Maryland Law Review

Volume 45 | Issue 1 Article 11

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Introduction

This Article highlights the more notable labor and employment law decisions by the Supreme Court since the beginning of 1984.[1] Although the Court worked no major changes,[2] it has been "tinkering and tailoring,"[3] deferring to administrative interpretation or refining its own analysis from previous opinions. Even so, the Court has acted in important areas, and its decisions raise significant questions.

I. NATIONAL LABOR RELATIONS ACT CASES

A. Constructive Concerted Activity

The Supreme Court's most significant interpretation of the National Labor Relations Act[4] (NLRA) in either of the last two terms is *NLRB v. City Disposal Systems, Inc.*,[5] in which it endorsed the NLRB's

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1. For a complete listing of the decisions issued during the 1983-84 term, see Hardin, *Labor Law Decisions of the Supreme Court, 1983-84 Term*, 116 LAB. REL. REP. (BNA) No. 31, at 301 (1984).

2. There has been one major reversal in the 1984-85 term. In Garcia v. San Antonio Metropolitan Transit Authority, 105 S. Ct. 1005 (1985) the Court overruled National League of Cities v. Usery, 426 U.S. 833 (1976) and announced that public employers are subject to the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219. Although the case is obviously of great importance to public employers, the decision turned on issues of federalism and involved no significant interpretation of the FLSA itself.

3. *See* Player, *Employment Discrimination: The 1983 Term of the Supreme Court, "Tinkering and Tailoring,"* Reference Manual, 1984 Midwest Labor Law Conference (Ohio Legal Center Institute) 2.01.

4. 29 U.S.C. §§ 151-159 (1982).

5. 104 S. Ct. 1505 (1984). For a more thorough review of the issues raised by *City Disposal*, see Bethel, *Constructive Concerted Activity Under the NLRA: Conflicting Signals from the Court and the Board*, 59 IND. L.J. 583 (1984). *See also*, Gorman & Finkin, *The Individual and the Requirement of "Concert" Under the National Labor Relations Act*, 130 U. PA. L. REV. 286 (1981) (traces pre-*City Disposal* NLRB and court decisions concerning protection for

so-called *Interboro* doctrine.[6] In *City Disposal*, an employee (Brown) was discharged for refusing to drive a garbage truck. Because Brown believed that the truck had defective brakes, he claimed that his refusal was justified by a clause in the collective bargaining agreement providing that employees could not be discharged for refusing to operate unsafe equipment "unless such refusal is unjustified."[7] The Board adopted the finding of its administrative law judge (ALJ) that the discharge violated section 8(a)(1).[8] Even though an employee acting alone would not appear to be engaged in "concerted activity" for purposes of section 7,[9] the *Interboro* doctrine, invoked by the ALJ in *City Disposal*, created the fiction of constructive concerted activity for employees who seek to invoke collectively bargained rights. As the Court noted in *City Disposal*, the Board's *Interboro* decisions have been supported by two rationales: First, the claim of a collectively bargained right is merely an extension of the concerted activity that created the right; second, an employee's invocation of contractual rights protects, and therefore is in the interest of, other employees in the bargaining unit.[10]

In *City Disposal*, the Court, speaking through Justice Brennan, accepted both theories, although it placed primary emphasis on the extension of concerted activity rationale. The Court said that the Act does not require a literal definition of concerted activity, even

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individual complaints above wages, hours, and working conditions and application of the *Interboro* doctrine).

6. The doctrine is named for the Second Circuit's decision in *NLRB v. Interboro Contractors*, 388 F.2d 495 (2d Cir. 1967), *enforcing* 157 N.L.R.B. 1295 (1966). In brief, the doctrine holds that individual employees who seek to invoke the terms of a collective bargaining agreement are engaged in concerted activity for purposes of § 7 of the NLRA.

7. 104 S. Ct. at 1507-08. The entire clause read:

> Employer shall not require employees to take out on the streets or highways any vehicle that is not in safe operating condition or equipped with safety appliances prescribed by law. It shall not be a violation of the Agreement where employees refuse to operate such equipment unless such refusal is unjustified.

8. 29 U.S.C. § 158(a)(1) provides that "[i]t shall be an unfair labor practice for an employer—to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title."

9. 29 U.S.C. § 157:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

10. 104 S. Ct. at 1510.

though the term obviously includes "activities of employees who have joined together in order to achieve common goals."[11] When an individual appears to have acted alone, the issue is the "precise manner" in which that individual's conduct "must be linked to the actions of fellow employees" in order to satisfy section 7's requirement of concert.[12]

The Court had little difficulty linking Brown's individual action to the concerted activity of contract negotiation. The Court said that a claim of contractual right is "an integral part" of the process of collective bargaining. When an employee claims rights under a contract, then he "reharness[es] the power of [the] group to ensure the enforcement" of those rights.[13] Such reassembly of "his fellow union members to reenact their decision," Brennan said, amounts to a "concerted activity in a very real sense."[14] An individual's claim of a contractual right also benefits other employees. Such claims "preserv[e] the integrity of the entire process" and "breathe life" into the agreement.[15]

Interestingly, the Supreme Court accepted the *Interboro* version of constructive concerted activity as a reasonable interpretation of the Act at about the same time that the NLRB rejected another form of constructive concerted activity. In *Meyers Industries*,[16] the Board overruled the line of cases emanating from *Alleluia Cushion Co.*,[17] in which an individual employee's conduct was deemed concerted if it was "on behalf of" or "for the benefit of" other employees, whether or not the other employees were aware of the conduct.[18] Unlike *Interboro*, *Alleluia Cushion* applied in nonunion work places when there was no collective bargaining agreement in effect. In *Meyers*, the Board said that, henceforth, employees could be engaged in concerted activity only if they acted with, or on the authority of, other employees.[19] Ironically, *Meyers* and *City Disposal* combined to protect employees who act alone only when they are already unionized. Individual employees in nonunion work places, who do not

11. *Id.* at 1511.
12. *Id.*
13. *Id.*
14. *Id.* at 1512.
15. *Id.* at 1513.
16. 268 N.L.R.B. No. 493 (1984), *enforcement denied*, 755 F.2d 941 (D.C. Cir. 1985).
17. 221 N.L.R.B. 999 (1975).
18. *See, e.g.*, Ontario Knife Co., 247 N.L.R.B. 1288, *enforcement denied*, 637 F.2d 840 (2d Cir. 1980); Steere Dairy, Inc., 237 N.L.R.B. 1350 (1978).
19. 268 N.L.R.B. at 497.

have a union to protect them and must, therefore, rely exclusively on the NLRA, act at their peril.

On the surface it does not seem controversial to conclude that an employee engages in concerted activity when he invokes rights found in a labor contract. Collective bargaining is one of the clearest examples of conduct protected by the Act and is, in fact, the very activity that the legislation was intended to foster.[20] Enforcement of collectively bargained rights is simply part of what has been aptly called "the continuous process of collective bargaining."[21] Moreover, group interest in the enforcement of the collective agreement is not fictitious, which was the problem with *Alleluia Cushion*. Whether invoked by one or more workers, all employees in the bargaining unit have an interest in the enforcement of rights won through the concerted activity of contract negotiations.

Even though the Court's interpretation seems innocuous, its decision is of dubious merit. In its zeal to protect the rights of individual employees the Court ignored the ordinary process of contract administration and, instead, thrust the NLRB into the unaccustomed role of contract enforcer.

One question the Court did not resolve in *City Disposal* is whether employee Brown had a contractual right to refuse to work. A good faith invocation of a contractual right is concerted activity. Finding concert, however, is only half the battle; the activity must also be protected.[22] The Court held that whether an individual's claim of right is protected depends upon the validity of his contractual interpretation:

> In this case, because Brown reasonably and honestly invoked his right to avoid driving unsafe trucks, his action was concerted. It may be that the collective-bargaining agreement prohibits an employee from refusing to drive a truck that he reasonably believes to be unsafe, but that is, in fact, perfectly safe. If so, Brown's action was concerted but unprotected.[23]

The Court remanded the case to the Board to determine whether Brown's conduct was protected by the statute. However, the Board

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20. *See* Bethel, *supra* note 5, at 600 nn. 112-114.

21. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960).

22. For a discussion of the distinction between protected and unprotected activity, see R. GORMAN, BASIC TEXT ON LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING, 302-25 (1976).

23. 104 S. Ct. at 1516.

will not engage in statutory interpretation; rather, the Board will do nothing more than interpret the contract.

Although the Board is not empowered to resolve mere contract disputes, it does have the right to interpret contracts in order to decide unfair labor practice cases.[24] In the typical case, for example, the Board might interpret contractual language to decide whether the parties had waived their obligation to bargain over a mandatory subject or whether the employer was authorized by contract to act unilaterally. Even though contract interpretation may be involved, the Board in such cases clearly enforces a statutory proscription. That is, it interprets the contract only to insure that neither party avoids the statutory obligation to bargain in good faith over wages, hours of work, and other terms and conditions of employment.[25] In *City Disposal*, the contract, not the statute, was the source of the employee's right to refuse work. To view such a refusal as a protected concerted activity involves no issue of statutory interpretation. Contract rights are merely elevated to the status of statutory entitlements, thereby enabling employees to invoke NLRB unfair labor practice procedures to enforce rights won in collective bargaining. The problem is the effect this approach could have on labor arbitration and on the union's status as exclusive representative.

The Board's power is limited, by statute, to deciding contested issues in election cases and to resolving unfair labor practice cases. Its exclusion from contract enforcement was not accidental. To the contrary, the statute encourages settlement of contractual disputes "by a method agreed upon by the parties."[26] That method is usually labor arbitration, which enjoys a preferred legal status primarily as the result of favored treatment by the Supreme Court. The Court's decisions, for example, provide for the specific enforcement of agreements to arbitrate,[27] limit judicial scrutiny of arbitrable grievances,[28] and shield arbitrators' decisions from significant appellate review.[29] The Court's opinions have also recognized the

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24. *See, e.g.*, NLRB v. C & C Plywood Corp., 385 U.S. 421 (1967).

25. The obligation to bargain in good faith is enforced as an unfair labor practice. *See* NLRA, § 8(a)(5), 29 U.S.C. § 158(a)(5) (employer) and § 8(b)(3), 29 U.S.C. § 158(b)(3) (union).

26. *See* Labor Management Relations (Taft-Hartley) Act, § 203(c), 29 U.S.C. § 173: "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

27. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

28. *See* United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).

29. *See* United Steelworkers v. Enterprise Wheel & Car Corp. 363 U.S. 593 (1960).

union's control over the grievance-arbitration process and its right to refuse to process even a meritorious grievance, as long as its decision is not arbitrary, discriminatory, or made in bad faith.[30] Centralizing such power in the hands of the union is thought to increase its stature and, therefore, its ability to deal with the employer.[31] Even though some individual rights are sacrificed, the power of the group makes the union a more formidable force in conflict resolution. In addition, the finality of the union's decision (and of arbitration generally) lends dignity to the parties' dispute resolution process, and thus encourages its use rather than a resort to economic force.

The Court in *City Disposal* simply ignored this system of dispute resolution. After his discharge, employee Brown filed a grievance. The union refused to process it.[32] Neither the Supreme Court's opinion nor the Board's opinion indicates the reason for the union's decision. Moreover, neither opinion suggests that the union's inaction breached its duty of fair representation. Under accepted principles prevailing before *City Disposal*, therefore, Brown's case was finished. He had no right to process the grievance on his own, and he could not sue his employer for breach of contract. Under the procedure approved by the Court, however, Brown will now bring his contractual claim to the Board under the guise of a section 8(a)(1) charge. The effect seems clear: the union's control over the arbitration process and its stature with both the employees and the employer suffer, and the exclusive procedure adopted by the parties for the resolution of contractual disputes is bypassed. Moreover, the Board becomes an instrument of contract enforcement, a role not assigned to it by Congress and one in which it has little expertise or experience.

The primary justification for *City Disposal* would appear to be a concern for the protection of individual rights, a policy whose importance cannot be doubted. The decision, however, actually protects contractual rather than statutory rights and, in the process, overlooks the nature of collectively bargained entitlements. In *City Disposal*, the parties negotiated their contract with the understanding that it would be enforced in the grievance-arbitration procedure. As such, the contractual rights at issue were not independent entitlements subject to judicial sanction or administrative enforcement. They were no more valuable than the contractual procedures used

30. *See, e.g.*, Vaca v. Sipes, 386 U.S. 171 (1967).
31. *Id.* at 191.
32. 104 S. Ct. at 1509.

to enforce them. The contractual process protects individual employees and also fosters private collective bargaining by insulating the relationship from governmental intrusion. *City Disposal*, however, ignores the bargain of the parties and, while seeking to enforce individual rights, denigrates the union's ability to represent both individual and collective interests.

Rather than the interpretation of labor contracts, the Board's sole function should be to insure that employees have access to the contract enforcement procedures contained in the collective bargaining agreement.[33] The Supreme Court recognized in *City Disposal* that grievance administration is an integral part of the process of collective bargaining. Employees who seek to invoke such processes, then, are surely engaged in protected concerted activity whether or not their grievance has merit. The employees, however, should have no protected right to seek redress in any other forum or by any other method. In *City Disposal*, the Court should have realized that enforcement of individual rights was not the only labor policy at issue. Insuring nondiscriminatory access to the grievance procedure would not have interfered with the union's role in contract administration and its obligation to represent the entire bargaining unit. Equally important, it would have insured employees all that they can reasonably expect from the parties' bargain—the opportunity to present their claims under the mandatory dispute resolution mechanism of the contract.

B. Federal Preemption of State Tort Action

In July 1981, Roderick S. Lueck injured his back while carrying a pig to a friend's house for a pig roast.[34] Lueck's employer, Allis-Chalmers Corporation, was party to a collective bargaining agreement with the United Auto Workers that contained a health and disability plan covering his injury. Lueck received disability benefits,

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33. Section 9(a) of the Act, 29 U.S.C. § 159(a), permits individual employees "to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative." Any such settlement must be consistent with the collective bargaining agreement and the bargaining representative must be given the right to be present at any discussion of a § 9(a) grievance. The force of the § 9(a) proviso allows employers to deal with individual employees concerning a grievance without fear of a § 8(a)(5) violation (refusal to bargain in good faith). Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50, 61 n. 12. Given the narrowness of the Supreme Court's interpretation in *Emporium Capwell*, § 9(a) should mean only that, when a collective bargaining agreement contains a grievance-arbitration procedure, individuals should have the opportunity to use that procedure without the intervention of the bargaining agent. *See* Bethel, *supra* note 5, at 618-19.

34. Allis-Chalmer Corp. v. Lueck, 105 S.Ct. 1904 (1985).

but alleged that Allis-Chalmers periodically and in bad faith ordered Aetna Life and Casualty Company (the plan's administrator) to suspend payments.[35] Although disputes concerning contractual insurance plans were arbitrable under the collective bargaining agreement,[36] Lueck ignored his contractual remedies and filed suit in state court against both Allis-Chalmers and Aetna seeking relief under a state-created tort for bad faith handling of an insurance claim. The Supreme Court of Wisconsin held that Lueck's complaint stated a cause of action under state law and was not preempted by federal law.[37] The court reasoned that the plaintiff's claim did not arise under the labor contract, but instead, alleged a breach of duty owed as a consequence of the relationship established by contract. Making a distinction more superficial than real, the court said that the breach of contract itself was irrelevant to determining whether the defendant acted in bad faith.[38] The court said that the state claim was not preempted by federal law because the administration of the disability plan under the collective bargaining agreement was "a matter only of peripheral concern to federal labor law."[39]

In *Allis-Chalmer Corp. v. Lueck*,[40] the Supreme Court reversed. There is, of course, little question but that suits to enforce the terms of a collective bargaining agreement must be brought under section 301 of the Labor Management Relations Act,[41] and that resolution of such claims is controlled by the substantive body of federal law developed under section 301.[42] Indeed, federal law controls whether the suit is brought in state or federal court.[43]

In reversing the decision of the Wisconsin Supreme Court, the Court noted that Congress has not indicated the extent to which

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35. *Id.* at 1908.

36. The contract contained a four-step grievance procedure. A separate letter of understanding established a special three-step procedure for disability grievances. If the dispute was not settled under that procedure, it could be pursued to arbitration under the contractual procedure. *Id.* at 1907-08 & n. 1.

37. Lueck v. Aetna Life Ins. Co., 115 Wis. 2d 559, 576, 342 N.W.2d 699, 707 (1984).

38. *Id.* at 566, 342 N.W.2d at 702-03.

39. *Id.*

40. 105 S. Ct. 1904 (1985).

