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Subsequent History

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SUBSEQUENT HISTORY

Each year a number of Tenth Circuit decisions which the *Journal* has selected for comment and analysis will subsequently be appealed to the U.S. Supreme Court. Throughout this issue we have attempted to note cases for which petitions for certiorari have been filed and what disposition, if any, has been made of those petitions prior to our publication deadline. When the Supreme Court grants review to a decision of the Tenth Circuit and an opinion is rendered, the *Journal* will utilize this section of the Tenth Circuit Survey to comment on the Supreme Court's decision. As a feature of this initial issue, we include comments on two Supreme Court decisions from the last term treating cases which originated in the Tenth Circuit.

I. CIVIL RIGHTS—TITLE VII—ARBITRATION IS NO BAR TO EMPLOYEE'S RIGHT TO TRIAL DE NOVO IN FEDERAL COURT IN EMPLOYMENT DISCRIMINATION SUIT BASED ON SAME CLAIM

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)

BY THOMAS L. ROBERTS*

INTRODUCTION

In *Alexander v. Gardner-Denver Co.*,[1] a unanimous opinion authored by Mr. Justice Powell, the U.S. Supreme Court reversed a decision by the Tenth Circuit Court of Appeals,[2] and, in so doing, set forth an important exegesis of the nature and character of employment discrimination suits brought by private employees under Title VII of the Civil Rights Act of 1964.[3]

Alexander comprehensively analyzes the relationship between federal courts and grievance-arbitration apparatuses typically included in collective-bargaining agreements. In general terms the Court explored and contrasted formal and informal

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[1] 415 U.S. 36 (1974). *See generally* Nash, *Board Referral to Arbitration and* Alexander v. Gardner-Denver: *Some Preliminary Observations*, 25 LABOR L.J. 259 (1974); Oppenheim, Gateway & Alexander, *Whither Arbitration?* 48 TUL. L. REV. 973 (1974); Comment, *Civil Rights—Title VII—Prior Resort to Arbitration Under a Collective Bargaining Agreement Does Not Preclude an Employee from Bringing Suit in Federal Court Under Title VII*—Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), 43 U. CIN. L. REV. 661 (1974).

[2] 466 F.2d 1209 (10th Cir. 1972), *aff'g per curiam* 346 F. Supp. 1012 (D. Colo. 1971).

[3] 42 U.S.C. §§ 2000e to 2000e-17 (1972), *as amended.*

means of resolving labor disputes. Specifically, it held that prior submission of an employee's claim of discrimination in employment to final arbitration pursuant to a nondiscrimination clause in a collective-bargaining agreement does not foreclose prosecution of the same claim by a trial de novo in federal court under Title VII.[4]

In reaching this conclusion the Court stressed the important function which Congress intended such suits to fulfill and clearly manifested an attitude of judicial hospitality toward them. *Alexander* thus represents a significant victory for potential Title VII claimants not only in the Court's refusal to bar suit by an employee who has attempted to preserve his rights through resort to arbitration, but also in its strong language evincing a liberal stance with respect to equal employment opportunity litigation.

Following a brief outline of the nature of a Title VII action and a sketch of the factural background appearing in *Alexander*, this comment will discuss the case as it was treated in the three tiers of the federal court system.

I. TITLE VII ACTIONS

Title VII of the Civil Rights Act of 1964[5] prohibits those employers within its purview from discriminating against any employee on the basis of race, color, religion, sex, or national origin.[6] Enforcement of the Act is left largely to private persons who have the right to bring suit in federal court against their employer if they believe themselves the victim of an unlawful discriminatory practice.[7]

Prior to institution of an action in federal court, however, the

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[4] Alexander v. Gardner-Denver Co., 415 U.S. 36, 46 n.6, 59-60 (1974).

[5] 42 U.S.C. §§ 2000e to 2000e-15 (1964). Title VII of the Civil Rights Act of 1964 was significantly changed by the Equal Employment Opportunity Act of 1972, 86 Stat. 103 (1972). For the sake of convenience, all citations to the Act in this article are to the 1972 Act, unless otherwise indicated, despite the fact that the present case was instituted prior to this amendment. The changes wrought by the 1972 Act, as to the character of the right to sue conferred upon employees of private employers, are not relevant.

[6] 42 U.S.C. §§ 2000e-2(a)(1) to (2) (Supp. II, 1972). Coverage of the Act extends to, among others, private employers engaged in an industry affecting commerce who employ 15 or more employees for 20 or more weeks per year. 42 U.S.C. § 2000e(b) (Supp. II, 1972).

[7] *See* 42 U.S.C. § 2000e-5(f)(i) (Supp. II, 1972). The 1972 Act increased the power of the EEOC to secure enforcement of Title VII by allowing it to file suits in its own name. *Id. Compare* 42 U.S.C. § 2000e-5 (1964). Despite this change, however, the fundamental enforcement thrust still resides with individual complainants. *See, e.g.*, Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968). *See generally*, Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824 (1972).

aggrieved employee must first submit his claim to the Equal Employment Opportunity Commission (EEOC) for investigation.[8] The claim must be submitted within 180 days from the occurrence of the alleged discriminatory act.[9]

If the EEOC finds reasonable cause to believe that the respondent company did, in fact, discriminate against the claimant in an unlawful manner, it "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."[10] If these informal efforts fail to achieve a conciliation agreement which satisfies the requirements of Title VII, the matter may thereafter proceed to formal litigation. If the company refuses to accede to conciliation, the EEOC itself may institute suit in its own name or merely notify the claimant of his right to sue.[11] If the employee-claimant presents the obstacle to conciliation, the EEOC will terminate its involvement and issue to the employee a "right to sue letter" informing him of his right to file a civil action pursuant to Title VII within 30 days from receipt of the letter.[12] If, as a result of its investigation of an employee's charge, the EEOC is satisfied that no reasonable cause has been demonstrated to believe the claim, the employee still receives a "right to sue letter" and may file suit within the specified period.

