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Employees: Show Us Your Paycheck

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EMPLOYEES: SHOW US YOUR PAYCHECK

INTRODUCTION

The Civil Rights Act of 1964[1] is widely regarded as one of the landmarks of the civil rights legislation enacted in the twentieth century.[2] Among the Act's many provisions is Title VII, considered to be the "most important general statute regarding employment discrimination."[3] Title VII was the first Congressional attempt to eliminate discrimination in employment.[4] More specifically, Congressional enactment of Title VII was aimed at eliminating employment discrimination "against any individual with respect to his compensation, terms, conditions, or privileges in employment, because of the

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1. 42 U.S.C. § 2000e - 2000e-17 (1988 & Supp. V 1993). The Civil Rights Act was drafted in response to the nationwide persistence of discrimination against minority groups to eliminate the unfairness and humiliation of discrimination. *See, e.g.*, David Benjamin Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F. L. REV. 645, 671 (1995). The Civil Rights Act addresses discriminatory conduct in several contexts, with discrimination in employment being the prime focus of Title VII. *See* Michael Mankes, *Combating Individual Employment Discrimination in the United States and Great Britain: A Novel Remedial Approach*, 16 COMP. LAB. L.J. 67, 68 (1994) (*citing* S. REP. NO. 872, 88th Cong., 2d Sess. (1964), *reprinted in* 1964 U.S.C.C.A.N. 557).

2. Mark A. Azman, *The Development of Title VII Protection for American Citizens Employed Abroad by American Employers: Yesterday, Today and Tomorrow*, 18 WM. MITCHELL L. REV. 531, 532-33 (1992) (commenting that Title VII was designed as a remedial statute to protect people from the overwhelming evils of discrimination and bigotry permeating employment).

3. Valerie L. Jacobson, Note, *Bringing a Title VII Action: Which Test Regarding Standing to Sue is the Most Applicable*, 18 FORDHAM URB. L.J. 95 (1990).

4. *Id.* Congress originally designed the statute to correct a long overdue imbalance within most employment contexts which was responsible for causing "inconvenience, unfairness and humiliation." *Id.* at 95-96.

individual's race, sex, color, religion, and national origin."[5] In enacting Title VII, Congress required the removal of all artificial, arbitrary and unnecessary barriers to employment which operated to invidiously discriminate on the basis of the enumerated impermissible classifications, including sex.[6]

Title VII is applicable to any actions of an employer at any time before and after hiring.[7] However, before a Title VII claim can be instituted, a requisite minimum number of employees must exist.[8] Specifically, Title VII requires an employer to maintain at least fifteen employees in each of the twenty or more calendar weeks in the current or prior year in order to be subject to Title VII jurisdiction.[9] This provision has caused confusion among the Circuit Courts of Appeals largely because of the statute's circular definitions of 'employer' and

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5. 42 U.S.C. § 2000e-2(a)(1). Sex discrimination was added to the list of prohibitions by floor amendment. *See* MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW 201 (2d ed. 1988) (*citing* Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 441 (1966)). Title VII covers discrimination based on these factors only and does not cover discrimination based on non-citizenship and sexual preference. The Senate's overwhelming vote to deny federal benefits to same sex married couples is further illustration of Title VII's exclusion of protection based on sexual preference. *See* Eric Schmitt, *Senators Reject Both Job-Bias Ban and Gay Marriage*, N.Y. TIMES, Sept. 11, 1996, at A1.

6. Constance E. Norton, Comment, *Legislatures Should Not Have Feared Title VII Pre-Emption of California's Temporary Transfer Alternative to Discriminatory Fetal Protection Policies*, 19 GOLDEN GATE U. L. REV. 463, 473-74 (1989).

7. *See* David R. Mitchell, Comment, *Legal Profession: Title VII Prohibits Sex Discrimination in Partnership Selection*, 24 WASHBURN L.J. 419, 421 (1985). "[A]n employer [may not] fail or refuse to hire or discharge any individual with respect to his compensation, terms, conditions, or privileges of employment, because of an individual's race, color, religion, sex, or national origin." *Id.* at n.10 (*quoting* 42 U.S.C. § 2000e-2(a)(1)).

8. *See* 42 U.S.C. § 2000e-5(b).

9. *See* 42 U.S.C. § 2000e(b). This section provides in pertinent part: "The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . . . " *Id.*

'employee.'[10] The problem arises when an employer attempts to have a claim filed against it dismissed on the jurisdictional grounds that it does not have the requisite minimum of employees to fall under Title VII. This defense, however, causes the courts many problems primarily because Title VII does not specify the proper method for counting employees.

Until now, federal courts have utilized two divergent approaches when determining whether there are the requisite number of employees to satisfy the jurisdictional minimum. The "payroll method," adopted by the First and Fifth Circuits, as well as numerous district courts,[11] counts all workers "maintained on an employer's payroll within a given week, regardless of whether they were working on every calendar day."[12] On the other hand, the "counting method," which has been adopted by the Seventh and Eighth Circuits, excludes part-time and hourly workers who are neither physically present at work nor on paid leave.[13] However, with the Supreme Court's recent decision in *Walters v. Metropolitan Educational Enterprises, Inc.*,[14] this split within the circuit has been resolved.

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10. Jacobson, *supra* note 3, at 97 (noting that the statute fails to define the specific factors which create an employment relationship). In addition, the definitional provisions of Title VII are silent as to Congressional intent and this has resulted in numerous courts adopting divergent methods for determining who is an employee in order to maintain a Title VII action. *Id.*

11. *See* Thurber v. Jack Reilly's, Inc., 717 F.2d 633, 634-35 (1st Cir. 1983) (concluding that Congress intended a broad interpretation of the term 'employer'); Dumas v. Town of Mount Vernon, 612 F.2d 974, 979 (5th Cir. 1980) (calculating the number of employees by tolling the number of persons on the payroll for any given day or week); Cohen v. S.U.P.A., Inc., 814 F. Supp. 251, 254-55 (N.D.N.Y. 1993) (determining that case law and legislative history compel adherence to the payroll method).

12. Elizabeth Mitchell, *Equal Employment Opportunity Comm'n v. Metropolitan Educ. Enter., Inc.*, 5 B.U. PUB. INT. L.J. 352, 353 (1996).

13. *See, e.g.*, Ost v. West Suburban Travelers Limousine, Inc., 88 F.3d 435, 439 (7th Cir. 1996) (stating that a week will not be counted unless the requisite number of hourly and part-time workers are either on paid leave or physically present in the workplace); McGraw v. Warren County Oil Co., 707 F.2d 990, 991 (8th Cir. 1983) (holding that "part-time workers who did not work for each day of the work week were [not] 'employees' for that week.").

