

# William & Mary Law Review

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Volume 16 (1974-1975)  
Issue 3 Symposium: *The Second Decade of  
Title VII: Refinement of the Remedies*

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Article 6

March 1975

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Robert A. Levitt

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### Repository Citation

Robert A. Levitt, *Title VII of the Civil Rights Act: A Review of Significant Recent Decisions*, 16 Wm. & Mary L. Rev. 529 (1975), <https://scholarship.law.wm.edu/wmlr/vol16/iss3/6>

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## TITLE VII OF THE CIVIL RIGHTS ACT: A REVIEW OF SIGNIFICANT RECENT DECISIONS

ROBERT A. LEVITT\*

Title VII of the Civil Rights Act of 1964<sup>1</sup> has entered its second decade as an instrument for eradicating employment discrimination based upon "race, color, religion, sex, or national origin."<sup>2</sup> During the past decade vast changes have occurred in the racial and sexual composition of the American work force; collective bargaining agreements have been revised significantly; recruitment, testing, and disciplinary policies have undergone substantial alteration; and court calendars have become filled with equal employment opportunity cases.<sup>3</sup> Although the overall financial impact of Title VII upon the employer is incalculable, an official of the Equal Employment Opportunity Commission (EEOC)<sup>4</sup> has estimated that more than \$100 million was recovered during one year-and-one-half period in back pay and wage adjustments in the steel and communications industries alone.<sup>5</sup> Presumably, because of the EEOC's greatly expanded jurisdiction and power after adoption of the 1972 amendments to Title VII,<sup>6</sup> employment discrimination recoveries will increase appreciably in the future.

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\*B.A., Brooklyn College; J.D., Brooklyn Law School. Industrial Relations Counselors Professor in Human Relations and Visiting Professor of Law, University of Virginia.

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

2. The statute explicitly prohibits employment discrimination on the basis of these five criteria on the part of an employer, 42 U.S.C. § 2000e-2(a) (Supp. II, 1972), *amending* 42 U.S.C. § 2000e-2(a) (1970), an employment agency, 42 U.S.C. § 2000e-2(b) (1970), or a labor organization, 42 U.S.C. § 2000e-2(c) (Supp. II, 1972), *amending* 42 U.S.C. § 2000e-2(c) (1970). The comprehensiveness of the prohibition is constrained, however, by the narrow definition of employer, which, although expanded in 1972, still excludes a substantial portion of the total labor force from Title VII protection. *See* 42 U.S.C. § 2000e(b) (Supp. II, 1972).

3. The federal courts have jurisdiction of actions brought under Title VII. 42 U.S.C. § 2000e-5(f) (Supp. II, 1972), *amending* 42 U.S.C. § 2000e-5(e) (1970).

4. The EEOC is the administrative agency created to oversee the accomplishment of the Act's purposes. *See* 42 U.S.C. §§ 2000e-4(a) to -(g) (Supp. II, 1972), *amending* 42 U.S.C. §§ 2000e-4(a) to -(i) (1970).

5. Copus, *New Directions in Equal Employment*, 27 N.Y.U. CONF. LAB. 125, 145-46 (1974).

6. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, *amending* 42 U.S.C. §§ 2000e to 2000e-15 (1970). The 1972 amendments to Title VII brought within the coverage of the Act employees of state and local governments, and the federal government, all previously exempted, and expanded the coverage of smaller employers. The amendments also grant the EEOC an independent right to sue in federal court to enforce Title VII. Prior to the 1972 amendments the EEOC was limited to issuing a notice of right to sue to an aggrieved individual after he filed his charge with the EEOC. For a general discussion of the

Enactment of Title VII has engendered two waves of litigation: first came the cases that interpreted or established the basic law under the Act, followed by back pay litigation, which has been described as a "blood bath."<sup>7</sup> Recent Title VII decisions likewise have raised complex obstacles to attempts to develop a workable and realistic procedure to eliminate discrimination in employment. A review of several of these recent developments, including the issues of seniority, sex discrimination, the interrelationship of Title VII to existing federal legislation, the use of goals and quotas, and the controversy surrounding the appropriate forum for obtaining redress for alleged discriminatory practices, will indicate the fringes of employment discrimination law that need refinement in the coming years.

### IMPACT OF TITLE VII UPON THE SENIORITY SYSTEM

The authors of the Civil Rights Act of 1964 obviously were aware of the potential impact of Title VII upon long-established seniority systems. Section 703(h) of the Act specifically provided: "[I]t shall not be an unlawful employment practice for an employer to apply . . . different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system . . ."<sup>8</sup> Legislative history of Title VII also indicates that Congress did not intend to disturb bona fide seniority systems already in existence.<sup>9</sup> Notwithstanding this statutory language and legislative history, the courts have held that seniority systems, racially neutral on their face, are

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1972 amendments, see Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824 (1972).

7. 87 LAB. REL. REP. 70 (Sept. 16, 1974) (statement by Michael H. Gottesman, attorney for the United Steelworkers of America).

8. 42 U.S.C. § 2000e-2(h) (1970).

9. For example, Senators Clark and Case, floor managers for the Act, submitted a memorandum to the Senate to explain the potential impact upon seniority systems. The memorandum stated in part:

Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier.

110 CONG. REC. 7213 (1964).

not bona fide systems if they operate to perpetuate the effects of past discrimination. Commencing with the landmark decision in *Quarles v. Philip Morris, Inc.*,<sup>10</sup> the courts have ordered sweeping changes in the seniority provisions of many collective bargaining agreements. Alterations have been required in the operation of plantwide seniority,<sup>11</sup> job posting and bidding,<sup>12</sup> preference in transfers,<sup>13</sup> "red circling" of rates for transferring minorities or females,<sup>14</sup> and special training programs.<sup>15</sup> Such a wholesale attack has prompted one prominent union attorney to state: "It's absolute madness for companies to function with anything less than plant-wide seniority . . . I am amazed to see that many companies are courting disaster."<sup>16</sup>

Recent indications are that the earlier court decisions may foreshadow an even stronger attack on existing seniority systems. In *Patterson v. American Tobacco Co.*,<sup>17</sup> a district court found that women and blacks had in the past been discriminated against in promotion, supervisory jobs, and job assignments. The court then ordered the most sweeping remedy ever to correct employment discrimination. First, the company was ordered to implement immediately a companywide posting and bidding system on every nonsupervisory job, whether vacant or filled, and, except for certain named jobs, no job qualifications were to be required except "seniority and a willingness to learn the job."<sup>18</sup> Second, if an incumbent is

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10. 279 F. Supp. 505 (E.D. Va. 1968).

11. See, e.g., *United States v. Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973), noted in Comment, *The Georgia Power Case: Another Federal Agency Comes of Age, or "My God! Our Employer-Client's Testing Practices Are Being Challenged by the EEOC?!"*, 57 MARQ. L. REV. 515 (1974); *Rock v. Norfolk & W. Ry.*, 473 F.2d 1344 (4th Cir.), cert. denied, 412 U.S. 907 (1973); *Papermakers Local 189 v. United States*, 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970).

12. See, e.g., *United States v. Sheet Metal Workers Local 36*, 416 F.2d 123 (8th Cir. 1969); *EEOC v. Plumbers Local 189*, 311 F. Supp. 468 (S.D. Ohio 1970), vacated on other grounds, 438 F.2d 408 (6th Cir.), cert. denied, 404 U.S. 832 (1971); *Dobbins v. Electrical Workers Local 212*, 292 F. Supp. 413 (S.D. Ohio 1968).

