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## The Second Decade of Title VII: Refinement of the Remedies

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## *SYMPOSIUM*

### THE SECOND DECADE OF TITLE VII: REFINEMENT OF THE REMEDIES

#### INTRODUCTION

Title VII of the Civil Rights Act of 1964<sup>1</sup> was intended to assure for all citizens of the United States the right to equal employment opportunities without regard to "race, color, religion, sex, or national origin."<sup>2</sup> Its enactment was a milestone in the course of the same general social movement that produced the landmark decision of *Brown v. Board of Education*.<sup>3</sup> As such, Title VII has effected major changes in the nation's employment practices, although it is now apparent that some aspects of those changes most likely were unforeseen when the Act became effective. During the first decade under the Act, it was discovered that violations of the Act could be found in facially neutral employment practices; it seems likely at this time that the second decade will be marked by confrontation of difficult questions concerning the appropriate judicial, administrative, and labor relations remedies for curing the employment practices that have been found discriminatory.

#### *An Overview of Title VII*

The objective of Title VII was the protection of the rights of "minority" citizens to an equal opportunity for jobs and later promotions. The initial statute prohibited discrimination by employers,<sup>4</sup>

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1. 42 U.S.C. §§ 2000e to 2000e-15 (1970), *as amended*, 42 U.S.C. §§ 2000e to 2000e-17 (Supp. II, 1972).

2. 42 U.S.C. § 2000e-2(a) (Supp. II, 1972), *amending* 42 U.S.C. § 2000e-2(a) (1970).

3. 347 U.S. 483 (1954).

4. The amended Act provides:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to

employment agencies,<sup>5</sup> and labor organizations.<sup>6</sup> In the 1972 amendments to Title VII,<sup>7</sup> the prohibitions of the Act were extended to state, county, and municipal governing bodies.<sup>8</sup> As originally proposed, the statute was to provide coverage only to those individuals who were subjected to discriminatory treatment on the basis of race, color, religion, or national origin.<sup>9</sup> Sex was added later to these categories,<sup>10</sup> but the proposed inclusion of age as a prohibited basis

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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; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (Supp. II, 1972), amending 42 U.S.C. § 2000e-2(a) (1970).

5. 42 U.S.C. § 2000e-2(b) (1970) provides: "It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin."

6. The amended Act provides:

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

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

42 U.S.C. § 2000e-2(c) (Supp. II, 1972), amending 42 U.S.C. § 2000e-2(c) (1970).

7. Pub. L. No. 92-261, 86 Stat. 103 (1972). For a general discussion of the 1972 Act, see Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824 (1972).

8. 42 U.S.C. § 2000e(h) (Supp. II, 1972).

9. H.R. REP. NO. 914, 88th Cong., 1st Sess. 2 (1963).

10. It would appear that the prohibition against sex discrimination was not included to protect women, but rather was an attempt by the opponents of the Act to complicate its provisions and thus assist in its defeat. The inclusion of "sex" in Title VII was proposed by Representative Smith (D-Va.) in the House Rules Committee. The only Congressmen vocally supporting the amendment all voted *against* the final bill. 110 CONG. REC. 2804-05 (1964). However, every Congressman voicing opposition to the sex amendment voted *for* the Civil Rights Act. *Id.* at 2804. See also Note, *Sex Discrimination in Employment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964*, 1968 DUKE L.J. 671, 677; Comment, *Sex Discrimination in Employment or Can Nettie Play Professional Football?*, 4 U. SAN FRAN. L. REV. 323, 334 (1970); 32 OHIO ST. L.J. 923, 929 (1971).

for discrimination was rejected.<sup>11</sup>

A new federal agency, the Equal Employment Opportunity Commission (EEOC), was created to implement the congressional mandate of equal opportunity in the labor market.<sup>12</sup> The EEOC's authority was constrained, however, by denying the Commission the ability to sue in federal court<sup>13</sup> or to issue cease-and-desist orders.<sup>14</sup> Instead the agency was limited to seeking conciliation agreements between the parties and to issuing right-to-sue letters to grievants.<sup>15</sup>

Title VII specifically places the ultimate authority for protecting equal employment opportunities in the federal judiciary.<sup>16</sup> As the final arbiter of discrimination disputes, the courts to this date have been unwilling to defer to the arbitration process<sup>17</sup> or to state administrative agencies.<sup>18</sup> Although a number of preliminary steps are provided by the Act in order to permit EEOC conciliation efforts,<sup>19</sup> an adversary determination can be made only through a judicial proceeding. Thus the courts have been very liberal in permitting class actions,<sup>20</sup> ordering preliminary relief,<sup>21</sup> and employing a broad scope of proof and pretrial discovery.<sup>22</sup>

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11. Amendment to Section 704(a)(1) of H.R. 7152, 88th Cong., 2d Sess. (1972).

