Private Wrongs: Rethinking the Title VII Back Pay Remedy*, 41 HASTINGS L.J. 1301, 1346-47 (1990) (finding that between 1974 and 1985, charges filed with the EEOC alleging failure to hire on the basis of race decreased as a percentage of total charges from 12% to 6% and charges alleging race discrimination in employment termination rose during the same period from 23% to 37%). For the years 1989 to 1991, the ratio of discharge to hiring claims was roughly seven to one. Telephone Interview with Barbara Roberts, EEOC Public Information Officer (June 17, 1992).

24. Donohue & Siegelman, *supra* note 18, at 984.

25. Fix & Struyk, *supra* note 19, at 9.

26. Donohue & Siegelman, *supra* note 18, at 1017-21.

27. *Id.* at 1017.

28. This is not to suggest that the volume of discharge suits currently filed under Title VII is optimal. There probably is excessive litigation in this area as members of protected classes use Title VII to challenge what they perceive to be arbitrary or otherwise unjustified discharges. There is reason to believe, however, that the ratio of

First, an individual discharged from employment is more likely to sue than an individual denied employment because the former has devoted time and energy to the relationship with the employer. The discharged individual who has spent years on the job will feel that something has been taken away from her.²⁹ Second, an individual who is not hired, particularly for a lower-skilled, entry-level position, is less likely to suspect discrimination. "Contact between the applicant and the employer during the hiring process is typically fleeting," the eventual outcome and the make-up of the applicant pool are unknown to the applicant, the applicant knows little about the decisionmakers, and "the process itself rarely signals exclusionary intent."³⁰ Presumably, the applicant simply will continue to look elsewhere for employment. If she is successful, she will have little if any incentive to consider whether there was discrimination earlier in her job search. Moreover, if she finds a position quickly, the back-pay remedy may be worthless.³¹

Even if the individual does not find employment and suspects discrimination, significant barriers to suit remain. A plaintiff must be committed seriously to the litigation. Charging parties currently wait an average of almost two years for resolution of Title VII claims.³² Moreover, discrimination in hiring for lower-skilled, entry-level positions is quite difficult to prove. Generally there is little if any paper record.³³ Employers may rebut the plaintiff's prima facie case by articulating any subjective, nondiscriminatory factor to justify a hiring decision.³⁴

Another significant problem faced by an individual who suspects discrimination in hiring for a lower-skilled, entry-level position is finding a lawyer. Because these jobs typically pay lower wages, the plaintiff may have difficulty paying a lawyer. Relying on a contingent fee agreement also may be problematic because the lower wages used to generate a back-pay award may not compensate a lawyer adequately.³⁵ Finally, attorneys'

hiring cases to discharge cases filed does not accurately reflect the amount of discrimination in hiring relative to the amount of discrimination in discharges.

29. Donohue & Siegelman, *supra* note 18, at 1024-25; see also Richard H. Fallon, Jr. & Paul C. Weiler, *Firefighters v. Stotts: Conflicting Models of Racial Justice*, 1984 SUP. CT. REV. 1, 58.

30. Fix & Struyk, *supra* note 19, at 13-14.

31. *E.g.*, *Oliver v. Moberly Mo. Sch. Dist.*, 427 F. Supp. 82, 88 (E.D. Mo. 1977).

32. Kotkin, *supra* note 23, at 1327 n.107.

33. Fix & Struyk, *supra* note 19, at 18.

34. *See St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2747 (1993).

35. It is too early to tell whether the amendments to Title VII permitting awards

fees are available only to prevailing parties. The difficulty and expense of proving a discrimination claim involving hiring for a lower-skilled, entry-level position will deter many attorneys from relying on the possibility of recovering attorneys' fees to accept a case.

The efficacy of Title VII depends in part on the willingness and ability of individuals to bring private suits challenging discriminatory employment practices. When private and social incentives to sue differ, the system may fail to produce the optimal amount and composition of litigation.³⁶ If victims do not sue, employers have less economic incentive to comply with the statute. It appears that Title VII does not provide employers with much incentive to avoid discrimination in hiring for lower-skilled, entry-level positions because the risk of suit is so low. Moreover, because an employee who is a member of a protected class may sue if discharged, Title VII actually may create some incentive for employers not to hire women and minorities.³⁷

Testing can help to root out discriminatory practices where the disincentives to bring a private suit result in underenforcement. Testing can detect "opportunity-diminishing" as well as "opportunity-denying" behavior.³⁸ Opportunity-diminishing behavior includes difficulty in obtaining a job application, negative comments, lengthy interview waiting time, cursory interviews, and disparate treatment in the quality of jobs offered.³⁹ These are all subtle signs of discouragement that are hard to detect and would permit an employer bent on discrimination to avoid taking actions which would constitute clear violations of the law.⁴⁰ The use of testers can uncover employment discrimination that otherwise is unprovable because of its subtle form.⁴¹

of compensatory and punitive damages will tend to make attorneys more available in cases offering no hope of a substantial back-pay award. For a discussion of these amendments, see *infra* Part III.E.

36. Donohue & Siegelman, *supra* note 18, at 1023.

37. *Id.* at 1024.

38. Fix & Struyk, *supra* note 19, at 24.

39. *Id.*

40. *Id.*

41. In fact, "the entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of intentional discrimination [in employment] is hard to come by." Price Waterhouse v. Hopkins, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring).

The experience with testers in housing discrimination cases suggests that testers' suits are far more likely than nontester suits to result in settlements favorable to the plaintiff.⁴² Comparative evidence generated by testers can go a long way toward meeting the plaintiff's burden in a Title VII case. Although the Supreme Court has stressed that a plaintiff need not offer direct proof of discrimination to prevail under Title VII, it recently held in *St. Mary's Honor Center v. Hicks*⁴³ that a plaintiff does not prevail in a disparate treatment case by showing that the employer's proffered nondiscriminatory reason for refusing to hire is a pretext.⁴⁴ The dissenting Justices appear to be correct that many plaintiffs without direct evidence of discrimination will lose under *Hicks*.⁴⁵ Testers can generate the comparative evidence necessary to prevail under *Hicks*.

Many critics of testing, however, correctly argue that testing poses greater potential costs to employers than it does to those subject to the fair housing laws. In particular, they note that more subjective factors legitimately may be considered in employment decisions than in decisions about selling or renting housing.

Nevertheless, the hiring process for lower-skilled, entry-level positions is usually a summary one, very similar to the rental of a housing unit.⁴⁶ Employers' out-of-pocket and opportunity costs associated with evaluating and selecting applicants for these types of positions are minimal. Processing an application for most of these positions requires little time or energy. Moreover, because the pool of qualified candidates is larger, employers are unlikely to lose the services of qualified candidates by focusing hiring efforts on a tester. "It is possible to monitor the early phases of these transactions without becoming involved in the kind of complex interpersonal exchanges that would entail outcomes based largely on subjective criteria."⁴⁷

For higher-skilled, upper-level positions, an employer may expend significant time and money screening, testing, interviewing, and otherwise evaluating candidates for employment.

42. *Id.* at 15.

43. 113 S. Ct. 2742 (1993).

44. *Id.* at 2748-49.

45. *See id.* at 2761-62 (Souter, J., dissenting).

46. Fix & Struyk, *supra* note 19, at 18.

47. *Id.*

Moreover, the pool of qualified applicants generally will be smaller. Therefore, it is more likely that an employer could lose other qualified applicants by offering the position to a tester. Testing for discrimination in hiring for upper-level positions involves intrusion into a more complex transaction. It is more difficult to feign the qualifications necessary for some higher-skilled positions, such as engineering, for example. This poses serious recruitment problems for testing programs.⁴⁸

Most importantly, testing for discrimination in hiring for upper-level positions is unnecessary because the victim has more incentive to sue and perhaps a greater likelihood of success. Testing would not fill an enforcement void in that context. Therefore, the costs to the employer probably would outweigh any benefits of testing for discriminatory hiring practices in that context.⁴⁹

In hiring for lower-skilled, entry-level positions, the minimal costs to employers caused by the use of testers will be outweighed by the benefits of more optimal enforcement of Title VII's proscription of discrimination in hiring. Moreover, a focus on hiring for lower-skilled, entry-level positions is appropriate because these jobs offer applicants the possibility to establish a "foothold" in the formal economy and to move up the socioeconomic ladder.⁵⁰ Therefore, testers should be used to uncover and remedy discrimination in hiring for lower-skilled, entry-level jobs.

II. EMPLOYMENT DISCRIMINATION TESTERS' STANDING TO SUE

The EEOC has concluded correctly that testers have standing to sue under Title VII because testers and other applicants have a right to be considered for employment without regard to their race or sex.⁵¹ Article III federal courts are empowered to decide only "cases and controversies"; the standing requirement is a product of this limitation.⁵² To have standing to sue, a

48. *Id.*

49. *Id.* at 18-19.

50. *Id.* at 19-20.

51. *See supra* text accompanying notes 8-9.

52. *E.g.*, *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982); *see also* U.S. CONST. art. III, § 1.

plaintiff must show a sufficient personal stake in the outcome of the litigation.⁵³ The Supreme Court has acknowledged, however, that it has been inconsistent in defining Article III standing.⁵⁴ Some members of the Court and some commentators have been more critical of the standing doctrine's complexity.⁵⁵

The current incarnation of Article III's standing requirement, which the Court has stated can be "distilled from [its] decisions,"⁵⁶ has three elements. First, the plaintiff must demonstrate an injury in fact. The plaintiff next must show that the injury can be traced to the challenged action. Finally, the plaintiff must show that the injury is likely to be redressed by a favorable decision on the merits.⁵⁷ In addition, the Court has articulated a number of "prudential limitations" on standing that are not mandated by Article III.⁵⁸ Congress by statute

Article III's requirements do not apply to state court actions. *See, e.g., International Primate Protection League v. Administrators of Tulane Educ. Fund*, 111 S. Ct. 1700, 1705 n.4 (1991).

53. *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962), which states that "the standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify the exercise of the court's remedial powers on his behalf"); *Linda R.S. v. Richard D.*, 410 U.S. 614, 616 (1973); *Sierra Club v. Morton*, 405 U.S. 727, 731-32 (1972) (stating that standing addresses whether a party has a sufficient stake in an otherwise justiciable controversy).

54. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).

55. For example, Justice Brennan in *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), wrote,

The law of standing as developed by the Supreme Court has become an area of incredible complexity. Much that the Court has written appears to have been designed to supply retrospective satisfaction rather than future guidance. The Court has itself characterized its law of standing as a "complicated specialty of federal jurisdiction." . . . One cannot help asking why this should be true.

Id. at 66 n.13 (Brennan, J., concurring) (alteration in original) (citations omitted); *see also Wright v. Regan*, 656 F.2d 820, 828 (D.C. Cir. 1981) (noting a "welter and confusion of case law" in the area of standing), *rev'd sub nom. Allen v. Wright*, 468 U.S. 737 (1984). Professor William Fletcher wrote, "The structure of standing law in the federal courts has long been criticized as incoherent . . . [,] 'permeated with sophistry,' as 'a word game played by secret rules,' and more recently as a largely meaningless 'litany' recited before 'the Court . . . chooses up sides and decides the case.'" William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 221 (1988) (citations omitted) (second deletion in original).

56. *Whitmore*, 495 U.S. at 155.

57. *Id.*; *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472-73 (1982).

58. *See Valley Forge Christian College*, 454 U.S. at 474-75; *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979). These prudential limitations on standing require that the plaintiff generally must assert her own legal rights and

may negate any prudential limitations and extend standing to the limits of Article III.⁵⁹

Although the Court has not spoken with one voice on this issue, it often has stated that the standing inquiry is related intimately to the particular cause of action asserted by the plaintiff.⁶⁰ The Court has written that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute."⁶¹ Professor William Fletcher has stated, consistent

interests, not those of third parties. *Valley Forge Christian College*, 454 U.S. at 474. The Court also has refused to adjudicate what it refers to as "'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches [of government]." *Id.* at 475 (quoting *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975)). Finally, the Court requires that the plaintiff's complaint fall within the zone of interests that the statute or constitutional guarantee in question is intended to protect or regulate. *Id.* at 475.

59. *Gladstone*, 441 U.S. at 100; *Simon*, 426 U.S. at 58-59 (Brennan, J., concurring); *Warth*, 422 U.S. at 501; Fletcher, *supra* note 55, at 223, 252. *But cf.* *Kansas v. Utilicorp United Inc.*, 497 U.S. 199 (1990) (holding that although § 4 of the Clayton Act, 15 U.S.C. § 15(a) (1988), provides a cause of action to any person injured in his business or property by reason of anything forbidden in the antitrust laws, the Court's "indirect purchaser rule" bars a suit by customers of a utility against a supplier who illegally overcharged the utility even though the entire overcharge was passed on to the customers).

60. In *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 111 S. Ct. 1700 (1991), the Court stated that

[s]tanding does not refer simply to a party's capacity to appear in court. Rather, standing is gauged by the specific common-law, statutory or constitutional claims that a party presents. "Typically, . . . the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted."

Id. at 1704 (quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984) (deletion in the original); *cf. infra* note 62 and accompanying text).

In contrast, the Court has stressed on several occasions that the standing inquiry is a threshold determination that "in no way depends on the merits of the plaintiff's contention that particular conduct is illegal." *Warth*, 422 U.S. at 500 (stating that the rules of standing are threshold determinants of the propriety of judicial intervention), *quoted in Whitmore*, 495 U.S. at 155; *see also Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 52 (1976) (Brennan, J., concurring) (stating that standing focuses on the stake of the party seeking to get a complaint before a federal court and not on the issues to be adjudicated).

61. *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973); *see also Valley Forge Christian College*, 454 U.S. at 492 (Brennan, J., dissenting) ("The Court makes a fundamental mistake when it determines that a plaintiff has failed to satisfy . . . any . . . test of 'standing,' without first determining whether the Constitution or statute defines injury, and creates a cause of action for redress of that injury, in precisely the circumstance presented to the Court."); *Simon*, 426 U.S. at 54 n.5 (holding that Congress may create new interests, the invasion of which will confer standing); *Warth*, 422 U.S. at 500 (noting that the existence of Article III standing "often turns on the nature and source of the claim asserted"); *Sierra Club v. Morton*, 405 U.S. 727, 732 n.3

with this reasoning, that the standing question should focus on whether the plaintiff has stated a cognizable claim.⁶² Congress's power to create a duty or right should include the power to decide who has standing to enforce it.⁶³ When a plaintiff seeks to enforce an interest that is protected by statute, asking

(1972) (stating that whether a litigant is the proper party to adjudicate a particular issue is a question within Congress's power to determine); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 152 (1951) (Frankfurter, J., concurring) (stating that "standing may be based on an interest created by . . . a statute").

62. Fletcher, *supra* note 55, at 223, 229 (arguing that standing "should be seen as a question of substantive law, answerable by reference to the statutory . . . provision whose protection is invoked"); cf. Christopher K. Skinner, Comment, *Fair Housing—The Use of Testers to Enforce Fair Housing Laws—When Testers Are Sued*, 21 ST. LOUIS U. L.J. 170, 190 (1977) (arguing that the question whether a black tester has standing to sue under the Fair Housing Act "requires a close examination of the language of the statute"). *But see* Paul A. LeBel, *Standing After Havens Realty: A Critique and an Alternative Framework for Analysis*, 1982 DUKE L.J. 1013, 1018, 1019 (arguing that focusing on whether the defendant invaded a plaintiff's congressionally created right is not properly a standing inquiry, but raises instead the separate question whether the plaintiff stated a claim upon which relief could be granted). Professor LeBel argues that the only Article III requirement for standing is the presence of an adverse relationship and that the courts should consider a number of practical limitations on standing on a case-by-case basis. *Id.* at 1033–34.

According to Professor Fletcher, being more sensitive to the particular right at issue and to the proper definition of the plaintiff class is more consistent with the historical approach to standing than is applying disembodied and abstract general principles. Fletcher, *supra* note 55, at 249. The Court itself has suggested that the search for a "standing formula" has led to the confusion of the law in this area. *See Valley Forge Christian College*, 454 U.S. at 475 (noting that inconsistency in standing cases demonstrates that the concept cannot be defined tersely).

63. Fletcher, *supra* note 55, at 223–24. "So long as the substantive rule [it creates] is constitutionally permissible, Congress should have plenary power to create statutory duties and to provide enforcement mechanisms for them . . ." *Id.* at 251. *See generally* Kenneth C. Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 654–69 (1973). The Congressional power to confer standing by creating legal rights has some limits. *See, e.g., Warth*, 422 U.S. at 501 (noting that Congress may legislate without regard to prudential standing rules but must abide by Article III's requirement of distinct and palpable injury); *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990) (holding that "Congress may not circumvent Article III by authorizing someone whose substantive rights have *not* been invaded to sue to redress an invasion of someone else's substantive rights").

Superimposing a test for standing on a statutory cause of action, however, is a way for the Court to enlarge its powers at the expense of Congress:

For the Court to limit the power of Congress to create statutory rights enforceable by certain groups of people—to limit, in other words, the power of Congress to create standing—is to limit the power of Congress to define and protect against certain kinds of injury that the Court thinks it improper to protect against.

Fletcher, *supra* note 55, at 233. Superimposing such a test "limits the power of the legislature to articulate public values and choose the manner in which they may be enforced." *Id.* In effect, it becomes a form of substantive due process.

whether that plaintiff has standing is the same as asking whether that plaintiff has a claim on the merits.⁶⁴

The best example of the Court's application of this principal is *Havens Realty Corp. v. Coleman*,⁶⁵ which involved the standing of testers to sue under the Fair Housing Act of 1968 (FHA).⁶⁶ The defendant realty company and one of its employees allegedly engaged in "racial steering." They purportedly showed black applicants buildings occupied primarily by blacks and refused to show them buildings and neighborhoods occupied primarily by whites.⁶⁷

The plaintiffs were three individuals and an organization committed to combatting housing discrimination in Richmond, Virginia. The organization, Housing Opportunities Made Equal (HOME), operated a housing counseling service and investigated and referred complaints alleging housing discrimination.⁶⁸ One of the individual plaintiffs was a black man interested in renting an apartment. The defendants falsely told him that no apartments were available in a particular complex. His standing was not at issue before the Court.⁶⁹ The other two individual plaintiffs, one black and one white, were testers hired by HOME to determine whether the defendants engaged in racial steering. On three occasions, both testers asked about the availability of apartments in the same area, although they had no interest in renting apartments there. Each time, the black tester was told that there were no apartments available; the white tester was told, accurately, that apartments were available.⁷⁰

In analyzing whether the testers had standing, the Court acknowledged that prudential barriers to standing were inapplicable because Congress intended FHA standing to be coextensive with Article III's limits.⁷¹ Thus, the *Havens* Court

64. STEPHEN G. BREYER & RICHARD B. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT AND CASES* 1084 (2d ed. 1985).

65. 455 U.S. 363 (1982).

66. 42 U.S.C. §§ 3601-3631 (1988).

67. *Havens*, 455 U.S. at 366 & n.1.

68. *Id.* at 367-68.

69. The black plaintiff's claim was not dismissed by the district court, and he prevailed at trial as a class representative. *Id.* at 369-70.

70. *Id.* at 368.

71. *Id.* at 372; see also *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 109 (1979) (stating that standing under the FHA is coextensive with Article III limits); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972) (concluding that the

determined that the sole requirement for standing to sue under the FHA was the Article III minimum of injury in fact.⁷²

The Court next examined the FHA's language to decide whether the testers had standing. It found that Congress conferred on all persons a legal right to truthful information about available housing when it made it unlawful "[t]o represent to *any person* because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available."⁷³ The Court stated that

[t]his congressional intention cannot be overlooked in determining whether testers have standing to sue. As we have previously recognized, "[t]he actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing . . .'" Section 804(d), which, in terms, establishes an enforceable right to truthful information concerning the availability of housing, is such an enactment. A tester who has been the object of a misrepresentation made unlawful under § 804(d) has suffered injury in precisely the form the statute was intended to guard against, and therefore has standing to maintain a claim for damages under the Act's provisions.⁷⁴

The Court found no support in section 804(d) for the argument that the testers were not injured because they did not intend to rent an apartment. Congress did not require in section 804(d) that a plaintiff have a bona fide interest in renting or purchasing real estate. Testers who receive false information have standing to sue under that section.⁷⁵ The black tester had standing because she had received false information. The white tester had no standing because he did not receive false information. His statutory right to accurate information concerning the availability of housing was not violated.⁷⁶ Since *Havens*, numerous courts have analyzed the

language of the FHA showed "a congressional intention to define standing as broadly as is permitted by Article III of the Constitution").

72. *Havens*, 455 U.S. at 372.

73. *Id.* at 373 (quoting 42 U.S.C. § 3604(d) (1976)) (alteration in original).

74. *Id.* at 373-74 (second and third alterations in original) (citations omitted).

75. *Id.* at 374.

76. *Id.* at 374-75. According to Professor LeBel, the Court erred in concluding that

rights and duties created by the FHA and have concluded that testers have standing to sue for violations of the rights created by the statute.⁷⁷

Congress's power to create statutory rights and duties and to provide enforcement mechanisms for them includes the power to create a cause of action for plaintiffs who act to redress injuries to themselves. Congress also has the power to create a cause of action for plaintiffs who act in part as private attorneys general. Prior to *Havens*, the Court recognized in

the white tester did not have standing as a tester because the defendants' conduct should be viewed as having inflicted an informational injury on the class of people to whom the defendant made representations. *LeBel*, *supra* note 62, at 1021.

The *Havens* Court, following its decision in *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979), concluded that both testers had standing as members of the community affected by the defendants' racial steering practices. *Havens*, 455 U.S. at 377.

The *Havens* Court also concluded that the organizational plaintiff had standing. The organization claimed that it had to devote significant resources to identify and to counteract the defendants' practices, thereby frustrating its efforts to assist in establishing equal access to housing through counseling and other referral services. The Court held that these allegations of injury were sufficient to constitute injury for standing purposes because they were more than simply allegations of a setback to the organization's abstract social interests. *See id.* at 378.

77. *E.g.*, *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1527 (7th Cir. 1990) (holding that testers have standing under § 3604(b) of the FHA, which makes unlawful "discrimination in the provision of services" in connection with the sale or rental of a dwelling); *see also* *Village of Bellwood v. Gorey & Assocs.*, 664 F. Supp. 320, 326-27 (N.D. Ill. 1987) (holding that black testers had standing under the FHA because they alleged that the defendants made misrepresentations concerning the availability of houses for inspection because of their race); *Coel v. Rose Tree Manor Apartments, Inc.*, No. 84-1521, 1987 U.S. Dist. LEXIS 9212, at *16, 1987 WL 18,393, at *6 (E.D. Pa. Oct. 13, 1987) (holding that testers have the same right to truthful information about apartment rentals as anyone else and the same rights as anyone else "to 'shop' for apartments without any particular interest in actually entering into a lease"); *Education/Instruccion, Inc. v. Commonwealth Ave. Assocs.*, Civ. Action No. 81-208-MA (D. Mass. Jan. 6, 1983) (LEXIS, Genfed library, Dist file) (holding that the black testers, but not the white testers, had standing under the FHA because the black testers alleged that they were denied the opportunity to view and inspect available residential property and that they received misinformation).

