MAJOR ISSUES IN THE FEDERAL LAW OF EMPLOYMENT DISCRIMINATION

Fifth Edition

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Preface

This edition of *Major Issues in the Federal Law of Employment Discrimination* discusses developments in the law through June 2011. These developments, like those recounted in earlier editions, are many and varied. This field of law continues to expand to cover new forms of discrimination and additional employment practices. Both new judicial decisions and new legislation have addressed the issues in this field in increasing detail. It would have been impossible to keep up with all of these developments without the diligent efforts of my research assistants, Nicholas Bluhm, Laura Bowers, Kevin Kelly, and Diane Wielocha. 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* (third edition 2010) in updating this monograph. Several federal judges have read and commented on this and earlier editions of this monograph, most recently Judge Denny Chin of the United States Court of Appeals for the Second Circuit. 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.

Introduction

Earlier editions of this monograph analyzed two major pieces of legislation that profoundly changed the federal law of employment discrimination: the Americans with Disabilities Act of 1990[1] 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 same process renewed itself in the last year, with the passage of the Genetic Nondiscrimination Act of 2008,[3] the ADA Amendments Act of 2008[4] and the Lilly Ledbetter Fair Pay Act of 2009.[5] Congress also is actively considering the Employment Non-discrimination Act,[6] which extends the prohibitions of Title VII to discrimination on the basis of perceived or actual sexual orientation and gender identity.

The current edition examines the law after the courts and Congress have tried to assimilate these changes to the increasing number of federal statutes that prohibit employment discrimination. Perhaps we stand at the threshold of further fundamental changes, but predicting developments in this field, and especially the details of how and when they will occur, is a notoriously treacherous exercise. The developments over the last two decades already offer enough material for analysis and exposition. No one of these developments, 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 dam-

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1. Pub. L. No. 101-336, 104 Stat. 327, 42 U.S.C. §§ 12101–12213 (2006).

2. Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified in part in scattered sections of 2 and 42 U.S.C. (2006)).

3. Pub. L. No. 110-233, 122 Stat. 881 (2008) (codified in scattered sections of 26, 29, and 42 U.S.C.A. (2010)).

4. Americans with Disabilities Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008) (codified in 29 U.S.C.A. § 705 (2010) and 42 U.S.C.A. §§ 12101-10 (2010)).

5. Pub. L. No. 111-2, 123 Stat. 5 (codified in Title VII at §§ 706(e)(3), 717(f), 42 U.S.C.A. §§ 2000e-5(e)(3), 16(f) (2010)).

6. H.R. 3017, 111th Cong., 1st Sess. (2009)

ages 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 to discrimination on other grounds, such as disability, as evidenced by the recent comprehensive set of amendments to the Americans with Disabilities Act (ADA). 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.[7] Title VII is both the broadest federal statute that prohibits 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.[8] 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

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7. Civil Rights Act of 1964, §§ 701–718, 42 U.S.C. §§ 2000e to 2000e-17 (2006). 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 employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

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

the ambiguities of important provisions, such as those concerned with bona fide occupational qualifications, equal pay, employment testing, and affirmative action.[9]

Since its enactment, Title VII has been subject to repeated and extensive amendments, beginning with the Equal Employment Opportunity Act of 1972. This act also was the product of 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 discrimination.[10] 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. In the Lilly Ledbetter Fair Pay Act of 2009,[11] Congress rejected another decision of the Supreme Court restricting the time limit for bringing claims of pay discrimination. This level of detail has led to renewed intensity in the debates that have always surrounded Title VII.

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. This topic is taken up immediately in Chapter 1, but it is important to note that it extends far beyond the strict limits of Title VII itself, to the Constitution, other federal statutes, and federal regulations that also prohibit discrimination in employment. These other sources of federal law have been interpreted and applied according to doctrines developed under Title VII, sometimes to the point of adopting the literal terms of Title VII by incorporation or cross-reference. This is true both of substantive and procedural provisions from Title VII, which accordingly are treated at length in the first two chapters of this book. Other doctrines—such as immunity

9. Civil Rights Act of 1964, § 703(e)(1), (h), (j), 42 U.S.C. § 2000e-2(e)(1), (h), (j) (2006).

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

11. Pub. L. No. 111-2, 123 Stat. 5 (codified in Title VII at §§ 706(e)(3), 717(f), 42 U.S.C.A. §§ 2000e-5(e)(3), 16(f) (2010)).

from liability for damages—have no counterpart under Title VII, while others raise issues that cut across many subjects beyond employment discrimination—such as the standards for awarding attorney's fees. This monograph treats these issues briefly, not because they lack significance but because their significance exceeds the bounds of a monograph focused on employment discrimination law. Other federal laws that share this focus, such as the Age Discrimination in Employment Act (ADEA) and the ADA, therefore receive more extended treatment than those that do not.

A brief survey of the other sources of federal 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 § 1983.[12] This statute creates a private right of action for deprivation of federal rights under color of state law. Judicial decisions 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.[13]

Another Reconstruction statute, the Civil Rights Act of 1866, otherwise known as § 1981,[14] 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, § 1981a,[15] 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 ADA, or the Vocational Rehabilita-

12. Civil Rights Act of 1871, § 1, 42 U.S.C. § 1983 (2006). *See also* Martin A. Schwartz & Kathryn R. Urbonya, Section 1983 Litigation (Second Edition, Federal Judicial Center 2008).

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

14. Civil Rights Act of 1866, § 1, 42 U.S.C. § 1981 (2006).

15. 42 U.S.C. § 1981a (2006).

tion Act.[16] The substantive prohibition in § 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 Act[17] 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 Act[18] prohibits another narrow form of discrimination: discrimination on the basis of age against individuals forty years old or older. The ADA is the latest act in this series. It generally prohibits discrimination against the disabled, including a requirement of reasonable accommodation, by private employers.[19] Still other federal statutes have been interpreted to prohibit discrimination in employment, but only in the field with which such statutes are primarily concerned. The National Labor Relations Act[20] and the Railway Labor Act,[21] for instance, have been interpreted to prohibit discrimination by labor unions that represent employees in collective bargaining.[22]

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 1964[23] prohibits discrimination on the basis of race or national origin by recipients of federal funds. Title IX of the Education Amendments of 1972[24] prohibits discrimination on the basis of sex by educational institutions that receive federal funds. Executive Order 11,246 returns to regulation solely of em-

16. 29 U.S.C. §§ 701–796i (2006).

17. *Id.* § 206(d).

18. *Id.* §§ 621–634. 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 (2006).

19. 42 U.S.C. § 12112 (2006).

20. 29 U.S.C. §§ 151–169 (2006).

21. 45 U.S.C. §§ 151–163 (2006).

22. *See infra* text accompanying notes 999-1005.

23. 42 U.S.C. §§ 2000d-2004 (2006).

24. 20 U.S.C. §§ 1681–1685 (2006).

ployers who are federal contractors. It generally prohibits discrimination and requires affirmative action 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. 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. These disputes, like those over the statutory law of employment discrimination, have followed the lead of developments under Title VII, although often with significant variations.

The Rehabilitation Act,[25] the predecessor to the ADA, prohibits exclusion of individuals with disabilities from federally assisted programs and requires affirmative action on their behalf by federal agencies and federal contractors. The ADA expanded upon the Rehabilitation Act by expressly covering discrimination in employment, regardless of the presence of federal funding.[26] The ADA is expressly modeled on Title VII, adopting much of the same language in the central prohibitions in the Act and incorporating by reference the procedures and remedies under Title VII. The ADA's major innovation involves an adaptation of the provision on reasonable accommodation of religious practices in Title VII. The ADA expands this provision, freed from constitutional restrictions on regulation of religion, to apply to disabilities. Employers must take affirmative steps, short of any undue hardship, to change the workplace to accommodate individuals with disabilities (although not to individuals who are only "regarded as" disabled). The ADA has also spawned repeated litigation and amending legislation on the issue of coverage: of what disabilities are severe enough, or perceived to be severe enough, to trigger the protections of the Act. The ADA Amendments Act has resolved these questions broadly in favor of coverage, minimizing the effects necessary to gain coverage, or in the case of individuals regarded as

25. 29 U.S.C. §§ 701–796i (2006).
26. 42 U.S.C. §§ 12101-12213 (2006).

disabled, eliminating such effects beyond the existence of an "impairment."

The cumulative effect of these additional prohibitions against discrimination raises important questions of policy, particularly insofar as they alter the traditional common law rule of employment-at-will. Title VII began from the premise that an employer could hire or fire an employee for any reason so long as it was not a discriminatory reason—one based on race, color, national origin, sex, or religion. But as the grounds of prohibited discrimination have expanded, the employer's freedom to act has diminished, leading to a variety of practical problems in administering the laws against employment discrimination. Foremost among these is the need to distinguish a discriminatory reason from a bad, but nevertheless nondiscriminatory, reason offered by an employer. An employee might be fired for a bad reason, one that does not make good business sense, but the employee has no claim unless that reason also is discriminatory. A further complication is that plaintiffs often join claims under the federal statutes with claims under state law, which might be based either on state fair employment practice laws or state exceptions to the doctrine of employment-at-will. These claims might or might not be sufficiently related to the federal claims to invoke the supplemental jurisdiction of the federal courts, but if they do, they have to be decided in a way that preserves the important differences between state and federal law. The abstract question of policy—how broad should the federal laws against employment discrimination be—quickly comes up against the practical problem of judicial administration—how to prevent those claims from becoming a general requirement of discipline or discharge only for good cause, completely overturning contrary state law. This monograph begins with the definition of prohibited discrimination and how it relates to permissible employer discretion.

I. Prohibitions and Defenses in 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.[27] The definition of disparate treatment has been codified by the Civil Rights Act of 1991 in the following terms: "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."[28] This definition 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, while class claims usually rely on statistical evidence of treatment of an entire group of employees based on race or some other protected characteristic. 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.[29] 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."[30] 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 practice is "job related

27. 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).

28. § 703(m), 42 U.S.C. § 2000e-2(m) (2006).

29. § 703(k), 42 U.S.C. § 2000e-2(k) (2006).

30. § 703(k)(1)(A)(i), 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).

for the position in question and consistent with business necessity."[31] 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.[32] 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 an earlier version of the Act promoted quotas.[33] The exact language of the statute must therefore be examined quite closely.[34] 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*.[35] 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.[36]

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."[37] If the defendant then carries this burden, the burden of production shifts back to the plaintiff "to show that [the de-

31. *Id.*

32. § 703(k)(1)(A)(ii), (C), 42 U.S.C. § 2000e-(k)(1)(A)(ii), (C) (2006).

33. President George H.W. Bush vetoed the Civil Rights Act of 1990, the predecessor to the Civil Rights Act of 1991, for this reason. Weekly Comp. Pres. Doc., Vol. 26, No. 43, at 1631 (Oct. 20, 1990). 136 Cong. Rec. S16,418 (daily ed. Oct. 22, 1992) (veto message of President Bush objecting to bill).

34. *See infra* text accompanying notes 141–87.

35. 411 U.S. 792 (1973).

36. *Id.* at 802.

37. *Id.*

fendant's] stated reason for [the plaintiff's] rejection was in fact pretext."[38]

The Court emphasized that this structure of shifting burdens of production was not the only way to prove an individual claim of disparate treatment.[39] 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 race or some other protected characteristic. 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 where, by definition, the plaintiff cannot prove that "he belongs to a racial minority."[40] Even when this structure does apply, it shifts only the burden of production, not the burden of persuasion, to the defendant;[41] and it imposes on the defendant only the burden of articulating a legitimate, nondiscriminatory reason,[42] not of proving that the offered reason was closely related to performance on the job.[43]

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.[44] Some courts have tried to avoid this difficulty through the simple expedient of identifying whites as a "protected class" equivalent to a minority group.[45] More recent decisions have abandoned the term "protected class" and require additional evidence of background circumstances supporting an inference of reverse discrimination against members of a majority group. [46]

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38. *Id.* at 804.

39. *Id.* at 802 & n.13. The Supreme Court has repeatedly made this point. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510 (2002); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

40. 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).

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

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

43. The employer's burden of business justification under the theory of disparate impact, by contrast, is much heavier. *See infra* text accompanying notes 159–184.

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

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

46. Mastro v. Potomac Elec. Power Co., 447 F.3d 843, 851 (D.C. Cir. 2006), *cert. denied*, 549 U.S. 1166 (2007); Nagle v. Village of Calumet Park, 554 F.3d 1106, 1119 (7th Cir. 2009).

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.[47] The Supreme Court seems to have accepted this last alternative when it suggested that the plaintiff attacking an affirmative action plan has the burden of proving that it is a pretext for discrimination.[48] More recently, however, the Court has placed the burden of proof on the employer in a situation closely related to affirmative action. In *Ricci v. DeStefano*,[49] the Court held that the city of New Haven violated Title VII when it discarded the results of an examination for promotion within its fire department. The city made this decision because most blacks and Hispanics scored too low to be eligible for promotion, a reason that the Court found to be inadequate because the city had failed to show that it had "a strong basis in evidence of an impermissible disparate impact."[50] This decision seems to make any consideration of race, if it is permissible at all, dependent upon a sufficiently strong showing by the employer.

In any event, the scope of permissible affirmative action cannot easily be reconciled with proof of intentional discrimination simply by modifying the framework of 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.[51] 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

47. *E.g.*, Moran v. Selig, 447 F.3d 748, 753 (9th Cir. 2006) (accepting as a "legitimate non-discriminatory reason" defendant's attempt "to remedy in part its past discriminatory conduct); Lilly v. City of Beckley, 797 F.2d 191, 194–96 (4th Cir. 1986).

48. Johnson v. Transp. Agency, 480 U.S. 616, 626 (1987).

49. 129 S. Ct. 2658 (2009).

50. *Id.* at 2677.

51. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) (age discrimination case); Enlow v. Salem-Keizer Yellow Cab Co., Inc., 389 F.3d 802, 812 (9th Cir. 2004), *cert. denied*, 544 U.S. 974 (2005) (age discrimination case); Griffith v. City of Des Moines, 387 F.3d 733, 736 (8th Cir. 2004) (national origin 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).

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*, among them claims involving loss of a job, either from firings or layoffs. Excluding disability claims, the majority of employment discrimination cases are filed by employees who have lost their jobs.[52] 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 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 federal courts. They have substituted various alternative elements, such as satisfactory performance until the incident giving rise to the discharge,[53] departure from the general policies on discipline or discharge usually followed by the employer,[54] or different treatment of someone

52. John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation,* 43 Stan. L. Rev. 983, 1015 (1991); Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, Uncertain Justice: Litigating Claims of Employment Discrimination in the Contemporary United States 14 (Apr. 16, 2008) (unpublished manuscript *available at* http://ssrn.com/abstract=1093313) (published as Individual Justice or Collective Legal Mobilization? Employment Discrimination in the Post-Civil Rights United States, 7 J. Emp. Leg. Stud. 175 (2010)).

53. Montgomery v. Am. Airlines, Inc., 626 F.3d 382, 394 (7th Cir. 2010); Sorbo v. United Parcel Serv., 432 F.3d 1169, 1173 (10th Cir. 2005).

54. Kendrick v. Penske Transp. Servs., Inc., 220 F.3d 1220, 1230 (10th Cir. 2000); Scales v. Slater, 181 F.3d 703, 711 (5th Cir. 1999); Salazar v. Wash. Metro. Area Transit Auth., 401 F.3d 504, 509 (D.C. Cir. 2005).

from another race or other group.[55] 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,[56] 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.

The most common adaptation of *McDonnell Douglas* has been for discharge, layoff, or discipline cases. In these cases, the circuit courts have required evidence that the plaintiff's job performance met the employer-defendant's "legitimate expectations."[57] This formulation replaces evidence "that, despite his qualifications, he was rejected," which is more suitable for hiring and promotion cases. Where the circuit courts have tried to further 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 most cases to be resolved 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 said repeatedly that the burden of persuasion always remains with the plaintiff,[58] that the employer's burden of articulat-

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55. *Montgomery*, 626 F.3d at 394; Clay v. United Parcel Serv., Inc., 501 F.3d 695, 703 (6th Cir. 2007); Phillip v. Ford Motor Co., 413 F.3d 766, 768 (8th Cir. 2005); Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 285 (4th Cir. 2004) (en banc).

56. O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 311–13 (1996) (age discrimination).

57. *See, e.g.*, United States v. Brennan, __ F.3d __, __, Nos. 08-5171-cv (L), 08-5172-cv (XAP), 08-5375-cv (XAP), 08-5149-cv (CON), 08-4639-cv (CON), 2011 WL 1679850, at *20 (2d Cir. May 5; as corrected June 2, 2011); *Hill*, 354 F.3d at 285; Kosereis v. Rhode Island, 331 F.3d 207, 212-213 (1st Cir. 2003).

58. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981); Bd. of Trustees v. Sweeney, 439 U.S. 24, 25 (1978); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 57–78 (1978).

ing a legitimate nondiscriminatory reason is a light one,[59] that the plaintiff is under no obligation to specifically plead the elements of a prima facie case,[60] 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.[61]

As the next section elaborates in detail, the plaintiff must do more than just discredit the defendant's offered legitimate, nondiscriminatory reason. The plaintiff must prove "*both* that the reason was false, *and* that discrimination was the real reason."[62] The Supreme Court considered one way of making such proof—the theory that a manager was the "cat's paw" of a lower-level supervisor—in *Staub v. Proctor Hospital*.[63] Although that case concerned a claim under the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Court relied on precedents under Title VII to analyze the claim by a reservist that he was discriminatorily discharged because of his military obligations. The Court held that the employer remained liable under USERRA even though the principal evidence of discrimination implicated the plaintiff's immediate supervisors and not the manager who made the ultimate decision to fire him. The manager's reliance on other information and on his own judgment did not constitute a "superseding cause" that negated the influence of the discriminatory actions of the plaintiff's immediate supervisors.[64] As it has in other decisions, the Supreme Court recognized

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59. *Burdine*, 450 U.S. at 254–55; *Furnco*, 438 U.S. at 579–80.

60. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 506–07 (2002). Nevertheless, the Court required more precise pleading in a case involving claims of unconstitutional discrimination. Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009). The defendants were high government officials who asserted a defense of qualified immunity. Partly because they would be burdened by ongoing discovery, the Court required the complaint to "contain facts plausibly showing" that the defendants had engaged in prohibited discrimination. *Id.* at 1952.

61. Ash v. Tyson Foods, Inc.546 U.S. 454 (2006) (per curiam); Anderson v. Bessemer City, 470 U.S. 564, 573 (1985); U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983).

62. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993). *See also* Van Zant v. KLM Royal Dutch Airlines, 80 F.3d 708, 714 (2d Cir. 1996) (quotation omitted) (holding plaintiff must present evidence to show that "[discrimination] was the real reason for the discharge").

63. 131 S. Ct. 1186 (2011).

64. *Id*. at 1190. The "cat's paw" theory of liability originated in *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990). *Staub,* 131 S. Ct. at 1190 n.1.

the "cat's paw" theory as one of several different ways of proving discrimination.

McDonnell Douglas and the Right to Jury Trial

In *St. Mary's Honor Center v. Hicks*,[65] the Supreme Court addressed the issue of how much evidence the plaintiff needed to survive a motion for summary judgment or for directed verdict, an issue of continuing significance in employment discrimination cases. 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.

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.[66] 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.

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. This require-

65. 509 U.S. 502 (1993).
66. *Id.* at 510–12.

ment is sometimes framed as proof of "pretext plus," but it is more clearly and accurately framed as evidence of "discrediting plus." Once the plaintiff proves pretext, by whatever means, the plaintiff need not prove any "plus" at all. Proof of pretext is proof of illegal motivation, which can be established by relying upon circumstantial evidence in addition to evidence discrediting the defendant's offered reason. The Supreme Court confirmed this conclusion in *Reeves v. Sanderson Plumbing Products, Inc.*,[67] where the plaintiff presented sufficient evidence to support a finding of discrimination by relying upon the evidence establishing a prima facie case under *McDonnell Douglas* and by discrediting the defendant's offered reason.[68]

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.[69] Following the lead of decisions approving the use of summary judgment,[70] however, the federal courts have closely examined the plaintiff's evidence to determine whether it supports a reasonable inference of intentional discrimination.[71] Nevertheless, the practice in different circuits has been highly variable: Some courts recognize that these cases should rarely be taken from the jury, because they involve questions of intent;[72] other courts allow judges greater leeway to grant summary judgment or judgment as a matter of law.[73]

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67. 530 U.S. 133 (2000).

