

MAJOR ISSUES IN THE FEDERAL LAW OF
EMPLOYMENT DISCRIMINATION

Fourth Edition

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Preface

This edition of *Major Issues in the Federal Law of Employment Discrimination* discusses most developments in the law through June 2004. These developments are many and varied, in what has proved to be an ever-expanding field of law, and it would have been impossible to keep up with all of them without the diligent efforts of my research assistants, Derek Bentsen, Karen Francis, Kate McKune, and Amy Voorhees. For similar reasons, I am grateful to Foundation Press, which has allowed me to use material from my book *Employment Discrimination Law: Visions of Equality in Theory and Doctrine* (2001) in updating this monograph. Several federal judges have read and commented on this and earlier editions of this monograph. I continue to be grateful to them and to the editors at the Federal Judicial Center, who read the entire manuscript and recommended several important changes. Everyone who assisted with this monograph improved it in ways too numerous to mention, but I remain responsible, of course, for any mistakes.

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Introduction

The last edition of this monograph analyzed two major pieces of legislation that profoundly changed the federal law of employment discrimination: the Americans with Disabilities Act of 1990¹ and the Civil Rights Act of 1991.² Both of these statutes responded to perceived deficiencies in existing law: the first, to the limited coverage of laws protecting the disabled, and the second, to accumulated judicial decisions that had generally restricted the scope and enforcement of previously enacted laws.

The current edition recounts no such landmark changes in the law. The developments of the last decade, mainly judicial decisions, have attempted to assimilate these earlier statutory changes into employment discrimination law and to take account of changes in other, related fields of law. No one of these judicial decisions, by itself, has signaled a decisive shift in employment discrimination law, but cumulatively they have confirmed several trends first evident in the legislation of the early 1990s. The law has evolved toward ever more intricate statutory provisions and correspondingly detailed judicial decisions. It has also relied increasingly on damages as a remedy for employment discrimination and therefore on tort principles to determine liability. Newer statutes have also shifted away from racial discrimination as the principal target of civil rights laws and toward discrimination on other grounds, such as disability. This introductory section places these developments in the context of previously enacted statutes.

The most important of these statutes is Title VII of the Civil Rights Act of 1964.³ Title VII is both the broadest federal statute that prohib-

1. Pub. L. No. 101-336, 104 Stat. 327, 42 U.S.C. §§ 12101–12213 (2000).

2. Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified in part in scattered sections of 2 and 42 U.S.C. (2000)).

3. Civil Rights Act of 1964, §§ 701–718, 42 U.S.C. §§ 2000e to 2000e-17 (2000). Section 2000e-2(a) states:

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 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 employ-

its discrimination in employment and the model for many of the narrower statutes. Title VII generally prohibits discrimination in all aspects of employment on the basis of race, color, religion, sex, or national origin by employers, unions, employment agencies, and joint labor-management committees. Despite the breadth of its prohibitions, Title VII was the product of an arduous legislative struggle that led to important compromises in matters of both substance and procedure. These compromises were necessary to secure enactment of the Civil Rights Act of 1964, and in particular, to obtain the two-thirds majority then required to invoke cloture in the Senate.⁴ Because of the controversy surrounding Title VII, its legislative history consists primarily of debates on the floor of each house. In the Senate, the bill that eventually became the Civil Rights Act of 1964 was never sent to committee for fear that it would never be reported out. Even in the House of Representatives, such important provisions as the general prohibition against sex discrimination were added to the bill on the floor without any consideration by committee. Although Title VII was fully debated in both houses, the debate often compounded the ambiguities of important provisions, such as those concerned with bona fide occupational qualifications, equal pay, employment testing, and affirmative action.⁵

Title VII was also amended extensively by the Equal Employment Opportunity Act of 1972, again after hard legislative bargaining, particularly over the provisions for public and private enforcement of the statute. The same intense legislative debate preceded enactment of the Civil Rights Act of 1991, which followed a similar bill that had been vetoed by the President a year earlier. The crucial issues that animated the legislative debate in 1990 and 1991 were affirmative action, the theory of disparate impact, and limits on damages for employment

ees 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.

4. Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. Indus. & Com. L. Rev. 431 (1966).

5. Civil Rights Act of 1964, § 703(e)(1), (h), (j), 42 U.S.C. § 2000e-2(e)(1), (h), (j) (2000).

discrimination.⁶ Similar issues had provoked controversy in 1964 and 1972, but not in such highly technical form. Partly because the Civil Rights Act of 1991 modified or overruled several decisions of the Supreme Court, its provisions added a new level of detail to Title VII. This level of detail, combined with the controversy surrounding enactment of the statute, has raised problems that have yet to be fully addressed by the courts. As it has throughout its history, Title VII continues to be the source of fundamental questions about the nature of discrimination, often appearing in the form of difficult issues of statutory interpretation.

The Constitution, other federal statutes, and federal regulations also prohibit discrimination in employment, but they do so through narrower prohibitions that apply to fewer employers. These other sources of federal law have been interpreted and applied according to doctrines developed under Title VII, sometimes to the point of following the law under Title VII in its entirety. Thorough treatment of these other sources of federal law would require the discussion of many issues—such as immunity from liability for damages—that do not arise under Title VII and that could only be fully treated in an independent monograph. Accordingly, this monograph examines other federal prohibitions against employment discrimination only insofar as they are related to Title VII. This monograph still covers several important statutes explicitly modeled on Title VII, such as the Americans with Disabilities Act.

A brief survey of these other sources of law reveals both the diversity of their origins and their fundamental similarity to the prohibitions in Title VII. The Due Process Clause of the Fifth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and to a lesser extent, the Religion Clauses of the First Amendment prohibit discrimination by public employers on the basis of race, national origin, sex, or religion. These prohibitions are enforced against state and local governments by the Civil Rights Act of 1871, otherwise known as section 1983.⁷ This statute creates a private right of action for deprivation of federal rights under color of state law. Judicial decisions

6. See Symposium, *The Civil Rights Act of 1991: Theory and Practice*, 68 *Notre Dame L. Rev.* 911 (1993).

7. Civil Rights Act of 1871, § 1, 42 U.S.C. § 1983 (2000). See also Karen M. Blum & Kathryn R. Urbonya, *Section 1983 Litigation* (Federal Judicial Center 1998).

have recognized an analogous private right of action against federal officers for acts of discrimination in violation of the provisions of the Constitution that apply to the federal government.⁸

Another Reconstruction statute, the Civil Rights Act of 1866, otherwise known as section 1981,⁹ prohibits discrimination on the basis of race or national origin in employment contracts by public and private employers. Section 1981 was amended by the Civil Rights Act of 1991 to clarify the scope of its coverage. A separate provision, section 1981a,¹⁰ was added to provide damages to victims of discrimination on the basis of sex, religion, or disability. Section 1981a does not contain any substantive prohibition of its own; it simply adds a remedy for plaintiffs who can establish a claim of discrimination under Title VII, the Americans with Disabilities Act, or the Vocational Rehabilitation Act.¹¹ The substantive prohibition in section 1981 is still limited to discrimination on the basis of race or national origin.

By contrast, several other, more recently enacted statutes are limited to particular grounds of discrimination. Thus, the Equal Pay Act¹² prohibits only discrimination on the basis of sex, and only in the narrow form of denial of equal pay for equal work; if men and women employed by the same employer in the same establishment do not do substantially equal work, the Equal Pay Act does not apply at all. The Age Discrimination in Employment Act¹³ prohibits another narrow form of discrimination: discrimination on the basis of age against individuals forty years old or older. The Americans with Disabilities Act is the latest act in this series. It generally prohibits discrimination against the disabled, including a requirement of reasonable accommodation, by private employers.¹⁴ Still other federal statutes have been interpreted to prohibit discrimination in employment, but only in the field

8. *Davis v. Passman*, 442 U.S. 228 (1979).

9. Civil Rights Act of 1866, § 1, 42 U.S.C. § 1981 (2000).

10. 42 U.S.C. § 1981a (2000).

11. 29 U.S.C. §§ 701–796i (2000).

12. 29 U.S.C. § 206(d) (2000).

13. 29 U.S.C. §§ 621–634 (2000). The Act formerly prohibited discrimination by private employers only against individuals at least 40 years old but less than 70 years old. It was amended by the Age Discrimination in Employment Amendments of 1986 to eliminate the upper limit on coverage. Pub. L. No. 99-592, 100 Stat. 3342 (1986), codified in 29 U.S.C. §§ 623, 630, 631 (2000).

14. 42 U.S.C. § 12112 (2000).

with which such statutes are primarily concerned. The National Labor Relations Act¹⁵ and the Railway Labor Act,¹⁶ for instance, have been interpreted to prohibit discrimination by labor unions that represent employees in collective bargaining.¹⁷

Another group of federal statutes and a series of executive orders prohibit discrimination in employment by federal contractors and recipients of federal funds. These statutes prohibit only specific forms of discrimination. Title VI of the Civil Rights Act of 1964¹⁸ prohibits discrimination on the basis of race or national origin by recipients of federal funds. Title IX of the Education Amendments of 1972¹⁹ prohibits discrimination on the basis of sex by educational institutions that receive federal funds. The Rehabilitation Act,²⁰ the predecessor to the Americans with Disabilities Act, prohibits exclusion of the disabled from federally assisted programs and requires affirmative action by federal agencies and federal contractors to employ and promote qualified disabled individuals.

In contrast to these specific statutory prohibitions, Executive Order 11,246²¹ generally prohibits discrimination and requires affirmative action by federal contractors on the basis of race, national origin, sex, and religion. This executive order is enforced by the Office of Federal Contract Compliance Programs in the Department of Labor, which also enforces the obligations imposed upon federal contractors by the Rehabilitation Act. Because the executive order is not explicitly authorized by statute, disputes have arisen over its validity and scope, but without ever resulting in a holding of invalidity.²² Disputes have also arisen over the constitutionality of the affirmative action plans required by the executive order, especially in the construction industry, but these too have never resulted in a holding of unconstitutionality.²³ These disputes, like those over the statutory law of employ-

15. 29 U.S.C. §§ 151–169 (2000).

16. 45 U.S.C. §§ 151–163 (2000).

17. *See infra* text accompanying notes 944–49.

18. 42 U.S.C. §§ 2000d–2004 (2000).

19. 20 U.S.C. §§ 1681–1685 (2000).

20. 29 U.S.C. §§ 701–796i (2000).

21. 3 C.F.R. 339 (1964–1965), *reprinted as amended in* 42 U.S.C. § 2000e (2000).

22. *See infra* text accompanying note 925.

23. *See infra* text accompanying notes 926–29.

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ment discrimination, have followed the lead of developments under Title VII, although often with significant variations.

I. Substantive Provisions of Title VII

Title VII prohibits two forms of discrimination: disparate treatment and disparate impact. Employment practices result in disparate treatment (or intentional discrimination) if they are based in any way on a prohibited factor, such as race.²⁴ The elements of the theory of disparate treatment have been codified by the Civil Rights Act of 1991: “an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”²⁵ These elements can be broken down into three parts: (1) an employment practice (2) motivated at least in part by (3) a prohibited factor.

Claims of disparate treatment can, in turn, be subdivided into individual claims and class claims, which differ not in what is proved, but in how it is proved. Both types of claims require proof that the employer was motivated by a prohibited factor. Individual claims tend to emphasize anecdotal evidence concerning the treatment of an individual plaintiff, however, while class claims usually rely on statistical evidence of treatment of an entire class. Even so, this generalization admits of exceptions, which are discussed more fully in the sections that follow.

Claims of disparate impact do not require proof of motivation, but only proof of neutral practices with discriminatory effects. Like the definition of disparate treatment, the elements of the theory of disparate impact were codified by the Civil Rights Act of 1991.²⁶ These elements can be broken down into three parts. First, the plaintiff must prove that an employment practice “causes a disparate impact on the basis of race, color, religion, sex, or national origin.”²⁷ If the plaintiff carries this initial burden, then the burden of proof, both of production and persuasion, shifts to the defendant to show that the disputed

24. Thus, the Supreme Court has held that a union engaged in disparate treatment by refusing to pursue grievances alleging racial discrimination. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 669 (1987).

25. Section 703(m), 42 U.S.C. § 2000e-2(m) (2000).

26. Section 703(k), 42 U.S.C. § 2000e-2(k) (2000).

27. Section 703(k)(1)(A)(i), 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000).

practice is “job related for the position in question and consistent with business necessity.”²⁸ If the defendant carries this burden, then the burden of proof shifts back to the plaintiff to prove that “an alternative employment practice” exists with a smaller disparate impact.²⁹ The precise formulation of these burdens of proof was a source of controversy in the debates over the Civil Rights Act of 1991, giving rise to charges that the legislation was “a quota bill.”³⁰ The exact language of the statute must therefore be examined quite closely, as it is in the section of this monograph devoted to the theory of disparate impact.³¹ Ambiguities continue to surround the theory of disparate impact and, in particular, whether it represents a narrow or broad departure from the theory of disparate treatment.

Individual Claims of Disparate Treatment

McDonnell Douglas and Its Limits

The standard analysis of individual claims of disparate treatment was set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green*.³² The Court held that the plaintiff, who had alleged racial discrimination in hiring, had the burden of producing evidence

- (i) that he belongs to a racial minority; (ii) that he applied 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.³³

If the plaintiff carries this burden, then the defendant has the burden of production “to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.”³⁴ If the defendant then carries this burden, the burden of production shifts back to the plaintiff “to show that [the defendant’s] stated reason for [the plaintiff’s] rejection was in fact pretext.”³⁵

28. *Id.*

29. Section 703(k)(1)(A)(ii), (C), 42 U.S.C. § 2000e-(k)(1)(A)(ii), (C) (2000).

30. *See* note 182 *infra*.

31. *See infra* text accompanying notes 110–91.

32. 411 U.S. 792 (1973).

33. *Id.* at 802.

34. *Id.*

35. *Id.* at 804.

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The Court emphasized that this structure of shifting burdens of production was not the only way to prove an individual claim of disparate treatment.³⁶ Disparate treatment can also be proved by direct evidence of discrimination, such as a statement by a supervisor that reveals an intent to treat an employee differently on the basis of sex. The narrowness of the holding in *McDonnell Douglas* has become apparent in subsequent cases. The Court has made clear that its structure of burdens of proof does not apply to reverse discrimination claims, at least as it is literally framed.³⁷ This structure shifts only the burden of production, not the burden of persuasion, to the defendant;³⁸ and it imposes on the defendant only the burden of articulating a legitimate, nondiscriminatory reason,³⁹ not of proving that the offered reason was closely related to performance on the job.⁴⁰

The limited scope of *McDonnell Douglas* is apparent from the way in which the elements of the plaintiff's prima facie case are defined. The first element, membership in a minority group, simply does not apply to claims of reverse discrimination.⁴¹ Some courts have tried to avoid this difficulty through the simple expedient of identifying whites as a "protected class" equivalent to a minority group.⁴² Other courts have required additional evidence of background circumstances supporting an inference of reverse discrimination.⁴³ Still others have adapted the defendant's rebuttal case to claims of reverse discrimination by allowing evidence of a permissible affirmative action plan to serve as a legitimate, nondiscriminatory reason for the disputed decision.⁴⁴ This last alternative has been taken up by the Supreme Court in

36. *Id.* at 802 & n.13.

37. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976). *See also* *Parker v. Baltimore & Ohio R.R.*, 652 F.2d 1012, 1017-18 (D.C. Cir. 1981).

38. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981).

39. *Board of Trustees v. Sweeney*, 439 U.S. 24 (1978).

40. The employer's burden of business justification under the theory of disparate impact, by contrast, is much heavier. *See infra* text accompanying notes 156-81.

41. *McDonald*, 427 U.S. at 279 n.6.

42. *E.g.*, *Chaline v. KCOH, Inc.*, 693 F.2d 477, 480 (5th Cir. 1982).

43. *E.g.*, *Lanphear v. Prokop*, 703 F.2d 1311, 1315 (D.C. Cir. 1983); *see* *Lincoln v. Board of Regents*, 697 F.2d 928, 938 (11th Cir. 1983), *cert. denied*, 464 U.S. 826 (1983) (relying on evidence of a majority of black teachers at a traditionally black college).

44. *E.g.*, *Lilly v. City of Beckley*, 797 F.2d 191, 194-96 (4th Cir. 1986).

a little-noticed passage⁴⁵ that places the burden on the plaintiff of proving that an affirmative action plan is a pretext for discrimination. This passage seems to assume that a valid affirmative action plan constitutes a “legitimate, nondiscriminatory reason,” even though it allows the employer explicitly to take account of race, national origin, or sex.

Although proof of intentional discrimination must somehow be reconciled with the scope of permissible affirmative action, this cannot be accomplished simply by modifying the shifting burdens of production in *McDonnell Douglas*. These burdens leave open the possibility of proving intentional discrimination by other means, including direct evidence that the employer relied on a prohibited characteristic.⁴⁶ No better direct evidence can be found than proof that the employer relied on an affirmative action plan which, by definition, involves consideration of an otherwise prohibited characteristic. Although the employer must be given the opportunity to present evidence that its affirmative action plan is permissible, this evidence does not easily fit within the framework of *McDonnell Douglas*; affirmative action is better characterized as a legitimate *discriminatory* reason than as a legitimate nondiscriminatory reason. Sensing this, most courts have not relied heavily on *McDonnell Douglas* to resolve claims of reverse discrimination.

Other cases also fall outside the literal terms of *McDonnell Douglas*, including those involving claims of wrongful discharge or layoff. Excluding disability claims, the majority of employment discrimination cases are filed by employees who have lost their jobs.⁴⁷ Two of the four elements of the plaintiff’s prima facie case are rarely significant in most of these cases. The second element, that the plaintiff has the minimal qualifications for the job, almost always is satisfied; otherwise, the plaintiff would not have gotten the job in the first place. Even more than hiring cases, discharge cases focus on the qualifications above the

45. *Johnson v. Transportation Agency*, 480 U.S. 616, 626 (1987).

46. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (age discrimination case); *Ramsey v. City of Denver*, 907 F.2d 1004, 1007–08 (10th Cir. 1990), *cert. denied*, 506 U.S. 907 (1992) (sex discrimination case); *EEOC v. Alton Packaging Corp.*, 901 F.2d 920, 923 (11th Cir. 1990) (race discrimination case).

47. John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 *Stan. L. Rev.* 983, 1015 (1991).

minimum for the job and the plaintiff's failure to satisfy them. Likewise, the fourth element, that the position remained open and the employer continued to look for applicants with the plaintiff's qualifications, often is entirely irrelevant. As the layoff cases illustrate, the continued existence of the plaintiff's position does not have any bearing at all on whether the plaintiff was discharged for a discriminatory reason.

These deficiencies in *McDonnell Douglas* have not gone unnoticed by the lower federal courts. They have substituted various alternative elements, such as satisfactory performance until the incident giving rise to the discharge,⁴⁸ departure from the general policies on discipline or discharge usually followed by the employer,⁴⁹ or different treatment of someone from another race or other group.⁵⁰ This last alternative does not require proof that the plaintiff was replaced by someone from a different group, as the Supreme Court itself has held,⁵¹ although that fact might strengthen the plaintiff's claim. It only requires proof that employees like the plaintiff were subject to stricter requirements than other employees, which is, of course, just another way of stating the ultimate issue of discrimination. This last alternative replaces the entire structure of shifting burdens of production, not just a single element of the plaintiff's prima facie case.

Where the lower federal courts have tried to refine *McDonnell Douglas*, the Supreme Court has been more concerned with limiting its overall significance. The lower federal courts have tried to make more of the burden of proof than has the Supreme Court in order to resolve the many cases that come before them. Yet the ease with which each party can satisfy its burden has left them to resolve most cases on the issue of pretext, which is just another way of framing the ultimate issue of discrimination. The Supreme Court, not faced with the need to decide a large number of routine cases, has emphasized the limited significance of all aspects of the burden of production. The Court has

48. *Crimm v. Missouri Pac. R.R.*, 750 F.2d 703, 711 (8th Cir. 1984); *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1282–83 (7th Cir. 1977).

49. *Moore v. City of Charlotte*, 754 F.2d 1100, 1105–06 (4th Cir.), *cert. denied*, 472 U.S. 1021 (1985); *EEOC v. Brown & Root, Inc.*, 688 F.2d 338, 340–41 (5th Cir. 1982).

50. *Perryman v. Johnson Prods. Co.*, 698 F.2d 1138, 1142–43 (11th Cir. 1983).

51. *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311–13 (1996).

said repeatedly that the burden of persuasion always remains with the plaintiff,⁵² that the employer's burden of articulating a legitimate non-discriminatory reason is a light one,⁵³ that the plaintiff is under no obligation to specifically plead the elements of a prima facie case,⁵⁴ and that most cases should be resolved on the factual issue of whether discrimination occurred instead of the legal issue of whether the burden of production has been satisfied.⁵⁵ Most recently, the Supreme Court has held that *McDonnell Douglas* does not establish a rule of pleading and that the elements of the plaintiff's prima facie case need not be specifically alleged in the complaint.⁵⁶

***McDonnell Douglas* and the Right to Jury Trial**

The Supreme Court began to address the issue of how much evidence the plaintiff needed to survive a motion for summary judgment or for directed verdict in *St. Mary's Honor Center v. Hicks*.⁵⁷ Although this case was tried to a judge, it raised the question whether the plaintiff could prevail simply by discrediting the legitimate nondiscriminatory reason offered by the defendant. Hicks, a supervisor of the St. Mary's Honor Center, a halfway house operated by a state prison system, alleged that he had been discharged because he was black. In its defense, the employer offered as its legitimate, nondiscriminatory reason the fact that the subordinates supervised by Hicks had violated the rules for operation of the center. The district court rejected this reason because Hicks was the only supervisor disciplined even though other supervisors had allowed violations of the center's rules. Nevertheless, the court found an absence of discrimination. The court concluded that the real reason for Hicks's discharge was neither the reason offered by the employer nor his race, but his supervisor's personal dislike for him.

52. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *Board of Trustees v. Sweeney*, 439 U.S. 24, 25 (1978); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577-78 (1978).

53. *Burdine*, 450 U.S. at 254-55; *Furnco*, 438 U.S. at 579-80.

54. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 506-07 (2002).

55. *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985); *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983).

56. *Swierkiewicz*, 534 U.S. at 515.

57. 509 U.S. 502 (1993).

I. Substantive Provisions of Title VII

The Supreme Court ultimately agreed with this conclusion, holding that the plaintiff only raised an issue of pretext by discrediting the reason offered by the defendant. The trier of fact, in this case the district judge, was free to decide that Hicks had not established pretext based on all the evidence in the record as a whole.⁵⁸ This holding accords with previous decisions placing the burden of persuasion always on the plaintiff, as well as with decisions reducing the burden on the defendant to offering a legitimate nondiscriminatory reason, leaving most cases to be decided on the issue of pretext. All of these previous decisions imply that the defendant can prevail despite the fact that its offered reason for discharge turned out to be false.

What was less clear after *St. Mary's Honor Center*, however, was whether the trier of fact was free to decide for the plaintiff based on evidence discrediting the defendant's offered legitimate, nondiscriminatory reason. The opinion plainly stated that a finding of discrimination could be based on such evidence,⁵⁹ but the lower courts were divided on the extent to which additional evidence was necessary. The question was posed somewhat confusingly in terms of the plaintiff's need to present evidence of "pretext plus": evidence in addition to the evidence discrediting the defendant's offered reason. This is plainly the wrong way to pose the question, however. After *St. Mary's Honor Center*, proof of pretext requires more than simply discrediting the defendant's offered reason. It also requires proof that the defendant's motivating reason was discriminatory. There is no "plus" that must be added to the proof of pretext. Nevertheless, some lower courts required such additional evidence, and if it was not forthcoming, entered judgment as a matter of law for the defendant. In *Reeves v. Sanderson Plumbing Products, Inc.*,⁶⁰ the Supreme Court resolved this conflict among the circuits and held that no such evidence was necessary. The plaintiff could rely upon any evidence in the record to support a finding of discrimination, including the evidence establishing the prima facie case and the evidence discrediting the defendant's offered reason.⁶¹

58. *Id.* at 510–12.

59. *Id.* at 511.

60. 530 U.S. 133 (2000).

61. *Id.* at 147–49.

Neither of these Supreme Court decisions gives much guidance to the lower federal courts in expeditiously deciding the vast bulk of employment discrimination cases, however. On the contrary, in *Reeves*, the Court cautioned against prematurely resolving these cases without considering all of the evidence favorable to the plaintiff.⁶² Following the lead of decisions approving the use of summary judgment,⁶³ however, the lower federal courts have closely examined the plaintiff's evidence to determine whether it supports a reasonable inference of intentional discrimination.⁶⁴ Nevertheless, the practice in different circuits has been highly variable: Some courts have recognized that these cases should rarely be taken from the jury, because they involve questions of intent,⁶⁵ and other courts have allowed judges greater leeway to grant summary judgment or judgment as a matter of law.⁶⁶ How much leeway is left after *Reeves* is now an open question.

This question has become all the more significant as the right to jury trial has been extended to the full range of employment discrimination cases. A decision on summary judgment now denies the plaintiff both a trial and a decision by a jury, which can award damages in addition to any back pay awarded by the court.⁶⁷ By this means, and by the related practice on motions for judgment as a matter of law, the lower courts have retained control over the employment discrimination cases that are submitted to juries. The plaintiff's burden of production must be satisfied before a case can go to the jury. This burden is rarely satisfied simply by making out a prima facie case under *McDonnell Douglas*; the plaintiff must also present sufficient evidence

62. *Id.* at 150–54.

63. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 597–98 (1986).

64. *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8–10 (1st Cir. 1990); *Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1436–39 (9th Cir. 1990); *Gagne v. Northwestern Nat'l Ins. Co.*, 881 F.2d 309, 314 (6th Cir. 1989); *Weihaupt v. American Med. Ass'n*, 874 F.2d 419, 428–30 (7th Cir. 1989); *Meiri v. Dacon*, 759 F.2d 989, 997–98 (2d Cir.), *cert. denied*, 474 U.S. 829 (1985).

65. *Kerzer v. Kingly Mfg.*, 156 F.3d 396, 400 (2d Cir. 1998); *Sheridan v. E.I. DuPont de Nemours*, 100 F.3d 1061, 1071 (3d Cir. 1996) (en banc), *cert. denied*, 521 U.S. 1129 (1997).

66. *Taylor v. Virginia Union Univ.*, 193 F.3d 219, 230–34 (4th Cir. 1999) (en banc), *cert. denied*, 528 U.S. 1189 (2000); *Walton v. Bisco Indus., Inc.*, 119 F.3d 368, 370 (5th Cir. 1997).

67. 42 U.S.C. § 1981a(b), (c) (2000).

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on the issue of pretext. As *St. Mary's Honor Center* and *Reeves* have recognized, this burden can be satisfied by discrediting the reason offered by the defendant. Moreover, the plaintiff gets the benefit of all of the favorable evidence in the record. As Justice Ginsburg observed in her concurring opinion in *Reeves*, the plaintiff will usually meet the burden of producing sufficient evidence to have the case go to the jury,⁶⁸ but as the Court made clear, the possibility remains that the plaintiff will fail to meet this burden even after discrediting the defendant's offered reason.

If the plaintiff's burden of production is satisfied, then the case goes to the jury and the jurors need not be instructed that the burden is satisfied.⁶⁹ By definition, these burdens have been met by the parties in all cases that go to the jury. Jurors need to be instructed on the burden of persuasion, but the instruction need only state that that burden rests always with the plaintiff in proving intentional discrimination. In some circuits, the jury must also be instructed on the inferences that may be drawn from findings that a plaintiff has made out a prima facie case and has discredited the defendant's offered "legitimate, nondiscriminatory reason."⁷⁰ Conversely, some circuits have also allowed, but not required, a jury instruction on the employer's business judgment: that the jury need not agree with the employer's offered reason to find that it is nondiscriminatory.⁷¹ This is as far as *McDonnell Douglas* and the cases following it can take the court in framing jury instructions.

68. *Reeves*, 530 U.S. at 154 (Ginsburg, J., concurring).

69. The Second Circuit has been particularly insistent in warning of the dangers of importing phrases such as "prima facie" case into the instructions to the jury. *E.g.*, *Cabrera v. Jakobovitz*, 24 F.3d 372, 380–81 (2d Cir. 1994); *Hagelthorn v. Kennecott Corp.*, 710 F.2d 76, 85 (2d Cir. 1983).

70. *Compare* *Smith v. Borough of Wilkesburg*, 147 F.3d 272, 280 (3d Cir. 1998) (requiring such an instruction), *with* *Achor v. Riverside Golf Club*, 117 F.3d 339, 341 (7th Cir. 1997) (requiring only instruction on plaintiff's burden of persuasion).

71. *E.g.*, *Kelley v. Airborne Freight Corp.*, 140 F.3d 335, 350–51 & n.6 (1st Cir. 1998). Along the same lines, some courts have held that the "same-actor" inference is not mandatory: that the fact that the same person who hired the plaintiff also fired him does not require judgment for the employer. *Wexler v. White's Fine Furniture Inc.*, 317 F.3d 564, 572–74 (6th Cir. 2003) (citing cases).

Mixed-Motive Cases

In mixed-motive cases, the task of instructing the jury becomes more complicated than it is in cases in which the only disputed issue is pretext. Mixed-motive cases involve evidence that supports a finding that the defendant acted both for a discriminatory reason and for a legitimate reason in making an employment decision adverse to the plaintiff. These cases do not fit easily into the framework established by *McDonnell Douglas*, which presupposes that the employer's decision was entirely based either on a legitimate reason or on a discriminatory reason, but not on both. The word "pretext," as it is commonly understood, means that the offered reason for a decision is not the real reason. The offered reason only hides the real reason; it does not accompany it. Mixed-motive cases are those in which both reasons play a role. It is therefore necessary to revise the ordinary understanding of pretext to make mixed-motive cases fit within the framework of *McDonnell Douglas*.

In *Price Waterhouse v. Hopkins*,⁷² the Supreme Court began this task by holding that the defendant bears the burden of production and persuasion on the mixed-motive issue. In particular, after the plaintiff has proved that a prohibited reason was a substantial or motivating factor in the disputed employment decision, the defendant has the burden of proving that the same decision would have been made for an entirely legitimate reason.⁷³ The defendant's burden also includes the burden of persuasion, defined as the usual burden in civil cases of proof by a preponderance of the evidence.⁷⁴ Both of these issues—the existence of a prohibited reason and the existence of a legitimate reason—were assigned to the violation stage of the case, not the remedy stage of the case.⁷⁵ As a consequence, if the defendant established a mixed-motive defense, the plaintiff was not a prevailing party and so could not obtain declaratory or prospective injunctive relief or an award of attorney's fees.⁷⁶

72. 490 U.S. 228 (1989).

73. *Id.* at 249–50 (plurality opinion of Brennan, J.); *id.* at 259–60 (White, J., concurring in the judgment).

74. *Id.* at 249.

75. *Id.* at 244–45 n.10 (plurality opinion of Brennan, J.).

76. Section 706(k), 42 U.S.C. § 2000e-5(k) (2000); see *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

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In the Civil Rights Act of 1991, Congress largely followed the Supreme Court in shifting the burden of production and persuasion to the defendant in mixed-motive cases. Congress departed from *Price Waterhouse* in two respects, however, one minor and one more important. First, the Act defines disparate treatment as requiring the plaintiff to prove only that a discriminatory reason was a “motivating factor,” not that it was a “substantial factor.”⁷⁷ Whatever the difference in meaning of these phrases, the law is now settled in favor of “motivating factor.” Second, the mixed-motive defense is now assigned firmly to the remedy stage of the case. The definition of disparate treatment specifies what the plaintiff must prove in order to establish a violation of the statute. The mixed-motive defense imposes a limitation only upon remedies. The general remedial section of Title VII now contains a subsection that relieves the defendant of liability for compensatory relief upon proof that the defendant “would have taken the same action in the absence of the impermissible motivating factor.” Even if the defense is established, the court may still award declaratory and prospective injunctive relief and attorney’s fees.⁷⁸

Assigning the mixed-motive defense to the remedy stage of a case also allows the defense itself to be more clearly distinguished from the defendant’s rebuttal burden under *McDonnell Douglas*. The defense that the employment decision would have been adverse to the plaintiff anyway arises only after a finding of discrimination, and for that reason, the burden of production and persuasion shifts from the plaintiff to the defendant. By contrast, the defense under *McDonnell Douglas* arises after the plaintiff has made out a prima facie case, which does not amount to a finding of discrimination,⁷⁹ and it shifts only the burden of production to the defendant, not the burden of persuasion.⁸⁰

In cases tried to a jury, these theoretical complications have practical consequences. Since the shifting burdens of production under *McDonnell Douglas* only address the issue whether the case gets to the jury, and then only rarely, the jury need not be instructed on these burdens at all. That leaves the shifting burdens of persuasion on the mixed-motive defense, which do need to be explained to the jury.

77. Section 706(g)(2)(B), 42 U.S.C. § 2000e-5(g)(2)(B) (2000).

78. Section 706(g)(2)(B)(i), 42 U.S.C. § 2000e-5(g)(2)(B)(i) (2000).

79. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 576 (1978).

80. *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253–56 (1981).

Again, the jury needs to be instructed on this defense only if the defendant carries its burden of production: the burden of producing evidence from which a reasonable inference can be drawn that it would have reached the same decision for legitimate reasons. Only if the defendant meets this burden is it necessary to instruct the jury on the shifting burdens of persuasion.

These burdens can be explained by defining the issue of violation—on which the plaintiff has the burden of persuasion—in terms of the defendant’s actual decision-making process, and defining the mixed-motive defense—on which the defendant has the burden of persuasion—in terms of a hypothetical decision-making process free of discrimination. If the plaintiff proves by a preponderance of the evidence that a prohibited reason, such as race or sex, was a motivating factor in the defendant’s actual decision-making process, then a violation of Title VII has been established. If, however, the defendant proves by a preponderance of evidence that the decision would have been the same even if the decision-making process had been entirely free from discrimination, then the plaintiff cannot be granted any compensatory relief.

Even this example understates the complexity of existing law. Despite amendments to Title VII that clarified the treatment of mixed-motive cases, some decisions still insist on assigning the mixed-motive defense to the liability stage of litigation and not the remedy stage. These decisions follow the lead of the Supreme Court in *Price Waterhouse*, which was decided before Title VII was amended by the Civil Rights Act of 1991 to include the statutory provision quoted earlier.⁸¹ Although this decision did not result in a majority ruling, the plurality opinion of Justice Brennan and the separate opinions of Justice White and Justice O’Connor placed the mixed-motive issue in the liability phase of the case rather than the remedy phase. These opinions placed the burden on the plaintiff of proving that a discriminatory reason “played a motivating part” or was “a substantial factor” in the disputed employment decision.⁸² If the plaintiff made this showing, then the defendant could entirely escape liability by proving that the same deci-

81. See *supra* text accompanying notes 77–78.

82. *Price Waterhouse*, 490 U.S. at 250 (plurality opinion of Brennan, J.) (“played a motivating part”); *id.* at 259 (White, J., concurring in the judgment) (“a substantial factor”); *id.* at 265 (O’Connor, J., concurring in the judgment) (“a substantial factor”).

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sion adverse to the plaintiff would have been made in the absence of the discriminatory reason.⁸³ This result differs significantly from what the literal terms of Title VII now seem to require. Title VII now provides for the recovery of injunctive relief and attorney's fees upon proof by the plaintiff that a prohibited reason was a motivating factor in the defendant's decision, regardless of proof by the defendant that it would have reached the same decision entirely for legitimate reasons. *Price Waterhouse* would not allow any relief at all in this situation.

To some extent, returning to *Price Waterhouse* makes sense for claims outside the scope of Title VII, such as those under the Age Discrimination in Employment Act (ADEA). The statutory provisions on mixed-motive cases were added to Title VII by the Civil Rights Act of 1991, but not to statutes like the ADEA (although they were amended in other respects by the Act). This pattern of selective amendment yields the inference that mixed-motive cases under the ADEA should be decided according to preexisting law. This inference has been drawn by some courts of appeals,⁸⁴ but others have gone even further in restricting the scope of the amendments.

Again relying on *Price Waterhouse*, these latter decisions distinguished mixed-motive cases from pretext cases based on the nature of the plaintiff's evidence of discrimination, holding that a plaintiff under Title VII can take advantage of the new provisions for mixed-motive cases only if the plaintiff relies on "direct" evidence of discrimination. If the plaintiff relies on circumstantial evidence, the case must be analyzed under *McDonnell Douglas*, and the burden of proof on the issue of pretext remains entirely on the plaintiff.⁸⁵ The Supreme Court rejected these decisions in *Desert Palace, Inc. v. Costa*,⁸⁶ holding that a jury could properly be instructed that the burden of proof shifts to the employer in mixed-motive cases, even if the plaintiff presented only circumstantial evidence of discrimination.

83. *Id.* at 252 (plurality opinion of Brennan, J.); *id.* at 259–60 (White, J., concurring in the judgment); *id.* at 267–68 (O'Connor, J., concurring in the judgment).

84. *E.g.*, *Miller v. CIGNA Corp.*, 47 F.3d 586, 597 & n.9 (3d Cir. 1995) (en banc). The same inference might also be drawn for individual claims of intentional discrimination under section 1981 and the ADA, which were also amended by the Civil Rights Act of 1991, but not with respect to mixed-motive cases.

85. *E.g.*, *Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, 580–83 (1st Cir. 1999) (citing cases).

86. 539 U.S. 90 (2003).

The Court found the contrary decisions problematic for several reasons. First, under Title VII, Congress made the plaintiff's proof that a discriminatory reason was a "motivating factor" sufficient to resolve the issue of liability and to shift the burden of proof to the defendant. Congress did not make the nature of the plaintiff's evidence decisive, but only the conclusions drawn from that evidence. Moreover, any attempt to draw a distinction between direct and circumstantial evidence transforms a question of degree—how closely evidence is connected to a fact in dispute—into a question of kind—whether it is connected closely enough to be "direct." As the cases on "stray remarks" illustrate, issues of interpretation, context, and countervailing evidence might always intervene between even the most compelling evidence and a finding of discrimination.⁸⁷

Even putting these complications to one side, however, existing law is still far from simple. When the issue of mixed motives is properly raised, the court must instruct the jury on the niceties of the burden of persuasion on two closely related issues—whether the defendant's decision was motivated by a prohibited reason and whether it would have been the same in the absence of a prohibited reason. A decision under the ADEA illustrates how complicated these issues can be. *McKennon v. Nashville Banner Publishing Co.*⁸⁸ involved a defense of "after acquired" evidence, in which an employer discovered, after the plaintiff was discharged and filed a claim of discrimination, that she had misused confidential documents. This conduct would ordinarily have been grounds for discharge, but it was unknown to the employer when the plaintiff was discharged. Despite the employer's concession, for purposes of summary judgment, that it had engaged in age discrimination, the district court granted summary judgment for the employer. The court of appeals affirmed the decision, but the Supreme Court reversed it, holding that the "after acquired" evidence went only to the issue of remedy and limited back pay to the period before such evidence was discovered. The Court's opinion makes clear that reasoning very similar to that under Title VII also applies to claims under other statutes and that this reasoning is not limited to mixed-motive cases. In *McKennon*, the actual decision was based solely on a dis-

87. *E.g.*, *Indurante v. Local 705, Int'l Bhd. of Teamsters*, 160 F.3d 364, 367 (7th Cir. 1998); *Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 513–14 (3d Cir. 1997).

88. 513 U.S. 352 (1995).

criminatorial reason, and the hypothetical decision, solely on a legitimate reason. The technicalities of jury instructions did not arise in *McKennon* because the case came up on summary judgment. Nevertheless, separating the case into issues of violation and remedy makes a start toward clarifying the law.

As the law has developed for individual claims of disparate treatment the plaintiff's burden of proving pretext under *McDonnell Douglas* has often been decisive. Either the plaintiff fails to present sufficient evidence of pretext to survive a motion for summary judgment or a motion for judgment as a matter of law, or the case goes to the jury. If the latter, the jury need only be instructed under *McDonnell Douglas* that the plaintiff bears the burden of persuasion on this issue. In mixed-motive cases, however, the burden of persuasion is divided between the plaintiff and the defendant. This division has created problems, both in defining when a case genuinely raises a question of mixed motives and, when it does, in instructing the jury appropriately. These problems have yet to be fully resolved, either by the Supreme Court or by the lower courts.

Class Claims of Disparate Treatment

Strictly speaking, the distinction between class claims and individual claims is one of procedure rather than substance, concerning how individual claims are joined in a single action instead of the theory of liability that the plaintiff pursues in order to establish a violation. The standard procedural form for class claims is either a class action by private plaintiffs under Federal Rule of Civil Procedure 23 or a pattern-or-practice action by public officials under statutory authority. Some of these claims have been litigated as a series of individual claims of intentional discrimination, following the structure of proof in *McDonnell Douglas*. Conversely, a few individual cases have been litigated by presenting statistical evidence of intentional discrimination or disparate impact.⁸⁹ Yet substantive theories of liability have tended to correspond to the procedural forms of action: Individual theories of liability are mostly to be found in individual actions, and class-wide theories of liability, relying mainly on statistics or the the-

89. E.g., *Connecticut v. Teal*, 457 U.S. 440, 443 (1982).

ory of disparate impact, have been found mostly in class actions and pattern-or-practice actions.

The class claims that most closely resemble individual claims are those of disparate treatment, since both kinds of claims require proof of intentional discrimination. The means of proving intentional discrimination, however, is very different in class claims of disparate treatment. These claims invariably require evidence in the form of class-wide statistics, often supplemented by evidence of individual instances of disparate treatment. Using statistics to prove disparate treatment is similar to using them to prove disparate impact,⁹⁰ but the extent of a group's underrepresentation in the employer's workforce must usually be greater to support an inference of disparate treatment than it must be to support an inference of disparate impact.

The variety of statistical evidence poses more immediate choices for legal doctrine. Judges and juries cannot be left entirely on their own in evaluating statistical evidence, yet they also must not be hemmed in by simplistic quantitative analysis of statistical evidence. Some lower court decisions, unfortunately, have confused judicial analysis of statistical evidence with formulation of categorical rules of law. The latter is not appropriate for the former. The Supreme Court has clearly recognized this point and has refused to offer any definitive method of analyzing statistical evidence. In cautioning that statistical evidence comes in many forms and is always rebuttable, the Court has said that the force of such evidence "depends on all of the surrounding facts and circumstances."⁹¹ The methods the Supreme Court has endorsed are suggestive and instructive, not exhaustive; they should not be taken to exclude the use of alternative methods of evaluating statistical evidence upon a proper showing. The Supreme Court has offered two models of analysis, and the lower federal courts have endorsed several variations on these models.