Thus a Title VII plaintiff is entitled to an adjudication of his rights in federal court regardless of what informal measures have been taken by the EEOC prior to the filing of a complaint in court. An EEOC finding of cause is not a jurisdictional prerequisite. There are only two jurisdictional prerequisites to a Title VII suit brought by an employee of a private company.[13] First, the employee must have filed his claim of discrimination with the EEOC in timely fashion; and, second, he must have received the statutory notice of his right to sue from the EEOC and have filed

[8] 42 U.S.C. § 2000e-5(b) (Supp. II, 1972).

[9] *Id.* § 2000e-5(e).

[10] *Id.* § 2000e-5(b).

[11] *Id.* § 2000e-5(f)(1). This requirement has been codified in 29 C.F.R. §§ 1601.25, 1601.25b (1974).

[12] 42 U.S.C. § 2000e-5(f)(1) (1970). The 1972 Act extended this period to 90 days. 42 U.S.C. § 2000e-5(f)(1) (Supp. II, 1972).

[13] The qualification, "employee of a *private* company," is necessary because the jurisdictional prerequisites for suits brought by employees of governmental organization are different. *See, e.g.*, 42 U.S.C. § 2000e-16 (Supp. II, 1972) which controls suits brought against agencies of the federal government. The EEOC has no role in these actions; rather, the initial charge must be filed with the Civil Service Commission.

the federal complaint within the 30-day period.[14]

Having reached federal court in proper fashion, a Title VII private-employee plaintiff is entitled to a full-dress trial de novo.[15] Remedies available under the Act are restricted to those equitable in nature; injunctive, restitutional, and/or "any other equitable relief as the court deems appropriate."[16] Consequently, most courts have characterized Title VII suits as being equitable in nature, concluding that monetary damages, compensatory or punitive, are unavailable[17] and that there is no right to trial by jury.[18] The matter is therefore tried to the court, sitting in equity, with a full panoply of equitable remedies at its disposal.

In sum, an employee who feels himself the object of discrimination at the hands of his private employer need only file a charge with the EEOC within 180 days from the happening of the event complained of, and then, regardless of subsequent events (short of a conciliation agreement to which he consents), he may bring suit in federal court on the claim within 30 days from receipt of the statutory notice of right to sue. He is then entitled to a trial de novo on his complaint in equity.

II. FACTUAL BACKGROUND

Harrell Alexander, Sr., a black male, accepted a job with the Gardner-Denver Company at its Denver, Colorado, plant in May of 1966 as a maintenance worker.[19] After having been with the company for 2 years, he secured a position as a drill press operator trainee in June 1968. He held this assignment until his discharge from the company on September 29, 1969. As reason for Alexander's release, the company informed him that his performance

[14] McDonnel Douglas Corp. v. Green, 411 U.S. 792, 798 (1973).

[15] *Id.* at 799.

[16] 42 U.S.C. § 2000e-5(g) (1972).

[17] *See, e.g.*, Loo v. Gerarge, 374 F. Supp. 1338 (D. Hawaii 1974); Howard v. Lockheed-Georgia Co., 7 E.P.D. ¶ 9335 (N.D. Ga. 1974); Van Hoomissen v. Xerox Corp., 7 E.P.D. ¶ 9146 (N.D. Cal. 1973). Monetary relief is available under Title VII, but it is restricted to back pay liability, a remedy which has been construed as restitutional and thus equitable in nature. *See generally,* Comment, *Back Pay for Employment Discrimination Under Title VII—Role of the Judiciary in Exercising its Discretion,* 23 CATH. U.L. REV. 525 (1974); Comment, *Equal Employment Opportunity: The Back Pay Remedy Under Title VII,* 1974 U. ILL. L.F. 379. Back pay liability is subject to strict time limitation, and the maximum period for its award is two years prior to filing of the discrimination charge with the EEOC. 42 U.S.C. § 2000e-5(g) (Supp. II, 1972).

[18] *See* Loo v. Gerarge, 374 F. Supp. 1338 (D. Hawaii 1974); EEOC v. Laacke & Joys Co., 7 E.P.D. ¶ 9258 (E.D. Wis. 1974); Sape & Hart, *supra* note 7, at 878.

[19] This factual summary is, unless otherwise noted, taken from Alexander v. Gardner-Denver Co., 415 U.S. 36, 38-43 (1974).

was substandard and unacceptable due to his excessive production of defective parts which had to be scrapped. Alexander, however, regarded this explanation a pretext for the fact that he was wrongfully terminated from employment.

The collective-bargaining agreement in effect between Alexander's union and his former employer provided that if an employee felt that the company had breached the agreement to his detriment, the worker had the right to lodge a grievance within 5 days of the alleged breach. On October 1, 1969, Alexander filed a grievance, stating merely that he had been "unjustly" discharged and omitting any reference to racial discrimination.

The collective-bargaining agreement contained a clause prohibiting the company from discriminating against any employee, *inter alia,* on the basis of race. Further, if a dispute could not be resolved informally between the employee and the company via the grievance mechanism, the controversy was to be submitted to final and binding arbitration before an arbitrator jointly selected and paid by the union and the company.

Union officials processed Alexander's grievance through several stages of negotiation. At the last step in the prearbitration phase, Alexander interposed a claim of racial discrimination. The company denied this claim. The parties at loggerheads, the matter was submitted to arbitration. After the claim was referred to an arbitrator but before a decision was rendered, Alexander filed a charge of racial discrimination with the Colorado Civil Rights Commission due to an apparent lack of confidence on his part in the arbitration process. The state commission promptly referred the complaint to the EEOC. This occurred in November of 1969. Subsequently, an arbitration hearing was held, and on December 30, 1969, the arbitrator ruled adversely to the grievant, concluding that Alexander has been "discharged for just cause" and making no mention of the charge of discrimination.[20]

Meanwhile, on July 25, 1970, the EEOC completed its investigation of the charge and determined that the facts presented no reasonable cause to believe that a Title VII violation had occurred. Following receipt of his statutory notice of right to sue, Alexander commenced a timely action in federal court.

[20] The district court found that the discrimination claim had, in fact, been raised in the arbitration proceeding, despite the arbitrator's omission of any reference to it in his decision. 346 F. Supp. at 1014, noted in the Supreme Court opinion at 415 U.S. 36, 43 & 43 n.4. *But see* Alexander v. Gardner-Denver Co., Civil No. C-2476 (D. Colo., Nov. 19, 1974) (unpublished opinion), where on remand the district court said the opposite.