The lower federal courts have concluded that housing testers discriminated against on the basis of race have standing under 42 U.S.C. § 1982 (1988) (prohibiting discrimination in the sale, lease, or rental of any residential property receiving federal monies, thereby affirming the right of all citizens to hold and convey property) even though, unlike the FHA, § 1982 does not create any specific statutory right, such as the right to receive accurate information about the availability of housing. *See, e.g.*, *Watts v. Boyd Properties, Inc.* 758 F.2d 1482 (11th Cir. 1985); *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894 (3d Cir. 1977); *City of Evanston v. Baird & Warner, Inc.*, No. 89 C 1098, 1990 U.S. Dist. LEXIS 15,407, at *3, 1990 WL 186,575, at *5 (N.D. Ill. Nov. 15, 1990); *Gorey & Assocs.*, 664 F. Supp. at 328; *Education/Instruccion, Inc.*, No. 81-208-MA (D. Mass. Jan. 6, 1983) (LEXIS, Genfed library, Dist file).

*Pierson v. Ray*⁷⁸ that a plaintiff in a civil rights action may vindicate a greater societal goal by benefitting nonparties to the lawsuit. The Court also found that a plaintiff may suffer injury for Article III purposes even if the plaintiff acted to precipitate the lawsuit. In *Pierson*, the plaintiffs, a multiracial group of clergy on a pilgrimage from New Orleans to Detroit in 1965, planned in advance to stop in Jackson, Mississippi and to use the segregated facilities at the interstate bus terminal located there. They planned to be arrested and jailed. The plaintiffs were arrested after they tried to enter the restaurant in the Jackson terminal. They were convicted under a state statute forbidding congregating and causing a breach of the peace.⁷⁹ They subsequently sued the police and presiding judge under section 1983, but the court of appeals concluded that they were not entitled to a recovery because they consented to the defendants' conduct.⁸⁰ The Supreme Court reversed, explaining that absent evidence that the plaintiffs "tricked" or "goaded" the officers into arresting them, the plaintiffs had not consented to the injury and thus they were entitled to relief.⁸¹ The Court held that the plaintiffs had the right to use the waiting room of the terminal and that exercising that right in a peaceful, orderly, and inoffensive manner did not disqualify them from damages under section 1983.⁸²

A plaintiff can vindicate the rights of others by bringing suit so long as the plaintiff suffered some injury, however slight.⁸³

78. 386 U.S. 547 (1967).

79. *Id.* at 548-50.

80. *Pierson v. Ray*, 352 F.2d 213, 220-21 (5th Cir. 1965), *rev'd*, 386 U.S. 547 (1967).

81. 386 U.S. at 558.

82. *Id.* The Court had reached a similar conclusion in *Evers v. Dwyer*, 358 U.S. 202 (1958). The plaintiff, a black resident of Memphis, Tennessee, boarded a bus in Memphis for the purpose of challenging the constitutionality of a statute requiring segregated seating. He left the bus after two police officers instructed him to "go to the back of the bus, get off, or be arrested." *Id.* at 203-04 (quoting the district court's findings). He brought suit seeking a declaration of his and others' right to ride the bus free from segregated seating arrangements. He also sought an injunction against enforcement of the statute. A three-judge district court dismissed the case on the ground that there was no actual controversy within the meaning of the Declaratory Judgment Act, 28 U.S.C. § 2201 (1988), because the plaintiff boarded the bus to institute the litigation and therefore was not representative of a class of black citizens who used the bus as a means of transportation. *Evers*, 358 U.S. at 202-03.

The Supreme Court reversed. It held that the fact that the plaintiff boarded the bus to institute the litigation was of no significance. *Id.* at 204. It reasoned that "[a] resident of a municipality who cannot use [its] transportation facilities . . . without being subjected . . . to special disabilities . . . [had] a substantial, immediate, and real interest in the validity of the statute which imposed[d] the disability." *Id.*

83. Justice Brennan noted correctly that "the Constitution draws no distinction

The Article III judicial power exists to protect against or to redress injury to the complaining party, even though the court's judgment may benefit others collaterally.⁸⁴ It is not objectionable that a plaintiff otherwise entitled to enforce a statutory right or duty wants something beyond personal vindication.⁸⁵ Thus, when interpreting statutory rights or duties, courts should consider what forms of harm private enforcement can prevent or cure.⁸⁶

Acting on behalf of others as a private attorney general has been approved in the housing discrimination context. In *Trafficante v. Metropolitan Life Insurance Co.*,⁸⁷ the Court explained that Congress intended private FHA complainants to "act not only on their own behalf but also 'as private attorneys general in vindicating a policy that Congress considered to be of the highest priority.'"⁸⁸ The Court recognized this as an appropriate exercise of congressional authority.⁸⁹ The *Havens* Court came to the same conclusion when it found that a tester had standing in part because she was serving a purpose beyond seeking redress for an injury personal to her.⁹⁰ The tester vindicated the rights of blacks who wanted to live in an apartment in the area.⁹¹ The *Havens* Court concluded that Congress intended to permit litigants under the FHA to vindicate their own rights *and* the rights of others.⁹²

between injuries that are large, and those that are comparatively small. . . . The only distinction that a Constitution guaranteeing justice to all can recognize is one between some injury and none at all." *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 497 (1982) (Brennan, J., dissenting); accord *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 34 n.25 (1975) (holding that a small injury is sufficient for standing). The magnitude of the injury sustained by the plaintiff will be relevant to the remedies available to the plaintiff, see *infra* Part III, but it should not affect the plaintiff's right to bring the case.

84. *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

85. *Fletcher*, *supra* note 55, at 242.

86. According to Professor Fletcher, these considerations are the proper content of the causation and redressability requirements of current Article III standing doctrine where a federal statutory right is involved. Considering these factors ensures that the statutory right is interpreted as broadly as intended by Congress. *Id.*

87. 409 U.S. 205 (1972).

88. *Id.* at 211 (quoting the amicus brief of the Solicitor General).

89. *Id.* at 209, 211.

90. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982).

91. *Fletcher*, *supra* note 55, at 245.

92. *Havens*, 455 U.S. at 373-74; *Fletcher*, *supra* note 55, at 254 (concluding that "Congress intended that certain persons not directly injured in a conventional sense be empowered to enforce those statutory duties" imposed by the FHA); see also *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990) (noting that "Congress created [the right to be free from misrepresentations] so that private parties could enforce the

Therefore, whether testers⁹³ have standing to sue under Title VII is a question of statutory interpretation. The answer depends on the purposes of Title VII, the nature of the rights Congress created in the statute, and the enforcement scheme created by Congress, including the class of persons Congress intended to permit to enforce the statutory rights and duties.⁹⁴

The starting point is the statutory language. Congress chose to permit charges of discrimination under Title VII to be filed "by or on behalf of a person claiming to be aggrieved, or by a member of the [EEOC]."⁹⁵ The Supreme Court has held that the use of the "person claiming to be aggrieved" language in the FHA showed a congressional intent to define standing as broadly as permitted by Article III.⁹⁶ Because Title VII and the FHA are both civil rights acts, Congress probably intended the same language in the two statutes to have the same meaning.⁹⁷ The enforcement provisions of Title VII and the FHA are essentially the same as well.⁹⁸ Consequently, the courts have

[FHA] as private attorneys general without running afoul of Article III").

93. Many of the tester cases filed to date have been filed on behalf of the organizations employing the testers as well as on the testers' behalf. See, e.g., *supra* notes 5-6. If the organization can show it suffered injury as a result of the defendant's alleged discriminatory practices, it would have standing under *Gladstone* and *Havens*. See *supra* note 76.

Moreover, an association has standing to sue in a representational capacity, even if it has not been injured itself, when: (a) it seeks to represent members who would otherwise have standing; (b) it seeks to protect interests that are relevant to its purpose; and (c) neither the claim asserted nor the relief requested requires individual members to participate in the lawsuit. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). Under the third prong, an association may seek declaratory and injunctive relief on behalf of its members, but not damages. See *Warth v. Seldin*, 422 U.S. 490, 515-16 (1975) (holding that an association may not sue to recover damages for individual members because establishing "the fact and extent of injury would require individualized proof," thereby requiring each member who claims damages to be a party to the lawsuit).

94. The authors of two recent Comments also have argued that testers have standing to sue under Title VII. See Shannon E. Brown, Comment, *Tester Standing Under Title VII*, 49 WASH. & LEE L. REV. 1117, 1125-33 (1992) (arguing that precedent and history indicate that testers have standing); Steven G. Anderson, Comment, *Tester Standing Under Title VII: A Rose by Any Other Name*, 41 DEPAUL L. REV. 1217, 1258-68 (1992) (proposing that the policies underlying both Title VII and federal standing doctrine support tester standing).

95. 42 U.S.C. § 2000e-5(b) (1988).

96. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 103 (1979); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 208-09 (1972).

97. *EEOC v. Bailey Co.*, 563 F.2d 439, 453 (6th Cir. 1977), *cert. denied*, 435 U.S. 915 (1978).

98. Under both statutes, private parties are permitted to file suit in district court to enforce the statutory rights and duties. 42 U.S.C. § 2000e-5(f) (1988) (Title VII); *id.* § 3613(a) (FHA). Both statutes provide for an administrative phase prior to adversarial

recognized uniformly that Congress intended standing under Title VII to be construed as broadly as permitted by Article III.⁹⁹

Broadly defining the class of persons permitted to sue to redress violations of Title VII is consistent with the ambitious purpose of the statute—to eradicate discrimination in employment on the basis of race, color, religion, sex, or national origin. To accomplish the complementary purpose of eradicating discrimination in housing, Congress intended standing to be interpreted broadly under the FHA.¹⁰⁰ The Ninth Circuit properly rejected the argument that standing under Title VII should be interpreted more narrowly than under the FHA.¹⁰¹ The court concluded that standing should be granted generously

judicial proceedings, in which the responsible agency is charged with attempting to resolve the dispute through conciliation and mediation. Under the FHA the administrative phase is optional; under Title VII it is mandatory. *See id.* § 3610(a)–(b) (FHA); § 2000e-5(b) (Title VII). Unlike the FHA, which was amended only recently to give HUD the power to try cases before an administrative law judge, Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, sec. 8, § 812(b), 102 Stat. 1619, 1629 (codified at 42 U.S.C. § 3612(b) (1988)), and to give the Attorney General the power to try cases in federal court, *id.* sec. 8, § 814(a), 102 Stat. at 1634 (codified at 42 U.S.C. § 3614(a) (1988)), Title VII gives the EEOC the power to file charges in its own name, 42 U.S.C. § 2000e-5(b) (1988) (providing that charges may be filed “by a member of the Commission”). The provision giving the EEOC this power was added to the statute in 1972 to expand the coverage of Title VII and to increase compliance. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103. There is no suggestion in the language or history of this provision that Congress intended to narrow the class of plaintiffs who could sue under Title VII. Thus, this power of public enforcement provides no basis for interpreting the “person claiming to be aggrieved” language more narrowly in Title VII than in the FHA. *Stewart v. Hannon*, 675 F.2d 846, 849 (7th Cir. 1982); *Bailey Co.*, 563 F.2d at 453; *Waters v. Heublein, Inc.*, 547 F.2d 466, 469–70 (9th Cir. 1976), *cert. denied*, 433 U.S. 915 (1977).

99. *See, e.g., Stewart*, 675 F.2d at 849; *EEOC v. Mississippi College*, 626 F.2d 477, 482–83 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981); *Bailey Co.*, 563 F.2d at 453; *Waters*, 547 F.2d at 489; *Senter v. General Motors Corp.*, 532 F.2d 511 (6th Cir.), *cert. denied*, 429 U.S. 870 (1976); *Hackett v. McGuire Bros.*, 445 F.2d 442, 446 (3d Cir. 1971).

100. *See supra* note 71 and accompanying text.

101. *Waters*, 547 F.2d at 469. The Third Circuit likewise read Congressional intent correctly when it stated,

The national policy reflected . . . in Title VII of the Civil Rights Act of 1964 . . . may not be frustrated by the development of overly technical judicial doctrines of standing or election of remedies. If the plaintiff is sufficiently aggrieved so that he claims enough injury in fact to present a genuine case or controversy in the Article III sense, then he should have standing to sue . . .

Hackett, 445 F.2d at 446–47; *see also Pennsylvania v. Local Union 542, Int'l Union of Operating Eng'rs*, 469 F. Supp. 329, 388 (E.D. Pa. 1978) (arguing that public policy requires that “standing be interpreted as liberally as Article III permits in Title VII . . . actions”).

under both statutes because "[t]he distinction between laws aimed at desegregation and laws aimed at equal [employment] opportunity is illusory."¹⁰²

As discussed earlier, the question whether a tester claims sufficient injury to raise a genuine case or controversy depends on whether the tester can allege that her rights under Title VII have been violated or that the defendant breached a duty owed to her under the statute.¹⁰³ "The policy [expressed in Title VII], of course, is broadly to proscribe discrimination in employment practices."¹⁰⁴ The provisions defining prohibited acts should be given "a liberal construction in order to carry out the purposes of Congress to eliminate . . . unfairness, and the humiliation of discrimination."¹⁰⁵ The provisions defining unlawful discrimination have been interpreted to prohibit acts that have either the purpose or the effect of discriminating on the basis of a prohibited classification.¹⁰⁶

The language of Title VII illuminates congressional intent. Congress defined acts of employers, employment agencies, and labor organizations that are "unlawful employment practices" in section 2000e-2.¹⁰⁷ These provisions reflect comprehensive legislative intent to proscribe employment discrimination. Under section 2000e-2(a)(1), it is unlawful for an employer "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

102. *Waters*, 547 F.2d at 469.

103. See *supra* note 61 and accompanying text.

104. *Arizona Governing Comm. for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1103 (1983); see also *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 67 (1977).

105. *Armbruster v. Quinn*, 498 F. Supp. 858, 861 (E.D. Mich. 1980), *rev'd on other grounds*, 711 F.2d 1332 (6th Cir. 1983); accord *Baker v. Stuart Broadcasting Co.*, 560 F.2d 389 (8th Cir. 1977). Title VII's legislative history indicates that Congress intended that the courts interpret discrimination broadly. See, e.g., 110 CONG. REC. 7213 (1964) (Interpretive memorandum of Title VII by Sens. Clark and Case, the bill's floor managers) (defining discrimination as making a distinction or a difference in treatment or favor); see also *Willingham v. Macon Tel. Publishing Co.*, 482 F.2d 535, 538 n.3 (5th Cir. 1973).

106. For example, Title VII prohibits both intentional discrimination and, under the disparate impact rubric, the use of neutral employment practices that have an adverse impact on members of a protected class. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429 (1971); see also *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973). Moreover, in 42 U.S.C. § 2000e-2(c)(3) (1988), Congress prohibited "attempts" by a labor organization to cause an employer to discriminate, even if no discrimination results.

107. 42 U.S.C. § 2000e-2(a) to (c) (1988).

origin."¹⁰⁸ There is no language that suggests that an applicant for employment must have a bona fide interest in employment to have a right to be considered for the job on equal terms with other applicants. In fact, to make out a prima facie case of discriminatory refusal to hire, a plaintiff need not show that she would have accepted the job if it were offered.¹⁰⁹ The fact that the plaintiff would not have accepted a job offer might affect the remedies available, but it is not relevant to the standing issue. Put simply, under section 2000e-2(a)(1), an individual has the right to be considered for employment without regard to race, sex, or any other forbidden characteristic, and an employer has a corresponding duty to consider all applicants without regard to those characteristics.

In section 2000e-2(a)(2), Congress defined this right and duty more explicitly. That section makes it unlawful for an employer "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, because of such individual's race, color, religion, sex, or national origin."¹¹⁰ Thus, the statute grants all applicants the right to be considered for employment on their merits, whether or not they intend to accept a job offer. Just as the FHA grants all individuals the right to shop for apartments free from discrimination, Title VII grants individuals a similar right to "shop" for a job, even if they are only "window shopping."¹¹¹ Testers have standing to enforce this right.¹¹²

108. 42 U.S.C. § 2000e-2(a)(1) (1988) (emphasis added).

109. To make out a prima facie discrimination case under Title VII, a plaintiff must show that: 1) she was a member of a protected class, 2) she applied for and was qualified for a job for which the employer was seeking applicants, 3) she was rejected, and 4) the employer continued to seek applicants from persons with the plaintiff's qualifications. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

110. 42 U.S.C. § 2000e-2(a)(2) (1988) (emphasis added).

111. *Cf. Coel v. Rose Tree Manor Apartments, Inc.*, No. 84-1521, 1987 U.S. Dist. LEXIS 9212, at *16, 1987 WL 18,393, at *6 (E.D. Pa. Oct. 13, 1987).

112. Testers also have standing to sue employment agencies that for discriminatory reasons refuse to refer them for employment. It is unlawful for an employment agency "to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(b) (1988). Under Title VII, an individual's right to be considered for referral on an equal basis with others in no way depends on whether the individual has a bona fide interest in ultimately accepting an offer of employment. The provisions prohibiting discrimination by labor organizations are similarly broad and make no reference to the individual's intent to accept union

That a tester's injury may be less severe than the injury suffered by an individual with an actual interest in employment is insignificant. Unlawful discrimination under Title VII is by definition "class discrimination."¹¹³ "[C]laims under Title VII involve the vindication of a major public interest, and . . . any action under [Title VII] involves considerations beyond those raised by the individual claimant."¹¹⁴ Therefore, "in the enforcement process of Title VII . . . [t]he private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices."¹¹⁵ By providing attorneys' fees to prevailing plaintiffs, "Congress intended to facilitate the bringing of discrimination complaints."¹¹⁶ By permitting Title VII plaintiffs to act as private attorneys general vindicating an important public policy, Congress anticipated that these plaintiffs would represent the interests of individuals not before the court. Because testers who receive disparate treatment on the basis of race, sex, or some other prohibited characteristic suffer some injury under Title VII, they have standing to sue in order to vindicate the interests of individuals not before the court.

membership or to work for an employer after referral by the union. 42 U.S.C. § 2000e-2(c) provides:

It shall be an unlawful employment practice for a labor organization—

- (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
- (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
- (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Id.

113. *League of United Latin Am. Citizens v. City of Santa Ana*, 410 F. Supp. 873, 887 (C.D. Cal.), *modified on other grounds*, 13 Fair Empl. Prac. Cas. (BNA) 1019 (C.D. Cal. 1976) (quoting *Huff v. N.D. Cass Co.*, 485 F.2d 710, 713-14 (5th Cir. 1973)).

114. *Abron v. Black & Decker (U.S.) Inc.*, 654 F.2d 951, 967 (4th Cir. 1981) (quoting S. CONF. REP. NO. 681, 92d Cong., 2d Sess. (1972), *reprinted in* SENATE COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., 2D SESS., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 1847 (1972)).

115. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1973).

116. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63 (1980); *see also* *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418-19 (1978); *Kennedy v. Whitehurst*, 690 F.2d 951, 953 (D.C. Cir. 1982).

The only court to address the question of tester standing under Title VII ruled that two black testers who were denied referrals by an employment agency had standing to sue that agency under 42 U.S.C. § 2000e-2(b) (1988), which makes it unlawful for an employment agency "to fail or refuse to refer for employment . . . any individual because of his race."¹¹⁷ The court correctly ruled that the section creates a right to nondiscriminatory referrals. The tester plaintiffs claimed that the agency violated that right, an injury sufficient to confer standing on the testers.¹¹⁸ The court noted, however, that testers would not have standing to sue an employer for discriminatory failure to hire, because testers do not actually seek a job and could not be injured by a failure to hire.¹¹⁹ This analysis is incorrect. As discussed, there is no textual support in Title VII for the conclusion that an applicant for employment has a right to nondiscriminatory treatment only if that applicant has a bona fide interest in a job with the defendant employer.¹²⁰

III. REMEDIES AVAILABLE TO EMPLOYMENT DISCRIMINATION TESTERS

The current EEOC position is to wait for charges to be filed by private groups or individuals who engage in testing. This approach is problematic because it is unlikely to fill the enforcement void identified in Part I. First, private parties are not obligated to limit the use of testers to the context of hiring for lower-skilled, entry-level positions.¹²¹ Second, under current

117. *Fair Employment Council v. BMC Mktg. Corp., Inc.*, 1993 Daily Lab. Rep. (BNA) No. 118, at E-1 (D.D.C. June 22, 1993) (quoting 42 U.S.C. § 2000e-2(b) (1988)) (emphasis added by the *Fair Employment Council* court).

118. *Id.* at E-1 to E-2.

119. *Id.* at E-2.

120. See *supra* text accompanying notes 107-12; cf. *Northeastern Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 113 S. Ct. 2297, 2301 (1993) (holding that when the government erects a barrier that makes it more difficult for members of a group to obtain a benefit, a member of that group need not show that she would have obtained the benefit in order to have standing; the denial of equal treatment itself constitutes injury).

121. There probably is no enforcement void in the context of hiring for higher-skilled, upper-level positions. See *supra* Part I. Testers should not be permitted to intrude unnecessarily into employers' hiring practices for such positions.

law, insufficient remedies are available to encourage private tester litigation. The remedies available are discussed in this Part. Also, as discussed in Part IV, state common-law causes of action and attorney disciplinary rules might be used against testers and their counsel to deter the practice.

A. Attorneys' Fees and the Supreme Court

Because many civil rights attorneys rely on statutory fee awards to earn a living, testing may be underused if attorneys representing testers cannot recover their fees.¹²² Under recent Supreme Court decisions, a victorious plaintiff is a "prevailing party" for purposes of the attorneys' fees provisions of Title VII only if the plaintiff obtains relief that materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff. Moreover, when the plaintiff's success is purely technical or *de minimis*, no fees can be recovered. These restrictions on fee awards may deter the use of testers.

The standards for recovery of attorneys' fees under Title VII are analogous to those under other federal civil rights statutes. Title VII provides that "[i]n any action or proceeding . . . the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs."¹²³ In the Civil Rights Attorneys Fees Act of 1976 (section 1988),¹²⁴ Congress used identical language to provide for an award of attorneys' fees under other civil rights statutes.¹²⁵ Thus, decisions interpreting

122. *Evans v. Jeff D.*, 475 U.S. 717, 758 & n.13, 760, 766 (1986) (Brennan, J., dissenting) (noting that civil rights practitioners must be concerned with earning a living, and that "[t]he congressional policy underlying the Fees Acts is . . . to create incentives for lawyers to devote time to civil rights cases by making it economically feasible for them to do so"); *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968) (stating that "[i]f successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest" and asserting that "Congress . . . enacted the provision for counsel fees . . . to encourage individuals injured by racial discrimination to seek judicial relief").

123. 42 U.S.C. § 2000e-5(k) (1988).

124. 42 U.S.C. § 1988 (1988 & Supp. 1991).