41. Section 301(a), 29 U.S.C. § 185(a), provides: "Suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

42. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). For a discussion of the *Lincoln Mills* case and § 301 lawsuits generally, see R. GORMAN, *supra* note 22, at 543-51.

43. Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962).

section 301 was intended to preempt state law.[44] The Court held, therefore, that a local rule exists independently " 'unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the states.' "[45]

In *Allis-Chalmers*, the Court said that the labor policies developed under section 301 require that its preemptive effect extend beyond mere contract violation lawsuits. The Court held that the meaning to be given a collective bargaining agreement must be subject to a uniform body of federal law, whether the question arises in a breach of contract action or in a tort action.[46] Otherwise, the policy favoring uniformity—which facilitates collective bargaining and contract enforcement—would be frustrated.[47] Despite the interest in uniform enforcement, the Court noted that not every employment-related state action was preempted by section 301: "Clearly, § 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law."[48] Moreover, federal law does not preempt state rules that regulate conduct or establish rights independent of contract.[49] State-recognized rights that depend for their existence on the labor contract are preempted, however.[50] The question, the Court said, was whether

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44. 105 S. Ct. at 1910.

45. *Id.* (quoting Malone v. White Motor Corp., 435 U.S. 497, 504 (1978)).

46. 105 S.Ct. at 1911.

47. The Court explained the policies favoring uniformity by quoting at length from *Lucas Flour*:

> [T]he subject matter of § 301(a) "is peculiarly one that calls for uniform law." . . . The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation . . . [and] might substantially impede the parties' willingness to agree to contract terms providing for final arbitral or judicial resolution of disputes.

Allis-Chalmers, 105 S. Ct. at 1910 (quoting *Lucas Flour*, 369 U.S. at 103-04)). The Court concluded: "Were state law allowed to determine the meaning intended by the parties in adopting a particular contract phrase or term, all the evils addressed in *Lucas Flour* would recur." 105 S. Ct. at 1911.

48. 105 S. Ct. at 1912.

49. *Id.*

50. *Id.*

the state-created action at issue was independent of the labor contract or whether its existence was intertwined with the collective bargaining agreement.[51]

The Court rejected the Wisconsin court's assertion that the tort suit was independent of any contract claim. The Wisconsin court had argued that even though the obligation to pay disability benefits was created by contract, the tort action concerned the unreasonable delay of those payments, an issue that did not necessarily depend on contract interpretation.[52] The Supreme Court repudiated that rationale for two reasons: First, it said that the state court had no right to assume that the collective bargaining agreement created no implied rights, including an implied right to timely payment.[53] Whether it did is a question of contract interpretation to be decided under federal law.[54] Second, the Court observed that any insurance-related dispute was an arbitrable issue under the collective bargaining agreement and questioned whether an arbitrator would conclude that there was no implied right to timely payment. Even if the duty to act in good faith differs from the contractual duty to pay, the Court concluded that the duties are "tightly" bound so that the existence of each depends on contract interpretation.[55] The Court buttressed its conclusion that the duties did not exist independently by reviewing the origin of the state tort action. The Court said that the tort claim was merely a device that plaintiffs could use to plead in tort what was essentially a contract action in order to recover punitive damages: "That being so this tort claim is firmly rooted in the expectations of the parties that must be evaluated by federal contract law."[56]

At the end of its opinion, almost as an afterthought, the Court justified its decision by claiming that it was essential to safeguard labor arbitration:

> Perhaps the most harmful aspect of the Wisconsin decision is that it would allow essentially the same suit to be brought directly in state court without first exhausting the grievance procedures established in the bargaining agreement. . . . Unless this suit is preempted, [the right of the parties] to decide who is to resolve contract disputes will be lost.[57]

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51. *Id.*
52. 116 Wis.2d at 574, 342 N.W.2d at 707.
53. 105 S. Ct. at 1913.
54. *Id.*
55. 105 S. Ct. at 1914.
56. *Id.*
57. *Id.* at 1915.

There is no reason to doubt the wisdom of the Court's argument. Any system that allows parties to bypass exclusive contractual dispute resolution procedures endangers not only the bargain but the collective bargaining relationship itself. What is confusing, however, is why this preoccupation with the welfare of labor arbitration was absent last term when the Court decided *City Disposal*. That case, in effect, permits an employee to sidestep contract enforcement procedures and to take what is essentially a contract action to the NLRB.[58] *City Disposal* would appear to pose the same threat to arbitration decried by the Court in *Allis-Chalmers*. Its decision last term should have demonstrated the same concern.

Discussion.—Given the development of substantive law under section 301 since *Lincoln Mills*,[59] the Court's decision on the preemption issue is hardly surprising. The Court obviously has no interest in whether Wisconsin allows plaintiffs to plead contract actions in tort for the purpose of structuring damage claims *unless* the contract at issue is a collective bargaining agreement. Despite the efforts of the Wisconsin Supreme Court, there is no serious question that Roderick Lueck had a garden variety complaint that his rights under the labor contract were violated. As such, his right to a remedy was not a matter of state concern, but was to be determined in accordance with the federal law developed under section 301.

Allis-Chalmers does, however, raise an interesting issue concerning the scope of federal preemption. In responding to the state's assertion that the federal interest was merely "peripheral," the Supreme Court explained, as it had done in the previous term,[60] the difference between so-called *Garmon* preemption and the preemption doctrine at issue in *Allis-Chalmers*. The doctrine established in *San Diego Building Trades Council v. Garmon*[61] protects the primary jurisdiction of the NLRB over unfair labor practice charges. *Garmon* preemption prevents conflict between state tribunals and the NLRB "by ensuring that primary responsibility for interpreting and applying this body of labor law remains with" the Board.[62] Despite the strong federal interest at stake, there are exceptions for "unusually

58. *See supra* note 32 and accompanying text.

59. *See supra* note 42.

60. *See* Brown v. Hotel & Restaurant Employees & Bartenders, 104 S. Ct. 3179 (1984).

61. 359 U.S. 236 (1959).

62. 104 S. Ct. at 3186-87. For a general discussion of *Garmon* preemption, see R. GORMAN, *supra* note 22, at 766-86.

'deeply rooted' local interests."[63] By contrast, the Court has described the doctrine at work in *Allis-Chalmers* as "preemption which is based on actual federal protection of the conduct at issue."[64] In such cases, the balancing test employed in *Garmon* is irrelevant, "since Congress, acting within its power under the commerce clause, has provided that federal law must prevail."[65]

In light of the Court's conclusion that rights that "can be waived or altered by agreement of private parties, are preempted,"[66] one question that certainly arises is what effect *Allis-Chalmers* will have on state wrongful discharge actions. Some state courts have made significant inroads on the common law employment-at-will doctrine, either by applying a so-called public policy exception, or by finding a contractual assurance of continued employment.[67] If a plaintiff's state court suit depends on a right to employment expressed or implied in a collective bargaining agreement, it seems clearly preempted under *Allis-Chalmers*. Such a conclusion is inescapable because the plaintiff's right to continued employment is then merely a question of contract interpretation, which is precisely the reason Lueck's claim warranted preemption. The result is less clear, however, if a plaintiff claims relief under a public policy exception.[68] In such cases, the plaintiff's right to a remedy does not depend on contract interpretation, but on protection of strongly felt state interests. Those interests exist independent of the labor contract and, presumably, cannot be waived in a private agreement to which the state is not a party and with which it has no significant concern. Although the Court did not address the issue in *Allis-Chalmers*, its language makes it seem likely that the decision does not preempt state wrongful discharge actions based on a

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63. *See Brown*, 104 S. Ct. at 3187; *see also* Sears, Roebuck & Co. v. San Diego District Council of Carpenters, 436 U.S. 180 (1978) (state jurisdiction over trespassory aspects of union's picketing not preempted).

64. *Brown*, 104 S.Ct. at 3186.

65. *Allis-Chalmers*, 105 S. Ct. at 1912 n. 9.

66. *Id.* at 1912.

67. *See, e.g.*, Note, *Protecting at Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980).

68. The public policy exception is usually applied to prevent employers from discharging employees who have refused to violate the law or have otherwise exercised rights under law. *See, e.g.*, Perks v. Firestone Tire & Rubber Co., 611 F.2d 1363 (3d Cir. 1979) (discharge of an at-will employee for refusal to take a polygraph examination gives rise to a cause of action for tortious discharge under Pennsylvania law); Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (employee discharged after refusing to participate in an illegal price-fixing scheme can maintain an action in tort).

public policy theory.[69]

C. *Discrimination Against Undocumented Workers*

In *Sure-Tan, Inc. v. NLRB*,[70] the Court faced two different issues and published opinions that produced two different majorities. Seven Justices agreed that undocumented aliens are employees for purposes of the NLRA and that an employer violates section 8(a)(3)[71] when it reports them to the immigration authorities in retaliation for their union activities. By a vote of 5-4, however, the Court limited the authority of the Board to issue make whole relief and admonished the Seventh Circuit for impermissibly expanding the Board's original order.

The decision arose out of a representation case in Chicago. After losing an election, the employer filed objections contending that six of his employees were in the country illegally, a fact that he had known for some time. The day after the Regional Director overturned the objections, the employer asked the Immigration and Naturalization Service (INS) to investigate his employees. Within a month, INS arrested five of the employees and allowed them to leave the country voluntarily.[72] The Board found that the employer's action was taken in retaliation for the employees' union activity and was, therefore, a constructive discharge in violation of sections 8(a)(1) and 8(a)(3) of the Act. As a remedy, the Board issued the usual cease and desist order, but disagreed with the administrative law judge's recommendation that an offer of reinstatement with back pay remain open for six months.[73] The Board also rejected the ALJ's invitation to award four weeks minimum back pay, which had been premised on his belief that the ordinary back pay calculation would be tolled because the discriminatees were unavailable for work. Branding the ALJ's recommendations "unnecessarily

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69. The Court said: "We pass no judgment on whether an independent, non-negotiable, state-imposed duty which does not create similar problems of contract interpretation would be pre-empted under similar circumstances." 105 S. Ct. at 1914 n. 11.

70. 104 S. Ct. 2803 (1984).

71. 29 U.S.C. § 158(a)(3) provides that it is an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." In its most common application, § 8(a)(3) prohibits employers from retaliating against employees on account of their union activity. For a discussion of the coverage of § 8(a)(3), see R. GORMAN, *supra* note 22, at 137-42, 326-38.

72. 104 S. Ct. at 2806-07.

73. The ALJ's recommendation was based on his view that the inability of the employees to return to the United States rendered reemployment unlikely. 234 N.L.R.B. 1187, 1192 (1978).

speculative," the Board entered a "conventional" order of reinstatement and back pay, and stated that "[t]he appropriate forum for determining the issues relating to [the employees'] availability for work is a compliance proceeding."[74]

On review, the Seventh Circuit agreed with the Board's finding of a violation, but modified the remedy significantly. Deciding the issue that the Board had put off, the court held that the employees could be reinstated only if they reentered the country legally and were "permitted by law to be employed in the United States."[75] In addition, the court ordered that the reinstatement offer remain open for four years, that it be written in Spanish, and that delivery of the offers allow for verification of receipt.[76] The court also noted that, under ordinary circumstances, the discriminatees might not be eligible to receive any back pay because they were unavailable for work after leaving the country.[77] The court concluded that it would "effectuate the policies of the Act to set a minimum amount of back pay" since the employer's discriminatory conduct cost the employees their jobs.[78] Although the court conceded that the amount of time the employees might have remained employed before "independent detection" by INS was "obviously conjectural," it thought an award of six months was reasonable.[79] The Board acquiesced in the court's modified remedy without issuance of a new opinion.[80]

The Unfair Labor Practice.—As noted, seven members of the Supreme Court agreed that undocumented aliens were included within the protection of the Act and that the employer's discriminatory conduct violated section 8(a)(3). Only Justices Powell and Rehnquist dissented, finding it "unlikely that Congress intended the term 'employee' to include . . . persons wanted . . . for the violation of our criminal laws,"[81] thereby lumping undocumented workers into the same category as axe murderers and child molesters.[82]

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74. *Id.* at 1187. Subsequently, the Board denied a motion for clarification filed by the General Counsel, who claimed that the Board's remedial order might violate immigration laws. 246 N.L.R.B. 788 (1979).

75. 672 F.2d. 592, 606 (7th Cir. 1982).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. 104 S. Ct. at 2808 n. 4.

81. *Id.* at 2820 (Powell, J., concurring in part and dissenting in part).

82. Clearly, even child molesters and axe murderers are covered by the Act and can be represented for purposes of collective bargaining if they otherwise perform a job

The majority, however, had little trouble classifying such workers as "employees" for the purposes of the Act, pointing to the "striking" breadth of the statute and the fact that the few exemptions from coverage did not include illegal aliens.[83] Moreover, the majority found that including such workers within the protection of the Act was consistent with its purpose of fostering collective bargaining:

> If undocumented alien employees were excluded from participation in union activities and from protections against employer intimidation, there would be created a subclass of workers without a comparable stake in the collective goals of their legally resident coworkers, thereby eroding the unity of all the employees and impeding effective collective bargaining.[84]

The Court rejected the contention that inclusion of undocumented workers under the NLRA conflicted with the policies of the Immigration and Nationality Act.[85] It said that the INA was concerned primarily with the admission of aliens and the treatment of lawfully admitted aliens, not with the employment conditions of those entering the country illegally.[86] It noted that "[a] primary purpose in restricting immigration is to preserve jobs for American workers."[87] By furnishing illegal workers the protection of the NLRA, the incentive for employers to replace legal residents with illegal ones might be diminished. The result would be a reduction in employment opportunities for illegal aliens, which, in turn, would presumably discourage illegal entry.[88]

Although it called it a "more difficult issue,"[89] the Court had no difficulty concluding that the employer's conduct violated section 8(a)(3). The employer argued, presumably with a straight face, that it was the employees' illegal status and not his action that prompted

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included within a bargaining unit. Justices Powell and Rehnquist, however, seem to imply that undocumented aliens are a criminal class and, therefore, fall wholly outside the protection of the law. Even though their presence in the country is illegal, however, the Court recognized that undocumented aliens violate no law by accepting employment in the United States. 104 S. Ct. at 2809. Moreover, nothing in the NLRA indicates that their presence in the country is so reprehensible as to leave them totally at their peril in their relationship with employers.

83. 104 S. Ct. at 2809.

84. *Id.*

85. 8 U.S.C. §§ 1101-1503 (1970 & Supp. 1985).

86. 104 S. Ct. at 2809. The Court also noted that it is not illegal for employers to hire undocumented aliens. *Id.*

87. *Id.* at 2810.

88. *Id.*

89. *Id.*

their fate. The Court, however, agreed with the ALJ's conclusion that " 'but for [petitioner's] letter to Immigration, the discriminatees would have continued to work indefinitely.' "[90] Since the report was made solely in retaliation for union activity, the violation was clear-cut.[91]

The Remedy.—Justice O'Connor's treatment of the remedy commanded a smaller majority. Chief Justice Burger and Justice White, joined her, as did Justices Powell and Rehnquist, who believed that undocumented workers fall outside the protection of the Act and, therefore, are entitled to no remedy at all.[92]

The most controversial issue before the Court was the Seventh Circuit's decision to modify the Board's remedy and to grant the discriminatees six month's back pay. The order fell for two reasons: first, the modification exceeded the appellate court's limited power on judicial review by divesting the Board of its primary responsibility to formulate remedies;[93] second, the court's order exceeded the Board's remedial power.[94] Although the Supreme Court acknowledged that the Board has broad power to devise remedies, it said that a remedy must "be tailored to the unfair labor practice it is intended to redress."[95] Specifically, back pay should be awarded only for actual, and not speculative, consequences. The Court concluded that the six month award set by the Seventh Circuit was "not

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90. *Id.* (quoting the opinion of the ALJ, 234 N.L.R.B. at 1191).

91. For the burden of proof in a § 8(a)(3) case, see NLRB v. Transportation Management Corp., 462 U.S. 393 (1983). The Court also rejected the employer's claim that its action was justified under the first amendment pursuant to the Court's decision in Bill Johnson's Restaurant, Inc. v. NLRB, 461 U.S. 731, (1983). 104 S. Ct. at 2812. In *Bill Johnson's*, the Court held that an employer's libel suit against a union was not an enjoinable unfair labor practice unless the suit was filed in retaliation and lacked a reasonable basis. The Court concluded that that reasoning did not apply in *Sure-Tan*. In *Bill Johnson's*, the employer's action was retaliatory, as was also true in *Sure-Tan*. However, in *Bill Johnson's* the employer asserted a state-created right to protect its own interest. Thus, the Court concluded that the right of access to the courts was protected by the first amendment regardless of the retaliatory motive. In *Sure-Tan*, however, the employer did not suffer "a comparable, legally protected injury . . . [and] did not invoke the INS administrative process in order to seek the redress of any wrongs committed against [it]." 104 S. Ct. at 2812. Moreover, in *Sure-Tan*, there was no conflict between the Board's unfair labor practice jurisdiction and a state interest. Therefore, the issues of federalism raised in *Bill Johnson's* were absent. *Id.*

92. Justices Powell and Rehnquist concurred in a separate opinion. 104 S. Ct. at 2820.

93. *Id.* at 2812-13.