Thus, prior to his arrival in court, plaintiff Alexander had submitted his claim of racial discrimination in employment to two separate bodies, one private (arbitrator) and the other public (EEOC). Both independently concluded that his claim was without foundation in fact.

III. DISPOSITION IN THE DISTRICT AND CIRCUIT COURTS

Alexander's action came before Judge Fred M. Winner of the U.S. District Court for the District of Colorado on a motion for summary judgment filed by the defendant.[21] The company argued that plaintiff's voluntary submission of his discrimination charge to binding arbitration, which resulted in a rejection of his grievance, should preclude him from proceeding further in the matter by court action and urged that the cause of action be dismissed.

After disposing of preliminary matters,[22] Judge Winner faced this "vital and troublesome issue."[23] Observing that prior to the present action the plaintiff had unsuccessfully sought relief in two different forums, the court phrased the question presented in terms of "just how many chances plaintiff should be afforded to try to establish his claim of discrimination."[24]

Prior to undertaking analysis and discussion of "two diametric lines of authority"[25] pertinent to the main issue, Judge Winner excerpted generously from *Culpepper v. Reynolds Metals Co.*[26] In that case, the Fifth Circuit Court of Appeals held that when a potential Title VII claimant submits his employment discrimination charge to grievance-arbitration procedures, the 180-day statute of limitations is tolled.[27] If this were not so, the Fifth Circuit reasoned, Congress' intent to place primary reliance on informal and private means of resolving Title VII disputes would be frustrated. The court's reference to *Culpepper* therefore served to

[21] Alexander v. Gardner-Denver Co., 346 F. Supp. 1012 (1971).

[22] Defendant also urged entry of summary judgment in its favor on two other grounds: (1) that complaint was not filed within the 30-day period following notification of right to sue from the EEOC, and; (2) that an EEOC finding of reasonable cause to believe the charge was a jurisdictional prerequisite to suit which was absent here. Judge Winner rejected the first ground in view of an extension of the time for filing the complaint previously granted by the court. Defendant's second contention was held to be without foundation in the law. *Id.* at 1014.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] 421 F.2d 888 (5th Cir. 1970).

[27] *Id.* at 891-92.

focus attention on the fact that Title VII was designed to emphasize the role of informal methods of securing compliance with the Act.

Judge Winner then quoted extensively from *Hutchings v. United Industries, Inc.*,[28] a case which held, on public policy grounds, that "the federal courts cannot be divested of jurisdiction of a Title VII action by any arbitration procedure under a labor contract."[29] In reaching this conclusion, the Fifth Circuit Court of Appeals highlighted the dissimilarities between grievance-arbitration founded upon contract and judicial proceedings based upon federal statute. These differences, the court felt, compelled the inference that the filing of a grievance according to the terms of a collective-bargaining agreement and the filing of a judicial action do not constitute enforcement of an indentical right in separate forums. Rather, the contractual and statutory rights are of independent origin, and the enforcement of one should have no influence upon the right to enforce the other.[30] Furthermore, the *Hutchings* court was of the opinion that the structure and language of the Act clearly indicated that Congress intended the federal judiciary, and not the EEOC or private arbitrators, to be the final decisionmaker as to an individual's rights under Title VII. The doctrine of election of remedies has application only insofar as it might prevent a windfall to a plaintiff; it may be utilized only to avoid duplication of relief, not to preclude court action altogether. Thus when a plaintiff has not received adequate relief by means of arbitration, election of remedies cannot be interposed to foreclose prosecution of the claimant's federal statutory right of action.

The court then directed its attention to the antithetical view as expressed in *Dewey v. Reynolds Metals Co.*[31] In this case the Sixth Circuit Court of Appeals reasoned that to allow an employee to bring suit under Title VII after he had unsuccessfully submitted the same complaint to final arbitration "could sound the death knell to arbitration of labor disputes" because a situation would be created in which "the employer, but not the employee, [would be] bound by the arbitration."[32] Having nothing

[28] 428 F.2d 303 (5th Cir. 1970).

[29] 346 F. Supp. at 1015.

[30] 428 F.2d at 312-14.

[31] 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971) (Harlan, J., not participating).

[32] *Id.* at 332 quoted in 346 F. Supp. at 1016.

to gain but everything to lose in arbitration, employers, in the *Dewey* court's opinion, would tend to ignore the process entirely. Such result would run afoul of the well-established federal policy which favors arbitration of labor disputes.[33]

Noting that *Dewey* was affirmed by an equally divided Supreme Court,[34] Judge Winner embraced the case in its entirety, and held that:

> [W]hen an employee voluntarily submits a claim of discrimination to arbitration under a union contract grievance procedure—a submission which is binding on the employer no matter what the result—the employee is bound by the arbitration award just as is the employer. We cannot accept a philosophy which gives the employee two strings to his bow when the employer has only one.[35]

The court reiterated *Dewey's* prediction that a contrary holding would sound the "death knell" to arbitration. Arbitration which would always obligate the employer but never the employee would, in Judge Winner's colorful language, constitute "a trial balloon for the employee, but a moon shot for the employer."[36] This disparity would amount to preferential treatment of minority group members, a result, in the court's interpretation, prohibited by *Griggs v. Duke Power Co.*[37]

Alexander thus presented a question novel in this circuit. Faced with an irreconciliable split of authority on the issue, the court chose the viewpoint headlined by *Dewey*. Although the possible impact of the opposite view, the demise of arbitration altogether, was perhaps overstated, the precedent chosen by Judge Winner has certain appeal to notions of fair play and common sense, especially when juxtaposed with the federal policy favoring arbitration as a means of settling labor disputes. Also *Dewey* was alluring in that the Supreme Court had failed to disapprove of it.

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[33] 429 F.2d at 337.

[34] 402 U.S. 689 (1971). A Supreme Court affirmance by an equally divided opinion is, of course, not authoritative as precedent, but binds only the parties before the court. *See* 1B J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 0.402[2] at 119 n.26 (2d ed. 1974).