12. 42 U.S.C. § 2000e-4 (1970).

13. 42 U.S.C. § 2000e-5(e) (1970). However, the EEOC was empowered to bring civil suits by the 1972 amendments to Title VII. 42 U.S.C. § 2000e-5(f) (Supp. II, 1972).

14. 42 U.S.C. § 2000e-5 (1970).

15. 42 U.S.C. § 2000e-5(a) (1970). The 1972 amendments, while continuing to recognize a private party's right of action, authorize the EEOC to bring suit in federal district court against a nongovernmental employer who refuses to discontinue voluntarily a discriminatory employment practice. 42 U.S.C. § 2000e-5(f)(1) (Supp. II, 1972).

16. 42 U.S.C. § 2000e-5(f) (Supp. II, 1972), amending 42 U.S.C. § 2000e-5(e) (1970).

17. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). See also Isaacson & Zifchak, *Fair Employment Forums After Alexander v. Gardner-Denver Co.: Separate and Unequal*, 16 WM. & MARY L. REV. 439 (1975).

18. *Batiste v. Furnco Constr. Corp.*, 503 F.2d 447 (7th Cir. 1974), cert. denied, 95 S. Ct. 1127 (1975).

19. 42 U.S.C. §§ 2000e-5, e-6 (Supp. II, 1972).

20. See generally *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421 (8th Cir. 1970); *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496 (5th Cir. 1968).

21. See generally *United States v. Hayes Int'l Corp.*, 415 F.2d 1038 (5th Cir. 1969); *Pennsylvania v. O'Neill*, 348 F. Supp. 1084 (E.D. Pa. 1972), modified on other grounds, 473 F.2d 1029 (3d Cir. 1973).

22. See generally *Rios v. Local 638, Steamfitters*, 326 F. Supp. 198 (S.D.N.Y. 1971); *Baxter v. Savannah Sugar Ref. Corp.*, 46 F.R.D. 56 (S.D. Ga. 1969); *Georgia Power Co. v. EEOC*, 295 F. Supp. 950 (N.D. Ga. 1968), aff'd, 412 F.2d 462 (5th Cir. 1969); *United States v. Building & Constr. Trades Council*, 271 F. Supp. 454 (E.D. Mo. 1966).

*The First Decade of Title VII*

The period from 1964 to 1974 marked a major change, not only in the composition of the national work force, but, perhaps more importantly, in the attitudes and personnel policies of those involved in the labor market. It was a decade in which employment expectations and opportunities of classes protected under Title VII, particularly blacks and women, were expanded greatly. Employers and unions were forced to reconsider carefully their standards for hiring, promotion, and membership. It became increasingly obvious as the enforcement of Title VII expanded that the initial congressional conception of employment discrimination as an overt policy by employers was in error.<sup>23</sup> Rather, litigation has brought the realization that most discriminatory practices are the result of longstanding procedures which, while nondiscriminatory on their face, adversely affect minority groups.<sup>24</sup>

The first decade of Title VII can be characterized as a period during which the courts were confronted primarily with the need to determine what actions constituted illegal discrimination within the meaning of the Act. Concurrently, there was a need for the courts to clarify a number of procedural uncertainties in order to develop effective mechanisms to resolve allegations of employment discrimination.

During the first 10 years, the courts thus attempted to answer many of the basic questions concerning what constitutes race discrimination,<sup>25</sup> sex discrimination,<sup>26</sup> religious discrimination,<sup>27</sup> and

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23. Sape, *The Use of Numerical Quotas To Achieve Integration in Employment*, 16 WM. & MARY L. REV. 481, 482 (1975).

24. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

25. See generally *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (racially biased testing); *United States v. N.L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973) (seniority); *United States v. Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973) (testing, seniority); *Moody v. Albemarle Paper Co.*, 474 F.2d 134 (4th Cir. 1973) (testing); *United States v. Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971) (seniority); *United States v. Local 36, Sheet Metal Workers*, 416 F.2d 123 (8th Cir. 1969) (union discrimination); *Local 53, Int'l Ass'n of Heat & Frost Workers v. Vogler*, 407 F.2d 1047 (5th Cir. 1969) (union discrimination).