The first, and simpler, of the two models of statistical analysis was endorsed by the Supreme Court in *International Brotherhood of Teamsters v. United States*.⁹² This model of statistical inference—or "the in-

90. See *infra* text accompanying notes 147–55.

91. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 (1977). For a recent decision that makes this point, in particular, about the "5 percent significance level," see *Kadas v. MCI Systemhouse Corp.*, 255 F.3d 359, 362 (7th Cir. 2001).

92. 431 U.S. 324, 342 n.23 (1977).

exorable zero” as it was referred to by the court of appeals—concerns extreme disparities in the treatment of workers from different groups. *Teamsters* was a “pattern-or-practice” case, so called because the government alleged that the Teamsters Union and various trucking companies had engaged in a systematic practice of denying better paying jobs to blacks and Hispanics. These were “over-the-road” jobs involving driving between major cities, for which the defendants employed few, if any, members of minority groups. Almost all the blacks and Hispanics were employed instead as “city drivers” and “servicemen,” working within a single metropolitan area. Although the opinion compared the proportion of minority employees in these different positions, the decisive comparison was between the proportion of minority employees who were over-the-road drivers and the proportion of minorities in the general population. The latter figure, the Court made clear, was relevant only because it was an adequate approximation of the proportion of minorities in the relevant labor market.⁹³

Such a rough approximation, and the general commonsense approach taken by the Supreme Court, are the distinguishing features of the simple model of statistical inference. Everything depends upon the disparity in treatment being large enough to dispel any lingering doubts from imprecise estimates. The Court simply assumed that the proportion of minorities in the general population would approximate the proportion in the labor market, an assumption only partly confirmed by the statistics on hiring for city driver and serviceman positions.⁹⁴ Any remaining doubts about this assumption were overcome by the enormous disparity represented by “the inexorable zero” of minorities among over-the-road drivers. Accordingly, the Court found no need to rely on even elementary tests of statistical significance.

Few cases from recent years present the stark disparities found in *Teamsters*. Under the influence of Title VII, most employers have entirely abandoned explicit discriminatory practices with obvious effects on large numbers of employees. Consequently, the disparities revealed by statistical evidence have become narrower, and the assessment of the evidence has become subject to greater and more technical disputes. Expert witnesses are essential for the plaintiffs in most of these cases, and often for the defendant as well. Although *Teamsters* was

93. *Id.* at 337 n.17.

94. *Id.* at 339 n.20, 342 n.23.

decided without the benefit of expert testimony, its simple model of statistical inference was based on a more sophisticated model, which consists of three separate steps: first, an examination of the presence or treatment of a minority in the relevant labor market; second, a determination of how the same group is treated by the defendant employer; and third, a comparison of the figures generated by the first two steps to determine whether they support an inference of intentional discrimination.

The second, and more complex, model for evaluating statistical evidence was used in *Hazelwood School District v. United States*.⁹⁵ That case concerned a claim of racial discrimination in hiring teachers by a public school district in the suburbs of St. Louis, Missouri. The Court held that the appropriate statistics compared the racial composition of the labor market with the racial composition of the group hired by the school district, for the period after the effective date of Title VII and by means of tests for statistical significance.

Hazelwood held that the labor market must be defined to include only persons with undisputed qualifications for the job—in this case, those with state teaching certificates—and only persons in the geographical area surrounding the place of employment—here, part or all of the St. Louis metropolitan area. The first issue, undisputed qualifications, determines the relevance of general population figures as evidence of the racial composition of the labor market. If no qualifications are required for the job, or only qualifications that are easily acquired, then general population figures provide an adequate approximation of the racial composition of the labor market.⁹⁶ Otherwise, statistics confined to those qualified for the job are necessary. Whether a qualification is necessary for the job, of course, is often a matter of dispute, so that the appropriate definition of the labor market depends upon what employment practices are claimed to be discriminatory and what qualifications, like the state teaching certificate in *Hazelwood*, are undisputed.

The second issue, the geographic definition of the labor market, was discussed by the Court at greater length, although it was not resolved. The St. Louis City School District had attempted to maintain a ratio of 50% black teachers. The United States, on behalf of black ap-

95. 433 U.S. 299 (1977).

96. *Id.* at 308 & n.13.

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plicants for employment, argued that teachers in the St. Louis city schools should be included in the labor market, thereby increasing the proportion of blacks, because they could quit their jobs in the city and commute to the Hazelwood schools in the suburbs. The school district argued that these teachers should be excluded from the labor market because the affirmative action policy of the St. Louis City School District had depleted the pool of black applicants from which suburban school districts could hire teachers. These arguments are typical of the efforts of litigants to define the labor market so that it favors their positions.

Another issue left unresolved in *Hazelwood* was the use of applicant-flow statistics. Applicant-flow statistics can be used instead of general or qualified population statistics for a particular geographical area. The advantage of applicant-flow statistics is that they reveal who in the labor market has actually expressed an interest in the job offered by the employer. Population statistics for a particular geographical area include persons within the geographical area who are not interested in the job offered by the employer and exclude persons outside the geographical area who are interested. The racial composition of the group actually interested in the job offered by the employer may differ significantly from the racial composition of the general or qualified population. The disadvantage of applicant-flow statistics is that they may reflect distortions in the proportion of minority applicants, arising from the deterrent effect of the disputed employment practice, from the employer's general reputation for discrimination, or from the opposite effect of an employer's affirmative action efforts to recruit minority employees. In *Hazelwood*, the Supreme Court left the need for applicant-flow statistics to be determined on the facts of each case.⁹⁷

After the racial composition of the labor market has been determined, it must be compared with the racial composition of the group of applicants actually hired by the employer during the relevant time period, determined by the effective date of Title VII or, more commonly, by the statute of limitations. Only hiring that occurred after the effective date of Title VII and within the limitation period constitutes an actionable violation of Title VII, although evidence of pre-act

97. *Id.*

or pre-limitation discrimination may support an inference of intentional discrimination at a later time.⁹⁸ As the Court noted in *Hazelwood*, the racial composition of the employer's workforce may reflect pre-act discrimination and may deviate substantially from the racial composition of the pool of employees actually hired over the relevant time period.⁹⁹

The comparison between the racial composition of the labor market and the racial composition of the group hired should be accomplished by statistical methods, unless there are extreme disparities,¹⁰⁰ such as the nearly complete absence of minority employees in the highest paying jobs in *Teamsters*.¹⁰¹ The particular statistical methods adopted by the Court in *Hazelwood* may or may not be appropriate in other cases.¹⁰² This is a question for statisticians. The important point is that statistical methods are needed to account for the effects of chance: the possibility that differences in racial composition arise solely through the selection of a small sample of those hired from the larger population of those in the labor market. Statistical methods, however, have their limitations. In particular, they cannot be used to determine whether the difference in selection rates is large enough to justify a finding of intentional discrimination. This is a matter of legal policy, not of statistical expertise.

Statistics and statistical methods can be used in other kinds of cases as well. For instance, in *Bazemore v. Friday*,¹⁰³ the Supreme Court held that a regression analysis was highly probative of salary discrimination against black employees of a state agricultural extension service. Plaintiffs commonly use regression analysis to try to prove that employees of one race or sex are paid less than employees of another. In order to do so, the regression analysis must isolate the effect that race or sex has on pay by controlling for the differences

98. See *Bazemore v. Friday*, 478 U.S. 385, 400–01 (1986) (Brennan, J., concurring in part) (emphasizing this point).

99. *Hazelwood*, 433 U.S. at 309 & n.15.

100. *Id.* at 307.

101. *Teamsters*, 431 U.S. at 337–38.

102. *Hazelwood*, 433 U.S. at 310–12 & n.17.

103. 478 U.S. 385 (1986) (per curiam). In an unusual alignment of opinions, Justice Brennan wrote an opinion concurring in part for all the justices. *Id.* at 388. He also wrote an opinion dissenting in part for four justices. *Id.* at 409. Justice White wrote a concurring opinion for five justices. *Id.* at 407.

between employees that an employer may legitimately consider in setting rates of pay. Nevertheless, because of limitations in the data on which it is based and because of theoretical disputes over what factors do legitimately affect compensation, regression analysis seldom takes account of all the factors that might conceivably be relevant. In *Bazemore*, the Court recognized that a regression analysis may omit some measurable variables, particularly when the record as a whole supported an inference of discrimination and the plaintiffs submitted evidence that the omitted factor, the county where employees worked, did not account for the difference between the salaries of black employees and those of white employees.¹⁰⁴ The Court's decision may have been influenced by the way the lower courts framed their decision, almost holding that the regression analysis was inadmissible because it was "unacceptable as evidence of discrimination."¹⁰⁵ The Supreme Court stopped just short of holding that the finding of no discrimination by the district court was clearly erroneous on the record before it.¹⁰⁶ The general significance of the decision, however, lies in its evaluation of the statistical evidence based on the entire record.¹⁰⁷ As the Court had earlier cautioned in *Teamsters*, statistics "come in infinite variety and, like any other kind of evidence, they may be rebutted."¹⁰⁸

A final issue raised, but not resolved, by *Hazelwood* is the content of the plaintiff's "prima facie" case on a claim of class-wide disparate treatment. In *Hazelwood* and in *Teamsters*, the Court held that after the plaintiff has made out a prima facie case through statistical evidence, the defendant must be given an opportunity to present rebuttal evidence. It did not elaborate on the elements of the plaintiff's prima facie case or on the consequences of the plaintiff's making out a prima facie case. The Court's silence on the elements of the plaintiff's prima facie case apparently follows from its view that the relevance and probative force of statistics must be determined on a case-by-case basis.

The Court's silence on the consequences of a prima facie case is more puzzling. On the one hand, its language suggests that the burden

104. *Id.* at 402–03.

105. *Id.* at 400 (quoting the Fourth Circuit's opinion below).

106. *Id.* at 403–404 & n.14.

107. *Id.* at 400.

108. *Teamsters*, 431 U.S. at 340.

of production shifts to the defendant to present evidence from which a reasonable inference of no disparate treatment may be drawn and that the defendant's failure to carry this burden requires a finding of disparate treatment.¹⁰⁹ On the other hand, just as the Court failed to specify the content of the plaintiff's prima facie case, it also failed to specify the content of the defendant's rebuttal case. If one interprets its language narrowly, the Court may only have required that the defendant be given an opportunity to present evidence on the issue of disparate treatment, not that the defendant bear the burden of production after the plaintiff has made out a prima facie case. In this interpretation, the Court's use of the phrase "prima facie" refers only to the plaintiff's ordinary burden of production to present evidence from which a reasonable inference of liability can be drawn. The consequence of a prima facie case in this sense is only to allow, not to require, the district judge to draw an inference of disparate treatment, even if the defendant presents no evidence in rebuttal. Although this narrow view appears to be better supported by the Court's opinion as a whole, the only certain conclusion is that the Court would have done better to avoid using the phrase "prima facie case."

Class Claims of Disparate Impact

Unlike class claims of disparate treatment, class claims of disparate impact do not require proof of intentional discrimination. These claims require instead only proof of discriminatory effects. Exactly what this means—how it is proved by the plaintiff and how it may be rebutted by the defendant—has been a source of controversy since the Supreme Court developed the theory of disparate impact in *Griggs v. Duke Power Co.*¹¹⁰ Several decisions elaborated on the theory but left the elements of the plaintiff's case and the defendant's rebuttal uncertain. The Supreme Court resolved these uncertainties in favor of the defendants in *Wards Cove Packing Co. v. Atonio*,¹¹¹ only to have its decision largely overruled by Congress when it codified the theory of disparate impact in the Civil Rights Act of 1991.¹¹² Together with the

109. *Hazelwood*, 433 U.S. at 309.

110. 401 U.S. 424 (1971).

111. 490 U.S. 642 (1989).

112. 42 U.S.C. § 2000e-3(k) (2000); see Pub. L. No. 102-166 § 3(2), 105 Stat. 1071 (1991) (stating purpose to overrule *Wards Cove*).

related issue of affirmative action, the theory of disparate impact generated most of the controversy over the Act. Despite codification of the theory, doubts remain about exactly what it requires and the purposes that it serves. These problems go back to the original decision in *Griggs*.

Under *Griggs*, a plaintiff can establish a violation of Title VII by proving that an employment practice has a disparate impact on persons of a particular race, national origin, sex, or religion. Once the plaintiff proves disparate impact, the burden of proof shifts to the defendant to prove that the employment practice is justified by “business necessity” or is “related to job performance.”¹¹³ Under *Albemarle Paper Co. v. Moody*,¹¹⁴ if the defendant carries its burden of proof, the burden shifts back to the plaintiff to prove that the offered justification is a pretext for discrimination. The Civil Rights Act of 1991 codified this three-stage structure of shifting burdens of proof, though it did not clarify ambiguities in the elements of each party’s case.

The fundamental ambiguity in the theory of disparate impact concerns its underlying purpose: Is it only a modest addition to the theory of disparate treatment, designed to prevent pretextual discrimination by shifting part of the burden of proof onto the defendant? Or is it an entirely independent theory, designed to discourage employers from using employment practices with an adverse impact upon any particular group? If the theory of disparate impact is designed only to prevent pretextual discrimination, then it would result in liability only when there is evidence of disparate treatment (evidence not strong enough, however, to justify a finding of intentional discrimination) and it would impose a significant, but not overwhelming, burden on the employer to show that a disputed employment practice is related to performance on the job. The theory would ease the plaintiff’s burden of proving intentional discrimination, but only to a degree. By contrast, if the theory of disparate impact is designed to discourage employment practices that disproportionately exclude members of minority groups and women, then it would result in liability in the absence of evidence of disparate treatment, and it would impose a heavy burden on the employer to justify an employment practice with disparate impact. The theory would serve the independent purpose of

113. *Griggs*, 401 U.S. at 431.

114. 422 U.S. 405, 425 (1975).

eliminating neutral employment practices that impose systematic disadvantages upon racial minorities and women.

To understand the ambiguities in the theory of disparate impact, it is necessary to examine the decisions that led from *Griggs* to *Wards Cove*.

Decisions Before *Wards Cove*

In *Griggs v. Duke Power Co.*,¹¹⁵ the Supreme Court sent an ambivalent message, endorsing both a narrow and a broad interpretation of the theory of disparate impact. The Court seemingly endorsed a narrower version of the theory of disparate impact when it stated, “Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.”¹¹⁶ A few paragraphs later, however, the Court appeared to adopt the broader interpretation of the theory: “But Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.”¹¹⁷ Likewise, on the issue of the defendant’s burden of justification, the Court first appeared to place a heavy burden on the defendant, consistent with a broader interpretation of the theory: “The touchstone is business necessity.”¹¹⁸ But in the very next sentence, it appeared to impose only a light burden on the employer, consistent with the narrow interpretation: “If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.”¹¹⁹ It is unclear whether the theory of disparate impact requires a difficult showing of business necessity or an easy showing of relationship to job performance.

These ambiguities in *Griggs* cannot be resolved by examining the facts of the case. The evidence before the Court was equally consistent with a finding of liability based on a narrow or broad interpretation of the theory of disparate impact. The disputed employment practices in *Griggs* were the requirement of a high school diploma and passing scores on two general intelligence tests for hiring or promotion to higher-level departments, from which blacks had formerly been ex-

115. 401 U.S. 424 (1971).

116. *Id.* at 431.

117. *Id.* at 432.

118. *Id.* at 431.

119. *Id.*

cluded entirely. The evidence before the Court was that in North Carolina, 34% of white men, but only 12% of black men, had completed high school and that 58% of whites, but only 6% of blacks, had passed a similar battery of tests, although in an unrelated case.¹²⁰ More striking was the fact that the employer had extended the high school diploma requirement and imposed the testing requirement when it abandoned segregation just before the effective date of Title VII.¹²¹ Moreover, no black worker had been employed in the higher-level departments until administrative proceedings were commenced in *Griggs* itself,¹²² and the employer offered no justification for the disputed requirements beyond a desire to improve the overall quality of its workforce.¹²³ The principal obstacle to applying the theory of disparate treatment was not absence of evidence, but the findings of the district court and the court of appeals that the employer had not engaged in intentional discrimination.¹²⁴ The record in *Griggs* may have required application of the theory of disparate impact, but it did not require a choice between a narrow version of that theory and a broad one.

Subsequent decisions of the Supreme Court, until *Wards Cove*, were equally ambiguous concerning the choice between a narrow version and a broad version of the theory. Most of these decisions concerned the defendant's burden of justifying an employment practice with disparate impact. The decisions are discussed in detail in the subsection below on the defendant's burden of proof, but broadly speaking, they fall into two groups. One group is consistent with the Uniform Guidelines on Employee Selection Procedures¹²⁵ adopted by the Equal Employment Opportunity Commission (EEOC); the other is not.

Uniform Guidelines on Employee Selection Procedures

The Uniform Guidelines on Employee Selection Procedures impose exacting requirements upon defendants to justify practices with dispa-

120. *Id.* at 430 n.6.

121. *Id.* at 427–28.

122. *Id.* at 427 & n.2.

123. *Id.* at 431.

124. *Id.* at 428.

125. 29 C.F.R. pt. 1607 (2000).

rate impact, although the current version of the guidelines has relaxed these requirements somewhat. The cases that follow the Uniform Guidelines have generally endorsed a broad interpretation of the theory of disparate impact.¹²⁶ Other cases, however, have imposed less stringent requirements upon the employer than the Uniform Guidelines do and, to that extent, favored a narrow interpretation of the theory.¹²⁷

These cases raise the further issue of the authority of the Uniform Guidelines themselves. The EEOC does not have authority to promulgate substantive regulations with the force of law;¹²⁸ its guidelines on substantive issues are only interpretative regulations. Because the Supreme Court has sometimes given “great deference” to the EEOC guidelines¹²⁹ and sometimes not given them any deference at all,¹³⁰ it is difficult to determine what authority they actually possess.

***Wards Cove* and the Civil Rights Act of 1991**

The continued ambivalence of the Supreme Court toward the theory of disparate impact is perfectly illustrated by *Watson v. Fort Worth Bank & Trust*,¹³¹ the case that immediately preceded *Wards Cove*. In *Watson*, the Court expanded the scope of the theory of disparate impact, but divided evenly over the burden of proof that it placed upon employers. The first part of the opinion held that the theory of disparate impact applied to subjective employment practices, which required the exercise of discretion, in addition to standardized tests and qualifications, which were considered in *Griggs* and *Albemarle Paper*. The Court held that such practices could be challenged under the theory of disparate impact because, otherwise, employers could avoid application of the theory simply by replacing objective employment

126. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425–436 (1975); *Dothard v. Rawlinson*, 433 U.S. 321, 328–33 (1977).

127. *Washington v. Davis*, 426 U.S. 229, 250–52 (1976); *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587 & n.31 (1979); cf. *Connecticut v. Teal*, 457 U.S. 440 (1982) (refusing to follow the Uniform Guidelines on the issue of proof of disparate impact).

128. Section 713(a), 42 U.S.C. § 2000e-12(a) (1988).

129. *Albemarle Paper*, 422 U.S. at 431; *Griggs*, 401 U.S. at 433–34.

130. *General Elec. Co. v. Gilbert*, 429 U.S. 125, 140–45 (1976); *City of Los Angeles Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 719 n.36 (1978).

131. 487 U.S. 977 (1988).

I. Substantive Provisions of Title VII

practices with subjective decision making, which could be influenced by subconscious stereotypes and prejudices.¹³² While the Court in *Watson* was unanimous on expanding the scope of the theory of disparate impact, in this respect, it divided evenly on what the theory required the defendant to prove after disparate impact had been shown.¹³³ The failure of the Court to resolve this issue in *Watson* led directly to *Wards Cove* and ultimately to the Civil Rights Act of 1991.

The decision in *Wards Cove* was largely, but not entirely, overruled by the Civil Rights Act of 1991. It was only on the issues of the defendant's burden of proof and the plaintiff's burden of proving pretext that the Act overruled *Wards Cove*. On the issue of the plaintiff's initial burden of proving disparate impact, the Act did not overrule *Wards Cove* and may go even further than the decision in requiring the plaintiff to identify the employment practices that caused the disparate impact. Although the former issues are of greater theoretical significance, the latter issue may be of greater practical importance because the burden of proof switches to the defendant only after the plaintiff has proved disparate impact. If the plaintiff fails to satisfy this initial burden, the defendant need not justify the disputed employment practice.

The claims in *Wards Cove* concerned discrimination in hiring workers in two salmon canneries that operated in Alaska during the summer. The jobs in the canneries were divided into cannery jobs, which did not require any skills, and non-cannery jobs, which did. The non-cannery jobs paid more than the cannery jobs and were filled predominantly by white workers. The cannery jobs were filled predominantly by minority workers: Filipinos and Alaska Natives. The cannery and non-cannery workers also lived in separate dormitories and ate in separate mess halls. The Court held that the plaintiffs could not establish disparate impact simply by proving a racial imbalance in the composition of the workforce for cannery and non-cannery jobs. Instead, it was necessary for the plaintiffs to establish a disparity be-

132. *Id.* at 989–91.

133. Compare *id.* at 997–99 (opinion of O'Connor, J.) (defendant need only show "legitimate business purposes" or "business reasons") with *id.* at 1000–01 (Blackmun, J., concurring in part and concurring in the judgment), and *id.* at 1011 (Stevens, J., concurring in the judgment) (both dissenting from this part of Justice O'Connor's opinion).

tween the proportion of minority workers in non-cannery jobs and the proportion of those workers in the labor market for those positions.¹³⁴ Moreover, the plaintiffs were required to identify the particular employment practices that caused this disparity.¹³⁵

The Court's analysis of this issue follows the treatment of statistical evidence in *Hazelwood School District v. United States*,¹³⁶ where such evidence was used to prove disparate treatment (an issue analyzed in the previous section of this monograph). *Wards Cove* went beyond *Hazelwood* in requiring the plaintiff to identify the particular employment practices that caused the disparate impact. This holding was codified—not overruled—by the Civil Rights Act of 1991, which imposed the same requirement in nearly identical terms.¹³⁷ Since the Act did not address the use of statistical evidence in any other respect, the entire discussion of this issue in *Wards Cove* remains good law.

The controversial holdings in *Wards Cove* concerned the defendant's burden of proof and the plaintiff's burden of proving pretext. The Court held that if the plaintiff succeeded in establishing disparate impact when the case was remanded to the district court, only the burden of production switched to the defendant and that the court's examination of the employer's evidence was limited to "a reasoned review of the employer's justification for his use of the challenged practice."¹³⁸ If the defendant then succeeded in carrying this lighter burden of proof, the plaintiff was required to show that an alternative employment practice was equally effective in meeting the same business purposes but had a smaller disparate impact. In the Civil Rights Act of 1991, Congress rejected both of these holdings¹³⁹ and indeed identified *Wards Cove* as one of the decisions overruled by the Act.¹⁴⁰ In particular, in the Civil Rights Act of 1991, Congress defined "demonstrate" to mean "meets the burden of production and persuasion" and required the defendant to "demonstrate that the challenged prac-

134. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 654 (1989).

135. *Id.* at 656.

136. 433 U.S. 299 (1977). *See supra* text accompanying notes 100–09.

137. Section 703(k)(1)(A)(i), (B)(i), 42 U.S.C. § 2000e-2(k)(1)(A)(i), (B)(i) (2000).

138. *Wards Cove*, 490 U.S. at 659.

139. Sections 701(m), 703(k)(1)(A)(i), 42 U.S.C. §§ 2000e(m), 2000e-2(k)(1)(A)(i) (2000).

140. Pub. L. No. 102-166, §§ 2(2), 3(2), 105 Stat. 1071 (1991).

tice is job related for the position in question and consistent with business necessity.”¹⁴¹ Congress also required that the plaintiff’s proof of an alternative employment practice with lesser adverse impact meet the standards existing on the day before *Wards Cove* was decided.¹⁴² In the statement of legislative purpose and in the legislative history, Congress stated that the terms “business necessity” and “job related” are intended to follow the law as it existed before *Wards Cove*.¹⁴³

Despite the clarity with which Congress rejected these holdings in *Wards Cove*, the ultimate effect of its legislation remains ambiguous. In rejecting these holdings, Congress clearly rejected a narrow interpretation of the theory of disparate impact that places only a light burden of proof upon the employer. It is not quite so clear what Congress accepted. In the crucial provision defining the defendant’s burden of proof, Congress did not choose between the terms “business necessity” and “related to job performance,” first used in *Griggs* to characterize the defendant’s burden of proof. Instead, it used both phrases, requiring the defendant to prove “that the challenged practice is job related for the position in question and consistent with business necessity.”¹⁴⁴ From this provision, along with its authorized legislative history, Congress plainly meant to turn the clock back to before *Wards Cove*. Nevertheless, as we have seen, and as the section on the defendant’s burden of proof discusses in detail, the decisions prior to *Wards Cove* were ambiguous about exactly what was required of the defendant. The Civil Rights Act of 1991 did not eliminate that ambiguity.

On the issue of proof of an “alternative employment practice,” it is even less clear what Congress accomplished because it is doubtful that *Wards Cove* made any change in the law. *Albemarle Paper Co. v.*

141. Sections 701(m), 703(k)(1)(A)(i), 42 U.S.C. §§ 2000e(m), 2000e-2(k)(1)(A)(i) (2000).

142. *Id.* § 703(k)(1)(C), 42 U.S.C. § 2000e-2(k)(1)(C) (2000).

143. Pub. L. No. 102-166, §§ 3(2), 105 Stat. 1071 (1991). In an unusual provision, section 105(b) of the Civil Rights Act of 1991 identifies the only authorized legislative history of the provisions on disparate impact as a memorandum appearing at 137 Cong. Rec. S15,276 (daily ed. Oct. 25, 1991). *Id.* § 105(b), 105 Stat. at 1075. See *infra* note 159.

144. Civil Rights Act of 1964, § 703(k)(1)(A)(i), 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000).

*Moody*¹⁴⁵ already placed on the plaintiff the burden of proving pretext after the defendant carried its burden of proof. That decision, like *Wards Cove*, simply mentioned evidence of alternative employment practices as one way of proving pretext.¹⁴⁶ It did not discuss the issue further.

Proof of Disparate Impact

The surviving holding in *Wards Cove* makes clear that the plaintiff's burden of proving disparate impact should be analyzed along the same lines as it was in *Hazelwood School District v. United States*.¹⁴⁷ The labor market for the jobs at issue must be defined; the proportion of a particular group among those in the labor market and the proportion among those who possess the disputed qualification must then be established. The two proportions must next be compared by statistical means to determine the probability that any difference between them resulted solely by chance. Finally, any statistically significant difference must be examined to determine whether it is large enough to be practically significant. Proof of disparate impact differs from proof of disparate treatment only in the inference to be drawn from the statistical evidence; disparate impact is more directly and easily proved through statistical evidence than is intentional discrimination.

Both *Wards Cove* and the Civil Rights Act of 1991 added to the analysis in *Hazelwood* by requiring proof that "a particular employment practice" resulted in disparate impact.¹⁴⁸ Alternatively, the plaintiff can prove that elements of the defendant's decision-making process cannot be separated for analysis, in which case they are treated as a single employment practice.¹⁴⁹ The defendant can rebut either of these showings by demonstrating that the particular employment

145. 422 U.S. 405 (1975).

146. *Id.* at 425. By contrast, the Uniform Guidelines on Employee Selection Procedures impose upon the employer the burden of proving that a validated employment practice has the least disparate impact among available alternatives. 29 C.F.R. § 1607.3B (2000). Even if this provision of the guidelines could have been reconciled with *Albemarle Paper*, it is now plainly superseded by the Civil Rights Act of 1991, which places the burden of proof on this issue explicitly on the plaintiff. Section 703(k)(1)(A)(ii), 42 U.S.C. § 2000e-2(k)(1)(A)(ii) (2000).

147. 433 U.S. 299 (1977); *Wards Cove*, 490 U.S. at 650–55.

148. Section 703(k)(1)(B)(i), 42 U.S.C. § 2000e-2(k)(1)(B)(i) (2000).

149. *Id.*

practice identified by the plaintiff did not cause the disparate impact.¹⁵⁰ These provisions add another layer of complexity, and another layer of shifting burdens of proof, to claims of disparate impact, but they also serve a significant purpose. They focus the inquiry on specific employment practices that the defendant must then justify.¹⁵¹

The Uniform Guidelines endorse a different rule for determining disparate impact: the “bottom line” rule that examines the net effect of all of the employer’s tests and qualifications on the ultimate selection of members of a particular race, national origin, or sex for a particular job.¹⁵² The extent of this departure from existing law should not be exaggerated, however. The Uniform Guidelines purport only to establish rules for the guidance of federal agencies in exercising their discretion to enforce laws against employment discrimination. Thus, the Uniform Guidelines explicitly state that the “bottom line” rule is subject to exceptions and that it is not a rule of law, but only a guide to the exercise of prosecutorial discretion.¹⁵³ This disclaimer is entirely consistent with the limited deference given to the Uniform Guidelines by the Supreme Court.¹⁵⁴

The same approach should be taken to other provisions of the Uniform Guidelines that depart from the analysis of statistical evidence in *Hazelwood*. The Uniform Guidelines endorse the general rule that an employer should examine applicant-flow statistics to determine disparate impact and, in particular, that the pass rate for any group cannot be less than four-fifths of the pass rate of the most successful group. Unlike the analysis in *Hazelwood*, the four-fifths rule of the Uniform Guidelines does not require an analysis of the relevant labor market or the presence of a statistically significant disparity between pass rates. Nevertheless, the Uniform Guidelines allow an exception for statistically insignificant disparities based on small num-

150. Section 703(k)(1)(B)(ii), 42 U.S.C. § 2000e-2(k)(1)(B)(ii) (2000).

151. The decision in *Connecticut v. Teal*, 457 U.S. 440 (1982), which preceded the Civil Rights Act of 1991, served a similar purpose, although it allowed the plaintiff to decide whether to attack a single employment practice for its disparate impact or to attack the overall effect of the employer’s selection procedures. That option has now been eliminated by the Act: Each selection procedure must be evaluated separately.

152. *Teal*, 457 U.S. at 452; 29 C.F.R. § 1607.4C (2000). See *supra* text accompanying note 125.

153. 29 C.F.R. § 1607.4C (2000).

154. See *supra* text accompanying notes 125–33.

bers.¹⁵⁵ Because the Uniform Guidelines provide a simpler method of determining disparate impact than does *Hazelwood*, they provide useful preliminary to, but not a substitute for, the more complicated analysis endorsed by the Supreme Court.

Defendant's Burden of Proof

As discussed earlier, several crucial provisions of the Civil Rights Act of 1991 concern the defendant's burden of proof. First, the Act defines "demonstrate" to mean "meets the burden of production and persuasion."¹⁵⁶ Second, in a provision that was the subject of extended debate and compromise, the Act requires the defendant "to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."¹⁵⁷ Although this provision requires proof of both job relationship and business necessity, it qualifies the latter phrase by requiring proof only that the disputed practice is "consistent with business necessity," not that it is "required by business necessity."¹⁵⁸ Third, both the preamble to the statute and the authorized legislative history state that the purpose of this provision was to return the law to the condition that it was in immediately before the decision in *Wards Cove*.¹⁵⁹ Presumably Congress meant to reject the opinion of Justice O'Connor, writing for four justices in *Watson v. Fort Worth Bank & Trust*,¹⁶⁰ which addressed the defendant's burden of proof. That opinion simply prefigured the rejected holdings in *Wards Cove*. Even so, the decisions before *Watson* were also ambiguous.

155. 29 C.F.R. § 1607.4D (2000).

156. Section 701(m), 42 U.S.C. § 2000e(m) (2000).

157. Section 703(k)(1)(A)(i), 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000).

158. *Id.*

159. Pub. L. No. 102-166, §§ 3(2), 105(b), 105 Stat. 1071, 1075 (1991). The second of these provisions identified the only authorized legislative history of the provisions on the theory of disparate impact as an interpretive memorandum appearing at 137 Cong. Rec. S15,276 (daily ed. Oct. 25, 1991). In discussing the defendant's burden of proof, this memorandum states: "The terms 'business necessity' and 'job related' are intended to reflect the concepts enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)." The statement of purposes of the Civil Rights Act of 1991 in section 3(2) says the same thing in almost exactly the same words.

160. 487 U.S. 977 (1988).

I. Substantive Provisions of Title VII

This ambiguity is most apparent in the different degrees of deference that the Supreme Court has given to the Uniform Guidelines (and their predecessors) on the employer's burden of proof. The Uniform Guidelines allow three forms of justification for employment practices with disparate impact, called "validation" in their terminology: content validation, criterion validation, and construct validation. These forms of validation can be applied to any employment practice, whether a subjective evaluation or an objective test or qualification.¹⁶¹ It is simplest, however, to discuss these forms of validation as they apply to objective employment tests.

In content validation, an employment test is shown to be related to the job if the content of the test is "representative of important aspects of performance on the job for which the candidates are to be evaluated."¹⁶² The most important requirements for content validity are that the content of the test contain all-important aspects of the job and that performance on those aspects of the job be readily observable. The latter requirement is necessary to distinguish content validation from construct validation, in which abstract abilities and characteristics are related to performance on the job. The standard example of content validity is a typing test for the position of typist. Note, however, that a typing test would not be content valid for a secretary's job that required significant work other than typing, such as taking dictation, making appointments, answering phone calls, and filing. Note also that a typing test is content valid for the position of typist because it directly incorporates the important aspects of the job, not because it measures some abstract ability or characteristic, such as manual dexterity, which could be related to the job only through construct validation.

Criterion validation is the most general and acceptable form of validation under the Uniform Guidelines. It requires that a test or qualification be shown to be related to good performance on the job according to some criterion, such as error rate, output, or supervisors' evaluations. The crucial steps in criterion validation are proving that the chosen criterion in fact measures good performance on the job and establishing a statistically significant correlation between good performance on the test and good performance on the job according to

161. 29 C.F.R. § 1607.2B (2000).

162. *Id.* § 1607.5B.

the chosen criterion.¹⁶³ An example of criterion validation is a showing that a test for manual dexterity is related to good performance on an assembly-line job, as measured by the criteria of speed of performance and error rate. Validation requires that the criteria of speed and error rate be established as appropriate measures of good performance on the job and that a statistically significant correlation be established between good performance on the test and good performance according to these criteria. Note that the process of validating this test, like the process of validating the typing test discussed earlier, does not make any appeal to the abstract ability or construct of manual dexterity. Even a test that purported to measure some other construct, such as intelligence, would be criterion valid if it was shown to have a statistically significant correlation with good performance on the job according to some accepted criterion.

Unlike content validation, criterion validation is not limited to tests that reproduce important aspects of the job, and unlike construct validation, its acceptability is not openly doubted by the Uniform Guidelines. The requirements of criterion validation, however, are difficult and costly to satisfy. In many complicated jobs, the only appropriate criterion of good performance is some form of supervisor's evaluation, which cannot easily be checked for uniformity and lack of bias.¹⁶⁴ Establishing a statistically significant correlation between the qualifications or test and good performance on the job is even more difficult and costly.¹⁶⁵ Consequently, some cases have applied the requirements for criterion validation with a degree of leniency not found in the Uniform Guidelines.¹⁶⁶

Construct validation is the least favored form of validation under the Uniform Guidelines. Employers using construct validation must show that a test or qualification measures a "construct," an abstract ability or characteristic such as intelligence or manual dexterity, and that possessing the construct is correlated with good performance on

163. *Id.* § 1607.14B(2), (5).

164. *Id.* § 1607.5B(3), (4). *See also* *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 432–33 (1975).

165. Barbara L. Schlei & Paul Grossman, *Employment Discrimination Law* 113 n.106 (2d ed. 1983) (criterion validation costs estimated at between \$100,000 and \$400,000 in 1978).

166. *E.g.*, *Washington v. Davis*, 426 U.S. 229, 248–52 (1976).

the job. The notorious problems with intelligence tests illustrate the difficulty of construct validation. First, any construct like intelligence is difficult to define, precisely because it is an abstract ability or characteristic. Does intelligence include ability in higher mathematics but not shrewdness in business dealing? If it includes both, how is good performance in these separate activities to be weighted? Second, constructs that are difficult to define are also difficult to measure. How do we know that an intelligence test measures the forms of intelligence relevant to both higher mathematics and business dealing? Third, constructs are difficult to relate to good performance on the job. How can a statistically significant correlation be established between intelligence and good performance on any particular job? The Uniform Guidelines impose exacting standards for construct validation to avoid these problems. The most exacting standard is a preliminary requirement that the construct itself have been related to good performance on the job by criterion validation.¹⁶⁷ Since few such criterion validations of constructs have been performed for particular jobs, an employer is better off directly relying on criterion validation of the qualification or test at issue by showing a statistically significant correlation between having the qualification or performing well on the test and performing well on the job. It is easier to validate an intelligence test directly by criterion validation than by first showing that it measures intelligence and then showing that intelligence is related to good performance on the job.

The Supreme Court's reaction to the Uniform Guidelines has been mixed. In *Albemarle Paper Co. v. Moody*,¹⁶⁸ the Court strongly endorsed an earlier version of the guidelines adopted by the EEOC that imposed even more stringent requirements on validation than do the Uniform Guidelines. Quoting *Griggs*, the Court stated that the guidelines were "entitled to great deference."¹⁶⁹ Like *Griggs*, however, *Albemarle Paper* was a case in which there was independent evidence of intentional discrimination and in which the employer's attempt to justify its use of employment tests was obviously flawed. Although the employer's validation study was superficially in compliance with the

167. 29 C.F.R. § 1607.15D(7) (2000).

168. 422 U.S. 405 (1975).

169. *Id.* at 431 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 433–34 (1971)).

guidelines, it was hastily conceived and poorly executed, and it failed to yield statistically significant results.¹⁷⁰ Likewise, in *Dothard v. Rawlinson*,¹⁷¹ the Court found an employer's justification for a height and weight requirement with a disparate impact on women to be inadequate, but the employer offered only an unsupported correlation between height and weight and strength.

In cases in which the employer has offered some plausible justification for a practice with disparate impact, the Court has been much more lenient than the Uniform Guidelines. In *Washington v. Davis*,¹⁷² a case not directly concerned with Title VII, the Court went out of its way to hold that the earlier version of the guidelines endorsed in *Albemarle Paper* had been satisfied. The disputed employment practice was a test of verbal and writing ability used to screen applicants for jobs as police officers. The plaintiffs alleged that the test had a disparate impact upon blacks. The defendants tried to justify use of the test by showing that scores on the test were correlated with scores on a test administered to newly hired police officers after a seventeen-week training course. The Court held that the requirements of the earlier guidelines were satisfied despite the existence of a correlation only between scores on two written tests. There was no correlation between performance on either of the tests and performance as a police officer.¹⁷³ The Court reasoned that it was "apparent" that some minimal level of verbal ability was necessary for completion of the training program and that establishing only a relationship between the verbal ability test and the training test was "the much more sensible construction of the job-relatedness requirement."¹⁷⁴

In a later case, decided after the Uniform Guidelines took effect, the Court was even more summary in finding a justification for an employment practice with alleged disparate impact. In *New York City Transit Authority v. Beazer*,¹⁷⁵ the Court held that the exclusion of persons on methadone from jobs in the transit system, despite possible disparate impact upon blacks and Hispanics, was justified by a show-

170. *Id.* at 431-36.

171. 433 U.S. 321 (1977).

172. 426 U.S. 229 (1976).

173. *Id.* at 250-52.

174. *Id.* at 250-51.

175. 440 U.S. 568 (1979).

ing that it served the employer's legitimate goals of safety and efficiency.¹⁷⁶

A possible explanation for the lenient application of the requirements of validation in both *Washington* and *New York City Transit Authority* is the absence of evidence of intentional discrimination and, at least in the latter case, the weakness of the evidence of disparate impact.¹⁷⁷ These facts support the conclusion that the Court has adopted only a narrow version of the theory of disparate impact, one designed to ease the burden of plaintiffs in proving intentional discrimination but not to force employers to abandon employment practices with disparate impact. Nevertheless, statements of the Court in *Griggs* and *Albemarle Paper* support a broad interpretation of the theory.

The courts of appeals have also refused to accept a literal interpretation of the Uniform Guidelines. Particularly in evaluating attempts at criterion and content validation, they have interpreted the guidelines leniently, citing their character as guidelines rather than as regulations with the force of law.¹⁷⁸ The Supreme Court also summarily affirmed the decision of a three-judge district court that relied on similar reasoning.¹⁷⁹ The cases that have addressed these issues after the Civil Rights Act of 1991 have applied the guidelines in the same flexible way.¹⁸⁰ Others have not even relied upon the guidelines, but have found an employer's attempt at validation inadequate only because it was based on conclusory expert testimony about the minimum requirements for the job.¹⁸¹ The meaning of the present statutory language—"job related for the position in question and consistent with business necessity"—must be developed in further decisions such

176. *Id.* at 587 & n.31.

177. *Id.* at 584–87.

178. *Contreras v. City of Los Angeles*, 656 F.2d 1267, 1281 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982); *Guardians Ass'n v. Civil Serv. Comm'n*, 630 F.2d 79, 90–91 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981).

179. *National Educ. Ass'n v. South Carolina*, 434 U.S. 1026 (1978), *aff'g* 445 F. Supp. 1094 (D.S.C. 1977).

180. *Williams v. Ford Motor Co.*, 187 F.3d 533, 539 n.5 (6th Cir. 1999); *Officers for Justice v. Civil Serv. Comm'n*, 979 F.2d 721, 726–27 (9th Cir. 1992); *Legault v. aRusso*, 842 F. Supp. 1479, 1488–89 (D.N.H. 1994).

181. *Lanning v. Southeastern Pa. Transp. Auth.*, 181 F.3d 478, 491–92 (3d Cir. 1999); *Bradley v. Pizzaco of Nebraska, Inc.*, 7 F.3d 795, 797–99 (8th Cir. 1993).

as these. It was not determined by the ambiguous decisions that preceded *Wards Cove*.

The Theory of Disparate Impact and Affirmative Action

Before the Civil Rights Act of 1991, doubts about the theory of disparate impact focused on two issues: first, its source in the statutory language, and second, its relationship to affirmative action. The first of these issues was settled by the Act; the second was not. Opponents of the Act, and of its predecessor, the proposed Civil Rights Act of 1990, characterized it as “a quota bill.”¹⁸² Their objections led Congress to maintain a studied silence on the issue of affirmative action, broken only by two specific provisions in the legislation as it was ultimately enacted. First, the Civil Rights Act of 1991 prohibits “group norming” of test scores: the practice of altering scores on employment-related tests based on race, national origin, sex, or religion.¹⁸³ This prohibition is directed against a specific form of affirmative action. Second, in an uncodified section of the Act, Congress disclaimed any effect on “court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law.”¹⁸⁴ These provisions, like those directly concerned with the theory of disparate impact, are intertwined with the decision in *Wards Cove*.