125. Section 1988 provides that "[i]n any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." *Id.* § 1988(b).

section 1988 generally govern interpretation of Title VII's attorneys' fees provision.¹²⁶

Recent Supreme Court decisions have interpreted section 1988 restrictively. In *Rhodes v. Stewart*,¹²⁷ the Court extended its ruling in *Hewitt v. Helms*,¹²⁸ which held that "a favorable judicial statement of law in the course of litigation that results in judgment against the plaintiff does not suffice to render [the plaintiff] a 'prevailing party.'"¹²⁹ The *Rhodes* Court ruled that plaintiffs who succeeded on their claims but obtained declaratory relief which had no prospective effect were not prevailing parties.¹³⁰ In *Rhodes*, plaintiffs Reese and Stewart, who both were incarcerated, filed a complaint in January 1978 alleging that their First and Fourteenth Amendment rights were violated by prison officials who refused them permission to subscribe to a magazine. Reese died in 1979, and Stewart was released on parole in early 1980.¹³¹ Nevertheless, in 1981 the district court ruled that correctional officers had not applied the proper standards in denying the request for the subscription and ordered the prison officials to comply with those

126. *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983).

127. 488 U.S. 1 (1988).

128. 482 U.S. 755 (1987).

129. *Id.* at 763. In *Hewitt*, the court of appeals ruled that the plaintiff, a prison inmate, showed that his due process rights were violated when a prison hearing committee found him guilty of misconduct on the basis of hearsay evidence and sentenced him to six months of restrictive confinement. *Id.* at 757. On remand, the defendants established an immunity defense, and the district court granted summary judgment in their favor. The court of appeals affirmed. *Id.* at 758-59. Helms had petitioned the district court on remand for attorneys' fees under § 1988, even though judgment had been entered against him. *Id.* at 759. The district court denied the request, but the court of appeals reversed, stating that its earlier determination that Helms's due process rights were violated made Helms a prevailing party. *Id.* The Supreme Court reversed, reasoning that

[i]n order to be eligible for attorney's fees under § 1988, a litigant must be a 'prevailing party.' Whatever the outer boundaries of that term may be, Helms does not fit within them. Respect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail. . . . Helms obtained no relief. Because of the defendants' official immunity he received no damages award. No injunction or declaratory judgment was entered in his favor. Nor did Helms obtain relief without benefit of a formal judgment—for example, through a consent decree or settlement. . . . The most that he obtained was an interlocutory ruling that his complaint should not have been dismissed for failure to state a constitutional claim. That is not the stuff of which legal victories are made.

Id. at 759-60 (citations omitted).

130. *Rhodes*, 488 U.S. at 4.

131. *Id.* at 2-3.

standards.¹³² The district court then awarded attorneys' fees to the plaintiffs,¹³³ which the court of appeals affirmed, reasoning that Stewart and Rhodes had obtained a declaratory judgment, making them prevailing parties for purposes of section 1988.¹³⁴

The Supreme Court reversed, concluding that "[a]lthough the plaintiff in *Hewitt* had not won a declaratory judgment, nothing in our opinion suggested that the entry of such a judgment in a party's favor automatically renders that party prevailing under § 1988."¹³⁵ The Court further ruled that a declaratory judgment

constitute[s] relief, for purposes of § 1988, if, and only if, it affects the behavior of the defendant toward the plaintiff. . . . A modification of prison policies on magazine subscriptions could not in any way have benefited either plaintiff, one of whom was dead and the other released before the District Court entered its order.¹³⁶

Thus, under *Rhodes*, the plaintiff must do more than win a lawsuit to be a prevailing party.¹³⁷

Thereafter, in *Texas State Teachers Ass'n v. Garland Independent School District*,¹³⁸ the Court held that to be a prevailing party the plaintiff must be able to point to a resolution of the dispute that changes the legal relationship between the parties.¹³⁹ The plaintiff teachers brought suit under section 1983 against the school district and its officials challenging various school district policies restricting communications concerning employee organizations. After succeeding on some but not all of their claims, the plaintiffs sought fees in the district court.¹⁴⁰ The district court denied the fee request on the ground that the plaintiffs had not succeeded on the "central issue" in the litigation.¹⁴¹ The court of appeals affirmed.¹⁴²

The Supreme Court reversed, holding that the plaintiffs were entitled to recover fees because the district court's order

132. *Id.* at 1-2.

133. *Id.* at 2.

134. *Id.* at 3.

135. *Id.*

136. *Id.* at 4.

137. *Id.* at 3 (Blackmun, J., dissenting).

138. 489 U.S. 782 (1989).

139. *Id.* at 792.

140. *Id.* at 785-87.

141. *Id.* at 787-88.

142. *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 837 F.2d 190 (5th Cir. 1988), *rev'd*, 489 U.S. 782 (1989).

“materially altered the school district’s policy limiting the rights of teachers to communicate with each other concerning employee organizations and union activities.”¹⁴³ Therefore, the teachers were able to point to a resolution of the dispute that changed the defendants’ conduct towards them.¹⁴⁴ On the other hand, the Court stated that if the plaintiff’s success was “purely technical or *de minimis*,” a district court would be justified in denying a fee request.¹⁴⁵

Until the Court’s decision three years later in *Farrar v. Hobby*,¹⁴⁶ it appeared to be a reasonable reading of *Garland* that the “*de minimis* or technical victory” exception was “a second barrier to prevailing party status.”¹⁴⁷ In *Farrar*, however, the Court ruled that this exception is part of the determination of what constitutes a reasonable fee.¹⁴⁸ The plaintiffs in *Farrar* brought an action seeking seventeen million dollars in damages against the lieutenant governor of Texas and others under sections 1983 and 1985, alleging that the plaintiffs were deprived of liberty and property without due process when the state closed a school for delinquent, disabled, and disturbed teens that the plaintiffs owned and operated.¹⁴⁹ The district court entered judgment for the lieutenant governor after a jury concluded that although he committed an act under color of law that deprived one of the plaintiffs of a civil right, that conduct was not a proximate cause of any damages.¹⁵⁰ On appeal, the Fifth Circuit ruled that the jury’s finding required an award of nominal damages to the plaintiff,¹⁵¹ and on remand the district court additionally awarded the plaintiff \$280,000 in attorneys’ fees.¹⁵² The Fifth Circuit reversed the fee award, relying on *Hewitt*, *Rhodes*, and *Garland*.¹⁵³

The Supreme Court affirmed. It held that the award of nominal damages made the plaintiffs prevailing parties because “[a] judgment for damages in any amount, whether compensatory or nominal, modifies the defendant’s behavior for

143. 489 U.S. at 793.

144. *Id.* at 792.

145. *Id.* at 792–93.

146. 113 S. Ct. 566 (1992).

147. *Id.* at 576 (O’Connor, J., concurring).

148. *Id.*

149. *Id.* at 570–71.

150. *Id.* at 570.

151. *Farrar v. Cain*, 756 F.2d 1148, 1152 (5th Cir. 1985).

152. 113 S. Ct. at 570.

153. *Estate of Farrar v. Cain*, 941 F.2d 1311, 1315 (5th Cir. 1991), *aff’d sub nom.* *Farrar v. Hobby*, 113 S. Ct. 566 (1992).

the plaintiffs' benefit by forcing the defendant to pay an amount of money he otherwise would not pay."¹⁵⁴ Nevertheless, the Court stated that a prevailing plaintiff should receive no attorneys' fees at all if the nature of the relief did not justify the award.¹⁵⁵ The Court affirmed the Fifth Circuit's conclusion that no fee award was appropriate because, in a civil rights suit for damages, the award of nominal damages highlights the plaintiff's failure to prove actual, compensable injury and shows that the plaintiffs achieved little beyond the "moral satisfaction of knowing that a federal court concluded that [their] rights had been violated' in some unspecified way."¹⁵⁶ As Justice O'Connor observed, whether the *Garland* technical or de minimis standard is a barrier to prevailing party status or is part of the determination of what constitutes a reasonable fee is irrelevant to the final outcome: "When the plaintiff's success is purely technical or de minimis, no fees can be awarded."¹⁵⁷

Thus, under *Hewitt*, *Rhodes*, *Garland*, and *Farrar*, a tester must satisfy a two-part test to recover attorneys' fees under Title VII. First, a tester must obtain actual relief on the merits of the claim that materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the tester. Second, the relief must be more than de minimis or purely technical. The remaining subparts of this Part discuss why private testers are unlikely to recover fees under this test.

B. Injunctive Relief

Title VII authorizes courts to grant successful plaintiffs equitable relief that would be sufficient to support a fee award. If a court finds a defendant has violated Title VII,

the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or

154. 113 S. Ct. at 574.

155. See *id.* at 575; *Lyte v. Sara Lee Corp.*, 950 F.2d 101, 104 (2d Cir. 1991); *Stefan v. Laurenitis*, 889 F.2d 363, 369 (1st Cir. 1989).

156. 113 S. Ct. at 574 (quoting *Hewitt v. Helms*, 482 U.S. 755, 762 (1987)).

157. *Id.* at 576 (O'Connor, J., concurring).

without back pay . . . or any other equitable relief as the court deems appropriate.¹⁵⁸

An employment discrimination tester would not be entitled to reinstatement or back pay because a tester would not have accepted a job offer from the defendant.¹⁵⁹ Therefore, the question is whether a tester can obtain an injunction forbidding future unlawful employment practices, perhaps including an order requiring an employer to change its hiring practices, or "other equitable relief" sufficient to support a fee award.¹⁶⁰

Testers may not be able to obtain injunctive relief for violations of their rights under Title VII. When there is a danger of future harm, the court's power to grant an injunction survives the cessation of the illegal conduct that forms the basis of the suit,¹⁶¹ and most courts that have considered the question

158. 42 U.S.C. § 2000e-5(g)(1) (1988). This section consistently has been interpreted to permit only equitable remedies for violations of Title VII. *E.g.*, *Wilson v. City of Aliceville*, 779 F.2d 631 (11th Cir. 1986); *Shah v. Mt. Zion Hosp. & Medical Ctr.*, 642 F.2d 268 (9th Cir. 1981); *Slack v. Havens*, 522 F.2d 1091 (9th Cir. 1975); *EEOC v. Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975), *vacated sub nom. Utility Workers Union v. EEOC*, 431 U.S. 951 (1977); *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969). In addition, under the Civil Rights Act of 1991, compensatory and punitive damages may be awarded to a successful plaintiff. *See infra* Part III.E.

159. Courts have ruled consistently, in Title VII actions, that a plaintiff who voluntarily ceases employment with the defendant is not entitled to an order requiring the defendant to employ the individual. *Hampton v. IRS*, 913 F.2d 180, 182 (5th Cir. 1990) (holding that where a Title VII plaintiff alleges that his reassignment was motivated by racial discrimination but does not contest his subsequent discharge, he may not obtain an order requiring his reinstatement); *Backus v. Baptist Medical Ctr.*, 671 F.2d 1100, 1102-03 (8th Cir. 1982) (holding that a plaintiff who left the defendant's employ voluntarily during the pendency of a Title VII discrimination action was not entitled to back pay or reinstatement); *Ahn v. Turnage*, No. C-87-2433 RHS, 1991 U.S. Dist. LEXIS 14,307, at *6 (N.D. Cal. Sept. 27, 1991) (holding that a plaintiff who left the defendant's employ and had no viable constructive discharge claim was not entitled to back pay or reinstatement); *EEOC v. Red Baron Steak Houses*, 47 Fair Empl. Prac. Cas. (BNA) 49 (N.D. Cal. 1988) (denying reinstatement to a plaintiff discharged in violation of Title VII because she voluntarily took herself out of the work force). It seems logical that a plaintiff who never intended to work for the defendant also would be ineligible for such relief.

160. An injunction prohibiting future violations of Title VII would not be superfluous even though Title VII already prohibits the conduct. The injunction would deter future violations because the defendant would be subject to the court's contempt power if it violated the statute. The injunction also would send a signal to employers and others that the court is protecting rights to equal employment opportunity. In cases involving retaliation, an injunction may be necessary to assure employees that they are entitled to exercise the rights granted by Title VII. *Berkman v. City of New York*, 705 F.2d 584, 597 (2d Cir. 1983); *see generally United States v. W.T. Grant Co.*, 345 U.S. 629, 634-35 (1953) (holding that the purpose of an injunction is to prevent future violations of the law).

161. *Walls v. Mississippi State Dep't of Pub. Welfare*, 730 F.2d 306, 325 (5th Cir.

have stated that an employer found liable for discriminating in violation of Title VII may be enjoined from committing future acts of discrimination unless there is no reasonable expectation that the employer will discriminate in the future.¹⁶² Courts are reluctant, however, to interfere with an employer's operation and often conclude that there is no reasonable likelihood that an employer will discriminate in the future unless the record contains evidence of widespread, pervasive discrimination.¹⁶³

1984); *NAACP v. City of Evergreen*, 693 F.2d 1367, 1370 (11th Cir. 1982).

162. See, e.g., *Bouman v. Block*, 940 F.2d 1211, 1233 (9th Cir.), cert. denied, 112 S. Ct. 640 (1991); *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1519 (9th Cir. 1989); *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1544-45 (9th Cir. 1987); *Walls*, 730 F.2d at 325; *Bundy v. Jackson*, 641 F.2d 934, 946 n.13 (D.C. Cir. 1981); *Rochon v. FBI*, 691 F. Supp. 1548, 1553 (D.D.C. 1988); *Ross v. Double Diamond, Inc.*, 672 F. Supp. 261, 277 (N.D. Tex. 1987); cf. *City of Evergreen*, 693 F.2d at 1370-71 (noting that in cases presenting abundant evidence of consistent past discrimination, injunctive relief is mandatory absent clear and convincing proof that there is no reasonable probability of further noncompliance with the law); *Harmond v. Cavazos*, 56 Fair Empl. Prac. Cas. (BNA) 142, 143 (N.D. Ga. 1991). *Contra Berkman*, 705 F.2d at 595 (holding that relief designed to assure compliance with Title VII in the future is "appropriate whenever a Title VII violation [is] found, irrespective of any history of prior discriminatory practices or the intent of the defendant").

163. *Hacienda Hotel*, 881 F.2d at 1519. In *Hacienda Hotel*, the Ninth Circuit Court of Appeals found that the district court did not abuse its discretion in concluding that the curative steps taken by the defendant during litigation were insufficient assurances of future compliance with Title VII, where the defendant committed multiple Title VII violations and did not act promptly in response to complaints of sexual harassment. *Id.*

In *Spencer v. General Elec. Co.*, 894 F.2d 651 (4th Cir. 1990), the court held that a plaintiff who prevailed in a hostile-environment sexual harassment case was not entitled to an injunction where the defendant had adopted an antiharassment policy and fired the offending supervisor, where there was no evidence of systemic company-wide discrimination and where an injunction would discourage employers from voluntarily complying with Title VII after suit is filed. *Id.* at 660-61. In *Johnson v. Brock*, 810 F.2d 219 (D.C. Cir. 1987), the plaintiff proved that he was discriminated against in promotions and that the supervisors who discriminated against him were still with the company. *Id.* at 226. The court held, however, that absent evidence of animus toward the plaintiff and callous disregard of the plaintiff's rights, it would be unreasonable to conclude that discrimination would continue in the future. The court believed that a judgment in the plaintiff's favor had sufficiently impressed upon the defendant the need to exercise greater care in administering its employment policies. *Id.*; see also *Walls*, 730 F.2d at 325 (holding that the mere possibility of a recurrent violation is insufficient to obtain an injunction, but that instead a cognizable danger is required); *Harmond*, 56 Fair Empl. Prac. Cas. at 143 (holding that a plaintiff was not entitled to an injunction forbidding future discrimination because the person who retaliated against the plaintiff's exercise of Title VII rights was no longer with the company); *EEOC v. General Lines Inc.*, 51 Fair Empl. Prac. Cas. (BNA) 953, 955 (D. Wyo. 1986) (holding that although plaintiffs were discharged in retaliation for exercising Title VII rights they were not entitled to an injunction because there was no evidence that the defendant continued to engage in unlawful employment practices), *aff'd*, 865 F.2d 1555 (10th Cir. 1989); *EEOC v. Financial Assurance, Inc.*, 624 F. Supp.

Thus, testers would not be entitled to injunctive relief unless the evidence obtained through testing, a subsequent EEOC investigation, or discovery after suit was filed, revealed widespread discrimination.

Even if testers can meet this evidentiary burden, most courts likely will deny testers' requests for injunctive relief because testers have no interest in employment with the defendant and thus do not meet the "personal benefits" requirement for injunctive relief. Courts consistently have ruled that individuals who prove that they were discriminated against in violation of Title VII may not obtain injunctive relief if they are not employees of the defendant or likely to become employees because such individuals will not personally benefit from any change in the employer's practices. For example, most courts have ruled that a plaintiff who proves that he worked in a sexually hostile environment but who voluntarily left employment with the defendant is not entitled to an injunction forbidding future harassment because the injunction would not personally affect his rights.¹⁶⁴

686, 695 (W.D. Mo. 1985) (stating that where the defendant has not indulged in any similar discrimination in the past and there was no evidence that it was likely to do so in the future, there was nothing to be gained by ordering injunctive relief); *Smith v. Flesh Co.*, 512 F. Supp. 46, 53 (E.D. Mo. 1981) (holding that the plaintiff was not entitled to an injunction where there was no evidence that the defendant was discriminating against women at the time of trial).

164. *E.g.*, *Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1982) (stating that an employee who was sexually harassed and who left employment with the defendant and did not seek reinstatement was unlikely to obtain an injunction to restrain practices that injured her in the past but no longer affected her); *Abrams v. Tisch*, 50 Fair Empl. Prac. Cas. (BNA) 863, 864-65 (N.D. Ga. 1989) (holding that a plaintiff who was sexually harassed but voluntarily quit employment was not entitled to an injunction because it could not affect her rights).

The courts have applied this principle in other contexts as well. *See Beattie v. United States*, 949 F.2d 1092, 1093-94 (10th Cir. 1991) (holding that a plaintiff whose promotional opportunities allegedly were impeded in violation of Title VII was not entitled to injunctive relief even if he proved his case because by voluntarily quitting he could not prove that he was likely to be injured by the defendant in the future); *Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1136 (11th Cir. 1984) (holding that a plaintiff who sued for discrimination in wages, hiring, and promotion was not entitled to an injunction ordering the defendant not to engage in racially discriminatory hiring practices because the plaintiff did not seek reinstatement and did not show any other way he would personally benefit from the requested relief); *Backus v. Baptist Medical Ctr.*, 671 F.2d 1100, 1102-03 (8th Cir. 1982) (holding that a plaintiff who was illegally denied a transfer is not entitled to an injunction where he later quit his job voluntarily, thereby removing himself from the impact of the practice); *Miller v. Texas State Bd. of Barber Examiners*, 615 F.2d 650, 654 (5th Cir.) (holding that injunctive relief is not appropriate where the plaintiff was discriminated against in job

In short, to obtain an injunction under prevailing law, the plaintiff must be part of the class that would benefit from such relief.¹⁶⁵ Under the rationale of these cases, tester plaintiffs will not be able to obtain injunctive relief, even with proof of widespread discrimination.¹⁶⁶ Therefore, absent some other form of relief that materially alters the relationship of the parties and is more than de minimis or technical, successful testers will not be entitled to attorneys' fees.

assignments but was discharged for nondiscriminatory reasons), *cert. denied*, 449 U.S. 891 (1980); *McLaughlin v. New York*, 784 F. Supp. 961, 974 (N.D.N.Y. 1992) (holding that a plaintiff's request to enjoin future harassment is moot where the plaintiff is no longer employed by the defendant); *Babcock v. Frank*, 729 F. Supp. 279, 286 (S.D.N.Y. 1990) (holding that a plaintiff no longer employed is not entitled to injunctive relief); *Compston v. Borden, Inc.*, 424 F. Supp. 157, 162 (S.D. Ohio 1976) (holding that the plaintiff, who was subjected to a religiously hostile environment but was discharged for nondiscriminatory reasons, was not entitled to an injunction because he was no longer employed by the defendant and the case was not prosecuted as a class action).

This analysis is somewhat inconsistent, however, with the courts' treatment of Title VII injunctions in other contexts. For example, courts have held that an individual who works for an employer after proving she was denied a job in violation of Title VII can obtain an injunction affecting the employer's hiring practices although she would not be among the class of persons affected by the injunction. *E.g.*, *Taylor v. USAir, Inc.*, 56 Fair Empl. Prac. Cas. (BNA) 357, 366 (W.D. Pa. 1991).

165. *E.g.*, *Carmichael*, 738 F.2d at 1136 (stating that although an injunction may benefit nonparties, the class benefitted by the injunction must include the plaintiff).

The decisions denying injunctive relief to nonemployee plaintiffs ignore Congress's purpose in empowering Title VII plaintiffs to act as private attorneys general vindicating both their own rights and the rights of others. Congress authorized Title VII plaintiffs to litigate in the public interest and recognized that Title VII violations, which involve class-based discrimination, often warrant class-based relief. The decisions denying injunctive relief to nonemployee plaintiffs focus solely on the relationship between the particular plaintiff and the defendant employer.

166. Testers also would not be permitted to serve in a class action suit as representatives of a class of applicants with a bona fide interest in employment with the defendant. The Supreme Court has prohibited "across the board" class actions in Title VII cases. *East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (holding that three Mexican-American drivers who were not qualified for promotion to line-driver positions could not represent a class of black and Mexican-American city drivers who were denied promotions because a class representative must be part of the class and possess the same interest and suffer the same injury as class members); see also *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147 (1982) (holding that a plaintiff alleging discrimination in promotions cannot maintain a class action on behalf of individuals claiming discrimination in hiring).

Under these decisions, testers would not represent adequately the interests of a class of individuals with a bona fide interest in employment because they do not have the same interest or suffer the same injury as the class members. Moreover, if there was evidence to support class allegations in hiring, counsel likely would be able to locate a class representative who had an interest in employment with the defendant and would not need a tester to act as a plaintiff.

C. Declaratory Relief

A declaratory judgment is an equitable remedy that establishes the legal rights of parties where those rights have been questioned, threatened, disputed, or violated.¹⁶⁷ Courts have recognized that declaratory relief potentially is appropriate in Title VII cases.¹⁶⁸ A plaintiff who obtains a declaration that her right to be free from discrimination under Title VII was violated wins the satisfaction of prevailing in court. Further, it is in the public interest that a denial of employment opportunities be labeled a violation of Title VII.¹⁶⁹

In light of these purposes, courts should be more willing to award declaratory relief for a violation of Title VII than to issue an injunction, which may interfere with the operation of an employer's business. For example, some courts appear willing to award declaratory relief without considering whether the employer's discriminatory practices are widespread or whether the employer is likely to violate Title VII in the future.¹⁷⁰ Courts may require, however, that there be evidence that similar discriminatory conduct will recur before they will issue a declaratory judgment.¹⁷¹

Inexplicably, many courts have ruled that declaratory relief is not available to a Title VII plaintiff who no longer works for the employer, cannot show a likelihood of doing so, and does not represent a class.¹⁷² There is no apparent justification for this

167. EDWIN BORCHARD, *DECLARATORY JUDGMENTS* 7 (2d ed. 1941).

168. See *Marchwinski v. Oliver Tyrone Corp.*, 461 F. Supp. 160, 173 (W.D. Pa. 1978); *Wright v. St. John's Hosp.*, 414 F. Supp. 1202, 1208 (N.D. Okla. 1976).