[35] 346 F. Supp. at 1019. Judge Winner goes on to say that "Congress has [already] given the employee one and one-half strings under the Equal Employment Opportunity procedure." *Id.* The "one-half string" referred to is the assistance from the EEOC to which a claimant is entitled if the EEOC finds probable cause to believe that discrimination has occurred. The metaphor chosen (to what conceivable use could one put *half* a bowstring?) belies the importance of this resource to an aggrieved employee. To be sure, it represents an advantage, and no doubt the court felt this extra edge sufficient to render further unilateral aid to the employee unnecessary, if not downright unfair.

[36] 346 F. Supp. at 1019.

[37] 401 U.S. 424 (1971).

In addition, the *Dewey* preclusion rule finds inferential support in the fact that Congress clearly manifested an intention to rely primarily on informal avenues of relief in the effectuation of the goals of Title VII. No doubt these factors weighed heavily in the decison of the Tenth Circuit to accord the case only summary treatment on appeal.

Plaintiff Alexander appealed the district court's award of summary judgment in favor of the defendant company. The Tenth Circuit Court of Appeals (Hill and Barrett, Circuit Judges, and Langley, District Judge, presiding) affirmed Judge Winner's ruling in a per curiam opinion.[38] Finding the trial court's memorandum opinion "exhaustive of the authorities and conclusive in resolution of the issue," it merely affirmed the judgment "on the basis of the trial court's opinion and order, as reported."[39]

In view of the brevity of the Tenth Circuit opinion, one must look solely to the opinion entered by the district court in order to ascertain the circuit's attitude toward the issue presented. The court set forth a summary of the facts which preceded institution of the plaintiff's federal suit. One can only guess that this was intended to underscore the fact that plaintiff was afforded more than one opportunity to gain relief before he entered the federal courthouse. Apparently the court felt that two chances were enough.

IV. The Supreme Court Decision

The Supreme Court unanimously reversed the Tenth Circuit Court of Appeals, holding that the statutory right to a trial de novo afforded employees by Title VII cannot be divested by prior submission of the same claim to binding arbitration pursuant to an antidiscrimination clause contained in a collective-bargaining agreement.[40] In rejecting the rationale of the lower courts, the Supreme Court manifested its determination to insure full play to the Civil Rights Act in the employment arena.

Alexander comprehensively explores the function of Title VII as reflected in the statutory language and legislative history and examines its relationship to the arbitration process within the realm of labor disputes in general. The opinion does not discount the well-recognized importance of arbitration as a primary device

[38] 466 F.2d 1209 (10th Cir. 1972).
[39] *Id.* at 1210.
[40] 415 U.S. 36 (1974).

in maintaining industrial peace; rather, it stresses Congress' intended mission for Title VII in extirpating unlawful discriminatory practices from employment.

The Supreme Court recited some basic principles bearing on a Title VII action:

> Congress enacted Title VII of the Civil Rights Act of 1964 to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin. Cooperation and voluntary compliance were selected as the preferred means for achieving this goal.[41]

Before allowing an aggrieved party to file suit in federal court, Congress required that he first attempt to resolve his dispute informally and provided opportunities for nonjudicial solutions through establishment of the EEOC and through provisions which permit utilization of other similar state and local agencies.[42] These agencies, the Court noted, however, lack direct enforcement powers; therefore, it follows that "final responsibility for enforcement of Title VII is vested with federal courts."[43]

Congress conferred upon the courts broad authority to fashion whatever equitable relief is deemed appropriate under the circumstances of a particular case.[44] Such remedial power remains available despite a "no cause" finding by the EEOC.[45] The confluence of the courts' broad equitable powers and the fact that EEOC disposition of discrimination charges has no jurisdictional relevance led the Court to conclude that the power of the federal courts to secure compliance with Title VII is "plenary."[46]

The EEOC's authority under Title VII to investigate and to conciliate is typically set in motion by charges of individual employees. Although the 1972 Act permits the EEOC to bring suit in its own right, private suits continue to be the predominate mode of Title VII enforcement efforts. Private actions fulfill two functions simultaneously: "the private litigant not only redresses

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[41] *Id.* at 44 (citations omitted).

[42] *Id. See also* Love v. Pullman Co., 404 U.S. 522 (1972).

[43] 415 U.S. at 44. The Equal Employment Opportunity Act of 1972 did grant the EEOC authority to bring suit in its own name. *See* 42 U.S.C. § 2000e-5(f)(1) (Supp. II, 1972) and text accompanying note 12, *supra.* Despite this significant augmentation, Congress declined to grant the EEOC direct enforcement power: it still cannot "adjudicate claims or impose administrative sanctions." 415 U.S. at 44.

[44] 42 U.S.C. § 2000e-5(g) (Supp. II, 1972). *See* authorities cited note 19 *supra,* and accompanying text.

[45] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973).

[46] 415 U.S. at 45.

his own injury but also vindicates the important congressional policy against discriminatory employment practices."[47]

The Act is silent with respect to what bearing an arbitrator's finding has on an employee's right to sue under Title VII. Thus, the Court pointed out, "[t]here is no suggestion in the statutory scheme that a prior arbitral decision either forecloses an individual's right to sue or divests federal courts of jurisdiction."[48] The statute does, however, make clear that federal courts are to have plenary powers of enforcement as to Title VII and spells out the jurisdictional prerequisites to suit.[49]

Following this abstract of general principles, the Court explained its reasons for reversing the decision of the Tenth Circuit. Legislation in the employment sphere, the Court explained, has "long evidenced a general intent to accord parallel or overlapping remedies against discrimination."[50] Title VII itself, said the Court,

> provides for consideration of employment-discrimination claims in several forums . . . . (EEOC) . . . (state and local agencies) . . . (federal courts). And, in general, submission of a claim to one forum does not preclude a later submission to another. Moreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination. In sum, Title VII's purpose and procedures strongly suggest that an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective-bargaining agreement.[51]

The preceding quotation captures the essence of the Court's decision to part company with the lower courts on this issue. The Court fleshes in its rationale through analysis of the trilogy of notions which led the district and circuit courts to believe that the opposite view was warranted: election of remedies, waiver, and the federal policy which favors arbitration of labor disputes.

A. *Election of Remedies*

The Court summarily repudiated possible application of the

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[47] *Id.*

[48] *Id.* at 47.