94. *Id.* at 2813.

95. *Id.*

sufficiently tailored" to the actual harm suffered, and noted the absence of any evidence supporting the lower court's decision.[96]

The Supreme Court approved the Board's original order, which contemplated that calculation of back pay would occur in subsequent compliance proceedings. The Court made clear, however, that those proceedings would take place only if the discriminatees were lawfully admitted to the country. In that way, the congressional policy of discouraging illegal immigration could best be served. Moreover, the Court agreed with the ALJ's assertion that back pay liability should be tolled during that period when the discriminatees were not lawfully entitled to be in this country.[97] As a practical matter, the Court's decision precludes any relief at all for the discriminatees and imposes little sanction on the employer.[98] It was exactly this prospect that prompted the Seventh Circuit to impose a minimum back pay award. The Supreme Court, however, was unmoved: "Any perceived deficiencies in the NLRA's existing remedial arsenal can only be addressed by congressional action."[99]

The issues raised by *Sure-Tan* are not easy to resolve. The employer's misconduct was so blatant that the Seventh Circuit's reaction is easily understood. Nevertheless, the Board's powers are remedial, not punitive and, while the Supreme Court managed to avoid the issue, the court of appeals' order smacks of a penalty. There is scant support for Brennan's dissenting argument that the Board's decision to support the Seventh Circuit's order "rests squarely upon its own judgment that this award estimates with a fair degree of precision the period that these employees would have continued working . . . had petitioners not reported them to the INS."[100] The Board wrote no opinion supporting that position and, according to the majority, took no evidence on the issue.[101] The Seventh Circuit's entire discussion of the matter is limited to one sentence, which does no more than conclude that six months "is a

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96. *Id.* The court of appeals' entire discussion concerning the issue was in one sentence: "Although that period of time is obviously conjectural, we think that six months is a reasonable assumption." 672 F.2d. at 606.

97. 104 S. Ct. at 2815.

98. The only real effect of the Board's remedy was a standard cease and desist order, issued pursuant to § 10(c), 29 U.S.C. § 160(c).

99. 104 S. Ct. at 2815. The Court also reversed the Seventh Circuit's requirements that the reinstatement offers be drafted in Spanish, that receipt of the offers be verified, and that they be held open for four years. In each instance the rationale was the same: the court had no basis for "displacing the Board's discretionary judgment." *Id.* at 2816.

100. *Id.* at 2818 (Brennan, J., concurring in part and dissenting in part).

101. *Id.* at 2813 n. 9.

reasonable assumption."[102] It is true that back pay awards often cannot be proved with precision and that the Board sometimes estimates the amount due an aggrieved employee. In those cases, however, there is a least some standard affording an educated guess.[103] In *Sure-Tan*, there was nothing but conjecture.

Justice Brennan correctly asserts, however, that limiting the Board's remedial power might undercut the policy that the majority purported to implement. As discussed earlier, the majority claimed that its decision to include undocumented workers within the protection of the Act would lessen the incentive to hire illegal workers and, therefore, increase employment opportunities for lawful residents. However, since the effect of *Sure-Tan* is to deprive undocumented employees of any effective remedy for unlawful discrimination, the grant of section 7 rights is illusory, as is any purported effect on employers.[104]

Sure-Tan is discouraging not only because it affords no relief to the victims of unlawful discrimination, but also because it permits an employer to violate the law and then to interpose the consequences of its misconduct as a bar to any remedy. Although the result is harsh for the discriminatees, the Court was obviously troubled by the conflicting aims of our immigration policy and our national labor laws. On the broader issue, however, this case again points out the inability of the Board to deal with egregious violations through the limited remedial powers of section 10(c).[105] The Court deferred, saying that was an issue for Congress. One can only hope that Congress will listen.

D. Employer Relative in Bargaining Units

In *NLRB v. Action Automotive, Inc.*,[106] the Supreme Court considered the NLRB's practice of excluding from bargaining units certain relatives of the owners or managers of closely held corporations.

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102. 672 F.2d. at 606.

103. As the Court noted, in cases such as NLRB v. Superior Roofing Co., 460 F.2d 1240 (9th Cir. 1972), the Board has estimated back pay by using a formula based on seniority. *See also* Buncher v. NLRB, 405 F.2d 787 (3d Cir. 1968) (seniority standard is a rationally permissible device to fashion back pay remedy). The Court went on to note that in *Sure-Tan*, however, the court of appeals "estimated" back pay "without any evidence whatsoever as to the period of time" the discharged employees might have continued working. 104 S. Ct. at 2814 n. 11.

104. *Id.* at 2819 (Brennan, J., concurring in part and dissenting in part).

105. For a more detailed discussion of the Board's remedial deficiencies, see Bethel, *Profiting From Unfair Labor Practices: A Proposal to Regulate Management Representatives*, 79 NW. U.L. REV. 506 (1984).

106. 105 S. Ct. 984 (1985).

Although the Act exempts from its coverage "any individual employed by his parents or spouse,"[107] the reach of the exclusion has been narrowed to relatives of sole proprietors, partners, and majority shareholders.[108] Nevertheless, the Board has used its unit determination power under section 9(b)[109] to exclude not only relatives of part-owners, but also relatives of managers who have no significant ownership interest. Most often, the Board has concluded that such relatives have no community of interest with other employees. Although the Board has consistently claimed the power to make such exclusions, its reasoning has varied.

Initially, the Board excluded close relatives simply because of their ties to management.[110] In one case, for example, the Board reasoned that a son and a nephew of the president of a small company shared no community of interest with the other employees because "[t]he interests of such near relatives are identified not with their fellow-workers, but with management itself."[111] In response to judicial criticism,[112] the Board changed course and decided that the mere fact of a family relationship was insufficient to warrant exclusion from a bargaining unit. Rather, the Board said it would look for evidence that a relative "enjoys a special status which allies his interests with those of management."[113] Subsequently, however, the Board reverted to a community of interest standard employing factors other than special status. In such cases, the fact of the relationship and the consequences inferred therefrom were often used to justify exclusion.[114] At least two courts of appeals have criticized

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107. NLRA, § 2(3), 29 U.S.C. § 152(3) (1982).

108. In *Action Automotive*, the Court recognized that the exclusion from employee status in corporations is limited to children or spouses of those individuals who own at least 50% of the business. 105 S. Ct. at 989 n. 7. The exemption also applies to children and spouses of partners and sole proprietors. *Id.* at 990 n. 2 (Stevens, J., dissenting).

109. NLRA, § 9(b), 29 U.S.C. § 159(b) directs the Board to determine "the unit appropriate for the purposes of collective bargaining." For a discussion of the criteria used by the Board in making such determinations, see R. GORMAN, *supra* note 22, at 66-92.

110. *See, e.g.*, Louis Weinberg Assoc., Inc., 13 N.L.R.B. 66 (1939).

111. P.A. Mueller & Sons, Inc., 105 N.L.R.B. 552, 553 (1953).

112. *See, e.g.*, NLRB v. Sexton, 203 F.2d 940 (1953).

113. International Metal Products Co., 107 NLRB 65, 67 (1953). *See also* American Steel Buck Corp., 107 NLRB 554 (1953) (general manager's nephew acting as liaison between employees and management enjoys special status); Cherrin Corp. v. NLRB, 349 F.2d 1001 (6th Cir. 1965) (relative's special status evidenced by the following: she was not required to punch a time clock; her absences for illness were not recorded, and she was not reprimanded for tardiness).

114. *See, e.g.*, Foam Rubber City 2 of Florida, Inc., 167 N.L.R.B. 623 (1967) (children excluded, not because of special status, but because interests more closely aligned with management than with other employees).

the Board for a "zig-zag" approach, sometimes deciding cases on a special status theory and sometimes, without explanation, eschewing special status in favor of a community of interest rationale.[115]

In *Action Automotive*, the business was owned equally by three brothers, each of whom was active in the company's operation. The Board excluded two employees: the mother of the three owners and the wife of one of them. The Board noted that the mother lived with one of the brothers and communicated regularly with the other two. The wife lived with her husband (the company president) and sometimes took coffee breaks in his office.[116] Initially, the Board excluded the wife, in part because of special job-related benefits. The Board, however, abandoned that position before the Supreme Court,[117] thus raising the issue of whether it could exclude relatives under a community of interest test that did not include the existence of special status.

The Supreme Court upheld the Board's test. It claimed that the Board no longer followed a policy of automatic exclusion, but considered a "variety of factors" in deciding whether an owner's relatives should be excluded from the unit.[118] Those factors included financial dependence, the extent of family involvement in the business, and the existence of special job benefits (the last factor being relevant, but not necessary). The presence of such factors could justify a conclusion that the relatives had no community of interest with the other employees. For example, the Board could reasonably infer that close relatives, especially those who live with an owner, would receive more attention from management than other employees and that they might identify with "business interests" rather than with the interest of the unit. Also, the possibility existed that other employees would be inhibited by the participation of a manager's relatives in bargaining unit affairs.[119]

Presumably in response to Justice Stevens' charge that Chief Justice Burger's majority opinion evidenced a "pro-union rationale"[120] (probably one of the few times that Justice Burger has been accused of being pro-union), the Court explained that the Board's rule was not intended to screen out antiunion voters; "[r]ather, the

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115. *See* Linn Gear Co. v. NLRB, 608 F.2d 791 (9th Cir. 1979) and cases cited therein at 794-15; NLRB v. Caravelle Woods Products, Inc., 504 F.2d 1181 (7th Cir. 1974) and cases cited therein at 1185-86.

116. 105 S. Ct. at 986.

117. *Id.* at 987 n.2.

118. *Id.* at 988.

119. *Id.*

120. *Id.* at 991 (Stevens, J., dissenting).

family member is excluded . . . because the Board determines on the basis of objective factors that he lacks common interests with fellow employees who are not so related."[121] Even though the effect of the Board's policy might be to favor unions, the Court said that disparate impact by itself does not violate the Board's obligation of neutrality. Indeed, the Court speculated that every unit determination favored either management or labor.[122]

Although the case obviously has limited application, the issues raised in *Action Automotive* are both interesting and difficult. No one doubts the range of the Board's discretion in unit determination cases. However, decisions involving family members have a more significant effect on the excluded employees. Typically, unit determinations involve consideration of job-related factors, such as similarity in working conditions, abilities, and job tasks. Employees are excluded from a bargaining unit because they have no community of interest with those workers comprising the bulk of the unit. Typically, that means that their jobs or other relevant working conditions are dissimilar from the jobs or working conditions of the unit members. The excluded employees, however, retain their section 7 rights and, assuming they have sufficient interest, can seek collective bargaining with other employees with whom they do share a community of interest.

In *Action Automotive*, however, the employees effectively were denied any right to participate in collective bargaining. Since their exclusion from the unit resulted from their relationship to management rather than their job duties, they would presumably be excluded from *any* collective bargaining unit. Moreover, their virtual exclusion from the protection of section 7 was based merely on inferences derived from "factors" allegedly identifying their allegiance to management. Even though, as the Court said in *Action Automotive*, statutory employees have no right to be included in collective bargaining units, one might expect that the Board would move carefully in denying employees the protection that it was created to insure.

There is little evidence of such care. Although the Court asserted that the Board no longer applied a per se rule, the cases cited do not support such a conclusion. For example, the Court cited *Pandick Press Midwest, Inc.*,[123] as evidence that the Board measures a

121. *Id.* at 989.
122. *Id.*
123. 251 N.L.R.B. 473 (1980).

relative's allegiance to management, in part, by asking whether the relative lives with his or her family. However, only one member of the Board panel that decided *Pandick* relied on the fact that the employee lived with her father, who was manager of the plant.[124] The majority was content to exclude her on the basis of a more general conclusion: "[I]t appears that [the daughter] has access to management which, although it may not always result in easily identifiable special privileges, gives her a status and an area of interest distinct from that of other employees."[125] Presumably, any close relative of an employer would have access not available to other employees.

Similarly, the Court claimed that the Board considers the extent of family ownership and involvement in the business. Such factors were present in *Action Automotive*, in which a family network owned and operated the business. Board decisions, however, make these factors seem little more than coincidental. In *Pandick*, for example, the employee-relative's father owned less than 1% of the company's stock. Moreover, he was not a corporate officer but merely a plant manager.[126] Nonetheless, his daughter was excluded from the unit because of the family relationship.

The Court also cited *Marvin Witherow Trucking*[127] as evidence of the Board's reliance on factors other than family membership. The relative in question, the father of the owner, was a part-time truck driver. The Board found no evidence of special status, but nonetheless, determined that the father shared no community of interest with the other employees. Part of the Board's reasoning was unintelligible: noting that the unit was small and that the absence of any one driver would be a "critical impediment" to the employer, the Board observed that "[t]he risk that such a problem will effect [sic] the employer's operations herein is substantially less because of the availability of [the father]."[128] On the other hand, the Board also observed that the small number of employees would give the father considerable influence if he was included in the unit. As in *Pandick*, however, the Board was most influenced merely by the family relationship:

> [I]n view of the familial bond existing between father and son . . . we are of the opinion that [the father] would have

124. Only Board Member Fanning expressly mentioned the matter. *See id.* at 474 n. 5.
125. *Id.* at 473.
126. *Id.*
127. 229 N.L.R.B. 412 (1977).
128. *Id.* The Board did not explain why either a "critical impediment" or a family relationship were relevant to the unit determination problem.

> a greater affinity with the interests of management than he would with the interests of his fellow employees. It would contradict human experience to contend that the relationship between [father and son] is merely that of Employer and part-time employee.[129]

Regardless of how the Supreme Court views the Board's recent decisions, it is clear that the primary factor influencing the Board in unit determination cases has been the existence of a close family relationship, which is taken by the Board to indicate antiunion sentiment. Although the Court and the Board prefer to explain the rationale by pointing to the lack of "common interest"[130] or "community of interest separate from that of his fellow employees,"[131] such phrases connote nothing more than potential antagonism toward the union. Certainly, the factors relied on by the Board are not foolproof. The existence of close family ties does not necessarily indicate loyalty to business concerns, particularly in a case like *Pandick*, in which the father had little financial interest in the company.[132] Moreover, as Justice Stevens urged in dissent,[133] even antiunion employees are covered by the Act, and unions cannot systematically exclude groups whose personal, religious, or business interests might presage opposition, unless the family relationship doctrine applies. One might have hoped, then, that the Court's opinion would have given the Board more guidance, rather than merely rubber stamping its conclusory approach.

One facet of the Board's theory, referred to only briefly by the Court, deserves special mention. As noted in *Action Automotive*, inclusion of those with family ties to management "could tend to inhibit free expression of views and threaten the confidentiality of union attitudes and voting."[134] The rule approved by the Court

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129. *Id.*

130. 105 S. Ct. at 990 (Stevens, J., dissenting).

131. 229 N.L.R.B. at 412.

132. As the Ninth Circuit recognized in Linn Gear Co. v. NLRB, 608 F.2d 791, 793 (9th Cir. 1979):

> At the time of the election, [the owner's son] was 22 years old. He may be a maverick and have little contact with his family. He may come and go from his residence and take meals at different times from his father. Even if he does eat with his father, [the son] may very well be at odds with him on the issues concerning the employees, the Union, and the company. . . . In short, a hearing is necessary to shed light on these matters which bear directly on the question of whether [the son] shares a community of interest with his fellow employees.

133. 105 S. Ct. at 990 (Stevens, J., dissenting).

134. *Id.* at 988.

rests most easily on this ground. Although its behavioral assumptions are subject to criticism, the Board has consistently opposed surveillance, interrogation, and other tactics potentially threatening to union activity.[135] Clearly, the supposition in family relationship cases is that the inclusion in units of employees closely aligned to management might provoke fear of disclosure and of retaliation for union activity.

At least two criticisms of the Board's retaliation theory are possible. First, employees other than relatives might report the union activities of coworkers to management, but the union cannot exclude them from the unit no matter how strident their antiunion attitudes. Second, surveillance and interrogation are unfair labor practices, better dealt with in those procedures than in a representation case. Presumably, a manager who listened regularly to reports of union affairs from a relative could be prosecuted for a section 8(a)(1) violation notwithstanding the voluntary activity of the employee.