14. 117 S. Ct. 660 (1997).

This Comment will first review the two methods of counting employees for the purposes of obtaining jurisdiction over claims filed under Title VII and the rationale proffered by these courts in adopting that particular method.[15] Second, it will examine the past disagreement among the federal circuits, demonstrating the need for a clearer definition of who qualifies as an employee.[16] Finally, this Comment will analyze the Supreme Court's recent decision proclaiming the payroll method as the proper approach for determining the number of employees for Title VII jurisdictional purposes.[17]

SEEKING A DEFINITION OF "EMPLOYEE" IN THE FEDERAL CIRCUITS

Under Title VII, an employer is defined as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. . . ."[18] The "calendar year" referred to in the statute is the year in which the alleged discrimination occurred.[19] In examining which employees are to be counted when determining whether the employer has the requisite number of employees, a court must first interpret what is meant by Title VII's definition of employer. However, courts have had trouble developing a uniform view of this definition, resulting in confusion among the courts. To make matters worse, Title VII broadly defines an employee broadly as "an individual employed for an

15. *See infra* notes 17 - 100 and accompanying text.

16. *See infra* notes 101 - 133 and accompanying text.

17. *See infra* notes 134 - 156 and accompanying text.

18. 42 U.S.C. § 2000e(b).

19. *See generally* Dumas v. Town of Mount Vernon, 612 F.2d 974, 979 (5th Cir. 1980) (arguing that statute of limitations begins to run when the alleged discrimination occurred). *See also* 42 U.S.C. § 2000e-5(e)(2). This section states in pertinent part: "an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter . . . when a person aggrieved is injured by the application of the seniority system or provision of the system." *Id.*

employer."[20] It is this goal of defining who is an employee which has caused the most controversy and debate in the federal court system.

Legislative history supports the view that Congress intended to cover the full range of workers who may be subject to the harms the statute was designed to prevent,[21] unless such workers were excluded by a specific statutory exception.[22] However, Title VII does not explicitly prescribe a method for counting employees in determining whether an employer has the requisite jurisdictional minimum. As a consequence, courts have been left to their own devices when making this determination.

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20. 42 U.S.C. § 2000e(f).

21. 42 U.S.C. § 2000e-2(a)(2) states, in pertinent part: "[i]t shall be an unlawful employment practice for an employer . . . to limit, segregate, or classify his employees . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(2).

22. *See, e.g.*, 42 U.S.C. § 2000e(f) ("the term 'employee' shall not include any person elected to public office in any State . . . or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level, or an immediate advisor . . . . "); 42 U.S.C. § 2000e(b) (entities not considered to be employers are the "United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia . . . [or] a bona fide private membership club (other than a labor organization) . . . "); 42 U.S.C. § 2000e-2(e)-(i) (specifying that the following shall not be deemed unlawful employment practices: hiring, classifying or referring for employment, individuals on the basis of gender, religion, or national origin where such characteristics are a "bona fide occupational qualification"; employing individuals of a particular religion to work in an educational institution that is "owned, supported, controlled, or managed" by a religion or religious group; taking appropriate action against a member of the Communist Party or a Communist organization pursuant to the Subversive Activities Control Act of 1950; refusing to employ or to continue to employ any individual whose employment would compromise the national security of the United States; discriminating among employees based upon "a bona fide seniority or merit system," the quality or quantity of work performed, or a "professionally developed ability test" that is non-discriminatory in nature; differentiating between male and female employees with regard to wages pursuant to 29 U.S.C. § 206(d); and extending preferential treatment to Native Americans living "on or near a reservation.").

As a result, two different methods have emerged from case law.[23]

The 'payroll method' looks to the number of employees maintained on an employer's payroll within a given week.[24] If the employer has at least fifteen employees on the payroll for twenty weeks within the calendar year, the jurisdictional minimum is satisfied regardless of whether or not every employee on the payroll is working full time or shows up for work every day of the calendar week.[25]

In the alternative, the 'counting method' includes all "salaried employees toward the minimum, but only considers employees on days when they are physically present at work or are on paid leave."[26] The central rationale offered by the courts using this approach is that this method is most consistent with a plain reading of the language of the statute.[27] Consequently, courts using the 'counting method,' including the Seventh and Eighth Circuits, have adopted a narrower definition of 'employee' through the exclusion of hourly and part-time workers who are not physically present or who are on paid leave.[28]

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23. *Compare* Thurber v. Jack Reilly's, Inc., 717 F.2d 633, 634-35 (1st Cir. 1983) (holding that an employee is to be counted for each day that an employment relationship exists regardless of whether that employee was not physically present on work on a given day in the work week), *cert. denied*, 466 U.S. 904 (1984) *with* Equal Employment Opportunity Comm'n v. Garden and Assoc., Ltd., 956 F.2d 842, 843 (8th Cir. 1992) (holding that employees must either be physically present at work or "be on paid leave each day of the work week in order to be counted" as employees for that week).

24. *See generally* Dumas v. Town of Mount Vernon, 612 F.2d 974 (5th Cir. 1980).

25. Mitchell, *supra* note 12, at 353.

26. *Id.* Courts utilizing this method have found that, in keeping with the statute's most natural interpretation, the phrase "'for each working day' looks to the number of employees physically at work each day of the week." *Id.* at 354.

27. *Id.*

28. Note, *Employment Discrimination-Title VII-Seventh Circuit Reaffirms a Narrow Definition of 'Employer' for the Purposes of Title VII*, 109 HARV. L. REV. 675, 675 (1996).

A. The Counting Method: The Federal Courts' Decisions in Zimmerman *and* Metropolitan.

In *Zimmerman v. North American Signal Company*,[29] the United States Court of Appeals for the Seventh Circuit rejected the previously established payroll method and adopted the counting method.[30] Though *Zimmerman* involved a claim brought under the Age Discrimination in Employment Act,[31] [hereinafter "ADEA"], the Seventh Circuit examined the statutory language of the ADEA by focusing on a provision similar to Title VII, which requires an employer to have a requisite number of employees for each working day of a week before that week can be counted toward the jurisdictional minimum.[32] The court noted that "[t]he legislative history of the nearly identical definitional provisions of Title VII of the Civil Rights Act of 1964, militates against the distorting traditional concepts of employment relationships."[33]

Sam Zimmerman sued North American Signal Company [hereinafter "North American"] claiming unlawful age discrimination in violation of the ADEA.[34] North American argued that salaried workers should be "counted as employees for every day of the week they are on the payroll, whether or not they were actually at work on a particular day."[35] For each day

29. 704 F.2d 347 (7th Cir. 1983).