169. See *Williams v. General Foods Corp.*, 492 F.2d 399, 406 (7th Cir. 1974); *Mitchell v. OsAir, Inc.*, 629 F. Supp. 636, 644 (N.D. Ohio 1986).

170. See, e.g., *Bua v. County of San Diego*, 731 F. Supp. 962, 964 (S.D. Cal. 1990) (holding that a plaintiff who was denied promotions because of his race is entitled to a declaration that the defendant's promotion practices were discriminatory), *rev'd*, 953 F.2d 1386 (9th Cir. 1992); *Babcock v. Frank*, 729 F. Supp. 279, 286 (S.D.N.Y. 1990) (stating that declaratory relief may be available to a plaintiff in a hostile-environment sexual harassment case).

171. See *Williams*, 492 F.2d at 406; *Wright*, 414 F. Supp. at 1208.

172. *Ahn v. Turnage*, No. C-87-2433 RHS, 1991 U.S. Dist. LEXIS 14,307 (N.D. Cal. Sept. 27, 1991) (stating that a plaintiff who allegedly was sexually harassed, left defendant's employment, and had no viable constructive discharge claim is not entitled to declaratory relief if successful because there is no chance that she would be employed again by the defendant); *Abrams v. Tisch*, 50 Fair Empl. Prac. Cas. (BNA) 863, 864 (N.D. Ga. 1989) (holding that a plaintiff who was harassed because of race but who voluntarily left employment was not entitled to declaratory relief because the relief

restriction because, although a declaratory judgment may have some salutary class-wide effects, the remedy is personal to the plaintiff, serving simply as a determination that the defendant violated the plaintiff's rights. Other courts, recognizing this function of a declaratory remedy, freely grant declaratory relief to a plaintiff who no longer is employed by the defendant in order to give the plaintiff the satisfaction of succeeding on her claim.¹⁷³ Because there is no unanimity on this issue, it is by no means clear that testers who prove they were discriminated against in violation of Title VII will be able to obtain a declaration that their rights to be free from discrimination were violated.

Even if a tester obtained declaratory relief, that relief would not support a fee award because the declaration would not affect the future behavior of the defendant towards the tester.¹⁷⁴ The declaration that the defendant violated the tester's rights

would not affect the plaintiff's rights); *Hill v. Berkman*, 635 F. Supp. 1228, 1229, 1242 (E.D.N.Y. 1986) (holding that the plaintiff was not entitled to a declaration that the defendant discriminated against her on the basis of sex in denying her a promotion where she later left the defendant's employ voluntarily because the "plaintiff ha[d] shown no desire to reenlist, and . . . [did] not represent a class"); *Compston v. Borden, Inc.*, 424 F. Supp. 157, 162 (S.D. Ohio 1976) (holding that a plaintiff subjected to a religiously hostile environment but discharged for a nondiscriminatory reason was not entitled to declaratory relief because the plaintiff was no longer an employee, the action was not a class action, and there were no continuing adverse effects of the harassment).

173. *Mitchell*, 629 F. Supp. at 644 (holding that a plaintiff who was sexually harassed but who voluntarily left employment with the defendant was not entitled to injunctive relief because she no longer worked for the defendant, but was entitled to declaratory relief because she was entitled to the satisfaction of proving harassment and prevailing in her day in court); *cf. Snow v. Nevada Dep't of Prisons*, 582 F. Supp. 53, 61, 64 (D. Nev. 1984) (holding that where the plaintiff was discriminated against on the basis of her sex while employed by the defendant but was justifiably discharged, declaratory relief was appropriate because without specifically labeling the employer's acts as violations of Title VII there was no reasonable assurance that the same or similar conduct would not be repeated in the future); *Fisher v. Dillard Univ.*, 499 F. Supp. 525, 536 (E.D. La. 1980) (holding that a plaintiff who was discriminated against in salary and discharged because of her race but did not seek reinstatement was entitled to declaratory relief because there was a controversy sufficient to adjudicate the case and the plaintiff's future employment opportunities might be adversely affected without clarification of the reasons for her discharge).

174. *See Rhodes v. Stewart*, 488 U.S. 1, 4 (1988) ("A declaratory judgment . . . will constitute relief, for purposes of § 1988, if, and only if, it affects the behavior of the defendant towards the plaintiff."); *cf. Warren v. Fanning*, 950 F.2d 1370, 1372, 1375 (8th Cir. 1991) (stating that a jury finding that the plaintiff's Eighth Amendment rights were violated does not support a fee award where no damages were awarded), *cert. denied*, 113 S. Ct. 111 (1992); *Walker v. Anderson Elec. Connectors*, 944 F.2d 841, 847 (11th Cir. 1991) (stating that a jury finding that the plaintiff was subjected to sexual harassment does not support a fee award where the plaintiff was not constructively discharged and was not otherwise entitled to any backpay award), *cert. denied*, 113 S. Ct. 1043 (1993).

perhaps would deter future violations of Title VII, but it would not force the defendant to act in a way that would affect the defendant's future relationship with the tester.

D. Nominal Damages

Testers also might be able to recover nominal damages, but these damages will not support a fee award.

Common-law courts traditionally . . . vindicated deprivations of certain "absolute" rights that are not shown to have caused actual injury through the award of a nominal sum of money. By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed¹⁷⁵

Congress has stated that eradicating discrimination in employment is a national priority of the highest order.¹⁷⁶ Thus, an award of nominal damages would be appropriate for a Title VII plaintiff, including a tester, who is not entitled to damages but who proves that the defendant discriminated against him in violation of the statute.¹⁷⁷

175. *Carey v. Phipus*, 435 U.S. 247, 266 (1978) (footnote omitted) (holding that defendant's violation of due process rights demanded an award of nominal damages "not to exceed one dollar").

176. S. REP. NO. 872, 88th Cong., 2d Sess., pt. 1, at 11, 24 (1964); H.R. REP. NO. 914, 88th Cong., 1st Sess., pt. 1, at 18 (1963); H.R. REP. NO. 914, pt. 2, at 1-2; *see also Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968).

177. Prior to the 1991 amendments to Title VII permitting awards of compensatory damages for violations of Title VII, *see infra* note 180 and accompanying text, courts that considered awards of nominal damages under Title VII had to address whether nominal damages are equitable or legal. Because Title VII authorized only equitable relief, courts that determined that nominal damages are compensatory did not award nominal damages. The courts that considered the issue split on whether nominal damages are equitable or legal. *Compare, e.g., Derr v. Gulf Oil Corp.*, 796 F.2d 340, 344 (10th Cir. 1986) (holding that a plaintiff who proved that she was demoted because of her sex was entitled to nominal damages regardless of how the court ruled on her constructive discharge claim) *with, e.g., Trautvetter v. Quick*, 916 F.2d 1140, 1147-48 (7th Cir. 1990) (holding that a plaintiff who was harassed was not entitled to nominal damages because such damages are not equitable). The question of whether nominal damages are equitable or legal relief appears to be moot after the 1991 amendments to Title VII because both equitable relief and compensatory damages are now available. *See infra* note 180 and accompanying text.

In *Farrar v. Hobby*, however, the Supreme Court ruled that while an award of nominal damages satisfied the prevailing party standard, the award was technical or de minimis relief, which usually would not merit a fee recovery.¹⁷⁸ Such an award vindicates the plaintiff's rights but does not force the defendant employer to do anything to alter its relationship with the plaintiff. As with declaratory judgments, there may be collateral benefits to employees of the defendant company, to future applicants, or to the community at large, but the *Farrar* majority did not concern itself with those collateral benefits when interpreting the fee statutes.¹⁷⁹ Thus, a recovery of nominal damages likely would not entitle testers to an award of attorneys' fees.

E. Compensatory and Punitive Damages

In the Civil Rights Act of 1991, Congress authorized prevailing plaintiffs in Title VII actions to recover compensatory and punitive damages.¹⁸⁰ The tester cases successfully

178. *Farrar v. Hobby*, 113 S. Ct. 566, 574 (1992). For a discussion of *Farrar*, see *supra* text accompanying notes 146-57.

179. In her concurrence, however, Justice O'Connor wrote that an award of nominal damages might support a reasonable fee award. She suggested that the courts should consider the difference between the amount recovered and the damages sought, the significance of the legal issue on which the plaintiff prevailed, and the public purpose served. If such factors suggest that the plaintiff's victory was not de minimis, a court could award fees. *Id.* at 576 (O'Connor, J., concurring). Under O'Connor's reasoning, testers might be entitled to attorneys' fees if they recover nominal damages.

180. The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, provides:

In an action brought by a complaining party under [Title VII] against a respondent who engaged in unlawful intentional discrimination[,] . . . provided that the complaining party cannot recover under [42 U.S.C. § 1981, which prohibits discrimination on the basis of race in employment], the complaining party may recover compensatory and punitive damages . . . in addition to any relief authorized by [§ 2000e-5(g) of Title VII] from the respondent.

Id. tit. I, § 102, at 1072 (codified at 42 U.S.C. § 1981a(a)(1) (Supp. 1991)). Compensatory damages do not include backpay, interest on backpay, or other relief already available under § 2000e-5(g) of Title VII, but may be awarded for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." 42 U.S.C. § 1981a(b)(2), (3). The amount of punitive and compensatory damages allowable is fixed according to a schedule based on the size of a defendant's workforce. The maximum amounts allowable range from \$50,000 to \$300,000. *Id.* § 1981a(b)(3)(A)-(C).

prosecuted under the FHA, which also permits awards of compensatory and punitive damages, suggest that testers are likely to recover only modest amounts,¹⁸¹ which may not be sufficient to support a fee award.

Punitive damages are awardable under the amendments to Title VII only where "the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual."¹⁸² District courts in two housing discrimination cases brought by testers concluded that punitive damages were awardable regardless of the effects of the discrimination because the defendants intentionally discriminated against the testers.¹⁸³ By definition, Title VII disparate treatment cases involve intentional discrimination.¹⁸⁴ Therefore, testers may be able to convince the fact finder that an award of punitive damages would be appropriate, particularly where there is evidence of widespread discrimination. In two representative FHA cases, however, the courts awarded only \$1000 in punitive damages to each tester plaintiff.¹⁸⁵ The number of tester plaintiffs in a

181. See *infra* notes 185–89 and accompanying text.

182. 42 U.S.C. § 1981a(b)(1) (Supp. 1991). One of the few courts interpreting the punitive damages provisions of the amendments, however, has noted that there appears to be no difference between the standard for establishing a right to punitive damages and the standard for establishing liability for disparate treatment. Thus, according to the court, the standard is more lenient than under 42 U.S.C. § 1981. *Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259, 324 (N.D. Cal. 1992). However, in *Koppman v. South Central Bell Telephone Co.*, 59 Empl. Prac. Dec. (CCH) ¶ 41,665 (E.D. La. 1992), the court adopted the prevailing standard for punitive damages under § 1981—callous or malicious conduct. *Id.* at 71,820.

183. *City of Chicago v. Matchmaker Real Estate Sales Ctr., Inc.*, No. 88-C9695, 1991 U.S. Dist. LEXIS 4435, at *6, 1991 WL 55,770, at *3 (N.D. Ill. Apr. 8, 1991), *aff'd in part and rev'd in part*, 982 F.2d 1086 (7th Cir. 1992) (affirming the award of punitive damages against parties which actively discriminated against testers); *Davis v. Mansards*, 597 F. Supp. 334, 347 (N.D. Ind. 1984).

184. In a disparate treatment case, the plaintiff has the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

185. *Matchmaker Real Estate*, No. 88-C-9695, 1991 U.S. Dist. LEXIS at *8, 1991 WL at *3 (awarding each of 19 testers \$1000); *Davis*, 597 F. Supp. at 347 (awarding each of two testers \$1000). In a recent case involving employment discrimination testers, a jury awarded each of two tester plaintiffs \$10,000 in punitive damages. However, the facts were particularly egregious. During the testers' interviews, the owner of the defendant employment service offered to waive the application fee in exchange for sex. See *Jury Awards \$79,000 in Tester Case*, *Fair Employment Prac.: Summary Latest Devs.* (BNA), Aug. 30, 1993, at 98.

particular case would have to be large to result in a significant punitive damages award.

Additionally, testers could be compensated for emotional distress and humiliation. One court awarded compensatory damages of \$250 to one housing tester and \$300 to another, "tak[ing] into account the fact that the testers were being paid [a modest sum]."¹⁸⁶ Where the tester plaintiffs concentrate on creating a good record to support an award of compensatory damages, a court or jury may be more generous. One district court awarded \$5000 for emotional distress and humiliation to a black tester plaintiff who proved discrimination in the process of applying for housing.¹⁸⁷ The plaintiff testified that the knowledge that she was discriminated against harmed her emotionally and hampered her relationship with her family and her husband. The court ruled that "[t]he fact that [she] was a tester [did] not affect the measure of her actual damages. . . . [N]o one should have to toughen themselves to racial discrimination—a tester has no reason to expect mistreatment at the hands of ostensibly fairminded businesspeople."¹⁸⁸ It is difficult to predict how juries¹⁸⁹ and judges will react to tester requests for compensatory damages, but it appears from the housing cases that compensatory awards will be relatively low.

An award of punitive or compensatory damages would make a tester a prevailing party under *Hewitt, Rhodes, Garland*, and *Farrar*, but the amount must be "substantial" to support a significant fee award.¹⁹⁰ Not surprisingly, courts do not agree on what is substantial. The First and Seventh Circuits have ruled respectively that \$16,000 and \$45,500 are not substantial.¹⁹¹ The Second Circuit, in contrast, has ruled that a

186. *Coel v. Rose Tree Manor Apartments, Inc.*, No. 84-1521, 1987 U.S. Dist. LEXIS 9212, at *17, 1987 WL 18,393, at *7 (E.D. Pa. Oct. 13, 1987).

187. *Davis*, 597 F. Supp. at 347.

188. *Id.* The court awarded only \$2500 to the plaintiff's husband, who was also a tester, because he "approached the [apartment] complex with a degree of cynicism . . . and was consequently steadied for the blow of [the discrimination]." *Id.* at 348.

189. Under the Civil Rights Act of 1991, any party now has a right to a jury trial. 42 U.S.C. § 1981a(c) (Supp. 1991). A jury recently provided each of two employment tester plaintiffs \$5000 in compensatory damages for sexual harassment in the course of applying for placement services with an employment agency. *Jury Awards \$79,000 in Tester Case*, *supra* note 185, at 98.

190. See *supra* text accompanying notes 155-57.

191. *Northbrook Excess & Surplus Ins. Co. v. Procter & Gamble Co.*, 924 F.2d 633, 641-42 & nn.11-12 (7th Cir. 1991); *Stefan v. Laurenitis*, 889 F.2d 363, 369 (1st Cir. 1989).

\$9500 compensatory award is substantial.¹⁹² On the low end, however, the results have been more consistent. The First Circuit ruled in a section 1983 action that a \$1000 award is not sufficient to support a recovery of attorneys' fees,¹⁹³ and the Eleventh Circuit has affirmed a district court's conclusion that \$100 in compensatory damages also is insufficient.¹⁹⁴ The few reported tester cases decided under the FHA suggest that Title VII testers will recover compensatory awards near the \$1000 figure.¹⁹⁵ They are unlikely to obtain attorneys' fees based on such awards.¹⁹⁶

192. *Lyte v. Sara Lee Corp.*, 950 F.2d 101, 104 (2d Cir. 1991).

193. *Lewis v. Kendrick*, 944 F.2d 949 (1st Cir. 1991).

194. *Carr v. City of Florence*, 934 F.2d 1264 (11th Cir. 1991).

195. See *supra* notes 184-87 and accompanying text.

196. In the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, Congress created an exception to the *Hewitt, Rhodes, Garland*, and *Farrar* prevailing-party rule for so-called "mixed-motive" cases. The statutory provision was intended to overrule *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), in which the Court held that an employer would not be liable in a Title VII action even if the plaintiff shows that an impermissible factor (e.g., sex) was taken into account in making an employment decision if the employer proves it would have made the same decision absent the impermissible consideration. *Id.* at 242, 258.

Under the amendments to Title VII, if a complainant "demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice," 42 U.S.C. § 2000e-2(m) (Supp. 1991), and the respondent proves that it

would have taken the same action in the absence of the impermissible motivating factor, the court—

(i) may grant declaratory relief, injunctive relief . . . , and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under [this section] and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment.

§ 2000e-5(g)(2)(B)(i),(ii).

An underlying premise of the amendment is that an individual who proves that the employer's actions were inconsistent with Title VII's proscriptions should be entitled to attorneys' fees even if the individual is not entitled to other forms of relief. Testers who prove that their Title VII rights were violated might seek fees using this reasoning. The amendment, however, was intended specifically to overrule *Price Waterhouse* in "mixed-motive" cases. It was not intended to address the plight of other Title VII plaintiffs who can prove a violation of the Act but who are not entitled to significant relief. See, e.g., *Slade v. United States Postal Serv.*, 952 F.2d 357, 362 (10th Cir. 1991) (finding that the plaintiff was not a prevailing party although he proved that he was discriminatorily denied a job where the defendant thereafter rejected the plaintiff's application using nondiscriminatory criteria, reasoning that the plaintiff's success was purely technical and that the outcome of the case did not change the legal relationship between the parties).

IV. POSSIBLE STATE LAW RESTRICTIONS ON THE USE OF TESTERS BY PRIVATE GROUPS OR INDIVIDUALS

A. State Law Claims for Breach of Contract or Fraud

If the lack of remedies available to prevailing testers does not completely discourage private parties from engaging in testing, employers have some weapons available to deter the use of the practice. Employers might attempt to discourage testing by suing testers to recover out-of-pocket and opportunity costs.¹⁹⁷ Because testers have no bona fide interest in employment, employers unnecessarily will incur the costs associated with evaluating a tester's employment application.¹⁹⁸ An employer might even be deprived of the services of an applicant with an actual interest in employment if the employer first extends an offer to a tester.¹⁹⁹

Breach of contract actions against testers generally should fail because an applicant for employment ordinarily does not make a binding promise to accept a job if an employer ultimately offers one. "[A]n application for employment is not a contract; it is a mere solicitation of an offer of employment."²⁰⁰ An applicant remains free, as a matter of contract law, to refuse an employer's offer without liability for the time and money the employer expended responding to the applicant's solicitation of the offer.²⁰¹ An applicant may "decide[] whether to accept [the

197. See generally Skinner, *supra* note 62. The claims against testers could be asserted as counterclaims in Title VII actions brought by testers or in independent suits filed against testers who do not uncover evidence of discriminatory hiring practices.

198. *E.g.*, Letter from Jeffrey A. Norris to the Honorable Evan J. Kemp, *supra* note 12, at E-1.

199. *Id.*

200. Harden v. Maybelline Sales Corp., 282 Cal. Rptr. 96, 99 (Ct. App.), *review denied*, 1991 Cal. LEXIS 4230 (Cal. 1991); see also Sims v. United Bridge & Iron, 402 P.2d 911, 914 (Okla. 1965) (holding that an inquiry by an applicant "as to the existence of an 'opening'" was not itself an offer but was a solicitation of an offer of employment); CHARLES G. BAKALY, JR. & JOEL M. GROSSMAN, THE MODERN LAW OF EMPLOYMENT RELATIONSHIPS § 3.1.2, at 29 (2d ed. 1989) ("[A]n applicant's submission of a resume . . . should probably not be deemed an offer . . .").

201. As Professor Farnsworth puts it,

[A] party that enters negotiations in the hope of the gain that will result from ultimate agreement bears the risk of whatever loss results if the other party breaks off the negotiations. That loss includes out-of-pocket costs the disappointed party has incurred, any worsening of its situation, and any opportunities that it has lost as a result of the negotiations. . . .

employer's] offer on the terms [the employer] set forth or to attempt to negotiate more favorable terms."²⁰² The application and the employer's evaluation of the applicant are part of the precontractual negotiation process.²⁰³ If, during those negotiations, either party decides to walk away, there is no contract; if there is no contract, there can be no breach.²⁰⁴

... Although a duty of fair dealing is now generally imposed on the parties to a contract, that duty is not formulated so as to extend to precontractual negotiations.

E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217, 221 (1987).

202. *Comeaux v. Brown & Williamson Tobacco Co.*, 915 F.2d 1264, 1271 (9th Cir. 1990); see also *Harden*, 282 Cal. Rptr. at 99 (stating that an employment application "is not a valid employment agreement, since it does not contain essential material terms such as the job description or compensation"). A party is "free to call off the negotiations at [its] pleasure, at any time before the parties [have] come to an agreement on all of the terms. It is not an actionable wrong to dally in the vestibules of obligation." *Harley & Lund Corp. v. Murray Rubber Co.*, 31 F.2d 932, 933 (2d Cir.), cert. denied, 279 U.S. 872 (1929).

203. See RESTATEMENT (SECOND) OF CONTRACTS § 26 (1981); 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 22 (1963 & Supp. 1992); 1 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 4:7 (4th ed. 1990). Preliminary negotiations do not affect the legal relations of the parties involved if neither party has made an "offer" to contract with the other or an offer made has not been accepted. 1 CORBIN, *supra*, § 22. "An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." RESTATEMENT (SECOND) OF CONTRACTS § 24. "Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer." *Id.* § 50(1). When "the agreement reached constitute[s] agreement on all of the terms that the parties themselves regarded as essential . . . that agreement conclude[s] the negotiations and form[s] a contract." *Leeds v. First Allied Conn. Corp.*, 521 A.2d 1095, 1097 (Del. Ch. 1986), appeal dismissed, 520 A.2d 1044 (Del. 1987).

204. *A/S Apothekernes Laboratorium for Specialpraeparater v. I.M.C. Chem. Group, Inc.*, 873 F.2d 155, 160 (7th Cir. 1989). Professor Farnsworth explains:

Under the classic rules of offer and acceptance, there is no contractual liability until a contract is made by the acceptance of an offer

. . . [C]ourts traditionally take a view of this precontractual period that . . . results in a broad "freedom of negotiation." As a general rule, a party to precontractual negotiations may break them off without liability at any time and for any reason . . . or for no reason at all.

Farnsworth, *supra* note 201, at 221. "With regard to contracts generally, it is said that every contract results from an offer and the acceptance thereof. An offer becomes a binding promise and results in a contract only when it is accepted." *Sims*, 402 P.2d at 913 (citations omitted); see also RESTATEMENT (SECOND) OF CONTRACTS § 26 (1981) ("A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent.").

These rules seem fully appropriate in the context of negotiations for an agreement to enter into an at-will employment relationship. In virtually every American

Ordinarily, then, an applicant for employment has not made a legally binding promise to negotiate with the intent of entering into an employment contract in the future.

Some employers, however, have suggested that in response to the threat of testing allegedly posed by the EEOC's recent announcements, they will require applicants for employment to sign certifications of a bona fide interest in employment.²⁰⁵ If the applicant will not sign the certification, the employer will not process the application. If a tester chooses to sign such a certification, according to one employer representative, this will establish beyond question that the tester is a liar and will "taint" any evidence of discrimination that the tester obtains.²⁰⁶ The employer groups have ignored, thus far, the possibility that such a certification could be an enforceable "preliminary agreement to negotiate" that a tester with no interest in employment would breach. An employer might recover reliance damages for breach of this agreement, including the costs of processing the tester's application and any lost opportunities caused by the breach of the promise to negotiate.