13. See, e.g., *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974). See also 11 HOUSTON L. REV. 1296 (1974).

14. See, e.g., *Hicks v. Crown Zellerbach Corp.*, 321 F. Supp. 1241 (E.D. La. 1971). See note 19 *infra* & accompanying text.

15. See, e.g., *Franks v. Bowman Transp. Co.*, 495 F.2d 398 (5th Cir. 1974), cert. granted, 95 S. Ct. 1421 (1975) (No. 74-728); *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971).

16. 87 LAB. REL. REP. 70 (Sept. 16, 1974) (statement by Michael H. Gottesman).

17. 8 FEP Cases 778 (E.D. Va. 1974).

18. *Id.* at 783.

displaced by a minority or female employee, he is to be downgraded and "red-circled."<sup>19</sup> Third, regarding supervisory jobs, no vacancies were to be filled with other than females or blacks until the percentage of female and black supervisors approximates the percentage of blacks and females included in the total work force for the relevant Standard Metropolitan Statistical Area.<sup>20</sup> The court acknowledged that the "bumping" involved "will undoubtedly create morale problems, if not immediate economic problems, for those displaced," but it considered the relief to be justified in view of the employer's alleged past discrimination.<sup>21</sup>

Likewise, the recent decisions in *Watkins v. Steelworkers Local 2369*<sup>22</sup> also indicate an increased willingness of the federal judiciary to redraft existing seniority systems. In the first *Watkins* decision,<sup>23</sup> the court held that the standard provision in collective bargaining agreements requiring the layoff first of the last-hired employee ("last-in, first-out") violated Title VII when a history of discrimination in hiring was demonstrated. This discrimination was held to have prevented blacks and other minorities from accumulating the seniority needed to avoid being the first laid off during an economic slowdown.<sup>24</sup> This decision, however, ignored the clear legislative history of the Act, which had indicated that such recall provisions would not be affected by the law. For example, Senator Clark, the floor manager of the bill, submitted a statement from the Justice Department interpreting Title VII which stated: "Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by title VII."<sup>25</sup> The court overcame the import of the legislative history by ruling that section 703(h)<sup>26</sup> of the Act protected only bona fide seniority systems

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19. *Id.* at 784. An employee is said to be "red circled" until the wage level for the job he or she holds reaches the level at which he or she is being paid.

20. *Id.*

21. *Id.*

22. 369 F. Supp. 1221 (E.D. La. 1974) (liability); 8 FEP Cases 729 (E.D. La. 1974) (remedy).

23. 369 F. Supp. 1221 (E.D. La. 1974).

24. *Id.* at 1226.

25. 110 CONG. REC. 7207 (1964). See also 110 CONG. REC. 6563-64 (1964) (remarks of Senator Kuchel).

26. 42 U.S.C. § 2000e-2(h) (1970).

and that the procedure in *Watkins* was not bona fide.<sup>27</sup> The court also dismissed the objection that the black employees who would benefit by the decision were not those who were denied employment as a result of the original discrimination; the purpose of the relief was to ensure that, although the company had refused to hire blacks for twenty years, the plant would not operate without black employees for the next decade because of the layoffs.<sup>28</sup>

In the second *Watkins* decision,<sup>29</sup> which directed the remedy, the court ordered the company to reinstate a percentage of laid-off black employees. The percentage remaining laid off was to be no larger than the percentage of black employees in the work force when the layoffs commenced.<sup>30</sup> No employee currently working was to be laid off as a result of this decision; instead, the available work was to be apportioned among the entire work force until attrition or improved economic conditions resulted in a "normalization" in the number of employees. The decision had a particularly severe financial impact upon the employer because the court also mandated that the entire work force was to receive wages based on a normal 40-hour work-week, whether or not 40 hours of work actually were performed.<sup>31</sup>

The Court of Appeals for the Seventh Circuit, however, in *Waters v. Wisconsin Steel Works*,<sup>32</sup> reached a result opposite to that in *Watkins*, holding that a last-in, first-out seniority system was lawful, even when prior discrimination in hiring had existed. Relying on the Act's legislative history, the court found that Congress had not intended to outlaw such a provision.<sup>33</sup> It distinguished this system from that present in cases dealing with departmental or job

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27. 369 F. Supp. at 1228-29. The finding that the employer's seniority system was not bona fide was based primarily upon a history of past discrimination. The court relied upon the interpretation of section 703(h) given in *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505, 517 (E.D. Va. 1968). The court stated:

The defendants here cannot prevail under [the *Quarles*] standard: the seniority system at the Harvey plant is discriminatory for the same reason that department or job seniority systems in formerly segregated plants are discriminatory—because blacks were in the past denied access to the seniority unit, and were thereby prevented from accumulating relevant seniority.

*Id.* at 1228.

28. *Id.* at 1231.

29. 8 FEP Cases 729 (E.D. La. 1974).

30. *Id.* at 730.

31. *Id.*

32. 502 F.2d 1309 (7th Cir. 1974), petition for cert. filed, 43 U.S.L.W. 3505 (U.S. Mar. 18, 1975)(No. 74-1064).

33. *Id.* at 1318-19.

seniority systems, on the basis that in those cases blacks were given seniority credit for time actually worked in formerly all-black jobs.<sup>34</sup> The court held that to give preference to blacks in a last-in, first-out situation would provide newly hired blacks with fictional seniority and would amount to preferential rather than remedial treatment.<sup>35</sup> Moreover, the white employees would bear the burden of the past discrimination, which had not been created by them, but by their employer; Title VII, said the court, was "not designed to nurture such reverse discriminatory preferences."<sup>36</sup>

Similarly, in *Cox v. Allied Chemical Corp.*,<sup>37</sup> a federal district court in Louisiana recently rejected the *Watkins* rationale by holding that black employees were estopped from challenging a layoff system based upon seniority without a showing that they themselves are prevented from acquiring the necessary seniority because of past employment discrimination. The court stressed that under the "rightful place" theory, black employees are assured of the first opportunity to move into vacancies in positions for which they are qualified and which they would have occupied but for wrongful discrimination.<sup>38</sup> In *Franks v. Bowman Transportation Co.*,<sup>39</sup> the Court of Appeals for the Fifth Circuit held a system of department-wide seniority to be illegal because it locked in minority employees, although discrimination against newly hired employees had ceased. The court therefore required minority employees to be provided full companywide seniority for transfer purposes "for a reasonable time and for all purposes after transfer in the new department."<sup>40</sup> But the Court of Appeals for the Third Circuit, in *Jersey Central Power & Light Co. v. IBEW Local Unions*,<sup>41</sup> held that a seniority system that

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34. *Id.* at 1318, 1320.

35. *Id.* at 1319.

36. *Id.* at 1320. See also Slate, *Preferential Relief in Employment Discrimination Cases*, 5 LOYOLA U.L.J. (Chicago) 315 (1974).

37. 382 F. Supp. 309 (M.D. La. 1974).

38. *Id.* at 319-20. The court concluded, however, that the collective bargaining contract in question, which provided for the loss of unit seniority upon transfer from one unit to another, did perpetuate the effects of past racial discrimination. *Id.* at 320. Therefore, the court found that two blacks, who had maintenance-unit backgrounds, probably would have been transferred to the maintenance unit but for the unlawful seniority system. Hence, the layoffs of these two black employees, while retaining junior white employees in the maintenance unit, was unlawful. *Id.* at 321.

39. 495 F.2d 398 (5th Cir. 1974), cert. granted, 95 S. Ct. 1421 (1975) (No. 74-728).

40. *Id.* at 416.