30. *Id.* at 352-54.

31. *See* 29 U.S.C. § 630(b) (1994). The purpose behind the ADEA is to prevent an employer from discriminating against any person regarding hiring, discharging, compensation, privileges, or terms and conditions of employment based upon that person's age. *See* 29 U.S.C. § 623(a).

32. *Zimmerman*, 704 F.2d at 352. *See* 29 U.S.C. § 630(b). Section 630(b) states in pertinent part: "[t]he term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . . " *Id.*

33. *Zimmerman*, 704 F.2d at 352 (citations omitted).

34. *Id.* at 349.

35. *Id.* at 353. Thus, an hourly paid worker would not be counted for a particular work week if he or she were not physically present in the workplace, regardless of whether or not he or she returned on the next working day. *Id.*

of the work week, North American counted its employees utilizing the counting method. Alternatively, Zimmerman would add together all salaried and hourly paid employees that were either present at work or on paid leave during the work week.[36] Thus, if the court adopted the counting method, North American would not meet the jurisdictional requirements of Title VII. On the other hand, if the court adopted Zimmerman's payroll method, North American would enough employees to subject it to Title VII jurisdiction.

Finding no way to reconcile the phrase "for each working day" with the payroll method, the Seventh Circuit held that the proper method should exclude hourly paid workers on days when they were neither working nor on paid leave.[37] In adapting the counting method, the court looked to the Congressional intent behind the ADEA and determined that the term 'employer' was intended to have its common everyday dictionary usage.[38] Accordingly, the court felt that "employer" is correctly interpreted to count employees for each day when they are at work.[39]

In addition, the *Zimmerman* court insisted that the "court's interpretation of the term 'employer' cannot contradict the statutory definition."[40] According to the court, adopting the payroll method and counting hourly or part time workers as if they are on the weekly payroll, even if they were not at work each work day, "would render the phrase 'for each working day'

36. *Id. Zimmerman* focused on the nature of the employment relationship and not the number of hours or days worked by an employee.

37. *Id.*

38. *Id.* at 352 (*citing* 110 CONG. REC. 7216 (April 8, 1964) which states in pertinent part: "[t]he term 'employer' is intended to have its common dictionary meaning, except as qualified by the act.").

39. *Id.* at 353.

40. *Id.* at 352-53. It is well established that "a court should not construe a statute in any way that makes words or phrases meaningless, redundant, or superfluous." *Id.* at 353 (*citing* Conway County Farmers Assoc. v. United States, 588 F.2d 592, 598 (8th Cir. 1978)).

meaningless."[41] To conclude otherwise would be "contrary to the explicit definitional restriction chosen by Congress."[42]

Furthermore, the *Zimmerman* court made a distinction between hourly and salary employees,[43] noting that a presumption that a salaried employee works every day of the working week may be appropriate, the specific language of Title VII does not necessarily lend support such a reading.[44] The Seventh Circuit stated that "Congress could have exempted certain small employers from the Act's coverage,"[45] and, therefore, if Congress wanted to define the jurisdictional minimum in terms of a number of employees on a payroll each week, it certainly could have done so in plain terms.

Equal Employment Opportunity Commission v. Metropolitan Educational Enterprises, Inc.[46] is most illustrative of the Seventh Circuit's continued adoption of the counting method. In *Metropolitan,* the Seventh Circuit was invited to revisit its decision in *Zimmerman.* In *Metropolitan,* the plaintiff launched a barrage of arguments against the *Zimmerman* methodology. The Equal Employment Opportunity Commission [hereinafter "EEOC"] brought an action alleging that Metropolitan Educational Enterprises, Inc. [hereinafter "Metropolitan"] had fired Darlene Walters in retaliation for filing a gender discrimination charge. The Plaintiff contended that by enacting the Family and Medical Leave Act,[47] [hereinafter

41. *Id.* ("The Age Discrimination in Employment Act is remedial in nature and should be given liberal interpretation in order to effectuate the purpose of the Act. . . . [s]uch a liberal construction should be extended to the definition of employer.").

42. *Id.*

43. *Id.* at 353.

44. *Id.* at 354.

45. *Id.* (stating that Congress could have accomplished this exemption "by defining the jurisdictional minimum in terms of the number of employees on the payroll each week, the number of hours worked by each employee each week, the number of full-time employee-hours worked each week, or by any other variation.").

46. 60 F.3d 1225 (7th Cir. 1995), *cert. granted,* 116 S. Ct. 1260 (1996).

47. 29 U.S.C. § 2611(4)(A)(i) (1993 & Supp. V 1993). The FMLA defines employers as "any person engaged in commerce or in an industry or

"FMLA"], Congress endorsed the payroll method over the counting alternative used in *Zimmerman* in a manner that demanded deference from this court.[48] Plaintiff argued that the recent passage of the FMLA was a "significant development of the law on the proper interpretation of the statutory definition of 'employer' contained in Title VII," and, therefore, "it is not necessary that every employee actually perform work on each working day."[49]

Plaintiff attempted to reinforce this claim by relying on the congressional commentary pertaining to the FMLA.[50] Plaintiff urged the court to re-examine *Zimmerman's* holding, as most courts and the EEOC have interpreted the phrase 'employees for each working day' to mean "employ" in the sense of maintain on the payroll.[51] Finally, Plaintiff argued that the adoption of the payroll method "comports better with public policy considerations" and is simpler to implement.[52] In rejecting the plaintiff's arguments, the Seventh Circuit echoed its prior ruling in *Zimmerman* by noting that "had Congress truly intended to enact the payroll method into law, it certainly could have done so in clear and unambiguous terms."[53]

Moreover, the Seventh Circuit rejected plaintiff's argument that Congress had endorsed the payroll method over the counting method for purposes of the FMLA. According to the FMLA, "a part-time or full time employee whose name is included on an employer's payroll is considered to be employed on each working day of the calendar week and must be counted"

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activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year."

48. *Metropolitan*, 60 F.3d at 1228.

49. *Id.*

50. Mitchell, *supra* note 12, at 354-55. *See* S. Rep. No. 3, 103d Cong., 1st Sess. 21-22 (1993), reprinted 1995 U.S.C.C.A.N. 3.