Although the Board's assumptions have not been proven empirically, it seems reasonable to conclude that the spouse of a corporate officer might disclose to his wife the union activities of coworkers. At the very least, it is reasonable to assume that other employees might fear such disclosure. Exclusion from the unit is not an unreasonable response to such a delicate situation, provided sufficient evidence exists to demonstrate the relative's alliance to management. Although employees should not be excluded from a bargaining unit simply because of their likely opposition to the union, exclusion is warranted when it is reasonable to conclude that participation by close relatives would discourage the union activity of other employees.

II. EMPLOYMENT DISCRIMINATION CASES

A. Problems for Affirmative Action?

One of the Court's most interesting cases last term—and perhaps the one that has produced the most controversy—was *Firefighters Local Union No. 1784 v. Stotts*.[136] The case arose out of a 1980 consent decree that obligated the city of Memphis to increase the

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135. For a general discussion of these employer unfair labor practices, see R. GORMAN, *supra* note 22, at 172-78. Recent cases, however, may indicate a softening in the Board's attitude about interrogation. *See, e.g.*, Rossmore House, 269 N.L.R.B. 1176 (1984).

136. 104 S. Ct. 2576 (1984).

hiring and promotion opportunities for blacks in the city's fire department. The decree settled a Title VII suit filed in 1977 alleging that the city had engaged in a pattern and practice of discrimination in hiring and promotion.[137] Although the city did not admit any violations of the law, it agreed to fill 50% of future job vacancies with black applicants and to afford 20% of the promotions in each department to black employees.[138] Nothing in the decree spoke to layoffs and no mention was made of compensatory seniority, although a 1974 city-wide decree required that seniority for promotions and transfers be computed "as the total seniority of that person with the city."[139]

Citing projected budget deficits, in early 1981 the city announced layoffs affecting the fire department and invoked the "last hired-first fired" layoff plan contained in its agreement with the union and alluded to in the 1974 decree.[140] The plan included "bumping rights"[141] for senior employees, and would have had a disproportionate impact on newly hired black workers. During the period between the original decree in 1974 and the time of layoffs, 56% of the employees hired by the fire department were black and the representation of blacks within the department had risen from 3 or 4% to 11.5%.[142] However, of the forty employees to be laid off under the city's plan, fifteen (or 37.5%) were black.[143] The effect of demotions resulting from the city's entrenchment would have been dramatic. For example, the court of appeals noted that almost 60% of the employees affected by demotion under the city's plan were black, and that "fifty-five percent of all minority Lieutenants and 46% of all minority Drivers would either have been laid off or demoted if the announced layoffs had occurred."[144]

The district court found that the layoffs "would have a devastating and retrogressive effect"[145] on the gains in minority employment made in response to the consent decrees of 1974 and 1980,

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137. In addition, the city was party to a 1974 consent decree that established an interim goal of filling 50% of vacancies in the fire department with black applicants. *Id.* at 2581. The complete text of the 1974 consent decree is reprinted in the appendix to Stotts v. Memphis Fire Dep't, 679 F.2d 541, 570-73 (6th Cir. 1982).

138. 104 S. Ct. at 2581.

139. 679 F.2d at 572.

140. 104 S. Ct. at 2581.

141. As ordinarily applied, "bumping rights" allows an employee whose job has been eliminated to "bump", i.e., displace, a less senior employee.

142. 104 S. Ct. at 2582.

143. *Id.*

144. 679 F.2d at 549-50.

145. *Id.* at 549.

and, on May 4, 1981, entered a temporary restraining order prohibiting the layoff of any black employee. Two weeks later, the court entered a preliminary injunction ordering the city not to apply its layoff plan "insofar as it will decrease the percentage of black lieutenants, drivers, inspectors and parties that are presently employed."[146] In accordance with the court's order, the city developed a court approved modified layoff plan that resulted in the layoff or demotion of some white employees who had more seniority than some remaining minority employees.[147]

The Sixth Circuit Court of Appeals affirmed the district court's action, including the modification of the 1980 decree, even though it disagreed with the lower court's finding that the city's seniority system was not bona fide for purposes of section 703(h) of Title VII of the Civil Rights Act of 1964.[148] The court of appeals held that the district court's action simply enforced the terms of the 1980 decree. Alternatively, the Sixth Circuit said that the district court had authority to modify the decree on the basis of "new and unforseen circumstances."[149] The Supreme Court rejected both theories, and in the process not only limited the ability of federal courts to impose orders overriding a bona fide seniority system, but also used language so broad as to question the Court's commitment to class-based affirmative relief from unlawful discrimination.

The Court made short work of the argument that the district court's injunction and modification amounted to little more than specific performance of its prior order. The Court noted that the "scope of the consent decree must be discerned within its four corners" and pointed out that the 1980 decree did not mention layoffs.[150] The Court found no indication that the city had somehow

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146. 104 S. Ct. at 2582. Subsequently, the court broadened its order to include three more classifications. *Id.*

147. *Id.*

148. 679 F.2d at 551 n. 6. Section 703(h) of Title VII of the Civil Rights Act of 1964, codified at 42 U.S.C. § 2000e-2(h)(19) provides, in pertinent part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin. . . .

The district court held that the seniority plan was not bona fide because its operation would have a discriminatory impact. 679 F.2d at 550-51 n. 6.

149. 104 S. Ct. at 2582 (citing 679 F.2d at 562-63). The Sixth Circuit considered the city's economic hardships to be "new and unforeseen" circumstances.

150. *Id.* at 2586 (quoting United States v. Armour & Co., 402 U.S. 673, 681-82 (1971)).

impliedly promised not to use its preexisting layoff plan.[151] Moreover, the Court rejected the argument that the injunction merely carried out the purposes of the plan.[152] Although the purpose of the 1980 decree had been to remedy discriminatory hiring and promotion practices, "that remedy did not include the displacement of white employees with seniority over blacks."[153] Nor could it have, the Court said, since the relief ordered by the consent decree could not "exceed the bounds of remedies that are appropriate under Title VII."[154] Any such seniority override would have violated the policy of Title VII, which expressly protects employees under bona fide seniority systems. The Court did not eliminate the possibility that all parties to a dispute might consent to such an arrangement, but did point out that no such issue had been raised, since neither the union nor the white employees adversely affected by the district court's order were parties to the consent decree.[155]

The Court also repudiated the Sixth Circuit's holding that the district court possessed inherent authority to modify the consent decree in order to prevent it from being undermined by the unforeseen circumstances of a layoff.[156] The court of appeals had supported its theory primarily by pointing out the incongruity of encouraging parties to settle discrimination cases through a consent decree, yet denying to the district court the power to modify the decree when necessary to vindicate Title VII policies.[157] The Sixth Circuit said that if the case had been tried and the allegations of the complaint proved, the district court could have overridden the bona fide seniority system in framing a remedy. Therefore, it reasoned, the district court should also be permitted to override the seniority provisions in order "to effectuate the purpose of the 1980 Decree."[158]

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151. 104 S. Ct. at 2586. "Had there been any intention to depart from the seniority plan in the event of layoffs or demotions, it is much more reasonable to believe that there would have been an express provision to that effect." *Id.*

152. *Id.*

153. *Id.*

154. *Id.* The Court did point out that an express provision might allow for remedies exceeding those provided under Title VII. *Id.*

155. *Id.*

156. *Id.* at 2586, 2587 n. 9.

157. The Sixth Circuit also proposed what the Supreme Court characterized as a " 'settlement theory', i.e., that the strong policy favoring voluntary settlement of Title VII actions permitted consent decrees that encroached on seniority systems." 104 S. Ct. at 2587. The Court rejected the application of the theory (without conceding its legitimacy) by pointing out that the parties had not voluntarily agreed to the terms of the modification. *Id.* at 2588.

158. 679 F.2d at 566.

The Supreme Court, however, disagreed with the Sixth Circuit's premise, asserting that "rightful place" compensatory seniority is appropriate only when individuals have shown themselves to be victims of discrimination.[159] Employees are not entitled to seniority awards merely because of membership in a "disadvantaged class."[160] The Court noted that the district court had not found any of the minority employees protected by the modification to be actual victims of discrimination. Therefore, "[t]he Court of Appeals imposed on the parties as an adjunct of settlement something that could not have been ordered had the case gone to trial and the plaintiffs proved that a pattern or practice of discrimination existed."[161]

The Court's conclusion was clearly premised, in part, on the policies enunciated in section 703(h) that protect from sanction the discriminatory effects of a bona fide seniority plan.[162] The Court noted that a contractually established seniority system could not be displaced absent a finding that it was adopted with a discriminatory purpose or that such action was necessary to provide make whole relief to an actual victim of discrimination.[163] It also agreed with the court of appeals' determination that the city's layoff plan was a bona fide application of the seniority system.[164] However, the Court's analysis did not rest solely on the special protection that the Act affords seniority plans. Rather, the Court examined the class-based relief authorized by the district court to determine whether it was justified under the remedial policies of section 706(g).[165]

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159. 104 S. Ct. at 2588.

160. *Id.*

161. *Id.*

162. *Id.* In an earlier footnote the Court held that the authority of a district court to modify a consent decree was limited by Title VIII: "[A] district court cannot enter a disputed modification of a consent decree . . . if the resulting order is inconsistent with the statute." *Id.* at 2587 n. 9.

163. *Id.* at 2587 n. 9.

164. *Id.* at 2587.

165. *Id.* at 2588-89. 42 U.S.C. § 2000e-5(g) provides, in pertinent part:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in such unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmtive action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay. . . or any other equitable relief as the court deems appropriate. . . . No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for

As noted in the dissenting opinion, every court of appeals had found the statute to support race-conscious affirmative relief in class action litigation.[166] The majority in *Stotts*, however, ignored those cases, as well as the argument that such relief was contemplated by the 1972 amendments, which authorized "any other equitable relief as the court deems appropriate."[167] The majority said that victim-specific remedies were "consistent with the policy behind section 706(g)," which was "to provide make whole relief only to those who have been actual victims of illegal discrimination."[168] The majority supported its interpretation by pointing to statements from the legislative history that Title VII was not intended to authorize the use of quotas or other specific remedies "for anyone who is not discriminated against,"[169] and that its primary purpose was "to make victims of unlawful discrimination whole."[170]

Mootness.—Commentators have debated whether the Court seized upon *Stotts* as a vehicle for narrowing the Title VII remedial power of the courts. The opinion itself is ambiguous, but it may be significant that the Court even reached the issue. Noting that each of the white employees adversely affected by the injunction had been reinstated, the respondents, as well as the three dissenters, urged that the case was moot. The majority disagreed, supporting its decision with several curious assertions. First, the Court said that the injunction (which it clearly assumed to be a final order)[171] was still in effect and, unless reversed, would govern any future layoffs.[172] As the dissent pointed out, however, the effect of declaring the controversy moot would have been to vacate the district court's order and to return the parties to the status they occupied prior to

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any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of § 704(a) of this title."

166. 104 S. Ct. at 2606 n. 10 (Blackmun, J., dissenting).

167. Section 706(g) *as amended by* the Equal Employment Opportunity Act of 1972, 86 Stat. 107. As noted by the dissent, "as amended, the first sentence [of § 706(g)] authorizes a court to order 'such affirmtive action as may be appropriate, which may include, *but is not limited to*, reinstatement or hiring of employees, with or without back pay . . . *or any other equitable relief as the court deems appropriate.*" (Emphasized language added by amendments). 104 S. Ct. at 2609 (Blackmun, J., dissenting).

168. 104 S. Ct. at 2588-89.

169. *Id.* at 2589.

170. *Id.* at 2590 n. 15.

171. Throughout its statement of the facts the Court referred to the district court's order as an "injunction," not a preliminary injunction. *Id.* at 2579-82. Moreover, at one point the Court called the order a "so-called preliminary injunction." *Id.* at 2583.

172. *Id.* at 2583.

initiation of the lawsuit.[173] Moreover, the Court said that the premise of the "so-called preliminary injunction" was the district court's ruling that the consent degree had to be modified to prevent a reduction of the percentage of black workers and that the city's seniority system could be ignored.[174] Interestingly, the Court observed that respondents had not conceded that these rulings were wrong, but "to the contrary, they continue to defend them."[175] There is no authority for the proposition that a party urging mootness must concede the error of a lower court's decision. Nonetheless, the Court asserted that the modified decree would continue to affect the parties, not only in the event of another layoff, but because the city would not be able to offer potential employees the benefit of its seniority system.[176] Finally, the Court asserted that even though the laid off white employees had been reinstated, they continued to suffer from loss of pay and seniority incurred during the layoff.[177]

The Court seemed to separate the injunction from the modification of the decree, implying that the latter would stand, even if the injunction did not.[178] The majority, however, simply ignored the dissent's assertion that a finding of mootness would vacate the lower court's order, including its "rulings" and any modification imposed as a result of the same case. Moreover, the dissent correctly asserted that nothing in the lower court's order prevented the city from restoring pay or seniority to employees laid off as a result of the injunction.[179] Nor was there any indication that the respondents would oppose such action. As the dissenters observed, "[t]he opinion today provides the city with a decision to insure that it can do something that it has not claimed any interest in doing and has not been prevented from doing, and that respondents concede that they have no way of stopping."[180]

The mootness argument, then, seems compelling. Following reinstatement of the laid off employees, the dispute between the city

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173. *Id.* at 2597 (Blackmun, J., dissenting).
174. *Id.* at 2583.
175. *Id.*
176. *Id.*
177. *Id.* at 2584.
178. "The inquiry is not merely whether the injunction is still in effect, but whether the mandated modification of the consent decree continues to have an impact on the parties such that the case remains alive." *Id.* at 2583.
179. *Id.* at 2598 (Blackmun, J., dissenting).
180. *Id.* at 2599 (Blackmun, J., dissenting).

and the plaintiffs had ended. All workers were reinstated to the positions they had occupied prior to the strike. No court order prevented the city from reimbursing white employees laid off pursuant to the modified consent decree. While the union or the adversely affected employees might have sought such recovery in litigation, perhaps necessitating a ruling on the propriety of the district court's decision, no such action was filed. What seemed to concern the Supreme Court was the possibility that the district court's "rulings" would guide its action in future layoffs, if any. No such controversy faced the court, however. Vacation of the lower court's order would simply have returned the parties to square one. By deciding the merits, the Court rendered advice about how future lawsuits ought to be decided, but had little effect on any actual dispute.

Discussion.— Because of the broad language used by the Court to support its decision, reaction has run the gamut from predictions that *Stotts* "sounds the death knell for affirmative action" to assertions that the opinion offers "nothing new" at all.[181] The latter view maintains that the Court merely reasserted the importance of, and the protection afforded to, bona fide seniority systems under section 703(h).[182]

There is no doubting the significance of section 703(h), nor the influence it exerted on the Court's opinion. Indeed, one might well assert that the policies underlying 703(h) alone would have provided ample support for the Court's decision in *Stotts*. Certainly, the Court's reference to *Franks v. Bowman Transportation Co.*[183] and *Teamsters v. United States*,[184] two important decisions interpreting the statute, would lend credence to this view. The Court, however, did not stop with section 703(h), but suggested in sweeping terms that the remedial policies of section 706(g) restricted a lower court's authority to order racially conscious class-based remedies and limited power under Title VII to correction of wrongs suffered by identifiable victims of discrimination. It may be, as Justice Stevens

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181. *See Dispute Over Stotts Decision*, 117 LAB. REL. REP. (BNA) 245 (Nov. 26, 1984) (reporting comments of O. Peter Sherwood, former assistant counsel for the NAACP Legal Defense and Education Fund, Inc.; William Robinson, executive director of the Lawyers Committee for Civil Rights Under Law; and Assistant Attorney General William Bradford Reynolds.)

182. *Id.* at 246. (This opinion was offered by William Robinson.)

183. 424 U.S. 747 (1976) (identifiable victims of post-Act discrimination are entitled to grants of remedial seniority).

184. 431 U.S. 324 (1977) ("[A]n otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination." *Id.* at 353-54. Section 703(h), therefore, shields the discriminatory effect of pre-Act discrimination carried forward by seniority systems.)

charged[185] and other commentators have predicted,[186] that the Court's pronouncements were unnecessary to resolution of the case and, therefore, only advisory. Moreover, it is certainly too early to embrace the Reagan administration's position that class-based remedies are passé. It would be foolish, however, to disregard the tone of the Court's opinion and pretend that *Stotts* does nothing more than narrowly implement the policy of section 703(h). While advisory it may be, the advice it gives is disturbing.