41. 9 FEP CASES 117 (3d Cir. Jan. 30, 1975).

provided for layoffs by reverse order of seniority was not contrary to public policy, even though the court specifically found that female and minority group employees were disadvantaged by the system. Significantly, the court rejected the *Watkins* approach and held that a plantwide, facially neutral seniority system was bona fide within the meaning of section 703(h) of the Act, although it had a disproportionate impact upon female and minority group workers as a result of past employment discrimination.<sup>42</sup> The court reasoned from the legislative history that "Congress did not intend that a *per se* violation of the Act occur whenever females and minority group persons are disadvantaged by reverse seniority layoffs."<sup>43</sup>

The question of the legality of "last-in, first-out" clauses, which appear in the vast majority of collective bargaining agreements in this country, is one of the most critical issues in the equal employment area at present. On the one hand, it is argued that they threaten largely to undo the efforts of the last decade to eliminate the effects of discrimination in employment; on the other hand, it is contended that such clauses specifically are sanctioned by the language and the legislative history of the Act which also proscribes the creation of fictional seniority and preferential treatment. The conflicting results in cases such as *Watkins* and *Waters* therefore create a pressing need for Supreme Court resolution of this significant Title VII issue.

### SEX DISCRIMINATION

Sex discrimination in employment was the subject of several important decisions in 1974. The leading case involving discrimination on the basis of sex was the Supreme Court's decision in *Cleveland Board of Education v. LaFleur*.<sup>44</sup> In *LaFleur*, the Court held that to require pregnant teachers to leave their jobs five months in one case and four months in a consolidated case<sup>45</sup> before the birth of their

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42. *Id.* at 128-29.

43. *Id.* at 129. See also *United States v. Jacksonville Terminal Co.*, 451 F.2d 418, 445 (5th Cir. 1971); Note, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1159-60 (1971); Note, *Business Necessity Under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L.J. 98, 100-01 n.17 (1974).

44. 414 U.S. 632 (1974), *aff'g* 465 F.2d 1184 (6th Cir. 1972), *rev'g* 326 F. Supp. 1208 (N.D. Ohio 1971).

45. *Cohen v. Chesterfield County School Board*, 414 U.S. 632 (1974), *rev'g* 474 F.2d 395 (4th Cir. 1973), *rev'g* 326 F. Supp. 1159 (E.D. Va. 1971).



children violated the fourteenth amendment due process clause.<sup>46</sup> The Court viewed the use of a mandatory maternity leave policy as an arbitrary cutoff that bore no rational relationship to the states' interests in preserving the continuity of instruction. The Court did not determine, however, whether classifications based on sex are inherently suspect.<sup>47</sup>

In *Geduldig v. Aiello*,<sup>48</sup> the Supreme Court held that the California disability insurance program, which excluded disabilities resulting from a normal pregnancy and childbirth, did not violate the equal protection clause of the fourteenth amendment. Although *Aiello* was not concerned directly with Title VII, it is now arguable that disparate treatment based on pregnancy does not in and of itself constitute illegal discrimination.<sup>49</sup> Application of *Aiello* to Title VII suits has, however, resulted in a split among federal district courts. One court, relying on *Aiello*, refused to award disability benefits allegedly due as a result of pregnancy,<sup>50</sup> while four others have reached the opposite conclusion, holding that the failure to provide disability benefits to pregnant employees under a private

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46. U.S. CONST. amend. XIV, § 2. See generally Comment, *Due Process and the Pregnant Worker: The New Weapon in the Equal Rights Arsenal*, 23 EMORY L.J. 787 (1974); Comment, *Love's Labors Lost: New Conceptions of Maternity Leaves*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 260 (1972); Note, *Equal Protection and the Pregnancy Leave Case*, 34 OHIO ST. L.J. 628 (1973); Note, *LaFleur v. Cleveland Board of Education: An Unarticulated Application of the New Approach to Equal Protection*, 35 U. PITT. L. REV. 141 (1973); Comment, *Mandatory Maternity Leave: Title VII and Equal Protection*, 14 WM. & MARY L. REV. 1026 (1973); 23 DRAKE L. REV. 690 (1974); 27 SW. L.J. 542 (1973); 5 U. TOL. L. REV. 366 (1974).

47. See *Frontiero v. Richardson*, 411 U.S. 677 (1973). See generally Comment, *Toward Sexual Equality? An Analysis of Frontiero v. Richardson*, 59 IOWA L. REV. 377 (1973); 7 CREIGHTON L. REV. 69 (1973); 12 DUQUESNE L. REV. 982 (1974); 51 J. URBAN L. 535 (1974); 5 LOYOLA U.L.J. (Chicago) 295 (1974); 5 RUTGERS-CAMDEN L.J. 348 (1974); 5 SETON HALL L. REV. 958 (1974); 48 TUL. L. REV. 710 (1974).

48. 94 S. Ct. 2485 (1974). See generally 27 VAND. L. REV. 551 (1974).

49. The result in *Aiello* may have been foreshadowed by the Court's decision only two months earlier in *Kahn v. Shevin*, 94 S. Ct. 1734 (1974), which upheld a Florida statute that gave widows, but not widowers, a special exemption from property taxes. Observing that "[g]ender has never been rejected as an impermissible classification in all instances," the Court held that discrimination by a state tax law in favor of a certain class is not unlawful if based on a reasonable distinction or difference in state policy. *Id.* at 1737-38 n.10.

50. *Communications Workers of America v. American Tel. & Tel. Co.*, 379 F. Supp. 679 (S.D.N.Y. 1974), *rev'd*, 10 FEP Cases 435 (2d Cir. Apr. 5, 1975) (question of whether disparate treatment of pregnancy-related disabilities constitutes per se discrimination under the fourteenth amendment or Title VII). See also *Newmon v. Delta Air Lines*, 374 F. Supp. 238 (N.D. Ga. 1973) (denial of sickness and disability benefits to a pregnant woman not sex discrimination under Title VII since pregnancy does not qualify as sickness or disability) (pre-*Aiello* decision).

insurance plan is violative of Title VII.<sup>51</sup>

Alleged sex discrimination in employment directly affecting professional women confronted the Court of Appeals for the Second Circuit in *Faro v. New York University*,<sup>52</sup> the court holding that a female associate professor properly was denied an injunction under Title VII to prevent the University from terminating her employment. Refusing to be forced to judge the relative merits of professionals, the court stated that the plaintiff was no different from hundreds of others who have to make adjustments in life when they are unable to get the job they desire.<sup>53</sup>

Beyond the question of discrimination based upon pregnancy, sex discrimination issues largely are being treated by the EEOC and the courts as part of the broader problem of discrimination against minority groups. Females, for example, are benefiting from decisions dealing with seniority, promotions, quotas, and hiring because they suffered from abuses in these areas which cannot be treated accurately as purely race or sex discrimination issues. Although the proposed equal rights amendment<sup>54</sup> may have some impact on this

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51. *Sale v. Waverly-Shell Rock Bd. of Educ.*, 9 FEP CASES 138 (N.D. Iowa Jan. 8, 1975); *Vineyard v. Hollister Elementary School Dist.*, 8 FEP Cases 1009 (N.D. Cal. 1974); *Gilbert v. General Elec. Co.*, 375 F. Supp. 367 (E.D. Va. 1974); *Wetzel v. Liberty Mut. Ins. Co.*, 372 F. Supp. 1146 (W.D. Pa. 1974), *rev'd*, 9 FEP CASES 227 (3d Cir. Feb. 12, 1975).