[49] *Id.* These requirements are: (1) that a timely charge of discrimination be filed with the EEOC; and (2) that the charging party receive notice of his right to sue from the EEOC and thereafter lodge his complaint seasonably.

[50] *Id.*

[51] *Id.* at 47-49 (citations and footnote omitted).

doctrine of election of remedies, declaring it pertinent only when an individual seeks remedies inconsistent in either a legal or factual sense.[52] This concept could, therefore, have no relevance to a situation in which an employee seeks to vindicate two separate rights. In consenting to engage in grievance-arbitration procedures, an employee pursues redress of a contractual right—as signatory to a collective-bargaining agreement. In instituting litigation under Title VII, on the other hand, an employee seeks vindication of a statutory right—as a person within the class to be protected by an act of Congress. Since the rights emanate from different sources, they are separate and distinct. Pursuit of both thus cannot constitute pursuit of inconsistent remedies.

The Court analogized this procedure to that for settling disputes under the National Labor Relations Act. If a dispute entails violations of both contractual and statutory rights, the National Labor Relations Board is free to consider statutory claims, despite the fact that an arbitrator may have previously considered them in the guise of contractual rights. As the arbitrator and the NLRB are complementary under this scheme, so are the arbitrator and the federal court in the Title VII context.[53]

Unjust enrichment as a possible reason to require application of the doctrine of election of remedies was also rejected. The Court observed that provision to employees of a double opportunity to seek relief against alleged discrimination will not lead to a windfall on the part of a claimant. Unjust enrichment presents no danger because courts, consonant with their equitable authority, will doubtlessly structure relief to avoid duplication in a case where a plaintiff has previously achieved some satisfaction in arbitration.[54]

B. *Waiver*

The concept of waiver was likewise discarded as having no bearing on cases of this nature. The Court flatly pronounced that "there can be no prospective waiver of an employee's rights under Title VII."[55] Characterizing the mandate of Title VII as absolute, the Court concluded that to allow rights conferred by the Act to be waived in the process of bargaining collectively "would defeat

[52] *Id.* at 49 n.11.
[53] *Id.* at 50.
[54] *Id.* at 51 n.14.
[55] *Id.* at 51.

the paramount congressional purpose behind Title VII."[56]

Certain instances in which waiver can play a legitimate part in the collective-bargaining process, however, were recognized by the Court. Some statutory rights, *e.g.*, the right to strike, are waivable on a collective basis as a means of winning, in return, economic benefits for the members of a bargaining unit.[57] Such waivable rights are collective in character. Title VII guarantees, by contrast, are individualistic in nature and concern "not majoritarian processes, but an individual's right to equal employment opportunities."[58] As such, they are non-negotiable in the bargaining process.

Even rights conferred by Title VII may presumably be waived by an individual if the waiver occurs in connection with a voluntary settlement. As with other civil rights, such waivers, to be effective, must be both "voluntary and knowing."[59] In no event, however, can the individual's right to be free from discrimination in employment be deemed waived merely by virtue of the fact that the employee submitted his claim to binding arbitration under an anti-discrimination clause of a collective-bargaining agreement.

The limited role of the arbitrator in labor disputes suggested to the Court further reason to reject the preclusion rule. The arbitrator's responsibility is circumscribed. His duty is to fulfill the intent of the parties through interpretation and application of the collective-bargaining agreement from whence his authority derives. Unlike a court he has "no general authority to invoke public laws that conflict with the bargain between parties . . . ."[60] Contractual rights are his only concern. If a bargaining agreement duplicates rights created by Title VII, the arbitrator must, of course, effectuate them in a proper case. In so doing, however, he does not, nor cannot, usurp the jurisdiction of federal courts to deal with them because the rights devolve from separate origins. In a situation in which the agreement contains no protection against practices prohibited by Title VII, the arbitrator ex-

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[56] *Id.*

[57] *Id.*

[58] *Id. See, e.g.*, Satterwhite v. United Parcel Service, Inc., 496 F.2d 448 (10th Cir. 1974), *cert. denied*, 95 S. Ct. 668 (1974), discussed in the section on Labor Law, *supra* at 272. *See also* United States v. Allegheny-Ludlum Indus., Inc., 63 F.R.D. 1 (N.D. Ala. 1974).

[59] 415 U.S. at 52 n.15.

[60] *Id.* at 53.

ceeds the scope of his authority if he attempts to enforce rights of this kind, and the award becomes judicially unenforceable.[61] In short, if the agreement does not provide Title VII guarantees, the arbitrator is powerless to recognize them. If the agreement contains Title VII protections, the arbitrator is bound to enforce them, but by doing so, he enforces contractual, not statutory, rights. Despite the overlap, a federal court is not deprived of its jurisdiction over the same claims.

C. *Federal Policy Favoring Arbitration*

The third ground apparently relied on by the district court and the Tenth Circuit Court of Appeals was that allowance to the employee of two opportunities to redress Title VII claims was contrary to the strong federal policy favoring arbitration of labor disputes. If, for instance, the plaintiff in *Alexander* had secured from arbitration an award beneficial to him, the defendant company would have been bound by the decision. The district court felt that notions of fairness dictated that the same conclusiveness should attach with respect to the employee's rights. The Court's short answer to the district court's objection that the employee has " 'two strings to his bow when the employer has only one' "[62] was that:

> An employer does not have "two strings to his bow" with respect to an arbitral decision for the simple reason that Title VII does not provide employers with a cause of action against employees. An employer cannot be the victim of discriminatory employment practices.[63]

Since employees, and not employers, are the only possible objects of discriminatory employment practices, Congress understandably chose to afford them an extra measure of protection independent from any rights won through bargaining collectively. The employer has but a single set of rights—those contained in the agreement. The employee, by contrast and at the behest of Congress, has a dual set of rights—those contained in the agreement and those contained in Title VII. When an employee files suit in federal court he seeks not a review of the arbitrator's decision, but to redress an independent statutory right.

The Court did not share the district court's apprehension

[61] *Id.*, *citing* United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960).

[62] 415 U.S. at 54, *quoting* 346 F. Supp. at 1019.