68. *Id.* at 147–49.

69. *Id.* at 150–54.

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

71. 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); Wright v. Murray Guard, Inc., 455 F.3d 702, 706-15 (6th Cir. 2006); Weihaupt v. Am. 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).

72. 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).

73. Taylor v. Va. 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).

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.[74] The same is true of directed verdicts and judgments notwithstanding the verdict (or judgments as a matter of law in the current terminology). These procedural devices allow trial judges to retain control over which cases go to the jury by determining whether the plaintiff's burden of production has been satisfied. This burden is rarely met simply by making out a prima facie case under *McDonnell Douglas*; the plaintiff must also present sufficient evidence 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,[75] 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.[76] 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."[77] 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 non-

74. 42 U.S.C. § 1981a(b), (c) (2006).

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

76. 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. Jakabovitz, 24 F.3d 372, 380–81 (2d Cir. 1994); Hagelthorn v. Kennecott Corp., 710 F.2d 76, 85 (2d Cir. 1983).

77. *Compare* Smith v. Borough of Wilkinsburg, 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).

discriminatory.[78] This is as far as *McDonnell Douglas* and the cases following it can take the court in framing jury instructions.

Mixed-Motive and After-Acquired Evidence 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*,[79] 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.[80] 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.[81] 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

78. *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).

79. 490 U.S. 228 (1989).

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

81. *Id.* at 249.

case.[82] 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.[83]

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. This legislation applies only to mixed-motive cases under Title VII, and as the Supreme Court has made clear, *Price Waterhouse* does not apply to mixed-motive cases under any other employment discrimination law.[84] *Price Waterhouse* survives only to the extent that Congress adopted and modified it under Title VII. The modifications are twofold: 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."[85] 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 only imposes a limitation 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.[86]

Assigning the mixed-motive defense to the remedy stage 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 plain-

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

83. § 706(k), 42 U.S.C. § 2000e-5(k) (2006); *see* Hensley v. Eckerhart, 461 U.S. 424, 433 (1983).

84. Gross v. FBL Fin. Servs., 129 S. Ct. 2343, 2348-52 (2009).

85. § 706(g)(2)(B), 42 U.S.C. § 2000e-5(g)(2)(B) (2006).

86. § 706(g)(2)(B)(i), 42 U.S.C. § 2000e-5(g)(2)(B)(i) (2006).

tiff has made out a prima facie case, which does not amount to a finding of discrimination, and it shifts only the burden of production to the defendant, not the burden of persuasion.[87]

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.[88] 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

87. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253–56 (1981).

88. For model instructions on this issue, and other issues of discrimination, see 3C Kevin F. O'Malley, Jay E. Grenig & Hon. William C. Lee, Fed. Jury Prac. & Instr. ch. 170 (5th ed. & 2011 Supp.).

of 1991 to include the statutory provision quoted earlier.[89] 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.[90] If the plaintiff made this showing, then the defendant could entirely escape liability by proving that the same decision adverse to the plaintiff would have been made in the absence of the discriminatory reason.[91] 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.

Some decisions have 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.[92] 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. The Supreme Court rejected these decisions in *Desert Palace, Inc. v. Costa*,[93] 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.

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89. *See supra* text accompanying notes 85-86.

90. *Price Waterhouse*, 490 U.S. at 250 (Brennan, J., plurality opinion) ("played a motivating part"); *id.* at 259 (White, J., concurring in judgment) ("a substantial factor"); *id.* at 265 (O'Connor, J., concurring in judgment) ("a substantial factor").

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

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

93. 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.[94]

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*.[95] 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 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, 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. In *McKennon*, the actual decision was based solely on a discriminatory 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. Neverthe-

94. *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).

95. 513 U.S. 352 (1995).

less, 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.

Class Claims of Disparate Treatment

Strictly speaking, the distinction between individual claims and class claims is one of procedure rather than substance. It concerns how plaintiffs are joined in a single action, either individually or as part of a class, rather than the kind of claims that have been joined together. 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.[96] 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 theory 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.

96. *E.g.,* Connecticut v. Teal, 457 U.S. 440, 443 (1982); Kovacevich v. Kent State Univ., 224 F.3d 806, 831 (6th Cir. 2000).

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,[97] 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."[98] 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*.[99] This model of statistical inference—or "the inexorable 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,

97. *See infra* text accompanying notes 151-58.

98. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 340 (1977). For a 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).

99. 431 U.S. 324, 342 n.23 (1977).

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.[100]

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.[101] Any remaining doubts about this assumption were overcome by the enormous disparity represented by "the inexorable zero" of minorities among over-the-road drivers. It was highly unlikely that any permissible selection procedure would result in almost no blacks or Hispanics in the position of line driver. 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 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

100. *Id.* at 337 n.17.
101. *Id.* at 339 n.20, 342 n.23.

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*.[102] 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.[103] 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 applicants 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

102. 433 U.S. 299 (1977).
103. *Id.* at 308 & n.13.

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: the proportion of a group among all applicants, which is then compared to the proportion of the same among all those hired. 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.[104]

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 preenactment or prelimitation discrimination may support an inference of intentional discrimination at a later time.[105] As the Court noted in *Hazelwood*, the racial composition of the employer's workforce may reflect preenactment discrimination and

104. *Id.*

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

may deviate substantially from the racial composition of the pool of employees actually hired over the relevant time period.[106]

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,[107] such as the nearly complete absence of minority employees in the highest paying jobs in *Teamsters*.[108] The particular statistical methods adopted by the Court in *Hazelwood* may or may not be appropriate in other cases.[109] 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*,[110] 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 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

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

107. *Id.* at 307.

108. *Teamsters*, 431 U.S. at 337–38.

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

110. 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.

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.[111] 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.'"[112] 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.[113] The general significance of the decision, however, lies in its evaluation of the statistical evidence based on the entire record.[114] As the Court had earlier cautioned in *Teamsters*, statistics "come in infinite variety and, like any other kind of evidence, they may be rebutted."[115]

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 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.[116] On the other hand, just as the Court was silent as to the content of the plaintiff's prima facie case, it also did not 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

111. *Id.* at 402–03.
112. *Id.* at 400 (quoting Fourth Circuit's opinion below).
113. *Id.* at 403–404 & n.14.
114. *Id.* at 400.
115. *Teamsters*, 431 U.S. at 340.
116. *Hazelwood*, 433 U.S. at 309.

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."

The flexible structure of proof in class claims of intentional discrimination allows the admissibility of a wide range of evidence. A new form of evidence involves empirical studies of "implicit discrimination": discrimination that occurs subliminally without the individual necessarily being aware of it. These studies typically ask subjects to associate members of different groups with desirable or undesirable characteristics. For instance, in one experiment, subjects were confronted with faces that appeared to be African-American or white and then asked to decide immediately whether they fit with words like "good" or bad." Such "implicit association tests" (IATs) usually yield a finding that subjects take longer to associate members of minority groups with positive attributes than with negative ones. Studies of this kind were used to support certification of a nationwide class action in *Wal-Mart Stores*, *Inc. v. Dukes*.[117] In a decision discussed more fully in the next chapter, the Supreme Court reversed certification of the class, finding insufficient common issues and no basis for certifying the class as one mainly for injunctive relief. The plaintiffs alleged discrimination on the basis of sex in Wal-Mart's operations throughout the country and they presented expert testimony on the prevalence of gender stereotypes derived partly from IATs. Questions have been raised about the validity of IATs alone to support findings of unlawful discrimination, for two separate reasons: first, they need to be confirmed by studies using other methodologies; and second, they establish only widespread tendencies rather than the existence of discrimination in any particular case.[118] The overall tendency in the cases

117. 131 S. Ct. 2541 (2011).

118. For a review of the literature on gender bias, finding considerable evidence for it but cautioning against using it to find particular instances of sex discrimination, see

resembles that in *Dukes*: to let such evidence in and to leave the trier of fact to determine its ultimate persuasiveness.

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 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*.[119] 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*,[120] only to have its decision largely overruled by Congress when it codified the theory of disparate impact in the Civil Rights Act of 1991.[121] Together with the related issue of affirmative action, this history figured prominently in the decision in *Ricci v. DeStefano*.[122] Despite codification of the theory, doubts remain about exactly what it requires and what purposes 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."[123] Under *Albemarle Paper Co. v. Moody*,[124] 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

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David Faigman *et al.*, A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias, 59 Hastings L.J. 1389 (2008).

119. 401 U.S. 424 (1971).

120. 490 U.S. 642 (1989).

121. 42 U.S.C. § 2000e-2(k) (2006); *see* Pub. L. No. 102-166 § 3(2), 105 Stat. 1071 (1991) (stating purpose to overrule *Wards Cove*).

122. 129 S. Ct. 2658 (2009).

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

124. 422 U.S. 405, 425 (1975).

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 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.*,[125] 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."[126] 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 prac-

125. 401 U.S. 424 (1971).
126. *Id*. at 431.

tices, not simply the motivation."[127] 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."[128] 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."[129] 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.

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 Procedures[130] adopted by the Equal Employment Opportunity Commission (EEOC); the other is not.

The Uniform Guidelines impose exacting requirements upon defendants to justify practices with disparate 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.[131] Other cases, however, have imposed less stringent requirements for validation than the Uniform Guidelines do and, to that extent, favored a narrow interpretation of the theory.[132] The varying deference given to the Uniform Guidelines arises from their status simply as interpretive regulations. Under Title VII, the EEOC does not have authority to promulgate sub-

127. *Id.* at 432.

128. *Id.* at 431.

129. *Id.*

130. 29 C.F.R. pt. 1607 (2010).

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

132. 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); *see* Ricci v. DeStefano, 129 S. Ct. 2658, 2678-79 (2009) (finding validation sufficient without citation to the guidelines).

stantive regulations with the force of law.[133] Early decisions by the Supreme Court sometimes gave "great deference" to the EEOC guidelines,[134] and sometimes gave them hardly any deference at all.[135] Later decisions by the lower federal courts settled on the practice of treating them "with the appropriate mixture of deference and wariness."[136]

Wards Cove and the Civil Rights Act of 1991

The decision in *Wards Cove* was preceded by *Watson v. Fort Worth Bank & Trust*,[137] a case in which 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*.[138] The second part of the opinion led directly to *Wards Cove* and ultimately to the Civil Rights Act of 1991.

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 jobs on the cannery lines (called "cannery jobs" in the opinion) and other jobs (called "non-cannery jobs"). The cannery jobs were unskilled, while most of the non-cannery jobs were skilled and accordingly paid more. While the non-cannery jobs were filled predominantly by white workers, the cannery jobs were filled predominantly by minority workers. 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 between the proportion of minority workers in non-cannery

133. § 713(a), 42 U.S.C. § 2000e-12(a) (1988).

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

135. 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).

136. Guilino v. New York State Educ. Dep't, 460 F.3d 361, 384 (2d Cir. 2006) (internal quotation marks omitted). *Compare* Garcia v. Spun Steak Co., 998 F.2d 1480, 1489 (9th Cir. 1993) (not following EEOC guidelines on English-only rules), *with* Montes v. Vail Clinic, Inc., 497 F.3d 1160, 1171 (10th Cir. 2007) (following EEOC guidelines on English-only rules).

137. 487 U.S. 977 (1988).

138. *Id.* at 989–91.

jobs and the proportion of those workers in the labor market for those positions.[139] Moreover, the plaintiffs were required to identify the particular employment practices that caused this disparity.[140] This holding was codified—not overruled—by the Civil Rights Act of 1991, which imposed the same requirement in nearly identical terms.[141]

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."[142] 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 holdings[143] and indeed identified *Wards Cove* as one of the decisions overruled by the Act.[144] In particular, Congress defined "demonstrate" to mean "meets the burden of production and persuasion" and required the defendant to "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."[145] 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.[146] 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*.[147]

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

140. *Id.* at 656.

141. § 703(k)(1)(A)(i), (B)(i), 42 U.S.C. § 2000e-2(k)(1)(A)(i), (B)(i) (2006).

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

143. §§ 701(m), 703(k)(1)(A)(i), 42 U.S.C. §§ 2000e(m), 2000e-2(k)(1)(A)(i) (2006).

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

145. §§ 701(m), 703(k)(1)(A)(i), 42 U.S.C. §§ 2000e(m), 2000e-2(k)(1)(A)(i) (2006).

146. *Id.* § 703(k)(1)(C), 42 U.S.C. § 2000e-2(k)(1)(C) (2006).

147. Pub. L. No. 102-166, §§ 3(2), 105 Stat. 1071 (1991). In an unusual provision, § 105(b) of the Civil Rights Act of 1991 identifies the only authorized legislative history of

Despite the clarity with which Congress rejected these holdings in *Wards Cove*, the ultimate effect of its legislation remains ambiguous. 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."[148] 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. Moody*[149] 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.[150] 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

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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.

148. Civil Rights Act of 1964, § 703(k)(1)(A)(i), 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).

149. 422 U.S. 405 (1975).

150. *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 (2010). 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. § 703(k)(1)(A)(ii), 42 U.S.C. § 2000e-2(k)(1)(A)(ii) (2006).

lines as it was in *Hazelwood School District v. United States*.[151] 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.[152] 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.[153] The defendant can rebut either of these showings by demonstrating that the particular employment practice identified by the plaintiff did not cause the disparate impact.[154] 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.[155]

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 mem-

151. 433 U.S. 299 (1977); *Wards Cove*, 490 U.S. at 650–55.

152. § 703(k)(1)(B)(i), 42 U.S.C. § 2000e-2(k)(1)(B)(i) (2006).

153. *Id.*

154. § 703(k)(1)(B)(ii), 42 U.S.C. § 2000e-2(k)(1)(B)(ii) (2006).

155. 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 was eliminated by the Act: Each separable element of a selection procedure must be evaluated independently. As the Supreme Court has recently reaffirmed, the "plaintiff must begin by identifying the specific employment practice that is challenged." Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2555 (2011) (internal quotation marks and citation omitted).

bers of a particular race, national origin, or sex for a particular job.[156] 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.[157]

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 on a test (or other selection procedure) for any group cannot be less than four-fifths of the pass rate for 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 numbers.[158] Because the Uniform Guidelines provide a simpler method of determining disparate impact than does *Hazelwood*, they provide a useful starting point 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."[159] 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."[160] Although this provision requires proof of both job relationship and business necessity, it qualifies the latter

156. *Teal*, 457 U.S. at 452; 29 C.F.R. § 1607.4C (2010).
157. 29 C.F.R. § 1607.4C (2010).
158. *Id.* § 1607.4D.
159. § 701(m), 42 U.S.C. § 2000e(m) (2006).
160. § 703(k)(1)(A)(i), 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).

phrase by requiring proof only that the disputed practice is "consistent with business necessity," not that it is "required by business necessity."[161] 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*.[162] Presumably Congress meant to reject the opinion of Justice O'Connor, writing for four justices in *Watson v. Fort Worth Bank & Trust*,[163] 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.

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.[164] 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."[165] 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

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161. *Id.*

162. 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 § 3(2) says the same thing in almost the same words.

163. 487 U.S. 977 (1988).

164. 29 C.F.R. § 1607.2B (2010).

165. *Id.* § 1607.5B.

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 data entry test for a clerical worker. Note, however, that such a test would not be "content valid" for a job with broader duties, such as a customer service representative, which would require more than simply entering data into a computer—i.e., taking phone calls, responding to complaints, or assisting customers. Note also that such a test is "content valid" for a purely clerical position 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 the chosen criterion.[166] 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 data entry 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.

166. *Id.* § 1607.14B(2), (5).

The requirements of criterion validation, however, are difficult and costly to satisfy. In many complicated jobs, the only appropriate criterion of good performance is an evaluation by a supervisor or some other expert with training and experience. Such evaluations are almost always discretionary and judgmental and therefore cannot easily be checked for uniformity and lack of bias.[167] Establishing a statistically significant correlation between the qualifications or test and good performance on the job is even more difficult and costly.[168] Consequently, some cases have applied the requirements for criterion validation with a degree of leniency not found in the Uniform Guidelines.[169]

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 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.[170] Since few such criteri-

167. *Id.* § 1607.14B(3), (4). *See also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 432–33 (1975).

168. Ricci v. DeStefano, 129 S. Ct. 2658, 2665 (2009) (validation study cost $100,000); 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).

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

170. 29 C.F.R. § 1607.15D(7) (2010).

on 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*,[171] 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.'"[172] 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 guidelines, it was hastily conceived and poorly executed, and it failed to yield statistically significant results.[173] Likewise, in *Dothard v. Rawlinson*,[174] 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*,[175] 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

171. 422 U.S. 405 (1975).
172. *Id.* at 431 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 433–34 (1971)).
173. *Id.* at 431–36.
174. 433 U.S. 321 (1977).
175. 426 U.S. 229 (1976).

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.[176] 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."[177]

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*,[178] 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 showing that it served the employer's legitimate goals of safety and efficiency.[179]

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.[180] 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

176. *Id.* at 250–52.
177. *Id.* at 250–51.
178. 440 U.S. 568 (1979).
179. *Id.* at 587 & n.31.
180. *Id.* at 584–87.

the force of law.[181] The Supreme Court also summarily affirmed the decision of a three-judge district court that relied on similar reasoning.[182] The cases that have addressed these issues after the Civil Rights Act of 1991 have applied the guidelines in the same flexible way.[183] 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.[184] 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 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 its source in the statutory language and on its relationship to affirmative action. The former issue was settled by the Act, which codified the theory of disparate impact, but the latter issue was left open. The Act was initially opposed for fostering "quotas,"[185] leading 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.[186] 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

181. 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).

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

183. 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).

184. Lanning v. Se. 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).

185. *See supra* note 33.

186. § 701(*l*), 42 U.S.C. § 2000e-2(*l*) (2006).

in accordance with the law."[187] 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.[188] Any such requirement would be inconsistent with § 703(j) of Title VII, which provides that "[n]othing contained in this title shall be interpreted to require" any form of affirmative action.[189] 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 disparate 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 was strongly endorsed by the Supreme Court in *United Steelworkers v. Weber*,[190] 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.

All of these issues figured prominently in *Ricci v. DeStefano*,[191] a case concerned with the promotion of firefighters to the position of lieutenant and captain in the New Haven fire department. The city administered two tests that resulted in no blacks and only two Hispanics receiving scores high enough to become eligible for promotion under the applicable civil service rules. After a series of contentious hearings, the city decided to discard the test results and to start the promotion process over again. Its principal concern was to avoid liability under the theory of disparate impact to the blacks and Hispanics who had failed the test. Seventeen whites and one Hispanic who passed then sued, claiming vio-

187. Pub. L. No. 102-166, § 116, 105 Stat. 1071 (1991).
188. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 652 (1989).
189. § 703(j), 42 U.S.C. § 2000e-2(j) (2006).
190. 443 U.S. 193 (1979).
191. 129 S. Ct. 2658 (2009).

lations of Title VII and the Constitution. The Supreme Court, without reaching any of the constitutional issues, held the city liable for intentional discrimination under Title VII because it had made a decision based on race in rejecting the test results solely because of their adverse impact. The Court recognized a defense to this claim of intentional discrimination, but only if the city had a "strong basis in evidence" for concluding that it would have been held liable under the theory of disparate impact to minority employees if it had acted upon the test results.[192] The city failed to make out such a showing because, according to the Court, it failed to establish the absence of a business justification for the tests. On the available evidence, the Court found "no genuine dispute that the examinations were job-related and consistent with business necessity."[193] Summary judgment accordingly was entered for the plaintiffs.