The recent decision by the Court of Appeals for the Third Circuit in *Wetzel v. Liberty Mutual Ins. Co.*, 9 FEP CASES 227 (3d Cir. Feb. 12, 1975), was the first appellate court opinion on the issue of the relationship of Title VII to pregnancy and disability insurance. The court ruled that an employer's income protection plan which does not provide for benefits for disability due to pregnancy or for any disability related to pregnancy is violative of Title VII. The court refused to accept "voluntariness" as a justification for the exclusion of pregnancy benefits since the plan covered disabilities resulting from other voluntary activities (drinking, smoking, athletic activities, etc.) and, as a result of religious beliefs and the imperfections of contraceptives, pregnancy may not be voluntary. *Id.* at 232. The court also distinguished *Aiello* on the grounds that an interpretation of a statute was involved, not the Constitution, and that the plan in *Wetzel* excluded all, not just normal, pregnancy-related disabilities. *Id.* at 229-30.

52. 502 F.2d 1229 (2d Cir. 1974).

53. *Id.* at 1232. The court pointed out that of 20 equally brilliant law graduates in a law firm, only one gets the partnership, although the other 19 are almost equally qualified; likewise, of 50 junior bank officers, all of whom want to be vice-presidents, only one is chosen. The court also analogized to the difficulties judges have in choosing law clerks from the many applicants who possess equally outstanding qualifications. *Id.*

54. S.J. Res. 8, 92d Cong., 1st Sess. (1971); H.R.J. Res. 208, 92d Cong., 1st Sess. (1971). See generally Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971); Note, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 HARV. L. REV. 1499 (1971).

trend, it thus appears that sex discrimination issues are being engulfed by more general considerations.

#### THE INTERRELATIONSHIP OF TITLE VII WITH EXISTING FEDERAL LEGISLATION

##### *National Labor Relations Act*

Several important recent decisions indicate that the National Labor Relations Board (NLRB), pursuant to its authority under the National Labor Relations Act (NLRA),<sup>55</sup> will play a more active role in equal employment opportunity cases. The Board's position regarding its responsibility in the area of employment discrimination primarily emanates from the decision of the Court of Appeals for the Eighth Circuit in *NLRB v. Mansion House Center Management Corp.*<sup>56</sup> In *Mansion House*, the employer appealed from an order to bargain on the ground that the union was guilty of racial discrimination. This position initially was rejected by the Board,<sup>57</sup> but the court of appeals reversed, requiring the use of the following guidelines: (1) the claim that a union is guilty of racial discrimination is a relevant area of inquiry for the NLRB when that defense is presented to the Board in a refusal to bargain case;<sup>58</sup> (2) the machinery of the National Labor Relations Act, as amended, is not available to unions that are unwilling to correct past practices of racial discrimination;<sup>59</sup> and (3) evidence concerning racial imbalance in union membership is relevant to such an inquiry since statistical evidence may establish that a union has been guilty of past racial discrimination.<sup>60</sup> The court specifically held that the fact that minority group applicants have not been rejected by the union is not the sole test of discrimination.<sup>61</sup>

The Board now appears to be relying upon *Mansion House* in

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55. 29 U.S.C. §§ 151-68 (1970).

56. 473 F.2d 471 (8th Cir. 1973). See generally Comment, *The Civil Rights Potential of the Labor Management Relations Act: The Current Approach*, 12 DUQUESNE L. REV. 23 (1973); Note, *The Impact of De Facto Discrimination by Unions on the Availability of NLRB Bargaining Orders*, 47 S. CAL. L. REV. 1353 (1974).

57. *Mansion House Center Management Corp.*, 190 N.L.R.B. 437, 77 L.R.R.M. 1283 (1971).

58. 473 F.2d at 474.

59. *Id.* at 477.

60. *Id.*

61. *Id.*

certification cases. For example, in *Bekins Moving & Storage Co.*,<sup>62</sup> the employer sought to have the NLRB refuse certification to a union that allegedly discriminated against women and Spanish-surnamed individuals. The Board held that an employer properly could object to certification of the union within five days from the issuance of the tally of ballots cast in a representation election if the union was guilty of alleged discrimination against minorities.<sup>63</sup> Two Board members (Miller and Jenkins) ruled that the fifth amendment prohibited the Board from certifying a union that engaged in invidious discrimination as a bargaining representative.<sup>64</sup> A third member (Kennedy) agreed that the Board was foreclosed from certifying a union that discriminated on the basis of race, alienage, or national origin,<sup>65</sup> but he did not agree that the Board could deny certification on the basis of sex discrimination because the Supreme Court has refused to find classifications based on sex inherently suspect.<sup>66</sup> The other two members (Fanning and Penello) dissented on the ground that withholding certification on the basis of discrimination was neither required by the Constitution nor permitted by the NLRA.<sup>67</sup>

Since *Bekins*, the Board has indicated that it will proceed slowly in denying certification to a union on the basis of alleged discrimination.<sup>68</sup> For example, in *Grants Furniture Plaza, Inc.*,<sup>69</sup> the employer submitted statistical evidence allegedly showing that the percentage of female and Spanish-surnamed members in the union was lower than the ratio of such persons to the total population in the local metropolitan area. The employer also introduced evidence of a Department of Justice complaint alleging that the international union had perpetuated prior discriminatory practices against minority group individuals. The Board found both types of evidence insufficient reason to deny certification<sup>70</sup> because the unproven Jus-

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62. 211 N.L.R.B. No. 7, 86 L.R.R.M. 1323 (1974).

63. *Id.* at \_\_\_\_, 86 L.R.R.M. at 1328.

64. *Id.* at \_\_\_\_, 86 L.R.R.M. at 1325.

65. *Id.* at \_\_\_\_, 86 L.R.R.M. at 1329.

66. *Id.* at \_\_\_\_, 86 L.R.R.M. at 1330 n.29. He would consider, however, allegations of sex discrimination raised as a breach of the duty of fair representation after the union has been certified.

67. *Id.* at \_\_\_\_, 86 L.R.R.M. at 1332.

68. See *Grants Furniture Plaza, Inc.*, 213 N.L.R.B. No. 80, 87 L.R.R.M. 1175 (1974); *Bell & Howell Co.*, 213 N.L.R.B. No. 79, 87 L.R.R.M. 1172 (1974).

69. 213 N.L.R.B. No. 80, 87 L.R.R.M. 1175 (1974).

70. *Id.* at \_\_\_\_, 87 L.R.R.M. at 1176.

tice Department allegations did not corroborate adequately the alleged statistical imbalance, without proof that the union actually exercised control over the composition of the work force.<sup>71</sup> Following his concurring opinion in *Bekins*, Member Kennedy did not address the merits of the issue of sex discrimination, stating that certification could not be denied on the ground of sex discrimination;<sup>72</sup> he did agree, however, that statistics alone were not a reliable indication of discrimination in union membership since statistical imbalances might reflect merely the total composition of the unit that the union was obligated to represent.<sup>73</sup> Members Fanning and Penello concurred in the certification of the union for the reasons they had expressed in their *Bekins* dissent.<sup>74</sup>

The absence of unanimity in *Bekins*, coupled with the exacting proof requirements of later Board decisions, leaves the question of denial of certification because of alleged union discrimination somewhat in doubt; the expiration of Chairman Miller's term in December 1974 and the unascertainable viewpoint of his successor<sup>75</sup> do not help resolve this uncertainty. The recent Supreme Court decision in *Emporium Capwell Co. v. Western Addition Community Organization*,<sup>76</sup> however, may indicate the general line of demarcation between the operation of Title VII and the NLRA in collective bargaining situations.