Although the significance of *Stotts* is a matter of some speculation, some definite holdings emerge. Clearly, the inherent power of courts to modify consent decrees is circumscribed by the reach of Title VII. A court may not modify a preexisting bona fide seniority system in order to fulfill the purposes of a decree affording affirmative class-based relief. The further effect of the decision, however, is uncertain. The Court said that constructive seniority could be awarded only to proven victims of discrimination and broadly implied that other class-based relief was also inappropriate.[187] Both assertions are curious.

Because *Stotts* involved the *settlement* of a Title VII lawsuit, it is not surprising that no victims were identified. The Court heard no evidence, and the city was probably unwilling to admit unlawful conduct in order to settle the case. If *Stotts* means that affirmative relief is available only in the face of such admissions, it will significantly undermine the incentive for either party to settle. Plaintiffs will be

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185. 104 S. Ct. at 2594 (Stevens, J., concurring).

186. *See, e.g.*, Hardin, *supra* note 1, at 304-06.

187. 104 S. Ct. at 2588, 2589. One commentator claimed that only Justice O'Connor suggested that constructive seniority could be awarded "by specific findings after litigation by the specific identification of entitled victims through negotiation." *See* Hardin, *supra* note 1, at 307. The author characterized Justice O'Connor's position as "errant twaddle," *id.* at 308. Although the Court's opinion is ambiguous, Hardin's interpretation is not necessarily justified by the majority opinion:

> Here, there was no finding that any of the blacks protected from layoff had been a victim of discrimination and no award of competitive seniority to any of them. Nor had the parties in formulating the consent decree purported to identify any specific employee entitled to particular relief other than those listed in the exhibits attached to the decree. It, therefore, seems to us that in light of *Teamsters*, the Court of Appeals imposed on the parties as an adjunct of settlement something that could not have been ordered had the case gone to trial and the plaintiffs proved that a pattern or practice of discrimination existed.

104 S. Ct. at 2588.

See also More Discussion of Stotts Ruling, 117 LAB. REL. REP. (BNA) 266, 267 (Dec. 3, 1984) ("*Stotts* creates a more complicated context for settlement," reporting comments of Morgan Hodgson).

unwilling to settle without guarantees of specific relief, and employers will be reluctant to admit actual wrongdoing.

Even more troubling is the Court's analysis of section 706(g), which seems to indicate that class-based relief is inappropriate. Surely, a narrow reading of the case warrants no such conclusion. The Court's analysis of the Act's remedial provisions was tempered by section 703(h), which protects bona fide seniority systems. The decision, then, may signify nothing more than that affirmative grants of constructive seniority may be made only to actual victims of discrimination and that class-based affirmative relief is not appropriate to override the provisions of a bona fide seniority system. It does not necessarily mean that other forms of class-based relief are inappropriate. In fact, the consent decree at issue in *Stotts* provided class relief in the form of hiring and promotion goals. The Court did nothing to disturb those remedies, although admittedly the issue was not before it.

Given the narrowness of the issue in *Stotts*, the Reagan administration's unbridled glee in the decision is probably not justified. It is not, as one official asserted, "the most significant civil rights victory"[188] in years, nor does it necessarily mean that only "victim-specific" relief is available through the courts.[189] The tone of the opinion, however, certainly cannot be ignored. The Court decided a case that it might have avoided, and in doing so addressed the policy of section 706(g) by quoting broadly from sources that question the legality of goals and quotas.[190] Although the precise issue in *Stotts* was narrower, the Court's discussion of class-based relief was general and not expressly tied to the problems of bona fide seniority systems. Moreover, the Court paid no heed to the plethora of circuit court cases on point and seemed to disregard the remedial significance of the 1972 amendments. It is not without risk, then, that one dismisses the *Stotts* opinion as just one more victory for seniority. Although its effect may be limited and its advice uncertain, the rumblings in the opinion are ominous.[191]

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188. *See Dispute Over Stotts Decision*, *supra* note 181, at 245 (comments of William Bradford Reynolds).

189. *Id.*

190. 104 S. Ct. at 2588-90.

191. The Reagan administration has given *Stotts* an expansive reading. For example, the Department of Justice has asked 50 state and local governments to modify consent decrees containing race-conscious class-based relief. *See Campaign Against Existing Consent Decrees*, 118 LAB. REL. REP. (BNA) 182, 182-83 (Mar. 11, 1985).

Some courts, however, have given it a narrow reading. *See, e.g.*, Wygant v. Jackson Bd. of Educ., 746 F.2d 1152, 1157-58 (6th Cir. 1984), *cert. granted*, 53 U.S.L.W. 3727

One must also question what effect the attitudes expressed by the majority in *Stotts* might ultimately have on voluntary affirmative action. Even the Justice Department seems to concede that *Steelworkers v. Weber*[192] escaped the *Stotts* decision unscathed.[193] Certainly, whatever the import of the Court's comments about class-based affirmative relief, the decision in *Stotts* involved court-imposed remedies in the context of a court-approved settlement. Nothing in the decision expressly questions the ability of the parties to fashion voluntary plans that provide class-wide preferential treatment. It bears noting, however, that the Court conceded nothing on voluntary affirmative action and, in fact, did not cite *Weber* at all. Near the end of the opinion the Court acknowledged the Sixth Circuit's assertion that the modified consent decree was proper because it ordered nothing that the city might not have done voluntarily.[194] The Court merely stated that the city had not done so and noted that whether it "could have taken this course of action without violating the law is an issue we need not decide."[195] Other portions of the opinion allude to the possibility of voluntary agreement between the plaintiffs and the city, but stop short of endorsing any such action.[196] Although the opinion would appear to be less threatening to voluntary affirmative action than to other court-ordered relief, the Court's vagueness was unnecessary (as was its verbosity on section 706(g)) and is, therefore, disturbing.[197]

(1985); NAACP v. Detroit Police Officers Ass'n, 591 F. Supp. 1202-03, (E.D. Mich. 1984); EEOC v. Local 638, 36 Fair Empl. Prac. Cas. (BNA) 1466, 1467 (1985).

192. 443 U.S. 193 (1979) (Court rejected challenge to voluntary race-conscious affirmative action plan).

193. *See, e.g., Dispute Over Stotts Decision*, *supra* note 181, at 247 (reporting that Asst. Attorney General Reynolds conceded that Weber "remains viable" but is an "exceedingly narrow" decision).

194. 104 S. Ct. at 2590.

195. *Id.*

196. *Id.* at 2586.

197. Recently, the Court granted review of the Sixth Circuit's decision in Wygant v. Jackson Bd. of Educ., 746 F.2d 1152 (6th Cir. 1984). *See* 53 U.S.L.W. 3727 (1985). In *Wygant*, the court of appeals upheld a voluntary race-conscious layoff plan negotiated between a public employer and a union. The court said that the plan was valid, notwithstanding the lack of any finding of prior discrimination. 746 F.2d at 1155. The court distinguished *Stotts*, saying that it did not apply to voluntary affirmative action. *Id.* at 1158. The court also held that the plan's implementation was constitutional, *id.* at 1157, an issue that it recognized the Court had not decided in *Stotts*. *Id.* at 1158. Obviously, in *Wygant*, the Court will not only have an opportunity to explain the effect of *Stotts* on race-conscious relief, it will also reexamine *Weber*.

B. Title VII and Partnership

In *Hishon v. King & Spalding*,[198] the Supreme Court decided a case of significance to law firms, accounting firms, and other entities doing business in the partnership form. In 1972, Elizabeth Hishon accepted employment as an associate with King and Spalding, a large Atlanta law firm composed of fifty partners who employed another fifty attorneys as associates. In May 1978, the firm notified Hishon that she would not be promoted to partner. One year later, the firm ratified its previous decision, thereby not only denying Hishon admission to the partnership but, in accordance with the firm's "up or out" policy, terminating her employment as an associate as well.[199] Hishon filed suit in federal district court, alleging that King and Spaulding had discriminated against her on account of her sex, in violation of Title VII of the Civil Rights Act of 1964. The district court dismissed the case, finding that Hishon's allegations did not state a claim under Title VII.[200] A divided three-judge panel for the Eleventh Circuit affirmed.[201] On certiorari, the Supreme Court reversed, finding that consideration for partnership was among the "terms, conditions or privileges" of Hishon's employment within the meaning of Title VII.[202]

King and Spalding had resisted Hishon's claim by asserting that the decision to invite an associate into the partnership was outside the purview of Title VII since it changed an individual's status from employee to employer.[203] The partners own the business, share management decisions among themselves, and hire employees, including associate attorneys, to work *for* them. The firm argued that,

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198. 104 S. Ct. 2229 (1984).

199. *Id.* at 2232. The defendant claimed that it did not reconsider *Hishon's* case in 1979, but merely decided not to reconsider it. Therefore, defendant asserted that the time within which a claim cold be filed (180 days, *see* 42 U.S.C. § 200e-5(e)) began to run in 1978. Because the district court rejected Hishon's claim, it did not resolve the timeliness issue. 104 S. Ct. at 2232 n. 1.

200. *See* 24 Fair Empl. Prac. Cas. (BNA) 1303 (N.D. Ga. 1980).

201. *See* 678 F.2d 1022 (11th Cir. 1982).

202. 104 S. Ct. at 2233. Section 703(a)(1) provides that it is an "unlawful employment practice for an employer. . . to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin. . . ." 42 U.S.C. § 2000e-2(a).

The Court's decision was not entirely without precedent. In the only other reported case concerning partnership discrimination, a district court reached the same result on similar facts. *See* Lucido v. Cravath, Swaine & Moore, 14 Fair Empl. Prac. Cas. 353 (S.D.N.Y. 1977).

203. 104 S. Ct. at 2235.

while Title VII was intended to regulate the treatment afforded employees by employers, it was not designed to scrutinize relationships between partner-employers themselves.[204]

The Court did not concede the legitimacy of King and Spalding's argument, but found that consideration for partnership could be a condition or privilege of an associate attorney's employment, thus restricting its analysis to the employment perquisites of an individual who was clearly an employee for purposes of the Civil Rights Act:

> [E]ven if respondent is correct that a partnership invitation is not itself an offer of employment, Title VII would nonetheless apply and preclude discrimination on the basis of sex. The benefit a plaintiff is denied need not *be* employment to fall within Title VII's protection; it need only be a term, condition, or privilege *of* employment.[205]

Hishon alleged that the prospect of partnership was used as a recruiting device by the firm and that the representations concerning partnership were a significant factor in her decision to accept employment. She claimed that the recruiters told her that associates who "receive[d] satisfactory evaluations" were promoted to partner within five or six years as "a matter of course" and that such decisions were made on "a fair and equal basis."[206] The Court found the allegations of the complaint sufficient to state a claim that the opportunity for partnership consideration was a part of Hishon's employment contract. Since consideration for partnership was a part of the contract, it was a term or privilege of employment within the meaning of Title VII and, therefore could not be abridged for reasons prohibited by the statute.[207]

The Court's decision was not so narrow, however, as to rest entirely on the contract theory. The Court noted that employers sometimes provide employees with benefits, even though not contractually obligated to do so.[208] Although not employment rights, such benefits are nonetheless "privileges" for purposes of Title VII: "A benefit that is part and parcel of the employment relationship

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204. *Id.*

205. *Id.* (emphasis in original).

206. *Id.* at 2232.

207. "If the evidence at trial establishes that the parties contracted to have petitioner considered for partnership, that promise clearly was a term, condition, or privilege of her employment. Title VII would then bind respondents to consider petitioner for partnership as the statute provides, i.e. without regard to [her] sex." *Id.* at 2234.

208. *Id.*

may not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract simply not to provide the benefit at all."[209]

The Court found Hishon's complaint sufficient to allege that the opportunity for partnership consideration was "part and parcel of an associate's status as an employee," whether or not guaranteed by contract.[210] Thus, the Court noted the underlying allegations that associates could expect to be considered for partnership at the conclusion of their "apprenticeship"; that attorneys from outside the firm were not regularly considered for partnership; that the possibility of becoming a partner was used by the firm as a recruiting device; and that employment termination was the consequence of an adverse partnership decision.[211] Whether characterized as a contract right or merely a privilege arising from associate status, consideration for partnership was a term, condition, or privilege of employment that could not be denied on a discriminatory basis.[212]

In a concurring opinion, Justice Powell asserted that the Court's decision "should not be read as extending Title VII to the management of a law firm by its partners," pointing out that nothing in the opinion justified the conclusion that the relationship between partners themselves was employment within the purview of Title VII.[213] Powell's assertion is clearly correct as far as it goes: the Court did not even consider whether partners are employees for purposes of Title VII, since the "privilege of employment theory" was sufficient to dispose of the case. Moreover, the Court's opinion cannot fairly be read to mean that Title VII regulates relationships between partners. However, the Court did not go as far as Justice Powell and did not expressly acknowledge the inapplicability of Title VII to partners as partners, thus leaving the question open.

The court of appeals had dealt with the issue directly. Before the Eleventh Circuit, Hishon had contended that law firm partners were "equivalent to 'employees' of a corporation thereby establishing the employment context for Title VII's application."[214] The court of appeals rejected this theory, although its opinion offers little more than conclusions. For example, Hishon had cited *Bellis v.*

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209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.* at 2234-35. The Court also rejected the firm's claim that applying Title VII to partnership decisions violated its constitutional right of expression or association. *Id.* at 2235.
213. *Id.* at 2236 (Powell, J., concurring).
214. 678 F.2d 1022, 1026 (11th Cir. 1982).

United States[215] for the proposition that a partnership could have an identity separate from its individual partners (presumably for the purpose of showing that the partners could, therefore, be employees of a partnership). Without elaboration, the court merely said, "[F]or many purposes, such as the fifth amendment's protection, this 'separate identity' will yield results similar to those for corporations, but not for Title VII purposes."[216] The real motivation behind the Eleventh Circuit's decision was clear at the outset. In the first paragraph of the opinion the court stated, "[W]e cannot overlook the essence of a partnership—voluntary association."[217] The court reiterated that theme often. Thus, in discussing whether partners are employees under Title VII, the court said the partnership "is clearly a voluntary association of lawyers. . . .The partners own the partnership, they are not its 'employees' under Title VII. . . ."[218] Similarly, in rejecting the theory ultimately accepted by the Supreme Court, the Eleventh Circuit said, "[O]nce again, we decline to extend the meaning of 'employment opportunities' beyond its intended context by encroaching upon individuals' decisions to voluntarily associate in a business partnership."[219]

On the surface, the Supreme Court's decision to reject the Eleventh Circuit's approach and find partnership consideration an "employment opportunity" subject to Title VII is not difficult to understand. Firms that explicitly or impliedly promise partnership as an inducement to prospective employees must not base selection decisions on criteria prohibited by Title VII. The opinion, however, does raise interesting questions, particularly with regard to the issue reserved by the Court—the applicability of Title VII to relations between partners themselves.

Assuming that Justice Powell and the Eleventh Circuit are correct (i.e., that Title VII does not apply to partners in voluntary association), the reach of the opinion in *Hishon* might be seen as limited to cases involving similarly specific allegations as to the linkage between associate status and partnership consideration. For example, it is certainly not true that associates in all large firms can expect promotion to partnership as "a matter of course." In some firms, for example, the partnership resembles a pyramid, with relatively

215. 417 U.S. 85 (1974), *cited at* 678 F.2d at 1026.
216. 678 F.2d at 1026.
217. *Id.* at 1024.
218. *Id.* at 1028.
219. *Id.*

few partners and large numbers of presumably well-qualified associates.[220] In such firms, it may be difficult for associates to establish that partnership prospects were used as an inducement in recruiting or that express promises of partnership consideration were made. Moreover, it may be that associates in such firms are not routinely considered for partnership and have no legitimate expectation of such action, thereby negating a claim that partnership consideration is "part and parcel of an associate's status" regardless of any contractual commitment.[221] Finally, the linkage between associate status and partnership consideration referred to by the Court[222] might be discounted by proof that individuals other than associates are sometimes considered for the partnership.[223]

Even in firms in which relatively few associates can expect to become partners, however, it is likely that they are led to believe that they will at least be *considered* as potential partners. Although *Hishon* does not mandate an affirmative decision, it at least insures nondiscriminatory consideration. Associates cannot be rejected for reasons prohibited by Title VII. To that extent, *Hishon* may well work changes in the selection process for firms that choose their partners from groups of seasoned, competent associates.