One of the reasons offered in *Wards Cove* for adopting a narrow interpretation of the theory of disparate impact was that a broad interpretation of the theory would effectively require employers to engage in affirmative action.¹⁸⁵ Any such requirement would be inconsistent with section 703(j) of Title VII, which provides that “[n]othing contained in this title shall be interpreted to require” any form of affirmative action.¹⁸⁶ Whether the Civil Rights Act of 1991 endorsed this reasoning in *Wards Cove* is an open question. On the one hand, this passage appears in a part of the opinion concerned with proof of dis-

182. E.g., 136 Cong. Rec. S16,418 (daily ed. Oct. 22, 1992) (veto message of President Bush objecting to the bill because it “employs a maze of highly legalistic language to introduce the destructive force of quotas into our Nation’s employment system”).

183. Section 701(l), 42 U.S.C. § 2000e-2(l) (2000).

184. Pub. L. No. 102-166, § 116, 105 Stat. 1079 (1991).

185. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 652 (1989).

186. Section 703(j), 42 U.S.C. § 2000e-2(j) (2000).

parate impact. On this issue, as previously stated, the Civil Rights Act of 1991 followed *Wards Cove*.

On the other hand, the Act overruled *Wards Cove* on the issue of the defendant's burden of proof. The Act imposed a heavier burden on the defendant, which might well lead employers to engage in affirmative action. If employers can eliminate the disparate impact of an employment practice through affirmative action, they can avoid the burden of proving that the practice is justified. Voluntary affirmative action itself is not problematic after the Supreme Court's decision in *United Steelworkers v. Weber*,¹⁸⁷ which held that such plans are consistent with Title VII. As the defendant's burden of proof becomes heavier, however, affirmative action resembles less a voluntary option than a practical requirement.

Whatever doubts Congress had regarding affirmative action, the writers of the Uniform Guidelines do not share them. The guidelines explicitly provide that affirmative action plans that eliminate disparate impact are an alternative to validation¹⁸⁸ and that an employer's affirmative action policies shall be taken into account in determining disparate impact.¹⁸⁹ The guidelines also contain a policy statement on affirmative action approving the use of affirmative action plans,¹⁹⁰ and the EEOC has adopted separate guidelines on affirmative action providing for approval of affirmative action plans by the commission.¹⁹¹ All of these guidelines must now be qualified in light of the prohibition against group norming of scores on employment-related tests. Whether the guidelines require more extensive revision remains to be seen. This question, too, was raised but not resolved by the Civil Rights Act of 1991.

Affirmative Action

Affirmative action has caused more controversy in civil rights law than any other issue. In employment discrimination law, the controversy has occurred at several different levels: in the terms of the statute it-

187. 443 U.S. 193 (1979).

188. 29 C.F.R. § 1607.6A (2000).

189. *Id.* § 1607.4E.

190. *Id.* § 1607.17.

191. Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964 (codified as amended at 29 C.F.R. pt. 1608 (2000)).

self, in the requirements of the Constitution, and in guidelines promulgated by the EEOC. As the preceding section explains, the Civil Rights Act of 1991 generated debate over affirmative action, mostly as it related to the theory of disparate impact. In its final form the Act contained three provisions directly related to affirmative action: first, the prohibition against “group norming” of scores on employment tests—adjusting test scores on the basis of race, national origin, sex, or religion;¹⁹² second, general procedural restrictions on collateral attack on injunctions and consent decrees, mainly designed to protect judicially ordered or judicially approved affirmative action plans;¹⁹³ and third, the uncodified disclaimer that nothing in the Act’s amendments to Title VII affects existing affirmative action plans.¹⁹⁴ Only the third provision is discussed in this section of the monograph. The first concerns tests and is discussed in the preceding section;¹⁹⁵ the second concerns procedures for enforcing Title VII and is taken up in the section on preclusion.¹⁹⁶ The third provision, discussed below, leaves affirmative action under Title VII as it was before the Civil Rights Act of 1991.

Statutory Issues

As originally enacted, Title VII contained two provisions on affirmative action: a narrow provision that allows preferences in favor of Native Americans on or near a reservation,¹⁹⁷ and a general disclaimer of any form of required affirmative action. The former has given rise only to limited litigation, mainly over constitutional issues discussed later. The latter has been far more significant, and was one of several important exceptions and qualifications added to Title VII to ensure its passage. Consequently, the general disclaimer of required affirmative action in section 703(j) both limits and defines the prohibitions in Title VII against discrimination.

Section 703(j) states that “[n]othing contained in this title shall be interpreted to require” preferential treatment of any individual or

192. Section 703(l), 42 U.S.C. § 2000e-2(l) (2000).

193. Section 702(n), 42 U.S.C. § 2000e-2(n) (2000).

194. Pub. L. No. 102-166, § 116, 105 Stat. 1071, 1079 (1991).

195. *See supra* text accompanying notes 182–91.

196. *See infra* text accompanying notes 631–39.

197. Section 703(i), 42 U.S.C. § 2000e-2(i) (2000).

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group on the basis of race, national origin, sex, or religion.¹⁹⁸ In addition to the questions raised by the theory of disparate impact, discussed earlier, two questions have arisen about the language of section 703(j): first, whether “require” should be read as “require or permit,” thus making section 703(j) a prohibition against all forms of preferential treatment, either undertaken voluntarily by an employer or required by the government; and second, whether “[n]othing in this title” should refer only to the prohibitions against discrimination in Title VII or also to the provisions for remedying violations of Title VII. The first question was resolved by the Supreme Court in favor of a literal interpretation of the word “require.” Title VII does not prohibit preferential treatment voluntarily undertaken by an employer. The second question was resolved by the Supreme Court in favor of a non-literal interpretation of the phrase “[n]othing in this title.” Title VII does not prohibit courts from requiring preferential treatment as a remedy for employment discrimination, but it authorizes them to do so only in narrowly limited circumstances.

The Supreme Court decided that Title VII does not prohibit voluntary preferential treatment in *United Steelworkers v. Weber*.¹⁹⁹ Kaiser Aluminum & Chemical and the United Steelworkers had entered into a collective bargaining agreement that established a preference for black employees for admission to on-the-job training programs for craft positions. In particular, one-half of the openings in these programs were reserved for black employees. The Court characterized this preference as a wholly voluntary and private effort to eliminate the racial imbalance in Kaiser’s workforce of craft employees.²⁰⁰ But as Justice Rehnquist emphasized in his dissent,²⁰¹ evidence in the record suggested that this preference was adopted after an investigation by the Office of Federal Contract Compliance Programs, which enforces the nondiscrimination and affirmative action obligations of federal contractors under Executive Order 11,246.²⁰² Because the Court found no government involvement in the preference, it avoided any constitutional question about government power to establish or require

198. Section 703(j), 42 U.S.C. § 2000e-2(j) (2000).

199. 443 U.S. 193 (1979).

200. *Id.* at 201.

201. *Id.* at 222–23 (Rehnquist, J., dissenting).

202. *See infra* text accompanying notes 916–29.

preferences in employment.²⁰³ The Court's holding was limited to Title VII and to wholly voluntary private preferences. The Court found in the statute and its legislative history a congressional policy to preserve management and union freedom to devise remedies for discrimination without government interference.²⁰⁴ Consequently, wholly voluntary, private preferences violate neither section 703(j) nor the prohibitions against discrimination in section 703(a) and (d).

The Court's holding was further limited to the characteristics of the Kaiser preference. This preference was a permissible racial classification under Title VII because it was "designed to break down old patterns of racial segregation and hierarchy" and because it did "not unnecessarily trammel the interests of the white employees."²⁰⁵ On the first point, the Court relied on the nearly complete absence of blacks from craft positions in Kaiser's workforce and the long history of exclusion of blacks from craft positions generally.²⁰⁶ On the second point, the Court emphasized that the preference did not require the discharge of white workers, that it did not prevent the training and promotion of white employees, and that it was a temporary measure designed to end as soon as the racial imbalance in craft positions ended.²⁰⁷

In *Johnson v. Transportation Agency*,²⁰⁸ the Supreme Court upheld a preference in favor of women. The case involved a public employer, but it was decided entirely under Title VII because the plaintiff failed to assert any claim under the Constitution.²⁰⁹ Over two bitter dissents,²¹⁰ the Court continued to adhere to the decision and reasoning in *Weber*, modifying its analysis in only one significant respect: by suggesting that a preference would be upheld only if it were flexibly applied according to the proportion of the favored group—here women—who possessed the qualifications for the job.²¹¹ Justice O'Connor, in a separate opinion, would have taken this reasoning a

203. *Weber*, 443 U.S. at 200.

204. *Id.* at 204–07.

205. *Id.* at 208.

206. *Id.* at 198 & n.1.

207. *Id.* at 208.

208. 480 U.S. 616 (1987).

209. *Id.* at 620 n.2.

210. *Id.* at 657 (White, J., dissenting); *id.* at 657–77 (Scalia, J., dissenting).

211. *Id.* at 636–37.

step further and required evidence sufficient to make out a prima facie case of past discrimination against women, equating “manifest imbalance” under *Weber* with proof of disparate impact.²¹² This reasoning reveals the systematic connection between the theory of disparate impact and permissible forms of affirmative action, since both are concerned with the effects of employment practices. Nevertheless, this reasoning was not strictly necessary to the decision, because the imbalance in *Johnson*, as in *Weber*, was substantial. No woman had ever previously been employed in the position in dispute, or even in the same department.²¹³

The Court’s treatment of judicially ordered preferences has been more complicated, if not more confusing, than its treatment of wholly private preferences. The case closest to *Weber*, *Local No. 93, International Association of Firefighters v. City of Cleveland*,²¹⁴ concerned a consent decree that settled claims of racial discrimination in promotions in the Cleveland Fire Department. The plaintiffs and the city had reached agreement on the consent decree, but the union representing the firefighters, most of whom were white, had intervened in the action and objected to the decree because it established a preference in promotions. The only question presented to the Supreme Court was whether Title VII authorized the district court’s approval of the consent decree. The Court held that it did, even if it would not have authorized the district court to impose the same preference by its own order.²¹⁵ Instead, the same standards governing purely private preferences under *Weber* also governed judicial approval of consent decrees under Title VII.²¹⁶ The Court held, however, that the consent decree was binding only on the plaintiffs and the city, not on the union or on white employees, and in particular, it did not preclude the latter group from objecting in timely fashion to the district court’s action on constitutional grounds.²¹⁷ The Court did not reach the question whether the union could raise this constitutional objection on remand, since

212. *Id.* at 649–53 (O’Connor, J., concurring in the judgment). The majority explicitly refused to take this step. *Id.* at 632–33 & n.10.

213. *Id.* at 636.

214. 478 U.S. 501 (1986).

215. *Id.* at 516.

216. *Id.* at 518.

217. *Id.* at 530–31.

the union might have waived it by objecting to the consent decree only on statutory grounds.

The Court's only decision on modification, as opposed to approval, of consent decrees strikes a much different note. In *Firefighters Local Union No. 1784 v. Stotts*,²¹⁸ the Court held that a district court could not modify a consent decree to impose a preference in layoffs. The consent decree settled claims of racial discrimination in hiring and promotion in the Memphis Fire Department and established long-term and interim goals for hiring and promoting blacks, but it did not provide for preferences in layoffs or seniority. After the city announced that firefighters would be laid off in reverse order of seniority, according to the rule of "last hired, first fired," the black plaintiffs obtained a temporary restraining order, followed by an injunction, against layoffs that would reduce the proportion of blacks employed by the fire department. On appeal by the union and the city, the court of appeals affirmed the injunction issued by the district court, but the Supreme Court reversed. The Court found no basis for the district court's order in the consent decree because the city had not explicitly agreed to abandon its practice, confirmed in a collective-bargaining "memorandum of understanding" with the union, of laying off firefighters in reverse order of seniority according to the rule of "last hired, first fired."²¹⁹ The Court emphasized the importance of union participation in matters affecting seniority, relying on the exception for seniority systems in section 703(h).²²⁰ Relying on the principle that the "scope of a consent decree must be discerned within its four corners,"²²¹ the Court found no implied obligation based on the city's agreement to increase the proportion of blacks in the fire department or on the district court's continuing jurisdiction under the consent decree for such further orders as "may be necessary or appropriate to effectuate the purposes of this decree."²²² The purposes of the decree did not extend beyond the remedies that it explicitly provided for.

218. 467 U.S. 561 (1984).

219. *Id.* at 574–75.

220. Section 703(h), 42 U.S.C. § 2000e-2(h) (2000).

221. *Stotts*, 467 U.S. at 574 (quoting *United States v. Armour & Co.*, 402 U.S. 673, 681–82 (1971)).

222. *Id.* at 574.

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In the most controversial part of its opinion, the Court also relied on more general limits on judicial remedies under section 706(g). Section 706(g) prohibits awards of compensatory relief to any individual who “was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination” in violation of Title VII.²²³ The Court quoted four statements by prominent supporters of Title VII in the House and the Senate that interpret this provision as limiting remedies under Title VII to victims of discrimination. Three of the statements equated this limitation with a prohibition against “a racial quota” or “racial quotas.”²²⁴ Taken at face value, these statements apply to all forms of preferential relief ordered by a district court, whether or not they affect seniority.

Nevertheless, in subsequent cases the Court has refused to take these statements literally. In *Local 28, Sheet Metal Workers’ International Association v. EEOC*,²²⁵ the Court held that a district court could impose a goal of 29.23% minority membership upon a local union in the construction industry and that it could establish a fund primarily for the benefit of minority apprentices. The union had engaged in a long-standing pattern of racial discrimination, despite repeated judicial and administrative findings of past discrimination and repeated orders against future discrimination. After repeated attempts to obtain compliance with its orders, the district court imposed these disputed race-conscious remedies, which were affirmed in relevant part by the court of appeals. The Supreme Court also affirmed, but by a divided vote. Justice Brennan wrote for a plurality of four justices, and Justice Powell wrote a separate opinion concurring in part and concurring in the judgment.²²⁶

Both Justice Brennan and Justice Powell felt compelled to interpret the membership goal with a degree of flexibility, so that it did not

223. Section 706(g)(2)(A), 42 U.S.C. § 2000e-5(g)(2)(A) (2000).

224. *Stotts*, 467 U.S. at 579–83 (internal quotation marks omitted).

225. 478 U.S. 421 (1986).

226. Justice Powell joined the opinion of Justice Brennan, thereby creating an opinion for the Court, only on a few collateral holdings: that the sanctions imposed by the district court were for civil, instead of criminal, contempt; that the statistical evidence the district relied on was correct in all significant respects; and that the district court did not unduly interfere in the union’s internal affairs by appointing an administrator. *Id.* at 442–44, 481–82 (opinion of Brennan, J.).

cause white employees to lose their jobs if its schedule for admissions was not met.²²⁷ They reached this conclusion despite statements by the district judge that he intended to enforce the goal according to its literal terms, statements that led Justice O'Connor and Justice White to conclude that it was a rigid quota.²²⁸ Apparently, it is the fact that the goal, as interpreted by the majority, would not cause any whites to lose their jobs that distinguishes this case from *Stotts*.

On the general question whether preferential remedies are authorized by Title VII, Justice Brennan identified three circumstances in which they are appropriate: when a defendant has engaged in "particularly long-standing or egregious discrimination"; when informal mechanisms may obstruct equal employment opportunities (for instance, when an employer has a reputation for discrimination); and when interim goals are necessary "pending the development of non-discriminatory hiring or promotion procedures."²²⁹ Justice Brennan also emphasized, however, that other remedies were adequate in most cases, and he approved the cautious approach to preferences taken by the courts of appeals.²³⁰ Adding the necessary fifth vote to form a majority, Justice Powell agreed with the need for preferences only in "cases involving particularly egregious conduct."²³¹ Surprisingly, Justice White also expressed general agreement with Justice Brennan's approach, despite his conclusion that the goal was invalid because it operated as a rigid quota and despite his opinion in *Stotts* suggesting that Title VII did not authorize any form of preferential relief.²³² Thus, six justices have taken the position that Title VII authorizes judicially ordered preferences, although they bring different standards, and perhaps different attitudes, to the determination of when such relief is appropriate.

The studied silence of the Civil Rights Act of 1991 does not appear to have affected these decisions. The only provision that addresses affirmative action in general is uncodified and states, somewhat crypti-

227. *Id.* at 477-78 & n.48 (opinion of Brennan, J.); *id.* at 487-88 (Powell, J., concurring in part and concurring in the judgment).

228. *Id.* at 497-98 (O'Connor, J., concurring in part and dissenting in part); *id.* at 499-500 (White, J., dissenting).

229. *Id.* at 448-50 (opinion of Brennan, J.).

230. *Id.* at 475-76 & n.48.

231. *Id.* at 483 (Powell, J., concurring in part and concurring in the judgment).

232. *Id.* at 499-500 (White, J., dissenting).

cally, that “[n]othing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law.”²³³ The immediate purpose of this provision appears to have been to preserve existing affirmative action plans, despite the Act’s definition of “an unlawful employment practice” as one in which “race, color, religion, sex, or national origin was a motivating factor.”²³⁴ It is doubtful that this provision goes any further and ratifies preexisting decisions on affirmative action, although it does nothing to undermine them either.²³⁵

Constitutional Issues

*Sheet Metal Workers*²³⁶ also presented the constitutional question whether the race-conscious remedies ordered by the district court violated the Fifth Amendment. Only Justice Brennan and Justice Powell reached this question, and both held that the remedies were constitutional. Justice Brennan found the remedies to be justified by overwhelming evidence of past discrimination. He also found them to be narrowly tailored to eliminate past discrimination, both because other remedies had proved ineffective and because they only marginally affected the interests of white workers.²³⁷ Justice Powell essentially followed the same analysis, although he undertook a more searching examination of the preference as a narrowly tailored means of eliminating past discrimination.²³⁸ One year later, the Supreme Court again reached the same conclusion, upholding a judicially ordered preference to remedy egregious discrimination in *United States v. Paradise*,²³⁹ a case alleging long-standing racial discrimination by the Alabama state troopers in hiring and promotions.²⁴⁰

233. Pub. L. No. 102-166, § 116, 105 Stat. 1071, 1079 (1991).

234. Section 703(m), 42 U.S.C. § 2000e-2(m) (2000).

235. *Officers for Justice v. Civil Serv. Comm’n*, 979 F.2d 721, 725 (9th Cir. 1992).

236. 478 U.S. 421 (1986).

237. *Id.* at 481 (opinion of Brennan, J.).

238. *Id.* at 485–89.

239. 480 U.S. 149 (1987).

240. *Id.* Justice Brennan wrote for a plurality of four justices, finding egregious discrimination a sufficient ground for judicially ordered preferences. *Id.* at 166–71.

The Court addressed the constitutional question more thoroughly in *Wygant v. Jackson Board of Education*,²⁴¹ a case concerned with a preference in layoffs established by agreement between a union and a public employer. The preference required teachers to be laid off in reverse order of seniority unless doing so would reduce the percentage of minority teachers, in which case white teachers with greater seniority would be laid off instead of minority teachers with less seniority. Because the employer was a public school district, unlike the private employer in *Weber*, the case raised the constitutional question whether the preference violated the Fourteenth Amendment. The Court held that it did, again by a majority composed of justices who joined in separate opinions. Justice Powell, writing on behalf of three justices, and in part, on behalf of Justice O'Connor, applied the standard of strict scrutiny that he had adopted in earlier decisions on the constitutionality of affirmative action.²⁴² He reasoned that the preference was defective because it was not based on evidence of past employment discrimination by the school district, but on the need to provide minority students with role models and on the existence of general societal discrimination.²⁴³ Although he would not have required findings of discrimination to be made when the preference was adopted, he found insufficient evidence of past discrimination by the school district in the record before the Court.²⁴⁴ He also found that the preference was not narrowly tailored to remedy past discrimination because it imposed too great a burden upon laid-off white employees.²⁴⁵ Justice O'Connor agreed with Justice Powell on the absence of evidence of past discrimination by the school district, but she found the preference to be unrelated to remedying any form of employment discrimination, since it was designed to match the percentage of mi-

Justice Stevens concurred in the judgment based on the broad remedial authority of federal courts to remedy constitutional violations. *Id.* at 189–95.

241. 476 U.S. 267 (1986).

242. *Id.* at 273–74 (opinion of Powell, J.); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978) (opinion of Powell, J.); *Fullilove v. Klutznick*, 448 U.S. 448, 491 (1980) (Powell, J., concurring).

243. *Wygant*, 476 U.S. at 274–76 (opinion of Powell, J.).

244. *Id.* at 277–78.

245. *Id.* at 279–84.

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minority teachers with the percentage of minority students.²⁴⁶ Justice White concurred in the judgment solely on the ground that the preference effectively required whites to be discharged and minorities to be hired until the school district achieved a suitable racial balance.²⁴⁷ The net effect of these opinions, and the opinions in *Sheet Metal Workers*, is to emphasize the difference between wholly private preferences adopted voluntarily by private employers and preferences ordered or approved by a court or adopted by a public employer. The former are governed by the comparatively lenient standards of *Weber*. The latter are governed by the stricter constitutional standards of *Wygant*.

Subsequent decisions have taken a more critical view of affirmative action, at least when it is initiated by state or local government, but these decisions have not directly concerned employment. In *City of Richmond v. J. A. Croson Co.*,²⁴⁸ a majority of justices held for the first time that benign preferences on the basis of race are subject to “strict scrutiny,” and so, presumably, would be more difficult to justify.²⁴⁹ That case held unconstitutional a local ordinance setting aside a fixed proportion of government contracts for minority-owned businesses. The same principles were extended to federal statutes creating similar preferences in *Adarand Constructors, Inc. v. Peña*,²⁵⁰ although only after prior decisions had reached contrary results.²⁵¹ It is now clear that all racial classifications by government—whether federal, state, or local—must meet the same standard of “strict scrutiny” under the Constitution.²⁵² *Adarand* overruled prior decisions to the extent

246. *Id.* at 294 (O’Connor, J., concurring in part and concurring in the judgment).

247. *Id.* at 294–95 (White, J., concurring in the judgment).

248. 488 U.S. 469 (1989).

249. *Id.* at 493–98 (opinion of O’Connor, J.); *id.* at 520–21 (Scalia, J., concurring in the judgment).

250. 515 U.S. 200, 235–36 (1995) (opinion of O’Connor, J.). Justice Scalia provided the crucial fifth vote for the decision in this case. He would have gone further and simply prohibited all government classifications on the basis of race. *Id.* at 239 (Scalia, J., concurring in part and concurring in the judgment).

251. *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990) (upholding a preference for minority-owned businesses in the award of broadcast licenses by the FCC); *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (upholding a set-aside for minority-owned contractors in local public works financed with federal funds).

252. *Adarand*, 515 U.S. at 235.

that they applied a more lenient standard, requiring a decision on remand only whether the preference at issue met the demanding standard of being narrowly tailored to serve a compelling government interest.²⁵³

The requirements of strict scrutiny nevertheless can sometimes be satisfied, as Justice O'Connor emphasized in her opinion in *Adarand*.²⁵⁴ This position was later adopted by a majority of the Court in *Grutter v. Bollinger*,²⁵⁵ upholding an affirmative action plan for admission to law school based on the compelling interest in diversity in higher education. Although diversity itself is seldom offered as a justification for affirmative action in employment, the Court emphasized the importance of universities and law schools in training the nation's leaders: "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."²⁵⁶ This passage supports, but does not require, a sympathetic treatment of affirmative action plans in employment that have a similar goal.

One form of affirmative action, however, stands on an entirely different constitutional footing. In *Morton v. Mancari*,²⁵⁷ the Supreme Court held that a preference for employment of Native Americans in the Bureau of Indian Affairs violated neither Title VII nor the Fifth Amendment. The Court reasoned that Title VII was not intended to disturb the long-standing federal policy of preferential employment of Native Americans in the Bureau of Indian Affairs²⁵⁸ because the statute explicitly authorized a separate preference for Native Americans on or near Indian reservations.²⁵⁹ The preference did not violate the Fifth Amendment because it was "reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the

253. *Id.*

254. *Id.* at 237–38 (O'Connor, J.). In this part of her opinion, Justice O'Connor spoke for a plurality of four justices.

255. 539 U.S. 306 (2003).

256. *Id.* at 335.

257. 417 U.S. 535 (1974).

258. *Id.* at 541–45.

259. Section 703(i), 42 U.S.C. § 2000e-2(i) (2000). Congress also exempted Native American tribes from the coverage of the statute. Section 701(b)(1), 42 U.S.C. § 2000e(b)(1) (2000).

needs of its constituent groups.”²⁶⁰ Although the Court characterized the preference as one not involving race, it only applied to persons of “one-fourth or more degree Indian blood.”²⁶¹ Based on this reasoning, the decision might be limited to the special situation of Indian tribes, as suggested in a decision invalidating a racial classification by the state of Hawaii that favored citizens of Hawaiian ancestry.²⁶² It remains difficult, however, to distinguish Native Americans from other racial and ethnic groups, such as Hawaiians, without begging the very question at issue. Favorable treatment of Native Americans at the level of constitutional standards cannot be used to justify favorable treatment of Native Americans at the concrete level of particular programs of affirmative action. The constitutional decisions on affirmative action have not yet developed a satisfactory solution to this problem.

EEOC Guidelines

The EEOC has adopted a comprehensive set of guidelines on affirmative action,²⁶³ which provide that preferences are permissible under Title VII if three requirements are met: “a reasonable self analysis; a reasonable basis for concluding action is appropriate; and reasonable action.”²⁶⁴ A reasonable self-analysis attempts to determine whether employment practices result in disparate impact or disparate treatment, or whether they leave uncorrected the effects of prior discrimination.²⁶⁵ Any finding of disparate impact, disparate treatment, or uncorrected effects of prior discrimination constitutes a reasonable basis for a preference, but no admission of any violation of Title VII is necessary.²⁶⁶ The preference, in turn, must be a reasonable means of remedying the problems revealed by the self-analysis.²⁶⁷ Affirmative action plans that comply with these requirements and that are dated and in writing constitute a complete defense to claims of reverse discrimination.²⁶⁸ However, they do not provide any defense to claims of

260. *Morton*, 417 U.S. at 554.

261. *Id.* at 553 n.24.

262. *Rice v. Cayetano*, 528 U.S. 495, 524 (2000).

263. 29 C.F.R. pt. 1608 (2000).

264. *Id.* § 1608.4.

265. *Id.* § 1608.4(a).

266. *Id.* § 1608.4(b).

267. *Id.* § 1608.4(c).

268. *Id.* §§ 1608.4(d), 1608.10(b).

discrimination that arise from the conditions they were designed to correct. Similar consequences follow from preferences implemented in various enforcement proceedings under Title VII or other federal or state law and, in some circumstances, from unwritten plans.²⁶⁹

The availability of a defense to reverse discrimination claims is the most important consequence of compliance with the guidelines. Section 713(b) of Title VII provides that action “in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission” constitutes a complete defense to claims based on such action.²⁷⁰ By its own regulations, the EEOC has narrowly defined the written interpretations or opinions that give rise to a defense under section 713(b),²⁷¹ but the Guidelines on Affirmative Action explicitly declare themselves to be such a written interpretation or opinion.²⁷² Nevertheless, the binding effect of the guidelines is not completely clear. Section 713(a) only authorizes the EEOC to issue procedural regulations.²⁷³ This limited authorization implies that substantive regulations issued by the EEOC do not have the force of statutory law.²⁷⁴

In *Local No. 93, International Association of Firefighters v. City of Cleveland*,²⁷⁵ the Supreme Court took a very similar approach to the guidelines. It cited them for the general policy approving settlement of Title VII claims, but not for the requirements for permissible affirmative action plans or for the defense available under section 713(b). Instead, the Court said that the guidelines were entitled to some deference as a source of experience and informed judgment but that they

269. *Id.* §§ 1608.4–9.

270. Section 713(b), 42 U.S.C. § 2000e-12(b)(1) (2000).

271. 29 C.F.R. § 1601.93 (2000).

272. *Id.* § 1608.2.

273. Section 713(a), 42 U.S.C. § 2000e-12(a) (2000).

274. Both the original enactment of Title VII and its amendment by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972), depended on compromises limiting the power of the EEOC and expanding the power of the federal courts. See Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. Indus. & Com. L. Rev. 431, 435–37, 439, 450–52 (1966); George P. Sape & Thomas J. Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 Geo. Wash. L. Rev. 824, 830–44 (1972).

275. 478 U.S. 501 (1986).

“do not have the force of law.”²⁷⁶ After the Civil Rights Act of 1991, this general principle applies to the inconsistency between the guidelines and the prohibition against group norming of employment test scores.²⁷⁷ The statutory prohibition against changing test scores on the basis of race, national origin, sex, or religion plainly overrides any inconsistent provision in the guidelines.

Seniority Systems

An important exception to the prohibition against discrimination in Title VII is the seniority clause of section 703(h). It provides that differences in terms and conditions of employment pursuant to a bona fide seniority system do not violate the statute, “provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.”²⁷⁸ This exception was at first narrowly construed by the lower federal courts to allow only seniority systems that computed seniority according to time employed at the plant or by the employer,²⁷⁹ but in *International Brotherhood of Teamsters v. United States*,²⁸⁰ the Supreme Court held that it protected all forms of seniority systems. In particular, a seniority system could not be shown to violate the statute under the theory of disparate impact. Instead, it was necessary to show that the system resulted in disparate treatment and therefore was not “bona fide” or was “the result of an intention to discriminate.”²⁸¹ In subsequent cases, the Court applied the exception to a seniority system that distinguished between permanent employees who had worked forty-five weeks in a single calendar year and temporary employees who had not²⁸² and to a seniority system that was established after the effective date of Title VII.²⁸³

276. *Id.* at 517. In earlier cases concerned with other guidelines of the EEOC, the Court’s attitude has varied from “great deference” in *Griggs v. Duke Power Co.*, 401 U.S. 424, 433–34 (1971), to almost no deference at all in *General Elec. Co. v. Gilbert*, 429 U.S. 125, 140–45 (1976).

277. Section 703(l), 42 U.S.C. § 2000e-2(l) (2000).

278. Section 703(h), 42 U.S.C. § 2000e-2(h) (2000).

279. *Local 189, United Papermakers & Paperworkers v. United States*, 416 F.2d 980 (5th Cir. 1969); *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968).

280. 431 U.S. 324 (1977).

281. *Id.* at 353 (internal quotation marks omitted).

282. *California Brewers Ass’n v. Bryant*, 444 U.S. 598 (1980).

283. *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982).

In both cases, the Court followed its reasoning in *Teamsters* that the exception applied to all forms of seniority systems.

The Court has left unclear, however, how disparate treatment in a seniority system is to be proved. In a procedural ruling, the Court held that the district court's findings on this issue must be accepted on appeal unless clearly erroneous,²⁸⁴ but apart from the suggestion in *Teamsters* that a seniority system was illegal if it had its "genesis in racial discrimination,"²⁸⁵ the Court has not elaborated on the ways in which disparate treatment can be established. The disparate impact of a seniority system may be difficult to distinguish from disparate treatment. Seniority systems carry forward the effects of past discrimination, for instance, by awarding seniority to white employees who benefited from past hiring discrimination against blacks. Presumably, *Teamsters* implies that such disparate impact alone does not establish disparate treatment. However, evidence of discrimination in other employment practices does give rise to an inference of discrimination in the seniority system, and in a particular case other evidence may be decisive, such as replacing a plant-wide seniority system with a departmental seniority system as soon as blacks have appeared in a job.²⁸⁶

The Court has formulated clear rules on two issues related to seniority systems: statutes of limitations and remedies. In *United Air Lines, Inc. v. Evans*,²⁸⁷ the Court held that a bona fide seniority system did not preserve a claim that was otherwise barred by the statute of limitations. As explained at greater length in the section on statutes of limitations,²⁸⁸ this holding applies to discrete discriminatory acts, such

284. *Pullman-Standard v. Swint*, 456 U.S. 273 (1982).

285. *Teamsters*, 431 U.S. at 346 n.28 (emphasis omitted) (quoting *Quarles v. Philip Morris Inc.*, 279 F. Supp. 505, 517 (E.D. Va. 1968)).

286. *Myers v. Gilman Paper Co.*, 25 Fair Empl. Prac. Cas. (BNA) 468 (S.D. Ga. 1981). Several decisions vacated and remanded by the Supreme Court eventually resulted in findings that a seniority system was not bona fide. *Terrell v. United States Pipe & Foundry Co.*, 644 F.2d 1112 (5th Cir. 1981), *vacated and remanded*, 456 U.S. 955 (1982), *on remand*, 696 F.2d 1132 (5th Cir. 1983), *on remand*, 39 Fair Empl. Prac. Cas. (BNA) 571 (N.D. Ala. 1985); *United States v. Georgia Power Co.*, 634 F.2d 929 (5th Cir. 1981), *vacated and remanded*, 456 U.S. 952 (1982), *on remand*, 695 F.2d 890 (5th Cir. 1983).

287. 431 U.S. 553 (1977).

288. See *infra* text accompanying notes 458–70.

as hiring or firing. Claims of discrimination in the seniority system itself are now governed by a separate provision that starts the limitation period running from the latest of three different events identified in the statute.²⁸⁹ The Civil Rights Act of 1991 added this provision to liberalize the limitation period for these claims and to overrule a more restrictive decision of the Supreme Court.²⁹⁰

On the issue of remedies, *Franks v. Bowman Transportation Co.*²⁹¹ held that section 703(h) does not limit awards of remedial seniority to identified victims of discrimination, either to determine fringe benefits payable by the employer or to determine rights in competition with other employees. Instead, the district court's discretion to award remedial seniority was to be exercised according to the same standard applicable to awards of back pay. Remedial seniority was to be denied "only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."²⁹² Section 703(h) does not limit the broad grant of remedial authority in section 706(g), because it imposes a limit only on the prohibitions against discrimination in sections 703 and 704.

Sex Discrimination

Five topics in Title VII law largely or exclusively concern claims of sex discrimination: the exception for bona fide occupational qualifications; classifications on the basis of pregnancy; comparable pay for comparable work; sex-segregated actuarial tables; and sexual harassment.

Bona Fide Occupational Qualifications

Section 703(e)(1) allows classifications on the basis of "religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enter-

289. Section 706(e)(2), 42 U.S.C. § 2000e-5(e)(2) (2000).

290. See *infra* notes 469–70 and accompanying text.

291. 424 U.S. 747 (1976).

292. *Id.* at 771 (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975)).

prise.”²⁹³ It does not allow classifications on the basis of race. The principal application of the bona fide occupational qualification (BFOQ) exception has been to sex-based classifications.

Both of the Supreme Court decisions on the BFOQ exception under Title VII have emphasized that it should be narrowly construed, although one held that the BFOQ exception applied to the position in dispute and the other held that it did not. In the first case, *Dothard v. Rawlinson*,²⁹⁴ the Court held that women could be excluded from positions as prison guards in close contact with male inmates in the Alabama prison system. The Court reasoned that female prison guards would be in danger of sexual assault, at least in the extreme conditions of the prisons in Alabama, which had been held to violate the Eighth Amendment in an unrelated case.²⁹⁵ The danger of sexual assault would have threatened the general security of the prisons by undermining control over the prison population.²⁹⁶ The risk posed by the hiring of female prison guards involved more than risks of sexual assault to the women themselves, who would have been able to evaluate these risks for themselves in taking the job.

In *Dothard*, the Court quoted, but did not explicitly endorse, two tests for applying the BFOQ exception, both formulated by the Fifth Circuit: whether “the *essence* of the business operation would be undermined by not hiring members of one sex exclusively”²⁹⁷ and whether the employer “had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.”²⁹⁸ The Court endorsed only the position that the BFOQ exception “was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex”²⁹⁹ and that

293. Section 703(e)(1), 42 U.S.C. § 2000e-2(e)(1) (2000).

294. 433 U.S. 321 (1977).

295. *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976), *modified on other grounds*, 559 F.2d 283 (5th Cir. 1977), *rev'd in part on other grounds*, 438 U.S. 781 (1978).

296. *Dothard*, 433 U.S. at 336.

297. *Id.* at 333 (quoting *Diaz v. Pan Am. World Airways*, 442 F.2d 385, 388 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971)).

298. *Id.* (quoting *Weeks v. Southern Bell Tel. & Tel.*, 408 F.2d 228, 235 (5th Cir. 1969)).

299. *Id.* at 334.

I. Substantive Provisions of Title VII

“it is impermissible under Title VII to refuse to hire an individual woman or man on the basis of stereotyped characterizations of the sexes.”³⁰⁰ Indeed, in subsequent decisions concerning employment in prisons and jails, the lower courts have distinguished *Dothard* when the defendant failed to submit proof of the need for guards of a single sex.³⁰¹

In the second case, *Automobile Workers v. Johnson Controls, Inc.*,³⁰² the Supreme Court held that the BFOQ exception did not justify the exclusion of fertile women from jobs that required exposure to lead in the process of making batteries. The Court applied the same standards as in *Dothard*, but reached a different result because the justification offered by the employer for the sex-based exclusion concerned the safety of a fetus, not the safety of other employees or customers.³⁰³ By contrast, in *Dothard*, the presence of female prison guards created a risk of disturbances that endangered other prison employees and prisoners.³⁰⁴ This reasoning appears strained because it makes the result in *Johnson Controls* depend on the obvious, but seemingly irrelevant, fact that fetuses do not participate in the process of making batteries. The safety of the fetus, however, raises distinctive issues under the Pregnancy Discrimination Act,³⁰⁵ which generally prohibits discrimination on the basis of pregnancy, as the next section of this monograph explains. Relying on both this Act and an analogy to the constitutional decisions on abortion, the Court left decisions about the safety of children entirely to their parents: “Decisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents.”³⁰⁶ These special features of the case may limit its significance as a precedent.

Indeed, apart from the fact that the BFOQ exception is “extremely narrow,” its exact scope has remained uncertain. The standards

300. *Id.* at 333.

301. *E.g.*, *United States v. Gregory*, 818 F.2d 1114, 1117–18 (4th Cir. 1987).

302. 499 U.S. 187 (1991).

303. *Id.* at 203.

304. *Id.* at 202. The Court also distinguished cases interpreting the BFOQ under the Age Discrimination in Employment Act, 29 U.S.C. § 623(f)(1) (2000), whose language tracks the BFOQ under Title VII. *Id.* at 202–03.

305. Section 701(k), 42 U.S.C. § 2000e(k) (2000).

306. *Johnson Controls*, 499 U.S. at 206.

quoted in *Dothard* and applied in *Johnson Controls* leave open crucial questions about the legitimate role of sex-based differences in defining the “essence of the business operation,” or what constitutes “stereotyped characterizations of the sexes.” For instance, several decisions have allowed classifications on the basis of sex to protect the physical privacy of others, for instance, in the job of nurse in a maternity ward or in a nursing home with mostly female patients.³⁰⁷ Even so, these decisions, particularly those concerned with guards of one sex watching prisoners of another sex, have required proof that there is no other way to protect the prisoners’ privacy.³⁰⁸ These decisions depend on a judgment, but presumably not a stereotype, that members of one sex would violate the privacy of members of the opposite sex, even though they might be otherwise able to perform the job.

Other cases have gone beyond the literal terms of the BFOQ exception and allowed classifications on the basis of sex as conditions of employment, not as qualifications for employment. The best known of these concern claims that an employer’s rules allowing women, but not men, to have long hair violate Title VII.³⁰⁹ Courts have allowed such rules despite the fact that hair length is irrelevant to the performance of most jobs. Again, however, the decisions concerned with sex-based dress requirements have prohibited sexually revealing costumes when they are required only of women.³¹⁰ The principal problem in applying the BFOQ exception, and in extending it to conditions of employment, is identifying the narrow range of cases in which judgments about sex-based roles are legitimate.

One cautionary note about the BFOQ exception is necessary. The language of the exception—allowing classifications “reasonably necessary to the normal operation of that particular business or enterprise”—invites confusion with the defendant’s burden of showing job relationship and business necessity under the theory of disparate impact. Although the defendant bears the burden of proof on both is-

307. *E.g.*, *Fesel v. Masonic Home of Del., Inc.*, 447 F. Supp. 1346 (D. Del. 1978), *affd per curiam*, 591 F.2d 1334 (3d Cir. 1979); *EEOC v. Mercy Health Ctr.*, 29 Fair Empl. Prac. Cas. (BNA) 159 (W.D. Okla. 1982).

308. *E.g.*, *Forts v. Ward*, 621 F.2d 1210, 1215–17 (2d Cir. 1980).

309. *Willingham v. Macon Tel. Publ’g Co.*, 507 F.2d 1084 (5th Cir. 1975).

310. *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599, 608–11 (S.D.N.Y. 1981).

sues,³¹¹ the similarity ends there. The BFOQ exception provides a justification for occupational qualifications explicitly based on sex, national origin, or religion, and only insofar as they set occupational qualifications for employment.³¹² By contrast, the defendant's burden of proof under the theory of disparate impact applies to neutral employment practices.

Pregnancy

The Supreme Court originally examined discrimination on the basis of pregnancy in constitutional cases. The Court first held that a public employer could not impose mandatory pregnancy leaves of fixed duration, because they rested on an unconstitutional, un rebuttable presumption, namely that women in the later stages of pregnancy are physically unable to serve as teachers.³¹³ But in *Geduldig v. Aiello*,³¹⁴ the Court held that classifications on the basis of pregnancy simply were not classifications on the basis of sex. It reasoned that the exclusion of pregnancy from a state disability program was not an exclusion based on sex because it did not distinguish women from men, but only pregnant persons from nonpregnant persons.³¹⁵ In two subsequent cases, the Court applied this reasoning to Title VII, holding that employers could exclude pregnancy from disability and sick leave plans.³¹⁶

In response to these decisions, Congress enacted the Pregnancy Discrimination Act of 1978,³¹⁷ which overruled the Court's pregnancy decisions under Title VII. It did so by rejecting both the reasoning and

311. *Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219 (9th Cir. 1971); see *Johnson Controls*, 499 U.S. at 206 ("We have no difficulty concluding that Johnson Controls cannot establish a BFOQ"). The defendant's burden of proof under the theory of disparate impact is determined by sections 701(m), 703(k)(1)(A)(i), 42 U.S.C. § 2000e(m), 2000e-2(k)(1)(A)(i) (2000).

312. *Arizona Governing Comm. v. Norris*, 463 U.S. 1073, 1084 n.13 (1983) (opinion of Marshall, J.); see *Johnson Controls*, 499 U.S. at 200.

313. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974).

314. 417 U.S. 484 (1974).

315. *Id.* at 496 n.20.