The dissenting opinion disputed the evidence on the job relationship of the tests, pointing out that paper-and-pencil tests like those administered by the city were unreliable measures of the leadership skills necessary in the positions of lieutenant and captain.[194] The larger significance of the case concerned what the employer had to prove to establish the absence of a defense to a claim of disparate impact. The Court derived its standard of a "strong basis in evidence" from opinions on the constitutionality of affirmative action, not those on affirmative action under Title VII,[195] and used it to balance two conflicting concerns: one to give employers leeway to comply with Title VII and the requirements of the theory of disparate impact, and another to avoid any form of coerced affirmative action. It was this second concern that returned to the reasoning in *Wards Cove* and earlier cases. According to the Court, a standard that required only minimal proof "would amount to a *de facto* quota system, in which a 'focus on statistics … could put undue pressure on employers to adopt inappropriate prophylactic measures.'"[196] This reasoning works to the disadvantage of employers, like the city of New Haven, who discard test results for fear of disparate impact liability. But by contrast, it

192. *Id.* at 2676.

193. *Id.* at 2678.

194. *Id.* at 2703-07 (Ginsburg, J., dissenting).

195. *Id.* at 2675 (relying upon Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989), and Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986) (plurality opinion)).

196. *Id.* (quoting Watson v. Ft. Worth Bank & Trust, 487 U.S. 977, 992 (1988) (plurality opinion)).

also works to the advantage of employers faced with actual claims of disparate impact. If the employer's burden of proof is higher to show the *absence* of a business justification in cases like *Ricci*, it must necessarily be lower to show the *presence* of such a justification in response to a disparate impact claim. The opinion in *Ricci* also has implications for affirmative action (discussed in the next section), but the Court was careful to limit its decision to cases in which an employer had already settled on a test or selection procedure. The Court distinguished cases in which an employer was initially choosing a test or designing a selection procedure.[197]

Whatever doubts the Court has about 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 validation[198] and that an employer's affirmative action policies shall be taken into account in determining disparate impact.[199] The guidelines also contain a policy statement on affirmative action approving the use of affirmative action plans,[200] and the EEOC has adopted separate guidelines on affirmative action providing for approval of such plans by the commission.[201] All of these guidelines must now be qualified in light of the prohibition against group norming of test scores enacted by the Civil Rights Act of 1991[202] and by subsequent decisions such as *Ricci*.

197. *Id.* at 2676-77. In an interesting sequel to *Ricci*, the Second Circuit allowed a disparate impact claim to go forward by a nonwhite firefighter who failed the promotion test. Briscoe v. City of New Haven, 654 F.3d 200 (2d Cir. 2011). The court reached this conclusion despite the passage in *Ricci* that contemplated the possibility of such a claim: "If, after it certifies the test results, the City faces a disparate-impact suit, then in light of our holding today it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability." *Ricci,* 129 S. Ct. at 2681. A petition for certiorari has not, as of this writing, been filed in this case.

198. 29 C.F.R. § 1607.6A (2010).

199. *Id.* § 1607.4E.

200. *Id.* § 1607.17.

201. Affirmative Action Appropriate under Title VII of the Civil Rights Act of 1964 (codified as amended at 29 C.F.R. pt. 1608 (2010)).

202. § 703(*l*), 42 U.S.C. § 2000e-2(*l*) (2006).

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 itself, 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;[203] second, general procedural restrictions on collateral attack on injunctions and consent decrees, mainly designed to protect judicially ordered or judicially approved affirmative action plans;[204] and third, the uncodified disclaimer that nothing in the Act's amendments to Title VII affects existing affirmative action plans.[205] The first provision concerns tests and is discussed in the preceding section;[206] the second concerns procedures for enforcing Title VII and is taken up in the section on preclusion.[207] 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,[208] 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 § 703(j) both limits and defines the prohibitions in Title VII against discrimination.

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203. *Id.*
204. § 702(n), 42 U.S.C. § 2000e-2(n) (2006).
205. Pub. L. No. 102-166, § 116, 105 Stat. 1071, 1079 (1991).
206. *See supra* text accompanying notes 182–91.
207. *See infra* text accompanying notes 645–53.
208. § 703(i), 42 U.S.C. § 2000e-2(i) (2006).

Section 703(j) states that "[n]othing contained in this title shall be interpreted to require" preferential treatment of any individual or group on the basis of race, national origin, sex, or religion.[209] In addition to the questions raised by the theory of disparate impact, discussed earlier, two questions have arisen about the language of § 703(j): first, whether "require" should be read as "require or permit," thus making § 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 Supreme Court resolved the first question in favor of a literal interpretation of the word "require." Title VII does not prohibit preferential treatment voluntarily undertaken by an employer. The Supreme Court resolved the second question in favor of a nonliteral 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*,[210] 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.[211] Because the Court found no government involvement in the preference, it avoided any constitutional question about government power to establish or require preferences in employment.[212] The Court's holding was limited to Title VII and to wholly voluntary private preferences—in particular, those "designed to break down old patterns of racial segregation and hierarchy," and that did

209. § 703(j), 42 U.S.C. § 2000e-2(j) (2006).

210. 443 U.S. 193 (1979).

211. *Id.* at 201. The dissent, however, found a degree of government coercion based on evidence that the plan was adopted to preserve the employer's eligibility to obtain federal contracts. *Id.* at 222–23 (Rehnquist, J., dissenting).

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

"not unnecessarily trammel the interests of the white employees."[213] 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.[214] 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.[215]

In *Johnson v. Transportation Agency*,[216] the Supreme Court upheld a preference in favor of women on much the same grounds. The case involved a public employer, but it, too, was decided entirely under Title VII.[217] Over two bitter dissents,[218] 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.[219] Justice O'Connor, in a separate opinion, would have taken this reasoning a 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.[220] 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.[221]

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 on its facts to *Weber* is *Local No.*

213. *Id.* at 208.

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

215. *Id.* at 208.

216. 480 U.S. 616 (1987).

217. The plaintiff failed to assert any claim under the Constitution. *Id.* at 620 n.2.

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

219. *Id.* at 636–37.

220. *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.

221. *Id.* at 636.

93, International Association of Firefighters v. City of Cleveland,[222] which upheld 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.[223] 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.[224]

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*,[225] 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 district court enjoined any layoffs that would reduce the proportion of blacks employed by the fire department. The Court found no basis for this order in the consent decree, emphasizing the importance of union participation in matters affecting seniority, and relying on the exception for seniority systems in § 703(h).[226] In the most controversial part of its opinion, the Court discussed more general limits on judicial remedies under § 706(g), suggesting that it restricted compensatory relief, or any form of individual benefits, only to victims

222. 478 U.S. 501 (1986).
223. *Id.* at 516.
224. *Id.* at 530–31.
225. 467 U.S. 561 (1984).
226. *Id.* at 574–75; § 703(h), 42 U.S.C. § 2000e-2(h) (2006).

of discrimination.[227] It relied on statements by prominent supporters of Title VII interpreting § 706(g) as a limit on "racial quotas."[228]

Nevertheless, in subsequent cases the Court has refused to take these statements literally. In *Local 28, Sheet Metal Workers' International Association v. EEOC*,[229] 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,[230] interpreting the membership goal with a degree of flexibility, so that it did not cause white employees to lose their jobs if its schedule for admissions was not met.[231]
For a plurality of four justices, Justice Brennan identified several 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 nondiscriminatory hiring or promotion procedures."[232] 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.[233]

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227. § 706(g)(2)(A), 42 U.S.C. § 2000e-5(g)(2)(A) (2006).

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

229. 478 U.S. 421 (1986).

230. Justice Brennan wrote for a plurality of four justices, and Justice Powell wrote a separate opinion concurring in part and concurring in the judgment. Powell joined the opinion of 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.).

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

232. *Id.* at 448–50 (opinion of Brennan, J.).

233. *Id.* at 475–76 & n.48.

Adding the necessary fifth vote to form a majority, Justice Powell agreed with the need for preferences only in "cases involving particularly egregious conduct."[234]

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 cryptically, 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."[235] 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."[236] It is doubtful that this provision goes any further than preserving existing decisions on affirmative action, neither ratifying nor undermining their force as precedents.[237]

Any change is more likely to come from the Supreme Court itself, as in *Ricci v. DeStefano*.[238] As noted in the previous section, this decision directly concerned the relationship between claims of disparate treatment and disparate impact. The Court held that an employer had engaged in intentional discrimination in violation of Title VII when it discarded the results of two promotion tests solely because of their adverse impact on blacks and Hispanics. The decision to discard the test results amounted to intentional discrimination on the basis of race and the employer failed to make out a defense that it would otherwise have been held liable under the theory of disparate impact. The connection to affirmative action was hardly addressed in the opinion, but it is apparent from the common concern of both the theory of disparate and affirmative action with groups. Both focus on the numbers of each group in the employer's work force, not on the treatment of individual employees.

The immediate significance of the opinion lies as much in what it doesn't say as what it does. The Court takes the standard for considering race in these circumstances from constitutional decisions on affirmative action, not those under Title VII. The employer had to have a "strong

234. *Id.* at 483 (Powell, J., concurring in part and concurring in judgment).
235. Pub. L. No. 102-166, § 116, 105 Stat. 1071, 1079 (1991).
236. § 703(m), 42 U.S.C. § 2000e-2(m) (2006).
237. Officers for Justice v. Civil Serv. Comm'n, 979 F.2d 721, 725 (9th Cir. 1992).
238. 129 S. Ct. 2658 (2009).

basis in evidence of an impermissible disparate impact" in order to justify discarding the test results.[239] This standard is not taken from any of the Title VII cases, such as *Weber* or *Johnson*, which impose a markedly more lenient standard for permissible affirmative action: that it is necessary to remedy "old patterns of segregation and hierarchy" and it does not "unnecessarily trammel the interests of the white employees."[240] Under *Weber* and *Johnson*, in contrast to *Ricci*, the employer need not show a substantial threat of liability under the theory of disparate impact.[241] It remains to be determined how these variant standards will be reconciled.

Constitutional Issues

Sheet Metal Workers[242] 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.[243] 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.[244] 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*,[245] a case alleging long-standing racial discrimination by the Alabama state troopers in hiring and promotions.[246]

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239. *Id.* at 2677.

240. United Steelworkers v. Weber, 443 U.S. 193, 208 (1979); Johnson v. Transp. Agency, 480 U.S. 616, 629–30 (1987).

241. *Weber*, 443 U.S. at 212 (Blackmun, J., concurring); *Johnson*, 480 U.S. at 632–33 & n. 10.

242. 478 U.S. 421 (1986).

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

244. *Id.* at 485–89.

245. 480 U.S. 149 (1987).

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

The Court addressed the constitutional question more thoroughly in *Wygant v. Jackson Board of Education*,[247] 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, again by a divided vote and in separate opinions, held that it did, basing the decision on two different reasons: (1) the preference was not based on evidence of past employment discrimination by the school district;[248] and (2) it was not narrowly tailored to remedy past discrimination because it imposed too great a burden upon laid-off white employees.[249] 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.*,[250] 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.[251] That case held unconstitutional a local ordinance setting aside a fixed proportion of government contracts for minority-owned businesses. The same princi-

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

247. 476 U.S. 267 (1986).

248. *Wygant*, 476 U.S. at 274–76 (opinion of Powell, J.); *id.* at 294 (O'Connor, J., concurring in part and concurring in judgment).

249. *Id.* at 279–84 (opinion of Powell, J.); *id.* at 294–95 (White, J., concurring in judgment).

250. 488 U.S. 469 (1989).

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

ples were extended to federal statutes creating similar preferences in *Adarand Constructors, Inc. v. Pena*,[252] although only after prior decisions had reached contrary results.[253] All racial classifications by government—whether federal, state, or local—must meet the same standard of "strict scrutiny" under the Constitution.[254]

Nevertheless, the requirements of strict scrutiny can sometimes be satisfied, as illustrated by *Grutter v. Bollinger*.[255] That case upheld 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. In a subsequent decision,[257] involving local school districts, the Court took a harder look at race-based student assignments and found the justification for this form of affirmative action to be wanting.

One form of affirmative action, however, stands on an entirely different constitutional footing. In *Morton v. Mancari*,[258] the Supreme Court held that a preference for employment of Native Americans in the Bureau of Indian Affairs (BIA) violated neither Title VII nor the Fifth Amendment. The Court reasoned that Title VII was not intended to dis-

252. 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 judgment).

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

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

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

256. *Id.* at 335.

257. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 718–37 (2007).

258. 417 U.S. 535 (1974).

turb the long-standing federal policy of preferential employment of Native Americans in the BIA[259] because the statute explicitly authorized a separate preference for Native Americans on or near Indian reservations.[260] 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 needs of its constituent groups."[261] Although the Court characterized the preference as one not involving race, it only applied to persons of "one-fourth or more degree Indian blood."[262] 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.[263] 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[264] 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."[265] 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.[266] Any finding of disparate impact, disparate treatment, or uncorrected effects of prior

259. *Id.* at 541–45.

260. § 703(i), 42 U.S.C. § 2000e-2(i) (2006). Congress also exempted Native American tribes from the coverage of the statute. § 701(b)(1), 42 U.S.C. § 2000e(b)(1) (2006).

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

262. *Id.* at 553 n.24.

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

264. 29 C.F.R. pt. 1608 (2010).

265. *Id.* § 1608.4.

266. *Id.* § 1608.4(a).

discrimination constitutes a reasonable basis for a preference, but no admission of any violation of Title VII is necessary.[267] The preference, in turn, must be a reasonable means of remedying the problems revealed by the self-analysis.[268] Affirmative action plans that comply with these requirements and that are dated and in writing constitute a complete defense to claims of reverse discrimination (typically, claims by white males that they are the victims of discrimination in favor of minorities or women).[269] However, they do not provide any defense to claims of discrimination by minorities or women that they have been the victims of traditional forms of discrimination. 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.[270]

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.[271] By its own regulations, the EEOC has defined the written interpretations or opinions that give rise to a defense under § 713(b),[272] and the Guidelines on Affirmative Action explicitly declare themselves to be such a written interpretation or opinion.[273] Nevertheless, the binding effect of the guidelines is limited by § 713(a), which authorizes the EEOC to issue only procedural regulations.[274] In *Local No. 93, International Association of Firefighters v. City of Cleveland*,[275] the Supreme Court recognized the limited effect of 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 § 713(b). Instead, the Court said that the guidelines were

267. *Id.* § 1608.4(b).
268. *Id.* § 1608.4(c).
269. *Id.* §§ 1608.4(d), 1608.10(b).
270. *Id.* §§ 1608.4–.9.
271. § 713(b), 42 U.S.C. § 2000e-12(b)(1) (2006).
272. 29 C.F.R. § 1601.93 (2010).
273. *Id.* § 1608.2.
274. § 713(a), 42 U.S.C. § 2000e-12(a) (2006).
275. 478 U.S. 501 (1986).

entitled to some deference as a source of experience and informed judgment but that they "do not have the force of law."[276]

Seniority Systems

An important exception to the prohibition against discrimination in Title VII is the seniority clause of § 703(h). Section 703(h) 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."[277] 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, excluding from its protection seniority systems limited to particular departments or to skilled positions.[278] However, in *International Brotherhood of Teamsters v. United States*,[279] 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."[280] 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 not[281] and to a seniority system that was established after the effective date of Title VII.[282] In both cases, the Court followed its reasoning in *Teamsters* that the exception applied to all forms of seniority systems.

The Court 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

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276. *Id.* at 517.

277. § 703(h), 42 U.S.C. § 2000e-2(h) (2006).

278. 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).

279. 431 U.S. 324 (1977).

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

281. California Brewers Ass'n v. Bryant, 444 U.S. 598 (1980).

282. Am. Tobacco Co. v. Patterson, 456 U.S. 63 (1982).

clearly erroneous;[283] but apart from the suggestion in *Teamsters* that a seniority system was illegal if it had its "'genesis in racial discrimination,'"[284] 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.[285]

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*,[286] 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,[287] this holding applies to discrete discriminatory acts, such 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: when the seniority system was adopted, when it was applied to the plaintiff, or when the plaintiff was injured by its application.[288] The Civil Rights Act of 1991

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

284. *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)).

285. 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).

286. 431 U.S. 553 (1977).

287. *See infra* text accompanying notes 463–67.

288. § 706(e)(2), 42 U.S.C. § 2000e-5(e)(2) (2006).

added this provision to liberalize the limitation period for these claims and to overrule a more restrictive decision of the Supreme Court.[289]

On the issue of remedies, *Franks v. Bowman Transportation Co*.[290] held that § 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.'"[291] Section 703(h) does not limit the broad grant of remedial authority in § 706(g), because it imposes a limit only on the prohibitions against discrimination in §§ 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 enterprise."[292] 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

289. *See infra* notes 473–74 and accompanying text.
290. 424 U.S. 747 (1976).
291. *Id.* at 771 (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975)).
292. § 703(e)(1), 42 U.S.C. § 2000e-2(e)(1) (2006).

the other held that it did not. In the first case, *Dothard v. Rawlinson*,[293] 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.[294] The danger of sexual assault would have threatened the general security of the prisons by undermining control over the prison population.[295] 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'"[296] 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.'"[297] 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"[298] and that "it is impermissible under Title VII to refuse to hire an individual woman or man on the basis of stereotyped characterizations of the sexes."[299] Some lower courts have upheld the exclusion of guards of one sex from watching inmates of the opposite sex by deferring to prison officials in their evaluation of the available evidence,[300] while others have required proof that there was no other way to protect the privacy or security of inmates.[301]

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293. 433 U.S. 321 (1977).

294. 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).

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

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

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

298. *Id.* at 334.

299. *Id.* at 333.

300. Everson v. Michigan Dep't of Corr., 391 F.3d 737, 750 (6th Cir. 2004) (deferring to prison authorities based on evidence of need); Torres v. Wisconsin Dep't of

In its second decision, *International Union v. Johnson Controls, Inc.*,[302] the Supreme Court held that the BFOQ did not allow 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] For the Court, the safety of the fetus raised 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 said: "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 nevertheless do not detract from its general significance as a precedent. The case reinforces the point that the BFOQ exception is "extremely narrow," even if its exact scope remains uncertain. The standards 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." 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

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Health & Social Servs., 859 F.2d 1523, 1532 (7th Cir. 1988) (en banc), *cert. denied*, 489 U.S. 1017, 1082 (1989) (reversing and remanding for reevaluation of evidence, giving appropriate weight to judgment of prison officials).

301. *E.g.*, Forts v. Ward, 621 F.2d 1210, 1215–17 (2d Cir. 1980); United States v. Gregory, 818 F.2d 1114, 1117–18 (4th Cir.), *cert. denied*, 484 U.S. 847 (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) (2006), whose language tracks the BFOQ under Title VII. *Id.* at 202–03.

305. § 701(k), 42 U.S.C. § 2000e(k) (2006).

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

ward or in a nursing home with mostly female patients.[307] 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.[308] 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.[309] 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.

A 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 issues,[310] the similarity ends there. The BFOQ exception provides a justification for occupational qualifications explicitly based on sex, national origin, or religion.[311] By contrast, the defendant's burden of proof under the theory of disparate impact applies to neutral employment practices.

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307. *E.g.*, Fesel v. Masonic Home of Del., Inc., 447 F. Supp. 1346 (D. Del. 1978), *aff'd 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. Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084 (5th Cir. 1975).

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

310. Rosenfeld v. S. 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 §§ 701(m), 703(k)(1)(A)(i), 42 U.S.C. § 2000e(m), 2000e–2(k)(1)(A)(i) (2006).

311. 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.

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, unrebuttable presumption, namely that women in the later stages of pregnancy are physically unable to serve as teachers.[312] But in *Geduldig v. Aiello*,[313] 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 non-pregnant persons.[314] In two subsequent cases, the Court applied this reasoning to Title VII, holding that employers could exclude pregnancy from disability and sick leave plans.[315]

In response to these decisions, Congress enacted the Pregnancy Discrimination Act of 1978,[316] which overruled the Court's pregnancy decisions under Title VII. It did so by rejecting both the reasoning and 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."[317] 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."[318]

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 of little practical con-

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

313. 417 U.S. 484 (1974).

314. *Id.* at 496 n.20.

315. 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.

316. § 701(k), 42 U.S.C. § 2000e(k) (2006).