*Western Addition* involved the discharge of two black employees for engaging in picketing and handbilling activities in order to protest their employer's alleged discriminatory employment practices.

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71. *Id.* at \_\_\_\_, 87 L.R.R.M. at 1176.

72. *Id.* at \_\_\_\_, 87 L.R.R.M. at 1177. See note 66 *supra* & accompanying text.

73. *Id.* at \_\_\_\_, 87 L.R.R.M. at 1177.

74. *Id.* at \_\_\_\_, 87 L.R.R.M. at 1177. See note 67 *supra* & accompanying text.

75. Betty Southard Murphy, a former Administrator with the Wage-Hour Division of the Department of Labor, was confirmed by the Senate as the new Chairman of the NLRB in February 1975. 88 LAB. REL. REP. 113 (Feb. 10, 1975).

76. 95 S. Ct. 977 (1975). For a discussion of the court of appeals decision reversed in *Western Addition*, see Note, *Racial Discrimination in Employment and the Remedy of Self-Help: An Unwarranted Addition*, 15 WM. & MARY L. REV. 615 (1974). See also Craver, *Minority Action versus Union Exclusivity: The Need to Harmonize NLRA and Title VII Policies*, 26 HASTINGS L.J. 1 (1974); Gould, *Racial Protest and Self-Help Under Taft-Hartley: The Western Addition Case*, 29 ARB. J. (n.s.) 161 (1974); Case Note, *Labor Law—Interaction of Title VII and the National Labor Relations Act—Union Exclusivity and Individual Rights*, 15 B.C. IND. & COM. L. REV. 1029 (1974); Note, *Employer Discrimination: How Far Does NLRB Jurisdiction Reach?*, 59 CORNELL L. REV. 1078 (1974); Note, *Title VII and NLRA: Protection of Extra-Union Opposition to Employment Discrimination*, 72 MICH. L. REV. 313 (1973).

The union simultaneously was processing a grievance on the issue. The NLRB dismissed the complaint of unfair labor practices committed in the discharge because the employees' picketing was in derogation of the union's status as exclusive bargaining agent.<sup>77</sup> The Court of Appeals for the District of Columbia Circuit, however, reversed the Board's decision<sup>78</sup> and remanded the case to determine whether "the union was actually remedying the discrimination to the *fullest extent possible, by the most expedient and efficacious means.*"<sup>79</sup>

*Western Addition* thus posed the question of whether attempts to remedy racial discrimination in employment by engaging in separate bargaining with the employer are protected by section 7<sup>80</sup> of the NLRA or proscribed by section 9(a).<sup>81</sup> The Supreme Court stressed its "long and consistent adherence to the principle of exclusive representation tempered by safeguards for the protection of minority interests," and refused to fashion the "limited exception," urged by the respondent, that "employees who seek to bargain separately with their employer as to the elimination of racially discriminatory employment practices peculiarly affecting them, should be

77. *The Emporium*, 192 N.L.R.B. 173, 77 L.R.R.M. 1669 (1971).

78. *Western Addition Community Organization v. NLRB*, 485 F.2d 917 (D.C. Cir. 1973). The two primary cases that previously had dealt with the issue of employee self-help were *NLRB v. R.C. Can Co.*, 328 F.2d 974 (5th Cir. 1964), *enforcing* 140 N.L.R.B. 588, 52 L.R.R.M. 1071 (1963) (protected concerted activity found where union and "quickie" strike had same purpose), and *NLRB v. Tanner Motor Livery, Ltd.*, 419 F.2d 216 (9th Cir. 1969), *denying enforcement* to 166 N.L.R.B. 551, 65 L.R.R.M. 1502 (1967) (picketing lost its protected status because in derogation of the bargaining representative). See also Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act*, 115 U. PA. L. REV. 1195 (1967); Gould, *Black Power in the Unions: The Impact Upon Collective Bargaining Relationships*, 79 YALE L.J. 46 (1969); Koretz & Rabin, *The Development and History of Protected Concerted Activity*, 24 SYRACUSE L. REV. 715 (1973).

79. 485 F.2d at 931.

80. Section 7 provides:

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 any agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

29 U.S.C. § 157 (1970).

81. Section 9(a) provides in part: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . . ." *Id.* § 159(a).

free from the constraints of the exclusivity principle of § 9(a)."<sup>82</sup> Given the potential for conflict between the various minority-employee groups who might demand a right to bargain with the employer, the Court reasoned that the basic national labor policy of exclusive recognition would be undermined seriously if the exception were imposed.<sup>83</sup> Similarly, the Court held that the congressional policy of protecting from reprisal employee efforts to oppose unlawful discrimination, as expressed in section 704(a) of Title VII,<sup>84</sup> did not protect the picketing employees from discharge.<sup>85</sup> The Court also rejected the argument that the remedies provided by Title VII were inadequate because such a contention properly should be addressed to the Congress, not the courts or the NLRB.<sup>86</sup>

The Court thus answered in the negative several basic questions of labor law, including the following: whether minority employees may strike to compel their employer to bargain concerning racial matters, even though the employer must recognize the union as the exclusive bargaining representative of its employees; whether the NLRA protects minority actions that are in derogation of, and unsanctioned by, the union representative; and whether Title VII requires protection of activities of minority employees concerning racial discrimination that otherwise would be unprotected by the

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82. 95 S. Ct. at 986.

83. The Court stated:

The policy of industrial self-determination as expressed in § 7 does not require fragmentation of the bargaining unit along racial or other lines in order to consist with the national labor policy against discrimination. And in the face of such fragmentation, whatever its effect on discriminatory practices, the bargaining process that the principle of exclusive representation is meant to lubricate could not endure unhampered.

*Id.* at 989.

84. Section 704(a) provides in part: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter . . ." 42 U.S.C. § 2000e-3(a) (1970).

85. The Court stated:

Even assuming that § 704(a) protects employees' picketing and instituting a consumer boycott of their employer, the same conduct is not necessarily entitled to affirmative protection from the NLRA. . . . If the discharges in this case are violative of § 704(a) of Title VII, the remedial provisions of that title provide the means by which [the discharged employees] may recover their jobs with back pay.

*Id.* (footnote omitted).

86. *Id.* at 990.

Taft-Hartley Act.<sup>87</sup> The *Western Addition* decision therefore suggests the boundary between Title VII and the NLRA: the NLRA seemingly will not be expanded to encompass employment discrimination questions if such expansion threatens the policy of exclusive representation. Redress for alleged discrimination by employers must be sought through the union or through standard Title VII remedial channels, rather than by filing an unfair labor practice charge with the NLRB.<sup>88</sup> Although this constraint may make minority union members "prisoners of the union,"<sup>89</sup> the duty of fair representation<sup>90</sup> currently imposed upon the union should be an effective method to ensure protection of minority-employee rights.

### *The Equal Pay Act of 1963*

In *Corning Glass Works v. Brennan*,<sup>91</sup> the Supreme Court rendered its first decision under the Equal Pay Act of 1963.<sup>92</sup> At a time when applicable state laws prohibited night work by women, the employer in *Corning* set up a night shift for inspectors and assigned male employees exclusively to the job. The males demanded and received substantially higher rates than females received on the day shift.<sup>93</sup> Subsequently, the plant was organized and the union negoti-

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87. See generally 87 LAB. REL. REP. 122-23 (Oct. 7, 1974).