51. *Metropolitan*, 60 F.3d at 1225.

52. *Id.* at 1230.

53. *Id.* at 1229. The court concluded that "Congress chose not to respond to these concerns in enacting the FMLA. . . . [because] if indeed Congress intended to wished to resolve the Circuit conflict in a particular direction, this was 'a strange way to make a change.'" *Id.* (citations omitted).

regardless of whether or not they were physically present at work.[54] The Act also requires that an employee who is out on paid or unpaid leave be counted as long as the employer has a reasonable expectation that the employee will later return to active employment.[55] Instead of adopting the aforementioned FMLA's interpretation, the *Metropolitan* court observed that "this purported legal milestone of counting employees occurred not within the text of the statute, but within the legislative history, which has no force of law."[56]

Plaintiff also argued that if *Zimmerman* was not overturned, employers will continue to evade "anti-discrimination legislation simply by structuring" their workplace to escape "the jurisdictional minimum present on each working day" in order to avoid potential liability.[57] The court rejected this theory and pointed out that in the decade since *Zimmerman* was decided, there have been conspicuously few participants in the parade of employers who have purposely structured their workplace in a manner designed to avoid the jurisdictional minimum required for Title VII.[58] Likewise, the court rejected the argument that the adoption of the alternative payroll method would afford simplicity by stating "simplicity alone is simply not sufficient to override settled statutory interpretation and Circuit precedent."[59] Although the Seventh Circuit recognized that many circuit and district courts have rejected this analysis, the court did not find a compelling reason to overturn precedent.[60]

The court noted that, although *Zimmerman* involved a claim brought under the ADEA as opposed to Title VII, the

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54. Mark Strength, *An Overview of the Application of the Family and Medical Leave Act of 1993 to Employees of Private Employers*, 54 ALA. L. Rev. 390, 391 (1993).

55. *See supra* note 48

56. *Metropolitan*, 60 F.3d at 1228. The court cited the District of Columbia Circuit, which stated that "[a] Congressional report, even a conference report is not legislation . . . and it does not change the law." *Id.* at 1229 (*quoting In re* North, 50 F.3d 42, 46 (D.C. Cir. 1995)).

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

analysis was the same, and as such, was dispositive in this case.[61] The court strongly insisted that "compelling reasons are required to overturn Circuit precedent" and that stare decisis "has even greater force when the precedent in question involves statutory construction."[62] Accordingly, the Seventh Circuit reaffirmed *Zimmerman.* [63]

Judge Ripple, in his concurrence, questioned the correctness of *Zimmerman*, but noted that the doctrines of stare decisis and precedent are especially difficult to overcome when the court deals with matters of statutory interpretation.[64] Moreover, although obligation to abide by precedent is not absolute, contrary decisions of other circuit courts did not cast a significant shadow over *Zimmerman* as to warrant overruling that decision.[65] Judge Ripple concluded with a plea for legislative

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61. *Id.*

62. *Id.* at 1228. *See* Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989) (stating that "[w]e have said that the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction"). Additionally, the court noted that numerous courts have adopted the *Zimmerman* approach. *See, e.g.*, Equal Employment Opportunity Comm'n v. Garden and Assoc. Ltd., 956 F.2d 842, 843 (8th Cir. 1992) (holding workers "must either work or be on paid leave each day of the work week to be counted as an employee for that week under 29 U.S.C. § 630 (b)."); Richardson v. Bedford Place Housing Phase I Assoc., 855 F. Supp. 366, 370 (N.D.Ga. 1994) (holding an employee is counted only in the weeks in which he/she worked every day of the work week); Lord v. Casco Bay Weekly, Inc., 789 F. Supp. 32, 34 (D.Me. 1992) (holding "only those part-time hourly paid employees who worked each day of the week are to be included when counting the number of employee's [in a given] week.").

63. *Metropolitan*, 60 F.3d at 1228. The court was of the belief that "[w]hile we afford deference to legitimate agency interpretations of statutory language made before we have ruled on an issue, the converse is not true: the judiciary, not administrative agencies, is the final arbiter of statutory construction." *Id.* at 1229-30.

64. *Id.* at 1230 (Ripple, J., concurring).

65. *Id.* (Ripple, J., concurring). "Upon examination of the case law to the contrary, however, I cannot say that those cases cast a shadow on *Zimmerman* as to justify its overruling." *Id.* (Ripple, J., concurring).

action establishing a uniform method for counting employees under Title VII.[66]

Having failed to find a compelling reason to override the statutory interpretation in *Zimmerman,* the Seventh Circuit, in *Metropolitan,* held that despite the FMLA's endorsement of the payroll method, the appropriate method for counting employees to determine whether the a company is an "employer" under Title VII is to count hourly or part-time workers as employees only on days when the are physically present at work.[67]

While acknowledging that the statute could have been drafted more clearly, the court believed that *Zimmerman's* interpretation of its plain text has "stood the test of time and a new set of appellate eyes."[68] Furthermore, the court felt that "judicial construction of the plain language of a statute ends the matter conclusively: 'the law is clear that when a court can glean the meaning of a statute from its text, it should look no further.'"[69]

B. The Payroll Method: A Broad Interpretation of "Employee."

In comparison, the payroll method, which has been adopted by numerous circuit and district courts,[70] uses a more liberal reading of 'employee' than those courts who have utilized

66. *Id.* (Ripple, J., concurring) ("This issue is one, however, that deserves definitive legislative attention. . . . [t]he ambiguity of the present situation ought to be clarified.").

67. *Id.* at 1228.

68. *Id.*

69. *Id.* (*citing* United States v. Hudspeth, 42 F.3d 1015, 1022 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 2252 (1995)).

70. *See, e.g.*, Gorman v. No. Pittsburgh Oral Surgery Assoc., Ltd., 664 F. Supp. 212 (W.D.Penn. 1987) (holding that the payroll method clearly effectuates the goals and spirit of the Age Discrimination and Employment Act); Vera-Lozano v. International Broadcasting, 50 F.3d 67 (1st Cir. 1995) (stating that the most persuasive evidence when determining the jurisdictional minimum for Title VII is the ongoing employment relationship between the employee and the employer, not merely counting the number of employees physically present at work on a given workday).

the counting method. Under this more expansive method, the court looks at the number of employees maintained on an employer's payroll within a given week: if the number is at least fifteen for twenty calendar weeks, the jurisdictional minimum is satisfied, regardless of whether or not every employee on the payroll shows up for work every day of the calendar year.[71] This method of determining who is an 'employer' for purpose of Title VII has been argued as being easier to enforce in the everyday workplace.[72] Moreover, proponents of the payroll method argue that the payroll method would not render the clause 'for each working day' in the "employer" definition "meaningless, redundant, or superfluous."