316. *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976); *Nashville Gas Co. v. Satty*, 434 U.S. 136, 143-46 (1977). In the latter case, however, the Court held that denial of accrued seniority because of pregnancy was prohibited by Title VII because it had a disparate impact on women. *Nashville Gas*, 434 U.S. at 141-43.

317. Section 701(k), 42 U.S.C. § 2000e(k) (2000).

the holdings of these decisions. It rejected the reasoning by defining “because of sex” or “on the basis of sex” to include “because of or on the basis of pregnancy, childbirth, or related medical conditions.”³¹⁸ It rejected the holdings by generally requiring that pregnant women be “treated the same for all employment-related purposes” as others “similar in their ability or inability to work” and by specifically applying this requirement to “receipt of benefits under fringe benefit programs.”³¹⁹

Several questions about discrimination on the basis of pregnancy were left unresolved by the Pregnancy Discrimination Act (PDA). First, does *Geduldig* have any remaining precedential effect in constitutional law? This question is theoretically interesting but practically of little consequence, since most classifications on the basis of pregnancy by public employers are prohibited by the PDA.³²⁰

Second, are classifications on the basis of pregnancy subject to the BFOQ exception of section 703(e)? Federal courts have answered this question in the affirmative, on the ground that the primary effect of the PDA was to make classifications on the basis of pregnancy equivalent to classifications on the basis of sex.³²¹ The scope of the BFOQ exception as applied to pregnancy remains difficult to determine, as *Automobile Workers v. Johnson Controls, Inc.*³²² illustrates. As the Court reasoned in that case, any exclusion of women from jobs based on the fact that they are or might become pregnant must fit within the narrow confines of the BFOQ exception and with the purpose of the PDA to protect women from discrimination on that ground.³²³

Third, does Title VII require an employer to provide benefits for pregnancy to wives of male employees when it provides general disability benefits to husbands of female employees? The Supreme Court resolved this question in favor of requiring such benefits, but it emphasized that employers remain free to deny all benefits for spouses of

318. *Id.* (internal quotation marks omitted).

319. *Id.*

320. Since 1972, Title VII has covered public employers. Sections 701(b), (f), (h) and 701-17(a), 42 U.S.C. §§ 2000e(b), (f), (h), and 2000e-16(a) (2000).

321. *E.g.*, *Levin v. Delta Air Lines, Inc.*, 730 F.2d 994, 996–98 (5th Cir. 1984); *Harriss v. Pan Am. World Airways*, 649 F.2d 670, 676–77 (9th Cir. 1980).

322. 499 U.S. 187 (1991).

323. *See supra* text accompanying notes 293–312.

employees.³²⁴ This point distinguishes the PDA from broader legislation that requires employers to grant leave to their employees for pregnancy and other family matters.³²⁵ State laws that require pregnancy leave also have been upheld against arguments that they are preempted by Title VII.³²⁶

Comparable Worth

The question whether Title VII requires comparable pay for jobs of comparable worth concerns the relationship between Title VII and the Equal Pay Act and, specifically, the effect of the equal pay clause in section 703(h), usually called the “Bennett Amendment.” The Bennett Amendment provides that an employer may “differentiate upon the basis of sex” in compensating its employees “if such differentiation is authorized by” the Equal Pay Act.³²⁷ The Equal Pay Act, in turn, requires equal pay for men and women for equal work in the same establishment “on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.”³²⁸ The language of the Bennett Amendment creates an obvious problem. It presupposes that some differences in compensation on the basis of sex are “authorized” by the Equal Pay Act, but upon examination, the Equal Pay Act does not explicitly authorize any differences in compensation on the basis of sex. Indeed, it does not even mention any permissible differences in compensation on the basis of sex.

324. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 n.25 (1983). Along the same lines, one court has held that the theory of disparate impact is not available to change a neutral absenteeism policy as applied to pregnant employees. *Dormeyer v. Comerica Bank-Illinois*, 223 F.3d 579, 583–84 (7th Cir. 2000). By contrast, another court has extended the reasoning of *Newport News* to require employers to provide contraceptive coverage under general medical insurance plans. *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266 (W.D. Wash. 2001).

325. *E.g.*, *The Family and Medical Leave Act*, 29 U.S.C. §§ 2601–2654 (2000).

326. *California Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 285 (1987).

327. Section 703(h), 42 U.S.C. § 2000e-2(h) (2000).

328. 29 U.S.C. § 206(d)(1) (2000).

The Supreme Court addressed this problem in *County of Washington v. Gunther*.³²⁹ It held that the only differences in compensation “authorized” by the Equal Pay Act were those within its exceptions (i) through (iv). This holding is not free from difficulty, since exceptions (i), (ii), and (iii) are nearly the same as exceptions to Title VII contained elsewhere in section 703(h),³³⁰ and exception (iv) appears only to emphasize that the Equal Pay Act does not prohibit differences in pay on a basis other than sex, a limitation that applies equally to the prohibition against sex discrimination in Title VII. The Court’s interpretation of the Bennett Amendment appears to make the amendment entirely redundant. To counter this objection, the Court suggested, but did not decide, that the Bennett Amendment requires proof of disparate treatment, not just disparate impact, because it incorporates exception (iv) of the Equal Pay Act into Title VII.³³¹ Reasoning along the same lines, the Ninth Circuit held that the Bennett Amendment did not incorporate the proviso to the Equal Pay Act requiring equal pay to be achieved only by raising pay.³³²

The significance of *Gunther* lies in the greater scope that it gives to claims of sex discrimination in compensation under Title VII as compared with similar claims under the Equal Pay Act. The Equal Pay Act requires only equal pay for equal work. If the jobs of men and women are not substantially equal in skill, effort, responsibility, and working conditions, as those terms are technically defined under the Equal Pay Act, then the employer is under no obligation to pay men and women equally. After *Gunther*, Title VII imposes an unconditional obligation on employers not to discriminate in compensation on the basis of sex.³³³

The breadth of the employer’s obligation under Title VII, however, remains an open question. The decision in *Gunther* was narrowly based on rather peculiar facts. The plaintiffs were female guards at a county jail who were paid less than male guards. Although they performed different tasks than male guards did, and so did not perform

329. 452 U.S. 161 (1981).

330. Section 703(h), 42 U.S.C. § 2000e-2(h) (2000).

331. *Gunther*, 452 U.S. at 170–71.

332. *Norris v. Arizona Governing Comm.*, 796 F.2d 1119, 1123–24 (9th Cir. 1986).

333. *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974).

substantially equal work as required by the Equal Pay Act, they claimed that the county discriminated against them by paying them less than it paid male guards. Most of the evidence of discrimination, however, came from the county's own study of the compensation of male and female prison guards. As the Court emphasized, the case did not require an independent judicial comparison of the worth of different jobs.³³⁴ Consequently, *Gunther* only opened the door to claims of comparable worth under Title VII. Some circuits have concluded that it does not open the door very far, relying on the Court's suggestion that the theory of disparate impact might not apply to claims of comparable worth.³³⁵

Sex-Segregated Actuarial Tables

Insurance companies commonly use sex-segregated actuarial tables to estimate the life expectancy of persons covered by life insurance policies and annuities. Such tables reflect the apparently greater life expectancy of women than men, and they result in women paying less than men for an equal amount of life insurance but more for an annuity that results in equal monthly benefits. Employers have also used sex-segregated actuarial tables in life insurance and pension plans in fringe benefits plans. This practice has given rise to claims that use of sex-segregated actuarial tables constitutes sex discrimination in violation of Title VII.

The Supreme Court resolved such claims in *City of Los Angeles Department of Water & Power v. Manhart*,³³⁶ holding that Title VII prohibits employers from using sex-segregated actuarial tables. The Court reasoned that Title VII prohibits all classifications on the basis of sex unless specifically exempted. Sex-segregated actuarial tables were prohibited because they were not allowed by any of the exceptions to Title VII, in particular, the exceptions in the Equal Pay Act incorporated in Title VII by the Bennett Amendment.³³⁷

334. *Gunther*, 452 U.S. at 181.

335. *American Nurses' Ass'n v. Illinois*, 783 F.2d 716, 723 (7th Cir. 1986); *AFSCME v. Washington*, 770 F.2d 1401, 1405–08 (9th Cir. 1985); *Spaulding v. University of Washington*, 740 F.2d 686, 689–90, 705–06 (9th Cir.), *cert. denied*, 469 U.S. 1036 (1984).

336. 435 U.S. 702 (1978).

337. *Id.* at 712–13.

The Court appeared to allow sex-based classifications in actuarial tables in only two situations related to employment. First, since Title VII only regulates the relationship between employer and employee, an employer remains free to pay cash to employees, who can then purchase life insurance or annuities from independent insurance companies.³³⁸ However, as the Supreme Court has subsequently held, any use of sex-segregated actuarial tables in an employer's fringe benefit plan, even if it is administered by an insurance company, violates Title VII.³³⁹ Second, the Court allowed an employer to take into account the proportion of men and women in its workforce in computing unisex actuarial tables.³⁴⁰ This use of sex-based classification is needed to ensure the solvency of insurance and pension plans, at least in the absence of any practical predictor of life expectancy that is better than sex. For similar reasons, the Court has refused to make its decisions on this issue retroactive, applying them only to payments based on contributions made after the decisions were rendered.³⁴¹

Sexual Harassment

The decisions on sexual harassment raise two distinct but related issues: First, what constitutes sexual harassment? Second, when is the employer liable for it? In *Meritor Savings Bank v. Vinson*,³⁴² the Supreme Court addressed both issues, but definitively resolved only the first. On the first, the Court followed the EEOC guidelines in recognizing claims for sexual harassment based on a hostile work environment, in addition to those involving a "tangible employment action," such as a raise or a loss in pay. The plaintiff in *Meritor* alleged that her supervisor engaged in a pattern of extended and explicit sexual harassment, including several instances of rape. The Court held that these allegations were sufficient to state a claim for relief, even if the plaintiff did not suffer any tangible economic loss from her supervisor's advances. The plaintiff need only prove that the sexual advances and comments were unwelcome and were "sufficiently severe or pervasive

338. *Id.* at 717–18.

339. *Arizona Governing Comm. v. Norris*, 463 U.S. 1073 (1983) (per curiam); *Florida v. Lang*, 487 U.S. 223, 238 (1988).

340. *Manhart*, 435 U.S. at 718.

341. *Id.* at 718–23; *Arizona Governing Comm.*, 463 U.S. at 1075.

342. 477 U.S. 57 (1986).

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‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’”³⁴³ The Court distinguished claims of this kind, alleging a hostile environment, from those involving tangible economic loss, but allowed recovery for both. An employee need not suffer the loss of pay, benefits, or the job itself in order to have a claim for sexual harassment. All that is needed is a change in working conditions.

The distinction between the two forms of sexual harassment made a difference both in what constitutes prohibited harassment and in determining the vicarious liability of the employer. The latter issue was addressed, but not definitively resolved, in *Meritor*. The Court reversed the ruling of the court of appeals imposing liability automatically upon the employer, looking instead to common law principles of agency to place some limits on the employer’s liability for the acts of its employees.³⁴⁴ This issue of agency is significant because Title VII does not prohibit discrimination by employees, only discrimination by employers as defined by the statute, including “any agent” of such an employer.³⁴⁵ If the harassing employee is acting as an agent of the employer, then the employer is liable, and according to the literal terms of the statute, so is the employee. Some courts, however, have held that an individual agent of an employer cannot be held personally liable at all under Title VII,³⁴⁶ relying on provisions of the Civil Rights Act of 1991 that imposed limited liability for damages, depending upon the size of the employer.³⁴⁷ These decisions have reasoned that if small employers have reduced liability, then individual employees should have none at all. In any event, if the harassing employee is not an agent of the employer, then neither the employer nor the employee

343. *Id.* at 67 (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

344. *Id.* at 71–72.

345. Sections 701(b), 703(a), 42 U.S.C. §§ 2000e(b), 2000e–2(a) (2000).

346. *E.g.*, *Miller v. Maxwell’s Int’l Inc.*, 991 F.2d 583, 587–88 (9th Cir. 1993), *cert. denied*, 510 U.S. 1109 (1994); *Lowry v. Clark*, 843 F. Supp. 228, 229–31 (E.D. Ky. 1994). Other courts have disagreed. *E.g.*, *Bridges v. Eastman Kodak Co.*, 800 F. Supp. 1172, 1179–80 (S.D.N.Y. 1992); *Raiser v. O’Shaughnessy*, 830 F. Supp. 1134, 1137 (N.D. Ill. 1993).

347. 42 U.S.C. § 1981a (2000).

is liable under Title VII, although it remains possible that either or both may be liable under state law.³⁴⁸

The Supreme Court has resolved some of the disputes over liability of employers for sexual harassment. In *Burlington Industries, Inc. v. Ellerth*,³⁴⁹ the plaintiff was allegedly harassed by a supervisor, who threatened her with various adverse decisions, such as the denial of a raise or a promotion, unless she gave in to his advances. None of his threats were carried out, however, resulting in no “tangible employment action.” According to the Court, her claim therefore had to be analyzed as one for sexual harassment based on a hostile environment. Under *Meritor*, this required her to prove that the alleged harassment was “severe or pervasive.”³⁵⁰ This analysis also allowed the employer to avoid liability if it met both elements of an affirmative defense: “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”³⁵¹ If the employer failed to establish this defense, then it was vicariously liable for the alleged harassment. As the Supreme Court formulated the defense, the employer must prove two distinct elements; establishing its own reasonable care under the first element is not enough. The employer must also establish the plaintiff’s own failure to use reasonable care under the second element.³⁵²

In a companion case, *Faragher v. City of Boca Raton*,³⁵³ the Court clarified the first element of the defense, holding that it had not been

348. Barbara Lindemann & David D. Kadue, *Sexual Harassment in Employment Law* ch. 15 (1992 & Supp. 1999).

349. 524 U.S. 742 (1998).

350. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986).

351. *Burlington Indus.*, 524 U.S. at 765.

352. Some courts nevertheless have expressed doubts about whether the employer must make out both elements of the defense in order to prevail. For examples of the differing positions, see *Harrison v. Eddy Potash*, 248 F.3d 1014, 1026 (10th Cir. 2001) (employer must make out both elements of defense); *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 266 (5th Cir. 1999) (opinion of Jones, J.) (employer need only prove its own reasonable care), *on subsequent publication of separate opinion*, 168 F.3d 795, 796 (5th Cir. 1999) (Weiner, J., specially concurring) (employer must make out both elements of defense).

353. 524 U.S. 775 (1998).

satisfied by an employer who had a policy against sexual harassment but failed to implement it effectively. The employer, a city parks and recreation department, had not disseminated the policy widely enough so that it could reach the relatively remote location, a lifeguard station, where the plaintiffs worked. The employer also had failed to assure employees that they could bypass their immediate supervisors in complaining about harassment by the supervisors themselves, as alleged in this case. Because of the size of the employer and its widely dispersed operations, it was required to take more elaborate steps to publicize and implement its policy than a small employer with a single workplace would. Although the plaintiffs made only minimal efforts to complain about the harassing conduct, this was an issue only under the second element of the defense. Because the employer had not established the first element, it could not take advantage of the defense at all and accordingly was held liable for the supervisors' harassment.

Where the affirmative defense recognized in *Burlington Industries* and *Faragher* is not available, the employer might be exposed to either greater or lesser liability. Its liability is greater in cases in which the plaintiff proves that the harassment was accompanied by a "tangible employment action." A finding to this effect results in strict liability of the employer without any affirmative defense. Because a finding of tangible employment action has such significant consequences, the Court defined the term with some care in *Burlington Industries*. As an initial matter, it means something different from "quid pro quo" sexual harassment, a term used in prior cases to describe demands for sexual favors accompanied by threats or promises of employment-related benefits. As the facts of *Burlington Industries* make clear, an unfulfilled threat does not constitute a tangible employment action. Typically, a tangible employment action involves "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."³⁵⁴ Because "failing to promote" appears on this list, a significant change in benefits apparently must be judged according to the baseline of the benefits that would have been received in the absence of the alleged harass-

354. *Burlington Indus.*, 524 U.S. at 761.

ment. Somewhat paradoxically, inaction can be sufficient to create a “tangible employment action.”³⁵⁵

Other forms of harassment by supervisors can also result in liability of the employer without any affirmative defense. If the harassing supervisor is sufficiently high in the management of a corporate employer, his actions are directly attributed to the corporation because he acts as its alter ego.³⁵⁶ Thus, harassment by the company’s president constitutes harassment by the company itself. So, too, harassment explicitly permitted or condoned by the employer results in direct liability, although such cases rarely arise in practice.³⁵⁷

At the opposite extreme, an employer is liable for harassment by co-workers only if it is negligent in allowing the harassment to take place. Both *Burlington Industries* and *Faragher* are concerned solely with harassment by supervisors and other managers of the employer. Employees with the same status as the plaintiff are mentioned only in passing, but in terms that restrict the employer’s liability to negligence in monitoring their conduct.³⁵⁸ Because co-workers exercise no authority over the plaintiff, the employer cannot be subjected to vicarious liability on the ground that such employees acted as agents within the scope of their employment. The employer’s liability is limited to negligence in allowing a hostile working environment to persist. The entire burden of proof concerning the issue of reasonable care is therefore on the plaintiff, in contrast to the affirmative defense recognized in *Burlington Industries* and *Faragher*.

In addition to formulating standards for imposing liability upon employers, the Supreme Court has sought to clarify the standards for determining what constitutes sexual harassment in the first place. Only the most egregious conduct can support a claim of sexual harassment based on a hostile environment. As the Court subsequently held in *Harris v. Forklift Systems, Inc.*,³⁵⁹ however, the plaintiff need

355. *Id.* A constructive discharge constitutes a tangible employment action, however, only if it results from official action of the employer, such as a demotion or a cut in pay. *Pennsylvania State Police v. Suders*, 124 S. Ct. 2342 (2004).

356. *Burlington Indus.*, 524 U.S. at 758.

357. *Id.*

358. *Faragher*, 524 U.S. at 799. For a case involving harassment by co-workers that has reached this conclusion, see *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 766–67 (2d Cir. 1998).

359. 510 U.S. 17 (1993).

not introduce evidence of psychological injury in order to establish a hostile environment. As Justice O'Connor said, speaking for the Court, "Title VII comes into play before the harassing conduct leads to a nervous breakdown."³⁶⁰ She also strongly suggested that the standards for sexual harassment be determined according to the viewpoint of a "reasonable person," instead of a "reasonable woman" or a "reasonable man," depending on the gender of the plaintiff.³⁶¹

The latter possibility was taken up in *Oncale v. Sundowner Offshore Services, Inc.*,³⁶² in which the Supreme Court recognized a claim by a male plaintiff alleging sexual harassment by other male employees. Although this form of harassment is obviously atypical, Title VII does not distinguish between male and female employees, either as victims of sexual harassment or as perpetrators.³⁶³ Exactly when conduct between employees of the same sex becomes sexual harassment presents a more difficult practical question. The Court again stated that the question must be resolved by determining whether a "reasonable person" would find the harassing conduct to be so severe or pervasive as to alter the conditions of employment, and emphasized that such an inquiry depends upon all of the surrounding circumstances.³⁶⁴ This reasoning has not been extended, however, to protect against harassment on the basis of sexual orientation.³⁶⁵

The difficulty of establishing "severe or pervasive" harassment of any kind based on a single comment was indirectly addressed by the Supreme Court in *Clark County School District v. Breeden*.³⁶⁶ That case

360. *Id.* at 22.

361. The Court used the phrase "reasonable person" twice in stating the standard for liability, and Justice Ginsburg did so again in her concurring opinion. *Id.* at 21, 22; *id.* at 25 (Ginsburg, J., concurring).

362. 523 U.S. 75 (1998).

363. *Id.* at 78–80.

364. *Id.* at 81.

365. *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000); *Higgins v. New Balance Athletic Shoes, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999). *Oncale* has also been interpreted not to allow a claim against an "equal opportunity" harasser, who engages in the same harassment of men and women. *Holman v. Indiana*, 211 F.3d 399, 404 (7th Cir. 2000). *Oncale* has been interpreted, however, to allow a claim by a man who alleged that he was harassed because he was effeminate. *Nichols v. Azteca Rest. Enters. Inc.*, 256 F.3d 864, 874 (9th Cir. 2001) (relying also on decision on sexual stereotyping).

366. 532 U.S. 268 (2001) (per curiam).

concerned a claim of retaliation for complaining about an alleged incident of sexual harassment involving the reaction of two co-workers to a remark reportedly made by a prospective applicant for employment. The applicant's file was under evaluation by the plaintiff (a woman) and two male co-workers. In the plaintiff's presence, the male co-workers chuckled in response to a crude description of sexual activity made by the applicant and contained in his application file. The Supreme Court, summarily reversing the decision below, held that their reaction to this comment could not reasonably form the basis for a complaint of sexual harassment and that, accordingly, the plaintiff had no claim of retaliation for protesting about their behavior to her employer. The plaintiff, according to the Court, had protested what was, "at worst an 'isolated incident[t]' that cannot remotely be considered 'extremely serious' as our cases require."³⁶⁷

National Origin Discrimination

The prohibition in Title VII against discrimination on the basis of national origin raises three issues, the first more theoretical than the other two. The first concerns the BFOQ exception for national origin. There is no corresponding exception for race, yet classifications on the basis of race closely resemble those on the basis of national origin. Congress has left the different approach to these two, very similar forms of discrimination to be explained and reconciled by the courts. The second issue concerns the uncertain relationship between national origin and citizenship. The law is now clear that Title VII does not prohibit discrimination based on citizenship, or more precisely, lack of citizenship, which often disqualifies an individual from working under the immigration laws. Nevertheless, status as an alien is inevitably intertwined with national origin because virtually all aliens have a foreign national origin. The third issue concerns the impact of "English only" rules in the workplace. Speaking a foreign language again correlates strongly with foreign national origin, so that a seemingly neutral requirement that all employees speak English imposes a significant disadvantage on certain ethnic minorities, such as Hispanics.

³⁶⁷ *Id.* at 271 (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998)).

I. Substantive Provisions of Title VII

The BFOQ for national origin squarely raises the issue of how discrimination on this ground differs from discrimination on the basis of race. The BFOQ for national origin, like the BFOQ for sex, is available only when an otherwise prohibited characteristic is “a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.”³⁶⁸ The BFOQ creates a narrow exception to the prohibitions against discrimination on the basis of sex, national origin, and religion, but not to the prohibition against discrimination on the basis of race. The omission of a BFOQ for race reflects a deliberate congressional decision to prohibit all racial classifications in employment. It also creates the anomaly that some classifications on the basis of national origin are permissible while similar classifications on the basis of race are not. At least in constitutional law, the two forms of discrimination have been considered so similar that the prohibitions against each have been regarded as equivalent.³⁶⁹

As a matter of legal doctrine, the anomaly created by the BFOQ for national origin has been almost entirely eliminated by decisions giving the BFOQ an exceedingly narrow interpretation. The narrowness of the BFOQ has been discussed earlier in its application to sex discrimination,³⁷⁰ and it is even more pronounced with respect to national origin. The Supreme Court has never upheld a BFOQ for national origin; it has only suggested in dictum that the BFOQ might justify a requirement that executives of a subsidiary of a Japanese corporation be of Japanese origin.³⁷¹ Few lower courts have followed up on this sug-

368. Section 703(e)(1), 42 U.S.C. § 2000e-2(e)(1) (1988); 110 Cong. Rec. 2550, 7271 (1964).

369. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287–99 (1978) (opinion of Powell, J.); *id.* at 355–62 & n.34 (opinion of Brennan, White, Marshall, and Blackmun, JJ.); *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943).

370. See *supra* text accompanying notes 297–308.

371. *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 189 n.19 (1982). This decision also raises the further question of the relationship between Title VII and “treaties of freedom and navigation” that allow foreign corporations in the United States to give preferential treatment to citizens of their own country. See *id.* at 178–80; *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1138–41 (3d Cir. 1988), *cert. denied*, 493 U.S. 944 (1989) (treaty provision that employers may select managers based on citizenship does not conflict with Title VII, but would conflict with and preempt Title VII if it resulted in a disparate impact on the basis of race or national origin).

gestion,³⁷² apparently because of the difficulty of distinguishing between racial discrimination and national origin discrimination. Although the distinction might be easily drawn in theory—distinguishing Japanese, for instance, from all other Asians—it remains unsettling in practice. It does not readily justify allowing one form of discrimination under the BFOQ when the other, nearly identical, form of discrimination is subject to an absolute prohibition.

A similar issue concerns the relationship between national origin and citizenship. In *Espinoza v. Farah Manufacturing Co.*,³⁷³ the Supreme Court held that discrimination against aliens did not constitute discrimination on the basis of national origin. The employer, Farah Manufacturing Co., had located its plant near the Mexican border, but refused to employ aliens and, in particular, persons of Mexican citizenship. Nevertheless, of those employed at the plant, 96% were American citizens of Mexican national origin. On these facts, the Court held that the exclusion of aliens from employment did not violate Title VII. Disparate treatment on the basis of alienage is not prohibited by Title VII, and at least in this case, it resulted in no disparate impact upon persons of Mexican national origin, because they constituted the overwhelming majority of those employed at the plant.³⁷⁴ In other cases, however, disparate treatment on the basis of alienage may result in disparate impact on the basis of national origin. The practical problem arises in applying the theory of disparate impact to such cases and, in particular, defining the labor market so as to exclude aliens that the employer cannot legally hire.

The specific problem in *Espinoza* was addressed by Congress in a comprehensive revision of the immigration and naturalization laws, the Immigration Reform and Control Act (IRCA) of 1986.³⁷⁵ The IRCA contained two complicated prohibitions against employment discrimination. The first was designed mainly to protect aliens who were lawfully in this country and had the right to work here despite their

372. Tram N. Nguyen, Note, *When National Origin May Constitute a Bona Fide Occupational Qualification: The Friendship, Commerce, and Navigation Treaty as an Affirmative Defense to a Title VII Claim*, 37 Colum. J. Transnat'l L. 215, 245–47 (1998).

373. 414 U.S. 86 (1973).

374. *Id.* at 93.

375. Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended at 8 U.S.C. and scattered sections of 7, 18, 20, 29, and 42 U.S.C. (2000)).

I. Substantive Provisions of Title VII

status as aliens. The prohibition extends, however, to all “protected individuals,” which includes citizens and several technically defined categories of aliens, and it prohibits any form of discrimination on the basis of “citizenship status.”³⁷⁶ The second prohibition is against discrimination on the basis of national origin, but only by employers who are not covered by Title VII because they have fewer than fifteen employees.³⁷⁷ Both prohibitions apply only to employers who have at least four employees.³⁷⁸

Another distinctive issue about national origin concerns the languages associated with particular ethnic groups. The most controversial cases concern “English only” rules in the workplace. The EEOC has taken the position that a requirement that employees speak English at all times, even on breaks, will be presumed to be discriminatory and that a requirement that employees speak English only at specified times, typically while actually working, must be justified by business necessity.³⁷⁹ The circuit courts that have addressed this issue have disagreed with the EEOC, at least as to rules of the latter kind. They have applied the theory of disparate impact to such rules, but found that the plaintiff has failed to show any adverse impact from restrictions on speaking a foreign language, usually Spanish, during working time.³⁸⁰ The disagreement, as in many issues of employment discrimination law, concerns the burden of proof. The EEOC places the burden of proof on the defendant to justify a practice with a disparate impact on an ethnic minority, while the courts impose it on the plaintiff to prove some substantial disadvantage suffered from a prohibition on speaking a second language.

376. Immigration and Nationality Act §§ 274B(a)(1), 316(a), 8 U.S.C. §§ 1324b(a)(1), 1427(a) (2000).

377. *Id.* § 274B(a)(2)(B), 8 U.S.C. § 1324b(a)(2)(B).

378. *Id.* §§ 274B(a)(2), 316(a), 8 U.S.C. §§ 1324b(a)(2), 1427(a).

379. 29 C.F.R. § 1606.7 (2000).

380. *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1485–90 (9th Cir. 1993), *cert. denied*, 512 U.S. 1228 (1994); *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).

Religious Discrimination

The prohibition in Title VII against discrimination on the basis of religion is subject to the BFOQ exception,³⁸¹ but it is also subject to three other provisions that apply only to religious discrimination. Section 702 creates an exception for employment by religious organizations and schools “of individuals of a particular religion to perform work connected with the carrying on” of their activities;³⁸² section 703(e)(2) creates a similar, and seemingly redundant, exception for religious schools;³⁸³ and section 701(j) defines “religion” to include “all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.”³⁸⁴ All of these provisions raise constitutional issues under the religion clauses of the First Amendment and have been interpreted to avoid constitutional doubts about their validity.

The exceptions for religious discrimination by religious organizations and schools in sections 702 and 703(e)(2) do not, according to their literal terms, allow discrimination on other grounds. Nevertheless, these exceptions have been interpreted to allow churches to employ ministers on any basis whatsoever, in order to avoid constitutional questions under the Free Exercise Clause.³⁸⁵ Other employees of religious organizations and schools are excepted only from the prohibition against discrimination on the basis of religion.³⁸⁶ These cases have also discussed the constitutional question whether the exception is either too narrow under the Free Exercise Clause, because it does

381. Section 703(e)(1), 42 U.S.C. § 2000e-2(e)(1) (2000).

382. Section 702, 42 U.S.C. § 2000e-1 (2000).

383. Section 703(e)(2), 42 U.S.C. § 2000e-2(e)(2) (2000). Section 702 originally was restricted to employees working in religious activities, but section 703(e)(2) was not. In 1972, however, section 702 was expanded to cover all the activities of religious organizations and schools. H.R. Rep. No. 92-899, at 16 (1972). This change made the exception in section 703(e)(2) for educational institutions largely redundant.

384. Section 701(j), 42 U.S.C. § 2000e(j) (2000).

385. *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1303 (11th Cir. 2000); *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 281–84 (5th Cir. 1981).

386. *EEOC v. Mississippi Coll.*, 626 F.2d 477, 484–86 (5th Cir. 1980); *EEOC v. Pacific Press Publ’g Ass’n*, 676 F.2d 1272, 1277–78 (9th Cir. 1982).

not except religious institutions entirely from Title VII, or too broad under the Establishment Clause, because it entangles the government with religious institutions.³⁸⁷

Similar questions, both statutory and constitutional, have arisen over the definition of “religion” in section 701(j) and, in particular, over the duty of employers to accommodate religious observances or practices “without undue hardship on the conduct of the employer’s business.” The Supreme Court resolved most of these questions in *Trans World Airlines v. Hardison*.³⁸⁸ It held that section 701(j) does not require an employer to accommodate an employee’s religious practices at “more than a *de minimis* cost” and that accommodation by subordinating the seniority rights of other employees would involve unequal treatment on the basis of religion.³⁸⁹ In another case, the Court held that the duty to accommodate does not require the employer to accept an employee’s proposed accommodation if its own accommodation is otherwise adequate.³⁹⁰ In narrowly interpreting the duty to accommodate, the Court implied, although it did not hold, that a narrow duty to accommodate was consistent with the Free Exercise Clause and that a broader duty to accommodate might be inconsistent with the Establishment Clause. The Court’s interpretation of section 701(j) appears to avoid or minimize these constitutional questions.

A case explicitly decided on constitutional grounds confirms this conclusion. In *Estate of Thornton v. Caldor, Inc.*,³⁹¹ the Court held unconstitutional a state statute that gave employees an absolute right to refuse to work on the Sabbath of their choice. The Court held that the statute violated the Establishment Clause of the First Amendment because it conferred a benefit only on employees who observed the Sabbath and because it allowed for no exceptions, such as an employer’s attempt to make reasonable accommodations. In a concurring opinion, Justice O’Connor suggested that these facts distinguished the rea-

387. *Mississippi Coll.*, 626 F.2d at 486–89; *Pacific Press*, 676 F.2d at 1278–82.

388. 432 U.S. 63 (1977).

389. *Id.* at 84.

390. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986).

391. 472 U.S. 703 (1985).

sonable accommodation provision in section 701(j) from the state statute before the Court.³⁹²

Justice O'Connor's suggestion was confirmed by the brief but controversial history of the Religious Freedom Restoration Act of 1993 (RFRA).³⁹³ RFRA was intended to expand upon the constitutional protection of religious practices recognized by the Supreme Court, which required only strict neutrality toward religion.³⁹⁴ RFRA prohibited the states and the federal government from imposing any substantial burden upon the exercise of religion, even by neutral rules of general application, unless it was accomplished by the least restrictive means available to serve a compelling government interest.³⁹⁵ When the constitutionality of RFRA was subsequently considered by the Supreme Court, however, the statute was held unconstitutional insofar as it applied to the states.³⁹⁶ According to the Court, RFRA exceeded the power of Congress to enforce constitutional rights under the Fourteenth Amendment and, instead, sought to define those rights contrary to the Court's own prior decisions. Although the details of this reasoning are complex and controversial, the ultimate result is clear: Legislative protection of religious freedom can only operate within a narrow area defined by several different constitutional restrictions.

Retaliation

Like many comprehensive statutes, Title VII contains substantive provisions that safeguard the operation of its procedures for enforcement. In Title VII, these are provisions against retaliation. The statute prohibits employers from making personnel decisions and taking other actions that discourage or punish attempts to enforce rights under the statute. Section 704(a) protects employees and applicants for employment from retaliation for having asserted their rights in two separate ways: for having "opposed any practice made an unlawful em-

392. *Id.* at 711–12 (O'Connor, J., concurring). *Accord* *Protos v. Volkswagen of Am. Inc.*, 797 F.2d 129, 135–37 (3d Cir. 1986).

393. 107 Stat. 1488, 42 U.S.C. §§ 2000bb to 2000bb-4 (2000).

394. *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 878–82 (1990).

395. 42 U.S.C. § 2000bb-1 (2000).

396. *City of Boerne v. Flores*, 521 U.S. 507, 529–36 (1997).

ployment practice by this title” or for having “made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.”³⁹⁷ The first of these clauses, which protects opposition by self-help, has generally been more narrowly interpreted than the second, which protects participation in enforcement proceedings.

Opposition under the first clause raises questions about the form of protest used. Some forms of protest, such as violence or destruction of property, clearly are unprotected. The difficult questions concern the traditional methods of protest used by unions and labor organizers, such as strikes, picketing, and boycotts. In a case arising under the National Labor Relations Act (NLRA), the Supreme Court held that picketing in protest of allegedly discriminatory practices was not protected by the NLRA from employer retaliation when it was not authorized by the union that represented the employees involved.³⁹⁸ Although the Court did not decide the question whether the employees’ conduct was protected under section 704(a) of Title VII,³⁹⁹ its holding implied that their conduct was also unprotected under Title VII; otherwise, the employees could have obtained substantially the same remedy under Title VII that they were denied under the NLRA. In any event, other federal courts have held that protection for opposition through economic pressure is less extensive under section 704 than under the corresponding provision of the NLRA.⁴⁰⁰ This result is generally correct, since Title VII sets up a scheme of administrative and judicial remedies for employment discrimination, whereas the NLRA sets up a scheme of collective bargaining that contemplates the use of economic pressure by both labor and management.

The only respect in which the opposition clause has been broadly construed concerns the permissible aims, not the permissible means, of protest. In order to gain protection, the protest need not be against an employment practice known to be unlawful. The person engaged in

397. Section 704(a), 42 U.S.C. § 2000e-3(a) (2000).

398. *Emporium Capwell Co. v. Western Addition Cmty. Org.*, 420 U.S. 50 (1975).

399. *Id.* at 70–73.

400. National Labor Relations Act § 7, 29 U.S.C. § 157 (2000). *See, e.g., Hochstadt v. Worcester Found. for Experimental Biology*, 545 F.2d 222 (1st Cir. 1976).

opposition need only have a reasonable belief that the practice is prohibited by Title VII.⁴⁰¹ These rules justifiably take account of the difficulty—and perhaps for nonlawyers, the impossibility—of determining whether a disputed employment practice actually violates Title VII.

In contrast to the protection for opposition, the protection for participation in enforcement proceedings has been broadly construed. The clause protects participation in state proceedings related to enforcement of Title VII,⁴⁰² and it protects all other forms of participation, even those that might be defamatory under state law.⁴⁰³ In the latter case, the employer's remedy is not through retaliation, but through a lawsuit in state court.⁴⁰⁴ Any adverse action taken by an employer after an employee has commenced enforcement proceedings, or participated in them in any way, can support a claim of retaliation. For this reason, the participation clause plays an important role in private litigation under Title VII. It often furnishes an added claim for relief, in addition to the claim of discrimination that gave rise to enforcement proceedings in the first place.

The general structure of proof for claims of retaliation follows *McDonnell Douglas Corp. v. Green*⁴⁰⁵ in shifting the burden of production from the plaintiff to the defendant. The plaintiff has the burden of producing evidence that he or she engaged in protected activity and suffered an adverse decision by the employer, and that there was a causal connection between the protected activity and the employer's decision. The defendant then has the burden of producing a legitimate, nondiscriminatory reason for its decision; the plaintiff has the burden of producing evidence that the offered reason is a pretext for retaliation.⁴⁰⁶ As in individual claims of disparate treatment, the burden of persuasion remains entirely on the plaintiff.⁴⁰⁷

401. *E.g.*, *Berg v. La Crosse Cooler Co.*, 612 F.2d 1041 (7th Cir. 1980).

402. *Hicks v. ABT Assocs., Inc.*, 572 F.2d 960, 968–69 (3d Cir. 1978) (dictum).

403. *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1003–08 (5th Cir. 1969).

404. *Id.* at 1007 n.22.

405. 411 U.S. 792 (1973).

406. *Jalil v. Avdel Corp.*, 873 F.2d 701, 706 (3d Cir. 1989), *cert. denied*, 493 U.S. 1023 (1990); *Taitt v. Chemical Bank*, 849 F.2d 775, 777 (2d Cir. 1988); *Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 731 (9th Cir. 1986), *cert. denied*, 494 U.S. 1056 (1990).

407. *Jalil*, 873 F.2d at 706.

A claim of retaliation, if supported by sufficient evidence to be submitted to the jury, raises the value of the plaintiff's potential recovery in two ways. First, a plaintiff who has been the victim of retaliation has a greater chance of winning the jury's sympathy on the underlying claim of discrimination. Second, proof of retaliation goes a long way toward justifying an award of punitive damages, which are available only upon proof that the defendant acted "with malice or with reckless indifference to the federally protected rights of an aggrieved individual."⁴⁰⁸ The crucial issue in retaliation claims, however, as in claims of discrimination, is whether the plaintiff has presented sufficient evidence to survive a motion for summary judgment or a motion for judgment as a matter of law, and therefore, sufficient evidence to have the claim submitted to the jury.

Advertising

Section 704(b) generally prohibits discrimination in advertising for jobs.⁴⁰⁹ Because it regulates the press, section 704(b) raises questions under the First Amendment, but these are easily resolved. If the underlying activity can be prohibited—such as selling narcotics—then advertisements for the activity can be prohibited also. Accordingly, the Supreme Court has readily upheld statutory prohibitions against discrimination in "help wanted" advertising.⁴¹⁰

Section 704(b) does raise a difficult issue of standing, however. The individuals harmed by advertising in violation of section 704(b) are only those who have been deterred from applying for the job advertised. Those who applied for the job, even if they were rejected, were not harmed by the advertisement, even if they suffered discrimination in hiring. By definition, the latter individuals applied for the job despite the advertisement. Nevertheless only those least likely to sue—deterred non-applicants—appear to have standing to assert claims under section 704(b). Enforcement of this provision, therefore, has been indirect, through the threat of claims of discrimination in hiring. Few forms of evidence are as compelling as discriminatory ad-

408. 42 U.S.C. § 1981a(b)(1) (2000).

409. Section 704(b), 42 U.S.C. § 2000e-3(b) (2000).

410. *E.g.*, *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973).

vertising to support a claim of discrimination in related employment practices.

Coverage

The coverage of Title VII raises numerous issues of varying significance. Section 701 makes Title VII applicable to all employers with fifteen or more employees in an industry affecting commerce; all labor organizations in an industry affecting commerce; and all employment agencies that regularly provide employment to statutorily defined employers.⁴¹¹ The statutory definition of “employer” includes state and local government, but excludes the United States and related entities, Indian tribes, and certain private membership clubs.⁴¹² The exception for the United States and related entities is largely, but not entirely, offset by the special provisions for coverage of employees of the United States.⁴¹³

Section 701 reflects diverse concerns, such as protecting the freedom of association of smaller employers, or at least leaving them to be regulated only by state law; recognizing the greater ability of larger employers to comply with a complex statutory scheme; and providing a special remedy for federal employees consistent with the remedies available under the civil service system. The limit on the size of employers, together with provisions in the Civil Rights Act of 1991 limiting liability for damages based on the size of the employer, have led most of the circuits to hold that individual agents of an employer are not covered by the statute at all.⁴¹⁴ This issue has been most frequently litigated in sexual harassment cases, in which the plaintiff has sued

411. Section 701(b)–(e), 42 U.S.C. § 2000e(b)–(e) (2000).

412. Section 701(a)–(b), 42 U.S.C. § 2000e(a)–(b) (2000).

413. Section 717(a), 42 U.S.C. § 2000e-16(a) (2000). The Civil Rights Act of 1991 also added special provisions for claims by employees of the Senate (but not the House of Representatives), but these have now been superseded by the Congressional Accountability Act of 1995, codified at 2 U.S.C. §§ 1301–1433 (2000). This Act makes employees of the Senate and the House subject to Title VII and the other federal employment discrimination statutes, but provides special procedures for enforcement. *Id.* §§ 1302, 1311, 1401.

414. E.g., *Tomka v. Seiler Corp.*, 66 F.3d 1295 (2d Cir. 1995); *Miller v. Maxwell’s Int’l Inc.*, 991 F.2d 583 (9th Cir. 1993), *cert. denied*, 510 U.S. 1109 (1994).

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both the employer and a supervisor who has allegedly engaged in harassment.⁴¹⁵

Apart from routine litigation over the question whether an employer has fifteen or more employees,⁴¹⁶ most of the questions about coverage have addressed two additional issues of general significance: whether Title VII extends to all aspects of employment and whether it extends to employees who work outside the United States. The first question has been resolved in favor of coverage, reaching such conditions and benefits from employment as eligibility for partnership in a law firm⁴¹⁷ and pension benefits.⁴¹⁸ The question of coverage of employees working overseas was first resolved by the Supreme Court against coverage,⁴¹⁹ but this decision was overruled by the Civil Rights Act of 1991, which explicitly extends coverage to American citizens employed overseas by American employers and corporations controlled by such employers.⁴²⁰ This extension of coverage is subject to a defense that compliance with Title VII would violate the law of the country of employment.⁴²¹

415. *E.g.*, *Paroline v. Unisys Corp.*, 879 F.2d 100 (4th Cir. 1989), *vacated in part on other grounds*, 900 F.2d 27 (4th Cir. 1990); *Grant v. Lone Star Co.*, 21 F.3d 649 (5th Cir. 1994).