Under a preliminary agreement to negotiate, the parties undertake a general obligation of fair dealing in their negotiations.²⁰⁷ Until recently, courts have been reluctant to enforce these preliminary agreements on the grounds that they were indefinite.²⁰⁸ Many courts, however, now take the position that "an agreement to negotiate in good faith . . . if [it] otherwise meet[s] the requisites of a contract, is an enforceable contract."²⁰⁹ Although there may be some uncertainty concerning

jurisdiction, absent agreement to the contrary, either party to an employment relationship may terminate that relationship at any time and for any reason without contractual liability. *E.g.*, Peter Linzer, *The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323, 335 (1986). Therefore, a tester would be able to enter into an at-will relationship with an employer and quit the job the very next minute without breaching the contract. *See, e.g.*, BAKALY & GROSSMAN, *supra* note 200, § 7.1, at 104. "Furthermore, employees may not be liable for breach of the covenant of good faith and fair dealing for quitting their jobs." *Id.* § 7.1, at 105.

205. *See supra* note 16.

206. *See supra* note 16. This criticism ignores the fact that in most cases the tester's credibility as a witness will not be important to proving the case. Where testers with identical credentials are treated differently, the disparate treatment itself is the most compelling proof of discrimination. In such cases, the tester may at most have to respond to a claim that he or she intentionally influenced the employer to hire or otherwise treat the majority-group tester more favorably.

207. Farnsworth, *supra* note 201, at 263.

208. *See id.* at 264-65.

209. Channel Home Ctrs., Div. of Grace Retail Corp. v. Grossman, 795 F.2d 291, 299

the content of the obligation to negotiate in good faith, "[w]hatever one's definition of unfair dealing . . . a refusal to negotiate where there is an agreement to do so plainly amounts to a breach of the agreement."²¹⁰ Thus, a tester who signs an agreement to negotiate in good faith or to seriously consider an offer of employment would breach that agreement because he does not intend to consider an offer of employment with the employer. Recovery for breach of such an agreement should be measured by the reliance interest of the nonbreaching party. Thus, an employer could recover any expenses it incurred in reliance on the tester's promise and any lost opportunities it suffered as a result of the promise.²¹¹ In the context of applications for lower-skilled, entry-level positions, the employer's damages likely would not be significant; nonetheless, the threat of suit may deter the use of testers.

Even without a preliminary agreement to negotiate, tort law provides remedies for bad faith in negotiation.²¹² Tort claims for fraudulent misrepresentation or nondisclosure might be asserted against testers. Courts have rarely applied the law of misrepresentation to failed negotiations,²¹³ but if a tester affirmatively states that she has a bona fide interest in employment and if the employer would not have considered the tester for employment absent that representation, the employer should be able to recover any damages it sustained as a result of reliance on those representations.²¹⁴ A tester also might

(3d Cir. 1986) (citations omitted); *see also* Farnsworth, *supra* note 201, at 265-67. To determine whether the requirements for an enforceable contract have been met, a court "must ask (1) whether both parties manifested an intention to be bound by the agreement; (2) whether the terms of the agreement are sufficiently definite to be enforced; and (3) whether there was consideration." *Grossman*, 795 F.2d at 299.

210. Farnsworth, *supra* note 201, at 273.

211. *Id.* at 264, 267.

212. *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. c (1981).

213. Farnsworth, *supra* note 201, at 235-36 (noting that there are few circumstances where a party would have reason to overstate its eagerness to negotiate and that even when such misrepresentations are made, the injured party may be discouraged by the difficulty of proving fraudulent intent or of showing substantial loss).

214. *Id.* at 233-34 ("A negotiating party may not with impunity fraudulently misrepresent its intention to come to terms. Such an assertion is one of fact—of a state of mind—and if fraudulent, it may be actionable in tort." (footnote omitted)).

This analysis is consistent with § 525 of the Restatement (Second) of Torts. That section, entitled "Liability for Fraudulent Misrepresentation," provides:

One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.

misrepresent his qualifications. Such a misrepresentation could be a basis for tort liability if the employer would not have considered the application but for the misrepresentation and the employer suffers damages as a result of its reliance on the misrepresentation.²¹⁵

The more difficult question is whether an applicant has a duty to disclose that she has no bona fide interest in employment. If an applicant has such a duty, an employer could recover for damages it suffered as a result of nondisclosure.²¹⁶ Professor Farnsworth has stated categorically that "[i]mplicit in the act of negotiating is a representation of a serious intent to reach agreement with the other party."²¹⁷ Thus, he asserts that tort law may impose liability in the absence of any explicit representation if a party enters into negotiations without a serious intent to reach an agreement or if a party, having lost that intent, continues in negotiations and fails to give prompt notice that it has changed its mind.²¹⁸

RESTATEMENT (SECOND) OF TORTS § 525 (1965).

Section 544 of the Restatement provides that "[t]he recipient of a fraudulent misrepresentation of intention is justified in relying upon it if the existence of the intention is material and the recipient has reason to believe that it will be carried out." *Id.* § 544.

215. *Fried v. AFTEC, Inc.*, 587 A.2d 290, 297-98 (N.J. Super. Ct. App. Div. 1991) (finding that an employer's counterclaim in a termination case brought by a former employee stated an actionable claim for fraud insofar as the employer asserted that the employee materially misrepresented his background, training, or skills).

216. Section 551 of the Restatement (Second) of Torts, entitled "Liability for Nondisclosure" provides:

(1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.

(2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,

.....
 (e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

RESTATEMENT (SECOND) OF TORTS § 551 (1981).

217. Farnsworth, *supra* note 201, at 234.

218. *Id.* In the specific context of "negotiations" attendant to decisions whether to extend an offer of employment to an applicant, however, it is customary that the employer runs the risk that an employee is not serious about entertaining an offer of employment. Applicants often "test the waters" to see if other employment opportunities are available and solicit offers that they are not serious about accepting. At least in the initial stages of considering whether to offer a job to an applicant,

Thus, under some circumstances, employers or others targeted by testers would be able to assert viable state common-law claims against testers for breach of contract or fraud. Further, the threat of suit may suffice to deter the use of testing for discriminatory hiring practices.

B. Ethical, Criminal, and Common-Law Proscriptions of Conduct That Stirs Up Litigation

In various forms, state law prohibits soliciting individuals to institute litigation, financial support of litigation by nonparties, and other conduct that stirs up litigation. These proscriptions could be used to deter the use of testers by private parties.

The attorney disciplinary rules prohibiting the solicitation of individuals to institute suit discourage the "creation" of lawsuits. For example, under the Model Rules of Professional Conduct "[a] lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship . . . when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain."²¹⁹

employers cannot assume that each applicant has a serious interest in employment with them. It could be argued that at that stage in the process, the applicant has no duty to disclose any lack of serious interest because that fact is not "basic to the transaction." See *supra* note 216. Comment j to § 551 of the Restatement (Second) of Torts states:

A basic fact is a fact that is assumed by the parties as a basis for the transaction itself. It is a fact that goes to the basis, or essence, of the transaction, and is an important part of the substance of what is bargained for or dealt with. Other facts may serve as important and persuasive inducements to enter into the transaction, but not go to its essence. These facts may be material, but they are not basic. If the parties expressly or impliedly place the risk as to the existence of a fact on one party or if the law places it there by custom or otherwise the other party has no duty of disclosure.

RESTATEMENT (SECOND) OF TORTS § 551 cmt. j (1965).

If, however, the applicant becomes aware that the employer is expending significant amounts of time and money considering his suitability for employment or may be bypassing other qualified candidates, the applicant's lack of interest may become basic to the transaction. According to Comment l to § 551 of the Restatement, "good faith and fair dealing may require a disclosure" where nondisclosure would be so extreme and unfair as to be shocking "to the ethical sense of the community," even though the law generally assigns the risk of nondisclosure to the party who is not aware of the underlying facts. *Id.* § 551 cmt. l.

219. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3(a) (1992).

Under the Model Code of Professional Responsibility, a lawyer may not "recommend employment as a private practitioner, of himself . . . to a layperson who has not sought his advice,"²²⁰ and "[a] lawyer who has given in-person unsolicited advice to a layperson that he should obtain counsel or take legal action shall not accept employment resulting from that advice."²²¹ These rules, read literally, would prohibit in-person solicitation of testers by attorneys.²²²

Moreover, states historically have prohibited "barratry," which at common law was defined as the practice of "frequently exciting or stirring up suits and quarrels between others."²²³ Barratry reaches the conduct of lay persons as well as attorneys, and it prohibits a broader range of activity than the antisolicitation rules. Many states have criminal statutes outlawing barratry in broad terms.²²⁴ A court also may recognize a tort cause of action for barratry.²²⁵ A prohibition on stirring up litigation could be read to include the practice of hiring, training, directing, and representing testers for the purpose of creating a cause of action that otherwise did not exist.

The attorney disciplinary rules of many states and the common law of "maintenance" also may prohibit an attorney,

220. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A) (1981) (footnote omitted).

221. *Id.* DR 2-104.

222. The term "solicit" includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or circulars distributed for advertising purposes. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1992).

223. *Galinski v. Kessler*, 480 N.E.2d 1176, 1178 (Ill. App. Ct. 1985); *accord Boettcher v. Criscione*, 299 P.2d 806, 811 (Kan. 1956), *modified*, 305 P.2d 1055 (Kan. 1957); *see also Schackow v. Medical-Legal Consulting Serv., Inc.*, 416 A.2d 1303, 1312 (Md. Ct. Spec. App. 1980) (stating that barratry is soliciting a person to make a claim where the party has no existing relationship with that person and where the party may recognize personal gain); *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 382 A.2d 1226, 1228, 1230 (Pa. Super. Ct. 1977) (stating that the common thread in barratry cases is "fomenting litigation or other legal action when none was contemplated by the client"), *rev'd on other grounds*, 393 A.2d 1175 (Pa. 1978), *and cert. denied*, 442 U.S. 907 (1979).

224. *Galinski*, 480 N.E.2d at 1178 (noting that barratry has been made a criminal offense by statutes in many, if not all, of the states). In Georgia, for example, a person commits barratry if the person "knowingly and willfully . . . [s]olicits or encourages the institution of a judicial or administrative proceeding or offers assistance therein before being consulted by a complainant in relation thereto." GA. CODE ANN. § 16-10-95 (1992).

225. *See Berlin v. Nathan*, 381 N.E.2d 1367 (Ill. App. Ct. 1978) (noting that there are strict limitations on such suits because the law does not look favorably upon them), *cert. denied*, 444 U.S. 828 (1979).

layperson, or lay organization from relieving testers of the burden of paying the costs of litigation. Under the Model Code of Professional Responsibility, "a lawyer may advance . . . the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, *provided the client remains ultimately liable for such expenses.*"²²⁶ In jurisdictions that follow the Model Code, agreements between testers and their attorneys under which the attorneys do not seek reimbursement for costs may be prohibited.²²⁷ The common law of maintenance may prohibit the payment of a tester's litigation costs by anyone other than the tester. Like barratry, maintenance was intended to prevent "multitudinous and useless lawsuits and . . . the speculation in lawsuits."²²⁸ Maintenance "involve[s] an officious intermeddling in a suit which in no way belongs to the intermeddler by maintaining or assisting either party to the action with money or otherwise to prosecute or defend it."²²⁹

Ethical bars on the solicitation of clients and payment of litigation costs by attorneys, the criminal and tort offense of barratry, and the common law of maintenance might be used by employers to deter employment discrimination testing. Courts often permit defendants to inquire into the ethics of plaintiffs' attorneys and may disqualify counsel if the defense can show a violation of the ethics rules.²³⁰ The threat of disciplinary proceedings and possible criminal or civil liability might deter all but the most hardy counsel, lay organizations, or testers from conducting testing audits.

The United States Supreme Court has held that wholesale application of these various prohibitions on activities that

226. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-103(B) (1981) (emphasis added). The Model Rules, on the other hand, permit a lawyer to advance court costs and expenses and to make repayment contingent on the successful outcome of the litigation. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(e)(1) (1992).

227. Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Actions and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 97-98 (1991).

228. *Galinski*, 480 N.E.2d at 1178; see also *McKellips v. Mackintosh*, 475 N.W.2d 926, 928 (S.D. 1991).

229. *Galinski*, 480 N.E.2d at 1178; see also *American Hotel Management Assocs., Inc., v. Jones*, 768 F.2d 562, 570-71 (4th Cir. 1985); *Schackow v. Medical-Legal Consulting Serv., Inc.*, 416 A.2d 1303, 1312-13 (Md. Ct. Spec. App. 1980); *McKellips*, 475 N.W.2d at 928; *Giambattista v. National Bank of Commerce*, 586 P.2d 1180, 1186 (Wash. Ct. App. 1978), *review denied*, 92 Wash. 2d 1015 (1979).

230. Macey & Miller, *supra* note 227, at 96-97.

support or encourage litigation could impinge on the free speech and associational rights of attorneys and others.²³¹ The full scope of the protection offered by the First Amendment, however, is unclear. The Court has held only that informing individuals of their legal rights and offering legal assistance is protected by the First Amendment where a political agenda, rather than a desire for profit, motivated the conduct.²³² Thus, the First Amendment may offer only limited protection to attorneys and laypersons organizing testing audits and subsequent litigation, as well as to testers themselves.

The Court recognized in *NAACP v. Button* that collective action undertaken to obtain meaningful access to the courts implicates the First Amendment.²³³ The Court ruled that Virginia's barratry statute, which prohibited "any arrangement by which prospective litigants are advised to seek the assistance of particular attorneys,"²³⁴ could not be applied to the NAACP's practice of urging "Negroes aggrieved by the allegedly unconstitutional segregation of public schools in Virginia to exercise their legal rights and to retain members of the Association's legal staff."²³⁵ The Court ruled that the NAACP's activities were protected because, in the context of the NAACP's objectives, litigation is a form of political expression and not simply a technique for resolving private differences.²³⁶

In 1978, the Court elaborated on the scope of *Button* in two companion cases: *In re Primus*²³⁷ and *Ohralik v. Ohio State Bar Ass'n*.²³⁸ In *Primus*, the Court held that the First Amendment protected a lawyer who advised a lay person of her legal rights and disclosed in a subsequent letter that free legal assistance was available from the American Civil Liberties Union (ACLU). Relying on *Button*, the Court held that the lawyer's communication with the prospective client was protected because "[t]he ACLU engages in litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public."²³⁹ *Ohralik*, on the

231. See *In re Primus*, 436 U.S. 412, 438-39 (1978); *NAACP v. Button*, 371 U.S. 415, 428-29 (1963); see also U.S. CONST. amend. I.

232. See *infra* text accompanying note 236.

233. 371 U.S. at 428-29.

234. *Id.* at 433.

235. *Id.* at 437.

236. *Id.* at 429.

237. 436 U.S. 412 (1978).

238. 436 U.S. 447 (1978).

239. *Primus*, 436 U.S. at 431 (citation omitted).

other hand, involved a personal injury lawyer's in-person solicitation of two women who had been injured in an automobile accident. The Court held that the state could discipline the lawyer without offending *Button* and *Primus* because the solicitation of "remunerative employment is a subject [of commercial speech] only marginally affected with First Amendment concerns."²⁴⁰

After *Button*, *Primus*, and *Ohralik*, a state could constitutionally prohibit an attorney or lay person motivated by a desire for pecuniary gain from in-person solicitation of individuals to serve as testers and as plaintiffs in any resulting litigation. Solicitation by or on behalf of groups who use litigation as a form of political expression would be protected by the First Amendment so long as the lay organization did not "exert control over the actual conduct of any ensuing litigation"²⁴¹ and did not exist for the primary purpose of financial gain through the recovery of attorneys' fees.²⁴²

The scope of *Button* and *Primus*, however, is uncertain. Those cases protect only an individual's right to inform lay persons of their legal rights and to offer legal assistance to them to assert those rights. It is not clear that the reasoning of those cases would extend to the use of testers, because the use of testers is intended to create a cause of action and not simply to encourage individuals to assert existing causes of action. Thus, despite *Button* and *Primus*, testing by public-interest groups may not be protected by the First Amendment. State law therefore might be used to punish those who assist in stirring up litigation through the use of testers.

C. Ethics Rules Barring Attorneys from Contacting a Represented Party

The Model Rules of Professional Conduct and the Model Code of Professional Responsibility contain virtually identical restrictions on contacts between lawyers and persons who have retained counsel. Model Rule 4.2 provides: "In representing a client, a lawyer shall not communicate about the subject of the

240. *Ohralik*, 436 U.S. at 459.

241. *Primus*, 436 U.S. at 439.

242. *Id.* at 431.

representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."²⁴³

There is no accepted interpretation of the scope of this prohibition. Under a broad reading, the use of testers to uncover evidence on which to base a charge of discrimination might be prohibited. This uncertainty might further deter the use of testers.

The rules barring contact with represented parties apparently were intended to protect a represented individual from the perceived ability of a lawyer, through artful questioning, to obtain a damaging concession or other evidence from the individual in the absence of counsel. That concern would not seem to be implicated by a tester who, at an attorney's direction, applies for employment and participates in the evaluation or screening process to determine whether the employer discriminates.²⁴⁴

The rules also were intended, however, to preserve the represented party's relationship with counsel by preventing direct contact without counsel's consent.²⁴⁵ Read literally, and

243. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1992). The Model Code of Professional Responsibility provides:

(A) During the course of his representation of a client a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A) (1981) (footnote omitted).

244. See *United States v. Kenny*, 645 F.2d 1323, 1339 (9th Cir.) (finding that a prosecutor's use of a government informant to tape a conversation with a criminal defendant did not implicate the sorts of ethical problems addressed by the rules prohibiting contact with represented parties), *cert. denied*, 452 U.S. 920, and *cert. denied sub nom. Parker v. United States*, 454 U.S. 828 (1981); *United States v. Lemonakis*, 485 F.2d 941, 955-56 (D.C. Cir. 1973) (finding that a prosecutor who instructed an informant to record a conversation with a represented criminal defendant did not violate the rule because the defendant was not in danger of being tricked by the prosecutor's artfully contrived questions into giving his case away), *cert. denied*, 415 U.S. 989 (1974); *People v. White*, 567 N.E.2d 1368, 1386-87 (Ill. App. Ct.) (finding that an attorney's knowledge of an eavesdropping operation on a represented party did not present the danger that the represented party would be subjected to the attorney's superior legal skill and acumen), *appeal denied*, 575 N.E.2d 922 (1991).

245. *E.g.*, *United States v. Lopez*, 765 F. Supp. 1433, 1449 (N.D. Cal. 1991), *vacated*, 989 F.2d 1032 (1993); *Public Serv. Elec. & Gas v. Associated Elec. & Gas Ins. Servs.*, 745 F. Supp. 1037, 1039 (D.N.J. 1990); *Bouge v. Smith's Management Corp.*, 132 F.R.D. 560, 567-68 (D. Utah 1990); *United States v. Jamil*, 546 F. Supp. 646, 652 (E.D.N.Y. 1982), *rev'd on other grounds*, 707 F.2d 638, 646 (2d Cir. 1983); *White*, 567 N.E.2d at 1386-87.

somewhat consistent with this purpose, the no-contact rules could impede the use of testers.²⁴⁶ One way to avoid the rule might be to use lay testers working under the supervision and at the direction of lay persons. This tactic, however, is unlikely to succeed because attorneys likely would be involved in some significant way in the planning and execution of a testing audit. The no-contact rules apply to attorneys' agents, and a tester would be the lawyer's agent for purposes of the rule because litigation is the anticipated outcome of the process.²⁴⁷

The lawyer directing the contact violates the rules if the lawyer knows that the party contacted is represented in the matter. Many corporate employers have in-house or retained counsel. Knowledge of that fact alone may be sufficient to satisfy the knowledge requirement in a given case. See Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 HARV. L. REV. 670, 701 (1992) (stating that corporations and other formal entities may be able to use their regular counsel to monitor and thus perhaps to deter contacts with investigators).

Under a broad reading of the Rule, the company employee responsible for processing the tester's application would be a "party." In the case of an organization,

[Rule 4.2] prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 cmt (1992). An individual responsible for screening applicants for employment likely would fall into one or more of these categories.

246. See Karlan, *supra* note 245, at 701 (stating that a broad reading of the no-contact rules could impede many civil and criminal investigations).

247. The rules prohibit communications between a lawyer and a represented party. The courts have held universally that an individual acting at the direction of a lawyer is the lawyer's agent for purposes of the rules. See *United States v. Chavez*, 902 F.2d 259, 266 (4th Cir. 1990) (stating that "[b]oth government lawyers and government agents must be aware and respectful of the ethical guideline [of Model Rule 4.2] that forbids *ex parte* contacts with a represented defendant"); *Jamil*, 707 F.2d at 645 (stating that DR 7-104(A)(1) "may be found to apply to non-attorney government law enforcement officers when they act as the alter ego of government prosecutors"); *Upjohn Co. v. Aetna Casualty & Sur. Co.*, 768 F. Supp. 1186, 1213-14 (W.D. Mich. 1991) (finding that the ethical no-contact rules apply to nonlawyers hired by lawyers to collect evidence from an adverse party); see also Karlan, *supra* note 245, at 702 (noting that most courts agree that the no-contact rules apply to nonattorney investigators acting under an attorney's direction).

Under the broadest interpretation of the rules, contacts with represented persons are prohibited even though formal proceedings have not commenced. See *United States v. Hammad*, 858 F.2d 834, 839-40 (2d Cir. 1988) (holding that DR 7-104(A)(1) is not limited to the moment of indictment because the timing of an indictment lies substantially within the control of the prosecutor, who could manipulate grand jury proceedings to avoid the encumbrance of an indictment); *United States v. Killian*, 639 F.2d 206, 210 (5th Cir.) (suggesting that the rule may apply to a preindictment contact

Using the broadest reading of the no-contact rules, some courts have suggested that prior to an indictment an undercover agent may not contact a represented target of a criminal investigation and record incriminating statements made during any conversations.²⁴⁸ Under the rationale of these cases, the use of testers may violate the ethics rules. Moreover, the courts that favor a broad reading of the rules have not delineated clearly the conduct of informants that would be prohibited.²⁴⁹ Given this uncertainty, attorneys may forgo representing testers.²⁵⁰ A variety of sanctions could be ordered for violation

with a represented suspect), *cert. denied*, 451 U.S. 1021 (1981); *United States v. Durham*, 475 F.2d 208, 211 (7th Cir. 1973) (same); *United States v. Thomas*, 474 F.2d 110, 112 (10th Cir.) (same), *cert. denied*, 412 U.S. 932 (1973); *Jamil*, 546 F. Supp. at 657-58 (holding that a no-contact rule attaches at the early pretrial stages); *People v. Sharp*, 197 Cal. Rptr. 436, 439 (Ct. App. 1983) (holding that a district attorney may not communicate with a criminal defendant whom she knows to be represented by counsel even if the communication is limited to an inquiry into conduct for which the defendant has not been charged); *White*, 567 N.E.2d at 1386-87 (stating that the no-contact rule may apply prior to the bringing of judicial charges).