The First Circuit's decision in *Thurber v. Jack Reilly's, Inc.*[73] is most illustrative of the payroll method. In that case, an employee filed a sex discrimination suit which lead to a dispute regarding the definition of 'employer' under Title VII.[74] The *Thurber* court rejected the employer's argument "that the insertion of the words 'for each working day' in the statute necessarily imports a Congressional intent to restrict application of the statute to employers who had 15 or more employees actually at work on each working day in each of the 20 or more calendar weeks."[75] The *Thurber* court, in agreeing with the plaintiff, relied on the legislative history of the statute and, in particular, the comments made by Senator Dirksen, a principle co-sponsor of Title VII.[76] Senator Dirksen stated that because the definition of 'employer' was borrowed from Title VII, the Unemployment Compensation Act's[77] definition of 'employee'

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71. Mitchell, *supra* note 12, at 353.

72. *Metropolitan*, 60 F.3d at 1230.

73. 717 F.2d 633 (1st Cir. 1983), *cert. denied*, 466 U.S. 904 (1984). In *Thurber*, a female waitress sued her former employer, alleging gender discrimination in violation of Title VII and the Massachusetts anti-discrimination statute. *Id.*

74. *Id.* at 634.

75. *Id.*

76. *Id.*

77. *See* 26 U.S.C. § 3304 (1954). The Unemployment Compensation Act primarily grants unemployment assistance of lost wages to individuals during

must be inferred to mean that each employee would be counted towards the jurisdictional minimum on days in which an employment relationship exists, regardless of whether the employee was physically present at work each day.[78] In reaching its conclusions, the *Thurber* court reasoned that since the Unemployment Compensation Act counted each day an employment relationship existed and since Title VII is to be consistently construed with its remedial purpose, then this definition of employee is most appropriate for the analysis of this case.[79]

The *Thurber* court also cited district court opinions which relied on statements made in the congressional debate that "'the term 'employer' is intended to have its common dictionary meaning' and that employers with part-time or seasonal staffs were intended to be covered by the act 'when the number of employees exceeds the minimum figure.'"[80] The court looked to the 1972 debate regarding the reduction of the jurisdictional number of employees from twenty-five to fifteen and focused on the arguments that this reduction would surely lead to more employers being exempt from Title VII coverage, thereby reducing the number of discrimination claims and possible future reductions in court calendars.[81] The court stated that, while the number of employees was a compromise, there was no indication that Congress intended to impose a requirement that employees must report to work on each day in order to be included.[82]

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periods when they become involuntary unemployed through no fault to their own.

78. *Thurber*, 717 F.2d at 634.

79. *Id.* at 634-35.

80. Pedreya v. Cornell Prescription Pharmacies, 465 F. Supp. 936, 941 (D. Colo. 1979) (*quoting* 110 CONG. REC. 7216-17 (1964)). *See also* Hornick v. Borough of Duryea, 507 F. Supp. 1091, 1098 (M.D.Pa. 1980) (*quoting Pedreya*, 465 F. Supp. at 941).

81. *Richardson v. Bedford Place Housing Phase I Assoc.*, 855 F. Supp. 366, 370-71 (N.D. Ga. 1994).

82. *Thurber*, 717 F.2d at 635 (*citing* 92nd Cong., 1st Sess., U.S.C.C.A.N. 1972, pp. 2513-2519).

In addition, several district courts lend support to the payroll method. In *Hornick v. Borough of Duryea*,[83] the District Court for the Middle District of Pennsylvania held that part-time school crossing guards are to be counted as employees, even though they only work a few hours each day of the week.[84] In reaching this determination, the court noted that "the school-crossing guards were hired, controlled, and paid by the Borough."[85] Furthermore, the Borough maintained enough full-time employees to be subject to Title VII jurisdiction. The court found that in keeping with the remedial nature of Title VII and a broad interpretation of 'employer,' "the Borough was . . . subject to the anti-discrimination provisions of Title VII."[86]

The District Court for the Northern District of New York also supports the payroll method.[87] Due to the fact that the Second Circuit has not adopted either the counting or payroll method, the court in *Cohen v. S.U.P.A., Inc.*[88] was left to determine the proper method of counting employees for an age discrimination suit. In reaching a determination, the court, analyzed previous case law and interpreted the provisions of Title VII and concluded that claims brought under the ADEA were to have a similar interpretation of the word 'employer' when dealing with the jurisdictional requirements for coverage.[89] Thereafter,

83. 507 F. Supp. 1091 (M.D.Pa. 1980).

84. *Id.* at 1098. A female police officer sued her former employer charging that she was a victim of sexual discrimination in employment during her tenure as a temporary member of the Borough's police department. *Id.* at 1093.

85. *Id.* at 1098.

86. *Id.*

87. *See* Cohen v. S.U.P.A., Inc., 814 F. Supp. 251 (N.D.N.Y. 1993).

88. *Id.* In *Cohen*, a wholesale liquor salesman filed an Age Discrimination in Employment Act suit against his former employer charging unlawful termination due to his age. *Id.* at 253. Plaintiff charged that two college students were hired to replace him because they would not need the extended health insurance benefits that he required. *Id.*

89. *Id.* The court stated that "since Congress patterned the ADEA after Title VII, and courts construing Title VII have counted part-time employees regardless of whether the employee reported to work each day, then part-time employees are counted to fulfill the jurisdictional requirement of the ADEA." *Id.* at 256.

the *Cohen* court held that the proper method of counting employees is to "examine the numbers of employees on the payroll of a business over a twenty week period, and not the number of employees who happen to work on any given day."[90]

These district courts maintain that, by employing a liberal construction of 'employer,' Congress' "purpose of eliminating inconvenience, unfairness and humiliation of discrimination" would surely be achieved.[91] Lending support to this interpretation, it has been consistently asserted that, because "Title VII is remedial in nature, [it] should be given the broadest interpretation consistent with [this] purpose."[92] For example, the *Hornick* court adopted this rationale because both the remedial nature of Title VII and constantly changing work environments provide a sufficient basis to hold that an employee must not work every day of the week in order to be counted as a full-time employee under Title VII.[93]