416. *Walters v. Metropolitan Educ. Enters., Inc.*, 519 U.S. 202 (1997).

417. *Hishon v. King & Spaulding*, 467 U.S. 69, 74–76 (1984).

418. *Arizona Governing Comm. v. Norris*, 463 U.S. 1073 (1983) (*per curiam*); *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 708–11 (1978).

419. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991).

420. Sections 701(f), 702(c), 42 U.S.C. §§ 2000e(f), 2000–1(c) (2000).

421. Section 702(b), 42 U.S.C. § 2000e-1(b) (2000).

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II. Procedural Provisions of Title VII

Title VII establishes an enforcement scheme that is divided into three stages: state or local administrative proceedings to enforce state law or local ordinances against employment discrimination; investigation and conciliation by the EEOC; and litigation, either in public actions by the EEOC or the Attorney General, or in private actions. The first stage, state or local administrative remedies, must be exhausted only if a state or locality has enacted a statute or ordinance against employment discrimination.⁴²² An EEOC regulation contains an authoritative list of states and localities with appropriate agencies.⁴²³ The EEOC must give “substantial weight” to the findings of state and local agencies,⁴²⁴ but the courts are not bound by any administrative findings, whether by state or local agencies or by the EEOC.⁴²⁵ Federal courts, however, are bound by the decisions of state courts reviewing state or local administrative agencies.⁴²⁶

At the second stage, the EEOC exercises no adjudicatory authority, except in cases filed by federal employees and certain high-level state employees, for which special procedures apply.⁴²⁷ The only powers of the EEOC are to investigate charges, determine whether there is reasonable cause to support them, attempt to reach a settlement through conciliation, and decide whether to sue or, if the charge is filed against a state or local government agency, refer it to the Attor-

422. Section 706(c), (d), 42 U.S.C. § 2000e-5(c), (d) (2000); 29 C.F.R. § 1601.70 (2000).

423. 29 C.F.R. § 1601.74 (2000).

424. Section 706(b), 42 U.S.C. § 2000e-5(b) (2000).

425. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 106 (1991); *University of Tenn. v. Elliott*, 478 U.S. 788, 795–96 (1986); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798–800 (1973). However, federal courts may be bound by the unreviewed decisions of state agencies as they affect claims under other federal statutes. *University of Tenn.*, 478 U.S. at 796–99.

426. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982).

427. Section 717(b), 42 U.S.C. § 2000e-16 (2000); Civil Rights Act of 1991 § 321, 105 Stat. 1071, 1097. Employees of the House of Representatives and the Senate are subject to separate procedures established by each house. *Id.* §§ 117, 301–19, 105 Stat. 1071, 1080, 1088–96. Presidential employees also are subject to special procedures. *Id.* § 320, 105 Stat. 1071, 1096–97.

ney General for a decision whether to sue.⁴²⁸ If conciliation does not result in a settlement satisfactory to the charging party and if the EEOC or the Attorney General decides not to sue, the EEOC issues a right-to-sue letter to the charging party.⁴²⁹ Apart from the requirement of exhaustion of state and local administrative remedies and timely filing with the EEOC, the details of prior administrative proceedings are not generally significant in Title VII litigation.

At the third stage, after receipt of a right-to-sue letter, the charging party can sue in either federal or state court.⁴³⁰

Statutes of Limitations

Limitations for Filing with the EEOC

The limitation for filing charges with the EEOC depends upon the existence of a state or local agency to enforce a statute or ordinance against employment discrimination. In a state or locality without such an agency, a charge must be filed with the EEOC within 180 days of the alleged discrimination.⁴³¹ In a state or locality with such an agency, a charge must be filed with the EEOC within 300 days of the alleged discrimination or within 30 days of notice of termination of state or local proceedings, whichever period expires first.⁴³² Moreover, if an individual files a charge with the EEOC without first exhausting appropriate state or local administrative remedies, the EEOC must defer action on the charge for 60 days or until the termination of state or local proceedings, whichever occurs first.⁴³³

In *Love v. Pullman Co.*,⁴³⁴ the Supreme Court approved the EEOC's treatment of charges filed with the EEOC before exhaustion of state or local administrative remedies. In such cases, exhaustion of state and local administrative remedies is accomplished automatically by the EEOC, which refers the charge to the state or local agency and then, after expiration of the 60-day deferral period, reactivates the charge

428. Section 706(f), 42 U.S.C. § 2000e-5(f) (2000); *EEOC v. Illinois State Tollway Auth.*, 800 F.2d 656 (7th Cir. 1986).

429. Section 706(b), (e), (g), 42 U.S.C. § 2000e-5(b), (e), (g) (2000).

430. *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820 (1990).

431. Section 706(e), 42 U.S.C. § 2000e-5(e)(1) (2000).

432. *Id.*

433. Section 706(c), (d), 42 U.S.C. § 2000e-5(c), (d) (2000).

434. 404 U.S. 522 (1972).

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within its own proceedings.⁴³⁵ In *Mohasco Corp. v. Silver*,⁴³⁶ the Court examined the effect of this practice on the limitation for filing with the EEOC. Essentially, the Court combined the 300-day limitation for filing with the EEOC with the 60-day deferral period for state or local proceedings. The result was the “240-day maybe” rule. The 240-day branch of the rule derives from the 300-day branch of the limitation, less the 60-day deferral period. The Court reasoned that a charge initially filed with the EEOC without exhaustion of state or local administrative proceedings is effectively filed with the EEOC only 60 days later, when the charge is reactivated by the EEOC after referral to the state or local agency.⁴³⁷ Consequently, the original limitation of 300 days for effective filing with the EEOC must be shortened by 60 days to 240 days for initial filing. Sixty days of the 300-day limitation are taken up by the deferral period in which the EEOC cannot act on the charge. The “maybe” branch of the rule derives from the part of the deferral rule that ends the deferral period upon termination of state or local proceedings. Even if a charge is initially filed with the EEOC more than 240 days after the alleged discrimination, the charge may still be effectively filed with the EEOC within 300 days of the alleged discrimination if state or local administrative proceedings terminate in less than 60 days. Termination of these proceedings ends the deferral period and, under EEOC regulations, automatically reactivates the charge with the EEOC before the expiration of the 300-day limitation.⁴³⁸

The principal defect of the “240-day maybe” rule of *Mohasco* is that a 240-day limitation appears nowhere in the statute. This makes the “240-day maybe” rule difficult to find and understand, especially for nonlawyers who are supposed to be able to file charges with the EEOC without the assistance of counsel.⁴³⁹ The principal argument for the “240-day maybe” rule is that it is the only rule that results in equal treatment of those who file charges initially with the EEOC and those who file charges with the EEOC only after exhausting state or local

435. 29 C.F.R. § 1601.13 (2000).

436. 447 U.S. 807 (1980).

437. *Id.* at 815–817; 29 C.F.R. § 1601.13 (2000).

438. Section 706(c), (d), 42 U.S.C. § 2000e-5(c), (d) (2000); 29 C.F.R. § 1601.13(a)(3)(ii) (2000).

439. *Love*, 404 U.S. at 527.

administrative remedies. Both have 300 days from the date of the alleged discrimination and 240 days after the deferral period to file a timely charge with the EEOC.⁴⁴⁰

The EEOC has alleviated much of the uncertainty created by the “240-day maybe” rule by entering into work-sharing agreements with state and local agencies. Such agreements are expressly authorized by section 709(b),⁴⁴¹ and they typically provide for waiver of jurisdiction of the state or local agency if it is necessary to ensure that a charge is timely filed with the EEOC. These provisions become critical if the plaintiff has filed with the EEOC or the state agency within the “maybe” period identified in *Mohasco*: more than 240 days but no more than 300 days after the alleged discrimination. In *EEOC v. Commercial Office Products Co.*,⁴⁴² the Supreme Court held that waiver of state jurisdiction over charges filed in this period, followed by automatic referral of these charges to the EEOC, satisfies the 300-day limitation. Although the work-sharing agreements effectively circumvent the 60-day deferral period required by section 706(c) and (d), they follow the principle, endorsed by *Love*, that the EEOC can assist nonlawyers in complying with the complex procedures created by Title VII. Moreover, work-sharing agreements do not encroach upon the power of state and local agencies to process charges during the 60-day deferral period, since they require the consent of those agencies.

The Supreme Court has also simplified the time limits for filing with the EEOC by holding that compliance with the time limits for filing with state or local agencies is not necessary in order to exhaust such remedies. In *Oscar Mayer & Co. v. Evans*,⁴⁴³ the Court interpreted a provision of the Age Discrimination in Employment Act, adopted verbatim from Title VII, to mean that the only requirement for filing a charge with a state or local administrative agency is “the filing of a written and signed statement of the facts upon which the proceeding is based.”⁴⁴⁴ Relying extensively on the legislative history of Title VII,

440. *Mohasco*, 447 U.S. at 825.

441. Section 709(b), 42 U.S.C. § 2000e-8(b) (2000); see also section 705(g)(1), 42 U.S.C. § 2000e-4(g)(1) (2000).

442. 486 U.S. 107 (1988).

443. 441 U.S. 750 (1979).

444. Age Discrimination in Employment Act, 29 U.S.C. § 633(b) (2000). The corresponding provision in Title VII is section 706(c), 42 U.S.C. § 2000e-5(c) (2000).

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the Court reasoned that this provision listed all of the requirements for a filing sufficient to exhaust state or local remedies. Since filing within the state or local limitation was not listed, it was not necessary.⁴⁴⁵ Although most of the circuits to consider the issue have applied this reasoning to Title VII claims, some lower courts have doubted whether it allows plaintiffs to take advantage of the 300-day limitation for filing with the EEOC if they have failed to satisfy a state limitation of at least 180 days.⁴⁴⁶

The time limit for filing charges has been further simplified by an EEOC regulation that permits an unsworn charge to be filed within the limitation period, even though Title VII requires charges to be “under oath or affirmation,”⁴⁴⁷ and that allows later verification of the charge to relate back to the date of initial filing. This regulation was upheld by the Supreme Court in *Edelman v. Lynchburg College*.⁴⁴⁸

Limitations for Filing in Court

For private actions, the limitation for filing in federal court is 90 days from receipt of a right-to-sue letter.⁴⁴⁹ When a plaintiff represents himself or herself pro se and files the right-to-sue letter as a complaint, it is usually insufficient to satisfy or toll the 90-day limitation.⁴⁵⁰ If the letter is accompanied by the charge filed with the EEOC, however, it may constitute “a short and plain statement of the claim showing that the pleader is entitled to relief” under Federal Rule of Civil Procedure 8(a)(2).⁴⁵¹

For public actions brought by the EEOC or the Attorney General, Title VII specifies no limitation at all. Only the equitable defense of laches limits the time within which public actions may be brought.⁴⁵²

445. *Oscar Mayer*, 441 U.S. at 759.

446. *Martinez v. UAW, Local 1373*, 772 F.2d 348, 350–52 (7th Cir. 1985) (dictum); *Lowell v. Glidden-Durkee Div.*, 529 F. Supp. 17, 21–26 (N.D. Ill. 1981).

447. Section 706(b), 42 U.S.C. § 2000e-5(b) (2000).

448. 535 U.S. 106, 118–19 (2002).

449. Section 706(f)(1), 42 U.S.C. § 2000e-5(f)(1) (2000).

450. *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147 (1984).

451. *Judkins v. Beech Aircraft Corp.*, 745 F.2d 1330 (11th Cir. 1984).

452. *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977).

General Principles

In addition to interpreting the limitations for filing with the EEOC, the Supreme Court has decided several other issues generally applicable to limitations under Title VII. The Court has held that the limitations under Title VII are not tolled during judicial proceedings to remedy discrimination under other statutes, such as section 1981,⁴⁵³ or during resort to grievance and arbitration procedures under a collective bargaining agreement.⁴⁵⁴ The Court has also held, however, that the limitations under Title VII are not jurisdictional, so that they are subject to waiver, estoppel, and equitable tolling,⁴⁵⁵ and that they are tolled during the pendency of a class action.⁴⁵⁶ In a case of denial of tenure by a university, the Court held that the limitation began to run when tenure was denied, not at the expiration of a terminal contract one year later.⁴⁵⁷ The implications of this decision for employment decisions other than tenure are uncertain.

The Court's most important decision interpreting the limitations under Title VII concerns the theory of continuing violations. In *United Air Lines, Inc. v. Evans*,⁴⁵⁸ the Court held that a charge filed with the EEOC in 1973 did not timely raise a claim of discriminatory discharge in 1968, despite the fact that the plaintiff was rehired in 1972 and continued to suffer the adverse effects of the discharge through denial of seniority for any period before 1972. The Court's holding was based partly on the exception for seniority systems in section 703(h), discussed earlier,⁴⁵⁹ but it was also based on reasoning from the statute of limitations:

A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an

453. See *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975).

454. *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976).

455. *Zipes v. Trans World Airlines*, 455 U.S. 385 (1982).

456. *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983).

457. *Delaware State Coll. v. Ricks*, 449 U.S. 250 (1980).

458. 431 U.S. 553 (1977).

459. See *supra* text accompanying notes 287–90.

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unfortunate event in history which has no present legal consequences.⁴⁶⁰

Subsequent decisions have made it clear that the theory of continuing violations cannot be used to revive otherwise time-barred claims of discrimination concerned with discrete events,⁴⁶¹ but that it does apply to claims inherently concerned with repeated acts. Even after *Evans*, the theory still applies to claims in which the plaintiff was injured outside the limitation period by a series of repeated acts of discrimination that continued into the limitation period.

Claims, such as those for sexual or racial harassment based on a hostile environment, also support recovery under the theory of continuing violations, as the Supreme Court held in *National Railroad Passenger Corp. v. Morgan*.⁴⁶² Such claims necessarily arise over a period of time because “[t]heir very nature involves repeated conduct” and so can include acts that occurred outside the limitation period.⁴⁶³ By contrast, “discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges.”⁴⁶⁴

A similar result—if not the theory of continuing violations itself—applies to claims of discrimination in pay. In *Bazemore v. Friday*,⁴⁶⁵ the Supreme Court held that perpetuation of discriminatory salary differences originating before the effective date of Title VII can be the subject of a timely charge, since the discrimination was renewed every time the plaintiffs were paid.⁴⁶⁶

Further support for the theory of continuing violations can be derived from the limitation in section 706(g) on awards of back pay to two years prior to the filing of a charge with the EEOC.⁴⁶⁷ In the absence of the theory of continuing violations, this provision would be entirely redundant, since the longest limitation for filing charges with the EEOC would be only 300 days and awards of back pay could not

460. *Evans*, 431 U.S. at 558.

461. See Jackson & Matheson, *The Continuing Violation Theory and the Concept of Jurisdiction in Title VII Suits*, 67 Geo. L.J. 811, 819–23 (1979).

462. 536 U.S. 101, 122 (2002).

463. *Id.* at 115.

464. *Id.* at 102.

465. 478 U.S. 385 (1986).

466. *Id.* at 385–97.

467. Section 706(g)(1), 42 U.S.C. § 2000e-5(g)(1) (2000).

be given for any greater period before the filing with the EEOC. However, the two-year limitation on awards of back pay was added to section 706(g) to protect defendants from excessive awards of back pay under the theory of continuing violations,⁴⁶⁸ and it was added before the Supreme Court's decision in *Evans*. It would be ironic, but perhaps justifiable, if a limitation added to restrict the theory of continuing violations before *Evans* were interpreted as congressional ratification of the theory after *Evans*.

A more explicit, but limited, endorsement of the theory of continuing violations was created by the Civil Rights Act of 1991. When a plaintiff alleges discrimination in the seniority system itself, the limitation period starts to run from three different events, effectively making the last of them the only one that counts: when the seniority system is adopted, when the plaintiff is subject to the seniority system, or when the plaintiff is injured by the application of the seniority system.⁴⁶⁹ This provision was intended to overrule a more restrictive decision of the Supreme Court that started the limitation running when the seniority system was adopted or changed.⁴⁷⁰

Private Actions

Individual Actions

Private actions can be brought by individuals who themselves filed charges, or on whose behalf charges were filed, with the EEOC.⁴⁷¹ If these individuals have not agreed to a settlement of the charge and a public action has not been filed, they may bring an individual action after receiving a right-to-sue letter. Moreover, if the EEOC has failed to take any action on a charge for 180 days, after the expiration of the deferral period, an individual can receive a right-to-sue letter at his or her request.⁴⁷² Before any litigation is commenced, the EEOC will disclose the results of its investigation of a charge, but not discussions in attempted conciliation, to the charging party or to the person on whose behalf the charge was filed. The Supreme Court has held that

468. George P. Sape & Thomas J. Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 Geo. Wash. L. Rev. 824, 880–83 (1972).

469. Section 706(e)(2), 42 U.S.C. § 2000e-5(e)(2) (2000).

470. The overruled decision is *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900 (1989).

471. Section 706(f)(1), 42 U.S.C. § 2000e-5(f)(1) (2000).

472. *Id.*

the general prohibition against public disclosure of the results of an EEOC investigation before an action is filed does not apply to disclosure to those who are the subject of the charge or their attorneys.⁴⁷³

Class Actions

Private actions under Title VII are often brought as class actions. A named plaintiff can exhaust administrative remedies on behalf of the class and with respect to any claim that was the subject of or could reasonably have been expected to grow out of the EEOC's investigation of the charge.⁴⁷⁴ A line of cases, originating in the Fifth Circuit, initially adopted a principle of liberal certification of Title VII class actions.⁴⁷⁵ These cases applied the requirements of Federal Rule of Civil Procedure 23 loosely in Title VII cases and certified "across-the-board" classes that included all employees who suffered from discrimination throughout an employer's operations.

The Supreme Court subsequently halted this trend in two cases in which it reversed certification of classes approved by the Fifth Circuit. In *East Texas Motor Freight System v. Rodriguez*,⁴⁷⁶ the Court held that a class was erroneously certified on appeal when the named plaintiffs had not sought certification before trial, the case had not been tried as a class action, the relief requested by the named plaintiffs had been rejected in a union vote by most of the class members, and the named plaintiffs had lost on their individual claims at trial. In *General Telephone Co. v. Falcon*,⁴⁷⁷ the Court held that a class of applicants for employment was erroneously certified by the district court because the only named plaintiff was an employee who claimed discrimination in promotions. In *Rodriguez*, the Court stated, "We are not unaware that suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs. Common questions of law or fact are typically present. But careful attention to the requirements of Fed. Rule Civ. Proc. 23 remains nonetheless indispensa-

473. Section 706(b), 42 U.S.C. § 2000e-5(b) (2000); *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590 (1981).

474. *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970).

475. *E.g., Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969).

476. 431 U.S. 395 (1977).

477. 457 U.S. 147 (1982).

ble.”⁴⁷⁸ In *Falcon*, the Court added that the “across-the-board” rule led to neglect of the requirements of Rule 23, but left open the possibility that employment practices applicable to both employees and applicants might justify certification of an equally broad class.⁴⁷⁹ A similar possibility led to the Court’s later decision in *Bazemore v. Friday*,⁴⁸⁰ affirming the denial of class certification in some respects, but not others, based on geographical differences in conditions of employment.

The Supreme Court continued to limit the scope of Title VII class actions in *Cooper v. Federal Reserve Bank*,⁴⁸¹ but it did so in a manner favorable to individual plaintiffs. The Court held that the judgment in a class action dismissing claims of a pattern or practice of discrimination in promotions did not preclude subsequent individual claims by class members. Although the individual plaintiffs testified at trial in the class action, the district court denied their motions to intervene and did not adjudicate their individual claims. Consequently, they were bound by the judgment in the class action but only with respect to pattern-or-practice claims covering the same time period as the class action.

The Civil Rights Act of 1991 has further complicated the issue of certification of Title VII class actions by adding damages as a remedy routinely available to victims of employment discrimination.⁴⁸² Damage class actions typically are certified under Federal Rule of Civil Procedure 23(b)(3), which requires a finding that class actions are superior to actions by individual class members.⁴⁸³ Class members in such actions also are entitled to individual notice, and they have the right to opt out of any class action brought on their behalf.⁴⁸⁴ None of these requirements apply to class actions under Rule 23(b)(2), under

478. *Rodriguez*, 431 U.S. at 405. This statement was quoted in part in *Falcon*, 457 U.S. at 157. Proposed amendments to Rule 23 took effect on December 1, 2003. Bills concerned with class actions still are pending before Congress. S. 274 and H.R. 1115, 108th Cong. (2003).

479. *Falcon*, 457 U.S. at 157–60 & n.15.

480. 478 U.S. 385 (1986).

481. 467 U.S. 867 (1984).

482. 42 U.S.C. § 1981a(a)(1) (2000).

483. Fed. R. Civ. P. 23(b)(3).

484. Fed. R. Civ. P. 23(c)(2).

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which most Title VII class actions were certified before 1991.⁴⁸⁵ In a widely noted decision, the Fifth Circuit has held that class actions seeking damages as a remedy are subject to the stricter requirements of Rule 23(b)(3).⁴⁸⁶ Some courts have endorsed this conclusion,⁴⁸⁷ while others have not.⁴⁸⁸ The overall effect of the decision certainly is not to increase the availability of class actions in Title VII cases, and the ironic consequence is that the expanded remedies created by the Civil Rights Act of 1991 might restrict the procedures formerly available to victims of discrimination.

Arbitration

The availability of arbitration has mixed and uncertain effects on a private individual's right to bring a claim under Title VII. On the one hand, arbitration under a collective bargaining agreement, in which an employee's grievance is usually controlled by the union, does not affect the employee's individual rights under Title VII. The employee is under no obligation to resort to arbitration of this kind⁴⁸⁹ and, at most, the arbitrator's decision "may be admitted as evidence and accorded such weight as the court deems appropriate."⁴⁹⁰ On the other hand, agreements made by the individual employee to arbitrate disputes with the employer may preclude resort to litigation. So long as arbitration is authorized by an agreement that gives the employee control over the presentation of his or her claim, it can be used as a substitute for litigation.⁴⁹¹

The principles governing these different forms of arbitration technically are consistent, but they reflect an overall ambivalence toward arbitration that has not yet been fully resolved by the case law. The trend in recent decisions has been to expand the right to arbitration,

485. Fed. R. Civ. P. 23(b)(2).

486. *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 425 (5th Cir. 1998).

487. *E.g.*, *Lemon v. International Union of Operating Eng'rs*, 216 F.3d 577, 580–81 (7th Cir. 2000); *Miller v. Hygrade Food Prods. Corp.*, 198 F.R.D. 638, 641–42 (E.D. Pa. 2001) (collecting cases).

488. *E.g.*, *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 162–67 (2d Cir. 2001); *Hoffman v. Honda of Am. Mfg., Inc.*, 191 F.R.D. 530, 534–35 (S.D. Ohio 1999).

489. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47–54 (1974).

490. *Id.* at 60 & n.21.

491. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991).

but to ensure that the employee has actually consented to it by a binding contract. Thus, in *Circuit City Stores, Inc. v. Adams*,⁴⁹² the Supreme Court held that agreements to arbitrate claims of employment discrimination generally fell within the coverage of the Federal Arbitration Act and could be enforced according to its terms. At least one circuit has taken the further step of holding that a collective bargaining agreement waived an individual employee's right to sue.⁴⁹³ Yet the Supreme Court has emphasized that an agreement to arbitrate precludes resort to litigation only if it clearly states that it has this effect.⁴⁹⁴ Moreover, an arbitration agreement does not preclude public actions by the EEOC.⁴⁹⁵ The lower courts also have been careful to ensure that the agreement to arbitrate is supported by consideration,⁴⁹⁶ and they have scrutinized provisions that impede an employee's resort to arbitration, such as payment of arbitrator's fees.⁴⁹⁷ For example, in *Circuit City* itself, on remand from the Supreme Court, the court of appeals found the arbitration agreement to be unconscionable because it was so one-sided in favor of the employer.⁴⁹⁸

The substantive question is whether allowing employees to bargain away their right to judicial remedies in favor of arbitration confers too great an advantage upon employers. Employers cannot offer contracts of employment that violate the laws against employment discrimination or that dilute the protection conferred by these laws. Likewise, employees cannot waive their rights under these laws be-

492. 532 U.S. 105 (2001). In a consumer arbitration case, the Supreme Court upheld the power of the arbitrator to determine whether class claims are subject to arbitration. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

493. *Safrit v. Cone Mills Corp.*, 248 F.3d 306, 308 (4th Cir. 2001) (per curiam); see *Carson v. Giant Food Inc.*, 175 F.3d 325, 329 (4th Cir. 1999) (language of collective bargaining agreement must clearly waive right to arbitrate).

494. *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 79–82 (1998).

495. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 297–98 (2002).

496. Compare *Bailey v. Federal Nat'l Mortgage Ass'n*, 209 F.3d 740, 746 (D.C. Cir. 2000) (employee did not agree to arbitration simply by continuing to work for employer), with *Michalski v. Circuit City Stores Inc.*, 177 F.3d 634, 637 (7th Cir. 1999) (employer bound by agreement to arbitrate by promising to abide by results of arbitration).

497. *Bradford v. Rockwell Semiconductor Inc.*, 238 F.3d 549, 553 (4th Cir. 2001) (citing cases).

498. *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889 (9th Cir. 2002) (citing cases), cert. denied, 535 U.S. 1112 (2002).

cause, it is believed, employers would otherwise use their superior bargaining power to obtain agreements that allowed continued discrimination. For the same reason, arbitration agreements cannot be used as a means of weakening enforcement of the laws against employment discrimination, for instance, by giving employers effective control over the selection of arbitrators. As a procedural matter, the concern is that the simpler and less costly procedures typical of arbitration will work systematically to the disadvantage of plaintiffs. Unlike employers, plaintiffs may need modern procedural devices, such as discovery, to uncover evidence that disputed employment decisions are discriminatory.

Public Actions

Title VII authorizes the EEOC to sue private employers, and the Attorney General to sue state and local government employers.⁴⁹⁹ In addition, it authorizes EEOC commissioners to initiate administrative proceedings by filing charges with the EEOC.⁵⁰⁰ Public actions can be filed only after investigation and conciliation efforts have failed, and in any event, no sooner than 30 days after a charge has been pending in the EEOC, after the 60-day deferral period.⁵⁰¹ In general, more exacting compliance with administrative procedures is required in public actions than in private actions because the EEOC is held responsible for its own mistakes.⁵⁰² However, a very broadly worded charge filed by an EEOC commissioner was held sufficient to meet the requirements of specificity and notice prescribed by Title VII and EEOC regulations.⁵⁰³ If a public action is filed, the charging party has a right to intervene, and if a private action is filed, the EEOC or the Attorney General may seek permissive intervention after certifying that the case is of general public importance.⁵⁰⁴

499. Section 706(f), 42 U.S.C. § 2000e-5(f) (2000).

500. Section 706(b), 42 U.S.C. § 2000e-5(b) (2000).

501. Section 706(f)(1), 42 U.S.C. § 2000e-5(f)(1) (2000).

502. See *EEOC v. Raymond Metal Prods. Co.*, 530 F.2d 590 (4th Cir. 1976).

503. *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984). It met the requirements of section 706(b), 42 U.S.C. § 2000e-5(b) (2000), and 29 C.F.R. § 1601.12(a)(3) (2000).

504. Section 706(f)(1), 42 U.S.C. § 2000e-5(f)(1) (2000).

Public actions may be brought under either section 706 or section 707.⁵⁰⁵ Section 706 actions usually allege discrimination against a small number of individuals, whereas section 707 actions allege a “pattern or practice” of discrimination against a class of employees. Nothing turns on the difference between the two sections, however. The Supreme Court has held that the EEOC or the Attorney General can bring section 706 actions on behalf of a class of employees without certification of a class action under Federal Rule of Civil Procedure 23.⁵⁰⁶ Moreover, the allocation of authority to sue is the same in section 707 actions as it is in section 706 actions. The EEOC can sue private employers, and the Attorney General can sue state and local government employers. The language of the statute, however, is confused on this point, and it was only clarified by an executive reorganization plan.⁵⁰⁷

Actions by Federal Employees

Actions by federal employees are governed by section 717 of Title VII.⁵⁰⁸ A federal employee must exhaust administrative remedies in his or her agency, in accordance with the time limits specified in EEOC regulations.⁵⁰⁹ A complaint must be made to an EEO counselor within 45 days of the alleged discrimination, and a written complaint must be filed with the agency within 15 days of the final interview with the EEO counselor.⁵¹⁰ If the federal employee then takes the case to the EEOC, a complaint must be filed with the EEOC within 30 days of receipt of the final decision of the agency.⁵¹¹ If not, an action can be filed in federal court within 90 days of notice of the employing agency’s final decision or, if the employing agency has not reached a

505. Sections 706, 707, 42 U.S.C. §§ 2000e-5, -6 (2000).

506. *General Tel. Co. v. EEOC*, 446 U.S. 318 (1980).

507. Section 707(e), 42 U.S.C. § 2000e-6(e) (2000); Reorg. Plan No. 1 of 1978, § 5, 3 C.F.R. 321 (1978), *reprinted in* 5 U.S.C. app. at 206 (2000) *and in* 92 Stat. 3781 (1978).

508. Section 717, 42 U.S.C. § 2000e-16 (2000).

509. Claims by federal employees under the ADEA, however, need not be preceded by exhaustion of administrative remedies. 29 C.F.R. § 1614.201(a) (2000).

510. 29 C.F.R. §§ 1614.105(a), .106(b) (2000).

511. *Id.* § 1614.402(a).

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final decision, at any time after 180 days of filing with the agency.⁵¹² If a complaint is filed with the EEOC, then the EEOC acts in an adjudicative capacity, as the successor to the Civil Service Commission.⁵¹³ If the federal employee is dissatisfied with the results of the EEOC proceedings, the employee may file an action in federal court under the same time limits as an action filed directly from agency proceedings: within 90 days of notice of a final decision by the EEOC or, if the EEOC has not reached a final decision, at any time after 180 days of filing with the EEOC.⁵¹⁴

The Supreme Court has held that these time limits are not jurisdictional but rather are subject to equitable tolling, just like claims against private employers.⁵¹⁵ So, too, damages can be awarded to federal employees, both by courts and by the EEOC.⁵¹⁶ Actions by federal employees result in de novo judicial review, just like other Title VII actions.⁵¹⁷ However, actions to enforce or review an administrative decision favorable to the federal employee result in only limited judicial review.⁵¹⁸

For employees covered by its terms, section 717 provides the exclusive remedy for employment discrimination.⁵¹⁹ Special, complicated procedures apply to claims of discrimination that are joined with claims that may be brought before the Merit Systems Protection Board.⁵²⁰ By its terms, however, section 717 does not apply to all fed-

512. Section 717(c), 42 U.S.C. § 2000e-16(c) (2000); 29 C.F.R. § 1614.408 (2000).

513. Reorg. Plan No. 1 of 1978, § 3, 3 C.F.R. 321 (1978), *reprinted in* 5 U.S.C. app. at 206 (2000), *and in* 92 Stat. 3781 (1978).

514. Section 717(c), 42 U.S.C. § 2000e-16(c) (2000); 29 C.F.R. § 1614.408 (2000).

515. *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 93–96 (1990).

516. *West v. Gibson*, 527 U.S. 212 (1999).

517. *Chandler v. Roudebush*, 425 U.S. 840 (1976).

518. *Moore v. Devine*, 780 F.2d 1559 (11th Cir. 1986), *on reh'g*, 767 F.2d 1541 (11th Cir. 1985).

519. *Brown v. General Servs. Admin.*, 425 U.S. 820 (1976).

520. 5 U.S.C. § 7702 (2000); 5 C.F.R. §§ 1201.151–.175 (2000); 29 C.F.R. §§ 1614.302–.310 (2000). Claims involving collective bargaining are even more complex because they may also be brought before an arbitrator or before the Federal Labor Relations Authority. 5 U.S.C. §§ 7118, 7121–7123 (2000).

eral employees.⁵²¹ The Supreme Court has held that excluded federal employees have an implied right of action for disparate treatment in violation of the Fifth Amendment.⁵²² Employees of the Senate and the House of Representatives, and presidential appointees, however, now have special statutory remedies.⁵²³

Remedies

Civil Rights Act of 1991

The Civil Rights Act of 1991 greatly expanded the remedies available under Title VII by authorizing the award of damages for intentional discrimination.⁵²⁴ With the award of damages, the Act also granted the right to trial by jury.⁵²⁵ Together these changes moved the litigation of Title VII claims ever closer to the model of personal injury litigation: More is at stake and more is determined by the jury. The provision that contains these changes was enacted as a separate section of the United States Code, section 1981a, partly because it also extended the same remedies to plaintiffs who alleged discrimination on the basis of disability under the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990.⁵²⁶ Partly, too, Congress wanted to emphasize the parallel between actions for damages under Title VII and actions for damages under section 1981, which are, unlike Title VII claims, limited to discrimination on the basis of race or national origin.⁵²⁷ Section 1981a establishes a damage remedy for discrimination on the basis of sex, religion, or disability similar to that already available for discrimination on the basis of race or national origin under section 1981.

521. Section 717(a), 42 U.S.C. § 2000e-16(a) (2000). An exceptional decision extended section 717 to uniformed military personnel, but was disapproved by the court of appeals. *Hill v. Berkman*, 635 F. Supp. 1228 (E.D.N.Y. 1986). This decision has not been followed by the courts of appeals. E.g., *Roper v. Department of the Army*, 832 F.2d 247 (2d Cir. 1987).

522. *Davis v. Passman*, 442 U.S. 228 (1979).

523. *See supra* note 413.

524. 42 U.S.C. § 1981a(a)(1) (2000).

525. *Id.* § 1981a(c).

526. *Id.* § 1981a(a)(2), (3).

527. *See infra* text accompanying notes 644–46.

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Despite the parallel with damages under section 1981, section 1981a itself is limited in several respects. First, damages can be recovered under section 1981a only if they cannot be recovered under section 1981.⁵²⁸ Second, damages under section 1981a are available only for claims of disparate treatment, not for claims of disparate impact.⁵²⁹ Third, recovery of punitive damages is available only against private employers and only upon proof that the defendant acted “with malice or with reckless indifference to the federally protected rights of an aggrieved individual.”⁵³⁰ Fourth, monetary relief that can be recovered under Title VII, mainly in the form of awards of back pay, cannot be recovered under section 1981a.⁵³¹ Fifth, the total recovery for future pecuniary damages, nonpecuniary damages, and punitive damages is capped at different amounts depending on the size of the employer, from \$50,000 for employers with more than 14 but fewer than 101 employees, to \$300,000 for employers with more than 500 employees.⁵³²

Of these provisions, the most frequently litigated concerns the award of punitive damages, and in particular, the circumstances in which an employer can be held liable for the wrongful acts of its supervisors and other employees. In *Kolstad v. American Dental Association*,⁵³³ the Supreme Court held that section 1981a does not require proof that the underlying discrimination was egregious. It is sufficient that the employer engaged in discrimination “in the face of a perceived risk that its actions will violate federal law.”⁵³⁴ The Court went on to address the question of exactly who must perceive this risk, among all

528. 42 U.S.C. § 1981a(a)(1) (2000). Plaintiffs who have a claim for damages under section 1981 must rely on it.

529. *Id.* Likewise, section 1981 allows only claims for disparate treatment, and so allows recovery of damages only for claims of intentional discrimination on the basis of race or national origin. See *infra* text accompanying notes 647–48.

530. *Id.* § 1981a(b)(1). This is, however, generally similar to the standards for awarding punitive damages under other federal statutes. It has, for instance, been applied to claims under section 1981. *Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431, 441 (4th Cir. 2000).

531. 42 U.S.C. § 1981a(b)(2) (2000).

532. *Id.* § 1981a(b)(3). These caps, however, do not apply to awards of front pay. *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 852–54 (2001).

533. 527 U.S. 526 (1999).

534. *Id.* at 536.

those who act for an organizational employer. It held that an employer is not vicariously liable for decisions of managerial agents that are contrary to the employer's "good-faith efforts to comply with Title VII."⁵³⁵ This standard of vicarious liability is decidedly more favorable to an employer than the analogous standard for most claims of sexual harassment, which imposes absolute liability upon the employer, subject at most to an affirmative defense.⁵³⁶ Nevertheless, one court has held that punitive damages for sexual harassment can be awarded without an award of compensatory damages.⁵³⁷

These limits on damages, while significant, do not impose equally strict limits on the right to jury trial. Awards of back pay and injunctive relief still are made by the judge, because they are forms of equitable relief. Under the Seventh Amendment, however, the judge is bound by the jury's decision on all issues common to the requests for legal and equitable relief.⁵³⁸ When the plaintiff alleges intentional discrimination, seeks damages, and requests a jury, the issue of liability is submitted to the jury. Only on claims of disparate impact is the issue of liability determined by the judge.

A further limitation on section 1981a is increasingly only of historical interest. It concerns cases that arose before the Civil Rights Act of 1991 became effective on November 21, 1991. In *Landgraf v. USI Film Products*,⁵³⁹ the Supreme Court held that section 1981a does not apply to claims that arose before the Act's effective date. This holding might be generalized to other "substantive" provisions of the Act,⁵⁴⁰ but it probably does not apply to "procedural" provisions. The Court relied heavily on "the traditional presumption against applying statutes affecting substantive rights, liabilities, or duties to conduct arising

535. *Id.* at 545 (quoting *Kolstad v. American Dental Ass'n*, 139 F.3d 958, 974 (D.C. Cir. 1998) (Tatel, J., dissenting)).

536. *See supra* text accompanying notes 349–58.

537. *Cush-Crawford v. Adchem Corp.*, 94 F. Supp. 2d 294, 299 (E.D.N.Y. 2000) (noting a conflict among the circuits on the general issue whether an award of compensatory damages is a prerequisite to an award of punitive damages).

538. *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 550–54 (1990); *Dairy Queen v. Wood*, 369 U.S. 469, 473 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510–11 (1959).

539. 511 U.S. 244 (1994).

540. This generalization would apply only to the extent that these provisions are not governed by their own explicit effective dates. *See id.* at 250.

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before their enactment.”⁵⁴¹ It also warned, however, that different provisions of the Act might take effect at different stages of a case and that, for instance, a purely procedural right would apply to claims that arose before the effective date of the Act but were filed after it.⁵⁴²

Wholly apart from the issue of damages, the Civil Rights Act of 1991 also modified the remedies available under Title VII in various ways. The only common theme in these provisions is that they overruled, either partially or wholly, decisions of the Supreme Court. First, the Act introduced the partial defense that the plaintiff would have been rejected for an entirely legitimate reason even if the employer had not engaged in discrimination.⁵⁴³ This provision allows the award of declaratory relief, prospective injunctive relief, and attorney’s fees and costs, even if the defense is made out, thereby partially overruling a decision that had recognized a full defense on the same grounds.⁵⁴⁴ What appears mainly to have been at stake was the award of attorney’s fees to prevailing plaintiffs.⁵⁴⁵ In a second provision on a related subject, the Act also authorizes the award of fees for experts as costs,⁵⁴⁶ overruling a decision that had restricted fees for expert witnesses to the same fees for other witnesses.⁵⁴⁷ A third provision authorizes the award of interest against the United States.⁵⁴⁸ A fourth provision overrules yet another decision of the Supreme Court and restricts collateral

541. *Id.* at 278.

542. *Id.* at 280–81.

543. Section 706(g)(2)(B), 42 U.S.C. § 2000e-5(g)(2)(B) (2000). *See supra* text accompanying notes 72–88.

544. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 245–46 (1989).

545. This provision is in some tension with the general principles governing awards of attorney’s fees, because it authorizes the award of attorney’s fees based solely on a finding that the statute has been violated. *See infra* text accompanying notes 599–601.

546. Section 706(k), 42 U.S.C. § 2000e-5(k) (2000).

547. The overruled decision is *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987). Expert witness fees remain excluded, however, from awards of attorney’s fees under civil rights statutes other than Title VII and 42 U.S.C. §§ 1981, 1981a. *See* 42 U.S.C. § 1988 (2000); *West Virginia Univ. Hosp., Inc. v. Casey*, 499 U.S. 83 (1991).

548. Section 717(d), 42 U.S.C. § 2000e-16(d) (2000). This provision overruled the decision in *Library of Congress v. Shaw*, 478 U.S. 310 (1986), to the extent that the latter disallowed the award of interest, not to the extent that it allowed an award of back pay.

attack upon judgments and consent decrees by persons who were not parties to the underlying action.⁵⁴⁹ This provision was designed mainly to protect court-ordered and court-approved affirmative action plans from claims of reverse discrimination, but it could not, of course, deny any rights to present such claims guaranteed by the Due Process Clause.⁵⁵⁰ Hence, in making damages available under Title VII, Congress also took the opportunity in the Civil Rights Act of 1991 to correct what it perceived to be several mistaken decisions originally interpreting the statute.

Equitable Remedies

Equitable remedies in a variety of forms, from injunctions to awards of back pay, have always been available under Title VII. A finding of violation justifies issuance of an injunction against the discriminatory practice almost as a matter of course,⁵⁵¹ at least absent changed circumstances that would make an injunction inappropriate.⁵⁵² As discussed in the section on preferential treatment, a court may also order preferential relief for persons who are not victims of discrimination, but only in an exceptional case in which the defendant has not complied with less controversial remedies.⁵⁵³

Victims of discrimination are entitled to compensatory relief, subject to the defendant's burden of proving that they would have been rejected anyway for an entirely legitimate reason.⁵⁵⁴ If the defendant carries this burden of proof, the court may award only declaratory relief, prospective injunctive relief, and attorney's fees and costs.⁵⁵⁵ If the

549. Section 703(n), 42 U.S.C. § 2000e-2(n) (2000). The overruled decision was *Martin v. Wilks*, 490 U.S. 755 (1989).

550. Section 703(n)(2)(D), 42 U.S.C. § 2000e-2(n)(2)(D) (2000).

551. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 361 (1977).

552. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 436 (1975).

553. *See supra* text accompanying notes 223–30.

554. Section 706(g)(2)(B), 42 U.S.C. § 2000e-5(g)(2)(B) (2000).

555. Section 706(g)(2)(B)(i), 42 U.S.C. § 2000e-5(g)(2)(B)(i) (2000). This subsection addresses only claims of intentional discrimination under section 703(m), 42 U.S.C. § 2000e-2(m) (2000). Claims of disparate impact apparently fall under section 706(g)(2)(A), 42 U.S.C. § 2000e-5(g)(2)(A) (2000). In class actions, in which most claims of disparate impact are brought, this subsection has been applied to reach essentially the same results as those under subsection (g)(2)(B). *See infra* text accompanying notes 572–81.