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

318. *Id.*

sequence, since most classifications on the basis of pregnancy by public employers are prohibited by the PDA.[319]

Second, are classifications on the basis of pregnancy subject to the BFOQ exception of § 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.[320] The scope of the BFOQ exception as applied to pregnancy remains difficult to determine, as *International Union v. Johnson Controls, Inc.*[321] illustrates. The Court held that women could be excluded from jobs based on actual or potential pregnancy only if the exclusion conformed both to the terms of the BFOQ exception and to the purposes of the PDA.

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 employees.[322] This point distinguishes the PDA from broader legislation that requires employers to grant leave to their employees for pregnancy and other family matters.[323] State laws that require pregnancy leave also have been upheld against arguments that they are preempted by Title VII.[324]

Comparable Worth

The question whether Title VII requires comparable pay for jobs of comparable worth concerns the relationship between Title VII and the Equal

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319. Since 1972, Title VII has covered public employers. §§ 701(b), (f), (h) and 701-17(a), 42 U.S.C. §§ 2000e(b), (f), (h), and 2000e-16(a) (2006).

320. *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).

321. 499 U.S. 187 (1991).

322. 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).

323. *E.g.*, The Family and Medical Leave Act, 29 U.S.C. §§ 2601–2654 (2006).

324. California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 285 (1987).

Pay Act and, specifically, the effect of the equal pay clause in § 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.[325] 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."[326] 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.

The Supreme Court addressed this problem in *County of Washington v. Gunther*.[327] 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 § 703(h),[328] 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.[329]

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325. § 703(h), 42 U.S.C. § 2000e-2(h) (2006).

326. 29 U.S.C. § 206(d)(1) (2006).

327. 452 U.S. 161 (1981).

328. § 703(h), 42 U.S.C. § 2000e-2(h) (2006).

329. *Gunther*, 452 U.S. at 170–71. This reasoning would be affected by legislation changing the scope of defense (iv) under the Equal Pay Act. *See infra* text accompanying notes 954-55.

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.[330]

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 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.[331] 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.[332]

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

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

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

332. AFSCME v. Washington, 770 F.2d 1401, 1405–08 (9th Cir. 1985) (Kennedy, J.); Loyd v. Phillips Bros., 25 F.3d 518, 525 (7th Cir. 1994).

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*,[333] 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.[334]

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.[335] 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.[336] Second, the Court allowed an employer to take into account the proportion of men and women in its workforce in computing unisex actuarial tables.[337] 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.[338]

Sexual Harassment

The decisions on sexual harassment raise two distinct but related issues: First, what constitutes sexual harassment? Second, when is the employer

333. 435 U.S. 702 (1978).

334. *Id.* at 712–13.

335. *Id.* at 717–18.

336. Arizona Governing Comm. v. Norris, 463 U.S. 1073, 1089 (1983) (per curiam); Florida v. Long, 487 U.S. 223, 238 (1988).

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

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

liable for it? In *Meritor Savings Bank v. Vinson*,[339] the Supreme Court addressed both issues but definitively resolved only the first. On that issue, 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 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[340] 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.

On the second issue, the *Meritor* decision was not conclusive. 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.[341] 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.[342] 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 can-

339. 477 U.S. 57 (1986).
340. *Id.* at 67 (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).
341. *Id.* at 71–72.
342. §§ 701(b), 703(a), 42 U.S.C. §§ 2000e(b), 2000e–2(a) (2006).

not be held personally liable at all under Title VII,[343] relying on provisions of the Civil Rights Act of 1991 that imposed limited liability for damages, depending upon the size of the employer.[344] 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 is liable under Title VII, although it remains possible that either or both may be liable under state law.[345]

The Supreme Court has resolved some of the disputes over liability of employers for sexual harassment. In *Burlington Industries, Inc. v. Ellerth*,[346] 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."[347] 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."[348] 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 estab-

343. *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).

344. 42 U.S.C. § 1981a (2006).

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

346. 524 U.S. 742 (1998).

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

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

lish the plaintiff's own failure to use reasonable care under the second element.[349]

In a companion case, *Faragher v. City of Boca Raton*,[350] the Court clarified the first element of the defense, holding that it had not been 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 its sexual harassment 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.

When the affirmative defense recognized in *Burlington Industries* and *Faragher* is not available, the employer might be exposed to either greater or lesser liability. 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

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349. 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).

350. 524 U.S. 775 (1998).

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."[351] 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 harassment. Somewhat paradoxically, inaction can be sufficient to create a "tangible employment action."[352]

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.[353] 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.[354]

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.[355] 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 con-

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

352. *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, 542 U.S. 129 (2004).

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

354. *Id.*

355. *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).

trast 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. The conduct must be subjectively "unwelcome" to the plaintiff, and in hostile environment cases, objectively "severe or pervasive." Only egregious conduct meets the latter requirement, but as the Court made clear in *Harris v. Forklift Systems, Inc.*,[356] the plaintiff need 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."[357] 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.[358]

The latter possibility was taken up in *Oncale v. Sundowner Offshore Services, Inc.*,[359] 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 atypical, Title VII does not distinguish between male and female employees, either as victims of sexual harassment or as perpetrators.[360] 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.[361] This reasoning has not been extended, however, to protect against harassment on the basis of sexual orienta-

356. 510 U.S. 17 (1993).

357. *Id.* at 22.

358. 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).

359. 523 U.S. 75 (1998).

360. *Id.* at 78–80.

361. *Id.* at 81.

tion.[362] Judicial efforts to achieve these results must take account of proposals to amend Title VII to prohibit discrimination on this ground, which have been actively considered in recent sessions of Congress.[363]

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*.[364] That case 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 inciden[t]' that cannot remotely be considered 'extremely serious' as our cases require."[365]

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

362. 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).

363. The Employment Non-Discrimination Act of 2009 (ENDA), H.R. 3017, 111th Cong., 1st Sess (2009).

364. 532 U.S. 268 (2001) (per curiam).

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

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.

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."[366] 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.[367]

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 discrimina-

366. § 703(e)(1), 42 U.S.C. § 2000e-2(e)(1) (1988); 110 Cong. Rec. 2550, 7271 (1964).

367. *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).

tion,[368] 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.[369] Few lower courts have followed up on this suggestion,[370] 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.*,[371] 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.[372] In other cases, however, disparate

368. *See supra* text accompanying notes 292-311.

369. 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 disparate impact on basis of race or national origin).

370. 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).

371. 414 U.S. 86 (1973).

372. *Id.* at 93.

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 of 1986 (IRCA).[373] 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 status as aliens. The prohibition, however, applied more broadly, to all "protected individuals," which includes citizens and several technically defined categories of aliens. Everyone in these groups is protected from discrimination on the basis of "citizenship status."[374] 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.[375] Both prohibitions apply only to employers who have at least four employees.[376]

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.[377] The courts of appeals 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 failed to show any adverse impact from restrictions on speaking a foreign lan-

373. 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. (2006)).

374. Immigration and Nationality Act §§ 274B(a)(1), 316(a), 8 U.S.C. §§ 1324b(a)(1), 1427(a) (2006).

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

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

377. 29 C.F.R. § 1606.7 (2010).

guage, usually Spanish, during working time.[378] 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.

Religious Discrimination

The prohibition in Title VII against discrimination on the basis of religion is subject to the BFOQ exception,[379] 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;[380] § 703(e)(2) creates a similar, and seemingly redundant, exception for religious schools;[381] and § 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."[382] 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 §§ 702 and 703(e)(2) do not, according to their literal terms, allow discrimination on other grounds. Nevertheless, the Supreme Court has recognized a constitutionally based exception for employment of ministers. In a case under the ADA, *Hosanna-Tabor Evan-*

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378. 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).

379. § 703(e)(1), 42 U.S.C. § 2000e-2(e)(1) (2006).

380. § 702, 42 U.S.C. § 2000e-1 (2006).

381. § 703(e)(2), 42 U.S.C. § 2000e-2(e)(2) (2006). Section 702 originally was restricted to employees working in religious activities, but § 703(e)(2) was not. In 1972, however, § 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 § 703(e)(2) for educational institutions largely redundant.

382. § 701(j), 42 U.S.C. § 2000e(j) (2006).

gelical Lutheran Church and School v. EEOC,[383] the Court held that the Religion Clauses of the First Amendment "bar the government from interfering with the decision of a religious group to fire one of its ministers."[384] The Court endorsed lower court decisions that had recognized a "ministerial exception" to laws against employment discrimination but declined "to adopt a rigid formula for deciding when an employee qualifies as a minister."[385] The employee in that case, Perich, was a teacher in a religious school who had been "called" to the ministry by a Lutheran church. She covered religious material in her teaching, but no more than a secular teacher would have in the same position. The Court found four factors decisive in identifying Perich as a minister: "the formal title given by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church."[386]

Similar questions, both statutory and constitutional, have arisen over the definition of "religion" in § 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, Inc. v. Hardison*.[387] It held that § 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.[388] 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.[389] In narrowly interpreting the duty to accommodate, the Court implied, although it did

383. 132 S. Ct. 694 (2012).

384. *Id.* at 702.

385. *Id.* at 707.

386. *Id.* at 708. Concurring opinions would have given greater scope to the exception by deferring "to a religious organization's good-faith understanding of who qualifies as its minister," *id.* at 710 (Thomas, J., concurring), or by applying the exception whenever an individual, regardless of title, "leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith." *Id.* at 712 (Alito, J., concurring).

387. 432 U.S. 63 (1977).

388. *Id.* at 84.

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

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 § 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.*,[390] 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 reasonable accommodation provision in § 701(j) from the state statute before the Court.[391]

Justice O'Connor's suggestion was confirmed by the brief but controversial history of the Religious Freedom Restoration Act of 1993 (RFRA).[392] The RFRA was intended to expand upon the constitutional protection of religious practices recognized by the Supreme Court, which required only strict neutrality toward religion.[393] The 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.[394] 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.[395] According to the Court, the 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

390. 472 U.S. 703 (1985).

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

392. 107 Stat. 1488, 42 U.S.C. §§ 2000bb to 2000bb-4 (2006).

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

394. 42 U.S.C. § 2000bb-1 (2006).

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

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, such as discipline or discharge, for invoking rights under the statute. Employers are prohibited from taking any action that deters or punishes any attempt to enforce rights under the statute. Section 704(a) protects employees and applicants in two separate ways: for having "opposed any practice made an unlawful employment 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."[396] 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. In general, the less disruptive the form of protest, the more likely it is to be protected. For instance, the Supreme Court has recently held that an employee's response to her employer's questions about alleged sexual harassment in the workplace constituted protected opposition.[397] The employee could not be disciplined or discharged because she spoke out about sexual harassment at the employer's request. By contrast, forms of protest that involve violence or destruction of property clearly are unprotected. Between these two extremes fall the traditional forms 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 to protest allegedly discriminatory practices was not protected by the NLRA because it was not authorized by the union that represented the employees involved.[398] Although the Court did not decide the question whether the

396. § 704(a), 42 U.S.C. § 2000e-3(a) (2006).

397. Crawford v. Metro. Gov't of Nashville & Davidson Cnty., 129 S. Ct. 846 (2009).

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

employees' conduct was protected under § 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. The implication, as some courts have held, is that protection for opposition through economic pressure is no more extensive under § 704(a) than under the corresponding provision of the NLRA.[400]

Unlike permissible means, the permissible ends under the opposition clause have been consistently interpreted in favor of protection. The protest need not be against an employment practice known to be unlawful. The person engaged in 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.

The participation clause poses few of the ambiguities of the opposition clause. Since Title VII is enforced almost entirely through administrative and judicial proceedings—rather than through employee self-help—the statute must protect employees' access to the remedial mechanisms that it has established. This clause has therefore been broadly construed to protect participation in state proceedings related to enforcement of Title VII,[402] and 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.

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399. *Id.* at 70–73.

400. National Labor Relations Act § 7, 29 U.S.C. § 157 (2006). *See, e.g.,* Hochstadt v. Worcester Found. for Experimental Biology, 545 F.2d 222 (1st Cir. 1976).

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. Am. Cast Iron Pipe Co., 411 F.2d 998, 1003–08 (5th Cir. 1969).

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

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 decision need not have adverse effects upon the plaintiff's conditions of employment but need only be "materially adverse to a reasonable employee or job applicant" and "harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination."[406] Harm to third parties by the employer also can support a claim for retaliation, as the Supreme Court held in *Thompson v. North American Stainless, LP*.[407] The plaintiff in that case, Thompson, was the fiancée of another employee, Regalado, who filed a charge of sex discrimination against the employer. Thompson alleged that he was fired in retaliation for Regalado's charge, and the Court held that this allegation was sufficient to bring him within the "zone of interests" protected by § 704(a).[408]

If the plaintiff establishes the causal connection between an adverse decision and protected activity, 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 pre-

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

406. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 57 (2006).

407. 131 S. Ct. 863 (2011).

408. *Id.* at 870. The trend toward expanding prohibitions against retaliation is also apparent in claims under other statutes. In Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325 (2011), the Court held that an oral complaint of illegal activity was sufficient to trigger the (particular) prohibition against retaliation under the Fair Labor Standards Act. That prohibition extended to any employee who "has filed any complaint" of illegal activity under the act, 29 U.S.C. § 215(a)(3), but the Court held that an oral complaint was the functional equivalent, a position supported by agencies that administer the act. No similar issue arises under Title VII because § 704(a) does not use the word "filed." It is sufficient if the plaintiff "opposed" an unlawful employment practice or "participated" in enforcement proceedings.

text for retaliation.[409] As in individual claims of disparate treatment, the burden of persuasion remains entirely on the plaintiff.[410]

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."[411] 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.[412] Because it regulates the press, § 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.[413]

Section 704(b) does raise a difficult issue of standing, however. The individuals harmed by advertising in violation of § 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 nonapplicants—

409. Jalil v. Avdel Corp., 873 F.2d 701, 706 (3d Cir. 1989), *cert. denied*, 493 U.S. 1023 (1990); Taitt v. Chem. 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).

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

411. 42 U.S.C. § 1981a(b)(1) (2006).

412. § 704(b), 42 U.S.C. § 2000e-3(b) (2006).

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

appear to have standing to assert claims under § 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 advertising 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 employees.[414] 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.[415] 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.[416]

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.[417] This issue has been most frequently litigated in sexual harass-

414. § 701(b)–(e), 42 U.S.C. § 2000e(b)–(e) (2006).

415. § 701(a)–(b), 42 U.S.C. § 2000e(a)–(b) (2006).

416. § 717(a), 42 U.S.C. § 2000e-16(a) (2006). 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 (2006). 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.

417. *E.g.,* Albra v. Advan, Inc., 490 F.3d 826, 830 (11th Cir. 2007); Powell v. Yellow Book USA, Inc., 445 F.3d 1074, 1079 (8th Cir. 2006); Tomka v. Seiler Corp., 66 F.3d 1295 (2d Cir. 1995); Williams v. Banning, 72 F.3d 552, 555 (7th Cir. 1995); Miller v. Maxwell's Int'l Inc., 991 F.2d 583 (9th Cir. 1993), *cert. denied*, 510 U.S. 1109 (1994).

ment cases, in which the plaintiff has sued both the employer and a supervisor who has allegedly engaged in harassment.[418]

There is much routine litigation over the question whether an employer has fifteen or more employees,[419] and this question, like all questions of coverage, goes to the merits of the plaintiff's claim, not the subject-matter jurisdiction of the court.[420] Two questions of general significance have also arisen with some frequency: 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 firm[421] and pension benefits.[422] The question of coverage of employees working overseas was first resolved by the Supreme Court against coverage,[423] 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.[424] This extension of coverage is subject to a defense that compliance with Title VII would violate the law of the country of employment.[425]

418. *E.g.,* Lissau v. S. Food Serv., 159 F.3d 177, 181 (4th Cir. 1998); 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).

419. 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. All employees who meet this test are counted over the relevant period, whether or not they are actually working on the days in question. Walters v. Metro. Educ. Enters., Inc., 519 U.S. 202 (1997).

420. Arbaugh v. Y & H Corp., 546 U.S. 500 (2006).

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

422. 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).

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

424. §§ 701(f), 702(c), 42 U.S.C. §§ 2000e(f), 2000e–1(c) (2006).

425. § 702(b), 42 U.S.C. § 2000e-1(b) (2006).

II. Procedures and Remedies in 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.[426] An EEOC regulation contains an authoritative list of states and localities with appropriate agencies.[427] The EEOC must give "substantial weight" to the findings of state and local agencies,[428] but the courts are not bound by any administrative findings, whether by state or local agencies or by the EEOC.[429] Federal courts, however, are bound by the decisions of state courts reviewing state or local administrative agencies.[430]

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.[431] 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 Attorney General for a decision whether to sue.[432] If conciliation does not result in a settlement satisfacto-

426. § 706(c), (d), 42 U.S.C. § 2000e-5(c), (d) (2006); 29 C.F.R. § 1601.70 (2010).

427. 29 C.F.R. § 1601.74 (2010).

428. § 706(b), 42 U.S.C. § 2000e-5(b) (2006).

429. Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 106 (1991); Univ. 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. *Univ. of Tenn.*, 478 U.S. at 796–99.

430. Kremer v. Chem. Constr. Corp., 456 U.S. 461 (1982).

431. § 717(b), 42 U.S.C. § 2000e-16 (2006); 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.

432. § 706(f), 42 U.S.C. § 2000e-5(f) (2006); U.S. EEOC v. Ill. State Tollway Auth., 800 F.2d 656 (7th Cir. 1986).

ry 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.[433] 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.[434]

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.[435] 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.[436] 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.[437]

In *Love v. Pullman Co.*,[438] 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 within its own proceedings.[439] In *Mohasco Corp. v. Silver*,[440] the Court examined the

433. § 706(b), (e), (g), 42 U.S.C. § 2000e-5(b), (e), (g) (2006).
434. Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820 (1990).
435. § 706(e), 42 U.S.C. § 2000e-5(e)(1) (2006).
436. *Id.*
437. § 706(c), (d), 42 U.S.C. § 2000e-5(c), (d) (2006).
438. 404 U.S. 522 (1972).
439. 29 C.F.R. § 1601.13 (2010).
440. 447 U.S. 807 (1980).

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.[441] 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 can occur, for instance, if the state or local agency dismisses the charge. Termination ends the deferral period and, under EEOC regulations, automatically reactivates the charge with the EEOC before the expiration of the 300-day limitation.[442]

The problem with *Mohasco's* "240-day maybe" rule is that a 240-day limitation appears nowhere in the statute. The rule is thus 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.[443] The chief 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 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.[444]

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441. *Id.* at 815–817; 29 C.F.R. § 1601.13 (2010).

442. § 706(c), (d), 42 U.S.C. § 2000e-5(c), (d) (2006); 29 C.F.R. § 1601.13(a)(3)(ii) (2010).

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

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

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, as it has in many states. Such agreements are expressly authorized by § 709(b)[445] and typically provide for waiver of jurisdiction of the state or local agency if 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.*,[446] 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 § 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*,[447] 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."[448] Relying extensively on the legislative history of Title VII, 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.[449] Although most of the appellate

445. § 709(b), 42 U.S.C. § 2000e-8(b) (2006); *see also* § 705(g)(1), 42 U.S.C. § 2000e-4(g)(1) (2006).

446. 486 U.S. 107 (1988).

447. 441 U.S. 750 (1979).

448. Age Discrimination in Employment Act, 29 U.S.C. § 633(b) (2006). The corresponding provision in Title VII is § 706(c), 42 U.S.C. § 2000e-5(c) (2006).

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

courts to consider the issue have applied this reasoning to Title VII claims, some district 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.[450]

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,"[451] 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*.[452] Charges usually are filed on a form supplied by the EEOC, but it is not necessary to do so. The Supreme Court has upheld the sufficiency of an intake questionnaire filed with the EEOC, along with supporting affidavits. The documents filed need only identify the parties involved and be "reasonably construed as a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and the employee."[453]

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.[454] 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.[455] 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).[456]

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

451. § 706(b), 42 U.S.C. § 2000e-5(b) (2006).

452. 535 U.S. 106, 118–19 (2002).