In *Dumas v. Town of Mount Vernon, Alabama*,[94] an African-American women charged an Alabama town, town officials and county personnel board with employment discrimination on the basis of race.[95] The Fifth Circuit found it unnecessary to define the meaning of Title VII § 2000e (b) because it found that even if part-time workers were counted, the threshold of fifteen required in the statute would not have been reached.[96] However, in dicta, the court referred to an employment discrimination law treatise which states that "one looks to each of the 'working days' within the calendar weeks reviewed to see whether there were fifteen or more individuals who were on the payroll, regardless of whether they were actually full time or on any particular day."[97] This treatise was

90. *Id.* at 255.
91. *Hornick*, 507 F. Supp. at 1098.
92. *Id.*
93. *Id.*
94. 612 F.2d 974 (5th Cir. 1980).
95. *Id.* at 976.
96. *Id.* at 979.
97. *Id.* at 979-80 n.7 (*quoting* B. Schlei & P. Grossman, *Employment Discrimination Law*, 837-38 (1976)).

also relied on in *Pascutoi v. Washburn-McReavy Mortuary*.[98] In *Pascutoi*, the United States District Court for the District of Minnesota held that part-time workers could be counted as employees even though they did not work every working day in the calendar week since they has been on the defendant's payroll for the requisite number of weeks.[99] The rationale in *Pascutoi* is sound in keeping with congressional intent.[100]

II. TIME FOR THE SUPREME COURT TO SELECT A METHOD

The Supreme Court granted certiorari in *Walters v. Metropolitan Educational Enterprises, Inc.*,[101] recognizing the imminent need to settle the split in the federal circuit courts on the method used for counting employees to obtain Title VII jurisdiction. The Court heard oral arguments on November 6, 1996 from petitioners Darlene Walters and the Equal Employment Opportunity Commission, and respondent, Metropolitan Educational Enterprises, Inc., on the issue of whether the construction of Title VII's language "for each working day" should be interpreted to include workers who are

98. 1975 WL 3615, *2 (D.Minn. July 2, 1975). A female mortician brought a sex discrimination in employment suit against former employer charging that she was denied employment opportunities given to male morticians solely due to her sex. *Id.* at *1.

99. *Id.* at *2.

100. *Id.* (stating that "[t]his Court finds that the Civil Rights Act of 1964 and the Equal Employment Act of 1972 are remedial in nature and should be given the broadest interpretation consistent with their benevolent purpose"). *Id.*

101. 116 S. Ct. 1260 (1996). Petitioner Darlene Walters and the EEOC appealed the ruling of the Court of Appeals that "hourly and part-time workers are to be counted as Title VII employees only on the days they are physically present at work or on paid leave." Brief for Petitioner Darlene Walters at 14, Walters v. Metropolitan Educ. Enter., Inc., 116 S. Ct. 1260 (1996) (Nos. 95-259, 95-779).

on an employer's payroll or count only those workers that are physically present in the workplace or on paid leave. [102]

The attorneys for petitioners argued that the Supreme Court must overturn the Seventh Circuit's interpretation of the Title VII as including only those employees who are physically at work working for their employer or on paid leave.[103] The heart of the controversy involved the second step. Petitioners contended that the payroll method of counting employees is not only the more "rational method of determining jurisdiction"[104] but that it is also "consistent with the text, legislative history and underlying public policy of Title VII and with sound judicial policy." [105]

Petitioners claimed that the counting method utilized by the Seventh Circuit was erroneous for several reasons. First, they claimed that, by looking at the language of the statute itself, it is clear that Congress focused on the ongoing employment relationship.[106] Accordingly, an employer would come within the purview of Title VII when he or she has an ongoing employment relationship with an employer who had "15 or more employees for each working day in each of 20 or more calendar weeks."[107] Petitioners also focused on the verb "has" in the language of the statute.[108] They argued that, by using this verb, Congress intended "the number of employees an employer 'has' at a particular time, for purposes of Title VII, is thus the number of employees who are in an employment relationship with the employer at that time."[109] More importantly, in evaluating its

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102. Walters v. Metropolitan Educ. Enter., Inc., Nos. 95-259, 95-779, 1996 WL 656480, at *4 (U.S. Oral Arg. Nov. 6, 1996).

103. *Id.*

104. Petitioner Walters' Brief at 20, *Walters* (Nos. 95-259, 95-779).

105. *Id.*

106. *Walters*, 1996 WL 656480, at *5.

107. *Id.* at *17.

108. Brief for Petitioner Equal Employment Opportunity Commission at 13, Walters v. Metropolitan Educ. Enter., Inc., 116 S. Ct. 1260 (1996) (Nos. 95-779, 95-259).

109. *Id.* at 13-14. The EEOC looked to the plain dictionary reading of the verb "have." *Id.* at 13. Webster's Third New International Dictionary defines

own cases, the EEOC counts both salaried and hourly workers if they are on an employer's payroll in a given week.[110] The Commission views "[t]he payroll [a]s a reliable indicator of those individuals who have an employment relationship with the employer."[111]

Petitioner's second argument was that, contrary to the decision of the Seventh Circuit in *Metropolitan*, interpreting and applying the phrase "for each working day" to the payroll method does not render that phrase meaningless.[112] They claimed that reading the phrase in connection with the payroll method gives the phrase applicability to practical and recurrent situations in the workplace.[113] In oral argument, attorney's for the EEOC gave the following example to the Court:

> A [retail] business employs . . . 25 people. It's open 5 days a week [in] downtown Washington, DC [and] Business is good. The owner decides he wants to open on Saturdays. But because it's downtown, what he does is he asks half the employees to come in on Saturday one week, and the other half to come in on the other Saturday. Under the Seventh Circuit test, that business, thereby, *ipso facto*, removes itself from the coverage after Title VII. Because on the sixth working day, there are not 15 hourly employees present.[114]

Petitioners further argued that if the Court chose to adopt the counting method, "an employee who leaves employment on a Thursday is not a Title VII employee 'for each working day' of that week, having been employed for only four of the five days

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"have" to mean "to stand in any of several personal relationships to." *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1039 (3d ed. 1986).

110. *Id.* at 14.

111. *Id.*

112. *Walters*, 1996 WL 656480, at *5.

113. Petitioner Walters' Brief at 22, *Walters* (Nos. 95-259, 95-779). Furthermore, petitioner contended that the counting method is "cumbersome, expensive and time-consuming" and the further adoption of the *Zimmerman* method of counting employees would "truly [be] a morass." Reply Brief for Petitioner Darlene Walters at 1, Walters v. Metropolitan Educ. Enter., Inc., 116 S. Ct. 1260 (1996) (Nos. 95-259, 95-779).