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defendant fails to carry this burden, then the plaintiff is almost always entitled to an award of back pay. In *Albemarle Paper Co. v. Moody*,⁵⁵⁶ the Supreme Court held that back pay “should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.”⁵⁵⁷ One such reason mentioned by the Court is unjustified delay in asserting a claim for back pay.⁵⁵⁸ Section 706(g)(1) also provides that an award of back pay is subject to an offset for “[i]nterim earnings or amounts earnable with reasonable diligence,”⁵⁵⁹ and an unconditional offer of the position sought by the plaintiff, even without retroactive seniority, usually terminates the accrual of liability for back pay.⁵⁶⁰

The Supreme Court has stated that the same liberal standard applies to awards of remedial seniority in determining both fringe benefits available from the employer and rights in competition with other employees.⁵⁶¹ With respect to competitive seniority rights, however, the Court has applied the standard only to the award of “rightful place” seniority, which results in reinstatement of a victim of discrimination with full remedial seniority only after a vacancy arises in the relevant job.⁵⁶² Contrary to the implication of the term, an award of “rightful place” seniority does not immediately put the victim of discrimination in his or her rightful place, because it does not allow an incumbent employee to be bumped out of his or her job to create a vacancy. Some courts have awarded “front pay” to victims of discrimination to compensate them for the period between entry of the judgment and occurrence of a vacancy that allows them to achieve their

556. 422 U.S. 405 (1975).

557. *Id.* at 421.

558. *Id.* at 423–24. See *City of Los Angeles Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 718–23 (1978) (decision that employers could not use sex-segregated actuarial tables does not justify award of retroactive monetary relief); *Arizona Governing Comm. v. Norris*, 463 U.S. 1073, 1075 (1983) (per curiam) (same).

559. Section 706(g)(1), 42 U.S.C. § 2000e-5(g) (2000).

560. *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982).

561. *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 770–71 (1976).

562. *Id.* at 776–78.

rightful place.⁵⁶³ Front pay differs from back pay only in providing compensation for the effects of discrimination that occur after, instead of before, entry of the judgment. It is not awarded as routinely as back pay, perhaps because of the difficulty of determining the future effects of past discrimination.⁵⁶⁴

Finally, one defendant cannot seek contribution from another for monetary awards paid under Title VII.⁵⁶⁵

Taxation

With the increasing importance of monetary relief of all kinds—damages, back pay, and attorney’s fees—issues of taxation have become more important as well. These are not, in general, significant for employers, who can usually treat such amounts as a fully deductible business expense. For individual plaintiffs, however, it makes an enormous difference whether money obtained through judgments and settlements is included in taxable income. By an amendment to the Internal Revenue Code that specifically addresses this issue, these amounts are generally included in taxable income. Only damages “on account of personal physical injuries or physical sickness” are now excluded from income.⁵⁶⁶ In a decision concerned with taxation of an arbitration award, the Supreme Court held that back pay must be taxed at the rate for the year in which it should have been paid.⁵⁶⁷

Somewhat surprisingly, the Tax Court has extended the same treatment to attorney’s fees paid under a contingent fee agreement, although recognizing that the fees are deductible under the restrictions for miscellaneous itemized deductions.⁵⁶⁸ The Tax Court’s decision concerned a claim under the Age Discrimination in Employment Act and one that did not involve court-awarded attorney’s fees. Yet cases that reason that court-awarded fees are taxable to the plaintiff

563. *E.g.*, *White v. Carolina Paperboard Corp.*, 564 F.2d 1073, 1091 (4th Cir. 1977); *Patterson v. American Tobacco Co.*, 535 F.2d 257, 269 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976).

564. *E.g.*, *Dillon v. Coles*, 746 F.2d 998, 1005–06 (3d Cir. 1984).

565. *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77 (1981).

566. 26 U.S.C. § 104(a)(2) (2000).

567. *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200 (2001).

568. *Kenseth v. Commissioner*, 114 T.C. 399 (2000), *aff’d*, 259 F.3d 881 (7th Cir. 2001).

(and presumably to the attorney as well) are beginning to emerge.⁵⁶⁹ Even on the narrow issue of the taxation of contingent fees, however, one court has reached the opposite conclusion, finding that the attorney's share of the award did not constitute taxable income to the plaintiff.⁵⁷⁰ The conflict among these decisions eventually will have to be resolved by the Supreme Court, or more likely, by Congress, in which bills addressing this issue have already been introduced.⁵⁷¹

Class Actions and Pattern-or-Practice Actions

In public actions or private actions brought on behalf of a class of employees or applicants, the litigation is usually bifurcated into a "liability" stage that determines whether the defendant has violated Title VII and a "recovery" stage that determines the eligibility of individual class members for compensatory relief. These stages approximate the distinction between class-wide issues and individual remedies, but they do not follow it exactly. After finding a class-wide violation, the court should decide whether to award class-wide relief, typically in the form of an injunction prospectively prohibiting the discriminatory practice.⁵⁷² Usually it is only after deciding that issue that the court turns to the more difficult issue of individual relief for class members. Some opinions complicate the transition from the liability stage to the remedy stage still further by introducing the confusing terminology of "prima facie case" to describe the effect of finding a violation of Title VII.⁵⁷³ This is a mistake, first because "prima facie case" has several meanings, and second—and more fundamentally—because there is nothing "prima facie" about a finding of violation: The defendant has been found to have violated the law.

Because the defendant has already been found to have violated the statute, the defendant usually bears most of the burden of proving, during the recovery stage, that a class member is not entitled to compensatory relief. This principle, developed in judicial decisions, essen-

569. *E.g.*, *Sinyard v. Commissioner*, 268 F.3d 756, 759 (9th Cir. 2001), *cert. denied*, 536 U.S. 904 (2002).

570. *Estate of Clarks v. United States*, 202 F.3d 854, 856–58 (6th Cir. 2000).

571. *E.g.*, the Civil Rights Tax Relief Act, S. 557, H.R. 1155, 108th Cong. (2003).

572. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 361 (1977).

573. *E.g.*, *United States v. United States Steel Corp.*, 520 F.2d 1043, 1053–54 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1976).

tially anticipated the employer's partial defense, codified by the Civil Rights Act of 1991, that the plaintiff would have been rejected anyway for an entirely legitimate reason.⁵⁷⁴ The Act places the burden of proof for that defense entirely on the defendant. Similarly, in class actions and pattern-or-practice actions, a class member need only prove that he or she applied for the job in question in order to shift to the employer the burden of proving that he or she was not a victim of discrimination, for instance, because of lack of qualifications or the absence of a vacancy at the time of application.⁵⁷⁵ To obtain reinstatement, class members must also be qualified at the time reinstatement is offered, an additional issue upon which the employer apparently bears the burden of proof.⁵⁷⁶

A plaintiff who did not apply for the job at issue has the "not always easy burden of proving that he would have applied for the job" in the absence of discrimination.⁵⁷⁷ This requires a showing that the plaintiff was deterred from applying for the job and that he or she possessed the necessary qualifications, which would have been revealed in an application.⁵⁷⁸ If a nonapplicant makes this showing, he or she is treated just like an applicant; the employer bears the burden of proving that the nonapplicant was not a victim of discrimination.⁵⁷⁹ The Supreme Court has granted compensatory relief to class members who have applied for a job, whether or not they were already employed by the employer, and to class members who were employees but who did not apply for a job.⁵⁸⁰ It is not clear that the Court would extend compensatory relief to class members who are neither employees nor applicants, since they are difficult to distinguish from members of the public at large.⁵⁸¹

574. Section 706(g)(2)(B), 42 U.S.C. § 2000e-5(g)(2)(B) (2000).

575. *Teamsters*, 431 U.S. at 361–62.

576. See *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 772–73 nn.31–32 (1976).

577. *Teamsters*, 431 U.S. at 362–71.

578. *Id.* at 367–71.

579. *Id.* at 369 & n.53.

580. *Id.* at 367–71; *Franks*, 424 U.S. at 771–72.

581. See *Teamsters*, 431 U.S. at 368 n.52. For a case extending such compensatory relief, however, see *EEOC v. Joe's Stone Crab Inc.*, 15 F. Supp. 2d 1364 (S.D. Fla. 1998).

Attorney's Fees

Section 706(k) authorizes the award of attorney's fees to the prevailing party in Title VII cases.⁵⁸² In *Christiansburg Garment Co. v. EEOC*,⁵⁸³ the Supreme Court interpreted this section to require the award of attorney's fees to prevailing *plaintiffs* "unless special circumstances would render such an award unjust,"⁵⁸⁴ but to allow the award of attorney's fees to prevailing *defendants* only if "the action brought is found to be unreasonable, frivolous, meritless or vexatious."⁵⁸⁵ The Court reasoned that fee awards to prevailing plaintiffs further the statutory purpose of eliminating discrimination, whereas fee awards to prevailing defendants further only the statutory purpose of discouraging meritless litigation.⁵⁸⁶ These principles apply to awards of attorney's fees against the federal government and the states, despite the doctrine of sovereign immunity and the Eleventh Amendment, both of which have been overridden by explicit congressional enactment.⁵⁸⁷

Provisions for the award of attorney's fees like section 706(k) are found in other federal civil rights laws⁵⁸⁸ and have received a similar

582. Section 706(k), 42 U.S.C. § 2000e-5(k) (2000). *See generally* Diane Sheehy, *Awarding Attorneys' Fees & Managing Fee Litigation* (2d ed. Federal Judicial Center) (forthcoming 2004).

583. 434 U.S. 412 (1978).

584. *Id.* at 416–17 (quoting *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968)).

585. *Id.* at 421 (quoting *Carrion v. Yeshiva Univ.*, 535 F.2d 722, 727 (2d Cir. 1976)). This same standard applies to awards of attorney's fees against intervenors who have not been found to have violated the statute. *Independent Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754 (1989).

586. *Christiansburg Garment*, 434 U.S. at 420.

587. *Id.* at 422 n.20; *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). For claims under 42 U.S.C. § 1983 (2000), attorney's fees can be awarded against a state only if relief is ordered against state officials acting in their official capacity. *Kentucky v. Graham*, 473 U.S. 159 (1985); *Hutto v. Finney*, 437 U.S. 678 (1978).

588. For the Equal Pay Act and the Age Discrimination in Employment Act, the provision is 29 U.S.C. § 216(a) (2000); *see also id.* § 626(b). For the Reconstruction civil rights acts, 42 U.S.C. §§ 1981, 1983 (2000), the provision is 42 U.S.C. § 1988 (2000). This statute also applies to claims under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-4 (2000), and Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1685 (2000). The Rehabilitation Act of 1973 incorporates by reference the enforcement provisions of Title VI and Title VII, 29 U.S.C. § 794a (2000); and the Americans with Disabilities Act incorporates the enforcement provisions of Title VII alone, 42 U.S.C. § 12117(a) (2000).

interpretation.⁵⁸⁹ The most important condition for the award of attorney's fees under these laws is the need to be a prevailing party. In several cases, the Supreme Court has denied an award of attorney's fees altogether when the plaintiff has obtained only nominal judicial relief or a settlement short of a judicially enforceable judgment. In *Hewitt v. Helms*,⁵⁹⁰ the plaintiffs obtained an opinion that state prison officials had acted in violation of the Constitution but were immune from liability for damages, the only relief the plaintiffs sought. Despite the fact that the prison officials revised their regulations to conform to the opinion, the plaintiffs were not prevailing parties entitled to an award of attorney's fees.⁵⁹¹ In *Farrar v. Hobby*,⁵⁹² the plaintiff obtained nominal damages of one dollar and so was a prevailing plaintiff, but because he had failed to establish a claim to any other form of relief, he was not entitled to an award of attorney's fees. This decision is consistent with an earlier decision, *Texas State Teachers Association v. Garland Independent School District*,⁵⁹³ which had allowed an award of attorney's fees when the plaintiff succeeded on "any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit."⁵⁹⁴ The Court cautioned, however, that a "material alteration of the legal relationship of the parties" was necessary and that "purely technical or *de minimis*" success was inadequate.⁵⁹⁵

Carrying this reasoning to its logical conclusion, the Court eventually held that a prevailing party must obtain a judgment on the merits or a judicially approved consent decree in order to recover attorney's fees. In *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*,⁵⁹⁶ a case of housing discrimination, the plaintiffs had obtained the relief they sought from the state legislature, but without the entry of a judgment in their favor

589. *Hensley v. Eckerhart*, 461 U.S. 424, 429–30, 433 n.7 (1983).

590. 482 U.S. 755 (1987).

591. *Id.* at 759–64. *Accord* *Rhodes v. Stewart*, 488 U.S. 1 (1994) (no award of attorney's fees where prisoners' claims became moot before district court entered declaratory judgment in their favor).

592. 506 U.S. 103 (1992).

593. 489 U.S. 782 (1989).

594. *Id.* at 791–92 (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278–79 (1st Cir. 1978)). *Accord* *Hensley*, 461 U.S. at 433.

595. *Garland*, 489 U.S. at 792–93.

596. 532 U.S. 598 (2001).

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from the court. The Supreme Court held that serving as a “catalyst” for such relief was insufficient, offering a general interpretation of all the federal statutes authorizing the recovery of attorney’s fees. As a matter of statutory language, the authorization of fee awards only to a “prevailing party” requires entry of a judgment or consent decree in that party’s favor.⁵⁹⁷ As a matter of policy, where only injunctive and declaratory relief is sought, as in this case, the defendants might be deterred from making desirable changes if they could be assessed attorney’s fees for doing so, even in the absence of a judicially entered judgment.⁵⁹⁸

The preceding cases all concerned claims under statutes like Title VII, authorizing an award of attorney’s fees only to “the prevailing party.” The Civil Rights Act of 1991 might alter the interpretation of this phrase in a provision addressed to “mixed-motive” cases, in which the plaintiff proves discrimination but the defendant proves that the plaintiff would have been rejected or fired for entirely legitimate reasons. This provision, discussed earlier,⁵⁹⁹ explicitly authorizes an award of attorney’s fees upon a finding that Title VII has been violated.⁶⁰⁰ An award of attorney’s fees might therefore be allowed more liberally under Title VII than under other statutes. However, this provision does not amend the section of the statute that generally authorizes the award of attorney’s fees to the “prevailing party,” which is the phrase interpreted in decisions like *Buckhannon*. So far, the lower courts are divided on this question⁶⁰¹ and it awaits resolution by the Supreme Court.

597. *Id.* at 603, 604.

598. *Id.* at 608.

599. *See supra* text accompanying notes 72–88; 543–45.

600. Section 706(g)(2)(B), 42 U.S.C. § 2000e-5(g)(2)(B) (2000).

601. *Compare* *Gudenkauf v. Stauffer Communications Inc.*, 158 F.3d 1074, 1077 (10th Cir. 1998) (allowing an award of attorney’s fees in the absence of other relief), *with* *Canup v. Chipman-Union, Inc.*, 123 F.3d 1440, 1442 (11th Cir. 1997) (refusing to award attorney’s fees in the absence of other relief), *and* *Sheppard v. Riverview Nursing Ctr. Inc.*, 88 F.3d 1332, 1335 (4th Cir. 1996) (allowing only nominal award of attorney’s fees).

Qualifications and Exceptions

The general rule of *Christiansburg Garment Co. v. EEOC*⁶⁰² regarding the award of attorneys' fees has been qualified by several exceptions, some of them dependent upon the particular statute under which the plaintiff claims relief. The first exception concerns the proceedings for which attorney's fees may be received. Under Title VII, attorney's fees may be awarded for state administrative proceedings, which must be exhausted before a Title VII claim is filed.⁶⁰³ Under the general civil rights statute, section 1983,⁶⁰⁴ however, the law is different. Since administrative remedies need not be exhausted under section 1983, attorney's fees may not be awarded for local administrative proceedings, unless the attorney's work in those proceedings contributes to later representation in court.⁶⁰⁵ Likewise, under other federal statutes that do not require exhaustion of administrative remedies, a claim that is entirely resolved in administrative proceedings cannot form the basis for a later action only to recover attorney's fees.⁶⁰⁶ This principle may be inconsistent with, and therefore undermine, dicta in *New York Gaslight Club v. Carey*⁶⁰⁷ suggesting that a separate action could be brought only for attorney's fees.⁶⁰⁸

The second exception concerns waiver of the right to an award of attorney's fees, which may be exacted from the plaintiff in return for a favorable settlement. In *Evans v. Jeff D.*,⁶⁰⁹ the Supreme Court upheld the denial of attorney's fees on this ground even though the plaintiff had obtained affirmative relief in the settlement. The Court held that a waiver in settlement of a class action must be approved by the district court, like all other settlements in class actions.⁶¹⁰ The Court strongly

602. 434 U.S. 412 (1978).

603. *New York Gaslight Club v. Carey*, 447 U.S. 54 (1980).

604. 42 U.S.C. § 1983 (2000).

605. *Webb v. Board of Educ.*, 471 U.S. 234 (1985).

606. *North Carolina Dep't of Transp. v. Crest St. Cmty. Council*, 479 U.S. 6 (1986).

607. 447 U.S. 54 (1980).

608. The circuits are in conflict on this question. Compare *Chris v. Tenet*, 221 F.3d 648, 652 (4th Cir. 2000) (no separate action for attorney's fees), with *Jones v. American State Bank*, 857 F.2d 494 (8th Cir. 1988) (separate action).

609. 475 U.S. 717 (1986).

610. *Id.* at 738–40; Fed. R. Civ. P. 23(e).

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suggested, however, that in other actions, in which approval of settlements is not required, waivers should usually be enforced.⁶¹¹

The final, and related, exception arises from the operation of Federal Rule of Civil Procedure 68 in conjunction with fee-shifting statutes. Rule 68 shifts some of the costs of an action from a losing defendant to a prevailing plaintiff. In particular, if the defendant makes a written offer of settlement which the plaintiff refuses to accept but which is more favorable than the judgment that the plaintiff eventually obtains, then all costs incurred after the offer are shifted onto the plaintiff. In *Delta Air Lines v. August*,⁶¹² a Title VII case, the Supreme Court held that Rule 68 does not apply at all to a losing plaintiff because it would only encourage defendants to make nominal settlement offers.

In *Marek v. Chesny*,⁶¹³ an action under section 1983, the Court addressed a more complicated issue—“whether attorney’s fees incurred by a plaintiff subsequent to an offer of settlement under Federal Rule of Civil Procedure 68 must be paid by the defendant under 42 U.S.C. § 1988, when the plaintiff recovers a judgment less than the offer.”⁶¹⁴ The defendants’ offer of settlement, which expressly included “costs now accrued and attorney’s fees,” exceeded the judgment recovered by the plaintiff after trial plus the attorney’s fees for pre-offer services, but it did not exceed the sum of these amounts plus the attorney’s fees for post-offer services. The Court first held that the defendants’ offer for damages and costs together was valid under Rule 68 and that it was properly compared with the judgment recovered by the plaintiff plus pre-offer costs. On the major issue in the case, the Court then held that the “costs” shifted to the plaintiff by Rule 68 included attorney’s fees awardable under section 1988 to prevailing parties, and therefore that the plaintiff could not recover his attorney’s fees incurred after the offer of settlement. The Court emphasized the plain meaning of Rule 68, which authorizes the shifting only of “costs” incurred after the offer of settlement, and of section 1988, which authorizes an award of attorney’s fees “as part of the costs.”⁶¹⁵ For this reason, the Court’s

611. *Evans*, 475 U.S. at 738 & n.30.

612. 450 U.S. 346 (1981).

613. 473 U.S. 1 (1985).

614. *Id.* at 3.

615. 42 U.S.C. § 1988 (2000).

holding may not apply directly to other fee-shifting statutes that do not define attorney's fees as part of the costs, such as section 706(k) of Title VII. The Court did not hold that the defendants' attorney's fees were shifted onto the plaintiff, but only that the plaintiff's post-offer attorney's fees could not be shifted onto the defendants. Given the Court's decision in *Delta Airlines*, it is doubtful that the Court would ever hold that a defendant's attorney's fees could be shifted onto the plaintiff. If Rule 68 does not shift the defendant's attorney's fees onto a plaintiff who does not recover anything at all, it is unlikely that it shifts them onto a plaintiff who recovers less than the amount of the defendant's offer of settlement.

How an Award Is Computed

The leading decision on computing the amount of an award of attorney's fees is *Hensley v. Eckerhart*,⁶¹⁶ which established a two-step process applicable to all statutes that authorize an award of attorney's fees to the prevailing party.⁶¹⁷ First, the court should compute "the lodestar": the number of hours reasonably expended multiplied by a reasonable hourly rate. Second, the court should adjust the lodestar figure up or down to take account of other factors, chief among them the results obtained by the plaintiff. If the plaintiff has been only partially successful, the lodestar figure must be reduced so that it reflects only hours reasonably expended on claims on which the plaintiff prevailed or on related claims. Conversely, if the plaintiff has been exceptionally successful, the lodestar figure may be enhanced. In determining which hours were reasonably expended, "the most critical factor is the degree of success obtained."⁶¹⁸ Other factors may also be taken into account in adjusting the lodestar figure, but only to the extent that they are not already reflected in the lodestar figure itself.⁶¹⁹ The lodestar also includes the hours reasonably expended by paralegals and law clerks,⁶²⁰

616. 461 U.S. 424 (1983).

617. *Id.* at 433 n.7.

618. *Id.* at 436.

619. *Id.* at 434 n.9.

620. *Missouri v. Jenkins*, 491 U.S. 274, 283 (1989).

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and under Title VII, awards of costs can also include fees for experts,⁶²¹ essentially treating other professionals like attorneys.

The lodestar method of calculating awards of attorney's fees has been largely confirmed by the Supreme Court's subsequent decisions. In *Blum v. Stenson*,⁶²² the Court held that a 50% increase in the lodestar figure was not justified by the complexity or novelty of the issues, the skill of counsel, the results obtained, or the risks of litigation. None of these factors was out of the ordinary, and all were adequately reflected in the lodestar figure. In *Pennsylvania v. Delaware Valley Citizens' Council*,⁶²³ the Court twice considered, but did not definitively resolve, the question whether the lodestar figure can be adjusted upward to take account of the plaintiff's risk of loss and counsel's risk of not being compensated at all. In *City of Burlington v. Dague*,⁶²⁴ the Court finally held that no enhancement of the lodestar was permitted on those grounds. To the extent that the risk of loss reflects factors that should be used to enhance the award—such as the difficulty of the case—these were already taken into account in computing the lodestar. To the extent that the risk of loss reflects the merits of the case, it should not be used to enhance awards of attorney's fees and, consequently, encourage plaintiffs to bring weak cases.⁶²⁵ Just as the risk of loss cannot be used to enhance an award of attorney's fees, so, too, a contingent-fee contract between the plaintiff and his or her attorney cannot be used to reduce the fees awarded.⁶²⁶

The strength of the presumption in favor of the lodestar figure is illustrated—although in a manner not fully consistent with *Hensley*—by *City of Riverside v. Rivera*.⁶²⁷ In this case the Court affirmed an award of \$245,000 in attorney's fees to plaintiffs who had recovered a total of \$33,000 against police officers as a result of an illegal search and arrest. For a plurality of four, Justice Brennan held that the district court's findings were sufficient to support the lodestar figure as a reasonable fee award. He specifically rejected the contention that the fee

621. Section 706(k), 42 U.S.C. § 2000e-5(k) (2000). This provision also applies to claims under 42 U.S.C. §§ 1981, 1981a, 42 U.S.C. § 1988(c) (2000).

622. 465 U.S. 886 (1984).

623. 478 U.S. 546 (1986), *on reargument*, 483 U.S. 711 (1987).

624. 505 U.S. 557 (1992).

625. *Id.* at 563.

626. *Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989).

627. 477 U.S. 561 (1986).

award must be proportional to the relief obtained.⁶²⁸ Justice Powell concurred in the judgment on the ground that the district court's detailed findings of fact justified the fee award, but he expressed "serious doubts as to the fairness of the fees awarded in this case."⁶²⁹ Because Justice Powell concurred only in the judgment and because four justices dissented on the ground that the fee award greatly exceeded the relief obtained,⁶³⁰ the decision necessarily is closely tied to the facts of this case. Yet it does not undermine, but confirms, the central role of the lodestar method in calculating court-awarded attorney's fees.

Preclusion

The usual rules of preclusion generally apply to actions under Title VII. Thus, federal courts are bound by the decisions of state courts under the ordinary rules of full faith and credit, even if these decisions simply review decisions of state or local administrative agencies.⁶³¹ So, too, a conciliation agreement that awards a job to a charging party under Title VII does not bar another individual, displaced from the job, from suing for violation of the collective bargaining agreement.⁶³²

These general rules are subject to only two qualifications or exceptions. The first exception concerns the requirement of exhaustion of administrative remedies and is not at all problematic. When considering a claim under Title VII, a court is not bound by the decision of an administrative agency—whether state or local—or the EEOC itself.⁶³³ This conclusion is necessary so that the statutory requirement of exhaustion of administrative remedies does not become the effective equivalent of administrative adjudication. According binding effect to the decision of an administrative agency would make its decision final instead of the court's subsequent decision.

628. *Id.* at 574 (Brennan, J.).

629. *Id.* at 586 (Powell, J., concurring in the judgment).

630. *Id.* at 588–91 (Rehnquist, J., dissenting).

631. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982).

632. *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 771 (1983).

633. *University of Tenn. v. Elliott*, 478 U.S. 788, 795–96 (1986); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798–800 (1973). However, the federal courts may be bound by the unreviewed decisions of state agencies as they affect claims under other federal statutes. *University of Tenn.*, 478 U.S. at 796–99.

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The second exception concerns affirmative action and is therefore more complex and more controversial. The Supreme Court initially applied the usual rules of preclusion to affirmative action plans established by consent decrees and subsequently attacked by white employees or unions that represented them.⁶³⁴ In two cases, the Court held that consent decrees were binding only on the parties who signed them and on other persons in privity with them. In the most controversial of these cases, the Court held that persons who were not a party to the underlying action were under no duty to intervene to object to the consent decree in order to preserve their objections to it.⁶³⁵ This decision, to the extent it was not based on constitutional considerations, was superseded by the Civil Rights Act of 1991. The Act contains elaborate provisions making judgments and consent decrees binding on nonparties with actual notice of the proposed order and an opportunity to object to it, as well as on nonparties whose interests were adequately represented by an existing party.⁶³⁶ This extended preclusive effect, however, is subject to several limitations, the most important being the requirements of due process.⁶³⁷

Despite these limitations, the immediate effect of court orders has usually been conceded, and even when they have been open to collateral attack, the orders generally have not been invalidated for this reason alone. An examination of the merits of the affirmative action plan also is necessary.⁶³⁸ Such court orders, particularly when they involve affirmative action plans, have been most frequently set aside for entirely different reasons. The original defendants, or intervenors who are otherwise bound by the court order, have argued in favor of setting aside the order either because of changed circumstances or because the purpose for which the order was originally entered has been fulfilled.⁶³⁹ In these challenges, essentially on direct attack, arguments

634. *Martin v. Wilks*, 490 U.S. 755, 763 (1989); *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 514 (1986).

635. *Martin*, 490 U.S. at 765.

636. Section 703(n)(1)(B), 42 U.S.C. § 2000e-2(n)(1)(B) (2000).

637. Section 703(n)(2), 42 U.S.C. § 2000e-2(n)(2) (2000).

638. *E.g.*, *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 515–24 (1986); *Rutherford v. City of Cleveland*, 137 F.3d 905, 908 (6th Cir. 1998).

639. *E.g.*, *Patterson v. Newspaper & Mail Deliverers' Union of N.Y.*, 13 F.3d 33, 38 (2d Cir. 1993); *Detroit Police Officers Ass'n v. Young*, 989 F.2d 225, 228 (6th Cir.

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over who can collaterally attack the judgment have played a minimal role.

1993); *Brotherhood of Midwest Guardians Inc. v. City of Omaha*, 9 F.3d 677, 679–80 (8th Cir. 1993).

III. Other Federal Remedies for Employment Discrimination

Reconstruction Civil Rights Acts

In the aftermath of the Civil War, Congress passed several civil rights acts at the same time as it considered and sent to the states the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution. The civil rights acts were important components of Reconstruction and served to establish the rights of the newly freed slaves in the former states of the Confederacy. These acts were not vigorously enforced, however, when Reconstruction came to an end, and they were revived only by the Supreme Court almost a century later. Three of these statutes figure in the law of employment discrimination: section 1981, which grants to all persons the same right “to make and enforce contracts . . . as is enjoyed by white citizens”;⁶⁴⁰ section 1983, which creates a private right of action for deprivations of federal rights under color of state law;⁶⁴¹ and section 1985(3), which prohibits conspiracies to deny equal protection of the laws.⁶⁴²

An entire treatise could be devoted to these laws, and particularly to section 1983,⁶⁴³ which has developed as the principal vehicle for general civil rights claims under federal law. The procedures for enforcing these statutes differ significantly from those under Title VII, tending to be much simpler, but the substantive law and remedies are largely the same. The following discussion emphasizes the differences between these statutes and Title VII.

Section 1981

The principal Reconstruction statute that provides a remedy for employment discrimination is section 1981, which prohibits all forms of racial discrimination, whether public or private, in making contracts. The exact scope of section 1981 has been a matter of controversy, only

640. 42 U.S.C. § 1981 (2000).

641. *Id.* § 1983 (2000).

642. *Id.* § 1985(3).

643. See generally Karen M. Blum & Kathryn R. Urbonya, Section 1983 Litigation (Federal Judicial Center 1998).

recently resolved by the Civil Rights Act of 1991. For many years, section 1981 was thought to prohibit only state action in denying the right to contract, until the Supreme Court reached a contrary conclusion in interpreting a companion statute, section 1982, which prohibits discrimination with respect to property rights. The Court interpreted section 1982 to reach private discrimination in real estate transactions,⁶⁴⁴ and this precedent was soon extended to section 1981. In *Johnson v. Railway Express Agency*,⁶⁴⁵ the Supreme Court broadly interpreted section 1981 to provide a remedy for employment discrimination that is procedurally independent of Title VII. The Court later expanded section 1981 still further, to reach discrimination on the basis of national origin, in addition to discrimination on the basis of race.⁶⁴⁶

Despite these expansive decisions, the Court has limited section 1981 to claims of disparate treatment, excluding claims of disparate impact,⁶⁴⁷ and other federal courts have generally held that section 1981 imposes no greater burden on employers than does Title VII.⁶⁴⁸ The lower federal courts are divided on whether it covers discrimination against aliens.⁶⁴⁹

Another restrictive decision by the Supreme Court, in *Patterson v. McLean Credit Union*,⁶⁵⁰ eventually led Congress to amend section 1981 in the Civil Rights Act of 1991. Relying on the literal terms of

644. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437–39 (1968).

645. 421 U.S. 454 (1975).

646. *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604 (1987).

647. *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982).

648. E.g., *Johnson v. Ryder Truck Lines*, 575 F.2d 471 (4th Cir. 1978), *cert. denied*, 440 U.S. 979 (1979) (seniority system permitted by Title VII not prohibited by section 1981).

649. *Compare Bhandari v. First Nat'l Bank of Commerce*, 887 F.2d 609 (5th Cir. 1989), *cert. denied*, 494 U.S. 1061 (1990) (alienage discrimination not covered independently of racial discrimination), *with Anderson v. Conboy*, 156 F.3d 167, 175 (2d Cir. 1998) (alienage discrimination covered independently). The Supreme Court granted certiorari to resolve this question but did not reach it. *Duane v. GEICO*, 37 F.3d 1036 (4th Cir. 1994) (private discrimination against aliens covered), *cert. voluntarily dismissed*, 515 U.S. 1101 (1995). Early decisions of the Supreme Court, before section 1981 was extended to cover private discrimination, applied it to government discrimination against aliens. *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948).

650. 491 U.S. 164 (1989).

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section 1981 as it then read, the Court in *Patterson* held that section 1981 covered only discrimination in the formation of contracts, not in their performance, as in the claim of racial harassment in *Patterson* itself.⁶⁵¹ This decision is probably better explained as expressing long-standing doubts about the extension of section 1981 to private discrimination.⁶⁵² In any event, Congress put all these doubts to rest by adding a provision explicitly extending section 1981 to private discrimination⁶⁵³ and another provision overruling *Patterson* and extending section 1981 to all aspects of the contractual relationship.⁶⁵⁴ After some initial decisions holding that section 1981 did not apply to contracts of employment-at-will, the courts of appeals have now uniformly applied the statute to all contracts of employment.⁶⁵⁵

Although Congress clearly meant to overrule *Patterson* in the Civil Rights Act of 1991, it is less clear that it meant to affect another Supreme Court decision, *Jett v. Dallas Independent School District*,⁶⁵⁶ which held that claims under section 1981 against state officials must be brought under section 1983. The Court in *Jett* reasoned that section 1981 only created a right, whereas section 1983 explicitly provided a remedy for actions of state officials, and so the latter governed the method of enforcing the right.⁶⁵⁷ The new provisions in section 1981 do nothing to disturb this reasoning, although the general expansion of section 1981 might be thought to override the limitations under section 1983, particularly various immunities.⁶⁵⁸ The circuits are divided on this question, as they are on others about the effect of the Civil Rights Act of 1991.⁶⁵⁹

651. *Id.* at 175–78.

652. See Gerhard Casper, *Jones v. Mayer: Clio, Bemused and Confused Muse*, 1968 Sup. Ct. Rev. 89.

653. 42 U.S.C. § 1981(c) (2000).

654. *Id.* § 1981(b). Because these provisions are substantive, they do not apply to cases that arose before the Civil Rights Act of 1991 took effect on November 21, 1991. *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312–13 (1994).

655. *Skinner v. Maritz, Inc.*, 253 F.3d 337, 342 (8th Cir. 2001) (citing cases).

656. 491 U.S. 701 (1989).

657. *Id.* at 731–36.

658. See *infra* text accompanying notes 678–81.

659. Compare *Federation of African Am. Contractors v. City of Oakland*, 96 F.3d 1204, 1209, 1214 (9th Cir. 1996) (section 1981(c) allows claims directly against state actors under doctrine of respondeat superior), with *Butts v. Volusia County*, 222 F.3d 891, 894 (11th Cir. 2000) (no such direct action against state actor allowed).

Unlike Title VII, section 1981 does not require exhaustion of administrative remedies,⁶⁶⁰ but like the newly amended Title VII, it provides damages as a remedy⁶⁶¹ and gives rise to a right to jury trial under the Seventh Amendment.⁶⁶² Some, but not all, claims under section 1981 are governed by the general federal statute of limitations for all claims arising under federal statutes enacted after 1990. This statute of limitations requires all such claims to be brought within four years, unless “otherwise provided by law.”⁶⁶³ In *Jones v. R.R. Donnelley & Sons Co.*,⁶⁶⁴ the Supreme Court applied this general statute of limitations to claims under section 1981 that were “made possible” by the Civil Rights Act of 1991. This case involved claims for a hostile work environment, wrongful termination, and failure to transfer. Other claims under section 1981, however, predated the Civil Rights Act of 1991 and, apparently, continue to be governed by the previously applicable statute of limitations. These claims mainly involve discrimination in hiring⁶⁶⁵ and are governed by the statute of limitations for tort claims for personal injuries, adopted from the state in which the district court sits.⁶⁶⁶ Regardless of which statute of limitations applies—the state statute or the general federal statute—it applies to a claim under section 1981 independently of any administrative proceedings commenced by the plaintiff under Title VII.⁶⁶⁷ The limitation period begins to run on claims under section 1981 at the same time as the limitation period on any claims under Title VII,⁶⁶⁸

660. See *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460–61 (1975).

661. *Id.* at 460.

662. E.g., *Setser v. Novack Inv. Co.*, 638 F.2d 1137, 1139–40 (8th Cir.), *modified on other grounds*, 657 F.2d 962 (8th Cir.) (en banc), *cert. denied*, 454 U.S. 1064 (1981); *Moore v. Sun Oil Co.*, 636 F.2d 154, 156 (6th Cir. 1980); *cf.* *Curtis v. Loether*, 415 U.S. 189, 195–96 (1974) (action for damages under Fair Housing Act gives rise to Seventh Amendment right to jury trial in federal court).

663. 28 U.S.C. § 1658 (2000).

664. 124 S. Ct. 1836 (2004).

665. See *supra* text accompanying notes 650–51.

666. *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987) (rejecting longer limitation period for contract claims under state law); *Burnett v. Grattan*, 468 U.S. 42 (1984) (rejecting shorter limitation period for filing administrative complaints under state law).

667. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462–65 (1975).

668. *Chardon v. Fernandez*, 454 U.S. 6 (1981).

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but the time periods under each statute are different and are computed independently of one another.⁶⁶⁹

Section 1988 provides for the award of attorney's fees to prevailing parties on claims covered by any of the Reconstruction civil rights acts, under substantially the same terms as those under Title VII.⁶⁷⁰ Both Title VII claims and section 1981 claims, but not other claims, support an award of expert fees.⁶⁷¹

Section 1983

The modern law of section 1983 begins with *Monroe v. Pape*,⁶⁷² in which the Supreme Court interpreted the statute to provide a remedy for all deprivations of constitutional rights under color of state law, even if state law itself provided a remedy. This holding made section 1983 the vehicle for enforcing all constitutional rights against the state, including those based on the constitutional prohibitions against discrimination. Before the enactment of Title VII and its amendment to cover states and localities as employers, section 1983 already provided a remedy for employment discrimination by state and local officials. Moreover, with the subsequent recognition of a constitutional prohibition against sex discrimination, section 1983 covered all the same grounds of discrimination as Title VII: race, national origin, sex, and religion.

The content of these constitutional prohibitions differs significantly from Title VII. The constitutional prohibitions extend only to intentional discrimination, not to practices with disparate impact.⁶⁷³ Evidence of disparate impact may be used to prove intentional discrimination, as it may under Title VII, but an additional inference

669. A further refinement of these issues concerns the recovery of back pay and damages based on the theory of "continuing violations": violations that extend from an earlier period into the limitation period but could not, by themselves, be the subject of a timely claim. *See supra* text accompanying notes 458–70. Some circuits have refused to allow recovery for such violations under section 1981, even if back pay could be recovered under Title VII. *E.g.*, *Thomas v. Denny's, Inc.*, 111 F.3d 1506, 1513 (11th Cir.), *cert. denied*, 522 U.S. 1028 (1997).

670. 42 U.S.C. § 1988 (2000). *See supra* text accompanying notes 582–630.

671. 42 U.S.C. § 1988 (2000); § 706(k), 42 U.S.C. §§ 2000e-5(k), 1988(c) (2000).

672. 365 U.S. 167 (1961).

673. *Washington v. Davis*, 426 U.S. 229, 238–39 (1976).

about the intent of government officials must be drawn to reach this conclusion. Disparate impact alone does not constitute a violation of the Constitution. The constitutional prohibitions against sex discrimination also differ from those under Title VII. While Title VII prohibits any classification on the basis of sex, subject only to a narrow exception for bona fide occupational qualifications,⁶⁷⁴ the Constitution takes a more flexible approach, prohibiting classifications on the basis of sex unless they have an “exceedingly persuasive justification.”⁶⁷⁵ The nuances of the statutory and constitutional prohibitions against discrimination on other grounds, such as religion, might also yield different results in particular cases.

In the opposite direction, the Constitution is also broader in some respects than Title VII. Through the Fourteenth Amendment it prohibits discrimination by the states on the basis of alienage, except in positions bound up with the operation of the states as government entities, such as police officers or teachers.⁶⁷⁶ The Fifth Amendment imposes no corresponding prohibition upon the federal government, at least as to exclusion of aliens from federal employment by act of Congress or order of the President.⁶⁷⁷

In addition to satisfying the substantive requirements of the constitutional prohibitions against discrimination, plaintiffs under section 1983 must overcome several further obstacles in order to obtain relief, particularly in the form of damages. If the defendant is a unit of government, it must not be considered part of the state immune from monetary relief under the Eleventh Amendment,⁶⁷⁸ and the alleged discrimination must have resulted from the execution of official policy or custom.⁶⁷⁹ An individual state or local officer can be sued in an official capacity only for the award of attorney’s fees. The officer must be

674. *United Auto. Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 200–01 (1991).

675. *United States v. Virginia*, 518 U.S. 515, 531 (1996).

676. *Ambach v. Norwick*, 441 U.S. 68 (1979); *Folie v. Connelie*, 435 U.S. 291 (1978). By contrast, it prohibits discrimination in essentially clerical positions, such as notary public. *Bernal v. Fainter*, 467 U.S. 216 (1984).

677. *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976); *Mathews v. Diaz*, 426 U.S. 67 (1976).

678. *Quern v. Jordan*, 440 U.S. 332, 338 (1979).

679. *City of St. Louis v. Prapotnik*, 485 U.S. 112, 128 (1988); *Owens v. City of Independence*, 445 U.S. 622, 657 (1980).

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sued in a personal capacity for the remaining forms of relief, both damages and injunctive or declaratory relief.⁶⁸⁰ To obtain relief against the officer in a personal capacity, the plaintiff must also overcome a defense of official immunity, either absolute or qualified.⁶⁸¹

The statute of limitations for section 1983 is borrowed from state law. In *Wilson v. Garcia*,⁶⁸² the Supreme Court held that all claims under section 1983 should be subject to the state statute of limitations for claims for personal injury. The Court recognized the wide range of claims that may be brought under section 1983, but reasoned that uniform and definite limitation in each state was preferable to varying and uncertain limitations for different claims.⁶⁸³ With the exceptions noted earlier, attorney's fees can be recovered in section 1983 actions in the same circumstances as under Title VII.⁶⁸⁴

Section 1985(3)

Section 1985(3) prohibits employment discrimination in a narrow range of cases in which persons have conspired to deny equal protection or equal privileges and immunities under the law and have caused an injury to any person or property or a deprivation of any federal right or privilege.⁶⁸⁵ Like the other Reconstruction civil rights statutes, section 1985(3) suffered a century of neglect before it was revived by the Supreme Court. In *Griffin v. Breckenridge*,⁶⁸⁶ the Court interpreted section 1985(3) to reach purely private conspiracies involving "class-based, invidiously discriminatory animus." This last phrase closely follows the constitutional prohibition against government reliance upon "suspect classifications," and the scope of this statute has accordingly been limited to discrimination against groups defined in those terms. Thus, nonunion workers are not among the groups protected by the statute.⁶⁸⁷

A further limitation on section 1985(3) also follows from the element of "class-based, invidiously discriminatory animus" required to

680. See, e.g., *Hafer v. Melo*, 502 U.S. 21 (1991).

681. See, e.g., *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

682. 471 U.S. 261 (1985).

683. *Id.* at 271–75.

684. See *supra* text accompanying notes 582–630.

685. 42 U.S.C. § 1985(3) (2000).

686. 403 U.S. 88, 102 (1971).