For example, a firm may decide to "make" only one partner from a class of several eligible associates. Presumably, any associate who has remained with the firm long enough to face the partnership decision (a period as long as eight or ten years in some firms) will have demonstrated sufficient legal skills for partnership consideration. Consequently, such partnership decisions are sometimes based on more subjective criteria, such as the firm's perception of an associate as a potential leader or business-getter.[224] Those attributes may be related to social or professional affiliations not regularly available to blacks or women. Until recently, for example, the Jaycees systematically excluded women.[225] Similarly, country club

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220. *See, e.g.*, *The NLJ 250, A Special 5-Year Report on the Dramatic Growth of the Nation's Largest Law Firms*, Nat'l L.J. (Sept. 19, 1983) (special anniversary section).

221. *See, e.g.*, E. SMIGEL, THE WALL STREET LAWYER 74-90 (1969).

222. 104 S. Ct. at 2234.

223. *See, e.g.*, E. SMIGEL, *supra* note 221, at 42, 90 (discussion of law firm practice of selecting famous lawyers or well-known government figures to automatic partnership status).

224. *See, e.g.*, *id.* at 97-110.

225. *See* Roberts v. United States Jaycees, 104 S. Ct. 3244 (1984) (application of Title VII to compel respondents to admit women as regular members did not abridge either male members' freedom of expressive association or freedom of intimate association).

membership is often restricted by race. Yet it may be that an associate's potential for civic, business, or political contacts originates through membership in such organizations. Clearly, then, the use of such criteria in making partnership decisions raises the possibility that minorities and women will be adversely affected. Although the effect of using such subjective criteria is unclear, the potential for a discriminatory effect at least raises the possibility of a claim under adverse impact analysis.

Even more intriguing is speculation about the question the Court reserved, namely the application of Title VII to relationships between partners. In its opinion, the Eleventh Circuit declared that "the very essence of a partnership is the voluntary joinder of all partners" who own the business.[226] There is nothing controversial about the Court's opinion as it applies to the decision of two or more people to pool their resources and abilities and to accept the risks and rewards of a joint business venture. That account no doubt describes many law firms. It certainly does not describe them all.

Generalization about law firm organization is difficult (and probably dangerous) not only because of the myriad partnership arrangements, but also because of the secrecy that surrounds partnership agreements.[227] In *Hishon*, for example, King and Spalding supplied in discovery only an edited copy of its partnership agreement, which was placed under seal (the Eleventh Circuit described it as "particularly sensitive") and not made available to the EEOC.[228] Even though Justice Powell characterized law partnerships as "the common conduct of a shared enterprise,"[229] that generalization certainly does not capture all partnership arrangements. It is certainly not true, for example, that all law firm partnerships are comprised of lawyers who share equally in compensation, risk of loss, and firm governance.[230] In some firms the "partnership" may, in fact, encompass several levels of participation, depending on such factors as years of service, income production, and business generation. New partners may be little more than profit sharing associates, who accept little risk (and probably little profit) and who have little, if

226. 678 F.2d at 1028.

227. *See, e.g.*, SMIGEL, *supra* note 221, at 210-15.

228. 678 F.2d at 1025, 1025 n.6.

229. 104 S.Ct. at 2236.

230. *See, e.g.*, SMIGEL, *supra* note 221, at 183, 228; P. HOFFMAN, LIONS IN THE STREET 57-60 (1973).

any, voice in the governance of the firm.[231] Although higher level partners, who manage the firm and shoulder most of the risks of the venture, may resemble owners more than employees, lower level partners may not. Using the "economic realities" test alluded to by the Eleventh Circuit in *Hishon*,[232] such partners may have many of the attributes of "employees" for purposes of Title VII. They are unable to exert significant influence on the management of the firm, including, perhaps, such matters as their own compensation and work assignments.[233] Instead, they must wait to be elevated to a higher level within the partnership, a process no doubt comparable to a promotion in a typical employment relationship.

For the purposes of Title VII, the consequences of finding a mid-level class of employee-partners are two-fold. First, this analysis strengthens the claim that consideration for partnership is an employment opportunity within the firm, i.e., promotion to a more lucrative employment position. Second, and more importantly, it raises the possibility that simply designating attorneys as "partners," and assigning them microscopic shares of the profits, does not necessarily terminate coverage of Title VII. If such partners are viewed as employees for purposes of Title VII, any benefit or privilege afforded them—including "promotion" to a higher level partnership—would be subject to scrutiny.

Certainly, there is no authority for extending coverage of Title VII to relationships between partners. The Supreme Court's opinion merely says that the opportunity to be *considered* for partnership may be a privilege of an associate's employment. Moreover, both the Eleventh Circuit and Justice Powell offered opinions flatly asserting that Title VII has no role to play in law firm partnerships. Both of those opinions, however, are replete with conclusions and assumptions about the structure of law firms that are not valid in all cases. One must remember that the traditional notions of voluntary association and freedom to choose business partners were not sufficient to convince the Court that King and Spalding could select partners free from the constraints of Title VII. If the partnership decision itself is not sacrosanct, it is possible that the Court would tolerate an analysis that asks whether partnership may really be employment for purposes of Title VII.

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231. *See, e.g.*, SMIGEL, *supra* note 221, at 228.

232. 678 F.2d at 1027 n. 9. The test stems from NLRB v. Hearst Publications Co., 322 U.S. 111 (1944), in which the Court sought to determine employee status by looking to the "economic realities" of the employment relationship.

233. *See, e.g.*, SMIGEL, *supra* note 221, at 183, 228, 239-44.

C. *Involuntary Retirement and the ADEA*

The reasoning of *Hishon* influenced the Court in an age discrimination case handed down during the 1984 term. In *TWA v. Thurston*,[234] the Court considered an airline's policy of allowing pilots disabled for reasons other than age to bump less senior flight engineers, while at the same time requiring pilots disqualified because of age to bid for a flight engineer vacancy.

The controversy arose because the collective bargaining agreement between TWA and the Airline Pilots Association (ALPA) required both pilots and flight engineers to retire at age sixty.[235] At least as to pilots, the policy was apparently influenced by an FAA regulation.[236] At the time of the agreement in 1977, the retirement policy qualified as a bona fide seniority system and was lawful under the Age Discrimination in Employment Act (ADEA) despite its impact on employees in the protected age group.[237] The Act, however, was amended in 1978 to prohibit involuntary retirement of protected employees on account of age.[238]

In response to the amendments TWA announced, over union opposition, that it would ignore contract provisions requiring mandatory retirement of flight engineers.[239] The company also proposed that retiring pilots be allowed to transfer to the position of flight engineer and to continue working after reaching age sixty.[240] Bowing to resistance from the ALPA, the company modified its plan to permit aging pilots to bid for the job of flight engineer under procedures existing in the collective bargaining agreement.[241] The

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234. 105 S. Ct. 613 (1985).

235. 105 S. Ct. at 618.

236. *Id.* at 618 n.3. The FAA regulation, 14 C.F.R. § 121.383(c), draws a distinction between captains and first officers, who are defined as "pilots," and flight engineers, who are not considered "pilots."

237. The ADEA, 29 U.S.C. §§ 621-34, was effective in 1968. As originally enacted, it protected employees age 40 to 65. Section 4(f) of the original act, codified at 29 U.S.C. § 623(f)(2), provided that it was not unlawful "[t]o observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as retirement, pension or insurance plan, which is not a subterfuge to evade the purpose this Act."

238. The amendments added the following to the language quoted, *supra* note 237: "and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual . . . because of the age of such individual." *See* 29 U.S.C. § 623(f)(2).

239. 105 S. Ct. at 619.

240. *Id.*

241. *Id.* The union protested the company's action by filing suit under the Railway Labor Act, 45 U.S.C. §§ 156-188, contending that the modification was "a unilateral change in working conditions." The employer prevailed in both the district court and the court of appeals. 105 S. Ct. at 619 n. 5.

revised plan permitted any pilot approaching mandatory retirement to submit a "standing bid." If a flight engineer vacancy occurred, the most senior bidding employee would get the job.[242] Subsequently, the plan was amended to require that the job be filled when the vacancy occurred, thereby forcing some pilots to choose between accepting the lower paying flight engineer position prior to age sixty, or declining with the hope that another vacancy would occur before retirement.[243] The company's plan gave retiring pilots no assurance of continued employment. Thus, if no vacancy occurred after filing the bid, or if the pilot lacked enough seniority to secure a flight engineer position, the pilot was forced to retire at age sixty.[244]

This practice differed significantly from the treatment afforded pilots who were unable to fly for reasons unrelated to age. For example, pilots who were medically disqualified or whose position had been eliminated—and even pilots who were incompetent—were permitted to "bump" less senior flight engineers and therefore continue working.[245] Moreover, even if such pilots lacked sufficient seniority to displace another employee, their employment was not terminated, as happened to sixty-year-old pilots unable to secure another job. Rather, they were placed on leave and continued to accrue seniority, thereby entitling them to recall when a vacancy occurred in a position for which they were qualified.[246]

Relying expressly on its opinion in *Hishon*,[247] a unanimous Court found that TWA's transfer policies denied sixty-year-old pilots a "privilege of employment on the basis of age," holding that "[t]he Act does not require TWA to grant transfer privileges to disqualified captains. Nevertheless, if TWA does grant some disqualified captains the 'privilege' of 'bumping' less senior flight engineers, it may not deny this opportunity to others because of their age."[248]

The Court rejected TWA's assertion, approved by the district

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242. *Id.* at 619.

243. *Id.* at 619 n. 7.

244. *Id.*

245. *Id.*

246. *Id.* at 619 nn. 9 & 10.

247. 104 S. Ct. at 2229 (1984). *See supra* notes 198-233 and accompanying text.

248. 105 S. Ct. at 621. The plaintiffs also filed an action against the APLA. The court of appeals upheld a violation, but found that the union was not liable for damages since it interpreted the Act as not permitting the recovery of damages against unions. The Supreme Court decided that it was without jurisdiction to consider the matter. *Id.* at 620-21 n.14.

court, that the plaintiffs' burden was controlled by *McDonnell Douglas v. Green,*[249] and that plaintiffs' claims failed because they had been unable to show that a vacancy existed in the position of flight engineer at the time of their forced retirement.[250] The Court said that the *McDonnell Douglas* test did not apply since the plaintiffs had marshalled direct evidence of discrimination.[251] By contrast, *McDonnell Douglas* was "designed to assure that the 'plaintiff [has] his day in court despite the unavailability of direct evidence.' "[252]

The Court also rejected two affirmative defenses mounted by the employer. First, TWA contended that forced retirement of pilots at age sixty or older was not at issue, claiming that age was a bona fide occupational qualification (BFOQ) for the captain's position.[253] The Court, however, noted that the airlines policy of refusing to employ pilots age sixty and older was not an issue. Rather, the Court was concerned with TWA's practice of refusing to allow age-disqualified captains the same transfer rights available to other disqualified captains.[254] That policy did not exclude individuals from the position of pilot. Instead, it prevented certain pilots from

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249. 411 U.S. 792 (1973). In *McDonnell Douglas*, the Court said that a plaintiff established a prima facie case of discrimination by showing:

> (i) that he belongs to a racial minority; (ii) that he applied for and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802.

250. 105 S. Ct. at 622.

251. *Id.*

252. *Id.* (quoting Loeb v. Textron, Inc., 600 F.2d 1003, 1014 (1st Cir. 1979)). The court of appeals discussion of the *McDonnell Douglas* theory was more extensive. The court pointed out that the criteria of *McDonnell Douglas* allow a plaintiff to establish a discriminatory motive, despite the absence of direct evidence. Air Line Pilots Ass'n v. TWA, 713 F.2d 940, 951-52 (2d Cir. 1983). The court of appeals did take note, however, of statements by the Supreme Court indicating that *McDonnell Douglas* is "not necessarily applicable in every respect," 713 F.2d at 952 (quoting *McDonnell Douglas*, 411 U.S. at 803, n. 13), and that it is not an "inflexible rule" (quoting Furnco Construction Corp. v. Waters, 438 U.S. 567, 575 (1978)). The court also referred to one of its own opinions indicating that the *McDonnell Douglas* criteria are not "exclusive" and need not be adhered to "stubbornly . . . when common sense dictates the same result on the basis of alternative formulae." 713 F.2d at 952 (quoting Grant v. Bethlehem Steel Corp., 635 F.2d 1007, 1014 (2d Cir. 1983)). The court concluded that *McDonnell Douglas* does not bar a plaintiff from establishing a prima facia case by other means and that direct evidence of disparate treatment produced by the plaintiffs is sufficient. 713 F.2d at 952.

253. 105 S. Ct. at 622-23. Section 4(f)(1), codified at 29 U.S.C. § 623(f)(1), provides that it is not unlawful "to take any action otherwise prohibited. . . where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business."

254. 105 S. Ct. at 622-23.

working as flight engineers solely because of their age: "[I]t is the 'particular' job of flight engineer from which the respondents were excluded by the discriminatory transfer policy. Because age under 60 is not a *BFOQ* for the position of flight engineer, the age-based discrimination at issue in this case cannot be justified by §4(f)(1) [of the ADEA]."[255] The Court concluded that the ADEA allowed TWA to retire, or discharge, all disqualified captains, irrespective of their age.[256] The statute does not, however, authorize age discriminatory transfer policies, even if age is a bona fide occupational qualification for the employee's former position.[257]

The Court made short work of the employer's second affirmative defense. Relying on section 4(f)(2),[258] the employer claimed that its transfer policy was justified as part of a "bona fide seniority system."[259] However, that section provides expressly that no such bona fide plan could permit "the involuntary retirement of a protected individual. . .because of age."[260] Because TWA's plan permitted discriminatory age-based involuntary retirement, the affirmative defense of a bona fide seniority plan was "unavailable."[261]

Having found TWA in violation of the Act, the Court then addressed the plaintiffs' contention that they were entitled to double-back pay pursuant to section 7(b) of the ADEA, which authorizes such awards in cases of "willful violations."[262] The statute, which provides for enforcement "in accordance with the powers, remedies, and procedures of the Fair Labor Standards Act," (FLSA) does not define "willful."[263] The Court, however, relied on cases interpreting willfulness for purposes of imposing criminal penalities under the FLSA and agreed with the court of appeals' conclusion that a violation was willful if "the employer . . . knew or showed reckless disregard for the matter of whether its conduct was prohibited."[264] In adopting the "reckless disregard" standard, the Court

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255. *Id.*
256. *Id.* at 623.
257. *Id.*
258. 29 U.S.C. § 623(f)(2).
259. 105 S. Ct. at 623.
260. 29 U.S.C. § 623(f)(2).
261. 105 S. Ct. at 623.
262. Section 7(b) of the ADEA, codified at 29 U.S.C. § 626(b), states that "[t]he provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures . . . [in the Fair Labor Standards Act] . . . Provided, that liquidated damages shall be payable only in cases of willful violations of this Act."
263. *Id.*
264. 105 S. Ct. at 624 (quoting Airline Pilots Ass'n v. TWA, 713 F.2d at 956).

rejected TWA's claim that intent to violate the statute was essential.[265] It also rejected the so-called "in the picture" standard, advocated by the plaintiffs, which would have found an employer's conduct to be willful if the employer had notice of the "potential applicability" of the Act.[266] The Court concluded that Congress did not intend to punish employers who acted reasonably and in good faith. Those requirements were satisfied by TWA, which had sought legal advice, consulted with the union and, ultimately, adopted a plan that it thought satisfied the obligations of both the law and its collective bargaining agreement with the union.[267]

Although the case is interesting, the Court's decision should not provoke great controversy. The Court's holding on the underlying discrimination issue is clearly correct: TWA's "bumping" policy treated pilots disqualified for age differently from those disqualified for any other reason. As such, certain pilots were denied a privilege of employment available to other workers, solely because of their age. Moreover, no bona fide occupational reason prevented age disqualified pilots from working as flight engineers, a conclusion supported by the fact that TWA employed at least 148 flight engineers who were more than sixty years old.[268]

The Court also properly held, though it should not have had to, that plaintiffs did not have to satisfy the *McDonnell-Douglas* criteria. The district court's wooden application of those criteria may not have been unusual, but it was clearly wrong.[269] The district court had held that plaintiffs' cases failed even though they could show that they were members of the protected age group, that they were discharged, and that they were qualified for the position of flight engineer. They failed to satisfy *McDonnell Douglas*, however, because they could not show that a flight engineer's vacancy existed at the time of their forced retirements.[270] Presumably, even casual analysis would have demonstrated the peculiar anomaly created by the court's interpretation. Thus, under the district court's analysis, the plaintiffs would have had to show that a flight engineer's job was open at the time of their termination, while the basis of their claim was that they were discharged because no job *was* available due to the petitioner's discriminatory bumping policy. Fortunately, the

265. 105 S. Ct. at 624.
266. *Id.*
267. *Id.* at 626.
268. *Id.* at 623 n. 18.
269. *See, e.g.*, Wright v. Olin Corp., 697 F.2d 1172, 1185-87 (4th Cir. 1982).
270. 713 F.2d at 952.