88. The Court stated: "Questions arising under Title VII must be resolved by the means that Congress provided for that purpose." 95 S. Ct. at 989 n.25. Accordingly, a minority employee who pursues his grievance to arbitration remains free to relitigate the claim in federal court. *Alexander v. Gardner-Denver Co.*, 94 S. Ct. 1011 (1974). See notes 142-45 *infra* & accompanying text.

89. 95 S. Ct. at 990 (Douglas, J., dissenting).

90. See generally *Vaca v. Sipes*, 386 U.S. 171 (1967); *Wallace Corp. v. NLRB*, 323 U.S. 248 (1944); *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944).

91. 94 S. Ct. 2223 (1974). See generally 44 Miss. L.J. 1028 (1973); 5 ST. MARY'S L.J. 409 (1973).

92. The Equal Pay Act of 1963 was enacted as section 6(d) of the Fair Labor Standards Act of 1938, 29 U.S.C. § 206(d) (1970). The Act specifically prohibits discrimination by employers on the basis of sex in the wages paid for "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . . ." *Id.*

Title VII recognizes the overlap in coverage between the two Acts and provides in section 703(h): "It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of [the Equal Pay Act]." 42 U.S.C. § 2000e-2(h) (1970). The EEOC follows the equal pay interpretations of the Wage and Hour Administrator of the Department of Labor, but is not bound by them. 29 C.F.R. § 1604.8 (1973).

93. 94 S. Ct. at 2226.



ated a collective bargaining agreement that enacted for the first time a system of plantwide shift differentials. The differentials, however, were superimposed on the existing differences in base pay between male night inspectors and female day inspectors.<sup>94</sup> Several years later the applicable state laws were amended to permit women to work at night, and after the enactment of the Equal Pay Act in 1963, the company began to hire women for the night shift. Thereafter, a new collective bargaining agreement was signed abolishing different rates of pay for day- and night-shift inspectors and establishing a uniform pay rate. Although all inspectors hired after January 1969 received the same rate of pay regardless of sex or shift, the agreement perpetuated the higher salary paid to those male night-shift inspectors employed before January 1969, with the result that the differential between certain night and day inspectors was continued.<sup>95</sup> The Supreme Court reached the following conclusions: (1) that the inspection work, whether performed during the day or night, was "equal work" within the meaning of the law;<sup>96</sup> (2) that the nightshift premium originally paid to men on the night shift was sex-related, not a differential "based on any other factor other than sex" within the exception to the Act;<sup>97</sup> (3) that the employer did not cure the violation by allowing women to work as night inspectors, rather than by equalizing the pay of female day inspectors and male night inspectors;<sup>98</sup> (4) and that the employer did not absolve itself of a violation of the Act in 1969 when it equalized the pay for day and night inspectors, since it perpetuated the discrimination by continuing the pay differential for those previously on the job.<sup>99</sup>

### *Age Discrimination in Employment Act*

The Age Discrimination in Employment Act of 1967,<sup>100</sup> which covers some 37 million persons between the ages of 40 and 65, has just begun to emerge from the shadows of Title VII. Indeed, while the period of the 1960's was marked by major advances in equal employ-

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94. *Id.* at 2227.

95. *Id.* at 2227-28.

96. *Id.* at 2232.

97. *Id.* at 2233 n.25.

98. *Id.* at 2234.

99. *Id.* at 2235.

100. 29 U.S.C. §§ 621-34 (1970). See generally Note, *Discrimination Against the Elderly: A Prospectus of the Problem*, 7 SUFFOLK U.L. REV. 917 (1973).

ment opportunity for minorities, and the early 1970's by advances for women, it is likely that the second half of this decade will see great strides towards the elimination of age discrimination.

Unlike the quantity of litigation concerning race and sex discrimination, there have been few significant court decisions under this law to date. In *Brennan v. Taft Broadcasting Co.*,<sup>101</sup> however, the Court of Appeals for the Fifth Circuit held that the employer did not violate the law when it required an employee to retire at age 60 under the terms of a profit-sharing retirement plan. The court found that the plan, although not qualified under the Internal Revenue Code,<sup>102</sup> fell within the Act's exception for bona fide pension plans.<sup>103</sup> Based upon this exception, which provides that "no such employee benefit plan shall excuse the failure to hire any individual . . .,"<sup>104</sup> the plaintiff also contended that the employer was required to rehire him after his forced retirement. The court rejected this claim, however, reasoning that to require reemployment by the same employer of one legally retired would render the exception of bona fide pension plans meaningless; if retired employees must be rehired immediately, the court stated, the right to insist upon compliance with the plan would be an illusion.<sup>105</sup>

Another recent decision involving the Age Discrimination in Employment Act upheld a bus company's policy of refusing to hire persons 35 years of age or older as intercity bus drivers.<sup>106</sup> The Court of Appeals for the Seventh Circuit determined that the company policy was legitimate under an exception to the Act permitting age differentiations if age is shown to be "a bona fide occupational qualification reasonably necessary to the normal operation of the particular business . . . ."<sup>107</sup> The company was found to have demonstrated that its policy was not arbitrary, but based upon a good-faith judgment concerning the safety needs of its passengers.<sup>108</sup>

The Department of Labor has pursued various tacks to remedy age discrimination. It recently has attempted to reach settlement

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101. 500 F.2d 212 (5th Cir. 1974).

102. INT. REV. CODE OF 1954, §§ 401-04.

103. 500 F.2d at 215-16.

104. 29 U.S.C. § 623(f)(2) (1970).

105. 500 F.2d at 218.

106. *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974), cert. denied, 95 S. Ct. 805 (1975).

107. 29 U.S.C. § 623(f)(1) (1970).

108. 499 F.2d at 865.

agreements with employers who have been accused of age discrimination; for example, in May 1974 the Department arranged a two-million-dollar settlement for 160 employees of Standard Oil of California who had been laid off or forced to retire prior to their normal retirement age.<sup>109</sup> More recently, the Department announced institution of the largest suit ever filed under the Act against the Baltimore & Ohio and Chesapeake & Ohio Railroads, seeking more than \$20 million in back pay and other relief for 300 present and former employees.

The recently expanded role of the Age Discrimination in Employment Act as part of the employment discrimination practitioner's arsenal is illustrative of nonexclusivity of Title VII in this area of labor relations law. In addition to the recognized statutory overlap between Title VII and the Equal Pay Act, and the unresolved issues regarding the NLRB's role in collective bargaining situations affected by discrimination questions, this last interface emphasizes the need to consider carefully the interrelationship between the Civil Rights Act and other federal legislation.

### THE USE OF GOALS AND QUOTAS

The imposition of "goals" or "quotas" to remedy the effects of past discrimination has become a source of major controversy in the Title VII area. Section 703(j) of the Act states that nothing in the law shall require an employer to grant "preferential treatment" solely because of a racial imbalance in the work force.<sup>111</sup> During the legislative debates, Senator Clark stressed: "[T]he suggestion that racial balance or quota systems would be imposed by this proposed legislation is entirely inaccurate."<sup>112</sup> Nevertheless, the courts almost

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109. Address by W.J. Kilberg, Solicitor of Labor, Civil Rights Symposium, Kansas City, Mo., Oct. 7, 1974, in 87 LAB. REL. REP. 168 (Oct. 14, 1974).

110. *Id.*

111. Section 703(j) provides in part:

Nothing contained in this subchapter shall be interpreted to require any employer . . . [or] labor organization . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . . [or] admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program . . .