453. Fed. Express Corp. v. Holowecki, 552 U.S. 389, 402 (2008).

454. § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1) (2006).

455. Baldwin Cnty. Welcome Ctr. v. Brown, 466 U.S. 147 (1984).

456. Judkins v. Beech Aircraft Corp., 745 F.2d 1330 (11th Cir. 1984). The requirements for pleading must nevertheless show a plausible basis for establishing discrimination. Aschcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009); Coleman v. Maryland Court of Appeals, 626 F.3d 187 (4th Cir. 2010) (complaint dismissed because of conclusory allegations of racial discrimination).

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.[457]

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 § 1981,[458] or during resort to grievance and arbitration procedures under a collective bargaining agreement.[459] 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,[460] and that they are tolled during the pendency of a class action.[461] 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.[462] The implications of this decision for employment decisions other than tenure are uncertain.

The Supreme Court's most important decision interpreting the limitations under Title VII concerns the theory of continuing violations. In *United Air Lines, Inc. v. Evans*,[463] 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 § 703(h),[464] 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 evi-

457. Occidental Life Ins. Co. v. EEOC, 432 U.S. 355 (1977).
458. *See* Johnson v. Ry. Express Agency, 421 U.S. 454 (1975).
459. Elec. Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976).
460. Zipes v. Trans World Airlines, 455 U.S. 385 (1982).
461. Crown, Cork & Seal Co. v. Parker, 462 U.S. 345 (1983).
462. Delaware State Coll. v. Ricks, 449 U.S. 250 (1980).
463. 431 U.S. 553 (1977).
464. *See supra* text accompanying notes 277–82.

> dence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.[465]

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[466] 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.[467]

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*.[468] These types of 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.[469] By contrast, "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges."[470]

Further support for the theory of continuing violations can be derived from the limitation in § 706(g) on awards of back pay to two years prior to the filing of a charge with the EEOC.[471] 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 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 § 706(g) to protect defendants from excessive awards of back pay under the theory of continuing violations,[472] 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

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

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

467. *See* Lewis v. City of Chicago, 130 S. Ct. 2191, 2199 (2010).

468. 536 U.S. 101, 122 (2002).

469. *Id.* at 115.

470. *Id.* at 102.

471. § 706(g)(1), 42 U.S.C. § 2000e-5(g)(1) (2006).

472. 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).

the theory of continuing violations before *Evans* was interpreted as congressional ratification of the theory after *Evans*.

As applied to claims of discrimination in pay and in seniority systems, the theory of continuing violations has had an uneven reception, eventually resulting in its adoption by Congress. The process began with a restrictive decision of the Supreme Court that started the limitation running when the seniority system was adopted or changed, effectively barring most claims against the system under Title VII.[473] This decision was then superseded by the Civil Rights Act of 1991, which applied the statute of limitations far more liberally. 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.[474]

The course of decisions on claims of pay discrimination was similar but more complicated. In *Bazemore v. Friday*,[475] the Supreme Court held that perpetuation of discriminatory salary differences originating before the effective date of Title VII could be the subject of a timely charge, since the discrimination was renewed every time the plaintiffs were paid.[476] This decision did not quite answer the question whether pay constituted a continuing violation, and *National Railroad Passenger Corp. v. Morgan* stated, in dictum, that pay claims involved discrete acts rather a continuing violation.[477] This dictum then became a holding in *Ledbetter v. Goodyear Tire & Rubber Co.*,[478] requiring the plaintiff to show both lower pay and a discriminatory decision by the employer within the limitation period. That decision was then superseded by Congress in the Lilly Ledbetter Fair Pay Act of 2009.[479] This legislation adopted the same liberal approach for claims of pay discrimination as for claims against sen-

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

474. § 706(e)(2), 42 U.S.C. § 2000e-5(e)(2) (2006).

475. 478 U.S. 385 (1986).

476. *Id.* at 385–97.

477. 526 U.S. at 111–12.

478. 550 U.S. 618 (2007).

479. Pub. L. No. 111-2, 123 Stat. 5, codified in Title VII at §§ 706(e)(3), 717(f), 42 U.S.C.A. §§ 2000e-5(e)(3), 16(f) (2010). The Act also made corresponding changes to the Age Discrimination in Employment Act, the Rehabilitation Act, and the Americans with Disabilities Act. Pub. L. No. 111-2 §§ 4, 5.

iority systems, starting the limitation period running from the latest of any of three dates, including "when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice."[480] Claims of pay discrimination can now be brought under Title VII upon a showing only of lower pay within the limitation period, even if the employer's discriminatory decision occurred long before.[481]

The Supreme Court has continued to recognize limits on the theory of continuing violations, most recently in *AT&T Corp. v. Hulteen*.[482] Like *Evans*, *Hulteen* involved the present effect of past discriminatory practices. The practice in question was the denial of pregnancy benefits before the effective date of the Pregnancy Discrimination Act. The denial was entirely permissible under prevailing precedent at the time, but it reduced the plaintiff's current pension benefits. The Court held that this effect was insulated from challenge under Title VII for several interrelated reasons: the Pregnancy Discrimination Act was not retroactive; pension benefits were determined according to a neutral seniority system under § 703(h); and the special limitation period for challenging the operation of a seniority system in § 703(e)(2) did not apply. The Lilly Ledbetter Fair Pay Act also was inapplicable because both the initial denial of pregnancy benefits and the seniority system were lawful, so that there was no initial, illegal decrease in compensation.[483]

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.[484] If these individuals have not agreed to a settlement of the charge and a pub-

480. § 706(e)(3)(A), 42 U.S.C.A. § 2000e-5(e)(3)(A) (2010).

481. *See, e.g.,* Miller v. Kempthorne, 357 Fed. Appx. 384, 386 (2d Cir. 2009); Mikula v. Allegheny Cnty., 583 F.3d 181, 184-85 (3d Cir. 2009).

482. 129 S. Ct. 1962 (2009).

483. By contrast, where these conditions were not met, the Lilly Ledbetter Fair Pay Act allowed a Title VII claim to proceed based on the effects of alleged reverse discrimination that occurred more than 300 days before a charge was filed. Groesch v. City of Springfield, 635 F.3d 1020, 1024-26 (7th Cir. 2011).

484. § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1) (2006).

lic 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 upon request.[485] 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 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.[486]

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.[487] A line of cases, originating in the Fifth Circuit, initially adopted a principle of liberal certification of Title VII class actions.[488] 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*,[489] 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. Fal-*

485. *Id.*

486. § 706(b), 42 U.S.C. § 2000e-5(b) (2006); EEOC v. Associated Dry Goods Corp., 449 U.S. 590 (1981).

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

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

489. 431 U.S. 395 (1977).

con,[490] 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 indispensable."[491] 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.[492]

The Civil Rights Act of 1991 further complicated the process of certifying Title VII class actions by adding damages as a remedy routinely available to victims of employment discrimination.[493] 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 and that common questions predominate over those applicable only to individuals.[494] 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.[495] None of these requirements apply to class actions under Rule 23(b)(2), under which most Title VII class actions were certified before 1991.[496]

The Supreme Court eventually resolved the question of certification under subdivision (b)(2) or subdivision (b)(3) in *Wal-Mart Stores, Inc. v.*

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490. 457 U.S. 147 (1982).

491. *Rodriguez*, 431 U.S. at 405. This statement was quoted in part in *Falcon*, 457 U.S. at 157.

492. *Falcon*, 457 U.S. at 157–60 & n.15. A similar possibility led to the Court's later decision in *Bazemore v. Friday*, 478 U.S. 385 (1986), which affirmed the denial of class certification in some respects, but not others, based on geographical differences in conditions of employment. The Court reached a similar conclusion in *Cooper v. Federal Reserve Bank*, 467 U.S. 867 (1984), but it did so in a manner favorable to individual plaintiffs. The Court held that the judgment in a class action which dismissed claims of a pattern or practice of discrimination in promotions did not preclude subsequent individual claims by class members.

493. 42 U.S.C. § 1981a(a)(1) (2006).

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

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

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

Dukes.[497] That case involved a class of 1.5 million women who allegedly had been the victims of sex discrimination in pay and promotions at Wal-Mart's stores throughout the United States. In a unanimous ruling, the Supreme Court held that a class action could not be certified under (b)(2) because the plaintiffs' claims for back pay were more than "incidental" to their claims for injunctive and declaratory relief.[498] Individualized claims for monetary relief, the Court held, triggered the added requirements under (b)(3). These requirements could not be avoided for any of the reasons asserted by the plaintiffs: because injunctive and declaratory relief predominated; because back pay might be characterized as a form of equitable relief; or because back pay might be awarded by an averaging formula.[499] The Court went on to cast doubt on whether any class action seeking monetary relief could meet the requirements of Rule 23 or, for that matter, the Due Process Clause. These questions, however, were reserved for another day.[500]

In a more controversial ruling, the Supreme Court divided five-to-four over whether any class action could be certified. The majority held that the plaintiffs had failed to establish "commonality" under subdivision (a)(2): that "there are questions of law or fact common to the class."[501] For the majority, the crucial inquiry is "the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation."[502] This inquiry involves a "rigorous analysis" that goes beyond the pleadings and "will entail some overlap with the merits of the plaintiff's underlying claim."[503] Commonality could not be found on the record in *Wal-Mart* because the plaintiffs established only "Wal-Mart's 'policy' of *allowing discretion* by local supervisors over employment matters," which amounted to "a policy *against having* uniform employment practices."[504] The dissenters on this issue would have reached a different result based on a more lenient understanding of "commonality"

497. 131 S. Ct. 2541 (2011).

498. *Id.* at 2557.

499. *Id.* at 2559–60.

500. *Id.* at 2560.

501. Fed. R. Civ. P. 23(a)(2). *Wal-Mart*, 131 S. Ct. at 2550–57.

502. *Id.* at 2551, quoting Richard A. Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97, 131-132 (2009).

503. *Wal-Mart*, 131 S. Ct. at 2551.

504. *Id.* at 2554.

and greater deference to the findings of the trial court.[505] As it stands, however, the majority's holding revives renewed scrutiny of this requirement at trial and on appeal. Moreover, the unanimous holding on certification under (b)(3) imposes the special requirements of that subdivision in nearly every case in which the plaintiffs seek monetary relief. As we shall see in the next section, decisions on arbitration impose further barriers to class actions under Title VII.

Arbitration

The availability of arbitration has increasingly narrowed an individual's right to bring a claim under Title VII. Under *Alexander v. Gardner-Denver Co.*,[506] arbitration under a collective bargaining agreement did not usually affect the employee's individual rights under Title VII. At least when arbitration was under the control of the union, the employee was under no obligation to resort to arbitration of this kind[507] and, at most, the arbitrator's decision could be "admitted as evidence and accorded such weight as the court deems appropriate."[508] Under later decisions, however, any agreement to arbitrate a dispute over statutory rights, including one made by a union, can prevent the employee from going directly to court to sue. 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.[509]

The principles governing these different forms of arbitration technically are distinct, but they reflect an overall policy in favor of arbitration. The trend has been to expand the right to arbitration so long as the employee has actually consented to it by a binding contract. Thus, in *Circuit City Stores, Inc. v. Adams*,[510] 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. More recently, in *14 Penn Plaza LLC v. Pyett*,[511] the Court

505. *Id.* at 2561-67 (Ginsburg, J., concurring in part and dissenting in part).

506. 415 U.S. 36 (1974).

507. *Id.* at 47–54.

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

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

510. 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).

510. 129 S. Ct. 1456 (2009).

extended this reasoning from individual contracts to collective bargaining agreements. The plaintiffs in *Pyett* were subject to a collective bargaining agreement that explicitly provided for arbitration of all employment discrimination claims, including those brought under federal and state law. The Court held that this provision prevented them from asserting their claims under the ADEA directly in federal court.[512] The Court preserved its holding in *Alexander* only to the extent of noting that the arbitration in that case, in contrast to *Pyett*, did not explicitly extend to statutory claims.[513]

In a sign of increased deference to arbitration, the Supreme Court has held that the issue of arbitrability itself can be decided by the arbitrator in some circumstances. In *Rent-A-Center, West, Inc. v. Jackson*,[514] the Court held that the issue of unconscionability had to be decided by the arbitrator under an agreement that "clearly and unmistakably" assigned the issue to arbitration and where there was no specific claim that assigning this issue to the arbitrator was unconscionable. The plaintiff had challenged the agreement as a whole as unconscionable, but that was not sufficient, in the Court's view, to challenge the specific assignment of the issue to the arbitrator. This highly technical distinction forces parties who seek to prevent arbitration to cast their objection in specific terms that can be adjudicated by a court. Under § 2 of the Federal Arbitration Act, these terms are limited to "such grounds as exist at law or in equity for the revocation of any contract."[515]

Yet the Supreme Court has emphasized that an agreement to arbitrate prevents resort to litigation only if it clearly states that it has this effect.[516] Moreover, an arbitration agreement does not preclude public actions by the EEOC.[517] The lower courts also have been careful to ensure that the agreement to arbitrate is supported by consideration,[518] and they

512. *Id.* at 1463–66.

512. *Id.* at 1466–73. The Court also noted that the plaintiff had not properly raised the question whether the union controlled his access to arbitration and could prevent him from obtaining any remedy at all for discrimination. *Id.* at 1474.

514. 130 S. Ct. 2772 (2010).

515. 9 U.S.C. § 2.

516. Wright v. Universal Mar. Serv. Corp., 525 U.S. 70, 79–82 (1998).

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

518. *Compare* Bailey v. Fed. Nat'l Mortg. Ass'n, 209 F.3d 740, 746 (D.C. Cir. 2000) (employee did not agree to arbitration simply by continuing to work for employer),

have scrutinized provisions that impede an employee's resort to arbitration, such as payment of arbitrator's fees.[519] For example, in *Circuit City* itself, on remand from the Supreme Court, the court of appeals found the arbitration agreement unconscionable because it was so one-sided in favor of the employer.[520]

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 because, 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.

Yet the principle that the terms of the contract determine the scope and nature of arbitration often displaces the rules that would otherwise apply in litigation. This is particularly true of class actions. An arbitration agreement that does not provide for class actions does not support this procedure and cannot be interpreted by the arbitrator to do so.[521] Additional terms of the arbitration agreement might yield an implicit agreement to class procedures,[522] but there is no presumption to this effect. As a consequence, an agreement to arbitrate can prevent a plaintiff both from bringing a case in court and seeking a class action there—because the case must go to arbitration—and from bringing a class action in arbitration itself—because the agreement does not provide for it. In *AT&T Mobility LLC v. Concepcion*,[523] the Supreme Court held that the

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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).

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

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

521. Stolt-Nielsen S.A. v. Animalfeeds Int'l, 130 S. Ct. 1758, 1775–76 (2010).

522. 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).

523. 131 S. Ct. 1740 (2010).

Federal Arbitration Act preempted any state law that "prohibits outright the arbitration of a particular type of claim."[524] California law in that case made the agreement to arbitrate unconscionable because it did not provide for class procedures. It followed that it prevented arbitration of individual claims and was therefore preempted by federal law. This holding, although in a consumer contract, applies to all agreements to arbitrate and negates any attempt to require class actions through the doctrine of unconscionability.

Public Actions

Title VII authorizes the EEOC to sue private employers, and the Attorney General to sue state and local government employers.[525] In addition, it authorizes EEOC commissioners to initiate administrative proceedings by filing charges with the EEOC.[526] 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.[527] 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.[528] 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.[529] 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.[530]

Public actions may be brought under either § 706 or § 707.[531] Section 706 actions usually allege discrimination against a small number of individuals, whereas § 707 actions allege a "pattern or practice" of discrimination against a class of employees. Nothing turns on the difference be-

524. *Id.* at 1747.

525. § 706(f), 42 U.S.C. § 2000e-5(f) (2006).

526. § 706(b), 42 U.S.C. § 2000e-5(b) (2006).

527. § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1) (2006).

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

529. EEOC v. Shell Oil Co., 466 U.S. 54 (1984). It met the requirements of § 706(b), 42 U.S.C. § 2000e-5(b) (2006), and 29 C.F.R. § 1601.12(a)(3) (2010).

530. § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1) (2006).

531. §§ 706, 707, 42 U.S.C. §§ 2000e-5, -6 (2006).

tween the two sections, however. The Supreme Court has held that the EEOC or the Attorney General can bring § 706 actions on behalf of a class of employees without certification of a class action under Federal Rule of Civil Procedure 23.[532] Moreover, the allocation of authority to sue is the same in both §§ 706 and 707 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.[533]

Actions by Federal Employees

Actions by federal employees are governed by § 717 of Title VII.[534] A federal employee must exhaust administrative remedies in his or her agency, in accordance with the time limits specified in EEOC regulations.[535] A complaint must be made to an equal employment opportunity 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 counselor.[536] 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.[537] 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 final decision, at any time after 180 days of filing with the agency.[538] If a complaint is filed with the EEOC, then the EEOC acts in an adjudicative capacity, as the successor to the Civil Service Commission.[539] 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 fi-

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

533. § 707(e), 42 U.S.C. § 2000e-6(e) (2006); Reorg. Plan No. 1 of 1978, § 5, 3 C.F.R. 321 (1978), *reprinted in* 5 U.S.C. app. at 206 (2006), *and in* 92 Stat. 3781 (1978).

534. § 717, 42 U.S.C. § 2000e-16 (2006).

535. Claims by federal employees under the ADEA, however, need not be preceded by exhaustion of administrative remedies. 29 C.F.R. § 1614.201(a) (2010).

536. 29 C.F.R. §§ 1614.105(a), .106(b) (2010).

537. *Id.* § 1614.402(a).

538. § 717(c), 42 U.S.C. § 2000e-16(c) (2006); 29 C.F.R. § 1614.408 (2010).

539. Reorg. Plan No. 1 of 1978, § 3, 3 C.F.R. 321 (1978), *reprinted in* 5 U.S.C. app. at 206 (2010), *and in* 92 Stat. 3781 (1978).

nal 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.[540]

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.[541] So, too, damages can be awarded to federal employees, both by courts and by the EEOC.[542] Actions by federal employees result in de novo judicial review, just like other Title VII actions.[543] However, actions to enforce or review an administrative decision favorable to the federal employee result in only limited judicial review.[544]

For employees covered by its terms, § 717 provides the exclusive remedy for employment discrimination.[545] Special, complicated procedures apply to claims of discrimination that are joined with claims that may be brought before the Merit Systems Protection Board.[546] By its terms, however, § 717 does not apply to all federal employees.[547] The Supreme Court has held that excluded federal employees have an implied right of action for disparate treatment in violation of the Fifth Amendment.[548] Employees of the Senate and the House of Representatives, and presidential appointees, however, now have special statutory remedies.[549]

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540. § 717(c), 42 U.S.C. § 2000e-16(c) (2006); 29 C.F.R. § 1614.408 (2010).

541. Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 93–96 (1990).

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

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

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

545. Brown v. Gen. Servs. Admin., 425 U.S. 820 (1976).

546. 5 U.S.C. § 7702 (2006); 5 C.F.R. §§ 1201.151–.175 (2010); 29 C.F.R. §§ 1614.302–.310 (2010). 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 (2006).

547. § 717b(a), 42 U.S.C. § 2000e-16b(a) (2006). An exceptional decision extended § 717b 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. Dep't of the Army, 832 F.2d 247 (2d Cir. 1987).

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

549. *See supra* note 431.

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.[550] With the award of damages, the Act also granted the right to trial by jury.[551] 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 U.S. Code, § 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.[552] Partly, too, Congress wanted to emphasize the parallel between actions for damages under Title VII and actions for damages under § 1981, which are, unlike Title VII claims, limited to discrimination on the basis of race or national origin.[553] 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 § 1981.

Despite the parallel with damages under § 1981, § 1981a itself is limited in several respects. First, damages can be recovered under § 1981a only if they cannot be recovered under § 1981, for instance, because the plaintiff has a claim for race discrimination under the latter statute.[554] Second, damages under § 1981a are available only for claims of disparate treatment, not for claims of disparate impact.[555] 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 individ-

550. 42 U.S.C. § 1981a(a)(1) (2006).