Supreme Court made explicit what should already have been obvious: *McDonnell Douglas* was intended to protect plaintiffs who have no direct evidence of discrimination. It was not intended to deny plaintiffs the opportunity to submit express evidence of discriminatory employment practices.

The Court's interpretation of the ADEA's liquidated damages provision was less obvious but, nonetheless, appropriate. The plaintiffs had argued for an "in the picture" standard, partly because of an interpretation of a statute of limitations provision in the Portal to Portal Act, which is incorporated in the ADEA.[271] Section 6 of the Portal to Portal Act[272] provides a general two-year statute of limitations for lawsuits brought under the ADEA, which is increased to three years in the case of a willful violation.[273] Some courts of appeals have held that the willfulness requirement of section 6 is satisfied if the employer was merely aware that the ADEA might be applicable.[274] Without expressly approving that test, the Court determined that it could not, in any event, apply to the liquidated damages provision. Since employers are required to post notices concerning the ADEA, the result of an "in the picture" standard would be an award of double damages in almost every case.[275] Such a result would nullify the obvious intention of Congress to employ liquidated damages as a punitive measure.[276] Thus, the Court's decision to shield employers who have acted reasonably and in good faith, and to punish only those who have acted knowingly or recklessly, is in accord with the clear purpose of the legislation.

D. The "Clearly Erroneous" Standard of Rule 52(a)

Anderson v. City of Bessemer City, North Carolina[277] arose under Title VII, but involves no significant interpretation of that statute. Instead, the Court used *Anderson* as a vehicle for limiting the authority of appellate courts to overrule the factual findings of trial judges.

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271. *See* ADEA, § 7(e)(1), 29 U.S.C. § 626(e)(1), which states simply that "sections 255 and 259 of this title shall apply to actions under this chapter." 29 U.S.C. § 255(a), in pertinent part, provides that "every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued."

272. 29 U.S.C. § 255(a).

273. *Id.*

274. *See, e.g.*, Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139, 1142 (5th Cir. 1971); EEOC v. Central Kansas Medical Center, 705 F.2d 1270, 1274 (10th Cir. 1983).

275. 105 S. Ct. at 625.

276. *Id.*

277. 105 S. Ct. 1504 (1985).

Nonetheless, because there is no right to a jury trial in Title VII cases, *Anderson* should be of interest to labor lawyers who prosecute or defend such actions.

The plaintiff had charged the city with unlawful sex discrimination for rejecting her application for the position of recreation director in favor of a male applicant.[278] The district court sustained her claim, finding that: (1) the plaintiff was better qualified than the man who got the job; (2) the male members on the selection committee had shown a bias against women;[279] and, (3) the reasons offered to support their selection of the male candidate were pretextual.[280] The Fourth Circuit reversed, concluding that all three factual findings were clearly erroneous, pursuant to the standard established by Federal Rule of Civil Procedure 52(a).[281]

The court of appeals acknowledged that it had subjected the district court's findings to "close scrutiny."[282] Heightened scrutiny was justified, the court asserted, because the trial court had solicited findings of fact and conclusions of law from plaintiff's counsel, a practice the Fourth Circuit had previously criticized.[283] The Supreme Court acknowledged that verbatim adoption of the prevailing party's findings of fact had "the potential for overreaching and exaggeration" and noted that, like the Fourth Circuit, it had criticized courts for following that procedure.[284] In *Anderson*, however, the lower court had provided defendant's counsel an opportunity to comment on the proposed findings, and the findings ultimately issued by the court varied "considerably in organization and content" from those offered by the plaintiff.[285] As such, the Supreme Court was confident that the findings of fact "represent[ed] the judge's own considered conclusions."[286] Even a verbatim adoption of the plaintiff's proposed findings, however, would

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278. *Id.* at 1508.

279. *Id.* Four of the five members of the selection committee were men.

280. *Id.* at 1509-10.

281. *Id.* at 1511. FED. R. CIV. P. 52(a) provides that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

In 1982, the Supreme Court held that a finding of discriminatory intent in a Title VII action is a factual finding subject to Rule 52(a). *See* Pullman-Standard v. Swint, 456 U.S. 273, 293 (1982).

282. 717 F.2d 149, 156 (4th Cir. 1983).

283. *See* Chicopee Mfg. Corp. v. Kendall Co., 288 F.2d 719, 724-25 (4th Cir. 1951); Cuthbertson v. Biggers Bros., Inc., 702 F.2d 454, 465 (4th Cir. 1983).

284. 105 S. Ct. at 1511.

285. *Id.* The Court also said that the proposed findings were prepared by the plaintiff in accordance with guidelines set forth by the district court.

286. *Id.*

have been reviewable only under the "clearly erroneous" standard since, upon adoption, they become the findings of the court.[287]

On the merits, the court of appeals disagreed expressly with several findings of the district court. For example, the trial judge had found that the position of recreation director encompassed not only management of athletic programs, but development of other activities as well.[288] The Fourth Circuit, however, interpreted the same evidence to mean that implementation of an athletic program was the job's primary responsibility.[289] Moreover, the court of appeals rejected the district court's finding that Anderson was the better qualified applicant.[290] Again, construing the same evidence presented to the trial court, the Fourth Circuit concluded that the successful applicant's "overall training was superior to [plaintiff's] training and experience for the demands of this job."[291] The court of appeals also disagreed with the district court's finding that only the plaintiff had been asked questions concerning the potential impact of the job on her family, a factor the trial court used in concluding that the committee was biased against women.[292] Even though the latter finding depended, in part, on credibility determinations, the Fourth Circuit reversed the trial court, construing the evidence to mean that other applicants had been asked the same questions.[293]

The Supreme Court reversed the Fourth Circuit's decision, stating unambiguously that appellate courts are not free to discard factual findings with which they disagree.[294] They may reverse only findings that are "clearly erroneous."[295] Rule 52, the Court said, does not entitle reviewing courts "to decide factual issues *de novo*"; rather, the appellate court's function is to determine whether the findings of fact are wrong.[296] Although both the Supreme Court and the Fourth Circuit applied the same definition of "clearly erroneous,"[297] the *Anderson* opinion makes clear that the relevant inquiry is the *plausibility* of the district court's findings:

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287. *Id.*
288. *Id.* at 1513.
289. *Id.*
290. *Id.*
291. 717 F.2d at 154.
292. 105 S. Ct. at 1513-14.
293. 717 F.2d at 155.
294. 105 S. Ct. at 1512.
295. FED. R. CIV. P. 52(a). *See* text accompanying note 281.
296. 105 S. Ct. at 1512.
297. *Id.* at 1511; 717 F.2d at 154. Both courts looked to the opinion in United States v. United States Gypsum Co., 333 U.S. 364 (1948) for the following explanation of the "clearly erroneous" standard: "A finding is 'clearly erroneous' when although there is

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.[298]

The Court noted that when a trial court's factual findings are based on credibility determinations, the role of the appellate court is particularly circumscribed.[299] Although a court might reverse a factual finding when a witness' testimony is contradicted by "documentary or objective evidence," a decision by a trial court to discredit one of two or more witnesses "can virtually never be clear error."[300]

Even when credibility is not at issue, however, the Court indicated that reviewing courts must accept factual findings that are not clearly wrong. Prior to *Anderson*, some courts of appeals had asserted that they need not defer to findings based on physical or documentary evidence, presumably because appellate courts can read documents and examine physical evidence as well as trial judges.[301] The Supreme Court disagreed, stating that the trial court's superiority is not limited to determinations of credibility: "The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise."[302]

Anderson may not be a momentous decision, but it was a necessary one. Even a cursory review of the Fourth Circuit's action discloses the scant regard it had for the trial court's work. The Fourth Circuit simply ignored the findings of the trial judge and conducted its own thorough review of the evidence. In effect, the trial judge was little more than a hearing examiner who passed on the admissibility of evidence and made recommendations which the appellate judges were free to reject. Indeed, even the trial court's credibility determination was rejected as "clearly erroneous."[303] The Supreme

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evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.* at 395.

298. 105 S. Ct. at 1512 (United States v. Yellow Cab Co., 338 U.S. 338, 342 (1949); Inwood Laboratories, Inc. v. Ives Laboratories, 456 U.S. 844 (1982)).

299. 105 S. Ct. at 1512. The Court also noted that district courts cannot insulate their findings from review by "denominating them credibility determinations" when they are not. *Id.*

300. *Id.* at 1512-13.

301. *Id.* at 1512.

302. *Id.*

303. 717 F.2d at 155.

Court's opinion properly limits the appellate court's function to a review, not a retrial, of the district court's factual findings. The parties had already tried the case once, and "[r]equiring them to persuade three more judges at the appellate level is requiring too much."[304]

III. DUE PROCESS FOR PUBLIC EMPLOYEES

A recurring problem in public employment law has been whether the due process clause mandates a hearing before an employee's discharge. In *Cleveland Board of Education v. Loudermill*,[305] the Supreme Court acknowledged, as it had before,[306] that some public employees have a constitutionally protected property interest in their jobs. Such employees, the Court held, cannot be deprived of their jobs without due process of law, which includes a pretermination hearing.[307] The "hearing," however, need not be elaborate and, in fact, amounts to little more than an opportunity for the employee to respond to charges.[308]

The case arose out of the discharge of two employees of Ohio school districts. Although each had civil service protection entitling him to a posttermination hearing and appeal, state law imposed no predischarge procedure or requirements. Indeed, both complaints (filed in federal district court) alleged the unconstitutionality of the Ohio statute on the grounds that it did not provide employees an opportunity to respond to the charges against them prior to termination.[309] The district court dismissed both cases for failure to state a claim, reasoning that because the Ohio statutes created the property right in employment, the legislature could also limit the procedures employed to enforce that right.[310] Subsequently, the trial court abandoned that rationale, instead basing its decision on a balancing test.[311] The Sixth Circuit reversed, holding that the interests of the employees outweighed the state's interest in avoiding a pretermination hearing.[312]

Fundamental to the constitutional issue was the question of whether the employees even had a protected property interest in

304. 105 S. Ct. at 1512.
305. 105 S. Ct. 1487 (1985).
306. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564 (1972).
307. 105 S. Ct. at 1495.
308. *Id.* at 1490.
309. *Id.*
310. *Id.*
311. *Id.* at 1491 n. 2.
312. 721 F.2d 550, 562 (6th Cir. 1983).

their jobs. Under Ohio law, classified civil service employees could be discharged only for "misfeasance, malfeasance, or nonfeasance in office."[313] The Court had recognized previously that employees entitled to continued employment under state law have constitutionally protected property rights. One of the petitioners, however, finding support in the plurality opinion in *Arnett v. Kennedy*,[314] argued that the scope of the employees' substantive right was limited by the procedures provided by statute for its enforcement.[315]

In *Arnett*, the Court denied the claim of a federal employee who argued that the failure to provide him with a predischarge hearing violated his right to due process of law.[316] Three Justices (Rehnquist, Burger, and Stewart) thought that any expectancy of job retention was limited by statutory procedures for contesting a discharge:[317]

> The employee's statutorily defined right is not a guarantee against removal without cause in the abstract, but such a guarantee as enforced by the procedures which Congress has designated for the determination of cause.
>
> . . . .
>
> [W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet.[318]

The Court, noting that two of its more recent decisions had questioned the *Arnett* plurality's view,[319] abandoned it outright in *Loudermill*. It acknowledged that public employers are not required

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313. OHIO REV. CODE ANN. § 124.34 (1984), *pertinent portions quoted in* 105 S. Ct. at 1491 n.4.

314. 416 U.S. 134 (1974).

315. 105 S. Ct. at 1492.

316. 416 U.S. 134 (1974).

317. *Id.* at 151. The statute in question, 5 U.S.C. § 7501(a)-(b), provided for a post termination hearing.

318. 416 U.S. at 152, 153-54. The two other Justices comprising the majority (Powell and Blackmun) concurred in the judgment, but disagreed with the plurality's conclusion that the employee had no property right in his job. However, they believed that, on balance, a posttermination hearing sufficiently protected the employee's interests. *Id.* at 164-71.

319. *See, e.g.*, Vitek v. Jones, 445 U.S. 480 (1980) (involuntary transfer of prisoner to mental hospital is deprivation of a liberty interest necessitating appropriate procedural safeguards, including notice and a hearing); Logan v. Zimmerman Brush Co., 455 U.S. 422 (1980) (right to assert job discrimination claim through the Federal Employment Practices Commission is a protected property interest that cannot be deprived without some form of hearing). Both of these decisions are discussed in *Loudermill*, 105 S. Ct. at 1492-93.

by the Constitution to create a property interest in continued employment.[320] If they do, however, the substantive right cannot be limited by procedures falling short of fifth and fourteenth amendment guarantees: "The Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures."[321]

Having found that tenured employees may not be deprived of their employment without due process of law, the Court then turned to the procedures mandated by the Constitution. The Court read prior decisions to require "some kind of a hearing" prior to termination,[322] a process also warranted by a balancing of the parties' interests.[323] From the employees' side, the Court noted the importance to workers of retaining employment and the difficulty of securing new work after having been discharged.[324] It also asserted that employees have an interest in presenting their side of the story before termination, since that might be "the only meaningful opportunity to invoke the discretion of the decisionmaker."[325] The employers' interests were found to be less significant. A pretermination hearing would not necessarily either impose an administrative burden or result in inordinate delay.[326] Moreover, employers shared the employees' interest in avoiding an erroneous decision, a prospect that could be minimized by a pretermination hearing.[327] The Court also announced that public employers would rather keep qualified employees than train new ones and that governmental units have an interest in providing employment to citizens, "rather than taking the possibly erroneous and counterproductive step of forcing its employees onto the welfare roles."[328] The latter two interests appear to be little more than makeweight arguments. Certainly, neither employer advanced either interest in this case. The Court would have been better off merely stating the real reason for its decision: The employer's interest in controlling

320. 105 S. Ct. at 1487 (quoting Justice Powell's concurring opinion in *Arnett*, 416 U.S. at 167) ("While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize a deprivation of such an interest, once conferred, without appropriate procedural safeguards.")

321. 105 S. Ct. at 1493.

322. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564, 569-570 (1972); Perry v. Sindermann, 408 U.S. 593, 599 (1972).

323. 105 S. Ct. at 1494.

324. *Id.*

325. *Id.*

326. *Id.* at 1495.

327. *Id.*

328. *Id.*

its work force does not outweigh an employee's interest in responding to charges.

The government's interest in speed, however, was sufficient to affect the formality of the requisite predischarge proceeding. Although a pretermination hearing is a constitutional necessity, the "hearing" itself amounts to little more than notice with an opportunity to respond.[329] The Constitution, the Court decided, does not require a full evidentiary trial. Moreover, the hearing need not resolve the dispute. Rather, the procedure is merely "an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action."[330]

In a concurring opinion, Justice Brennan claimed that the Court's decision was limited to cases in which there is no factual dispute, and that under certain circumstances due process might require more. The issues decided by the Court in *Loudermill* involved no contested facts, but only "plausible arguments [by the employees] that might have prevented their discharge."[331] Brennan urged that when facts alleged in support of the discharge are in dispute, "an employee may deserve a fair opportunity before discharge to produce contrary records or testimony, or even to confront an accuser in front of the decisionmaker."[332]

Although the Court in *Loudermill* was not faced with disputed facts, Brennan's attempted distinction is not persuasive. The Court did not limit its discussion to the formalities required in the case before it, but spoke generally concerning public employment:

> The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. . . . To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.[333]

Nothing in the opinion justifies the conclusion that these requirements might be extended in factually contested cases. The decision seems clearly to require little more than a prima facie determination of cause, with controverted matters left for resolution

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329. *Id.*
330. *Id.*
331. *Id.* at 1499 (Brennan, J., concurring in part and dissenting in part).
332. *Id.*
333. *Id.* at 1495-96 (citations omitted).

in postdischarge proceedings. Indeed, the Court noted that it had required a full evidentiary proceeding *prior* to adverse governmental action only in a case involving the termination of welfare benefits.[334] In that case, the Court noted that termination could deprive a recipient of the means necessary to sustain life while waiting for a post-termination hearing,[335] a factor not present in employment termination cases. Although the Court acknowledged that discharge could produce adversity, the hardship to the employee does not depend on whether facts are contested or whether uncontested facts might be explained. In either case, *Loudermill* requires only that employees be given notice and an opportuity to explain their story. If the employer persists in the discharge, explanations, facts, and mitigation are litigated afterwards.