26. See generally *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir. 1971) (marital status); *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971) (customer preference); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969) (weight-lifting limitations); *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969) (weight-lifting limitations); *LeBlanc v. Southern Bell Tel. & Tel. Co.*, 333 F. Supp. 602 (E.D. La. 1971) (hour restrictions).

27. See generally *King's Garden, Inc. v. FCC*, 7 FEP Cases 1083 (D.C. Cir. 1974); *Dewey*

discrimination based upon national origin.<sup>28</sup> Likewise the courts have established that a statistical showing of disparity between the composition of the employer's work force and the surrounding population will support a *prima facie* case of discrimination,<sup>29</sup> and that statistics alone at times may prove a violation.<sup>30</sup> In line with the reliance upon statistical evidence, the courts furthermore have held that proof of intent to discriminate is not required,<sup>31</sup> and that facially neutral practices are unlawful if they perpetuate the effects of past discrimination.<sup>32</sup>

### *The Second Decade: Remedies for Discrimination*

If the first decade can be viewed as primarily devoted to determining what constitutes a violation, it appears that the second decade of Title VII will focus upon the equally difficult issue of determining legal and effective methods for assuring to all workers the equal opportunities mandated by the Act and remedying the damage done by practices deemed to be discriminatory. No other area of Title VII enforcement is more important to employers, employees, and unions, or more controversial, because it is the remedies devel-

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v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), *aff'd*, 402 U.S. 689 (1971); Shaffield v. Northrop Worldwide Aircraft Servs., Inc., 373 F. Supp. 937 (M.D. Ala. 1974); Claybaugh v. Pacific Northwest Bell Tel. Co., 355 F. Supp. 1 (D. Ore. 1973).

28. See generally Morton v. Mancari, 417 U.S. 535 (1974); Espinoza v. Farah Mfg. Co., Inc., 414 U.S. 86 (1973).

29. See United States v. Chesapeake & O. Ry., 471 F.2d 582 (4th Cir. 1972), *cert. denied*, 411 U.S. 939 (1973); United States v. Local 169, Carpenters, 457 F.2d 210 (7th Cir.), *cert. denied*, 409 U.S. 851 (1972); Bing v. Roadway Express, Inc., 444 F.2d 687 (5th Cir. 1971). In United States v. Local 86, Ironworkers, 443 F.2d 544 (9th Cir. 1971), the court stated: "It is our belief that the often-stated aphorism, 'statistics often tell much and courts listen,' has particular application in Title VII cases." *Id.* at 551.

30. See Reed v. Arlington Hotel, Inc., 476 F.2d 721 (8th Cir. 1973); Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970).

31. See Griggs v. Duke Power Co., 401 U.S. 424 (1971); Local 189, Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); Clark v. American Marine Corp., 304 F. Supp. 603 (E.D. La. 1969).

32. Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971) (no transfer policy); Local 189, Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970) (seniority devices); United States v. Local 36, Sheet Metal Workers, 416 F.2d 123 (8th Cir. 1969) (work experience criteria for job referrals).

This principle was adopted by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424, 430 (1970), the Court stating: "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."

oped in the recovery stage that will have the most far reaching impact upon the national labor market.

The purpose of this *Symposium*, therefore, is to facilitate the resolution of problems raised by the enforcement of Title VII, focusing upon the present and potential difficulties inherent in fashioning appropriate remedies. The Articles included address the future role of arbitration as a forum for resolving discrimination disputes,<sup>33</sup> the use of quotas in hiring and promotion,<sup>34</sup> and the "recovery" aspects of Title VII class actions.<sup>35</sup> Also included is an evaluation by practitioners of the administrative remedies provided by EEOC regulations<sup>36</sup> and a summary of the most recent judicial refinements of employment discrimination remedies.<sup>37</sup>

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33. Isaacson & Zifchak, *Fair Employment Forums After Alexander v. Gardner-Denver Co.: Separate and Unequal*, 16 WM. & MARY L. REV. 439 (1975).

34. Sape, *The Use of Numerical Quotas To Achieve Integration in Employment*, 16 WM. & MARY L. REV. 481 (1975).

35. Barnard, *Title VII Class Actions: The "Recovery Stage"*, 16 WM. & MARY L. REV. 507 (1975).

36. Elisburg, *Equal Employment Opportunity Commission Procedural Regulations: An Evaluation by the Practicing Bar*, 16 WM. & MARY L. REV. 555 (1975).

37. Levitt, *Title VII of the Civil Rights Act: A Review of Significant Recent Decisions*, 16 WM. & MARY L. REV. 529 (1975).