The rules restrict the conduct of a lawyer acting while representing a client. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1992); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A) (1981). A lawyer overseeing an audit for the purposes of litigation would be representing a client. Every court that has addressed the question has held that the rules apply to private lawyers representing clients in civil cases as well as to government lawyers. See Marc A. Schwartz, Note, *Prosecutorial Investigations and DR 7-104(A)(1)*, 89 COLUM. L. REV. 940, 943 & nn.19-20 (1989).

248. See *Hammad*, 858 F.2d at 839-40; *Killian*, 639 F.2d at 210; *Durham*, 475 F.2d at 211; *Thomas*, 474 F.2d at 112. Most courts, however, have not interpreted the no-contact rules to prohibit contacts occurring before formal proceedings have commenced. Courts have held in civil cases that the rule does not apply until suit is filed. See *Faragher v. National R.R. Passenger Corp.*, No. 91-2380, 1992 U.S. Dist. LEXIS 1810, at *3, 1992 WL 25,729, at *1 (E.D. Pa. Feb. 5, 1992) (finding that an attorney who represented a client who was injured in the course of his employment could send investigators to question the client's fellow employees before suit was filed because the employer was not represented in the matter and was not a "party" until formal proceedings were commenced). In the criminal context, most courts have held that the no-contact rule applies only after an indictment is returned. See *United States v. Ryans*, 903 F.2d 731, 739-40 (10th Cir.) (noting that the rule contemplates an adversarial relationship between litigants, and that a party should not be able to preclude investigations of its activities simply because it retained counsel), *cert. denied*, 498 U.S. 855 (1990); see also *United States v. Sutton*, 801 F.2d 1346, 1366 (D.C. Cir. 1986); *United States v. Fitterer*, 710 F.2d 1328, 1333 (8th Cir.), *cert. denied*, 464 U.S. 852 (1983); *Lemonakis*, 485 F.2d at 955; *Lopez*, 765 F. Supp. at 1436. Under this narrower reading of the no-contact rules, only the use of testers to corroborate a charge already filed would be barred.

249. See *Hammad*, 858 F.2d at 839-40 (stating that although the use of informants frequently will fall outside the scope of the rule, "in some instances a government prosecutor may . . . violate the ethical precepts of DR 7-104(A)(1)").

250. Cf. Schwartz, *supra* note 247, at 950 (noting that under *Hammad* and other decisions, investigative communications will be inhibited because an attorney cannot know how far the court is willing to go; the court may decide that a certain

of the rule, including dismissal, suppression of evidence obtained through the proscribed contact, contempt citations, and disciplinary proceedings.²⁵¹

V. THE EEOC'S AUTHORITY TO USE TESTERS TO ENFORCE TITLE VII

Parts III and IV identified reasons to believe that relying on private groups or individuals to use testers and on private attorneys to represent testers in subsequent litigation will be insufficient to fill the enforcement void identified in Part I. Thus, public enforcement by the EEOC may be the only way to assure that testers will be used effectively to combat discrimination in hiring. The issue is complicated by the fact that the EEOC could not engage in testing absent an amendment to Title VII. A close look at the provisions of Title VII reveals that Congress did not grant the Commission the power to use testers in its investigations.

A. *The EEOC's General Investigatory Authority*

The EEOC was created in 1964 as part of Title VII,²⁵² and the agency is authorized to "prevent any person from engaging in any [discriminatory] employment practice."²⁵³ Title VII's enforcement process begins with an administrative phase controlled by the EEOC. A "charge" first must be filed with the EEOC alleging that an employer has engaged in an unlawful employment practice.²⁵⁴ "[A] charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of."²⁵⁵ Within ten days, "the Commission shall serve a notice of

investigative technique violates the ethical precepts of DR 7-104(A)(1)).

251. See *Lopez*, 765 F. Supp. at 1461.

252. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, § 705(a), 78 Stat. 241, 258 (codified at 42 U.S.C. § 2000e-4(a) (1988)).

253. 42 U.S.C. § 2000e-5(a) (1988).

254. *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984).

255. 29 C.F.R. § 1601.12(b) (1992). Under Title VII, the Commission has the

the charge (including the date, place and circumstances of the alleged unlawful employment practice)" on the respondent.²⁵⁶ Thereafter, the Commission must investigate the charge.²⁵⁷

The EEOC's investigatory powers are set forth exclusively in sections 2000e-8 and 2000e-9. The former provides that

[i]n connection with any investigation of a charge . . . the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.²⁵⁸

In section 2000e-9, the Commission is granted the same subpoena power that the National Labor Relations Board (NLRB) was given to conduct investigations of unfair labor practice charges under the National Labor Relations Act.²⁵⁹

If the Commission finds reasonable cause to believe that the

authority to issue regulations governing the form and content of charges. 42 U.S.C. § 2000e-5 (1988).

256. 42 U.S.C. § 2000e-5(b) (1988).

257. *Id.* In a state with a law that prohibits the charged practice and establishes an enforcement agency, however, the EEOC may not initiate its own investigation until the state agency has been afforded an opportunity to investigate and resolve the matter. *Id.* § 2000e-5(c), (d).

258. *Id.* § 2000e-8(a).

259. *Id.* § 2000e-9. Under 29 U.S.C. § 161, the National Labor Relations Board is given

access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application.

. . . .
 In case of . . . refusal to obey a subpoena [sic] . . . any district court . . . within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of . . . refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation . . . and any failure to obey such order of court may be punished by said court as a contempt thereof.

29 U.S.C. § 161(1), (2) (1988).

The EEOC regulations based on the subpoena power granted by Title VII are at 29 C.F.R. § 1601.16 (1992).

charge is true, it must "endeavor to eliminate any . . . alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."²⁶⁰ If these methods are unsuccessful, the Commission may bring a civil action against the respondent.²⁶¹ If the Commission concludes that there is not reasonable cause to believe that the charge is true, it "shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action."²⁶² After receiving this notice, the aggrieved party may file a private civil action against the respondent.²⁶³ If the Commission has not filed a civil action or entered into a conciliation agreement within 180 days after a charge is filed, the aggrieved party may file a civil action.²⁶⁴ An aggrieved party always has the right to intervene in a civil action brought by the Commission on his behalf.²⁶⁵

The investigatory authority of the EEOC was a subject of debate in 1964 when Title VII was originally passed and again when the statute was amended in 1972. Some legislators were concerned that the EEOC's investigatory powers needed to be limited to protect employers' rights.²⁶⁶ The Commission's investigatory powers were limited in response to these concerns. The Commission is permitted to conduct only those investigations identified in the provisions of Title VII.²⁶⁷ Even

260. 42 U.S.C. § 2000e-5(b) (1988).

261. *Id.* § 2000e-5(f)(1).

262. *Id.* § 2000e-5(b).

263. *Id.* § 2000e-5(f)(1).

264. *Id.*

265. *Id.* For an overview of the structure of the administrative phase of Title VII, see *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62-64 (1984); *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359-60 (1977); *EEOC v. Bailey Co.*, 563 F.2d 439, 444-45 (6th Cir. 1977).

266. See S. REP. NO. 415, 92d Cong., 1st Sess. 25-26 (1971); 1 EEOC, LEGISLATIVE HISTORY OF TITLE VII AND XI OF THE CIVIL RIGHTS ACT OF 1964, 1019, 3007 (comments of Sen. Humphrey), 3019 (comments of Sen. Dirksen), 3045 (interpretative memorandum of Sens. Clark and Case); see also *Shell Oil Co.*, 466 U.S. at 64-65; *Graniteville Co. v. EEOC*, 438 F.2d 32, 41 (4th Cir. 1971); *Georgia Power Co. v. EEOC*, 412 F.2d 462, 467-68 (5th Cir. 1969); *United States Steel Corp. v. EEOC*, 6 Empl. Prac. Dec. (CCH) ¶ 8980, at 6168 (W.D. Pa.), *aff'd*, 487 F.2d 1396 (3d Cir. 1973); Teresa A. Belmonte, Note, *Factually or Statistically Based Commissioner's Charge: A New Approach to EEOC Enforcement of Title VII*, 63 B.U. L. REV. 645, 660-64 (1983).

267. Lawrence A. Katz, *Investigation and Conciliation of Employment Discrimination Charges Under Title VII: Employers' Rights in an Adversary Process*, 28 HASTINGS L.J. 877, 880 (1977); Norman Kallen, Note, *Investigatory Power of an Administrative Agency*, 44 CHI.-KENT L. REV. 50, 50 (1967).

In *EEOC v. Western Elec. Co.*, 382 F. Supp. 787 (D. Md. 1974), the court recognized the limits of the EEOC's investigatory powers. It granted partial summary judgment for the employer in a civil action brought by the EEOC, in part because it found that

if a particular investigative technique saves Commission resources, is particularly effective, or furthers the purpose of eliminating discrimination in the workplace, the Commission may not employ that technique unless Congress has authorized it to do so.²⁶⁸ The EEOC lacks traditional law enforcement powers, such as the power to conduct undercover operations.²⁶⁹ Congress did not explicitly authorize the Commission to conduct undercover investigations of employers to obtain evidence for the purpose of filing a charge under Title VII. Therefore, absent an amendment to the statute, the Commission cannot employ its own testers or orchestrate the use of testers by private groups.

If Congress intended to give the EEOC power to conduct undercover investigations, it would have been more explicit, given the disputes over the EEOC's investigatory power. It has

the statute did not authorize the EEOC to propound interrogatories on a respondent employer during the investigation of a charge and to treat them as admitted if the employer did not answer them. *Id.* at 793. The court reasoned that allowing the use of this procedure "would . . . encourage the Commission to exercise additional power which might infringe upon the rights of defendants." *Id.* at 795.

268. *EEOC v. General Elec. Co.*, 532 F.2d 359, 379 (4th Cir. 1976) (Widener, J., dissenting); *EEOC v. Red Arrow Corp.*, 392 F. Supp. 64, 64 (E.D. Mo. 1974); *EEOC v. Westvaco Corp.*, 372 F. Supp. 985, 991-92 (D. Md. 1974).

269. *EEOC v. First Nat'l Bank*, 614 F.2d 1004 (5th Cir. 1980), *cert denied*, 450 U.S. 917 (1981). In *First National Bank*, the EEOC brought suit against the defendant bank after investigating a charge of race discrimination filed by a former bank employee. The bank filed a counterclaim for malicious prosecution. When the EEOC refused to comply with discovery requests seeking information relevant to the counterclaim, the district court dismissed the EEOC's action. *Id.* at 1006. The court of appeals reversed, holding that the counterclaim was not viable because it was not authorized by the Federal Tort Claims Act (FTCA). *Id.* at 1007 (citing 28 U.S.C. § 2680(h) (1976)). The bank claimed that the EEOC was an investigative or law enforcement agency within the meaning of the FTCA, and thus was not entitled to immunity for malicious prosecution. The statute provides "[t]hat, with regard to acts or omissions of . . . law enforcement officers of the United States [the immunity waiver provisions of the statute] shall apply to any claim arising . . . out of . . . malicious prosecution." 28 U.S.C. § 2680(h) (1988). The FTCA defines an investigative or law enforcement officer as "any officer of the United States who is empowered by law to execute searches, to seize evidence or to make arrests for violation of Federal law." *Id.*

The court rejected the bank's argument, correctly reasoning that under Title VII,

the EEOC's agents are given the power to: "at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by [Title VII]." They are not, however, given authority to execute searches, seize evidence, or make arrests for violation of federal law.

First Nat'l Bank, 614 F.2d at 1007-08 (quoting 42 U.S.C. § 2000e-8(a) (1976)) (alteration in original).

been more explicit in empowering other federal agencies to conduct undercover operations. For example, internal revenue agents, in addition to having subpoena power, are authorized to enter premises to examine taxable objects, to execute and serve search and arrest warrants, to make arrests, and to conduct undercover investigative operations "necessary for the detection and prosecution of offenses under the internal revenue laws."²⁷⁰ Congress did not give similar powers to the EEOC.

B. Precharge Investigatory Authority

Even if Title VII were interpreted to give the Commission the discretion to use testers, the Commission could not employ testers to obtain evidence for the purpose of filing a charge of discrimination against an employer because the Commission has no authority to investigate until *after* a charge of discrimination is filed. Section 2000e-5(b) authorizes the Commission to investigate charges of discrimination.²⁷¹ There is no provision authorizing an investigation absent a charge. Likewise, under section 2000e-8(a), the EEOC is entitled to examine only evidence relevant to "the charge under investigation."²⁷² Many courts have recognized that the Commission has no power to investigate before a charge is filed.²⁷³ The

270. 26 U.S.C. §§ 7602-7606, 7608(c) (1988); *see also* *United States v. Little*, 753 F.2d 1420, 1436-37 (9th Cir. 1984).

271. 42 U.S.C. § 2000e-5(b) (1988).

272. *Id.* § 2000e-8(a); *see also* *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68-69 (1984) (holding that the Commission is entitled to access only to evidence relevant to the charge under investigation); *Graniteville Co. v. EEOC*, 438 F.2d 32, 43 (4th Cir. 1971) (Boreman, J., dissenting) (stating that it is a significant restriction on the powers of the EEOC that the Commission may demand and obtain only evidence relevant to a charge).

273. *See, e.g., Shell Oil Co.*, 466 U.S. at 62-65; *EEOC v. General Elec. Co.*, 532 F.2d 359, 364-68 (4th Cir. 1976); *Graniteville Co.*, 438 F.2d at 35, 41; *EEOC v. Maryland Nat'l Bank*, 42 Fair Empl. Prac. Cas. (BNA) 1094, 1096 (D. Md. 1986); *EEOC v. Institute of Gas Technology*, 23 Fair Empl. Prac. Cas. (BNA) 825, 827 (N.D. Ill. 1980); *McDonnell Douglas Corp. v. Marshall*, 465 F. Supp. 22, 25 (E.D. Mo. 1978), *aff'd sub nom. Emerson Elec. Co. v. Schlesinger*, 609 F.2d 898 (8th Cir. 1979); *United States Steel Corp. v. EEOC*, 6 Empl. Prac. Dec. (CCH) ¶ 8980, at 6166 (W.D. Pa.), *aff'd*, 487 F.2d 1396 (3d Cir. 1973).

Courts have come to the same conclusion concerning the NLRB's investigatory powers under the National Labor Relations Act. *See, e.g., NLRB v. Rex Disposables, Div. of DHJ Indus., Inc.*, 494 F.2d 588, 590 (5th Cir. 1974) (stating that the NLRB must

commentators also have noted this limitation.²⁷⁴ As the Supreme Court has stated,

the EEOC's investigative authority is tied to charges filed with the Commission; unlike other federal agencies that possess plenary authority to demand to see records relevant to matters within their jurisdiction, the EEOC is entitled to access only to evidence "relevant to the charge under investigation."

. . . [T]his limitation on the Commission's authority is not accidental. As Senators Clark and Case, the "bipartisan captains" responsible for Title VII during the Senate debate, explained . . . ,

It is important to note that the Commission's power to conduct an investigation can be exercised only after a specific charge has been filed in writing. In this respect the Commission's investigatory power is significantly narrower than that of the [FTC] or of the Wage and Hour Administrator, who are authorized to conduct investigations, inspect records, and issue subpoenas, [sic] whether or not there has been any complaint of wrongdoing.²⁷⁵

This limitation prevents the EEOC from engaging in general fact-finding investigations. The Commission

is not empowered to conduct general fact-finding missions concerning the affairs of the nation's work force and employers. The only legitimate purpose for an EEOC

proceed pursuant to a charge, not on its own initiative). As noted earlier, Congress gave the EEOC the same subpoena power it granted the NLRB. *See supra* note 259 and accompanying text.

274. William F. Gardner, *The Development of the Meaning of Title VII of the Civil Rights Act of 1964*, 23 ALA. L. REV. 451, 474 (1971); Katz, *supra* note 267, at 880; R. Gaull Silberman, *The EEOC Is Meeting the Challenge: Response to David Rose*, 42 VAND. L. REV. 1641, 1642 (1989); Belmonte, *supra* note 266, at 660.

275. *Shell Oil Co.*, 466 U.S. at 64-65 (quoting INTERPRETATIVE MEMORANDUM OF TITLE VII, 110 CONG. REC. 7212, 7214 (citations omitted) (alterations in original)); *see also* Belmonte, *supra* note 266, at 659. The only exception is that the EEOC has the power to investigate absent a charge under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, 626(a) (1988); *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1653 (1991) ("[T]he EEOC's role in combatting age discrimination is not dependent on the filing of a charge"); *Nicholson v. CPC Int'l, Inc.*, 877 F.2d 221, 226 (3d Cir. 1989).

investigation is to prepare for action against an employer charged with employment discrimination, or to drop the matter entirely if the . . . charge . . . [is] unfounded.²⁷⁶

Moreover, under section 2000e-5(b), the Commission must notify a respondent named in a charge within ten days.²⁷⁷ The Senate Report accompanying the 1972 amendments to Title VII, which included the ten-day notice requirement, stated that the notice requirement was intended to protect employers' rights by insuring that fairness and due process are part of the enforcement process.²⁷⁸ Notice also provides the employer with the opportunity to: 1) participate in the investigation of the allegations; 2) preserve relevant evidence; 3) conduct its own investigation; and 4) prepare for subsequent enforcement proceedings.²⁷⁹ Numerous Commission regulations, policies, and procedures reflect the Commission's understanding that the employer should be notified of, and given the opportunity to participate in, investigations of discrimination charges.²⁸⁰ An

276. *EEOC v. Ocean City Police Dep't*, 820 F.2d 1378, 1380 (4th Cir. 1987), *vacated*, 486 U.S. 1019 (1988). If, however, the Commission uncovers evidence of an uncharged unlawful practice while investigating a charge, it may file a new charge to cover the practice in question. *See, e.g., EEOC v. Bay Shipbuilding Corp.*, 27 Fair Empl. Prac. Cas. (BNA) 1372, 1376 (E.D. Wis.), *aff'd*, 668 F.2d 304 (7th Cir. 1981); *Extended and Systemic Investigations Procedures*, EEOC Compl. Man. (CCH) ¶ 803, at 718 (July 1991).

277. 42 U.S.C. § 2000e-5(b) (1988).

278. S. REP. NO. 415, 92d Cong., 1st Sess. 25 (1971); *see also Shell Oil Co.*, 466 U.S. at 74. Prior to 1972, the statute required that the EEOC notify an employer that a charge was filed against it but did not specify a time limit. *See* 42 U.S.C. § 2000e-5(b) (Supp. 1972) (amended 1972); *see also* Belmonte, *supra* note 266, at 665.

279. *Shell Oil Co.*, 466 U.S. at 78, 89-90; *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 371 n.30 (1977); *EEOC v. Bailey Co.*, 563 F.2d 439, 448 (6th Cir. 1977); *EEOC v. Western Elec. Co.*, 382 F. Supp. 787, 794-95 (D. Md. 1974).

280. *See* 29 C.F.R. §§ 1601.21(b), 1601.24, 1601.25 (1992) (stating that the EEOC will notify the respondent when it determines whether reasonable cause exists to believe that a charge is true and when it terminates conciliation efforts); *Intake of Commission Initiated Actions*, EEOC Compl. Man. (CCH), ¶ 372, at 441 (Mar. 1989) (stating that the EEOC must notify the respondent of the date, place, and circumstances to be covered by an upcoming investigation); *Extended and Systemic Investigation Procedures, id.* ¶ 809, at 721-22 (Feb. 1988) (detailing the procedure for the first meeting with an employer facing a pattern or practice investigation); *Evidence, id.* ¶ 2024, at 2038-39 (Apr. 1988) (stating that EEOC investigators must specify the scope of their investigation to the respondent); *Interviews, id.* ¶ 826, at 732 (Mar. 1988) (stating that the respondent has the right to have a spokesperson present during interviews conducted by EEOC investigators with management level employees); *id.* ¶ 827, at 733-34 (Mar. 1988) (stating that an EEOC investigator always should present proper credentials showing affiliation with the EEOC when conducting interviews); *On Site Investigation, id.* ¶¶ 902-903, at 781-82 (Mar. 1988) (stating that the EEOC must notify an employer of any on-site inspection); *id.* ¶ 923, at 792-93 (Mar. 1988)

investigation without notice to the employer would be contrary to the provisions of Title VII limiting the EEOC's investigative power to charges of discrimination.²⁸¹ Obviously, testers must be used without notice to the employer.

Whether the Commission is authorized to conduct investigations absent a charge of discrimination is complicated somewhat by the fact that Congress gave commissioners the power to file their own charges of discrimination.²⁸² Congress did not give the commissioners power, however, to conduct investigations in order to obtain evidence to serve as the basis for such charges. It may seem incongruous that commissioners have the power to file charges but cannot investigate to obtain evidence on which to base them. This scheme is consistent, however, with the purposes Congress envisaged for charges of discrimination in general and for commissioner's charges in particular. One reason Congress gave commissioners the power to file charges was to enable an aggrieved person to have a personal charge of discrimination considered by the Commission where, because of fear of reprisal, that person desires confidentiality.²⁸³ In those circumstances, the Commission does not need investigative power prior to filing the charge—the aggrieved party provides the necessary information. As with charges of discrimination filed by aggrieved parties who do not request anonymity, the Commission investigates after the charge is filed to determine whether there is reasonable cause to believe it is true.

Commissioners also were given the power to file charges to challenge a pattern or practice of discrimination.²⁸⁴ "Pattern or

(indicating that the EEOC must notify the employer of the EEOC's desire to examine records).

281. *Bailey Co.*, 563 F.2d at 450.

282. Section 2000e-5(b) provides that charges may be filed "by or on behalf of a person claiming to be aggrieved, or by a member of the Commission." 42 U.S.C. § 2000e-5(b) (1988).

283. *EEOC v. Dean Witter Co.*, 643 F.2d 1334, 1339 (9th Cir. 1980) (citing S. REP. NO. 415, 92d Cong., 1st Sess. 27 (1971)).

284. H.R. REP. NO. 238, 92d Cong., 1st Sess. 13-14 (1971). Section 2000e-6(e) provides that

[t]he Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 2000e-5 of this title.

practice discrimination is a pervasive and deeply imbedded form of discrimination.²⁸⁵ In carrying out its mission to pursue these cases, the Commission seeks "to identify situations where the patterns of employment discrimination are the most serious, and where maintenance of a successful 'systemic case' will have a significant positive impact on the employment opportunities available to minorities and women."²⁸⁶ Prior to 1972, the Attorney General had the statutory authority to bring pattern-and-practice cases in the district courts without first filing a charge of discrimination with the Commission.²⁸⁷ The authority to prosecute pattern-and-practice cases was transferred to the EEOC in 1972 and was incorporated into the regular charge processing system.²⁸⁸ Congress recognized that the EEOC "has access to the most current statistical computations and analyses regarding employment patterns,"²⁸⁹ in part because the EEOC has the power, under section 2000e-8(c)(3), to require employers to make reports that are "reasonable, necessary, or appropriate" for enforcement of the statute.²⁹⁰ The statute also authorizes the Commission to coordinate its recordkeeping requirements with "interested State and Federal agencies" that provide the Commission with further sources of information.²⁹¹

Congress contemplated that the EEOC, in exercising its power to file charges challenging a pattern or practice of discrimination, would review data provided by employers pursuant to these various recordkeeping requirements as well as other data already in the Commission's possession.²⁹² The Commission's policies and procedures incorporate this expectation. In determining whether to issue a pattern-and-practice charge, Commission personnel review 1) information

285. H.R. REP. NO. 238, 92d Cong., 1st Sess. 14 (1971).

286. *Processing Systemic Cases*, EEOC Compl. Man. (CCH) ¶ 561, at 571 (Feb. 1988). For the criteria that the EEOC uses to identify appropriate pattern-and-practice cases, see *id.* ¶ 562, at 571-72.