687. *United Bhd. of Carpenters, Local 610 v. Scott*, 463 U.S. 825, 835 (1983).

establish a violation of the statute. The statute covers deprivation of rights that overlap with those granted by Title VII, but the rights themselves must be derived from other sources of law, such as the Constitution. Section 1985(3) cannot be used to enforce rights granted solely by Title VII, which must be enforced according to the remedial scheme in Title VII itself. Thus, in *Great American Federal Savings & Loan Association v. Novotny*,⁶⁸⁸ the Supreme Court held that section 1985(3) did not provide a remedy for violations of Title VII that could be redressed under that statute.

Section 1985(3) provides for the same remedies and is enforced according to the same procedures as section 1983.

Equal Pay Act

The Equal Pay Act contains provisions that are distinctive both as a matter of substantive law and as a matter of procedure. Substantively, the Act requires employers to give equal pay to men and women “for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.”⁶⁸⁹ Much of the substantive law under the Equal Pay Act, like that under Title VII, is devoted to allocating the burden of proof. The plaintiff has the burden of proving that the work performed by members of both sexes is “substantially equal” according to the four factors listed in the statute: equal skill, effort, and responsibility, and similar working conditions.⁶⁹⁰ If the plaintiff carries the burdens of production and persuasion on these issues, then both burdens shift to the defendant to prove that one of the four exceptions justifies the difference in pay.⁶⁹¹

A leading case, *Corning Glass Works v. Brennan*,⁶⁹² illustrates how the burden of proof operates under the Equal Pay Act. That case con-

688. 442 U.S. 366 (1979).

689. 29 U.S.C. § 206(d)(1) (2000).

690. *Schultz v. Wheaton Glass Co.*, 421 F.2d 259, 265 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970).

691. *Corning Glass Works v. Brennan*, 417 U.S. 188, 196–97, 204–05 (1974).

692. *Id.* at 197–205.

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cerned a claim of unequal pay asserted by women who worked in the same position as men, as product inspectors, but during the day shift instead of the night shift. The men were paid more ostensibly because they worked at night, but the record also indicated that the original difference in pay, established in the 1920s, was based partly on the fact that only women worked during the day and only men worked at night. The Supreme Court held that time of work was not a matter of “similar working conditions,” because Congress intended to define such conditions according to technical standards, which included only the surroundings and hazards of employment. Since these standards excluded time of work, the plaintiff could establish that women performed the same work as men even though they worked on different shifts. The burden of proving that the difference in shifts justified the difference in pay was then placed on the defendant, who had to prove that the difference in pay fell within the catchall exception for “any other factor other than sex.” Because of the evidence that the shift differential was related to sex, the defendant lost on this issue and was held to have violated the Act. Moreover, the employer’s violation stood even though women had long since been admitted to the night shift. Another substantive provision of the Act requires employers to cure any difference in pay by raising the pay of the lower paid sex, which is almost invariably women.⁶⁹³ Because the employer had never raised the pay of female inspectors on the day shift to eliminate the original differential with the pay of male inspectors on the night shift, the employer remained in violation of the statute.

The narrowness of the Equal Pay Act is evident in several of its provisions. As a preliminary matter, its requirement of equal pay applies only “within any establishment,” so that differences in pay among employees in different locations operated by the same employer are not covered by the Act at all.⁶⁹⁴ The requirement of equal pay itself, as already noted, applies only if the prerequisite of equal work is met. Thus, outright discrimination against women in setting rates of pay does not violate the Act if the women perform different work from men—for instance, if women perform secretarial work and men perform janitorial work. This conclusion holds even if women are paid less than men for doing work that is more valuable. The plaintiff,

693. 29 U.S.C. § 206(d)(1) (2000).

694. *Id.*

however, need not prove that women perform exactly the same work as men, only work that is “substantially equal” to the work of men.⁶⁹⁵ The Equal Pay Act does not go any further in authorizing courts to evaluate the worth of different jobs or to reexamine employers’ decisions about different levels of pay. In enacting the requirement of equal pay for equal work, Congress explicitly considered and rejected a broader requirement of equal pay for “comparable work.” As noted in the discussion of Title VII, that statute refers to the Equal Pay Act and incorporates its defenses (i) through (iv) for claims of sex discrimination in pay, but it does not incorporate the requirement of proof of substantially equal work.⁶⁹⁶ Plaintiffs under Title VII can recover even if they work in substantially different jobs from those held by members of the opposite sex.

The Equal Pay Act also differs from Title VII in its procedures for enforcement. The Equal Pay Act is codified as a component of the federal minimum wage law, the Fair Labor Standards Act (FLSA), and is enforced according to its procedures and only against employers covered by the FLSA. The Equal Pay Act, however, does extend to some employees exempt from coverage of the FLSA.⁶⁹⁷ The FLSA authorizes criminal actions for “willful” violations and civil actions, both public and private, against employers.⁶⁹⁸ Although the Equal Pay Act prohibits unions from causing employers to violate the statute, it provides no civil remedies against unions.⁶⁹⁹

The statute originally authorized the Secretary of Labor to bring public actions, but an executive reorganization plan transferred the authority to bring public actions to the EEOC.⁷⁰⁰ Public actions come in two forms. Under section 16(c),⁷⁰¹ the EEOC can sue for back pay

695. *Schultz*, 421 F.2d at 265.

696. *See supra* text accompanying notes 329–33.

697. 29 U.S.C. §§ 203, 213, 216–217 (2000). The application of the FLSA to commercial enterprises operated by a religious organization does not violate the religion clauses of the First Amendment. *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 303–06 (1985).

698. 29 U.S.C. § 216(a) (2000).

699. *Id.* §§ 216–217. *But see* *Hodgson v. Sagner, Inc.*, 326 F. Supp. 371 (D. Md. 1971) (remedy awarded against union).

700. 29 U.S.C. §§ 216 (2000); Reorganization Plan No. 1 of 1978, § 1, *reprinted in* 5 U.S.C. app. at 206 (2000), *and in* 92 Stat. 3781 (1978).

701. 29 U.S.C. § 216(c) (2000).

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and an equal amount in liquidated damages to be awarded in the discretion of the district court. Under section 17,⁷⁰² the EEOC can sue for injunctive relief, including an order for back pay, but not liquidated damages.⁷⁰³ The difference between actions under the two sections is largely a result of parallel judicial interpretations and statutory amendments that have not yet been integrated in a complete revision of the enforcement provisions of the FLSA.

Private individuals can sue under section 216(b), but only if they have not previously accepted relief in a public action and if a public action has not yet been filed on their behalf.⁷⁰⁴ Private individuals are entitled to back pay and, in the discretion of the district court, an equal amount in liquidated damages.⁷⁰⁵ They are also entitled to an award of attorney's fees.⁷⁰⁶ Employees can be brought into a private action under the FLSA only by their written consent, a requirement that has been interpreted to allow only opt-in class actions.⁷⁰⁷

Exhaustion of administrative remedies is not required under the FLSA. The FLSA provides a limitation of two years for an ordinary violation and three years for a "willful violation," where a "willful violation" is defined as an action taken in knowing or reckless disregard of the fact that it is in violation of the law.⁷⁰⁸ Unreasonable conduct alone is not enough to support a longer limitation period.⁷⁰⁹ The FLSA also provides for a complete defense of reliance on written policy⁷¹⁰ and a partial defense of good faith, or reasonable belief in compliance with the Act, which may reduce liquidated damages in the discretion of the district court.⁷¹¹ Despite these provisions for liquidated damages, the most distinctive feature of the Equal Pay Act is the nar-

702. *Id.* § 217.

703. *E.g.*, *Brennan v. Board of Educ.*, 374 F. Supp. 817 (D.N.J. 1974).

704. 29 U.S.C. § 216(b)–(c) (2000).

705. *Id.* §§ 216(b), 260.

706. *Id.* § 216(b).

707. *Id.* See *Hoffman-LaRoche Inc. v. Sperling*, 493 U.S. 165, 169 (1989) (federal district court has discretion to facilitate notice to class members in ADEA action); *LaChappelle v. Owens-Illinois, Inc.*, 513 F.2d 286 (5th Cir. 1975) (opt-in class action allowed on ADEA claim under same provision).

708. *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 131–35 (1988).

709. *Id.* at 135 n.13.

710. 29 U.S.C. § 259 (2000).

711. *Id.* § 260.

rowness of its prohibition: only for sex discrimination, only in pay, and only in jobs that are substantially equal.

Age Discrimination in Employment Act

Prohibitions and Exceptions

The Age Discrimination in Employment Act (ADEA) prohibits discrimination on the basis of age against anyone who is at least 40 years old.⁷¹² The ADEA was enacted following the Civil Rights Act of 1964, on the basis of a report commissioned by Congress on employment discrimination against older workers. It differs from Title VII, however, in extending the prohibition against discrimination to grounds not generally recognized in the Constitution. Unlike race or sex, age can serve as the basis for government classifications whenever it rationally serves a legitimate government interest.⁷¹³ Consistently with this lenient standard of judicial review, the ADEA does not cover individuals under the age of 40 at all, and even among covered individuals, the ADEA only protects them from discrimination on the ground that they are too old, not that they are too young.⁷¹⁴

As originally enacted, the ADEA contained an upper limit on the age of those covered, but it has been amended several times, first raising this limit and then abandoning it entirely.⁷¹⁵ The Act applies to all private employers with at least twenty employees, to state and local government, and to most of the federal government,⁷¹⁶ but not to elected officials or certain of their appointees.⁷¹⁷

The provisions of the ADEA, both substantive and procedural, reflect a combination of Title VII and the Equal Pay Act. For instance, like the Equal Pay Act, the ADEA requires discrimination in wages to be eliminated only by raising wages.⁷¹⁸ The ADEA also resembles Title

712. *Id.* § 631.

713. *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 312–14 (1976).

714. *General Dynamics Land Sys., Inc. v. Cline*, 124 S. Ct. 1236, 1248–49 (2004).

715. 29 U.S.C. § 631(a) (2000).

716. *Id.* §§ 630(b), 633a. The application of the ADEA to the states has been held constitutional over a claim that it violated state sovereignty under the Tenth Amendment. *EEOC v. Wyoming*, 460 U.S. 226 (1983). The ADEA also applies to unions and employment agencies. 29 U.S.C. § 630(c), (d), (e) (2000).

717. 29 U.S.C. § 630(f) (2000).

718. *Id.* § 623(a)(3).

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VII in the method of proving individual claims of disparate treatment, in particular, by using the structure of burdens of production set forth in *McDonnell Douglas Corp. v. Green*.⁷¹⁹ The ADEA is complicated, however, by defenses for employment decisions “based on reasonable factors other than age” and for discipline or discharge “for good cause.”⁷²⁰ If these were genuine affirmative defenses, they would shift the burden of proof onto the defendant,⁷²¹ but it is more likely, following the model of Title VII, that they do so only if the plaintiff has already proved that age was a factor in the employment decision.⁷²² Exactly how this question should be resolved depends also on how amendments to Title VII, but not to the ADEA, by the Civil Rights Act of 1991 affect the relationship between these two statutes.⁷²³ In particular, pretext and mixed-motive cases might be treated slightly differently under the ADEA than under Title VII because of these provisions.⁷²⁴

Class-wide claims can also be proved by statistical evidence under the ADEA, as they can under Title VII, but the theory of disparate impact is less firmly established under the ADEA. The theory of disparate impact has been used when the disparity is large or when there is evidence of intentional discrimination.⁷²⁵ In the absence of such evidence, the use of the theory of disparate impact has been questioned,

719. 411 U.S. 792 (1973). See *supra* text accompanying notes 32–71.

720. 29 U.S.C. § 623(f)(1), (3) (2000).

721. See *Criswell v. Western Air Lines, Inc.*, 709 F.2d 544, 552–53 (9th Cir. 1983), *aff'd on other grounds*, 472 U.S. 400 (1985); 29 C.F.R. § 1625.7 (1993). See also *supra* text accompanying notes 72–83.

722. See *Marshall v. Westinghouse Elec. Corp.*, 576 F.2d 588, 590–92 (5th Cir. 1978). See also *supra* text accompanying notes 72–83. The Supreme Court has reserved decision on this question. *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 408 n.10 (1985).

723. The amendments added sections 703(m) and 706(g)(2)(B), 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B) (2000), to Title VII.

724. See *Miller v. CIGNA Corp.*, 47 F.3d 586, 592–98 & n.10 (3d Cir. 1995) (en banc) (applying general Title VII analysis to ADEA, but not amendments only to Title VII in the Civil Rights Act of 1991).

725. *Monroe v. United Air Lines, Inc.*, 736 F.2d 394, 404 (7th Cir. 1984); *Dace v. ACF Indus., Inc.*, 722 F.2d 374, 378 (8th Cir. 1983); *Criswell*, 709 F.2d at 552; *Geller v. Markham*, 635 F.2d 1027, 1032–35 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981).

most recently by the Supreme Court in *Hazen Paper Co. v. Biggins*.⁷²⁶ This question again is further complicated by amendments made to Title VII, but not to the ADEA, by the Civil Rights Act of 1991. In particular, Congress codified the theory of disparate impact only under Title VII.⁷²⁷ This disparity in the two statutes has led to a conflict among the circuits on the application of the theory of disparate impact to claims under the ADEA,⁷²⁸ and a case is now pending in the Supreme Court to resolve this issue.⁷²⁹

Hazen Paper did resolve one question: whether a finding of intentional discrimination can be based solely on the employer's reliance on a factor correlated with age, in that case, the imminent vesting of pension rights. Although a discharge for this reason violates the Employee Retirement Income Security Act (ERISA),⁷³⁰ it supports a finding of age discrimination only with additional evidence that age was a factor in the employer's decision.⁷³¹ For similar reasons, some lower courts have held that the higher salary of older workers who have been discharged or laid off does not support an inference of age discrimination.⁷³²

Like both Title VII and the Equal Pay Act, the ADEA contains defenses for bona fide seniority systems⁷³³ and for reliance on administrative interpretations.⁷³⁴ Also like Title VII, the ADEA generally exempts from coverage the operation of foreign corporations in foreign

726. 507 U.S. 604, 609–10 (1993).

727. Section 703(k), 42 U.S.C. § 2000e-2(k) (2000). See generally Howard Eglit, *The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991: Three Acts and a Dog That Didn't Bark*, 39 Wayne L. Rev. 1093, 1127–50 (1993).

728. See *Adams v. Florida Power Corp.*, 255 F.3d 1322, 1324–25 (11th Cir. 2001) (finding no claim of disparate impact under the ADEA and citing conflicting decisions from other circuits).

729. *Smith v. City of Jackson*, 351 F.3d 183 (2003), cert. granted, 124 S. Ct. 1724 (2004).

730. 29 U.S.C. §§ 1001–1461 (2000), and scattered sections of 5, 18, and 26 U.S.C. (2000).

731. *Hazen Paper*, 507 U.S. at 608–14.

732. *Cramer v. McDonnell Douglas Corp.*, 120 F.3d 874, 876 n.5 (8th Cir. 1997); *Amburgey v. Corhart*, 936 F.2d 805, 813 (5th Cir. 1991). For an account of the arguments on both sides of this issue, see the opinions in *Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1203–22 (7th Cir. 1987).

733. 29 U.S.C. § 623(f)(2) (2000).

734. *Id.* §§ 626(e)(1), 259.

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countries, unless they are controlled by an American employer.⁷³⁵ The ADEA also contains some unique exceptions: for certain executives over the age of 65,⁷³⁶ and for administratively created exceptions, which have been limited to programs of public employment for “the long-term unemployed, handicapped, members of minority groups, older workers, or youth.”⁷³⁷ Three different occupational groups—firefighters, law enforcement officers, and tenured professors at colleges and universities—have been subject to changing statutory provisions. The original exceptions for these occupations allowed employers to impose maximum ages of employment, or what is virtually the same thing—ages of mandatory retirement.⁷³⁸ These exceptions expired at the end of 1993, only to be reinstated later in different form. States and localities can now set a maximum age for employment of firefighters and law enforcement officers, as well as an age for mandatory retirement.⁷³⁹ Colleges and universities cannot impose mandatory retirement upon tenured professors, but they can increase the incentives for early retirement.⁷⁴⁰

Special provisions also apply to “any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter.”⁷⁴¹ Moreover, “no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement for any [covered individual] because of the age of such individual.”⁷⁴² This qualification was added after the provision had been interpreted to permit retirement plans that required the retirement of covered individuals.⁷⁴³ Congress rejected this interpretation by drastically narrowing the scope of the exception. When the Supreme Court continued to read the exception to allow any form of age discrimination within a pension plan (but not

735. *Id.* § 623(h).

736. *Id.* § 631(c).

737. 29 U.S.C. § 628 (2000); 29 C.F.R. § 1627.16 (2000).

738. Age Discrimination in Employment Act of 1986, Pub. L. No. 99-592, §§ 3, 6, 100 Stat. 3342 (1986).

739. 29 U.S.C. § 623(j) (2000).

740. *Id.* § 623(m).

741. 29 U.S.C. § 623(f)(2)(A) (2000).

742. *Id.*

743. *United Air Lines v. McMann*, 434 U.S. 192 (1977).

outside it), Congress again amended the statute to narrow the exception.⁷⁴⁴ The amendment allows classifications on the basis of age only if they are cost-justified according to specified EEOC regulations or if they are part of “a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.”⁷⁴⁵ Other, highly technical provisions apply to pension plans and to employee benefit plans generally.⁷⁴⁶ All of these provisions have the common purpose of protecting the benefits available to older workers while recognizing the needs of employers to provide an orderly transition to retirement.

Another provision, closely related in function to those regulating pension plans, concerns waiver of claims under the ADEA.⁷⁴⁷ All waivers must be for additional consideration, apart from benefits that the employee already receives, and must be subject to waiting periods during which the employee can consider the waiver and, in some instances, revoke it after entering into it.⁷⁴⁸ Further restrictions apply to waivers “in connection with an exit incentive or other employment termination program offered to a group of employees.”⁷⁴⁹ This last provision applies to early retirement plans, but waivers also figure in the settlement of ADEA claims, which frequently involve the payment of retirement benefits to increase the plaintiff’s total recovery. These, too, are subject to many of the same restrictions as other waivers.⁷⁵⁰ All these restrictions limit the ability of employers to take advantage of older workers by offering retirement on terms that seem beneficial to them, but that are, on balance, against their interests. The possibility of a bargain to the mutual benefit of employers and employees never-

744. 29 U.S.C. § 623(f)(2)(B).

745. *Id.*

746. *Id.* §§ 623(j)–(l). For a decision applying these provisions to medical benefits for retirees, see *Erie County Retirees Ass’n v. County of Erie*, 220 F.3d 193, 214–17 (3d Cir. 2000).

747. 29 U.S.C. § 626(f).

748. See *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 428 (1998) (allowing employees to revoke waiver without tendering back benefits received under it). The implementing regulations for this provision are found at 29 C.F.R. §§ 1625.22, .23 (2001).

749. 29 U.S.C. § 626(f)(1)(H) (2000).

750. *Id.* § 626(f)(2).

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theless remains open. The ADEA does not completely displace contracts as a mechanism for determining the rights of older workers.

The most general defense in the ADEA is for bona fide occupational qualifications (BFOQ) on the basis of age,⁷⁵¹ modeled on the same defense under Title VII.⁷⁵² In *Western Air Lines, Inc. v. Criswell*,⁷⁵³ the Supreme Court gave the two defenses the same interpretation: “[L]ike its Title VII counterpart, the BFOQ exception ‘was in fact meant to be an extremely narrow exception to the general prohibition’ of age discrimination contained in the ADEA.”⁷⁵⁴ The Court then endorsed the more specific test for the BFOQ exception based on safety considerations articulated in *Usery v. Tamiami Trail Tours, Inc.*⁷⁵⁵

[T]he job qualifications which the employer invokes to justify his discrimination must be *reasonably necessary* to the essence of his business—here, the *safe* transportation of bus passengers from one point to another. The greater the safety factor, measured by the likelihood of harm and the probable severity of that harm in case of an accident, the more stringent may be the job qualifications designed to insure safe driving.⁷⁵⁶

The Court then applied this standard to jury instructions concerned with mandatory retirement of flight engineers at age 60. It held that the instructions properly required the defendant to establish more than “a rational basis in fact” for believing that qualifications for the job cannot be determined on an individualized basis.⁷⁵⁷

In two other cases during the same term, the Court again emphasized the narrow scope of the BFOQ defense. In *Trans World Airlines, Inc. v. Thurston*,⁷⁵⁸ another case concerned with qualifications for airline crew members, the Court held that the BFOQ defense did not permit restrictions on transfers from a position for which there was a BFOQ to one for which there was no BFOQ. TWA had restricted transfers to the position of flight engineer by captains and first officers

751. *Id.* § 623(f)(1).

752. 42 U.S.C. § 2000e-2(e)(1) (2000). *See supra* text accompanying notes 293–312.

753. 472 U.S. 400 (1985).

754. *Id.* at 412 (quoting *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977)); *see* *United Auto Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 202 (1991).

755. 531 F.2d 224 (5th Cir. 1976).

756. *Criswell*, 472 U.S. at 413 (quoting *Usery*, 531 F.2d at 236).

757. *Criswell*, 472 U.S. at 417–23 (emphasis omitted from quoted phrase).

758. 469 U.S. 111 (1985).

who were age sixty or over and who could no longer serve in those positions under regulations of the Federal Aviation Administration (FAA). No similar regulations applied to the position of flight engineer. The parties did not dispute the BFOQ for captains and first officers based on the FAA regulations or the absence of a BFOQ for flight engineers.⁷⁵⁹ The Court held that the absence of a BFOQ for the position to which transfer was sought, that of flight engineer, was decisive. The BFOQ defense depends only on the nature of the job from which the employee transfers. However, in the reverse situation, in which an airline imposed age restrictions on flight engineers because they must be eligible to advance to the position of captain or first officer, a BFOQ has been upheld.⁷⁶⁰

In *Johnson v. Mayor of Baltimore*,⁷⁶¹ the Court rejected a broad interpretation of the BFOQ based on a federal statute requiring certain federal law enforcement officers and firefighters to retire at age fifty-five.⁷⁶² The Court found that the federal statute was enacted long before the ADEA for reasons entirely unrelated to the BFOQ defense. The Court also found that when the ADEA was extended to firefighters in 1978, the federal mandatory retirement statute was preserved only to enable the appropriate legislative committees to review its provisions. Although the ADEA is subject to several exceptions, as this decision illustrates, they tend to be narrowly construed to cover only the employment practices specifically identified by Congress.

Procedures and Remedies

Like the Equal Pay Act, the ADEA is generally enforced according to the procedures of the FLSA, although it requires exhaustion of administrative remedies and provides special procedures for federal employees. Both provisions are modeled to some extent on Title VII. The ADEA explicitly adopts the enforcement procedures of the FLSA for public and private actions,⁷⁶³ which were discussed earlier in connec-

759. *Id.* at 123 nn.17, 18.

760. *Johnson v. American Airlines, Inc.*, 745 F.2d 988 (5th Cir. 1984) (upholding jury verdict), *cert. denied*, 472 U.S. 1027 (1985).

761. 472 U.S. 353 (1985).

762. 5 U.S.C. § 8335(b) (2000).

763. 29 U.S.C. § 626(b) (2000).

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tion with the Equal Pay Act.⁷⁶⁴ Public enforcement of the ADEA, like public enforcement of the Equal Pay Act, was transferred to the EEOC.⁷⁶⁵ Actions by the EEOC need not be preceded by exhaustion of state administrative remedies or by filing a charge with the EEOC, but they must be preceded by an attempt at conciliation.⁷⁶⁶ The relationship between public actions and private actions remains the same as it is under the Equal Pay Act and the FLSA.⁷⁶⁷

Private actions must be preceded by the filing of a charge with the EEOC, followed by a 60-day waiting period to allow the EEOC to attempt conciliation.⁷⁶⁸ In states that do not have an agency that enforces a state law against employment discrimination on the basis of age, the charge must be filed with the EEOC within 180 days of the alleged discrimination.⁷⁶⁹ In states that do have an enforcement agency, the charge must be filed with the EEOC within 300 days of the alleged discrimination or 30 days of notice of termination of state proceedings, whichever is earlier.⁷⁷⁰ The ADEA explicitly grants parties the right to jury trial.⁷⁷¹ Any waiver of an individual's rights under the ADEA must meet strict statutory requirements to ensure that it is "knowing and voluntary."⁷⁷²

The limitations for filing actions under the ADEA originally were the same as those under the Equal Pay Act and the FLSA, but when the EEOC experienced delays in processing charges, many individual plaintiffs lost their claims under these limitations. Congress responded, first by extending the limitations for such delayed claims,⁷⁷³ and then by changing the limitations period so that it was the same as that under Title VII. Individuals must now file their actions in court

764. *See supra* text accompanying notes 700–07.

765. Reorganization Plan No. 1 of 1978, § 2, *reprinted in* 5 U.S.C. app. at 206 (2000), *and in* 92 Stat. 3781 (1978).

766. 29 U.S.C. § 626(b) (2000).

767. *Id.* §§ 626(b), 216(b)–(c). *See supra* text accompanying notes 700–01.

768. *Id.* § 626(d).

769. *Id.* § 626(d)(1).

770. *Id.* § 626(d)(2).

771. *Id.* § 626(c)(2).

772. *Id.* § 626(f).

773. Age Discrimination Claims Assistance Act of 1988, Pub. L. No. 100-283, 102 Stat. 78 (1988).

within 90 days of receiving a right-to-sue letter.⁷⁷⁴ The effect of this amendment is to relieve the EEOC of any explicit limitations for filing its actions, apparently applying the same doctrine of laches as applied to EEOC actions under Title VII.⁷⁷⁵

Remedies under the ADEA are the same as those under the Equal Pay Act and the FLSA, with two qualifications: that liquidated damages, in an amount equal to actual damages, are payable only for “willful violations” and that the court is authorized to grant “such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter.”⁷⁷⁶ In *Trans World Airlines, Inc. v. Thurston*,⁷⁷⁷ the Supreme Court considered the meaning of “willful violations” sufficient for the award of liquidated damages. The Court accepted the standard articulated by the court of appeals, but disagreed over its application. The standard was whether “the employer . . . knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.”⁷⁷⁸ The Court interpreted this standard to be substantially the same as the standard for determining willfulness under the provision for criminal penalties in the FLSA and the Equal Pay Act.⁷⁷⁹ On the record before it, the Court held that the employer had not acted willfully because it had sought the advice of counsel and had negotiated with the union to modify its collective bargaining agreement to conform to the Act. Subsequent cases have offered different interpretations of *Thurston*. The Third Circuit has required “some additional evidence of outrageous conduct,”⁷⁸⁰ but the Eleventh Circuit has dis-

774. 29 U.S.C. § 626(e) (2000). One court, however, has held that the statutory language does not preclude the plaintiff from filing under the FLSA limitation period if it extends beyond the 90-day period from receipt of a right-to-sue letter. *Simmons v. Al Smith Buick Co.*, 841 F. Supp. 168 (E.D.N.C. 1993). *Contra Crivella v. Urban Dev. Auth.*, 64 Fair Empl. Prac. Cas. (BNA) 1 (W.D. Pa. 1994).

775. *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 358–66, 372–73 (1977).

776. 29 U.S.C. § 626(b) (2000).

777. 469 U.S. 111 (1985).

778. *Id.* at 128–29 (quoting *Air Line Pilots Ass’n v. Trans World Airlines*, 713 F.2d 940, 956 (1983)).

779. 29 U.S.C. § 216(a) (2000); *Thurston*, 469 U.S. at 125–26.

780. *Dreyer v. Arco Chem. Co.*, 801 F.2d 651, 658 (3d Cir. 1986), *cert. denied*, 480 U.S. 906 (1987).

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agreed.⁷⁸¹ The Supreme Court itself has made clear that *Thurston* requires more than unreasonable action by the defendant.⁷⁸²

The ADEA creates special procedures for claims by federal employees that are similar to those under Title VII. The EEOC has succeeded the Civil Service Commission as the agency that adjudicates age discrimination complaints by federal employees.⁷⁸³ Federal employees can pursue their claims either through administrative proceedings (in which case they must follow the same procedures as those under Title VII⁷⁸⁴) or directly through judicial proceedings. If the latter, they must file an intent to sue with the EEOC within 180 days of the alleged discrimination and no less than 30 days before they file their action in court.⁷⁸⁵ The action in court must be commenced within an appropriate limitation period borrowed from either state or federal law.⁷⁸⁶ The Act authorizes actions in federal court for “such legal or equitable relief as will effectuate the purposes of this chapter.”⁷⁸⁷

The only exception to this broad remedial provision arises, not from the statute, but from constitutional decisions under the Eleventh and Fourteenth Amendments. In *Kimel v. Florida Board of Regents*,⁷⁸⁸ the Supreme Court held that the ADEA could not be enforced against the states or their instrumentalities through the award of damages. The Eleventh Amendment prohibits suits against the states in federal court, and the Fourteenth Amendment does not authorize Congress to abrogate this immunity for discrimination on the basis of age.⁷⁸⁹ The first of these holdings is unexceptional, but as applied to civil rights statutes such as Title VII, it is also insignificant. Congress exercised its

781. *Lindsey v. American Cast Iron Pipe Co.*, 810 F.2d 1094, 1099–1101 (11th Cir. 1987).

782. *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 135 & n.13 (1988). The same standard also governs determination of willfulness for the three-year limitation that applies to claims under the Equal Pay Act. *Id.* at 131.

783. 29 U.S.C. § 633a(a) (2000); Reorganization Plan No. 1 of 1978, § 2, reprinted in 5 U.S.C. app. at 206, and in 92 Stat. 3781 (1978).

784. See *supra* text accompanying notes 508–23.

785. 29 U.S.C. § 633a(d) (2000).

786. *Stevens v. United States Dep’t of the Treasury*, 500 U.S. 1, 7 (1991).

787. 29 U.S.C. § 633a(c) (2000).

788. 528 U.S. 62 (2000).

789. *Id.* at 73–78.

powers under section 5 of the Fourteenth Amendment to apply Title VII to the states, and in doing so, acted to abrogate the immunity that the states otherwise possessed.⁷⁹⁰ It is the second holding in *Kimel* that is crucial: that Congress exceeded its powers to enforce the Fourteenth Amendment by prohibiting age discrimination by the states. This holding follows directly from the reduced scrutiny that classifications on the basis of age receive under the Constitution.⁷⁹¹

As the Court was careful to point out, however, a prior decision had held that Congress had properly exercised its powers under the Commerce Clause in applying the ADEA to the states.⁷⁹² Thus, the substantive provisions of the ADEA remain binding upon the states, although enforcement depends upon a range of subsidiary issues developed in the decisions under the Eleventh Amendment. First, not all components of state government are “arms of the state” that benefit from its immunity from suit. Cities and other units of local government are sufficiently independent of the state to be denied the immunity.⁷⁹³ Second, even if a subdivision of state government is entitled to immunity, its immunity can be waived, either generally by legislation or by a waiver confined to a particular lawsuit.⁷⁹⁴ Third, even if the state retains its immunity, individual officers may still be liable, depending upon the definition of covered defendants under the stat-

790. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). For this reason, the Eleventh Amendment has not restricted the remedies or substantive theories of liability under statutes prohibiting race or sex discrimination. *In re Employment Discrimination Litig. Against the State of Ala.*, 198 F.3d 1305, 1324 (11th Cir. 1999) (theory of disparate impact applies against states in race discrimination claim under Title VII); *Varner v. Ill. State Univ.*, 226 F.3d 927, 936 (7th Cir. 2000), *cert. denied*, 533 U.S. 902 (2001).

791. *Kimel*, 528 U.S. at 84.

792. *Id.* at 78. The prior decision was *EEOC v. Wyoming*, 460 U.S. 226 (1983).

793. *Evans v. City of Bishop*, 238 F.3d 586, 589–90 (5th Cir. 2001) (city not immune from suit); *Williams v. Dallas Area Rapid Transit*, 242 F.3d 315 (5th Cir. 2001) (regional transportation authority not immune from suit).

794. *Lapides v. Board of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613, 618–24 (2002) (waiver by state removing case to federal court); *Katz v. Regents of the Univ. of Cal.*, 229 F.3d 831, 834–35 (9th Cir. 2000) (waiver by failing to assert defense and by submitting waiver by counsel for defendants). In the absence of such a waiver, the state is also immune from suit in state court. *Alden v. Maine*, 527 U.S. 706, 748 (1999).

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ute.⁷⁹⁵ No such decision has been handed down under the ADEA, but it remains a possibility under the definition of an “employer” as “any agent” of an employer with twenty or more employees.⁷⁹⁶ The very fact that this issue arises under the ADEA, but not under Title VII, illustrates how far the ADEA extends the prohibition against discrimination beyond the grounds of race, national origin, sex, and religion, to which the constitutional prohibition applies.

Disabilities

Two statutes prohibit discrimination on the basis of disabilities: the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990 (ADA). The ADA expanded upon the coverage of the Rehabilitation Act, reaching all employers with at least fifteen employees,⁷⁹⁷ while the Rehabilitation Act applies only to the federal government, federally funded programs, and federal contractors.⁷⁹⁸ Both acts also apply to outside employment, but again, the ADA is broader because it covers all public services and public accommodations, including those operated by private entities.⁷⁹⁹ Much of the case law has developed under the Rehabilitation Act, and most of it applies, with appropriate modifications, to the ADA. The ADA itself codifies the principle that its protections for persons with disabilities are at least as strong as those under the Rehabilitation Act.⁸⁰⁰ Accordingly, this section begins with a discussion of the Rehabilitation Act because it provides the foundation for the ADA.

795. *Luder v. Endicott*, 86 F. Supp. 2d 854, 866 (W.D. Wis. 2000) (individuals liable under Fair Labor Standards Act, and court cited conflicting decisions on this issue).

796. 29 U.S.C. § 630(b) (2000).

797. Section 101(5), 42 U.S.C. § 12111(5) (2000).

798. Sections 501–504a, 29 U.S.C. §§ 791–794a (2000).

799. Sections 201–246, 301–319, 42 U.S.C. §§ 12131–12161, 12181–12189 (2000). Section 504 of the Rehabilitation Act applies, by its terms, to participation in any form—not just employment—in any program receiving federal financial assistance or conducted by a federal agency. Section 504(a), 29 U.S.C. § 794(a) (2000). The Act also provides various special services for the disabled, such as vocational rehabilitation and federal training programs. *Id.* §§ 100–104, 300–316, 29 U.S.C. §§ 720–724, 770–777(f) (2000).

800. ADA § 501(a), 42 U.S.C. § 12201(a) (2000).

Rehabilitation Act of 1973

The Rehabilitation Act has three different provisions that apply to employment: section 501 prohibits discrimination and requires affirmative action in favor of the disabled by federal agencies;⁸⁰¹ section 503 requires federal contractors to “take affirmative action to employ and advance in employment qualified handicapped individuals”,⁸⁰² and section 504 prohibits exclusion of, and discrimination against, otherwise qualified handicapped individuals in federally assisted programs by federal agencies and by the Postal Service.⁸⁰³ All three sections are subject to exceptions for various disabilities that Congress found to be morally wrong (such as the use of illegal drugs),⁸⁰⁴ and sections 503 and 504 (but not section 501) are subject to an exception for alcoholism and for infectious diseases that “constitute a direct threat to the health or safety of other individuals” or that prevent the infected individual from performing the duties of the job.⁸⁰⁵

Sections 501 and 503 both impose an obligation on employers to engage in affirmative action. This obligation has seldom directly given rise to litigation, however. Federal employees have a cause of action for any violation of section 501,⁸⁰⁶ as do victims of discrimination under section 504.⁸⁰⁷ However, the employees of federal contractors have no private cause of action, either explicitly granted by section 503 or implied by the lower federal courts.⁸⁰⁸ Litigation over affirmative action has arisen only indirectly, through claims of discrimination by federal employees brought under both section 501 and section 504.

801. Section 501, 29 U.S.C. § 791 (2000).

802. Section 503, 29 U.S.C. § 793 (2000).

803. Section 504, 29 U.S.C. § 794 (2000). Section 504 prohibits employment discrimination by recipients of federal funds, whether or not the purpose of such assistance is to provide employment. *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984).

804. 29 U.S.C. §§ 705(20)(C)(i), (D), (E), (F) (2000).

805. 29 U.S.C. § 705(20)(C)(i) (2000).

806. Section 505(a)(1), 29 U.S.C. § 794a(a)(1) (2000).

807. Section 505(a)(2), 29 U.S.C. § 794a(a)(2).

808. *See, e.g., D'Amato v. Wisconsin Gas Co.*, 760 F.2d 1474, 1478 (7th Cir. 1985); *see Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 630 n.9 (1984) (reserving this question); *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 580 & n.17 (1979) (same). Section 503 is enforced by the Department of Labor through the Office of Federal Contract Compliance Programs. 29 U.S.C. § 503(b) (2000).

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The lower federal courts have generally imposed heavier obligations upon federal employers than on private employers, especially to reasonably accommodate the disabled.⁸⁰⁹ Following regulations of the EEOC, the federal courts have required the federal government to be “a model employer” of the disabled.⁸¹⁰ The theory of disparate impact is available to prove violations of section 504.⁸¹¹

The Rehabilitation Act only protects an “individual with a disability,” which is defined as “any person who (i) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.”⁸¹² The ADA uses essentially the same language in defining a covered “disability” and for that reason, the decisions on this question are taken up later in this monograph in a separate section discussing decisions under both statutes.⁸¹³

Only after the plaintiff establishes the existence of a disability does the question whether the plaintiff is “otherwise qualified” for the job arise. Section 504 protects only “a qualified handicapped individual.”⁸¹⁴ It protects such individuals from discrimination, and by regulations, it also gives them the right to reasonable accommodation of their disabilities.⁸¹⁵ A fundamental problem under both the Rehabilitation Act and the ADA is determining where the plaintiff’s burden of proving qualifications leaves off and the defendant’s burden of proving reasonable accommodations begins. The regulations address this problem by assigning to the employer the burden of proving that a proposed accommodation would result in “an undue hardship on the operation of its program.”⁸¹⁶ The regulations leave to judicial decisions, however, the interrelated questions of who is a “qualified individual,” what is a “reasonable accommodation,” and what amounts to

809. Gardner v. Morris, 752 F.2d 1271, 1280 (8th Cir. 1985); Hall v. United States Postal Serv., 857 F.2d 1073, 1080 (6th Cir. 1988); Mantoletto v. Bolger, 767 F.2d 1416, 1423 (9th Cir. 1985).

810. 29 C.F.R. § 1614.203(d) (2000).

811. Alexander v. Choate, 469 U.S. 287 (1985).

812. Section 7(8)(B), 29 U.S.C. § 706(8)(B) (2000).

813. See *infra* text accompanying notes 863–78.

814. Section 504(a), 29 U.S.C. § 794(a) (2000).

815. 29 C.F.R. § 32.13(a), (c) (2000). For federal agencies, the regulation is 29 C.F.R. § 1613.203(c) (2000).

816. 29 C.F.R. § 32.13(a), (c) (2000).

an “undue hardship.” A discussion of these decisions, again raising issues common to the Rehabilitation Act and the ADA, is presented in a separate section on decisions under both statutes.

Several other issues concerned with the coverage and scope of the Rehabilitation Act have been resolved, either by the Supreme Court or by Congress. After decisions of the Supreme Court narrowly defined the scope of a federally assisted “program or activity,”⁸¹⁷ Congress added an amendment broadly defining these terms to include all parts of an organization if any one part received federal assistance.⁸¹⁸ In separate legislation, Congress also tried to supersede a Supreme Court decision preventing the recovery of damages against states and their instrumentalities.⁸¹⁹ These amendments, although they expressly impose liability upon the states, may themselves exceed the power of Congress to abrogate the immunity of the states under the Eleventh Amendment.⁸²⁰ At least as the statute now reads, remedies are available against recipients of federal funds on the same terms as they are under Title VI of the Civil Rights Act of 1964,⁸²¹ including the award of back pay⁸²² and attorney’s fees.⁸²³ Damages and the right to jury trial are available for intentional violations of section 501 on the same terms as they are for violations of Title VII.⁸²⁴ Punitive damages, however, are not available in private actions against public entities that receive federal funds.⁸²⁵ Neither are damages for failure to make a rea-

817. *United States Dep’t of Transp. v. Paralyzed Veterans*, 477 U.S. 597 (1986); *Grove City Coll. v. Bell*, 465 U.S. 555, 570–74 (1984).

818. Section 504(b), 29 U.S.C. § 794(b) (2000).

819. 42 U.S.C. § 2000d-7(a) (2000). The overruled decision is *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985).

820. Some cases, however, have found a waiver of the states’ immunity under the Eleventh Amendment through acceptance of federal funds. *Douglas v. California Dep’t of Youth Auth.*, 271 F.3d 812, 819–21 (9th Cir. 2001); *Jim C. v. United States*, 235 F.3d 1079, 1081 (8th Cir. 2000), *cert. denied sub nom. Arkansas Dep’t of Educ. v. Jim C.*, 533 U.S. 949 (2001).

821. Section 505(a)(2), 29 U.S.C. § 794a(a)(2) (2000). *See infra* text accompanying notes 933–37.

822. *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984). One circuit, however, has denied recovery of punitive damages under section 504. *Moreno v. Consolidated Rail Corp.*, 99 F.3d 782, 788–92 (6th Cir. 1996).

823. Section 505(a)(2), 29 U.S.C. § 794a(a)(2) (2000).

824. 42 U.S.C. § 1981a(a)(2) (2000).

825. *Barnes v. Gorman*, 536 U.S. 181, 189–90 (2002).

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sonable accommodation if the employer has made a good-faith effort to provide a reasonable accommodation in consultation with the disabled individual.⁸²⁶

Americans with Disabilities Act

Title I of the Americans with Disabilities Act (ADA) closely follows Title VII of the Civil Rights Act of 1964, expanding upon the Rehabilitation Act to cover almost all employers. Like Title VII, it covers employers with fifteen or more employees,⁸²⁷ including employees of state and local government, but not the federal government. The latter are covered entirely by the Rehabilitation Act.⁸²⁸ The ADA also contains the same provisions as Title VII for coverage in foreign countries, creating exceptions for compliance with the laws of other countries and for foreign corporations not controlled by a covered employer.⁸²⁹

The fundamental prohibition in the ADA is against discrimination on the basis of disability,⁸³⁰ in terms that follow the corresponding prohibition in Title VII.⁸³¹ This prohibition is augmented by a prohibition against retaliation, again modeled on the corresponding prohibition in Title VII.⁸³² The ADA elaborates on the provisions of Title VII in offering a definition of “discriminate,” or at least a series of activities included within the definition. The first of these activities includes various forms of prohibited segregation,⁸³³ in language again taken

826. 42 U.S.C. § 1981a(a)(3).