[63] 415 U.S. at 54.

that a rule which would render arbitration inconclusive as to the employee, but not as to the employer, would " 'sound the death knell for arbitration clauses in labor contracts.' "[64] The Court observed that the primary incentive remains for an employer to enter into a collective-bargaining agreement containing an arbitration provision in order to obtain from the union a no-strike concession. This goal will ordinarily outweight intrepidations which an employer might entertain with regard to possible increased costs associated with providing employees an "arbitral remedy against discrimination in addition to their judicial remedy under Title VII."[65]

Also, arbitral remedies against discrimination can perform an important prophylactic function. If arbitration is fairly and objectively executed, many employee discrimination complaints will be resolved at this level, obviating the need for litigation. Working out differences though arbitration can be done more quickly and less expensively than through formal court action. For these reasons, the Court declined to join in the district court's pessimistic prophecy as to the likely ramifications of the "two strings" non-preclusion rule.

D. *Deferral Rule*

As an alternative to their argument for a preclusion rule, the respondent urged adoption of a stance intermediate between a preclusion rule and an absolute rejection of it. The company suggested that:

> [E]ven if a preclusion rule is not adopted, federal courts should defer to arbitral decision on discrimination claims where: (i) the claim was before the arbitrator; (ii) the collective-bargaining agreement prohibited the form of discrimination charged in the suit under Title VII; and (iii) the arbitrator has authority to rule on the claim and to fashion a remedy.[66]

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[64] *Id., quoting* 346 F. Supp. at 1019.

[65] 415 U.S. at 55. One commentator has suggested a further reason why *Alexander* will not sound the "death knell" to arbitration:

> [T]he scope of the arbitration clause is subject to collective bargaining. The employer can bargain for a clause expressly stating that racial discrminiation claims are outside the scope of the arbitration clause and must be pursued in some other appropriate forum.

Comment, *supra* note 1, at 667.

[66] 415 U.S. at 55-56 (footnote omitted). *See* Rios v. Reynolds Metals Co., 467 F.2d 54, 58 (5th Cir. 1972), where the court said that a federal court may, in limited circumstances, defer to a prior arbitration decision, and set out conditions similar to those suggested by the respondent.

According to this scheme, if the above conditions were satisfied in a particular suit, the court could properly grant summary judgment in favor of the defendant-employer and dismiss the action. In the Court's view, however, this rule would "deprive the petitioner of his statutory right to attempt to establish his claim in a federal court."[67] The deferral rule would be vulnerable to many of the objections associated with the preclusion rule, and the Court concluded that its adoption would detract from Congress' intent to repose final authority for carrying out the dictates of Title VII in the federal judiciary.

Recognizing that selection of forum necessarily determines the scope of the right sought to be enforced, the Court made a detailed analysis of the arbitral forum as compared to federal court, pointing up the several ways in which arbitration as an ajudicatory process falls short of the court's ability to protect substantive rights. The limited nature of the arbitrator's role was again stressed. He is bound by the intent of the parties as expressed in the collective-bargaining agreement; his competence lies in the realm of "the law of the shop, not the law of the land."[68] Many arbitrators are lay persons, not lawyers.[69] In sum, the skill and role of the arbitrator tend to render the arbitral forum inappropriate for the resolution of independent statutory rights accorded by Title VII "whose broad language frequently can be given meaning only by reference to public law concepts."[70]

As compared to the judicial forum the arbitration process is subject to several structural weaknesses. Fact-finding in arbitration hearings is informal and less comprehensive, and the rules of evidence and civil procedure have no application. Furthermore, the union's total control of the manner in which grievances are instituted and processed and the concomitant risk that an individual member's interests may be given short shrift for the good of the collective also suggest the inappropriateness of arbitration as a forum for ultimate determination of statutory rights.[71] These factors all militate against approval of a deferral rule.

Nor was the Court receptive to the idea of a more demanding deferral rule. "Judicialization" of the arbitration process would deprive this forum of its cardinal advantages of comparative inex-

[67] 415 U.S. at 56.
[68] *Id.* at 57.
[69] *Id.* at 57 n.18.
[70] *Id.* at 57.
[71] *Id.* at 58 n.19.

pensiveness and speediness in resolution of grievances. Court enforcement of a higher standard created by imposition of quasi-judicial procedures upon the arbitration process would necessitate a complicated review of almost *de novo* magnitude. Savings of court time would therefore be insufficient to justify inherent hazards to Title VII rights.

Finally, the Court noted the danger of a recoil effect associated with the deferral rule. Employees who lacked complete confidence in the arbitration procedure would tend to bypass it altogether rather than risk an adverse finding which would be conclusive of their rights in the judicial forum. As a consequence, the proportion of grievances submitted to arbitration (and thus susceptible to informal resolution) might diminish and cause a correlative increase in litigation which would more than offset possible savings of court time from utilization of the deferral rule.

E. *Conclusion*

After rejecting the preclusion and deferral rules as incompatible with the nature and purpose of Title VII, the Court concluded:

> [T]hat the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII. The federal court should consider the employee's claim *de novo*.[72]

This conclusion clearly establishes that Title VII actions brought by private employees are to be heard de novo in federal court and that whether the plaintiff has previously submitted his discrimination claim to arbitration shall have no bearing on his right to file suit.

The Court finally stated that the "arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate."[73] As a practical matter, this may weaken to some extent the general proposition that arbitration shall not influence the scope of litigation. However, the Court explicitly refused to announce standards by which to determine the weight of the arbitration record in a particular case and admonished courts to be ever mindful that Congress has seen fit to provide

[72] *Id.* at 59-60.
[73] *Id.* at 60.

discrimination claimants with "a judicial forum for the ultimate resolution of discriminatory employment claims."[74]

In *Alexander* the Supreme Court declined to diminish the potency of Title VII as a remedial device for employment discrimination.