287. 42 U.S.C. § 2000e-6 (1970) (amended 1972).

288. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 5, 86 Stat. 103, 107.

289. H.R. REP. NO. 238, 92d Cong., 1st Sess. 14 (1971); see also *EEOC v. Shell Oil Co.*, 466 U.S. 54, 69-70 (1984).

290. 42 U.S.C. § 2000e-8(c)(3) (1988). By Commission regulation, employers of 100 or more employees must file annual "EEO-1" reports with the EEOC detailing the racial and gender composition of their work forces by job classification. 29 C.F.R. § 1602.7 (1992).

291. 42 U.S.C. § 2000e-8(d) (1988).

292. See *Shell Oil Co.*, 466 U.S. at 80 (noting that most of the data on which a Commission pattern-or-practice charge is based is provided by the employer itself in the form of annual reports filed with the EEOC).

obtained in prior investigations or from prior complainants who elected not to file charges; 2) media reports; 3) information obtained by "interested" state or federal agencies; 4) EEO-1 reports,²⁹³ and 5) information obtained by civil rights organizations, employment agencies, and union and trade officials.²⁹⁴

The courts, commentators, and EEOC agree that two legitimate purposes for a commissioner's charge are protecting an aggrieved party's identity and challenging a pattern or practice of discrimination.²⁹⁵ The absence of congressional authorization to the EEOC to investigate employers for the purpose of filing commissioner's charges is consistent with those two purposes.

The scheme likewise is consistent with the role of charges in the enforcement scheme of Title VII—simply to notify the EEOC and the employer that someone believes that the employer has violated the statute.²⁹⁶ When the statute originally was enacted in 1964, the Attorney General could not file a charge unless the allegations were based on reasonable cause to believe that the unlawful employment practice had occurred.²⁹⁷ As part of the 1972 amendments, the reasonable cause language was removed, thereby loosening the constraints on commissioners' power to file charges.²⁹⁸ Since 1972, commissioners have been permitted to file charges although the allegations were not substantiated.²⁹⁹ The subsequent investigation is intended to determine whether there is reasonable cause to believe the allegations of the charge are true.³⁰⁰ Therefore, a charge is not the same as a complaint initiating suit. To put the EEOC and respondent on notice that

293. See *supra* note 290.

294. *Intake of Commission Initialed Actions*, EEOC Compl. Man. (CCH) ¶ 372, at 441-43 (Mar. 1989); see also *Systemic Case Processing*, *id.* ¶ 563, at 572-73 (Feb. 1988) (describing the procedure used to select pattern-and-practice respondents); *Shell Oil Co.*, 466 U.S. at 70-71; Belmonte, *supra* note 266, at 647.

295. *Shell Oil Co.*, 466 U.S. at 62; 29 C.F.R. §§ 1601.6, 1601.7, 1601.11 (1992); Belmonte, *supra* note 266, at 647; EEOC, *THE EEOC AND THE LAWS IT ENFORCES: A REFERENCE MANUAL, STATEMENTS AND PROCEDURES* (1988).

296. See *supra* text accompanying notes 278-81.

297. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, § 706(a), 78 Stat. 241, 259 (amended 1972).

298. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, sec. (4)(a), § 706(b), 86 Stat. 103, 104 (codified at 42 U.S.C. § 2000e-5(b) (1988)).

299. *Shell Oil Co.*, 466 U.S. at 62-63, 71, 76-77 & n.32; Belmonte, *supra* note 266, at 648 & n.31.

300. *Shell Oil Co.*, 466 U.S. at 71; *EEOC v. K-Mart Corp.*, 694 F.2d 1055, 1066 (6th Cir. 1982); *Graniteville Co. v. EEOC*, 438 F.2d 32, 36 (4th Cir. 1971).

someone believes that the respondent may have violated the statute and to initiate the investigation, the charging party, including a commissioner, need not state facts sufficient to make out a prima facie case.³⁰¹ Therefore, precharge investigatory power is unnecessary.³⁰²

VI. ADVANTAGES TO AUTHORIZING THE EEOC TO USE TESTERS TO UNCOVER AND REMEDY DISCRIMINATION IN HIRING FOR LOWER-SKILLED, ENTRY-LEVEL POSITIONS

A. Relief Available in Tester Litigation Brought by the EEOC

The EEOC should litigate cases on behalf of testers because the EEOC is more likely than a private party to obtain injunctive relief.³⁰³ Moreover, because private individuals and groups face obstacles in testing on their own,³⁰⁴ Congress should give the EEOC authority to use testers to fill the existing enforcement void.³⁰⁵

The barrier to injunctive relief posed by testers' lack of interest in employment³⁰⁶ could be overcome if the EEOC prosecuted tester cases under either its pattern-and-practice power³⁰⁷

301. *Shell Oil Co.*, 466 U.S. at 68; *K-Mart Corp.*, 694 F.2d at 1067; *Graniteville Co.*, 438 F.2d at 38.

302. The EEOC also lacks the authority to use testers to obtain corroborative evidence after a charge is filed. Under the current statutory scheme, the EEOC requests information from the respondent employer when investigating a charge. If the employer objects to the nature or scope of the request, it can refuse to respond and force the EEOC to initiate a subpoena enforcement action in federal district court. This scheme was intended to balance the EEOC's power to investigate fully charges of discrimination against the rights of employers to challenge the EEOC's demands for information. *In re EEOC*, 709 F.2d 392, 396-97 (5th Cir. 1983); *Reynolds Metal Co. v. Rumsfeld*, 417 F. Supp. 365, 373 (E.D. Va. 1976), *rev'd on other grounds sub nom. Reynolds Metals Co. v. Brown*, 564 F.2d 663 (4th Cir. 1977). The use of testers to corroborate a charge would deprive employers of this statutory right.

303. The EEOC is not authorized to recover attorneys' fees under Title VII because the Commission, unlike private litigants, needs no inducement to enforce Title VII. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 n.20 (1978). It is required by statute to enforce Title VII. 42 U.S.C. § 2000e-5(b) (1988).

304. See *supra* Parts III & IV.

305. See *supra* Part I.

306. See *supra* Part III.B.

307. See 42 U.S.C. § 2000e-6(a) (1988) (stating that the EEOC may request a permanent injunction if it is "necessary to ensure the full enjoyment of the rights herein described"). For a discussion of pattern-and-practice suits, see *supra* notes 284-94 and accompanying text.

or its power to file an action on behalf of an aggrieved individual. In these latter actions, the EEOC does not act simply as a proxy for victims of discrimination.³⁰⁸ In addition to obtaining relief for the charging party, the EEOC has an independent right of action to vindicate the public interest in preventing employment discrimination.³⁰⁹ Thus, the EEOC may seek classwide relief under Title VII without being certified as a class representative under Federal Rule of Civil Procedure 23.³¹⁰ Even if the individual complainants in a Title VII action brought by the EEOC are made whole by the relief ordered by the district court, the EEOC may seek injunctive relief to protect others and to deter future unlawful discrimination.³¹¹ In fact, during Justice Clarence Thomas's tenure at the EEOC, the Commission announced that as part of its litigation and conciliation efforts in individual cases of discrimination it would require that all respondents agree to refrain from the specific unlawful employment practices involved in the case or from any further discrimination.³¹² The EEOC also announced that it intended to require employers to notify all employees that the company would not violate Title VII and, if warranted, require employers to take specific measures to ensure that discrimination would not take place in the future.³¹³

The Commission need not wait for congressional authorization to litigate cases on behalf of testers. It currently has the power to bring pattern-and-practice cases and to litigate cases on behalf of aggrieved parties. If private groups or individuals do not use testers, however, the EEOC will have no tester suits to litigate. Therefore, Congress should amend the statute to permit the EEOC to engage in testing.³¹⁴

308. See *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1510-12 (9th Cir. 1989).

309. *General Tel. Co. v. EEOC*, 446 U.S. 318, 326 (1980); *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1543 (9th Cir. 1987); see also *Hacienda Hotel*, 881 F.2d at 1515.

310. *General Tel. Co.*, 446 U.S. at 326; see also FED. R. CIV. P. 23.

311. *Hacienda Hotel*, 881 F.2d at 1519; *Goodyear Aerospace Corp.*, 813 F.2d at 1544; see also *EEOC v. Red Baron Steak Houses*, 47 Fair Empl. Prac. Cas. (BNA) 49, 53 (N.D. Cal. 1988) (granting the EEOC an injunction forbidding the defendant from violating Title VII in the future to deter the defendant and to protect employees of the company in a case involving two employees who were discharged in violation of Title VII, but who were not entitled to reinstatement).

312. *EEOC Policy Statement on Remedies and Relief for Individual Cases of Unlawful Discrimination*, 1985 Daily Lab. Rep. (BNA) No. 25, at E-1, E-1 (Feb. 6, 1985).

313. *Id.*

314. Because its personnel already are overburdened, the Commission might contract with private groups to engage in testing according to standards and practices promulgated by the EEOC.

B. Preemption of State Laws That Interfere with Testing

If Congress authorized the EEOC to use testers to uncover discriminatory hiring practices, state laws that interfered with the EEOC's efforts to fulfill that congressional mission would be preempted. The Supremacy Clause provides that federal law is supreme, notwithstanding the laws of the states.³¹⁵ "In determining whether a state [law] is pre-empted by federal law and therefore invalid . . . , [the] sole task is to ascertain the intent of Congress."³¹⁶

State law may be preempted in three ways. First, Congress may preempt state law by express statutory terms.³¹⁷ Second, intent to preempt may be inferred where federal regulation is sufficiently comprehensive, leaving no room for supplementary state regulation.³¹⁸ Third, in the absence of express or implied preemption, federal law may preempt state law "to the extent it actually conflicts with federal law."³¹⁹ This is referred to as "conflict preemption."

The Supreme Court has stated that in Title VII "Congress has explicitly disclaimed any intent categorically to pre-empt state law or to 'occupy the field' of employment discrimination law."³²⁰ Rather, "[i]n two sections of the 1964 Civil Rights Act, §§ 708 and 1104, Congress has indicated that state laws will be pre-empted only if they actually conflict with federal law."³²¹

315. U.S. CONST. art. VI, cl. 2. This clause provides that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." *Id.*; see also *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992).

316. *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987).

317. *E.g., id.*; *Thornton v. Fondren Green Apartments*, 788 F. Supp. 928, 931 (S.D. Tex. 1992).

318. *E.g., Guerra*, 479 U.S. at 280-81; *Perry v. Mercedes Benz of N. Am., Inc.*, 957 F.2d 1257, 1261, 1264 (5th Cir. 1992); *Thornton*, 788 F. Supp. at 932.

319. *Guerra*, 479 U.S. at 281.

320. *Id.* (citing 42 U.S.C. §§ 2000e-7 & 2000h-4 (1988)).

321. *Id.* Section 708 provides:

Nothing in this [title] shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this [title].

Testing activities by private groups or individuals currently are not protected from the application of state law because Congress never considered whether testing was an appropriate means of enforcing Title VII. Though the rights that Congress created in Title VII are sufficient to confer standing on testers who receive disparate treatment,³²² the statute is silent on the use of testers. In fact, as discussed earlier, the EEOC does not have the authority to use testers.³²³ Conflict preemption analysis would not require striking down state laws that interfered with testing because it cannot be said with any assurance that those laws stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."³²⁴ State law restrictions on the use of testers would not interfere with the enforcement procedures Congress outlined in Title VII.³²⁵

Congress could expressly preempt state laws that interfere with testing if it authorized the EEOC to conduct or direct testing activities to uncover and remedy violations of Title VII. Even if Congress did not expressly preempt state laws that interfered with testing, an amendment to Title VII authorizing the EEOC to use testers would preempt any state law that interfered with EEOC testing under conflict preemption analysis. The state laws would interfere with the Title VII enforcement scheme envisaged by Congress and would then stand as "an obstacle to the accomplishment and execution of the full purpose and objectives of Congress."³²⁶

Section 1104 provides:

Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

Id. tit. XI, § 1104, 78 Stat. at 268 (codified at 42 U.S.C. § 2000h-4). "Accordingly, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of Title VII; these two sections provide a 'reliable indicium of congressional intent . . .'" *Guerra*, 479 U.S. at 282 (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 505 (1978)).

322. *See supra* Part II.

323. *See supra* Part V.

324. *Guerra*, 479 U.S. at 281 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

325. *But see* *United States v. Wisconsin*, 395 F. Supp. 732, 733-34 (W.D. Wis. 1975) (holding that a state law prohibiting the use of housing testers was an obstacle to the accomplishment of the purposes of the Fair Housing Act despite the fact that the Act was silent on the issue of the use of testers).

326. *Guerra*, 479 U.S. at 281 (quoting *Hines*, 312 U.S. at 67); *see also* *EEOC v. County of Hennepin*, 623 F. Supp. 29 (D. Minn. 1985). *County of Hennepin* involved a

State contract claims or tort claims for fraud, maintenance, or barratry levied against EEOC testers and their counsel would be preempted by an amendment to Title VII authorizing the EEOC to use testers because the state laws would interfere with Title VII's enforcement scheme. Moreover, the interests sought to be protected by the ethics rules barring solicitation and the laws of barratry and maintenance are not implicated by the EEOC's conduct in investigating and challenging unlawful employment practices.³²⁷ The EEOC is empowered to investigate and litigate in the public interest to vindicate the rights established by Title VII.³²⁸ The EEOC may not be retained by a private individual, and it does not engage in litigation for financial gain.

If Congress authorized the EEOC to use testers to uncover discriminatory hiring practices in entry-level employment, any uncertainty caused by the broad interpretations of the ethics rules barring *ex parte* communications also would disappear. The no-contact rules prohibit a lawyer's communications with a represented party unless "authorized by law." A specific statutory mandate would satisfy the "authorized by law" exception.³²⁹

state law that required the EEOC to "seek district court enforcement for its administrative subpoenas." *Id.* at 32. "As a part of its investigation, the EEOC [sought] to examine the personnel files of 16 deputy sheriffs . . ." *Id.* at 31 (restating the plaintiff's allegations). Under its power to issue administrative subpoenas, the EEOC issued a subpoena for the files. The state law, however, required a court order before such information could be provided. *Id.*

The court decided that "the federal scheme would be frustrated if the EEOC had to seek court orders to enforce EEOC subpoenas seeking information covered under the [state law]." *Id.* at 32. The court noted that EEOC "investigations [would] be significantly delayed if it must seek district court enforcement for its administrative subpoenas." *Id.* The court concluded that the state law "frustrate[d] the federal scheme embodied in Title VII." *Id.* Title VII, therefore, preempted the state law's requirement. *Id.*; see also *Sosa v. Hiraoka*, 920 F.2d 1451, 1461 n.4 (9th Cir. 1990) ("State immunity laws stand as such obstacles to Congress's evident purpose in authorizing Title VII suits against states, state subdivisions, and state officials, that Title VII must preempt state immunity laws.").

327. Cf. *National Org. for Women v. Minnesota Mining & Mfg. Co.*, 18 Fair Empl. Prac. (BNA) 1176, 1179 (D. Minn. 1977) (holding that an order forbidding EEOC attorneys from contacting current and prospective class members in Title VII class actions can be upheld only insofar as it protects the interest in forbidding the dissemination of misleading and erroneous information about the suit).

328. See *supra* text accompanying notes 306-13.

329. See *United States v. Lopez*, 765 F. Supp. 1433, 1450-51 (N.D. Cal. 1991) (noting that if a federal statute authorized government attorneys to question represented parties in the absence of counsel, the "authorized by law" exception in the ethics rule would be satisfied); *Bougé v. Smith's Management Corp.*, 132 F.R.D. 560, 564 n.9 (D. Utah 1990) (holding that Rules 4.2 and DR 7-104 have no application to *ex parte* contacts by counsel where a statute authorizes those contacts).

VII. ENTRAPMENT

The objections of employer groups and others that testing by the EEOC would constitute entrapment³³⁰ are unfounded as applied to the model described in this Article because testers merely provide an opportunity for employers to violate the law. They do not induce or coerce employers to break the law in any way.

When the Supreme Court first recognized entrapment as a complete defense to a criminal charge in 1932,³³¹ the Justices disagreed about the source of the defense. Since that time, most Justices have stated that the foundation of the defense is Congress's intent in enacting the criminal statute in question. In their view, the defense is based on the "notion that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a proscribed offense, but was induced to commit them by the Government."³³² Other members of the Court have written that the defense is based not on congressional intent or statutory interpretation, but on courts' supervisory power to protect the function and purity of criminal proceedings.³³³

330. See *supra* notes 16–17 and accompanying text. Some commentators also have noted the concern. See, e.g., David S. Bogen & Richard V. Falcon, *The Use of Racial Statistics in Fair Housing Cases*, 34 MD. L. REV. 59, 65 (1974) (stating that "there smacks about the use of testers a sense of entrapment which is distasteful to most").

331. *Sorrells v. United States*, 287 U.S. 435, 452 (1932) (holding that where a defendant is entrapped, the government cannot contend that the defendant is guilty).

332. See *United States v. Russell*, 411 U.S. 423, 435 (1973); see also *Jacobson v. United States*, 112 S. Ct. 1535, 1543 (1992) (stating that in enacting the criminal statute in question, Congress did not intend that its processes of detection and enforcement would be abused); *Hampton v. United States*, 425 U.S. 484, 488 (1976) (plurality opinion) (referring to "the statutory defense of entrapment"); *Sherman v. United States*, 356 U.S. 369, 372 (1958) (noting that Congress could not have intended that its statutes would be enforced by tempting innocent persons into violations); *Sorrells*, 287 U.S. at 448 (stating that in enacting criminal statutes, Congress did not intend that government officials would instigate an act on the part of persons otherwise innocent in order to lure them to commit the act and punish them).

333. See *Mathews v. United States*, 485 U.S. 58, 67 (1988) (Brennan, J., concurring) (stating that "my differences with the Court have been based on statutory interpretation and federal common law"); *Hampton*, 425 U.S. at 496 (Brennan, J., dissenting) (noting that "courts refuse to convict an entrapped defendant, not because his conduct falls outside the proscription of the statute, but because . . . the methods employed on behalf of the Government to bring about conviction cannot be countenanced" (quoting *Sherman*, 356 U.S. at 380 (Frankfurter, J., concurring))); *Russell*, 411 U.S. at 440–41 (Stewart, J., dissenting) (stating that the entrapment defense "is not grounded in some unexpressed intent of Congress to exclude from punishment . . . [innocents] tempted into crime by the Government, but rather on the

The Justices' views about the source of the entrapment defense influence their formulations of its substantive content. The majority have emphasized a "subjective approach," which focuses "on the intent or predisposition of the defendant to commit the crime."³³⁴ The other Justices have urged adoption of an "objective approach," which focuses "exclusively on the Government's conduct."³³⁵ Under the majority's view, the entrapment issue is for the jury,³³⁶ under the objective approach, it is for the court.³³⁷

The Court also has recognized that the conduct of law enforcement officers investigating a crime might be "so outrageous that due process principles absolutely would bar the

belief that 'the methods employed on behalf of the Government to bring about conviction cannot be countenanced' (quoting *Sherman*, 356 U.S. at 380 (Frankfurter, J., concurring)); *Sherman*, 356 U.S. at 380-81 (Frankfurter, J., concurring) (arguing that because the defendant clearly violated the criminal statute, the source of the entrapment defense must be the courts' supervisory jurisdiction); *Sorrells*, 287 U.S. at 457 (Roberts, J., concurring) (proposing that the doctrine of entrapment rests not on the statute in question but on the court's power to preserve the integrity of its proceedings—"a fundamental rule of public policy").

334. *Russell*, 411 U.S. at 429; see also *Jacobson*, 112 S. Ct. at 1540 (holding that the government must prove beyond a reasonable doubt that the defendant was disposed to commit the crime); *Sherman*, 356 U.S. at 372-73 (stating that to determine whether the government set a trap for the "unwary innocent" or the "unwary criminal," the courts "may examine the conduct of the government agent . . . and . . . the accused will be subjected to an 'appropriate and searching inquiry into his own conduct and predisposition'" (quoting *Sorrells*, 287 U.S. at 451)); *Sorrells*, 287 U.S. at 442 (holding that entrapment is established where "the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute").

335. *Mathews*, 485 U.S. at 67 (Brennan, J., concurring) (reaffirming his general support for the objective approach but holding that stare decisis required the application of the subjective approach); accord *Hampton*, 425 U.S. at 497 (Brennan, J., dissenting) (stating that the focus "is not on the propensities and predisposition of a specific defendant, but on whether the police conduct . . . falls below standards . . . for the proper use of governmental power" (quoting *Russell*, 411 U.S. at 441 (Stewart, J., dissenting))); *Russell*, 411 U.S. at 441 (Stewart, J., dissenting) (noting that "the very basis of the entrapment defense itself demands adherence to an approach that focuses on the conduct of the government agents, rather than on whether the defendant was 'predisposed' or 'otherwise innocent'"); *Sherman*, 356 U.S. at 383, 384 (Frankfurter, J., concurring) (arguing that because permissible police activity should not vary according to the particular defendant concerned, the test should focus not on the defendant's predisposition but "the conduct of the police and the likelihood, objectively considered, that it would entrap only those ready and willing to commit crime"); *Sorrells*, 287 U.S. at 459 (Roberts, J., concurring) (stating that any instigation and inducement by a government officer should not be condoned and rendered innocuous by the fact that the defendant had a bad reputation or had transgressed previously).

336. See, e.g., *Mathews*, 485 U.S. at 63.

337. See, e.g., *Hampton*, 425 U.S. at 497 (Brennan, J., dissenting).

government from invoking judicial processes to obtain a conviction.³³⁸ Some members of the Court have suggested that this due process component of the entrapment defense is not available to a defendant who was predisposed to commit the crime in question.³³⁹ Most Justices, however, have stated that the due process rights of a predisposed defendant could be violated by outrageous governmental investigative conduct.³⁴⁰ Regardless of whether a predisposed defendant may invoke the due process component of the entrapment defense, to satisfy its requirements a defendant must show that the government's conduct reached a high level of outrageousness that "shock[s] the conscience of the court."³⁴¹

Although the entrapment defense traditionally has been available only in criminal proceedings,³⁴² the statutory interpretation rationale for the defense and the alternate rationale of protecting the integrity of the adjudicative process apply with equal force to civil proceedings.³⁴³ Thus, the defense has been recognized in a tax refund proceeding³⁴⁴ and in administrative proceedings to revoke a doctor's license,³⁴⁵ a pharmacist's certificate of registration and permit,³⁴⁶ and a jockey's license.³⁴⁷

338. *Russell*, 411 U.S. at 431-32.