42 U.S.C. § 2000e-2(j) (1970).

112. 110 CONG. REC. 7207 (1964). The floor managers of the bill reported to the Senate:

uniformly have held that this section must be read in connection with the basic purposes of the Act and the very broad grant of power to the federal courts to frame affirmative relief. Consequently, courts have ordered unions to refer employees on an alternate one-for-one black-white ratio,<sup>113</sup> to admit to membership specified percentages of minorities,<sup>114</sup> and to admit minimum percentages of minorities to apprentice programs.<sup>115</sup> Similarly, employers have been ordered to hire minorities on a fixed-percentage basis such as one-for-one or one-for-two,<sup>116</sup> to hire on the basis of minimum qualifications or no qualifications at all,<sup>117</sup> and to provide special training for minorities and women.<sup>118</sup>

It had been hoped that the Supreme Court would rule definitively on the legality of the use of goals and quotas in *DeFunis v. Odegaard*,<sup>119</sup> concerning a student who had been denied admission to law school although he had been inducted into Phi Beta Kappa in college and had been graduated magna cum laude. DeFunis charged that blacks and other minorities received special considera-

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"There is no requirement in Title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race." *Id.* at 7213 (Interpretive Memorandum submitted jointly by Senators Clark and Case). Senator Williams remarked:

[T]o hire a Negro solely because he is a Negro is racial discrimination, just as much as a "white only" employment policy. Both forms of discrimination are prohibited by title VII of this bill. The language of that title simply states that race is not a qualification for employment. Every man must be judged according to his ability . . . Those who say that equality means favoritism do violence to commonsense.

*Id.* at 8921.

113. See, e.g., *United States v. Wood, Wire & Metal Lathers Local 46*, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); *United States v. Carpenters Local 169*, 457 F.2d 210 (7th Cir.), *cert. denied*, 409 U.S. 851 (1972).

114. See, e.g., *Vulcan Soc'y v. Civil Serv. Comm'n*, 490 F.2d 387 (2d Cir. 1973).

115. See, e.g., *Southern Ill. Builders Ass'n v. Ogilvie*, 471 F.2d 680 (7th Cir. 1972); *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971).

116. See, e.g., *Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n*, 482 F.2d 1333 (2d Cir. 1973); *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1972), *cert. denied*, 406 U.S. 950 (1972); *Pennsylvania v. O'Neill*, 348 F. Supp. 1084 (1972), *modified*, 473 F.2d 1029 (3d Cir. 1973) (hiring procedures affirmed).

117. See, e.g., *Associated Gen. Contractors, Inc. v. Altshuler*, 361 F. Supp. 1293 (1973), *aff'd*, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 94 S. Ct. 1971 (1974).

118. See, e.g., *Morrow v. Crisler*, 491 F.2d 1053 (5th Cir.), *cert. denied*, 95 S. Ct. 173 (1975).

119. 94 S. Ct. 1704 (1974). See generally Flaherty & Sheard, *DeFunis, the Equal Protection Dilemma: Affirmative Action and Quotas*, 12 DUQUESNE L. REV. 745 (1974); *DeFunis: The Road Not Taken, A Symposium*, 60 VA. L. REV. 917 (1974); 11 HOUSTON L. REV. 1298 (1974).

tion and preference in law school admissions, that 36 of the 37 minority students who were admitted had predicted first-year averages lower than his and that 30 of those students would have been rejected summarily if they had been white.<sup>120</sup> The Court, however, did not reach the question of quotas; rather, because DeFunis was graduating from the law school after a lower court had ordered him admitted, the Court held that the case was moot.<sup>121</sup> Justice Douglas filed a strong dissent emphasizing that "[t]here is no constitutional right for any race to be preferred" and that the "Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized."<sup>122</sup> He stressed that if admissions were to be based upon quotas, problems would arise regarding determination of which groups, and in what proportion, were to receive favored treatment, aggravated by the difficulties of determining which particular individuals were members of which groups.<sup>123</sup> He also stated: "[I]f discrimination based on race is constitutionally permissible when those who hold the reins can come up with 'compelling' reasons to justify it, then constitutional guarantees acquire an accordionlike quality."<sup>124</sup> Although the Court did not provide the needed clarification in *DeFunis*, it ultimately must confront the difficult question of whether quotas and "benign" reverse discrimination<sup>125</sup> are constitutional.

Problems inherent in the use of quotas are illustrated by the recent decision of the Court of Appeals for the Second Circuit in *Rios v. Steamfitters Local 638*.<sup>126</sup> The court held that section 703(j)<sup>127</sup> of Title VII does not prevent the courts from ordering a union to have a minimum of 30 percent non-white members by 1977 and at least 30 percent of the same group enrolled in apprenticeship classes each year to correct a history of discrimination in

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120. 94 S. Ct. at 1710 (Douglas, J., dissenting).

121. *Id.* at 1707.

122. *Id.* at 1716, 1718.

123. *Id.*

124. *Id.* at 1719.

125. See generally Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); Slate, *Preferential Relief in Employment Discrimination Cases*, 5 LOYOLA U.L.J. (Chicago) 315 (1974); Comment, *The Myth of Reverse Race Discrimination: An Historical Perspective*, 23 CLEV. ST. L. REV. 319 (1974).

126. 501 F.2d 622 (2d Cir. 1974).

127. 42 U.S.C. § 2000e-2(j) (1970). See note 111 *supra*.

membership.<sup>128</sup> Although conceding that its decision might appear to violate that section's prohibition of preferential treatment, the court held that the section was not applicable to quotas designed to eradicate the effects of past discrimination.<sup>129</sup>

Judge Hays dissented forcefully in *Rios* on the ground that the court's conclusion was not supported by the language of the Act or the legislative history.<sup>130</sup> Discussing the legislative history at length, he stated that section 703(j) is "not concerned with the causes of imbalance, past, present or future. It provides for no exception from its broad prohibition for imbalances caused by past discrimination."<sup>131</sup> He concluded: "Judicial resort to racial classification is designed to make racism respectable. It gives legal sanction to the unfortunate attitudes which have resulted in the exclusion of minorities from the mainstream of the nation's economy."<sup>132</sup>

In *Boston Chapter, NAACP v. Beecher*,<sup>133</sup> the Court of Appeals for the First Circuit cited *Rios* with approval, sustaining a lower court order<sup>134</sup> directing a municipal fire department to hire a specific ratio of minority applicants. The court found that discrimination had resulted in the past from the use of tests that were not job-

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128. 501 F.2d at 628.

129. *Id.* at 630-31. For a similar approach to the impact of section 703(j) upon the use of quotas, see *United States v. Ironworkers Local 86*, 443 F.2d 544, 553-54 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); *Contractors Ass'n v. Secretary of Labor*, 442 F.2d 159, 172 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971); *United States v. Local 38, IBEW*, 428 F.2d 144, 149-51 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970). In *Local 38 IBEW*, the court stated that section 703(j) "cannot be construed as a ban on affirmative relief against continuation of effects of past discrimination . . . . Any other interpretation would allow complete nullification of the stated purposes of the Civil Rights Act of 1964." 428 F.2d at 149-50.

130. 501 F.2d at 634.

131. *Id.* Judge Hays continued:

The legislative history of section 703(j) makes it abundantly clear that Congress intended Title VII to require unions and employers to accept members and to hire employees without regard to race. Quotas, for whatever reason imposed, fly in the face of that intent. Nowhere in the comprehensive reports of the House Judiciary Committee, and nowhere in the 534 hours of Senate debate is there as much as an oblique suggestion that Congress intended to permit court-ordered racial quotas 'to eradicate the effects of past discriminatory practices.' On the contrary, the prohibition against racial preference in section 703(j) is comprehensive. The majority's ruling today completely fails to give effect to that prohibition.