551. *Id.* § 1981a(c).

552. *Id.* § 1981a(a)(2), (3).

553. *See infra* text accompanying notes 900-02.

554. 42 U.S.C. § 1981a(a)(1) (2006). Plaintiffs who have a claim for damages under § 1981 must rely on it.

555. *Id.* Likewise, § 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 note 903.

ual."[556] Fourth, monetary relief that can be recovered under Title VII, mainly in the form of awards of back pay, cannot be recovered under § 1981a.[557] Fifth, the total recovery for future pecuniary damages, non-pecuniary 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.[558]

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*,[559] the Supreme Court held that § 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."[560] The Court went on to address the question of exactly who—among all those who act for an organizational employer—must perceive this risk. 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.'"[561] 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.[562] Nevertheless, one court has held that punitive damages for

556. *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 § 1981. Lowery v. Circuit City Stores, Inc., 206 F.3d 431, 441 (4th Cir. 2000).

557. 42 U.S.C. § 1981a(b)(2) (2006).

558. *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).

559. 527 U.S. 526 (1999).

560. *Id.* at 536.

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

562. *See supra* text accompanying notes 340-56.

sexual harassment can be awarded without an award of compensatory damages.[563]

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.[564] 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 § 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*,[565] the Supreme Court held that § 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,[566] 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 before their enactment."[567] 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.[568]

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

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563. Cush-Crawford v. Adchem Corp., 94 F. Supp. 2d 294, 299 (E.D.N.Y. 2000) (noting circuit conflict on issue whether award of compensatory damages is prerequisite to award of punitive damages).

564. 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).

565. 511 U.S. 244 (1994).

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

567. *Id.* at 278.

568. *Id.* at 280–81.

introduced the partial defense that the plaintiff would have been rejected anyway (for instance, denied a job or terminated) for an entirely legitimate reason. The employer must show that it would have made the same decision in the absence of discrimination.[569] This defense applies only to the award of compensatory relief. Even if the defense is made out, the plaintiff can still obtain declaratory relief, prospective injunctive relief, and attorney's fees and costs.[570] What appears mainly to have been at stake was the award of attorney's fees to prevailing plaintiffs. In a second provision on a related subject, the Act also authorizes the award of fees for experts as costs,[571] overruling a decision that had restricted fees for expert witnesses to the same fees for other witnesses.[572] A third provision authorizes the award of interest against the United States.[573] A fourth provision restricts collateral attack upon judgments and consent decrees by persons who were not parties to the underlying action, overruling another Supreme Court decision.[574] 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.[575]

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

569. § 706(g)(2)(B), 42 U.S.C. § 2000e-5(g)(2)(B) (2006).

570. *Id.* This provision partially overrules a decision that had recognized a full defense on the same grounds. Price Waterhouse v. Hopkins, 490 U.S. 228, 245–46 (1989). *See supra* text accompanying notes 79-83.

571. § 706(k), 42 U.S.C. § 2000e-5(k) (2006).

572. 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 (2006); W. Va. Univ. Hosp., Inc. v. Casey, 499 U.S. 83 (1991).

573. § 717(d), 42 U.S.C. § 2000e-16(d) (2006). 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.

574. § 703(n), 42 U.S.C. § 2000e-2(n) (2006). The overruled decision was *Martin v. Wilks*, 490 U.S. 755 (1989).

575. § 703(n)(2)(D), 42 U.S.C. § 2000e-2(n)(2)(D) (2006).

almost as a matter of course,[576] at least absent changed circumstances that would make an injunction inappropriate.[577] 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.[578]

Victims of discrimination are entitled to compensatory relief, subject to the defendant's burden of proving that they would have made the same decision anyway for an entirely legitimate reason.[579] If the defendant carries this burden of proof, the court may award only declaratory relief, prospective injunctive relief, and attorney's fees and costs.[580] If the 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*,[581] 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."[582] One such reason mentioned by the Court is unjustified delay in asserting a claim for back pay.[583] 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,"[584] and an unconditional offer of the position sought by the plaintiff, even without retroactive seniority, usually terminates the accrual of liability for back pay.[585]

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576. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 361 (1977).

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

578. *See supra* text accompanying notes 209–234.

579. § 706(g)(2)(B), 42 U.S.C. § 2000e-5(g)(2)(B) (2006).

580. § 706(g)(2)(B)(i), 42 U.S.C. § 2000e-5(g)(2)(B)(i) (2006). This subsection addresses only claims of intentional discrimination under § 703(m), 42 U.S.C. § 2000e-2(m) (2006). Claims of disparate impact apparently fall under § 706(g)(2)(A), 42 U.S.C. § 2000e-5(g)(2)(A) (2006). 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 596–98.

581. 422 U.S. 405 (1975).

582. *Id.* at 421.

583. *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).

584. § 706(g)(1), 42 U.S.C. § 2000e-5(g) (2006).

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

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.[586] 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.[587] 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 rightful place.[588] 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.[589]

Finally, one defendant cannot seek contribution from another for monetary awards paid under Title VII.[590]

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 phys-

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

587. *Id.* at 776–78.

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

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

590. Nw. Airlines v. Transp. Workers Union, 451 U.S. 77 (1981).

ical injuries or physical sickness" are now excluded from income.[591] Recoveries for back pay, front pay, emotional distress, and punitive damages, and any interest on these amounts, are included in income. Court-awarded attorney's fees are also included in the plaintiff's income, on the ground that the award of fees first goes to the plaintiff and only later to the plaintiff's attorney. Including any of these amounts in income, without offsetting deductions, necessarily reduces the plaintiff's net recovery after payment of taxes.

Plaintiffs face a further tax burden on their recovery if it is concentrated in a single taxable year. A basic principle of tax accounting applicable to "cash method" taxpayers (including nearly all individuals) requires the plaintiff to pay income tax on back pay, and other taxable recoveries, in the year in which the award is paid. It is not taxed as if it were spread out over the earlier years in which it should have been paid, and if it is not spread out over several later years, it is concentrated in a single year. This usually causes the plaintiff's income for that year to be taxed at a higher rate, and for a sufficiently large recovery, with the surcharge imposed under the alternative minimum tax (AMT).

The first of these consequences, bunching income in a single taxable year, can be counteracted by "grossing up" the plaintiff's recovery for any amounts included in income. Following the principle of making the plaintiff whole, this technique works backward from the net income after taxes that the plaintiff would have received in the absence of discrimination. This amount is then augmented by an additional recovery that would be sufficient to pay the taxes attributable to the plaintiff's entire, grossed-up recovery. When this recovery is then taxed, the plaintiff is left with the same after-tax income as he would have received in the absence of discrimination. This technique requires some approximation, as do all attempts to devise remedies based on what would have happened in the absence of discrimination. The contentious issue, on which the courts of appeals are divided, is whether the defendant can be required to pay a grossed-up recovery.[592]

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591. 26 U.S.C. § 104(a)(2) (2008); Comm'r v. Burke, 504 U.S. 229 (1992); Comm'r v. Schleier, 515 U.S. 323 (1995).

592. *Compare* Eshelman v. Agere Sys., Inc., 554 F.3d 426 (3d Cir. 2009) (approving grossed-up recovery), *with* Dashnaw v. Pena, 12 F.3d 1112 (D.C. Cir. 1994) (denying grossed-up recovery).

The second consequence, specifically concerned with the AMT, comes into play only if attorney's fees are included in the plaintiff's income. If they are, they will usually cause the plaintiff's income to rise above the threshold for application of the AMT, a complex set of provisions that, among other things, disallow deductions to individuals with a high ratio of deductible expense to annual income. Among the deductions disallowed are those ordinarily available for attorney's fees. However, Congress alleviated this problem in discrimination cases, including those brought under the principal federal laws against employment discrimination, by a provision in the American Jobs Creation Act of 2004.[593] The effect of this provision is to permit a deduction for any attorney's fees and court costs awarded or expended in connection with such cases, up to the amount of any judgment or settlement included in gross income, even for taxpayers subject to the AMT. However, in consolidated cases that arose before the effective date of the new legislation, the Supreme Court held that contingent fees are not excludable from adjusted gross income and so remain taxable to the plaintiff under the AMT.[594] It follows that attorney's fees not excluded under the new legislation remain taxable to the plaintiff, and the plaintiff's ability to claim a deduction depends on the intricacies of the AMT.

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.[595] 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 terminology of "prima facie case" to describe the effect

593. 118 Stat. 1418 (2004), amending 26 U.S.C. § 62(a)(20).

594. Comm'r v. Banks, 543 U.S. 426 (2005).

595. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 361 (1977).

of finding a violation of Title VII.[596] The term "prima facie case" is confusing because it has several meanings and 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, essentially 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.[597] 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 applied for the job in question in order to shift to the employer the burden of proving that he was not a victim of discrimination, for instance, because of lack of qualifications or the absence of a vacancy at the time of application.[598] 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.[599]

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.[600] This requires a showing that the plaintiff was deterred from applying for the job by the employer's discriminatory hiring practices. It also requires a showing that he or she possessed the qualifications that would have been revealed in an application.[601] A nonapplicant who makes this showing is treated just like an applicant; the employer bears the burden of proving that the nonapplicant was not a victim of discrimination.[602] 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

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

597. § 706(g)(2)(B), 42 U.S.C. § 2000e-5(g)(2)(B) (2006).

598. *Teamsters,* 431 U.S. at 361–62.

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

600. *Teamsters*, 431 U.S. at 362–71.

601. *Id.* at 367–71.

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

were employees but who did not apply for a job.[603] 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.[604]

Attorney's Fees

Section 706(k) authorizes the award of attorney's fees to the prevailing party in Title VII cases.[605] In *Christiansburg Garment Co. v. EEOC*,[606] the Supreme Court interpreted § 706(k) to require the award of attorney's fees to prevailing *plaintiffs* "'unless special circumstances would render such an award unjust,'"[607] 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.'"[608] 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.[609] 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.[610]

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

604. *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.*, 296 F.3d 1265, 1276-77 (11th Cir. 2002).

605. § 706(k), 42 U.S.C. § 2000e-5(k) (2006). *See generally* Alan Hirsch & Diane Sheehey, Awarding Attorneys' Fees & Managing Fee Litigation (2d ed. Federal Judicial Center 2005).

606. 434 U.S. 412 (1978).

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

608. *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. Indep. Fed'n of Flight Attendants v. Zipes, 491 U.S. 754 (1989).

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

610. *Id.* at 422 n.20. *See also* Fitzpatrick v. Bitzer, 427 U.S. 445, 457 (1976). For claims under 42 U.S.C. § 1983 (2006), 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).

Provisions for the award of attorney's fees like § 706(k) are found in other federal civil rights laws[611] and have received a similar interpretation.[612] 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*,[613] 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.[614] In *Farrar v. Hobby*,[615] 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*,[616] 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.'"[617] The Court cautioned, however, that a "material alteration of the legal relationship of the par-

611. For the Equal Pay Act and the Age Discrimination in Employment Act, the provision is 29 U.S.C. § 216(a) (2006); *see also id.* § 626(b). For the Reconstruction civil rights acts, 42 U.S.C. §§ 1981, 1983 (2006), the provision is 42 U.S.C. § 1988 (2006). This statute also applies to claims under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-4 (2006), and Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1685 (2006). The Rehabilitation Act of 1973 incorporates by reference the enforcement provisions of Title VI and Title VII, 29 U.S.C. § 794a (2006), and the Americans with Disabilities Act incorporates the enforcement provisions of Title VII alone, 42 U.S.C. § 12117(a) (2006).

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

613. 482 U.S. 755 (1987).

614. *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).

615. 506 U.S. 103 (1992).

616. 489 U.S. 782 (1989).

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

ties" was necessary and that "purely technical or *de minimis*" success was inadequate.[618]

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*,[619] 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 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.[620] 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.[621]

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 denied a job or fired for entirely legitimate reasons. This provision, discussed earlier,[622] explicitly authorizes an award of attorney's fees upon a finding that Title VII has been violated.[623] 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

618. *Garland*, 489 U.S. at 792–93.
619. 532 U.S. 598 (2001).
620. *Id.* at 603, 604.
621. *Id.* at 608.
622. *See supra* text accompanying notes 83-86.
623. § 706(g)(2)(B), 42 U.S.C. § 2000e-5(g)(2)(B) (2006).

fees to the "prevailing party," which is the phrase interpreted in decisions like *Buckhannon*. The circuits are divided on this question.[624]

Qualifications and Exceptions

The general rule of *Christiansburg Garment Co. v. EEOC*[625] regarding the award of attorney's 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.[626] Under the general civil rights statute, § 1983,[627] however, the law is different. Since administrative remedies need not be exhausted under § 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.[628] 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.[629] This principle may be inconsistent with, and therefore undermine, dicta in *New York Gaslight Club v. Carey*[630] suggesting that a separate action could be brought only for attorney's fees.[631]

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.*,[632] the Supreme Court upheld

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624. *Compare* Gudenkauf v. Stauffer Comm'cns, Inc., 158 F.3d 1074, 1077 (10th Cir. 1998) (allowing award of attorney's fees in 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 absence of other relief), *and* Sheppard v. Riverview Nursing Ctr. Inc., 88 F.3d 1332, 1335 (4th Cir. 1996), *cert. denied*, 519 U.S. 993 (1996) (allowing only nominal award of attorney's fees).

625. 434 U.S. 412 (1978).

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

627. 42 U.S.C. § 1983 (2006).

628. Webb v. Bd. of Educ., 471 U.S. 234 (1985).

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

630. 447 U.S. 54 (1980).

631. 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. Am. State Bank, 857 F.2d 494 (8th Cir. 1988) (separate action).

632. 475 U.S. 717 (1986).

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.[633] The Court strongly suggested, however, that in other actions, in which approval of settlements is not required, waivers should usually be enforced.[634]

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*,[635] 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*,[636] an action under § 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."[637] 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 § 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

633. *Id.* at 738–40; Fed. R. Civ. P. 23(e).
634. *Evans,* 475 U.S. at 738 & n.30.
635. 450 U.S. 346 (1981).
636. 473 U.S. 1 (1985).
637. *Id.* at 3.

"costs" incurred after the offer of settlement, and of § 1988, which authorizes an award of attorney's fees "as part of the costs."[638] For this reason, the Court's holding may not apply directly to other fee-shifting statutes that do not define attorney's fees as part of the costs, such as § 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*,[639] which established a two-step process applicable to all statutes that authorize an award of attorney's fees to the prevailing party.[640] 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."[641] 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.[642] The lodestar also includes the hours reasonably expended by paralegals and law clerks,[643] and under Title VII,

638. 42 U.S.C. § 1988 (2006).
639. 461 U.S. 424 (1983).
640. *Id.* at 433 n.7.
641. *Id.* at 436.
642. *Id.* at 434 n.9.
643. Missouri v. Jenkins, 491 U.S. 274, 283 (1989).

awards of costs can also include fees for experts,[644] 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*,[645] 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*,[646] 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*,[647] 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.[648] 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.[649]

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*.[650] 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 award must be

644. § 706(k), 42 U.S.C. § 2000e-5(k) (2006). This provision also applies to claims under 42 U.S.C. §§ 1981, 1981a. 42 U.S.C. § 1988(c) (2006).

645. 465 U.S. 886 (1984).

646. 478 U.S. 546 (1986), *on reargument*, 483 U.S. 711 (1987).

647. 505 U.S. 557 (1992).

648. *Id.* at 563.

649. Blanchard v. Bergeron, 489 U.S. 87, 93 (1989).

650. 477 U.S. 561 (1986).

proportional to the relief obtained.[651] 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."[652] 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,[653] 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.[654] 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.[655]

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.[656] 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.

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651. *Id.* at 574 (Brennan, J.).

652. *Id.* at 586 (Powell, J., concurring in the judgment).

653. *Id.* at 588–91 (Rehnquist, J., dissenting).

654. Kremer v. Chem. Constr. Corp., 456 U.S. 461 (1982).

655. W.R. Grace & Co. v. Local Union 759, 461 U.S. 757, 771 (1983).

656. 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.

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.[657] 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.[658] 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.[659] This extended preclusive effect, however, is subject to several limitations, the most important being the requirements of due process.[660]

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.[661] 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.[662] In these chal-

657. 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).

658. *Martin*, 490 U.S. at 765.

659. § 703(n)(1)(B), 42 U.S.C. § 2000e-2(n)(1)(B) (2006).

660. § 703(n)(2), 42 U.S.C. § 2000e-2(n)(2) (2006).

661. *E.g., Local No. 93, Int'l Ass'n of Firefighters*, 478 U.S. at 515–24; Rutherford v. City of Cleveland, 137 F.3d 905, 908 (6th Cir. 1998).

662. *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. 1993); Bhd. of Midwest Guardians Inc. v. City of Omaha, 9 F.3d 677, 679–80 (8th Cir. 1993).

lenges, essentially on direct attack, arguments over who can collaterally attack the judgment have played a minimal role.

III. 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.[663] 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.[664] Consistent 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.[665]

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.[666] The Act applies to all private employers with at least twenty employees, to state and local government, and to most of the federal government,[667] but not to elected officials or certain of their appointees.[668]

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.[669] The ADEA also resembles Title VII in the method of proving individual claims of disparate treatment, in particular, by using the structure of burdens of production set forth in

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663. *Id.* § 631.

664. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312–14 (1976).

665. General Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 597–600 (2004).

666. 29 U.S.C. § 631(a) (2006).

667. *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) (2006).

668. 29 U.S.C. § 630(f) (2006).

669. *Id.* § 623(a)(3).

McDonnell Douglas Corp. v. Green.[670] The Supreme Court has explicitly reserved the question whether the structure of proof from *McDonnell Douglas* applies in ADEA cases. The Court made this point in *Gross v. FBL Financial Services, Inc.*,[671] during the course of holding that the burden of proof rests always with the plaintiff under the ADEA, even in mixed-motive cases. In *Gross* the Court emphasized both that interpretation of the ADEA was independent of amendments made to Title VII and that nothing in the ADEA departed from the usual principal in civil litigation that the plaintiff must prove "but for" causation—that age was the necessary cause of the adverse action taken by the employer.[672] Accordingly, if an employer argues that it would have taken the same action against the plaintiff regardless of age, the plaintiff bears both the burden of production and the burden of persuasion on this issue. No burden of proof switches to the defendant.

The potentially different treatment of age discrimination arises from the nature of age differences as matters of degree, often correlated with other individual characteristics. If the plaintiff is replaced by someone only slightly younger, this small difference might not support a finding of age discrimination.[673] Likewise, discrimination on the basis of age must be distinguished from discrimination based on time of service with the employer. In *Hazen Paper Co. v. Biggins*,[674] the Supreme Court held that a finding of intentional discrimination could not 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),[675] it supports a finding of age discrimination only with additional evidence that age was a factor in the employer's decision.[676] This holding was recently extended in a case concerned with pension benefits for disabled

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670. 411 U.S. 792 (1973).

670. 129 S. Ct. 2343 (2009).

671. *Id.* at 2348-52. In particular, the Civil Rights Act of 1991 added §§ 703(m) and 706(g)(2)(B), 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B) (2006), to Title VII. No corresponding amendments were made to the ADEA.

673. *O'Connor*, 517 U.S. at 312-13.

674. 507 U.S. 604 (1993).

675. 29 U.S.C. §§ 1001–1461 (2006), and scattered sections of 5, 18, and 26 U.S.C. (2006). *See generally* Peter J. Weidenbeck, ERISA in the Courts (Federal Judicial Center 2008).