POSTSCRIPT

On remand plaintiff Alexander's action was tried de novo before Judge Richard P. Matsch of the United States District Court for the District of Colorado.[75] The court found that Alexander's last position with the company, as a drill press operator trainee, was one which required very careful and precise work. During his tenure at this job Alexander received three written warnings from his supervisor to the effect that his performance was substandard. Customarily drill press trainees were discharged from the company after two such warnings or else allowed to transfer to another position which required less precision in performance. Alexander's supervisor informed him of the possibility of transfer to a new job with the company. Alexander chose not to seek a change of position; and after having issued three warnings to him, the company terminated his employment. Due to the fact that Alexander had only one supervisor during this period (who was responsible for the issuance of all three warnings), the court felt that the merits of plaintiff's claim depended entirely on the question of whether that supervisor was racially prejudiced in his supervision of the plaintiff's performance. The court concluded that he was not and therefore found that plaintiff was "discharged from his employment with the defendant company for a legitimate, nondiscriminatory reason."[76] Accordingly, the court ordered dismissal of plaintiff's complaint and entry of judgment in favor of the defendant.

II. WELFARE—SOCIAL SECURITY ACT—AID TO FAMILIES WITH DEPENDENT CHILDREN— STANDARD WORK EXPENSES DEDUCTION

Shea v. Vialpando, 416 U.S. 251 (1974)

INTRODUCTION

Mrs. Ascension Vialpando was found eligible for and was

[74] *Id.* at 60 n.21.

[75] Alexander v. Gardner-Denver Co., Civil No. C-2476 (D. Colo., Nov. 19, 1974) (unpublished opinion).

[76] *Id.* at 5.

receiving benefits under Aid to Families with Dependent Children (AFDC) prior to July 1, 1970. On that date a new Colorado regulation was promulgated by the Colorado Division of Public Welfare[1] which established a limit of $30 as the standard allowance for work-related expenses. This regulation affected Mrs. Vialpando adversely by significantly reducing her deduction from net earnings for work-related expenses[2] thereby making her ineligible for any of her previous AFDC benefits.[3] Mrs. Vialpando brought a class action suit, *Vialpando v. Shea*,[4] in the United States District Court for the District of Colorado seeking declaratory and injunctive relief. Judgment was rendered for the plaintiff and the Court of Appeals for the Tenth Circuit affirmed.[5] This comment will examine the background of this case, and explore why the Supreme Court affirmed the Tenth Circuit Court of Appeals.[6]

I. HISTORICAL BACKGROUND

Originally passed by the Congress in 1935, the Social Security Act[7] provides for federal money matched by state money to be distributed to individuals determined to be in need of assistance and fitting into one of the categories of need.[8] One of the

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[1] COLORADO DIVISION OF PUBLIC WELFARE, 4 STAFF MANUAL § 4313.13 (1970).

[2] The effect of the new Colorado regulation on Mrs. Vialpando is shown by this table taken from Reply Brief for Appellant at 5, Vialpando v. Shea, 475 F.2d 731 (10th Cir. 1973):

	Before July of 1970	During and after July of 1970	
Mandatory Deductions	$ 55.72	$ 55.72	
General Work Expenses	15.00	15.00	
Transportation:			
Mileage	47.30		30.00
Car Payment	63.81	15.00	
	$181.83	$ 85.72	
	Plus Child Care	Plus Child Care	

Prior to July 1, 1970, Mrs. Vialpando was allowed to deduct $181.83 from her net earnings as her actual work-related expenses; after July 1, 1970, she was limited to deducting only $85.72. The loss of $96.11 of deductions caused her net earnings to be too high to qualify for AFDC benefits.

[3] The benefits include cash benefits and eligibility for medical assistance under medicaid. *See* Title XIX of the Social Security Act, 42 U.S.C. § 1396a(a)(10) (1970).

[4] Civil No. C-2449 (D. Colo., January 13, 1972).

[5] Shea v. Vialpando, 475 F.2d 731 (10th Cir. 1973).

[6] Shea v. Vialpando, 416 U.S. 251 (1974).

[7] The provisions of the Social Security Act relating to AFDC are found at 42 U.S.C. §§ 601-44 (1970).

[8] Old Age Assistance, *id.* § 301; Aid to Families with Dependant Children, *id.* § 601; Aid to the Aged, Blind and Disabled, *id.* § 801; Aid to the Blind, *id.* § 1201; Aid to the Permanently and Totally Disabled, *id.* § 1351.

categories established under the Social Security Act is AFDC. States are not required to participate, but if a state elects to do so, its plan for administering the program must be approved by the Secretary of the Department of Health, Education, and Welfare (HEW), and must meet certain requirements.[9] If by later alteration the state's plan fails to comply with Social Security Act provisions, the Secretary of HEW, after notice and an opportunity for a hearing, may refuse to furnish all or part of the federal funds to the state.[10]

State plans must comply with the provisions of section 402(a)(7) of the Social Security Act.[11] That section requires that:

> (a) A State plan for aid and services to needy families with children must . . . (7) . . . provide that the State Agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children . . . as well as any expenses reasonably attributable to the earning of any such income . . . .[12]

This section operates in two ways: to determine eligibility and to determine the amount of a grant of assistance.[13]

The Colorado regulation implemented in July, 1970, and at issue in the *Vialpando* case, read in part as follows:

> For employment expenses such as transportation, special clothing, union dues, special education or training costs, telephone, additional food or personal needs, etc., which are an obligation due to the employment, an allowance of $30 per month is made for such costs.[14]

This regulation, which sets a standard allowance of $30 for work-related expenses, was approved by the Secretary of HEW in July

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[9] Among other things, the provisions of the Social Security Act provide that the state program must permit application by all who wish to apply; that the state program must be in effect in all political subdivisions of the state. *Id.* § 602(a)(1). The program must insure efficient operation. *Id.* § 602(a)(5)(A). Assistance must be provided as far as practicable. *Id.* § 601. Aid must be provided with reasonable promptness to all eligible. *Id.* § 602(a)(10). The state of Colorado asserted that a standard work expense allowance was the only feasible way to comply with all of these provisions.

[10] *Id.* § 604.

[11] *Id.* § 602(a)(7).

[12] *Id.*

[13] COLORADO DIVISION OF PUBLIC WELFARE, 4 STAFF MANUAL § 4313.13 (1970). Gross earned income is reduced by payroll reductions and work expenses to yield net income. Net income is compared to state standards of need to determine eligibility for AFDC benefits. The work expense disregard of § 402(a)(7) and the "earned income disregard" of § 402(a)(8)(A)(ii), 42 U.S.C. § 602(a)(8)(A)(ii) are then applied in another formula to determine amount of assistance granted.