*Id.* at 636-37.

132. *Id.* at 639.

133. 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 95 S. Ct. 1561 (1975).

134. 371 F. Supp. 507 (D. Mass. 1974).

related<sup>135</sup> and which had had a disparate effect on black and Spanish-surnamed applicants.<sup>136</sup> The court indicated that section 703(j) was applicable only to cases in which racial imbalance had resulted irrespective of the actions of the employer.<sup>137</sup> The legislative intent, the court found, was evidenced by the failure of Congress in the debates preceeding the 1972 amendments to pass the Dent amendment,<sup>138</sup> which would have foreclosed all affirmative action plans; thus, the court concluded that Congress impliedly ratified the power of the courts to impose the color-conscious relief being employed at the time of the 1972 amendments.<sup>139</sup>

The question of the implementation of goals and quotas by the federal judiciary to obtain a magical proportion of minority employees remains one of the most emotional issues in the Title VII area. What many characterize as a necessary tool in the effort to correct two centuries of employment discrimination is attacked by an equally large number of detractors, who characterize quotas as "reverse discrimination" merely substituting one evil for another.<sup>140</sup>

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135. 504 F.2d at 1022-24. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). See also Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972); Wilson, *A Second Look At Griggs v. Duke Power Company: Ruminations on Job Testing, Discrimination and the Role of the Federal Courts*, 58 VA. L. REV. 844 (1972); Note, *Employment Testing: The Aftermath of Griggs v. Duke Power Company*, 72 COLUM. L. REV. 900 (1972).

136. 504 F.2d at 1021. Under the lower court's decree, four eligibility groups were created: (1) all black and Spanish-surnamed applicants who took and failed the previous test, but who passed a new, valid test; (2) all persons on the current eligibility list; (3) all black and Spanish-surnamed persons who did not belong in group (1), but who passed a new test and were qualified; and (4) all other persons who passed the new test. Persons in the first two groups were to be given initial preference on a one-to-one basis and those from the latter two were to be drawn upon after groups (1) and (2) were exhausted. The decree was to remain in effect until the fire department had a percentage of minority firemen approximately equal to the percentage of minorities in the locality. In no case was an unqualified minority person to be appointed. *Id.* at 1026-27.

See also Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1637-69 (1969).

137. 504 F.2d at 1028.

138. See generally Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. CHI. L. REV. 723, 747-57 (1972).

139. 504 F.2d at 1028.

140. See, e.g., Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. U.L. REV. 363, 367-88 (1966); Karst & Horowitz, *Affirmative Action and Equal Protection*, in DeFunis: *The Road Not Taken, A Symposium*, 60 VA. L. REV. 917, 955 (1974); *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1113-18 (1971).

This dispute is heightened by the apparent conflict between the language of the statute and legislative history and the rampant use of quotas by the courts. Although the court of appeals in *Beecher* characterized this dispute as "ancient history,"<sup>141</sup> Judge Hay's dissent in *Rios* and the Supreme Court's irresolution in *DeFunis* indicate that it remains very much alive.

#### APPROPRIATE FORUM FOR REDRESS

In its recent decision in *Alexander v. Gardner-Denver Co.*,<sup>142</sup> the Supreme Court appears to have reversed, or at least severely weakened, the policy of deferral to arbitration awards granted in labor disputes pursuant to a collective bargaining agreement that provides for binding arbitration.<sup>143</sup> In *Alexander*, the Court held that a discharged minority employee, who unsuccessfully sought to resolve by arbitration his reinstatement claim on the ground that his discharge was discriminatory, nevertheless may pursue his Title VII claim in federal court.<sup>144</sup> The federal judiciary, therefore, will neither defer to the arbitration process in Title VII actions, nor apply the doctrine of res judicata to arbitration awards. The Court, however, indicated that when an arbitration decision gives full consideration to Title VII rights, a court may give such a decision "great weight," particularly if the issue is solely one of fact and if the award is based upon an adequate record.<sup>145</sup>

A result very similar to *Alexander* was reached recently by the Court of Appeals for the Seventh Circuit in *Batiste v. Furnco Construction Corp.*,<sup>146</sup> the court holding that the decision of a state equal employment opportunity agency would not bar a Title VII claim in

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141. 504 F.2d at 1028.

142. 94 S. Ct. 1011 (1974). See generally Isaacson & Zifchak, *Fair Employment Forums After Alexander v. Gardner-Denver Co.: Separate and Unequal*, 16 WM. & MARY L. REV. 439 (1974); Oppenheim, *Gateway and Alexander—Whither Arbitration?*, 48 TUL. L. REV. 973 (1974); Siegel, *Deferral to Arbitration Awards in Title VII Actions*, 25 LAB. L.J. 398 (1974).

143. See *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960).

144. 94 S. Ct. at 1025.

145. *Id.* at n.21.

146. 503 F.2d 447 (7th Cir. 1974), cert. denied, 95 S. Ct. 1127 (1975). The employees appealed from the federal district court judgment, 350 F. Supp. 10 (N.D. Ill. 1972), which although granting them summary judgment on their complaint of racially discriminatory employment practices, denied them all injunctive and compensatory relief requested other than \$400 in attorney fees.



federal court under the doctrines of election of remedies and res judicata.<sup>147</sup> A decision by the Illinois Fair Employment Practices Commission awarding back pay to minority group bricklayers, therefore, did not bar de novo consideration by the federal district court.<sup>148</sup> The court specifically rejected the argument that full faith and credit must be afforded to the state determination, because the court found "a strong Congressional policy that plaintiffs not be deprived of their right to resort to the federal courts for adjudication of their federal claims under Title VII."<sup>149</sup> The court, however, found that, by entering summary judgment for the plaintiffs on the basis of the state agency's ruling, the district court had erred; the court reasoned: "While a defendant can be required to defend again, it cannot be forced to accept the prior findings, and the federal court must conduct its own inquiry."<sup>150</sup>

*Alexander* and *Batiste* indicate that there is no hesitation by the federal courts to preserve their statutory function as the "final arbiters" of employment discrimination disputes.<sup>151</sup> Questions may arise regarding the most efficacious means to resolve these disputes because of the roadblock thus imposed to the use of nonjudicial remedies, but, conceivably, further refinement in other methods of dispute resolution, such as arbitration and state administrative proceedings, will permit greater confidence to be placed in these alternatives by the federal judiciary. At present, however, employers must be prepared to defend an employment discrimination claim in more than one forum.

### CONCLUSION

As Title VII of the Civil Rights Act of 1964 embarks upon its second decade of reform in employment practices, it is clear that significant issues await resolution. Although the use of quotas to redress past discrimination and the availability of sick leave benefits for pregnant employees have attracted substantial publicity, other important issues, such as the appropriateness of nonjudicial forums for resolution of Title VII disputes and the legitimacy of seniority systems when they perpetuate past discrimination, also

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147. 503 F.2d at 450.

148. *Id.* at 451.

149. *Id.* at 450. *Accord*, *Cooper v. Philip Morris, Inc.*, 464 F.2d 9 (6th Cir. 1972).

150. 503 F.2d at 451. *See Batiste v. Furnco Constr. Corp.*, 350 F. Supp. 10 (N.D. Ill. 1972).

151. *See* note 3 *supra* & accompanying text.

confront the labor lawyer. An impressive start has been made towards the national goal of providing equal employment opportunities to all citizens regardless of their "race, color, religion, sex, or national origin"; nevertheless, extensive litigation will be necessary to resolve the many questions that remain.