Although it offers public employees some protection, *Loudermill* contains significant limitations. In the first place, the decision applies only to public employees who are tenured or have some legitimate expectation of job security. At-will public employees have no property interests in their jobs and, therefore, enjoy no due process protections. In addition, the scope of the protection afforded tenured employees is narrow. As noted, the employer need do little more than listen to an employee's explanation of the facts. *Loudermill* establishes no right to an evidentiary hearing, and importantly, no opportunity to confront an accuser. Furthermore, nothing in the opinion purports to limit an employer's discretion even after the "hearing," which is only a preliminary check on the reasonableness of the discharge.[336]

Despite its limitations, *Loudermill* does work one significant change in public employment law. No longer will public agencies be able to argue that governmentally created rights can be limited at will by restrictive enforcement procedures. The Court's decision on that issue is unquestionably correct. As noted by Justice Rehnquist in his dissenting opinion, the same Ohio statute granting tenure to public employees also created procedures for its revocation.[337] Since the tenure entitlement, therefore, was not intended by the state to be absolute, Justice Rehnquist criticized the Court for "seiz[ing] upon one of several paragraphs in a unitary statute to proclaim that in that paragraph the State has inexorably conferred upon a civil service employee something which it is powerless under

334. *Id.* at 1495; *see* Goldberg v. Kelly, 397 U.S. 254 (1970).
335. 397 U.S. at 264.
336. 105 S. Ct. at 1495.
337. *Id.* at 1503 (Rehnquist, J., dissenting).

the United States Constitution to qualify in the next paragraph of the statute."[338] Rehnquist's charge grossly mischaracterizes the Court's decision. The majority's opinion does not say, and cannot be interpreted fairly to mean, that states cannot limit or qualify an employee's job tenure. It merely holds that any procedural limitation must not offend recognized due process guarantees. That is, substantive rights need not be absolute, but they cannot be qualified by unconstitutional procedures. In *Loudermill*, for example, the state was free to discharge either employee for cause. Nothing in the Court's opinion limits that right. It merely recognizes that governmental units cannot deprive employees of property rights without due process of law. In such cases "some kind of prior hearing is paramount."[339]

Loudermill also contains a warning for public employers who are party to a collective bargaining agreement. Even if the employees subject to the agreement do not have tenure under state law, the contract itself may create a legitimate expectation of continued employment and, therefore, a constitutionally protected property right.[340] If the contract provides that discharge may be only for

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338. *Id.*

339. Board of Regents v. Roth, 408 U.S. 564, 570 (1972).

340. In *Roth*, the Court said:

> To have a property interest in a benefit, a person clearly must have . . . more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.
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> . . . .
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> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Id. at 577.

There is little doubt that employment contracts can create a legitimate claim of entitlement. Indeed, the commitment need not even be expressed. For example, in *Roth* the Court read its decision in Connell v. Higgenbotham, 403 U.S. 207 (1971), to mean that even those with only an "implied promise of continued employment" were safeguarded by the due process clause. 408 U.S. at 577. Similarly, in Perry v. Sindermann, 408 U.S. 593 (1972), decided the same day as *Roth*, the Court remanded the case in order to allow a discharged teacher to show that, notwithstanding the lack of formal tenure, he nonetheless had a reasonable expectation of continued employment:

> A written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient "cause" is shown. Yet absence of such an explicit contractual provision may not always foreclose the possibility that a teacher has a "property" interest in reemployment. For example, the law of contracts in most, if not all, jurisdictions long has employed a process by which agreements . . . may be "implied".

proper cause, or if such a guarantee is even implicit in the document,[341] *Loudermill* would require notice and an opportunity to be heard prior to the discharge. Since the grievance-arbitration provisions of a typical contract would not become operative until after the discharge, *Loudermill* would appear to mandate revisions calculated to provide a limited hearing before termination.

IV. THE FAIR LABOR STANDARDS ACT AND RELIGIOUS ORGANIZATIONS

The Fair Labor Standards Act (FLSA),[342] among other things,[343] establishes minimum wage and overtime requirements for employees who are engaged in commerce or who are employed by an enterprise engaged in commerce.[344] The question recently confronted by the Supreme Court in *Tony and Susan Alamo Foundation v. Secretary of Labor*,[345] was whether the FLSA applies to workers employed in the commercial activities of a religious foundation.

The Alamo Foundation is a nonprofit religious organization[346] that supports its activities by operating thirty-eight commercial ventures, ranging from construction companies to hog farms.[347] The businesses are staffed by approximately 300 "associates," described by the Court as consisting mostly of former "drug addicts, derelicts or criminals" who have been converted to the Foundation's religious beliefs.[348] The Foundation does not pay the associates in

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341. *See* Perry v. Sindermann, discussed at *supra* note 340. Arbitrators sometimes conclude that the mere existence of a collective bargaining agreement provides some form of job security, regardless of whether the contract expressly requires proper cause for discharge. *See, e.g.*, Coca Cola Bottling Co. of Boston (1949) (Wallen, Arb.) (unreported, but an edited version appears in A. COX, D. BOK, & R. GORMAN, LABOR LAW CASES AND MATERIALS 597-603 (8th ed. 1977)).

342. 29 U.S.C. §§ 201-219 (1982).

343. The statute also restricts the employment of child labor. 29 U.S.C. § 212.

344. The term "employee" is defined at 29 U.S.C. § 203(e). "Enterprise" is defined by 29 U.S.C. § 203(r). "Enterprise engaged in commerce" is defined at 29 U.S.C. § 203(s). For a brief description of these jurisdictional requirements, see LAB. REL. REP. (BNA) at LRX 253-59 (Jun. 17, 1985).

345. 105 S. Ct. 1953 (1985).

346. The Foundation's purposes are to " 'establish, conduct and maintain an Evangelistic Church; to conduct religious services, to minister to the sick and needy, to care for the fatherless and to rescue the fallen, and generally to do those things needful for the promotion of Christian faith, virtue, and charity.' " 105 S. Ct. at 1957 (quoting the Foundation's Articles of Incorporation).

347. Those businesses listed by the Court are "service stations, retail clothing and grocery outlets, hog farms, roofing and electrical construction companies, a recordkeeping company, a motel, and companies engaged in the production and distribution of candy." *Id.* at 1957 & n. 2.

348. *Id.*

cash, but furnishes them with room, board, clothing, transportation, and medical care.[349]

Although the associates did not consider themselves to be employees and did not seek the statute's protection[350] (one associate testified that the idea of working for compensation was "vexing to my soul"[351]), the Secretary of Labor sued the Foundation, contending that the associates were employees for purposes of the Act. The district court ignored the associates' claim that they were mere volunteers. It found that they were "entirely dependent on the Foundation" for the necessitites of life and that, under an economic realities test, they received "wages in another form."[352]

The Supreme Court upheld the trial court's decision, finding both that the Foundation's commercial ventures were enterprises engaged in commerce and that the associates were employees. The Foundation had contended that its businesses were not "enterprises" because there was no "common business purpose."[353] The Court, however, noted that it has traditionally interpreted the Act " 'liberally to apply to its furthest reaches,' "[354] and that the statute contains no exception for commercial ventures of religious foundations or other nonprofit organizations.[355] The fact that the Secretary of Labor has "consistently interpreted the statute to reach such businesses," the Court said, was also entitled to "considerable weight."[356] Finally, the Court rejected the Foundation's claim that any "business purpose" was negated because its commercial activities were "churches in disguise," both as vehicles for spreading the

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349. *Id.*

350. *Id.* at 1958.

351. *Id.* at 1963 n. 27.

352. *Id.* at 1958. The statute defines "wage" as including "board, lodging or other facilities." 29 U.S.C. § 203(m).

The Eighth Circuit affirmed the district court's decision as to liability, but remanded on the remedy issue. Donovan v. Tony and Susan Alamo Foundation, 722 F.2d 397 (1984). The district court ordered that all associates be advised of their opportunity to submit a claim. 105 S. Ct. at 1958. The court of appeals held that the trial court should have calculated the amount of back pay due. 722 F.2d at 404-405.

353. *Id.* at 1959. The Act defines "enterprise," in part, as "the related activities performed. . . by any person or persons for a common business purpose." 29 U.S.C. § 203(r).

354. 105 S. Ct. at 1959 (quoting Mitchell v. Lublin, McGaughy & Assoc., 358 U.S. 207, 211 (1959)).

355. *Id. See* 29 U.S.C. §501(c)(3).

356. 105 S. Ct. at 1959-60. The Court quoted 29 C.F.R. § 779.214 (1984) which says, in part, that "[a]ctivities of eleemosynary, religious, or educational organizations may be performed for a business purpose." The Court also found some support for its decision in the legislative history. 105 S. Ct. at 1959-60.

gospel and as a means of providing rehabilitation to the associates. The Court simply characterized the Foundation's argument as a factual question that had been resolved against it by the lower courts.[357] Although the Court did not question the Foundation's religious activities, it found that its businesses were commercial ventures operating in competition with ordinary commercial enterprises.[358] The Court noted that "[i]t is exactly this kind of 'unfair method of competition' that the Act was intended to prevent,"[359] and concluded that "the admixture of religious motivations does not alter a business's effect on commerce."[360]

The Court then turned to the question of employee status. The Foundation argued that its associates were volunteers who expected no compensation for their efforts, an assertion supported by the testimony of associates themselves.[361] Nevertheless, the Court applied a test of "economic reality" and found the associates to be employees for purposes of the Act. Not only were the associates completely dependent on the Foundation for the necessities of life, but they expected to receive such benefits in exchange for their services. The benefits, therefore, were "wages in another form." The Court also observed that if the FLSA is interpreted to contain an exception for those who work "voluntarily," employers might be able to use their superior bargaining power to force workers outside the protection of the Act. The consequences would be felt not only by the employees directly affected, but by other workers as well, since the result would be "a general downward pressure on wages in competing businesses."[362] The Court concluded that there was little likelihood that its decision would discourage genuine volunteers because the Fair Labor Standards Act reaches only those who work in commercial ventures with the expectation of compensation.[363]

Finally, the Court rejected claims that FLSA coverage violated the religion clauses of the first amendment. Clearly, the Court did not perceive coverage under the Act to present a significant threat to religious freedom. Its treatment of the issues was both mechanical and brief. The Foundation contended that requiring the associates to accept wages in violation of their religious convictions

357. 105 S. Ct. at 1959-60.
358. *Id.* at 1960-61.
359. *Id.* at 1961.
360. *Id.*
361. *Id.*
362. *Id.* at 1962.
363. *Id.*

interfered with their free exercise of religion.[364] The Court said, however, that the associates were already receiving benefits in exchange for their services. Under the Act, such payments qualify as wages.[365] Therefore, coverage would have little effect on the associates' freedom to worship. Moreover, if the Foundation were required to pay cash, "there is nothing in the Act to prevent the associates from returning the amounts to the Foundation, provided they do so voluntarily."[366] The Court also rejected the Foundation's contention that the Act's recordkeeping requirements posed a danger of excessive governmental entanglement, prohibited by the establishment clause. The Court simply held that the recordkeeping requirements were not excessive and posed little danger since they applied only to the Foundation's commercial ventures, not its "evangelical activities."[367]

Even though *Alamo* extends coverage of the Fair Labor Standards Act, the decision would not appear to have great practical effect. Employees who receive room, board, medical care, and similar benefits are probably already paid more than the minimum wage, a fact recognized by the Court in *Alamo*.[368] Employees who work more than forty hours a week, however, are entitled to overtime compensation.[369] In view of the long hours reportedly worked by some Alamo associates,[370] the Foundation may be required to make some wage payments in cash. It seems likely, however, that employees who are genuinely committed to the Foundation's religious mission will simply return the funds.

While the Court's decision seems clearly correct as applied to the Alamo Foundation, it might raise an issue concerning the distinction between volunteers and employees. The Court's treatment of the issue was almost cavalier. It merely asserted that coverage extends only to those in commercial ventures who expect compensation. The decision, the Court said, would not affect those "who drive the elderly to church, serve church suppers, or help remodel a church home for the needy."[371] The Court, however, glossed over

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364. *Id.* at 1963.

365. *See* 29 U.S.C. § 203(m).

366. 105 S. Ct. at 1963.

367. *Id.* at 1964.

368. *Id.* at 1963. Currently, the minimum wage is $3.35 per hour. 29 U.S.C. § 206(a)(1).

369. *See* 29 U.S.C. § 207.

370. Some former associates testified that they worked 10 to 15 hours a day, 6 or 7 days a week. 105 S. Ct. at 1962 n. 22.

371. *Id.* at 1962.

the possibility that churches might expect volunteers to participate in other forms of activity as well. It is not unusual, for example, for churches to fund projects by holding bakesales, dinners, car washes and a variety of other "commercial" activities. Even though not carried on over long periods of time, such activities obviously compete, at least to some extent, with "ordinary" commercial ventures like bakeries and restaurants. One would think that a Saturday afternoon car wash operated by a church youth group is not an "enterprise engaged in commerce" and that the workers, therefore, are not "employees." They are not, however, "ministering to the comfort of the sick, elderly, indigent, infirm or handicapped."[372] Rather, they are producing income in competition with commercial ventures. It should not matter that the income will be used for religious or charitable purposes, since that fact was unavailing in *Alamo*. Moreover, the fact that the members of the youth group expect no compensation is hardly determinative; the associates in *Alamo* had little expectations either.

Presumably, the Alamo associates were deemed employees because they depended on benefits from the Foundation for extended periods of time, a fact almost certainly not present in the casual fundraising activities of some churches. Nevertheless, the Court's opinion is unnecessarily superficial and may produce confusion, rather than certainty, for religious organizations that fund programs by selling products or services also available from ordinary commercial outlets.

Conclusion

As noted at the outset, even though the Court has decided important cases, neither of the last two terms has provided any major surprises. The Court continues to be charitable to labor arbitration when doing so is compatible with a decision apparently reached on other grounds.[373] Similarly, *Sure-Tan*, *City Disposal* and *Action Automotive* indicate that the Court has kept intact its version of deference

372. These were activities listed by the Court as having been recognized as volunteer work by the Secretary of Labor. *Id.*

373. Although the *Allis-Chalmers* decision was purportedly motivated by deference to the arbitral forum, recent cases raise questions about the Court's continued commitment to arbitration. *See, e.g.*, *City Disposal*, *supra* notes 4-33 and accompanying text; Metropolitan Edison Co. v. NLRB, 103 S. Ct. 1467 (1983) (two arbitration decisions on same subject not sufficient to establish contractual waiver of statutory right); Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981) (arbitration case no bar to subsequent claim under Fair Labor Standards Act); Alexander v. Gardner-Denver Sewer

to administrative expertise,[374] a factor evident in *Alamo* as well.

The decisions do, however, produce some consternation. *Sure-Tan* evidences insensitivity to the NLRB's dilemma of having to remedy egregious unfair labor practices on the part of employers through traditional measures. The same detachment is apparent in the *Loudermill* opinion, which purports to protect due process rights, while approving a procedure that is not likely to be of much significance to public employees suffering discharge. By far the most troublesome decision is *Stotts*. The Court's opinion is unnecessarily vague and, for that reason, appears to jeopardize significant gains in equal opportunity and affirmative action. One can only hope that the Court will be more careful when it confronts the issue anew next term.

Co., 415 U.S. 36 (1974) (arbitration case no bar to subsequent Title VII claim concerning same facts). *But see* W.R. Grace & Co. v. Local 759, Rubber Workers, 103 S. Ct. 2177 (1983).

374. It is not easy to predict when the Court will defer to the Board's interpretation of the statute. As one commentator has observed, "All that can be said with confidence is that courts tend to believe that their own competence matches that of the Board, and finally surpasses it, as the finding moves from pure fact, to mixed questions, to issues of pure statutory construction." R. GORMAN, *supra* note 22, at 13.

Deferential opinions like *Action Automotive* are not unusual. *See, e.g.*, Charles D. Bonnano Linen Service, Inc. v. NLRB, 454 U.S. 404, 419 (1982) ("The dissenting Justices would have us substitute our judgment for those [sic] of the Board with respect to the issues that Congress intended the Board should resolve. This we are unwilling to do.").

Other cases, however, refuse to accept NLRB interpretations. *See, e.g.*, Edward J. Debartolo Corp. v. NLRB, 103 S. Ct. 2926 (1983) (rejecting the Board's interpretation that handbilling was protected by the publicity proviso to § 8(b)(4)(B)). *See also* NLRB v. Savair Mfg. Co., 414 U.S. 270, 278 (1973) (In reviewing the agency's decision, Justice Douglas stated that "the Board's analysis ignores the realities of the situation.").