[14] *Id.*

1970. The impact of using a standard allowance for work-related expenses other than mandatory payroll deductions, instead of computing the actual work-related expenses, was to reduce the amount of the grants to some applicants, or, as in Mrs. Vialpando's case, to make some applicants ineligible for assistance.

The issue which the district court confronted in the *Vialpando* case was whether the Colorado regulation complied with the requirements of the Social Security Act. The court did not believe that it did and ordered Colorado to change the regulation to include consideration of all individualized expenses in determining eligibility for assistance. The defendant, the State of Colorado, maintained throughout the appeals, however, that a reasonable average ($30) sufficed to meet the requirements of the Social Security Act.

II. THE SUPREME COURT'S CONCERNS IN *Vialpando*

The Supreme Court, as did the Tenth Circuit Court of Appeals, closely examined the statutory provision in rejecting the state's argument that the requirement to "take into consideration" was satisfied by using a statistical average of actual expenses of all AFDC recipients in the state. The Court read the provision to be structured so "that the phrase 'take into consideration' modifies 'income and resources . . . *as well as* any expenses reasonably attributable to the earning of any such income.' "[15] Thus the "inescapable" conclusion[16] of both courts was that treatment of expenses must be the same as treatment of income, that is, on an individual basis.

The Supreme Court also examined the legislative history of section 402(a)(7) and found that it confirmed the Court's interpretation of the provision. Prior to 1962 state agencies were encouraged but not required to recognize special financial circumstances of employed assistance recipients.[17] By 1962 it was recognized that if work expenses were not to be considered, they would provide a disincentive to working, since work expenses reduce the amount of money available for food, shelter, and clothing.[18] Thus, the clause "as well as any expenses reasonably attributable to the earning of any such income" was added to the section.[19] The

[15] Shea v. Vialpando, 416 U.S. 251, 260 (1974) (emphasis by the Court).

[16] *Id.*

[17] *See* Social Security Board, Bureau of Public Assistance, State Letter No. 4 (April 30, 1942). *See also* HEW State Letter No. 291 (March 11, 1957).

[18] *See* S. REP. No. 1589, 87 Cong., 2d Sess. 1718 (1962).

[19] Act of July 25, 1962, Pub. L. No. 87-543, § 106(b), 76 Stat. 185, 188.

intent of Congress was to insure that all states take employment expenses fully into account in determining need.[20]

Finally the Supreme Court examined the administrative interpretations associated with the Social Security Act. The Department of HEW, while it did not view the use of maximum allowance as acceptable,[21] did view the standard based on averaging acceptable and noted its use as advantageous administratively.[22] The Supreme Court, however, rejected administrative efficiency or convenience as controlling in light of the statutory command and the congressional purpose.[23]

III. EFFECT OF *Vialpando*

While the conclusion of the Court might have been predicted, its importance lies in its effect. An attempt to extend the use of statistically based standard amounts, as allowed in *Rosado v. Wyman*,[24] was checked by *Vialpando*. In *Rosado* the Supreme Court approved the use of statistically based flat amounts for a determination of a state standard of need, but in *Vialpando* the Court clearly indicates that the grant of discretion given by Congress to the states to determine eligibility for aid does not extend to calculation of the amount of work-related expenses. Such a grant of discretion must be expressly given.

The decision sustains the holdings of most lower courts that had considered the issue,[25] and it clarifies whatever confusion the other courts had experienced when facing similar situations. *Conover v. Hall*[26] had upheld California's $50 standard allowance.

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[20] *See* S. REP. No. 1589, 87 Cong., 2d Sess. 1718 (1962).

[21] *See* Brief for the United States as Amicus Curiae, Adams v. Parham, Civil No. 16041 (N.D. Ga., April 14, 1972).

[22] *Id.* The standard work expense allowance was claimed to have administrative advantages of

(a) reducing error;
(b) giving the recipient greater certainty as to the amount of the grant;
(c) reducing delay in computation and payment;
(d) reducing the use of subjective judgment by the individual in the position of determining eligibility; and
(e) making a uniform statewide program possible.

[23] 416 U.S. at 265 n.13.

[24] 397 U.S. 397, 419 (1970).

[25] Anderson v. Graham, 492 F.2d 986 (8th Cir. 1973); Connecticut State Dept. of Pub. Welfare v. HEW, 448 F.2d 209 (2d Cir. 1971); Campagnuolo v. White, Civil No. 13968 (D. Conn., June 22, 1972); Adams v. Parham, Civil No. 16041 (N.D. Ga., April 14, 1972); Williford v. Laupheimer, 311 F. Supp. 720 (E.D. Pa. 1969); County of Alameda v. Carleson, 5 Cal. 3d 730, 488 P.2d 953, 97 Cal. Rptr. 384 (1971), *appeal dismissed*, 406 U.S. 913 (1972).

[26] 28 Cal. App. 3d 676, 104 Cal. Rptr. 77 (1972).

The decision was later vacated pending appeal in the California Supreme Court. In *X v. McCorkle*[27] the Court had approved in dicta (as the Supreme Court emphasizes) the $50 standard work expense allowance of New Jersey.

CONCLUSION

Shea v. Vialpando represents the present Supreme Court's need to solidly ground its welfare case decisions on clear statutory construction and congressional intent. State discretion in implementation will not be presumed in an area clearly provided for by the Congress.

Clear congressional intent was not found in *New York State Department of Social Services v. Dublino.*[28] In that case, welfare plaintiffs attempted to show that the federally sponsored WIN program preempted the New York Work Rules, but the court found no evidence of such a congressional intent to preempt. The court stated that "more would be required [than the apparent comprehensiveness of the WIN legislation] to show the 'clear manifestation of [congressional] intention' which must exist before a federal statute is held 'to supersede the exercise' of state action."[29]

Clearly, in *Vialpando* at least, we have an expression of intent with which the court can feel comfortable.

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[27] 333 F. Supp. 1109 (D.N.J. 1970).
[28] 413 U.S. 405 (1973).
[29] *Id.* at 408.