339. *See Hampton*, 425 U.S. at 490.

340. *Id.* at 492-93 (Powell, J., concurring); *id.* at 497 (Brennan, J., dissenting).

341. *United States v. Jacobson*, 916 F.2d 467, 469 (8th Cir. 1990) (en banc), *rev'd on other grounds*, 112 S. Ct. 1535 (1992).

342. *See, e.g., Zwak v. United States*, 848 F.2d 1179, 1183 (11th Cir. 1988); *Rodriguez v. United States*, 534 F. Supp. 370, 373 (D.P.R. 1982).

343. *See Zwak*, 848 F.2d at 1183-84 (arguing that the *Sorrells* rationale that statutes should not be given an unreasonable construction applies in a suit challenging a levy of an excise tax because Congress could not have intended to impose a tax upon a taxpayer who was induced to commit the taxable act by the government); *United States v. Fifty Thousand Dollars United States Currency*, 757 F.2d 103, 107 (6th Cir. 1985) (Merritt, J., dissenting) (arguing that the same policy considerations underlying the doctrine of entrapment in the criminal setting apply with equal force to a civil forfeiture proceeding); *Patty v. Board of Medical Examiners*, 508 P.2d 1121, 1125 (Cal. 1973) (holding that because the defense of entrapment is crucial to the fair administration of justice it should be recognized in an administrative proceeding); *Medley v. Maryville City Beer Bd.*, 726 S.W.2d 891, 895-96 (Tenn. 1987) (Fones, J., dissenting) (arguing that the defense should apply in the civil context if the purpose of the defense is preserving the dignity of and public confidence in the legal process).

344. *Zwak*, 848 F.2d at 1183-84.

345. *Patty*, 508 P.2d at 1122-25.

346. *Fumusa v. Arizona State Bd. of Pharmacy*, 545 P.2d 432, 434 (Ariz. Ct. App. 1976).

347. *Smith v. Pennsylvania State Horse Racing Comm'n*, 501 A.2d 303, 304 (Pa. Commw. Ct. 1985), *rev'd*, 535 A.2d 596 (Pa. 1988) (holding that the entrapment defense, though sometimes available in the administrative context, was not available to the defendant).

Some courts, however, have ruled that the defense does not apply in civil proceedings.³⁴⁸

Regardless of how the courts would or should rule on whether the entrapment defense could be asserted in a Title VII action against EEOC testers, the conduct of testers would not constitute entrapment under any accepted formulation of the defense because testers do not suggest illegal conduct to the employer or encourage or induce the employer to discriminate in any way. Testers merely afford the employer an opportunity to violate the law. All members of the Court consistently have agreed that the government may "afford opportunities . . . for the commission of [an] offense" without entrapping the defendant.³⁴⁹

The Court has recognized consistently that "decoys may be used" by law enforcement authorities.³⁵⁰ This conclusion is consistent with both the majority and minority views of the substantive content of the entrapment defense. According to

348. One court held that the defense did not apply in an action to review the disqualification of a supermarket from participation in the Food Stamps program because the enforcement provisions of the Food Stamp Act of 1964, 7 U.S.C. §§ 2011-2030 (1988), were intended to protect the public and not to punish, and because the supermarket owner could continue to operate the business even if disqualified from the program. *Rodriguez v. United States*, 534 F. Supp. 370, 374 (D.P.R. 1982). Another held that the defense did not apply in an action to suspend a liquor license because the sale and distribution of alcoholic beverages was highly regulated. *Medley v. Maryville City Beer Bd.*, 726 S.W.2d 891, 893 (Tenn. 1987). Finally, one court ruled that the entrapment defense is not available in a civil forfeiture proceeding because, to meet its statutory burden, the government need only show that the defendant furnished money in exchange for a controlled substance. *United States v. Fifty Thousand Dollars United States Currency*, 757 F.2d 103, 105 (6th Cir. 1985).

It is not entirely clear that the lines drawn have some principled grounding in the alternative rationales underlying the entrapment doctrine.

349. *Sorrells v. United States*, 287 U.S. 435, 441 (1932); *see also Jacobson v. United States*, 112 S. Ct. 1535, 1541 (1992) (stating in dictum that an agent employed to stop traffic in illegal drugs may offer the opportunity to buy or sell drugs and may make an arrest on the spot or later because the ready commission of the criminal act amply demonstrates the defendant's predisposition); *Mathews v. United States*, 485 U.S. 58, 66 (1988) ("Of course evidence that Government agents merely afforded an opportunity or facilities for the commission of the crime would be insufficient to warrant [an entrapment] instruction."); *United States v. Russell*, 411 U.S. 423, 435-36 (1973) (holding that the use of deceit in law enforcement will not defeat a prosecution if the government merely provides an opportunity for the defendant to commit the crime); *id.* at 445 (Stewart, J., dissenting) (stating that entrapment occurs only when an agent's involvement in criminal activity goes beyond the offer of an opportunity to commit the crime); *Sherman v. United States*, 356 U.S. 369, 372 (1958) (stating that the fact that government agents merely afford opportunities for the commission of an offense does not constitute entrapment); *id.* at 382 (Frankfurter, J., concurring) (same).

350. *Sorrells*, 287 U.S. at 445 (quoting *Newman v. United States*, 299 F. 128, 131 (4th Cir. 1924)).

the prevailing subjective formulation of the defense, entrapment occurs only when the criminal design originates in the minds of the government officials, the government implants that design in the mind of an innocent person, and the government induces that person to commit the crime.³⁵¹ Those Justices who favor the alternative objective approach believe entrapment occurs where the government unfairly induces an individual to commit a crime.³⁵² Regardless of the formulation, the conduct of testers would not constitute entrapment. If an employer discriminates against a tester, the design to discriminate originates in the employer's mind. The tester does not induce or persuade the employer to discriminate in any way.

Entrapment requires active and persistent government inducement. Most recently, in *Jacobson v. United States*,³⁵³ the Court held that the defendant was entrapped as a matter of law where the government induced him to order child pornography through the mails by repeated pleas, offers, and deception over a twenty-six month period.³⁵⁴ In *Sorrells v. United States*,³⁵⁵ the Court held that the entrapment defense was available where government agents lured a defendant to violate a prohibition statute "by repeated and persistent solicitation . . . [and] by taking advantage of the sentiment aroused by reminiscences of their experience as companions in arms in the [First] World War."³⁵⁶ In *Sherman v. United States*,³⁵⁷ the Court held that the defendant, who was undergoing medical treatment to overcome narcotics addiction, was entrapped as a matter of law where a government agent enticed the defendant not only to sell drugs to the agent but also to return to a drug habit. The Court explained that the government agent appealed to the

351. *Jacobson*, 112 S. Ct. at 1540; *Mathews*, 485 U.S. at 62-63; *id.* at 67-68 (Scalia, J., concurring); *Hampton v. United States*, 425 U.S. 484, 488-89 (1976) (plurality op.); *Russell*, 411 U.S. at 434-36; *Sherman*, 356 U.S. at 372; *Sorrells*, 287 U.S. at 442.

352. *Hampton*, 425 U.S. at 492-93 & n.2 (Powell, J., concurring) (arguing that entrapment was properly applied in cases where the government encouraged or otherwise acted in concert with the defendant); *id.* at 498-99 (Brennan, J., dissenting) (arguing that conduct that deliberately entices an individual to commit a crime and is the product of the creative activity of government officials constitutes entrapment); *Russell*, 411 U.S. at 445 (Stewart, J., dissenting) (arguing that government conduct that "could induce or instigate the commission of a crime by one not ready and willing to commit it" constitutes entrapment regardless of whether the defendant in fact had criminal propensities).

353. 112 S. Ct. 1535 (1992).

354. *Id.* at 1543.

355. 287 U.S. 435 (1932).

356. *Id.* at 441.

357. 356 U.S. 369 (1958).

defendant's sympathy by explaining that the agent needed drugs because he was not responding to treatment and was "suffering," that the agent had to request the drugs several times to overcome the defendant's refusal, evasiveness, and then hesitancy, that the defendant made no profit from the sales, and that the agent induced the defendant to return to his drug habit.³⁵⁸ The conduct of testers is easily distinguishable from the conduct found to be entrapment in *Jacobson*, *Sorrells*, and *Sherman*. Testers do not suggest the illegal act or offer any inducement to the employer to discriminate.

For the same reasons, the conduct of testers would not violate due process principles. Though the Court has never discussed in any detail the type of "undercover" investigative conduct that would violate due process, Judge Friendly once gave an example of the requisite conduct. He wrote,

It would be unthinkable, for example, to permit government agents to instigate robberies and beatings merely to gather evidence to convict other members of a gang of hoodlums. Governmental "investigation" involving participation in activities that result in injury to the rights of its citizens is a course that courts should be extremely reluctant to sanction.³⁵⁹

The conduct of testers does not rise to the level contemplated by Judge Friendly.

There are no cases discussing whether the conduct of testers in employment discrimination actions constitutes entrapment. Courts have ruled, however, that testers used to identify discriminatory housing practices do not entrap the realtor or housing owner defendant. In one case, the representative of a realty company told a white tester who was masquerading as a buyer that the property owner would not sell to blacks. The court ruled that there was no entrapment because the tester merely provided the defendant with an opportunity to violate the law.³⁶⁰ The other courts and the commentators that have addressed the issue in the housing context agree.³⁶¹ In other

358. *Id.* at 371, 373, 375-76.

359. *United States v. Archer*, 486 F.2d 670, 676-77 (2d Cir. 1973).

360. *Newbern v. Lake Lorelei, Inc.*, 308 F. Supp. 407, 415 (S.D. Ohio 1968).

361. *Zuch v. Hussey*, 394 F. Supp. 1028, 1051 (E.D. Mich. 1975) (Fair Housing Act action); *J. Howard Brandt, Inc. v. Commonwealth, Human Relations Comm'n*, 324 A.2d 840, 841-42 (Pa. Commw. Ct. 1974) (action under Pennsylvania Human Relations Act);

civil contexts, courts have held that providing an opportunity to violate the law is not entrapment, even where the undercover agent suggests the illegal activity.³⁶²

A tester does not even suggest the illegal activity. Therefore, a tester does not entrap the employer who discriminates. An employer would have a valid entrapment defense against a tester or decoy only if the tester or decoy persuaded or actively induced the employer to violate the law.³⁶³ EEOC testers would

James P. Chandler, *Fair Housing Laws: A Critique*, 24 HASTINGS L.J. 159, 205-06 & n.271 (1973); Skinner, *supra* note 62, at 187 (arguing that the concern with entrapment is unfounded because the testing agency "is merely creating conditions under which discrimination may occur and is there to record it if it does").

362. A court has ruled that pharmacy board investigators who presented a pharmacist with false prescription orders merely gave the pharmacist the opportunity to dispense drugs unlawfully. *Fumusa v. Arizona State Bd. of Pharmacy*, 545 P.2d 432, 434 (Ariz. Ct. App. 1976). In an action challenging a liquor license suspension, a court ruled that police may use a minor as a decoy to attempt to make illegal purchases from a licensed establishment. *Medley v. Maryville City Beer Bd.*, 726 S.W.2d 891, 893 (Tenn. 1987). Investigators of a state board of chiropractic examiners who contacted a doctor to ask him to write fraudulent sick slips and disability certificates to justify absences from employment did not entrap the doctor. *Crafton v. State Bd. of Chiropractic Examiners*, 693 S.W.2d 320, 321-22 (Mo. Ct. App. 1985).

Patty v. Board of Medical Examiners, 508 P.2d 1121 (Cal. 1973), is problematic. In *Patty*, a license revocation proceeding, the California Supreme Court held that there was sufficient evidence to support the trial court's conclusion that investigators hired by the California Board of Medical Examiners entrapped a doctor. The doctor wrote prescriptions for amphetamines and other drugs for the investigators without a legitimate clinical basis, but the investigators simply asked the doctor for the prescriptions. If the court was adopting as California law the substance of the defense recognized by the Supreme Court in *Sorrells* and its progeny, the case probably is decided wrongly. The court noted, however, some characteristics of the case that take it outside the realm of the typical decoy or tester case in which the tester or decoy merely affords the defendant the opportunity to violate the law. First, there may have been some racist motivation to the investigation of Dr. Patty. The court noted that Dr. Patty was the first black graduate of his medical school. *Id.* at 1123. It also noted that rather than being instructed to see if Dr. Patty would seize an opportunity to prescribe drugs illegally, the investigators were told "to 'work doctors' to get illegal prescriptions, almost a directive to entrap." *Id.* at 1130. The California Supreme Court emphasized that the investigators were "young women" and Dr. Patty was an "elderly male" (incidentally, Dr. Patty was fifty-one years old). *Id.* at 1129-30. There also was evidence that the doctor was susceptible to the investigators' requests because of illness, not because of a predisposition to break the law. During the time he was solicited, Dr. Patty was suffering from fatigue, instability, and chest pain, and he had been hospitalized for his conditions. The court emphasized that the investigators were aware of Patty's condition. *Id.* at 1124. Therefore, *Patty* does not support the proposition that testers in Title VII actions unlawfully induce or persuade employers to violate the law.

363. There also would be no Fourth Amendment bar to the use of testers by the EEOC as outlined in this Article. In *Northside Realty Assocs., Inc. v. United States*, 605 F.2d 1348 (5th Cir. 1979), the court stated that even if testers posing as prospective home buyers were state actors, they did not violate the Fourth Amendment rights of the realtors who did business with them in a discriminatory manner. *Id.* at 1355. It reasoned that

merely apply for employment. If instructed properly, they would actually try to get the employer to extend an offer. They would not induce or coerce the employer to discriminate in any way. They would not suggest illegal conduct. If an employer discriminates against a tester, the intent to violate the law truly originated in the mind of the employer.

Moreover, it now appears settled that the entrapment defense is statutory and based on the assumption that Congress would not have intended a statute to be applied to a defendant who was induced improperly to violate it.³⁶⁴ If Congress specifically authorized the EEOC to use testers to enforce Title VII, congressional intent would be clear: Title VII may be used to sanction employers who violate the rights of testers to be treated equally. Thus, assuming that the doctrine of civil entrapment would apply in Title VII actions, employers who discriminate against EEOC testers would not be able to rely on the entrapment defense to excuse their conduct.³⁶⁵

testers did no more than what any member of the home-buying public is invited, and indeed welcomed, to do. . . . The testers did not enter into any restricted areas of the office . . . [or] examine or take any confidential or private papers.

. . . [T]he testers behaved exactly as a prospective home buyer visiting a real estate office would be expected to behave. To the extent that [the realtor] has held itself open to the public for just the sorts of visits that transpired there, [the realtor] cannot complain that a privacy interest has been thwarted or embarrassed.

Id. (footnote omitted). This holding is consistent with the Supreme Court's decision in *Lewis v. United States*, 385 U.S. 206 (1966), that "[a] government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant." *Id.* at 211; *see also* *United States v. Little*, 753 F.2d 1420, 1437-38 (9th Cir. 1984); *United States v. Centennial Builders, Inc.*, 747 F.2d 678, 682-83 (11th Cir. 1984); *United States v. Medic House, Inc.*, 736 F. Supp. 1531, 1538-39 (W.D. Mo. 1989); *United States v. Spars*, 657 F. Supp. 730, 731-32 (D. Minn. 1986).

The result would be different if the testers entered areas without authorization or seized private papers. *See, e.g., Lewis*, 385 U.S. at 211-12. Courts also have refused to enforce administrative agency subpoenas based on information obtained by an enforcement agent who gained access to a target's premises by invoking governmental power and misrepresenting the nature of the visit to the premises. *See, e.g., SEC v. ESM Gov't Sec., Inc.*, 645 F.2d 310, 316-17 (5th Cir. Unit B May 1981) (stating that under their supervisory power, courts may refuse to enforce administrative subpoenas for abuse of process where a government agent betrays an individual's trust to gain access to otherwise unaccessible records). The same result occurs under the Fourth Amendment's exclusionary rule. A ruse entry is not consensual where a suspect is informed that the person seeking entry is a government agent, but the suspect is misinformed as to the purpose for which the agent seeks entry. *United States v. Bosse*, 898 F.2d 113, 115 (9th Cir. 1990).

364. *See supra* note 332 and accompanying text.

365. As a matter of law, the entrapment defense could not be asserted to challenge

CONCLUSION

Congress should amend Title VII to give the EEOC the power to use testers to uncover discrimination in hiring for lower-skilled, entry-level jobs. The focus on lower-skilled, entry-level positions is appropriate. The costs to employers imposed by testing for such discrimination are outweighed by the potential benefits of redressing conduct that often may go unchallenged

the conduct of private party testers because state action is required. *See* United States v. Russell, 411 U.S. 423, 442 (1973) (Stewart, J., dissenting) (stating that a defendant who was induced, provoked, or tempted into committing a crime by a private person may not claim entrapment); *Sherman v. United States*, 356 U.S. 369, 379-80 (1958) (Frankfurter, J., concurring) (noting that the entrapment defense is limited to cases involving acts of government agents or informers and not private persons); *Schieb v. Humane Soc'y*, 582 F. Supp. 717, 725-26 (E.D. Mich. 1984) (holding that Humane Society officials who organized a dog fight for purposes of aiding the prosecution of participants did not violate the participants' due process rights because the officials' actions were not taken under color of state law).

An employer might argue that a private tester's action nonetheless should be dismissed because the tester comes to the court with "unclean hands." This defense is available in civil actions brought by private parties. *Cf. Sorrells v. United States*, 287 U.S. 435, 455 (1932) (Roberts, J., concurring) ("Always the courts refuse their aid in civil cases to the perpetration and consummation of an illegal scheme."). Courts have recognized that the doctrine applies in Title VII actions. *See, e.g., Hargett v. Delta Automotive, Inc.*, 765 F. Supp. 1487, 1493 (N.D. Ala. 1991); *Carpenter v. Ford Motor Co.*, 761 F. Supp. 62, 66 (N.D. Ill. 1991); *Women Employed v. Rinella & Rinella*, 468 F. Supp. 1123, 1129 (N.D. Ill. 1979). The unclean hands doctrine, however, is related intimately to the entrapment defense. As long as a tester acts in a way that merely affords the employer the opportunity to discriminate, the unclean hands doctrine would not be a viable defense for the employer. A court may deny relief to a plaintiff if, in connection with the transaction under consideration, the plaintiff is guilty of misconduct, fraud, or bad faith toward the defendant. *Great W. Cities, Inc. v. Binstein*, 476 F. Supp. 827, 832 (N.D. Ill.), *aff'd*, 614 F.2d 775 (7th Cir. 1979). Testers would not violate the good faith requirement of the unclean hands doctrine because merely providing an opportunity for an individual to violate the law through the use of a decoy is not the sort of bad faith or fraud prohibited by the doctrine. *Cf. Medley*, 726 S.W.2d at 893 (stating that employing a minor to purchase alcohol from a licensed establishment would not justify any mitigation of the sanctions imposed upon the licensee under an unclean hands principle).

Active misconduct is necessary to run afoul of the unclean hands doctrine. *Rinella & Rinella*, 468 F. Supp. at 1128 (applying the unclean hands defense where, subsequent to her discharge, plaintiff and other members of the plaintiff organization handed out leaflets criticizing the employer; mobbed the lobby in its building, interfering with its business; went to a convention and criticized the employer's practices; handed out leaflets in the neighborhood of one of the employer's principals; harassed some of the employer's former clients and sent them derogatory letters about the employer; and filed meritless complaints against the employer with various administrative agencies). Thus, if private party testers flooded an employer with applications, thereby interfering with the employer's business and constituting harassment, the unclean hands doctrine might apply.

because of substantial disincentives to suit. Eliminating discrimination in hiring for those jobs is important because they offer the opportunity to establish a foothold in the formal economy. Testers could fill the void in enforcement resulting from the substantial disincentives to suit.

EEOC enforcement would solve problems associated with relying on private groups or individuals to use testers to fill the enforcement void. The EEOC can sue on behalf of testers and obtain appropriate relief. It does not rely on attorneys' fee awards to fund its litigation efforts. Congress could assure that testing would be used solely to fill the enforcement void by limiting the use of testing to uncovering discrimination in hiring for lower-skilled, entry-level positions. Congress could prohibit private parties from engaging in testing without the approval of the EEOC. Moreover, if Congress authorized the EEOC to use testers, state laws that interfered with EEOC testing activities would be preempted.

Finally, testing by the EEOC would not be inconsistent with the EEOC's role in enforcing Title VII. Employer representatives have argued that the use of testers by the EEOC would be inconsistent with the agency's duty to attempt to conciliate disputes and its role as a neutral investigator.³⁶⁶ Additionally, some judges have written that, unless an employer receives notice of and is involved in an investigation of suspected employment discrimination, the employer will not settle disputes and comply voluntarily with Title VII.³⁶⁷ These views of the nature of settlements are naive. Employers do not agree to settle cases as a reward for docile and superficial investigations and enforcement. Employers decide whether to settle cases based on the amount and strength of evidence of discrimination that has been uncovered. More aggressive investigation by the EEOC might actually increase settlements and voluntary compliance.³⁶⁸ While EEOC investigations

366. See *supra* note 16 and accompanying text.

367. See, e.g., *EEOC v. Bailey Co., Inc.*, 563 F.2d 439, 449 (6th Cir. 1977), *cert. denied*, 435 U.S. 915 (1978).

368. In fact, one of the reasons Congress amended the statute in 1972 to give the EEOC the right to sue respondents in civil actions was the realization that without that power "[c]onciliation alone ha[d] not succeeded in ending discriminatory employment practices, nor d[id] it show any reasonable promise of doing so." 2 EEOC, LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 644 (1972). Respondents generally were not agreeable to accepting EEOC decisions where discriminatory practices were found because the conciliation provisions were voluntary and many employees did not have the financial resources to bring suit. *Id.* at 426.

theoretically are neutral, the Commission is charged with enforcing Title VII and uncovering violations. The EEOC's relationship with respondents is more realistically viewed as at least potentially adversarial.³⁶⁹ As long as respondents are permitted to submit evidence and the Commission objectively considers their arguments, the agency's duty of fairness is satisfied.³⁷⁰

The EEOC could engage in testing to uncover discrimination in hiring for lower-skilled, entry-level jobs without upsetting the relationship between respondents and the EEOC. Moreover, EEOC testing would fill a gap in enforcement of Title VII in an area of critical importance. EEOC testing to fill that gap would help fulfill Congress's original goal—to assure equality in labor-force participation.

Congress thought that the power to initiate suit would be an impetus to settlement, because it represented a tangible threat to employers. Congress recognized that the EEOC needed some real power to obtain voluntary cooperation.

369. See Katz, *supra* note 267, at 879; *cf. Evidence, supra* note 280, at 2037 (1988) (noting that although the investigator is not an advocate for the charging party, she must be particularly diligent in searching out evidence tending to support the charging party's case).

370. See *Evidence, supra* note 280, at 2038 (1988) (stating that the respondent and the charging party each should be given the opportunity to respond to the other's evidence prior to analysis by the EEOC).