827. Section 101(5)(A), 42 U.S.C. § 12111(5)(A) (2000). In *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440 (2003), the Supreme Court held that physicians, who were also shareholders and directors of a professional corporation, should be counted as employees according to the common-law test of control over their actions by the firm.

828. An “employer” is defined as a “person,” which in turn is defined in the same way as it is under Title VII, to include state and local government. Section 101(5)(A), (7), 42 U.S.C. § 12111(5)(A), (7) (2000). The federal government is largely excluded from the definition of “employer,” leaving federal employees with their remedies under the Rehabilitation Act. Section 101(5)(B), 42 U.S.C. § 12111(7) (2000). Special procedures, however, apply to employees of Congress. Section 509, 42 U.S.C. § 12209 (2000).

829. Section 102(c), 42 U.S.C. § 12112(c) (2000).

830. Section 102(a), 42 U.S.C. § 12112(a) (2000).

831. Section 703(a)(1), 42 U.S.C. § 2000e-2(a) (2000).

832. Section 503, 42 U.S.C. § 12203 (2000).

833. Section 102(b)(1), 42 U.S.C. § 12112(b)(1) (2000).

from Title VII.⁸³⁴ Several others are concerned with evasion of the ADA by contracting for discrimination by others or perpetuating the effects of their discrimination.⁸³⁵ These follow case law that has developed in decisions under Title VII on the issue of agency⁸³⁶ or under the theory of disparate impact.⁸³⁷ The theory of disparate impact itself is codified in terms that were then partly incorporated into Title VII by the Civil Rights Act of 1991.⁸³⁸ Another subdivision codifies the obligation to reasonably accommodate disabilities,⁸³⁹ which was taken from regulations under the Rehabilitation Act that were themselves derived from the obligation to reasonably accommodate religious practices under Title VII.⁸⁴⁰ A unique prohibition imposes detailed restrictions on medical examinations and inquiries, prohibiting most such examinations and inquiries before an offer of employment, but allowing some before an applicant actually begins employment.⁸⁴¹

The ADA is also subject to a number of special exceptions and defenses. Several of the exceptions are modeled on, or even taken from, the exceptions to the Rehabilitation Act for conditions that Congress found unworthy of coverage. These exceptions concern activities or conditions like the illegal use of drugs and alcohol,⁸⁴² transvestitism and homosexuality,⁸⁴³ and compulsive gambling, kleptomania, and pyromania.⁸⁴⁴ Having a record of certain of these disabilities, such as drug addiction and alcoholism, can still result in coverage un-

834. Section 703(a)(2), 42 U.S.C. § 2000e-2(a)(2) (2000).

835. Section 102(b)(2), (3), 42 U.S.C. § 12112(b)(2), (3) (2000). The ADA also prohibits discrimination based on the disability of a related or associated individual. Section 702(b)(4), 42 U.S.C. § 12112(b)(4) (2000).

836. *Arizona Governing Comm. v. Norris*, 463 U.S. 1073, 1086 & n.16 (1983); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 63 (1986).

837. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 424 (1975).

838. Section 102(b)(6), (7), 42 U.S.C. § 12112(b)(6), (7) (2000). Similar provisions were enacted in section 703(k) of Title VII, 42 U.S.C. § 2000e-2(k) (2000).

839. Section 101(9), 42 U.S.C. § 12111(9) (2000).

840. *See supra* text accompanying notes 388–96.

841. Section 102(d), 42 U.S.C. § 12112(d) (2000).

842. Sections 104, 510, 511(b)(3), 42 U.S.C. §§ 12114, 12210, 12211(b)(3) (2000).

843. Sections 508, 511(a), 511(b)(1), 42 U.S.C. §§ 12208, 12211(a), 12211(b)(1) (2000).

844. Section 511(b)(2), 42 U.S.C. § 12211(b)(2) (2000).

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der the ADA.⁸⁴⁵ Other provisions are unique to the ADA: a general defense, apparently to claims for disparate treatment as well as disparate impact, that a job requirement is “job-related and consistent with business necessity” and that it cannot be modified by reasonable accommodation of the disabled;⁸⁴⁶ a more specific defense that must meet the same conditions but is limited to the requirement “that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace;”⁸⁴⁷ an exception for infectious and communicable diseases, but again subject to the duty of reasonable accommodation;⁸⁴⁸ and an exception for insurance plans, provided that they are not used as a subterfuge to avoid the purposes of the law.⁸⁴⁹

Of these provisions, only the “direct threat” defense has been considered by the Supreme Court. In *Chevron U.S.A. Inc. v. Echazabal*,⁸⁵⁰ the Court upheld an EEOC regulation that extended this defense from conditions that threaten “other individuals in the workplace” to conditions that threaten the employee himself or herself. The Court found no implication in the quoted phrase that Congress intended to prevent employers from protecting individuals outside the workplace or the employee himself or herself. The broader defense for practices that are “shown to be job-related and consistent with business necessity”—of which the “direct threat” defense is a part—easily encompasses such general safety concerns.⁸⁵¹ The Court accordingly deferred to the EEOC regulation as a reasonable interpretation of the statute by an administrative agency.⁸⁵² Procedures and remedies under the ADA simply follow those under Title VII.⁸⁵³ Damages and the right to jury

845. *Raytheon Co. v. Hernandez*, 124 S. Ct. 513, 520–21 (2003) (raising issue whether refusal to rehire based on discharge for past drug use violates the ADA).

846. Section 103(a), 42 U.S.C. § 12113(b) (2000).

847. Section 103(b), 42 U.S.C. § 12113(b) (2000). A particular job requirement may be defended either on the ground that it is a business necessity or that it protects against a direct threat from an excluded employee. *EEOC v. Exxon Corp.*, 203 F.3d 871, 873 (5th Cir. 2000).

848. Section 103(d), 42 U.S.C. § 12113(d) (2000).

849. Section 501(c), 42 U.S.C. § 12201(c) (2000).

850. 536 U.S. 73 (2002).

851. *Id.* at 78.

852. *Id.* at 87.

853. Section 107(a), 42 U.S.C. § 12117(a) (2000).

trial are available for intentional violations of Title I of the ADA on the same terms as they are for violations of Title VII.⁸⁵⁴ No damages are available, however, for failure to make a reasonable accommodation if the employer has made a good-faith effort to provide a reasonable accommodation in consultation with the disabled individual.⁸⁵⁵

Like the Rehabilitation Act, but even more pointedly, the ADA raises questions under the Eleventh Amendment about the application of its remedial provisions to the states. In fact, in *Board of Trustees of the University of Alabama v. Garrett*,⁸⁵⁶ the Supreme Court held that money damages could not be recovered against a state university under the ADA. The Court reasoned, as it had in the corresponding decision under the ADEA,⁸⁵⁷ that Congress's power to enforce the Fourteenth Amendment did not authorize it to abrogate the states' immunity under the Eleventh Amendment. That is because disability, like age, is not a category subject to heightened constitutional review and so does not justify the exercise of congressional power to expand upon the constitutional prohibitions against discrimination.⁸⁵⁸ Disability is unlike race or sex in this respect, and the ADA, unlike Title VII, can only be enforced against the states in conformity with the requirements of the Eleventh Amendment.

These requirements do not, however, bar all actions against state and local government. As explained in the section on the ADEA,⁸⁵⁹ the ADA may still be enforced against states and their subdivisions in certain circumstances. First, the ADA may be enforced against cities and other organs of local government, because these are not "arms of the state" protected by the Eleventh Amendment.⁸⁶⁰ Second, a state can waive its immunity to suit, either in a particular case or by a gen-

854. 42 U.S.C. § 1981a(a)(2) (2000).

855. *Id.* § 1981a(a)(3).

856. 531 U.S. 356 (2001).

857. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000).

858. *Garrett*, 531 U.S. at 365–68.

859. *See supra* text accompanying notes 788–95.

860. *Brinn v. Tidewater Transp. Dist. Comm'n*, 242 F.3d 227, 234 n.4 (4th Cir. 2001); *McKenzie v. Dovala*, 242 F.3d 967, 969 n.5 (10th Cir. 2001); *Gorman v. Easley*, 257 F.3d 738, 743 (8th Cir. 2001).

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eral legislation.⁸⁶¹ Third, individual state officers might be personally liable for injunctive relief or damages.⁸⁶²

Coverage of Disabilities

Both the Rehabilitation Act and the ADA define covered individuals in two basic ways: first, they must suffer from an impairment that is severe enough that it “substantially limits one or more of the major life activities”;⁸⁶³ but second, they must still be able “with or without reasonable accommodation” to “perform the essential functions of the employment position” that they seek.⁸⁶⁴ The first of these requirements is taken up in this section. The second, because it concerns the duty of reasonable accommodation, is taken up in the next section.

According to the terms of the statutes, the individual need not actually suffer from the impairment that is sufficient for coverage. It is enough if the individual has “a record of such an impairment” or is “regarded as having such an impairment.”⁸⁶⁵ But it is the nature of the impairment itself that has most frequently given rise to litigation. The decisions of the Supreme Court on this issue have been both expansive in some respects and restrictive in others.

In *School Board v. Arline*,⁸⁶⁶ the Supreme Court held that an individual could be disabled by a contagious disease, in that case, tuberculosis. The Court relied both on the breadth of the statutory definition under the Rehabilitation Act and on regulations that broadly define the terms “physical or mental impairment” and “major life activities” used in the definition.⁸⁶⁷ Because the plaintiff had been hospitalized for tuberculosis, she had a record of an impairment sufficient for coverage under the statute, even though she was hospitalized sev-

861. *See supra* note 794.

862. *Randolph v. Rodgers*, 253 F.3d 342, 347 (8th Cir. 2001) (claim for injunctive relief against state official under Title II of the ADA and the Rehabilitation Act); *Roe v. Ogden*, 253 F.3d 1225 (10th Cir. 2001) (claim for injunctive relief under Title II and 42 U.S.C. § 1983).

863. Rehabilitation Act § 7(8)(B), 29 U.S.C. § 706(8)(B) (2000); ADA § 3(2), 42 U.S.C. § 12102(2) (2000).

864. Section 101(8), 42 U.S.C. § 12111(8) (2000).

865. Rehabilitation Act § 7(8)(B), 29 U.S.C. § 706(8)(B) (2000); ADA § 3(2), 42 U.S.C. § 12102(2) (2000).

866. 480 U.S. 273 (1987).

867. *Id.* at 278.

eral decades before she was discharged from her position as a public school teacher. Moreover, she was not excluded from coverage because tuberculosis is contagious, since the contagiousness of the disease went only to the question, reserved by the Court, whether the plaintiff was “otherwise qualified” for her position as a school teacher.⁸⁶⁸ The initial question of coverage was different from the question whether she would ultimately prevail on her claim of discriminatory discharge.

Another infectious disease, but one that is more controversial, has also been held to be covered by the ADA. In *Bragdon v. Abbott*,⁸⁶⁹ the plaintiff was infected with HIV, the virus that causes AIDS. She had been refused treatment by a dentist and brought suit under Title III of the ADA, which prohibits discrimination in public accommodations. Title III protects individuals with “disabilities,” which are defined in the same terms throughout the ADA. The Supreme Court held that being infected by the virus, even without having AIDS, interfered with the major life activity of reproduction, since it created a substantial risk of infection of any child born to a woman with the virus. Presumably, the same reasoning would apply to men infected with the virus, since they would infect their partners, who would, in turn, infect any children born to them. Again, however, the contagiousness of the disease was not a reason to deny coverage, although it raised an issue of safety to be determined later in the litigation.

A more restrictive decision on covered disabilities is *Sutton v. United Air Lines, Inc.*,⁸⁷⁰ which required mitigating measures to be taken into account in assessing the degree of impairment caused by an individual’s disability. The plaintiffs in *Sutton* were twin sisters who sought positions as commercial airline pilots, but who were denied employment because they had particularly poor eyesight. On somewhat paradoxical grounds, the Supreme Court held that the denial of employment did not violate the ADA. The Court held that the plaintiffs were not disabled by their poor eyesight, even though the defendant found them to be disqualified for this reason. The Court reached this conclusion despite the fact that—indeed, precisely because—the plaintiffs could have corrected their vision with eyeglasses, seemingly

868. *Id.* at 287.

869. 524 U.S. 624 (1998).

870. 527 U.S. 471 (1999).

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removing the substance of the defendant's objection to their employment.

By analogy perhaps to the defense of contributory negligence in tort cases, the Court could have required the plaintiffs to take reasonable steps to mitigate the consequences of their disability. The Sutton sisters should not have been allowed to prevail by refusing to wear eyeglasses. But in tort law, precautions taken by the plaintiff defeat the defense of contributory negligence, allowing the plaintiff to recover for the defendant's negligence. Under *Sutton*, a plaintiff who has taken reasonable mitigating measures cannot recover any relief at all, because his or her condition falls outside the coverage of the ADA. In terms of the immediate incentives that it provides to plaintiffs, the decision in *Sutton* does not make any sense at all.

The decision does, however, make sense as a necessary limit on any scheme of remedial justice. The Suttons' disability was not covered by the ADA because it fell below the lower limit on impairments necessary to trigger the protection of the ADA. Just as a program of disability insurance cannot cover all impairments, no matter how minor or temporary, the ADA cannot cover all disabling conditions regardless of how little they detract from normal abilities. Otherwise, everyone could claim special advantages, and in the end, no one would receive them. At some point, disabilities become so minor that those who suffer from them no longer need the law's assistance. These individuals can be required to take care of themselves because they are in a better position to do so than anyone else. The coverage of the ADA is properly restricted to those who are in greater need, or in the terms used by the Act, to those with a condition that "substantially limits one or more of the major life activities."

Among the asserted "major life activities" in *Sutton* was working, a position supported by EEOC regulations and accepted by both parties for purposes of this case.⁸⁷¹ The Court itself did not decide that working was a major life activity, because it concluded that, even if it was, the Sutton sisters were not disqualified from a sufficiently broad range of occupations to be substantially limited in this activity.⁸⁷² For similar reasons, the Court also concluded that the sisters were not covered as

871. *Id.* at 492; 29 C.F.R. § 1630.2(j) (2000).

872. *Sutton*, 527 U.S. at 493.

persons “regarded as” disabled under the statute.⁸⁷³ The position from which they were actually disqualified—as a commercial airline pilot—implied that the employer did not regard them as disqualified from a wide range of jobs.

A later decision further explored this issue without, however, definitively resolving it. In *Toyota Manufacturing, Kentucky, Inc. v. Williams*,⁸⁷⁴ the Supreme Court held that a disability is covered under the ADA only if it prevents an individual from performing the tasks central to most people’s daily lives, not simply those associated with the individual’s present job. Such impairment must also be permanent or long-term.⁸⁷⁵ The plaintiff suffered from carpal tunnel syndrome and tendinitis, which prevented her from working at her job with vibrating tools and from reaching up and lifting. These impairments, however, did not prevent her from performing ordinary household activities, bathing, or brushing her teeth, and accordingly, her disability was not covered under the ADA. Although the Court did not address the question whether an impairment that prevented a person from performing a wide range of jobs would be sufficient for coverage, its reasoning implies that impairments whose effects are limited to employment, without effects on other aspects of everyday life, would not constitute a disability covered under the statute.

In two companion cases to *Sutton*, the Court again emphasized that the effects of a disability must be evaluated in its treated form. In one of the cases, the plaintiff suffered from a visual impairment—blindness in one eye—that could be treated by corrective glasses, like the impairment in *Sutton*.⁸⁷⁶ In the other, the plaintiff suffered from high blood pressure, which could be treated so that he could obtain employment in a wide range of other occupations.⁸⁷⁷ Both of these cases also resemble *Sutton* in implicating issues of safety in transportation. The plaintiffs in both cases sought jobs as truck drivers, and in one of the cases, government regulations provided an additional ground for the employer’s refusal to hire the plaintiff.⁸⁷⁸

873. *Id.* at 490.

874. 534 U.S. 184 (2002).

875. *Id.* at 198.

876. *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 565–66 (1999).

877. *Murphy v. UPS, Inc.*, 527 U.S. 516, 521 (1999).

878. *Albertson’s*, 527 U.S. at 570.

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Adding to the paradoxical nature of *Sutton* and its companion cases, concerns for safety seem to have a greater role in finding disabilities to be too minor to be covered by the ADA. If the disabilities are sufficiently severe, the plaintiff has passed the initial hurdle for obtaining coverage, leaving the issues of safety to be determined at a later stage in the litigation, as in *Arline* and *Bragdon*. Otherwise, if it is too minor, and seemingly poses a smaller risk to others, the disability is not covered by the statute at all.

Reasonable Accommodation

The duty of reasonable accommodation enters into the definition both of coverage and of affirmative obligations under the Rehabilitation Act and the ADA. As a question of coverage, the duty of reasonable accommodation represents the opposite side of the coin from disabilities that are too minor to deserve protection. Disabilities that are too severe to be remedied through reasonable accommodation render an individual unqualified and therefore outside the statutes' protection. As a question of affirmative obligations, reasonable accommodation represents the central doctrinal innovation of the Rehabilitation Act and the ADA.

The intersection of questions of coverage and reasonable accommodation are apparent under both statutes. Section 504 of the Rehabilitation Act protects only "a qualified handicapped individual" from discrimination. Regulations give such an individual a right to reasonable accommodation, implicitly making the question whether the person is "qualified" depend upon whether a reasonable accommodation is available for him or her.⁸⁷⁹ So, too, under the ADA, the general duty not to discriminate applies only to "a qualified individual with a disability." This phrase, in turn, is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."⁸⁸⁰ This section of the statute goes on to make the employer's judgment relevant to, but not dispositive of, what constitutes the essential functions of the job. The employer can also invoke "undue hardship" as a defense to a claim of reasonable accommoda-

879. 29 C.F.R. § 32.13(a), (c) (2000). For federal agencies, the regulation is 29 C.F.R. § 1613.704(a) (2000).

880. Section 101(8), 42 U.S.C. § 12111(8) (2000).

tion.⁸⁸¹ The individual's disability, the essential functions of the job, the accommodations available, and the hardship to the employer all are closely related. Under both statutes, all of these elements define both the coverage of protected individuals and the obligations of employers.

None of these interrelated elements appears to be so fundamental that the others can be derived from it. Nevertheless, some of these elements can be taken as fixed, at least over the short run in which most cases are decided. If the plaintiff has already been found to suffer from a covered disability (discussed in the previous section), the nature of the disability and the position that the plaintiff seeks will determine the range of possible accommodations. A plaintiff with a bad back can only be accommodated by measures that reduce the amount of lifting necessary in his or her job or that provide assistance in doing the lifting that is necessary. The parties are not likely to contest these issues.

The parties are more likely to argue over which of the possible accommodations compromise the essential functions of the job and which would impose an undue hardship upon the employer. These issues are deeply interrelated as well. The essential functions of the job can be changed by job restructuring, one of the reasonable accommodations listed in the statute.⁸⁸² Since any job could be changed to compensate for any disability—just by tailoring its requirements to what the disabled individual could do—the crucial question in many cases is whether a proposed job restructuring would cause undue hardship for the employer. This is just another way of framing the more general question of the scope of the employer's duty to accommodate.

A fundamental problem in addressing these issues is determining where the plaintiff's burden of proof leaves off and the defendant's burden of proof begins. The plaintiff has the initial burden of proving that he or she is a "qualified individual with a disability."⁸⁸³ The regulations under the Rehabilitation Act and the explicit terms of the ADA both assign to the employer the burden of proving that a proposed accommodation would result in "an undue hardship on the operation

881. Sections 101(10), 102(5)(A), 42 U.S.C. §§ 12111(10), 12112(5)(A) (2000).

882. Section 101(9)(B), 42 U.S.C. § 12111(9)(B) (2000).

883. *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806 (1999).

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of its program.”⁸⁸⁴ These sources of law, however, leave to judicial decisions the task of disentangling these interrelated issues so that both the plaintiff and the defendant have clearly defined burdens of proof.

The Supreme Court first addressed this problem in a decision under the Rehabilitation Act, *Southeastern Community College v. Davis*.⁸⁸⁵ That case involved admission to a clinical training program for registered nurses operated by a community college that received federal funds. Although the case did not concern employment, it raised closely analogous issues. The plaintiff had a severe hearing impairment and was denied admission to the program for that reason. The Court held that the community college was not required to make “substantial” or “fundamental” changes in its educational program to accommodate the plaintiff.⁸⁸⁶

The Court reached this conclusion by narrowly interpreting the “otherwise qualified handicapped individuals” who are covered by the statute. The Court interpreted this phrase to refer only to those who meet all of the nondiscriminatory qualifications for a job *despite* their disabilities, not those who meet the nondiscriminatory qualifications *not affected by* their disabilities. The limitations imposed by their disabilities need not be ignored, but can be taken into account, in determining their eligibility for the program in question.⁸⁸⁷ More generally, the Court held that the duty of reasonable accommodation imposed upon recipients of federal funds under section 504 did not amount to a broad duty of affirmative action like that imposed upon federal agencies under section 501 or federal contractors under section 503.⁸⁸⁸

Consistent with this reasoning, the lower federal courts have imposed a heavier duty of accommodation upon federal agencies than upon private employers, following the regulation, quoted earlier, that “the Federal Government shall become a model employer of handicapped individuals.”⁸⁸⁹ With this qualification, most of the decisions on the duty to accommodate under the Rehabilitation Act support at

884. 29 C.F.R. §§ 32.13(a), 1613.203(c) (2000); § 102(5)(A), 42 U.S.C. § 12112(5)(A) (2000).

885. 442 U.S. 397 (1979).

886. *Id.* at 410–11.

887. *Id.* at 405–06.

888. *Id.* at 407–12.

889. 29 C.F.R. § 1613.203(b) (2000).

least as strong a duty under the ADA, which specifically provides that the duties it imposes can only be broader, not narrower, than those under the Rehabilitation Act.⁸⁹⁰

A Supreme Court decision under Title III of the ADA, concerned with discrimination in public accommodations, illustrates both the broader coverage of the ADA and the tendency to expand the duties of covered defendants. Public accommodations, as defined in Title III of the ADA, are those provided by private entities, such as hotels and restaurants. *PGA Tour Inc. v. Martin*⁸⁹¹ concerned professional golf tournaments that were open to all qualifying golfers and for this reason were held to be a public accommodation.⁸⁹² The more widely noted holding was that allowing the plaintiff to use a golf cart because of a medical condition in one of his legs did not “fundamentally alter the nature” of the tournament.⁸⁹³ In reasoning that could easily be applied to the issue of “essential functions” under Title I, the Court stated, “the essence of the game has been shot-making.”⁸⁹⁴ Accordingly, allowing the plaintiff to use a golf cart was a reasonable accommodation of his disability.

The regulations under the Rehabilitation Act offer a list of accommodations that might be tried and factors that might be taken into account.⁸⁹⁵ The statutory language of the ADA follows the same pattern, defining the duty of reasonable accommodation by offering a list of examples, which nevertheless are not meant to be exhaustive: making facilities accessible to the disabled, restructuring jobs, modifying equipment and tests, providing readers and interpreters, and “other similar accommodations for individuals with disabilities.”⁸⁹⁶

One particular kind of accommodation, not mentioned in this list, created a conflict among the circuits over the duty of an employer to provide an accommodation contrary to the terms of a seniority system. Some circuits held that a proposed accommodation that violates seniority rights automatically creates an undue hardship for the em-

890. Section 501(a), 42 U.S.C. § 12201(a) (2000).

891. 532 U.S. 661 (2001).

892. *Id.* at 677.

893. *Id.* at 689–90.

894. *Id.* at 683.

895. 29 C.F.R. §§ 32.13(b), (c), 1613.203(c) (2000).

896. Section 101(9)(B), 42 U.S.C. § 12111(9)(B) (2000).

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ployer,⁸⁹⁷ while others held that such an accommodation is not necessarily ruled out.⁸⁹⁸ The Supreme Court, in *U.S. Airways, Inc. v. Barnett*,⁸⁹⁹ resolved this conflict by taking a middle course, holding that the ADA does not “ordinarily” require assignment of a disabled employee if it would violate the rules of a seniority system. In the absence of other evidence, a showing to this effect entitles the employer to summary judgment.⁹⁰⁰ Nevertheless, the plaintiff remains free to submit evidence that his or her case is an exception, for instance, because the employer frequently makes other, unilateral changes in the seniority system.⁹⁰¹

The definition of “undue hardship” in the ADA, like the definition of “reasonable accommodation,” follows regulations issued under the Rehabilitation Act.⁹⁰² “Undue hardship” under the ADA “means an action requiring significant difficulty or expense, when considered in light of” four enumerated factors.⁹⁰³ These factors are framed very broadly as the nature and cost of the accommodation, the nature and financial resources of the facility, the nature and financial resources of the employer, and the type of the employer’s operations.⁹⁰⁴ The legislative history makes it clear that Congress intended to impose no definite rules about what constitutes undue hardship, such as a certain percentage of the pay for the position in question.⁹⁰⁵

Two leading decisions of the lower federal courts illustrate the interchangeable precedent under the Rehabilitation Act and the ADA on the duty to accommodate. *Borkowski v. Valley Central School District*⁹⁰⁶ was decided under the Rehabilitation Act, and *Vande Zande v. Wiscon-*

897. *E.g.*, *Kralik v. Durbin*, 130 F.3d 76, 82 (3d Cir. 1997); *Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041, 1051 (7th Cir. 1996), *cert. denied*, 520 U.S. 1146 (1997).

898. *E.g.*, *Aka v. Washington Hosp. Ctr.*, 116 F.3d 876, 893 (D.C. Cir. 1997).

899. 535 U.S. 391 (2002).

900. *Id.* at 406.

901. *Id.*

902. 34 C.F.R. § 104.12(c); 45 C.F.R. § 84.12(c) (2000).

903. Section 101(10)(A), 42 U.S.C. § 12111(10)(A) (2000).

904. Section 101(10)(B), 42 U.S.C. § 12111(10)(B) (2000).

905. 136 Cong. Rec. H2470, H2475 (daily ed. May 17, 1990) (rejecting an amendment that would have established a presumption of undue hardship at 10% of annual salary); H.R. Rep. No. 101-485, pt. 3, at 41 (1990) (rejecting per se rule of undue hardship).

906. 63 F.3d 131 (2d Cir. 1995).

in *Department of Administration*⁹⁰⁷ was decided under the ADA. Both cases, however, addressed the same issue: how to divide the burden of proof between the plaintiff and the defendant on the duty of reasonable accommodation and the defense of undue hardship. Both decisions place upon the plaintiff the burden of proposing some form of reasonable accommodation, and both impose upon the defendant the burden of proving that a particular accommodation is too costly to be implemented. The difference between the two decisions lies in how much the plaintiff must prove in order to establish that a proposed accommodation is “reasonable.”

In *Borkowski*, the Second Circuit resolved the overlap between the open-ended definitions of “reasonable accommodation” and “undue hardship” in favor of the plaintiff, requiring her to make only a minimal showing that her proposed accommodation was cost-effective. The court imposed on the plaintiff only the burden of producing evidence—not the burden of persuasion—that the costs of a proposed accommodation “are not clearly disproportionate to the benefits that it will produce.”⁹⁰⁸ The remainder of the burden of production, and the entire burden of persuasion, falls on the defendant in establishing cost as an “undue hardship.” Accordingly, the court concluded that the plaintiff had presented sufficient evidence to survive a motion for summary judgment.

By contrast, in *Vande Zande*, the Seventh Circuit imposed a heavier burden on the plaintiff to show that a proposed accommodation was “reasonable in the sense both of efficacious and of proportional to costs.”⁹⁰⁹ On the record presented in *Vande Zande*, the plaintiff had not made this showing, and summary judgment was therefore properly entered against her. The accommodations that she proposed were too costly in comparison with the benefits that they conferred on both her and her employer in making her better able to perform her job.

Although the difference between these two decisions may be subtle, it is nevertheless significant, particularly in close cases resolved on summary judgment. *Borkowski* gives the plaintiff a greater chance of going to trial, or what amounts to the same thing—of obtaining a favorable settlement and more extensive accommodations. *Vande Zande*

907. 44 F.3d 538 (7th Cir. 1995).

908. *Borkowski*, 63 F.3d at 138.

909. *Vande Zande*, 44 F.3d at 543.

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makes it more difficult for the plaintiff to get past summary judgment and so obtain the relief that he or she seeks, either by judicial decision or by settlement.

The burden of proof was addressed in *U.S. Airways*, but in a manner that blurred the distinctions among the different approaches taken by the courts of appeals. Citing *Borkowski*, the Supreme Court assigned the burden of proof in a manner similar to the assignment in *Vande Zande*. The Court stated that the plaintiff, in order to defeat a motion for summary judgment, “need only show that an ‘accommodation’ seems reasonable on its face”;⁹¹⁰ the defendant “then must show special (typically case-specific) circumstances that demonstrate undue hardship.”⁹¹¹ Although such general statements are helpful in outlining the burden of proof imposed upon each party, they do not resolve the differences among the lower federal courts in their attitude toward summary judgment. As *Borkowski* and *Vande Zande* illustrate, some circuits are more inclined than others to grant summary judgment to the defendant on the related issues of reasonable accommodation and undue hardship.

The Supreme Court has also addressed burdens of proof and the standards for summary judgment in another case concerned with the narrow issue of the plaintiff’s prior representation that she was “totally disabled” in seeking disability benefits. In *Cleveland v. Policy Management Systems Corp.*,⁹¹² the Court held that an application for benefits under the Social Security Disability Insurance (SSDI) program did not necessarily preclude an individual from establishing coverage under the ADA. Under the SSDI program, covered disabilities are determined by applying a set of presumptions that have no counterpart under the ADA. Moreover, the ultimate award of benefits depends upon the existence of a disability alone, without consideration of the possibility of reasonable accommodation. Because of the difference between the issues under the ADA and the issues under the SSDI program, the plaintiff could survive a motion for summary judgment by the employer based solely on her representation of total disability in her application for SSDI benefits. Nevertheless, the burden of proof re-

910. *U.S. Airways*, 535 U.S. at 401 (citing cases).

911. *Id.* at 402.

912. 526 U.S. 795 (1999).

mained upon the plaintiff to establish that she was “otherwise qualified” for the position that she sought from the employer.

The preceding decisions all involve the substance of the employer’s duty of reasonable accommodation, but this duty has a procedural dimension as well. The ADA encourages employers to confer with an employee over proposed accommodations by relieving them of liability for damages if they have made a good-faith effort to provide a reasonable accommodation in consultation with their employees.⁹¹³ The scope of the duty to engage in this interactive process remains somewhat uncertain. Some circuits impose a virtually unconditional duty upon employers to consult with an employee after receiving a request for accommodation,⁹¹⁴ others impose a duty upon employers only to respond to reasonable proposals.⁹¹⁵ Of course, as a practical matter, employers are well advised to consider any proposed accommodation to reduce the risk of litigation, or if litigation occurs, to build a record of reasonable responses to employee requests. Resolving claims of discrimination in this way holds out the promise that employers will adjust to the needs of the disabled without the massive litigation that opened up employment opportunities to members of minority groups and women.

Regulation of Federal Contractors

The most comprehensive prohibitions against discrimination by federal contractors are derived not from a statute but from a presidential order. Executive Order 11,246 prohibits discrimination and requires affirmative action on the basis of race, national origin, sex, and religion.⁹¹⁶ Like section 503 of the Rehabilitation Act,⁹¹⁷ the executive order is enforced by the Office of Federal Contract Compliance Programs (OFCCP) in the Department of Labor. Unlike section 503,

913. 42 U.S.C. § 1981a(a)(3) (2000).

914. *Bultemeyer v. Fort Wayne Cmty. Sch.*, 100 F.3d 1281, 1286 (7th Cir. 1996); *Taylor v. Principal Fin. Group*, 93 F.3d 155, 162 (5th Cir. 1996).

915. *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1111–14 (9th Cir. 2000) (en banc), cert. granted, 532 U.S. 970 (2001), vacated and remanded on other grounds, 535 U.S. 391 (2002); *Willis v. Conopco, Inc.*, 108 F.3d 282, 285 (11th Cir. 1997); *White v. York Int’l Corp.*, 45 F.3d 357, 363 (10th Cir. 1995).

916. 3 C.F.R. 339 (1964–1965), reprinted as amended in 42 U.S.C. § 2000e (2000).

917. 29 U.S.C. § 793 (2000). See *supra* text accompanying note 808.

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however, the executive order has never been explicitly authorized or enacted by Congress, a deficiency that gives rise to persistent questions about its scope and validity.

The executive order states the obligations of federal contractors in only the most general terms, which are then spelled out in great detail in the regulations issued by the OFCCP. The resulting scheme of regulations is as elaborate as the statutory law under Title VII, but differs from it in several crucial respects. First, the executive order requires affirmative action rather than simply the prohibition of discrimination. Second, it is enforced mainly through administrative procedures instead of private litigation. Third, the executive order has been interpreted and implemented primarily through administrative regulations rather than judicial opinions. A full account of the employment obligations of federal contractors would go into each of these features in great detail. This section can only summarize them briefly.

Executive Order 11,246 applies to all contractors with contracts in excess of \$10,000, and it imposes increased compliance and reporting requirements on contractors with contracts in excess of \$50,000.⁹¹⁸ It imposes nondiscrimination and affirmative action obligations, but only the latter have been controversial. Employers with contracts in excess of \$50,000 must prepare written affirmative action plans containing a “work force analysis”; a determination whether any racial or ethnic minority group or women have been “underutilized” by the employer; and “goals and timetables” to remedy any underutilization found.⁹¹⁹ The regulations elaborate on each of these three requirements and add further requirements as well, and compliance is enforced by administratively imposed sanctions.⁹²⁰ Moreover, special provisions apply to employers with federal construction contracts in excess of \$10,000, including goals set by the OFCCP for employment of minority groups and women in most major geographical areas.⁹²¹

All of these various requirements are enforced almost entirely through administrative decisions of the OFCCP to terminate contracts or to suspend or debar contractors, but public actions may be brought

918. 41 C.F.R. §§ 60-1.5(a)(1), -1.40(a) (2000).

919. *Id.* §§ 60-2.11, -2.12.

920. *Id.* §§ 60-1.26, -1.27, -2.13, -2.14, -2.20 to -2.26.

921. *Id.* pt. 60-4.

against contractors to enforce their obligations under the executive order.⁹²² The OFCCP can also seek awards of back pay in administrative enforcement proceedings.⁹²³ Private individuals cannot sue under the executive order, although in limited circumstances, they can sue to require the OFCCP to take enforcement action.⁹²⁴

The process of administrative enforcement lends a degree of flexibility to the OFCCP regulations on affirmative action, reducing the incentives of federal contractors to challenge their validity. The OFCCP enforces these regulations along with the prohibition against discrimination by federal contractors, saving the most severe sanctions for the employers found to have engaged in outright discrimination. As a practical matter, most enforcement proceedings result in negotiated settlements in which the employer retains its eligibility for federal contracts in exchange for changes in its personnel practices to meet the demands of the OFCCP. Because a settlement cuts off any further proceedings, the OFCCP usually has the last word on the implementation of the executive order, either formally through its regulations or informally through its administrative enforcement policy. The opportunities for judicial review of a case that is settled are minimal, and when sanctions are actually imposed, they are usually based on clear evidence of discrimination. For these reasons, few challenges have been brought in recent years to the validity of the OFCCP regulations on affirmative action.

Several such challenges were brought, however, soon after the regulations were issued in substantially their present form. All of these challenges were rejected on the ground that the regulations served the government interest in eliminating past discrimination, particularly in the construction industry.⁹²⁵ It is doubtful that similar challenges today would be resolved in precisely the same way, after the subsequent decisions of the Supreme Court requiring strict scrutiny of all racial classifications by government. Nevertheless, it is a question not likely

922. *Id.* § 60-1.26.

923. *Id.* § 60-1.26(a)(2).

924. See *Legal Aid Soc'y v. Brennan*, 608 F.2d 1319 (9th Cir. 1979), *cert. denied*, 447 U.S. 921 (1980).

925. E.g., *Northeast Constr. Co. v. Romney*, 485 F.2d 752, 757-58 (D.C. Cir. 1973); *Contractors Ass'n v. Secretary of Labor*, 442 F.2d 159, 171 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

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to be resolved as long as the OFCCP moderates the literal requirements of its regulations through its enforcement policy.

An independent basis for challenging the OFCCP regulations relies on the limited congressional authority on which they are based. The only statute that explicitly confers authority on the President to issue the executive order concerns general policies for procuring goods and services for the federal government; it does not address the employment practices of federal contractors.⁹²⁶ The closest that Congress has come to specifically endorsing the executive order is a provision, added to Title VII in 1972, that specifies the procedures that must be followed before any sanctions may be imposed on federal contractors.⁹²⁷ This provision presupposes the validity of the executive order and its implementing regulations without, however, explicitly authorizing or endorsing it. The Supreme Court openly doubted whether this degree of congressional support was sufficient in *Chrysler Corp. v. Brown*,⁹²⁸ a complicated action to enjoin disclosure of an affirmative action plan under the Freedom of Information Act. A few lower federal courts have followed up on these doubts and restricted the scope of the executive order to employment practices closely connected with federal procurement.⁹²⁹ No court, however, has rejected the overall validity of the executive order and the regulations based on it, presumably because Congress has now, for several decades, acquiesced in their operation.

Regulation of Recipients of Federal Funds

Recipients of federal funds, like federal contractors, are subject to special prohibitions against discrimination tied to their receipt of federal money. Again, the Rehabilitation Act, in section 504, provides an example of this form of regulation.⁹³⁰ This provision itself was modeled on Title VI of the Civil Rights Act of 1964,⁹³¹ which prohibits racial

926. 40 U.S.C. § 486(a) (2000).

927. Section 718, 42 U.S.C. § 2000e-17 (2000). See Robert P. Schuwerk, Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. Chi. L. Rev. 723 (1972).

928. 441 U.S. 281, 303–08 (1979).

929. E.g., *Liberty Mut. Ins. Co. v. Friedman*, 639 F.2d 164 (4th Cir. 1981).

930. 29 U.S.C. § 794 (2000). See *supra* text accompanying notes 803–11.

931. 42 U.S.C. §§ 2000d to 2000d-4 (2000).

discrimination by recipients of federal funds. Title IX of the Education Amendments of 1972⁹³² also follows the model of Title VI in prohibiting sex discrimination by educational institutions that receive federal funds.

Title VI prohibits employment discrimination only “where a primary objective of the Federal financial assistance is to provide employment.”⁹³³ Title VI has therefore been limited in its application to employment cases. Its coverage was further restricted by a decision of the Supreme Court that applied its prohibitions only to the precise programs that received federal funds.⁹³⁴ This decision applied to all statutes modeled on Title VI, but it was superseded by legislation that expanded the coverage of these statutes to reach all the operations of an entity if any part of it received federal funds.⁹³⁵ Title VI, however, has been limited in other ways as well, particularly insofar as regulations under Title VI prohibit practices with disparate impact. These regulations were upheld by the Supreme Court, but in a decision denying the availability of compensatory relief.⁹³⁶ Most recently, the Supreme Court has also denied a private right of action for enforcing these regulations.⁹³⁷

Title IX of the Education Amendments of 1972 is limited only to sex discrimination in educational institutions. Unlike Title VI, however, Title IX prohibits employment discrimination by educational institutions regardless of the purpose of the federal funding.⁹³⁸ The usual remedy under Title IX, as under Title VI, is a public action, either through administrative proceedings to cut off federal funding or in court to require compliance with the statute.⁹³⁹ Private plaintiffs can nevertheless bring individual actions to enforce Title IX, as well as Title VI.⁹⁴⁰

932. 20 U.S.C. §§ 1681–1685 (2000).

933. 42 U.S.C. § 2000d-3 (2000).

934. *Grove City Coll. v. Bell*, 465 U.S. 555, 570–74 (1984).

935. 20 U.S.C. §§ 1687, 1688 (2000); 42 U.S.C. § 2000d-4a (2000).

936. *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582, 584, 607 n.27 (1983) (opinion of White, J.).

937. *Alexander v. Sandoval*, 532 U.S. 275, 282–93 (2001).

938. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982).

939. 20 U.S.C. §§ 1682, 1683; 42 U.S.C. §§ 2000d-1, d-2 (2000).

940. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 717 (1979); *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 70–71 (1992). *But see* *Barnes v. Gorman*, 536 U.S. 181,

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A number of other statutes that authorize the award of federal funds prohibit discrimination on the basis of race, national origin, sex, and religion in the funded programs. There are, for instance, the Public Works Employment Act of 1977,⁹⁴¹ the Railroad Revitalization and Regulatory Reform Act,⁹⁴² and the Housing and Community Development Act of 1974.⁹⁴³ Like Title VI and Title IX, these acts give rise to questions about the scope of their prohibitions and the availability of private actions to enforce them. In recent years, however, claims under such statutes have diminished in both number and significance. The focus of litigation has shifted primarily to statutes, like Title VII, that specifically prohibit discrimination in employment.

Statutes on Other Subjects

Federal statutes regulating other subjects have occasionally been interpreted to prohibit discrimination in employment. The most important of these are the National Labor Relations Act⁹⁴⁴ and the Railway Labor Act.⁹⁴⁵ These prohibit discrimination on the basis of race and sex, and probably also on the basis of religion and national origin, by unions certified to represent employees in collective bargaining.⁹⁴⁶ They do not, however, prevent certification of a union that has engaged in discrimination.⁹⁴⁷ The prohibitions against discrimination in collective bargaining agreements fostered by these statutes provide a more important remedy for employment discrimination, enforced through the grievance and arbitration procedures commonly found in such agreements.⁹⁴⁸ The National Labor Relations Act also contains a special provision to accommodate employees who have religious ob-

184–88 (2002) (punitive damages cannot be awarded against state agencies under the ADA and the Rehabilitation Act in claims modeled on Title VI).

941. 42 U.S.C. § 6709 (2000).

942. 49 U.S.C. § 306 (2000).

943. 42 U.S.C. § 5309 (2000).

944. 29 U.S.C. §§ 151–169 (2000).

945. 45 U.S.C. §§ 151–163 (2000).

946. *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944).

947. *Handy Andy, Inc.*, 228 N.L.R.B. 447 (1977).

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

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jections to paying dues to a union pursuant to a union security clause.⁹⁴⁹

The availability of implied remedies under other statutes has been limited by the Supreme Court's decision in *NAACP v. Federal Power Commission*.⁹⁵⁰ The Court held that agencies regulating other subjects, such as the rates for the sale and transmission of gas and electricity, could consider claims of employment discrimination only as they affected the employer's ability to comply with the statute administered by the agency. This decision reinforces the position of Title VII and other statutes specifically prohibiting employment discrimination as the predominant sources of authority in this field.

949. 29 U.S.C. § 169 (2000).

950. 425 U.S. 662 (1976).

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