676. *Hazen Paper*, 507 U.S. at 608–14.

employees.[677] These benefits were available only to employees who became disabled before they were eligible for retirement at age 55, but they did not always result in greater total benefits than those available to employees who retired after age 55. The Supreme Court held that any difference in benefits resulted from pension status rather than age. The correlation of age with pension status did not, by itself, support an inference of age discrimination.[678] For similar reasons, some courts of appeals have held that the higher salary of older workers who have been discharged or laid off does not support an inference of age discrimination.[679]

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 under the ADEA differs in significant respects from the theory under Title VII. In particular, the Civil Rights Act of 1991 codified the theory of disparate impact only under Title VII,[680] leading the Supreme Court to conclude that it applied under the ADEA only in the form in which it had existed prior to 1991. In *Smith v. City of Jackson*,[681] the Court applied the theory as it existed under *Wards Cove Packing Co. v. Atonio*,[682] which required the plaintiff to identify a specific employment practice that caused the alleged disparate impact and which imposed on the defendant the burden of showing that "a challenged practice serves, in a significant way, the legitimate employment goals of the employer." This showing, moreover, was subject only to "a reasoned review" by the court.[683] The decision in *Smith* was closely divided, with some justices refusing to apply the theory of disparate impact at all under the ADEA, but assuming that it did apply, they would have applied it only in the weaker form under *Wards Cove*.[684] Justice Scalia provided the crucial fifth vote for the Court's decision, based only on EEOC regulations rec-

677. Kentucky Ret. Sys. v. EEOC, 554 U.S. 135 (2008).

678. *Id.* at 143–48.

679. Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1125–26 (7th Cir. 1994); 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).

680. § 703(k), 42 U.S.C. § 2000e-2(k) (2006). *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).

681. 544 U.S. 228 (2005).

682. 490 U.S. 642 (1989).

683. *Id.* at 656–61.

684. *Smith*, 544 U.S. at 267-68 (O'Connor, J., concurring in the judgment).

ognizing the theory of disparate impact.[685] The Court largely confirmed this decision but modified it in one important respect, in *Meacham v. Knolls Atomic Power Laboratory, Inc.*[686] The Court there reaffirmed the application of the theory of disparate impact under the ADEA but made clear that the entire burden of proof, both of production and persuasion, shifted to the employer to justify a practice with disparate impact. This conclusion followed from the defense available under the ADEA for decisions based on "reasonable factors other than age" (RFOA). [687] As an affirmative defense, the RFOA placed the entire burden of proof upon the employer.[688]

The RFOA provision also complicates the treatment of individual claims of intentional discrimination under the ADEA. Along with a defense for discipline or discharge "for good cause," the provision seems to shift the entire burden of proof onto the defendant after the plaintiff has made out a prima facie case under *McDonnell Douglas*. Nevertheless, the courts that have considered this issue have refused to place more than the burden of production on the defendant, holding that these defenses come into play only after the plaintiff has already proved that age caused the disputed employment decision.[689] This conclusion accords with the recent holding in *Gross v. FBL Financial Services, Inc.*,[690] imposing the entire burden of proof on the plaintiff to show that age was the "but for" cause.

Like both Title VII and the Equal Pay Act, the ADEA contains defenses for bona fide seniority systems[691] and for reliance on administrative interpretations.[692] Also like Title VII, the ADEA generally exempts from coverage the operation of foreign corporations in foreign countries,

685. 243-48 (Scalia, J., concurring in part and concurring in the judgment).

686. 128 S. Ct. 2395 (2008).

687. 29 U.S.C. § 623(f)(1) (2006).

688. *Id.* at 2400-05.

689. *See* Marshall v. Westinghouse Elec. Corp., 576 F.2d 588, 590–92 (5th Cir. 1978). *See also supra* text accompanying notes 79–95. The Supreme Court has reserved decision on this question. W. Air Lines, Inc. v. Criswell, 472 U.S. 400, 408 n.10 (1985). It also suggested in both *Smith* and *Meacham* that "the RFOA provision plays its principal role" in disparate impact cases. *Smith*, 544 U.S. at 239; *Meacham*, 128 S. Ct. at 2403.

689. 129 S. Ct. 2343, 2349 (2009).

691. 29 U.S.C. § 623(f)(2) (2006).

692. *Id.* §§ 626(e)(1), 259.

unless they are controlled by an American employer.[693] The ADEA also contains some unique exceptions: for certain executives over the age of sixty-five,[694] 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."[695] 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.[696] 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.[697] Colleges and universities cannot impose mandatory retirement upon tenured professors, but they can increase the incentives for early retirement.[698]

Special provisions also apply to "a bona fide seniority system that is not intended to evade the purposes of this chapter."[699] 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."[700] This qualification was added after the provision had been interpreted to permit retirement plans that required the retirement of covered individuals.[701] 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 outside it), Congress again amended the statute to narrow the exception.[702] The amendment allows classifi-

693. *Id.* § 623(h).

694. *Id.* § 631(c).

695. 29 U.S.C. § 628 (2006); 29 C.F.R. § 1627.16 (2010).

696. Age Discrimination in Employment Act of 1986, Pub. L. No. 99-592, §§ 3, 6, 100 Stat. 3342 (1986).

697. 29 U.S.C. § 623(j) (2006).

698. *Id.* § 623(m).

699. 29 U.S.C. § 623(f)(2)(A) (2006).

700. *Id.*

701. United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977).

702. 29 U.S.C. § 623(f)(2)(B).

cations 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."[703] Other, highly technical provisions apply to pension plans and to employee benefit plans generally.[704] 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.[705] 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.[706] Further restrictions apply to waivers "in connection with an exit incentive or other employment termination program offered to a group or class of employees."[707] 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.[708] 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 nevertheless remains open. The ADEA does not completely displace contracts as a mechanism for determining the rights of older workers.

The ADEA contains a defense for BFOQs on the basis of age,[709] modeled on the same defense under Title VII.[710] In *Western Air Lines,*

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703. *Id.*

704. *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).

705. 29 U.S.C. § 626(f).

706. *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).

707. 29 U.S.C. § 626(f)(1)(H) (2006).

708. *Id.* § 626(f)(2).

709. *Id.* § 623(f)(1).

Inc. v. Criswell,[711] 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."[712] The Court then endorsed the more specific test for the BFOQ exception based on safety considerations articulated in *Usery v. Tamiami Trail Tours, Inc.*:[713]

> [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.[714]

The Court then applied this standard to jury instructions concerned with mandatory retirement of flight engineers at age sixty. 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.[715]

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*,[716] 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 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.[717] The Court

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710. 42 U.S.C. § 2000e-2(e)(1) (2006). *See supra* text accompanying notes 292–311.

711. 472 U.S. 400 (1985).

712. *Id.* at 412 (quoting Dothard v. Rawlinson, 433 U.S. 321, 334 (1977)); *see* Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 202 (1991).

713. 531 F.2d 224 (5th Cir. 1976).

714. *Criswell*, 472 U.S. at 413 (quoting *Usery*, 531 F.2d at 236).

715. *Id.* at 417–23 (emphasis omitted from quoted phrase).

716. 469 U.S. 111 (1985).

717. *Id.* at 123 nn.17, 18.

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.[718]

In *Johnson v. Mayor of Baltimore*,[719] 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.[720] 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

The ADEA is generally enforced according to the procedures of the Fair Labor Standards Act (FLSA), although it requires exhaustion of administrative remedies and provides special procedures for federal employees. Modeled in other respects on Title VII, the ADEA explicitly adopts the enforcement procedures of the FLSA for public and private actions.[721] Public enforcement of the ADEA was transferred to the EEOC.[722] 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.[723] The relationship between pub-

718. Johnson v. Am. Airlines, Inc., 745 F.2d 988 (5th Cir. 1984) (upholding jury verdict), *cert. denied*, 472 U.S. 1027 (1985).

719. 472 U.S. 353 (1985).

720. 5 U.S.C. § 8335(b) (2006).

721. 29 U.S.C. § 626(b) (2006).

722. Reorganization Plan No. 1 of 1978, § 2, *reprinted in* 5 U.S.C. app. at 206 (2006), *and in* 92 Stat. 3781 (1978).

723. 29 U.S.C. § 626(b) (2006).

lic actions and private actions remains the same as it is under the Equal Pay Act and the FLSA.[724]

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.[725] 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.[726] 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.[727] The ADEA explicitly grants parties the right to jury trial.[728] Any waiver of an individual's rights under the ADEA must meet strict statutory requirements to ensure that it is "knowing and voluntary."[729]

Individuals must file their actions in court within 90 days of receiving a right-to-sue letter.[730] The EEOC, however, is not subject to any explicit limitations for filing its actions, apart from the equitable doctrine of laches also applied to the EEOC under Title VII.[731]

Remedies under the ADEA are the same as those under 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."[732] In *Trans World Airlines, Inc. v. Thurston*,[733] 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

724. *Id.* §§ 626(b), 216(b)–(c). *See infra* text accompanying notes 959–66.

725. 29 U.S.C.A. § 626(d)(1) (2010).

726. *Id.* § 626(d)(1)(A).

727. *Id.* § 626(d)(1)(B).

728. *Id.* § 626(c)(2).

729. *Id.* § 626(f).

730. 29 U.S.C. § 626(e) (2006). 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).

731. Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 358–66, 372–73 (1977).

732. 29 U.S.C. § 626(b) (2006).

733. 469 U.S. 111 (1985).

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.'"[734] 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.[735] 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,"[736] but the Eleventh Circuit has disagreed.[737] The Supreme Court itself has made clear that *Thurston* requires more than unreasonable action by the defendant.[738]

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.[739] Federal employees can pursue their claims either through administrative proceedings (in which case they must follow the same procedures as those under Title VII[740]) 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.[741] The action in court must be commenced within an appropriate limitation period borrowed from either state or federal law.[742] The Act authorizes actions in

734. *Id.* at 128–29 (quoting Air Line Pilots Ass'n v. Trans World Airlines, 713 F.2d 940, 956 (1983)).

735. 29 U.S.C. § 216(a) (2006); *Thurston*, 469 U.S. at 125–26.

736. Dreyer v. Arco Chem. Co., 801 F.2d 651, 658 (3d Cir. 1986), *cert. denied*, 480 U.S. 906 (1987).

737. Lindsey v. Am. Cast Iron Pipe Co., 810 F.2d 1094, 1099–1101 (11th Cir. 1987).

738. 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.

739. 29 U.S.C. § 633a(a) (2006); Reorganization Plan No. 1 of 1978, § 2, *reprinted in* 5 U.S.C. app. at 206, *and in* 92 Stat. 3781 (1978).

740. *See supra* text accompanying notes 533–48.

741. 29 U.S.C. § 633a(d) (2006).

742. Stevens v. United States Dep't of the Treasury, 500 U.S. 1, 7 (1991).

federal court for "such legal or equitable relief as will effectuate the purposes of this chapter."[743]

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*,[744] 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.[745] 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 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.[746] 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.[747]

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.[748] 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 in-

743. 29 U.S.C. § 633a(c) (2006).

744. 528 U.S. 62 (2000).

745. *Id.* at 73–78.

746. 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).

747. *Kimel*, 528 U.S. at 84.

748. *Id.* at 78. The prior decision was *EEOC v. Wyoming,* 460 U.S. 226 (1983).

dependent of the state to be denied the immunity.[749] 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.[750] Third, even if the state retains its immunity, individual officers may still be liable, depending upon the definition of covered defendants under the statute. 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.[751] 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.

749. 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).

750. Lapides v. Bd. 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).

751. 29 U.S.C. § 630(b) (2006).

IV. Discrimination on the Basis of Disability

Two statutes prohibit discrimination on the basis of disability: 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,[752] while the Rehabilitation Act applies only to the federal government, federally funded programs, and federal contractors.[753] 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.[754] 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[755] and, in particular, that it imposes a duty of reasonable accommodation that is at least as strong.[756]

The duty of reasonable accommodation effectively expanded the prohibitions against discrimination on the basis of disability from a negative obligation not to take disabilities into account into an affirmative obligation to do so. This expansion contributed to extended litigation over the coverage of both statutes, resulting in several decisions restricting coverage under the ADA. In legislation similar to the Civil Rights Act of 1991, Congress then stepped in and superseded most, but not quite all, of the restrictive features of these decisions in the Americans with Disabilities Act Amendments Act of 2008 (ADAAA).[757] Accordingly,

752. § 101(5), 42 U.S.C. § 12111(5) (2006).

753. §§ 501–504a, 29 U.S.C. §§ 791–794a (2006).

754. §§ 201–246, 301–319, 42 U.S.C. §§ 12131–12161, 12181–12189 (2006). 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. § 504(a), 29 U.S.C. § 794(a) (2006). 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) (2006).

755. ADA § 501(a), 42 U.S.C. § 12201(a) (2006).

756. ADA § 102(b)(5), 42 U.S.C. § 12112(b)(5) (2006).

757. Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified in 29 U.S.C.A. § 705 (2010) and 42 U.S.C.A. §§ 12101-10 (2010)).

this section begins with a discussion of the Rehabilitation Act because it provides the foundation for the ADA. It then turns to questions of coverage under the ADA and how coverage has been affected by the ADAAA. This chapter concludes with a section on discrimination on the basis of disability and the duty of reasonable accommodation.

Rehabilitation Act of 1973

The Rehabilitation Act has three different provisions that apply to employment: § 501 prohibits discrimination and requires affirmative action in favor of the disabled by federal agencies;[758] § 503 requires federal contractors to "take affirmative action to employ and advance in employment qualified individuals with disabilities";[759] and § 504 prohibits exclusion of, and discrimination against, otherwise qualified handicapped individuals in federally assisted programs by federal agencies and by the Postal Service.[760] All three sections are subject to exceptions for various disabilities that Congress found to be morally wrong (such as the use of illegal drugs),[761] and §§ 503 and 504 (but not § 501) are subject to an exception for alcoholism and for infectious diseases that "constitute a direct threat to property or the safety of others" or that prevent the infected individual from performing the duties of the job.[762]

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 § 501,[763] as do victims of discrimination under § 504.[764] However, the employees of federal contractors have no private cause of action, either explicitly granted by § 503 or implied by the lower federal courts.[765] Litigation over affirmative action has arisen only indirectly,

758. § 501, 29 U.S.C.A. § 791 (2010).

759. § 503, 29 U.S.C. § 793 (2006).

760. § 504, 29 U.S.C. § 794 (2006). Section 504 prohibits employment discrimination by recipients of federal funds, whether or not the purpose of such assistance is to provide employment. Consol. Rail Corp. v. Darrone, 465 U.S. 624 (1984).

761. 29 U.S.C.A. §§ 705(20)(D), (E), (F) (2006).

762. *Id.* § 705(20)(C)(v), (D).

763. § 505(a)(1), 29 U.S.C. § 794a(a)(1) (2006).

764. § 505(a)(2), 29 U.S.C. § 794a(a)(2).

765. *See, e.g.,* D'Amato v. Wisconsin Gas Co., 760 F.2d 1474, 1478 (7th Cir. 1985); *see* Consol. 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

through claims of discrimination by federal employees brought under both § 501 and § 504. The lower federal courts have generally imposed heavier obligations upon federal employers than on private employers, especially to reasonably accommodate the disabled.[766] Following regulations of the EEOC, the federal courts have required the federal government to be "a model employer" of the disabled.[767] The theory of disparate impact is available to prove violations of § 504.[768]

The Rehabilitation Act only protects an "individual with a disability," and "disability" in turn is defined by cross reference to the ADA, which defines it as "(A) a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) a record of such an impairment, or (C) being regarded as having such an impairment."[769] This language is incorporated in the Rehabilitation Act by cross-reference to the definition in the ADA, which was expanded by new provisions added by the ADAAA. For that reason, the definition of covered disabilities is taken up in the next section of this monograph discussing decisions and the provisions of the ADAAA applicable to both statutes.[770]

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 individual with a disability."[771] It protects such individuals from discrimination, and by regulations it also gives them the right to reasonable accommodation of their disabilities.[772] 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

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503 is enforced by the Department of Labor through the Office of Federal Contract Compliance Programs. 29 U.S.C. § 793(b) (2006).

766. 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); Mantolete v. Bolger, 767 F.2d 1416, 1423 (9th Cir. 1985).

767. 29 C.F.R. § 1614.203(d) (2010).

768. Alexander v. Choate, 469 U.S. 287 (1985).

769. 29 U.S.C.A § 705(9)(B), (20)(B) (2010), referring to ADA § 3, 42 U.S.C.A. § 12102 (2010).

770. *See infra* text accompanying notes 828–54.

771. § 504(a), 29 U.S.C. § 794(a) (2006).

772. 29 C.F.R. § 32.13(a), (c) (2010).

assigning to the employer the burden of proving that a proposed accommodation would result in "an undue hardship on the operation of its program."[773] 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 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,"[774] Congress added an amendment broadly defining these terms to include all parts of an organization if any one part received federal assistance.[775] In separate legislation, Congress also tried to supersede a Supreme Court decision preventing the recovery of damages against states and their instrumentalities.[776] 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.[777] At least as the statute now reads, remedies are available against recipients of federal funds on the same terms as they are under the Civil Rights Act of 1964,[778] including the award of back pay[779] and attorney's fees.[780] Damages and the right to jury trial are available for intentional violations of

773. 29 C.F.R. § 32.13(a), (c) (2010).

774. 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).

775. § 504(b), 29 U.S.C. § 794(b) (2006).

776. These provisions are in Title VI of the Act. 42 U.S.C. § 2000d-7(a) (2006). The overruled decision is *Atascadero State Hospital v. Scanlon,* 473 U.S. 234 (1985).

777. 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).

778. § 505(a)(2), 29 U.S.C. § 794a(a)(2) (2006). *See infra* text accompanying notes 985-87.

779. Consol. Rail Corp. v. Darrone, 465 U.S. 624 (1984). One circuit, however, has denied recovery of punitive damages under § 504. Moreno v. Consol. Rail Corp., 99 F.3d 782, 788–92 (6th Cir. 1996).

780. § 505(a)(2), 29 U.S.C. § 794a(a)(2) (2006).

§ 501 on the same terms as they are for violations of Title VII.[781] Punitive damages, however, are not available in private actions against public entities that receive federal funds.[782] Neither are damages 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.[783]

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,[784] including employees of state and local government, but not the federal government. The latter are covered entirely by the Rehabilitation Act.[785] 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.[786]

The fundamental prohibition in the ADA is against discrimination on the basis of disability,[787] in terms that follow the corresponding prohibition in Title VII.[788] This prohibition is augmented by a prohibition against retaliation, again modeled on the corresponding prohibition in Title VII.[789] 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,[790] in language again taken from Title

781. 42 U.S.C. § 1981a(a)(2) (2006).

782. Barnes v. Gorman, 536 U.S. 181, 189–90 (2002).

783. 42 U.S.C. § 1981a(a)(3).

784. § 101(5)(A), 42 U.S.C. § 12111(5)(A) (2006).

785. 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. § 101(5)(A), (7), 42 U.S.C. § 12111(5)(A), (7) (2006). The federal government is largely excluded from the definition of "employer," leaving federal employees with their remedies under the Rehabilitation Act. § 101(5)(B), 42 U.S.C. § 12111(7) (2006). Special procedures, however, apply to employees of Congress. § 509, 42 U.S.C. § 12209 (2006).

786. § 102(c), 42 U.S.C. § 12112(c) (2006).

787. § 102(a), 42 U.S.C.A. § 12112(a) (2010).

788. § 703(a)(1), 42 U.S.C. § 2000e-2(a) (2006).

789. § 503, 42 U.S.C. § 12203 (2006).

790. § 102(b)(1), 42 U.S.C.A. § 12112(b)(1) (2010).

VII.[791] Several others are concerned with evasion of the ADA by contracting for discrimination by others or perpetuating the effects of their discrimination.[792] These follow case law that has developed in decisions under Title VII on the issue of agency[793] or under the theory of disparate impact.[794] 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.[795] Another subdivision codifies the obligation to reasonably accommodate disabilities,[796] which was taken from regulations under the Rehabilitation Act that were themselves derived from the obligation to reasonably accommodate religious practices under Title VII.[797] 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.[798] These prohibitions recently have been augmented by the Genetic Information Nondiscrimination Act of 2008,[799] which prohibits discrimination on the basis of genetic information and inquiries to obtain such information, except in narrowly defined circumstances.

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,[800] transvestitism and homosexuality,[801] and compulsive gambling, kleptomania, and pyromania.[802] Hav-

791. § 703(a)(2), 42 U.S.C. § 2000e-2(a)(2) (2006).

792. § 102(b)(2), (3), 42 U.S.C.A. § 12112(b)(2), (3) (2010). The ADA also prohibits discrimination based on the disability of a related or associated individual. § 702(b)(4), 42 U.S.C.A. § 12112(b)(4) (2010).