114. *Walters*, 1996 WL 656480, at *19-20.

of that week, not including Friday."[115] Petitioners pointed out that, in the ever-changing world of business, employees tend to enter and exit the workplace in midweek.[116] Thus, they concluded, it would be inequitable for the employee who leaves midweek to be unable to obtain jurisdiction over his or her former employer under Title VII, regardless of the prior employment relationship.[117]

Finally, the petitioner's contended that the legislative history and policy underlying Title VII lends support to the interpretation that the words of the statute favor the inclusion of part-time and seasonal workers.[118] Title VII is a civil rights statute enacted to combat discrimination in the workplace and, as such, should be read broadly and in a way that comports with its remedial nature.[119] Petitioners noted that according to Senator Humphrey, a co-sponsor of Title VII, Congress amended the definition of employer "to provide needed certainty as to coverage of employers where the number of employees fluctuates above and below the figure requisite to application of the title."[120]

In response, the Court voiced their concern about how the payroll method would be implemented in counting seasonal workers. Specifically, the Court was interested in how the petitioners would find an on-going employment relationship where a worker would only be employed for certain months and would be absent for the rest of the year.[121] Petitioners responded that if the particular employee has "no expectation of coming back" to his seasonal employment, that worker would not be

115. Petitioner Walters' Brief at 22-23, *Walters* (Nos. 95-259, 95-779).

116. *Id.* at 23. Petitioner further explained, "[i]t is surely customary that employees begin and end their employment at the beginning and end of payroll period, which, for example, are often pegged to the first and last day of a month . . . . [which] do not always fall on Monday and Friday." *Id.*

117. *Id.*

118. *Walters*, 1996 WL 656480, at *5.

119. Petitioner EEOC's Brief at 15, *Walters* (Nos. 95-259, 95-779).

120. *Id.* at 28 (*citing* 110 CONG. REC. 12, 722 (1964)).

121. *Walters*, 1996 WL 656480, at *26.

counted towards the jurisdictional minimum even though he may remain on the employer's payroll.[122]

Contrary to petitioners' arguments, the respondent, Metropolitan Educational Enterprises, Inc., argued that the Seventh Circuit's decision to maintain the counting method was correct and should not be reversed by the Court.[123] Metropolitan looked to the vagueness of the language in Title VII as an implicit implication by Congress that it did not intend to subject all employers to the regulation of the statute.[124] In addition, respondent tried to convince the Court that neither the legislative history nor the prior administrative or agency statutes support the petitioners' position.[125] Furthermore, unlike the FMLA and the Unemployment Compensation Act, there are no Congressional Committee Reports or any indication in the legislative history of Title VII that Congress intended the payroll method be adopted.[126] According to respondent, these are precisely the sources in which the Court has historically looked to for establishing precedent.[127] While the respondents conceded that Congress borrowed the twenty week concept from the Unemployment Compensation Act, they urged the Court look to "the language in the Unemployment Compensation Act [which] is markedly different from the language that ultimately found its way into Title VII."[128]

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122. *Id.* at *27. Attorney for Petitioner EEOC explained that if an employer chose to run his business by using employees who come irregularly and have no intent on returning to employment "it would be wrong to impose upon them the scrutiny of Title VII." *Id.* at 28.

123. *Id.* at *17.

124. *Id.* at *36.

125. *Id.*

126. Brief for Respondent Metropolitan Educational Enterprises, Inc. at 19, Walters v. Metropolitan Educ. Enter., Inc., 116 S. Ct. 1260 (1996) (No. 95-779, 95-259). "The phrase, 'for each working day,' is nowhere specifically discussed . . . in connection with the legislative history of Title VII." *Walters*, 1996 WL 656480, at *36.

127. *Id.*

128. *Id.* at *33. Furthermore, respondents argued that, for purposes of Title VII, Congress added the phrases "for each working day" and "in each of the twenty or more calendar weeks," both of which are conspicuously absent

The Court challenged Metropolitan's argument regarding Congress's recent passage of the Family and Medical Leave Act.[129] In enacting the FMLA, Congress used identical language to Title VII and has chosen to adopt the payroll method.[130] It appeared strange and troublesome to the Court that one might end up with the payroll method being used under the FMLA, the ADEA and the Unemployment Compensation Act and a different method under Title VII.[131] Specifically, the Court asked:

> [T]here is at least some legislative history that some people might read that seems very heavily to support the–what has been called the payroll method in connection with the Family Leave Act? I mean there's a bank for Title VII. We don't know why they wrote those words. But for the Family and Medical Leave Act, we do have legislative history don't we?[132]

In response, respondent pointed out that, even though Congressional intent for employing the payroll method for purposes of the FMLA was clear, it does not mean that the Court must use that decision as a "reliable indicator of what Congress intended when it enacted Title VII thirty years earlier."[133]

After hearing oral arguments from both sides, the Supreme Court was left to make its decision on which method to adopt when looking to obtain jurisdiction for purposes of Title VII. For employees, the payroll method is the most preferable method because it both maintains the internal consistency of Title VII and adequately protects all workers from discrimination.

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in the Unemployment Compensation Act. Respondent's Brief at 25, *Walters* (Nos. 95-259, 95-779).

129. *Walters*, 1996 WL 656480, at *33.

130. *Id.* For purposes of the Family and Medical Leave Act of 1993, Congress included precisely the same 'for each working day' language as Title VII. *See* 29 U.S.C. § 2611 (4) (A) (i) (Supp. V 1993). More importantly, House and Senate Committee Reports indicate that Congress clearly intended that phrase to "mean 'employ' in the sense of maintain on the payroll." Respondent's Brief at 44, *Walters* (Nos. 95-259, 95-779).

131. *Walters*, 1996 WL 656480, at *34.

132. *Id.* at *35.

133. Respondent's Brief at 31, *Walters* (Nos. 95-259, 95-779). Respondent's noted that "The court has spurned attempts to divine of an earlier Congress from legislative action taken by a later Congress." *Id.*

Moreover, it focuses on the nature of the relationship between employers and employees and not on the number of hours worked each day. For employers, the inquiry must stop with employees who are physically present at work or on paid leave. Though small businesses must be shielded from frivolous Title VII claims, they cannot be protected at the expense of the employee. If the Court adopts the counting method, employers may escape from the prohibitions of Title VII by discriminating against unsuspecting part-time workers who take a sick day or an unpaid leave of absence.

III. THE SUPREME COURT'S ENDORSEMENT OF THE PAYROLL METHOD

In January, 1997, the United States Supreme Court unanimously overruled the Seventh Circuit's decision in *Metropolitan*.[134] In the opinion authored by Justice Scalia, the Court stated that the relevant issue to be decided was whether, for purposes of Title VII coverage, employees should be counted according to the payroll method which focuses on the on-going employment relationship with the employee rather than the alternative counting method, which only counts employees who are physically present in the workplace or on paid leave.[135]

While the parties agreed that, for purposes of Title VII, an employee is anyone who has an on-going employment relationship with an employer, respondents reiterated their position that the employment relationship is defined by compensation.[136] Accordingly, an employee cannot be counted

134. Walters v. Metropolitan Educ. Enter., Inc., 117 S. Ct. 660 (1997).

135. *Id.* at 662. Specifically, Metropolitan had more than 15 employees on its payroll on each working day; however, for nine weeks it employed two part-time hourly workers who ordinarily only worked four days a week. *Id.* at 663. Therefore, Metropolitan argued that they were exempt from the scrutiny of Title VII because petitioner failed to meet the jurisdictional minimum necessary to bring a Title VII discrimination action. *Id.*

136. *Id.*

towards the jurisdictional minimum unless he or she is receiving compensation for their labor.[137]

The Court analyzed the differences between the two methods endorsed by the parties and found that the correct method of determining an on-going employment relationship is to look at whether the employee appears on the employer's payroll and not at whether the employee is being compensated on a particular day.[138] Moreover, this method of counting employees has been adopted by both the First and Fifth Circuits, numerous district courts, by the EEOC, and by the Department of Labor for purposes of the FMLA.

Next, the Court turned to the issue of interpreting the statutory language of Title VII. The Supreme Court has often insisted upon the structural reading of statutes: "Our normal canons of construction caution us to read the statute as a whole, and, unless there is good reason, to adopt a consistent interpretation of a term used in more than one place within a statute."[139] The Court found that, where there is no indication to the contrary, structural interpretations of statutes "are assumed to bear their 'ordinary, contemporary, common meaning.'"[140]

The Court rejected the court of appeals' notion that if Congress intended to adopt the payroll method, it would have phrased the statute to require an employer "have fifteen or more employee in each of the twenty or more calendar weeks" without adding the additional phrase, "for each working day."[141] The Court stated that "[w]ithout that qualification, it would have been unclear whether an employee who departed in the middle of a calendar week would count toward the 15-day minimum for that week; with the qualification he does not."[142] Therefore, by

137. *Id.*

138. *Id.*

139. United States v. Thomson/Center Arms Co., 504 U.S. 505, 512 n.5 (1992).

140. Walters v. Metropolitan Educ. Enter., Inc., 117 S. Ct. 660, 664 (1997) (*quoting* Pioneer Investment Services Co. v. Brunswick Assoc. Ltd., Partnership, 507 U.S. 380, 388 (1993)).

141. *Id.*

142. *Id.*

looking at the ordinary meaning of the words in the statute as well as the history and purpose of Title VII, it is clear that Title VII was intended to be interpreted consistent with the payroll method.[143]

The Court conceded that when an employer is normally asked how many employees he or she has, that employer would give the number of employees who are physically present in the workplace on that day.[144] However, the Court focused on the need for consistency and ease in administering the goals and policies of Title VII and concluded that these goals could not be achieved by counting employees only on days that they are physically present in the workplace.[145]

The Court was not persuaded by respondent's argument that interpreting the phrase "for each working day" in a manner that is consistent with the payroll method would render the phrase meaningless.[146] First, the Court determined that without an expansive interpretation, it would be remain problematic whether or not to count employees who leave work mid-week.[147] Second, commencing and leaving employment mid-week is more common than the court of appeals acknowledged.[148] In the ever-changing world of business, employers neither hire nor fire employees on a Monday through Friday work week.[149] Moreover, the Supreme Court found that more and more employer's payrolls work on an "end of the month rather than an

143. *Id.*

144. *Id.*

145. *Id.* Furthermore, employers rarely maintain daily attendance records for salaried employees. *Id.* The Court believed that if it were to accept Metropolitan's interpretation of Title VII, it would lead into an "incredibly complex and expensive factual inquiry." *Id.* at 665.

146. *Id.*

147. *Id.* The Court noted that "[s]imiliarly the adjective 'working' within the phrase 'for each working day' eliminates any ambiguity about whether employees who depart after the end of the workweek, but before the end of the calendar week, count toward the 15-employee minimum for that week." *Id.* at 664-65. For the Court, elimination of "mere ambiguity" was enough justification for the adoption of this interpretation of the statute. *Id.* at 665.

148. *Id.*

149. *Id.*

end of the week pay schedule."[150] If Metropolitan's argument was to be accepted by this Court, there would continue to be uncertainty in counting employees who are compensated for sick days, vacation days, leaves of absence, or holidays.

The Supreme Court unanimously adopted the payroll method of counting employees for Title VII jurisdiction. Therefore, there will no longer be divergent methods of counting employees because the Court has determined that the ultimate touchstone of the determination is:

> whether an employer has an employment relationship with 15 or more employees for each working day in 20 or more weeks during the year in question . . . [regardless of their non-appearance on a payroll] . . . [A]ll one needs to know about a given employee for a given year is whether the employee started or ended employment during that year, and if so, when. He is counted as an employee for each working day after arrival and before departure.[151]

The Court concluded that in light of the new and expansive interpretation of § 2000-e(b), Metropolitan was an "employer" for purposes of Title VII jurisdiction and Darlene Walters is entitled to bring her retaliatory-discharge claim against it under Title VII of the Civil Rights Act of 1964.[152]

CONCLUSION

Title VII of the Civil Rights Act of 1964 was a giant step forward in the effort to eradicate the moral and economic indignation and discrimination experienced by many Americans in the workplace. The United States Supreme Court's adoption of the payroll method finally creates uniformity among the lower courts in defining who is an "employer" for purposes of Title VII. The payroll method signals a victory for employees of small

150. *Id.*
151. *Id.* at 665-66.
152. *Id.* at 666.

businesses by adequately providing a clearer path for the assertion of Title VII discrimination claims against their employers. Moreover, by focusing on the nature of the relationship between employers and employees, and not on the number of hours worked each day, the goals and policies of Title VII can be realized and enforced to their fullest potential.

Dina Mastellone