793. Arizona Governing Comm. v. Norris, 463 U.S. 1073, 1086 & n.16 (1983); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 63 (1986).

794. Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405, 424 (1975).

795. § 102(b)(6), (7), 42 U.S.C.A. § 12112(b)(6), (7) (2010). Similar provisions were enacted in § 703(k) of Title VII, 42 U.S.C. § 2000e-2(k) (2006).

796. § 101(9), 42 U.S.C. § 12111(9) (2006).

797. *See supra* text accompanying notes 380–95.

798. § 102(d), 42 U.S.C. § 12112(d) (2006).

798. Pub. L. No. 110-233, 122 Stat. 881 (2008) (codified in 26, 29, and 42 U.S.C.A. (2010)).

800. §§ 104, 511, 512(b)(3), 42 U.S.C.A. §§ 12114, 12210, 12211(b)(3) (2010).

801. §§ 509, 512(a), (b)(1), 42 U.S.C.A. §§ 12208, 12211(a), (b)(1) (2010).

ing a record of certain of these disabilities, such as drug addiction and alcoholism, can still result in coverage under the ADA.[803] 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;[804] 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";[805] an exception for infectious and communicable diseases, but again subject to the duty of reasonable accommodation;[806] and an exception for insurance plans, provided that they are not used as a subterfuge to avoid the purposes of the law.[807]

Of these provisions, only the "direct threat" defense has been considered by the Supreme Court. In *Chevron U.S.A. Inc. v. Echazabal*,[808] 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.[809] The Court accordingly deferred to the EEOC regulation as a reasonable interpretation of the statute by an administrative agency.[810] Procedures and remedies under the ADA simply follow those under Title

802. § 512(b)(2), 42 U.S.C.A. § 12211(b)(2) (2010).

803. Raytheon Co. v. Hernandez, 540 U.S. 44, 53-55 (2003) (raising issue whether refusal to rehire based on discharge for past drug use violates ADA).

804. § 103(a), 42 U.S.C. § 12113(b) (2006).

805. § 103(b), 42 U.S.C. § 12113(b) (2006). 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).

806. § 103(e), 42 U.S.C. § 12113(e) (2006).

807. § 501(c), 42 U.S.C. § 12201(c) (2006).

808. 536 U.S. 73 (2002).

809. *Id.* at 78.

810. *Id.* at 87.

VII.[811] Damages and the right to jury trial are available for intentional violations of Title I of the ADA on the same terms as they are for violations of Title VII.[812] 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.[813]

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*,[814] 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,[815] 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.[816] 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,[817] 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.[818] Second, a state can waive its immunity to suit, either in a particular case or by general legislation.[819]

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811. § 107(a), 42 U.S.C. § 12117(a) (2006).

812. 42 U.S.C. § 1981a(a)(2) (2006).

813. *Id.* § 1981a(a)(3).

814. 531 U.S. 356 (2001).

815. Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000).

816. *Garrett*, 531 U.S. at 365–68.

817. *See supra* text accompanying note 753.

818. 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).

819. *See supra* note 749.

Third, individual state officers might be personally liable for injunctive relief or damages.[820]

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,"[821] but second, they must still be able "with or without reasonable accommodation" to "perform the essential functions of the employment position" that they seek.[822] 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."[823] 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*,[824] 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.[825] 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 several decades before she was discharged from her position as a public school teacher. Moreover, she was not excluded from coverage because tuberculosis is contagious,

820. 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).

821. 29 U.S.C.A. § 705(9)(B), 20(B) (2010); ADA § 3(1), 42 U.S.C.A. § 12102(1) (2010).

822. § 101(8), 42 U.S.C.A. § 12111(8) (2010).

823. 29 U.S.C.A. § 705(9)(B) (2010); ADA § 3(1), 42 U.S.C.A. § 12102(1) (2010).

824. 480 U.S. 273 (1987).

825. *Id.* at 278.

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.[826] 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*,[827] 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 infecting 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. The holding in *Bragdon* has been confirmed by the ADAAA, which now explicitly covers the "functions of the immune system" and "reproductive functions" as major life activities. [828]

A more restrictive decision on covered disabilities, *Sutton v. United Air Lines, Inc.*,[829] came under intense criticism from Congress and was largely superseded by the ADAAA, although Congress stopped short of completely overruling the decision. *Sutton* held that mitigating measures had to be taken into account in determining whether an individual is disabled, so that an otherwise disabling condition would not be covered if it could be corrected. 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. Somewhat paradoxically, the Supreme Court decided 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 because the plaintiffs

826. *Id.* at 287.
827. 524 U.S. 624 (1998).
828. ADA § 3(1)(B), 42 U.S.C.A. § 12102(1)(B) (2010).
829. 527 U.S. 471 (1999).

had corrected their vision with eyeglasses, seemingly removing the reason that the employer rejected. Ironically enough, the Court allowed the employer to reject the plaintiffs because of their poor vision despite the fact that they had corrected it. Congress specifically disapproved of this reasoning in the ADAAA. [830] In two companion cases to *Sutton*, the Court also emphasized that a disability must be evaluated in its treated form.[831] These cases are disapproved to that extent, but they also were affected by regulations of the Department of Transportation regulating eligibility to be employed as a truck driver, the position in which the plaintiffs were employed. [832] This feature of the decisions is not addressed by the ADAAA.

What the ADAAA did accomplish, in several very detailed provisions, was to greatly expand the coverage of the ADA: Most conditions must now be analyzed in their uncorrected and active state. Impairments are to be evaluated "without regard to the ameliorative effects of mitigating measures." [833] This subsection then goes on to list a variety of mitigating measures, such as "medication," "assistive technology," "reasonable accommodations or auxiliary aids or services," and "learned behavioral or adaptive neurological modifications." In a separate subsection, the Act also provides that an impairment "that is episodic or in remission is a disability if it would substantially limit a major life activity when active." [834] Hence, diseases such as cancer or epilepsy must be evaluated in their active state. In an abundance of caution, Congress also provided that the definitions of "disability" and "substantially limits" shall be interpreted, respectively, "in favor of broad coverage" and "con-

830. The uncodified statement of purpose in the Act refers to *Sutton* by name as one of the decisions that should no longer be followed. Americans with Disabilities Act Amendments Act of 2008 § (2)(a)(4), (b)(2), Pub. L. No. 110-325, 122 Stat. 3553 (codified in 29 U.S.C.A. § 705 (2010) and 42 U.S.C.A. §§ 12101-10 (2010)). The codified statement of the ADA's purposes was also amended to eliminate the reference to the estimated number of people with disabilities, a provision upon which *Sutton* relied to limit the ADA's coverage. ADA § 2(a)(1), 42 U.S.C.A. § 12101(a)(1) (2010); *see Sutton*, 527 U.S. at 484-87.

831. Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 565–66 (1999); Murphy v. UPS, Inc., 527 U.S. 516, 524-25 (1999).

832. *Albertson's*, 527 U.S. at 567–77; *Murphy*, 527 U.S. at 521.

833. ADA § 3(4)(E)(i), 42 U.S.C.A. § 12102(4)(E)(i) (2010).

834. ADA § 3(4)(D), 42 U.S.C. § 12102(4)(D) (2010).

sistently with the findings and purposes" of the Act, and that only one major life activity needs to be affected to trigger coverage. [835]

Despite all these provisions expanding coverage, Congress was much more equivocal about the result in *Sutton* itself, endorsing it in some respects and rejecting it in others. Individuals with defective eyesight correctable by "ordinary eyeglasses or contact lenses" do not suffer from an actual "disability" as now defined in the ADA. [836] Nevertheless, they may still gain coverage if they are "regarded as" disabled. In the ADAAA, Congress disapproved of *Sutton*'s limited interpretation of "regarded as" coverage, eliminating all requirements other than a real or perceived impairment for coverage on this ground. It is no longer necessary for the plaintiff to suffer any effects beyond those necessary to create a real or perceived impairment, an issue now subject to the EEOC's rule-making authority. [837] An actual or perceived limitation on a major life activity is no longer necessary. The plaintiff is covered simply if he or she has suffered discrimination in violation of the ADA "because of an actual or perceived physical or mental impairment." [838] The only exception to "regarded as" coverage is for impairments that are both "transitory and minor." [839] Note that an impairment must be both "transitory" and "minor" to be exempted from coverage. All other actual and perceived impairments—for instance, those that are permanent and minor—are sufficient for coverage. They do not, however, trigger all the substantive protections in the statute. The plaintiff must have suffered discrimination in violation of the ADA because of the actual or perceived impairment.[840] Individuals who gain coverage only because they are "regarded as" disabled are not entitled to reasonable accommodation of their disabilities.[841] They can recover under the statute only if they are victims of other forms of discrimination.

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835. ADA § 3(4)(A), (B), (C), 42 U.S.C.A. § 12102(4)(A), (B), (C) (2010).

836. ADA § 3(4)(E), 42 U.S.C.A. § 12102(4)(E) (2010). The term "ordinary eyeglasses or contact lenses" is itself defined in the statute, mainly to distinguish it from "low-vision devices" which "magnify, enhance, or otherwise augment a visual image." ADA § 3(4)(E)(iii), 42 U.S.C.A. § 12102(4)(E)(iii) (2010).

837. ADA § 506, 42 U.S.C.A. § 12206 (2010).

838. ADA § 3(3)(A), 42 U.S.C.A. § 12102(3)(A) (2010).

839. ADA § 3(3)(B), 42 U.S.C.A. § 12102(3)(B) (2010).

840. ADA § 3(3)(A), 42 U.S.C.A. § 12102(3)(A) (2010).

841. ADA § 501(h), 42 U.S.C.A. § 12201(h) (2010).

One such form has to do specifically with eyeglasses. Employers are now required to evaluate an individual's eyesight in its corrected state, unless they prove that evaluation in its uncorrected state is "job-related for the position in question and consistent with business necessity."[842] Hence, individuals with bad eyesight correctable by ordinary eyeglasses can gain coverage under the statute if they are "regarded as" disabled and if the employer discriminates against them because of their eyesight in its uncorrected state. It is still true, however, that an employer could prevail on the precise facts of *Sutton* by making the showing now required under the statute.

Sutton also assumed, but did not decide, that working was a major life activity.[843] This question has now been resolved in favor of coverage. The ADAAA includes working among a long list of major life activities, including both abstract abilities, such as "learning," and bodily functions, such as "normal cell growth." [844] The effect of the new list of major life activities is to expand coverage based both on an actual disability and on a record of having such a disability. Expanding coverage of impairments that constitute an actual disability automatically expands coverage based on "a record of such an impairment." [845] An individual with a record of a condition that substantially limits any of the listed activities is now covered.

Since work is now a "major life activity," the crucial question is whether the plaintiff's impairment "substantially limits" this activity. *Sutton* required the plaintiffs to prove that they were precluded from "a substantial class of jobs" or "a broad range of jobs." [846] A subsequent decision, *Toyota Manufacturing, Kentucky, Inc. v. Williams*,[847] imposed further restrictions, holding that the impairment must be one that "prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."[848] According to *Toyota Motor*, such an impairment must also be "permanent or long term."[849] Like *Sutton*, this decision was also singled out by Congress for criti-

842. ADA § 103(c), 42 U.S.C.A. § 12113(c) (2010).
843. *Id.* at 492; 29 C.F.R. § 1630.2(j) (2010).
844. ADA § 3(2), 42 U.S.C.A. § 12102(2) (2010).
845. ADA § 3(1)(B), 42 U.S.C.A. § 12102(1)(B) (2010).
846. *Sutton*, 527 U.S. at 492.
847. 534 U.S. 184 (2002).
848. *Id.* at 200–01.
849. *Id.* at 198.

cism,[850] and again like *Sutton*, part of it, but not all of it, was superseded by the ADAAA. In particular, the first of these quoted standards was disapproved, but not the second.

Although it is clear what Congress rejected in the ADAAA, it is less clear what it put in its place. The ADA now states that the definition of "disability" "shall be broadly construed in favor of coverage" and that the term "substantially limits" in this definition should be construed in light of the purposes of the ADAAA. [851] The uncodified statement of purposes specifically rejects "prevents or severely restricts" as the interpretation of a substantial limitation on a major life activity, but not the requirement that the limiting effects be "permanent or long term." [852] Nevertheless, the requirement that a condition be evaluated in its active state does allow temporary impairments that are the effect of continuing conditions to be sufficient for coverage. [853]

The ADAAA also undercuts the decision in *Toyota Motor* in another way. The plaintiff in *Toyota Motor* suffered from carpal tunnel syndrome and alleged that it interfered with her ability to perform "manual tasks." The Supreme Court held that "manual tasks" were a major life activity only to the extent that they involved "activities that are of central imporance to most people's daily lives." [854] Under the ADAAA, "performing manual tasks" is now on the list of major life activities, without any further need to analyze its relationship to other activities. [855] A substantial limit on "performing manual tasks" alone appears to be sufficient. Under the ADAAA, the plaintiff could also have argued that she was "regarded as" disabled, but if she had obtained coverage solely on this ground, she could not have asserted a right to reasonable accommodation.

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850. Americans with Disabilities Act Amendments Act of 2008 § (2)(a)(5), (b)(4), (5) Pub. L. No. 110-325, 122 Stat. 3553.

851. ADA § 3(4), 42 U.S.C.A. § 12102(4) (2010).

852. Americans with Disabilities Act Amendments Act of 2008 § (2)(a)(5), (b)(4), (5), Pub. L. No. 110-325, 122 Stat. 3553. A proposal to substitute new language for the statutory phrase "substantially restricts" was defeated in the Senate in the course of considering the ADAAA. 154 Cong. Rec. S8345-46 (daily ed. Sept. 11, 2008) (remarks of Sen. Harkin).

853. ADA § 3(4)(D), 42 U.S.C.A. § 12102(4)(D) (2010).

854.*Toyota Motor*, 534 U.S. at 197.

855. ADA § (3)(2)(A), 42 U.S.C.A. § 12102(2)(A) (2010).

Discrimination and Reasonable Accommodation

The ADAAA has now resolved most questions of whether an individual has a covered disability. For most plaintiffs, the focus of litigation is now likely to shift to the question whether the plaintiff is a "qualified individual" under Title I of the ADA and to the question whether the defendant has violated the prohibitions against employment discrimination in this title. These are questions under Title I concerning the scope of the defendant's duties and the range of legitimate reasons that can be offered for a disputed employment decision. 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" and of proving discrimination, subject to any defenses on which the defendant has the burden of proof. The most important such defense, both in regulations under the Rehabilitation Act and under the explicit terms of the ADA, is that a proposed accommodation would result in an "undue hardship."[856]

Both statutes, 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. 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.[857] 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."[858] 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

856. 29 C.F.R. § 32.13(a) (2010); § 102(b)(5)(A), 42 U.S.C. § 12112(b)(5)(A) (2006).

857. 29 C.F.R. § 32.13(a), (c) (2010). For federal agencies, the regulation is 29 C.F.R. § 1613.704(a) (2010).

858. § 101(8), 42 U.S.C.A. § 12111(8) (2010).

claim of reasonable accommodation.[859] 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.

The Supreme Court first addressed this problem in a decision under the Rehabilitation Act, *Southeastern Community College v. Davis*.[860] 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.[861]

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 eligibility for the program in question.[862]

These questions are particularly acute for individuals who obtain coverage under the ADA only because they are "regarded as" having a disability. As noted in the previous section, the employer does not owe such individuals any duty of reasonable accommodation. [863] Hence, for these individuals, the question of whether they are qualified "without regard to" their disabilities or "in spite of" their disabilities remains crucial. In terms of the employer's available defenses, it depends upon whether the employer must ignore the plaintiff's perceived disability or whether the employer can take account of its effect on performance. Thus, an employee who has an impairment, but not one so severe as to

859. ADA §§ 101(10), 102(b)(5)(A), 42 U.S.C. §§ 12111(10), 12112(b)(5)(A) (2006).

860. 442 U.S. 397 (1979).

861. *Id.* at 410–11.

862. *Id.* at 405–06.

863. ADA § 501(h), 42 U.S.C.A. § 12201(h) (2010).

constitute an actual disability, would have a covered disability if "regarded as" disabled by the employer. Would the employer violate the ADA if it took account of the impairment or its consequences for performance on the job? Under the "without regard to" approach, the employer would have to disregard the impairment, even if it affected likely performance on the job. Assuming he or she could perform the essential functions of the job, the employee would be a "qualified individual" entitled to protection against employment discrimination,[864] and taking account of her impairment would then constitute "discrimination on the basis of disability." [865] Alternatively, the employer could be allowed to take account of likely performance "in spite of" the disability. On this view, performance on the job would not be an impairment that constituted a disability, so that the employer would not be engaged in "discrimination on the basis of disability" in taking account of the impairment.

In the legislative history to the ADAAA, Congress addressed these questions, supporting the application of the standards from *Texas Department of Community Affairs v. Burdine*.[866] In particular, the House Committee on Education and Labor stated in its report that, in originally passing the ADA, "Congress intended and believed that the fact that an individual was discriminated against because of a perceived or actual impairment would be sufficient: if a person is disqualified on the basis of an actual or perceived physical or mental condition, and the employer can articulate no legitimate job-related reason for the rejection, a perceived concern about employment of persons with disabilities could be inferred and the plaintiff would qualify for coverage under the 'regarded as' test." [867] The committee then goes on to endorse the application of *Burdine* to claims involving indirect evidence of discrimination, reasoning that it goes to the issue whether the plaintiff is a "qualified individual." [868]

For individuals with an actual disability or a record of one, the employer's duty of reasonable accommodation raises added issues. In *Southeastern Community College v. Davis*, the Court held that § 504 of

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864. ADA § 101(8), 42 U.S.C.A. § 12111(8), (2010).

865. ADA § 102(a), 42 U.S.C.A. § 12112(a) (2010).

866. 450 U.S. 782 (1989).

867. H.R. Rep. 110–730, Pt. 1, 110th Cong., 2d Sess. 13 (2008), quoting H.R. Rep. No. 101–485, pt. 3, at 30-31 (1990).

868. *Id.* at 16–17.

the Rehabilitation Act did not impose on recipients of federal funds a broad duty of accommodation analogous to the duty to engage in affirmative action imposed upon federal agencies under § 501 or federal contractors under § 503.[869] 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."[870] With this qualification, most of the decisions on the duty to accommodate under the Rehabilitation Act support at 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.[871]

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*[872] concerned professional golf tournaments that were open to all qualifying golfers and for this reason were held to be a public accommodation.[873] 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.[874] 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."[875] 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.[876] The statutory language of the ADA follows the same pattern, defining the duty of reasonable accommodation by offering a list of ex-

869. *Id.* at 407–12.
870. 29 C.F.R. § 1613.203(b) (2010).
871. § 501(a), 42 U.S.C. § 12201(a) (2006).
872. 532 U.S. 661 (2001).
873. *Id.* at 677.
874. *Id.* at 689–90.
875. *Id.* at 683.
876. 29 C.F.R. §§ 32.13(b), (c), 1613.203(c) (2010).

amples, 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."[877]

The definition of "undue hardship" in the ADA, like the definition of "reasonable accommodation," follows regulations issued under the Rehabilitation Act.[878] "Undue hardship" under the ADA "means an action requiring significant difficulty or expense, when considered in light of" four enumerated factors.[879] 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.[880] 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.[881]

The literal terms of the ADA created a problem in assigning the burden of proof. The ADA requires the plaintiff to prove that an accommodation is reasonable, while it requires the defendant to prove that it causes an undue hardship. The statute, however, does not clearly distinguish between these issues, leaving for the courts the question when a reasonable accommodation could nevertheless cause an undue hardship. The statutory definitions of both "reasonable accommodation" and "undue hardship" depend upon lists of examples and factors to be taken into account, without precisely identifying what makes an accommodation "reasonable" or what makes hardship "undue."[882]

The Supreme Court attempted to give these provisions more definite content in *U.S. Airways, Inc. v. Barnett*,[883] a case involving an employee's request for accommodation of his bad back by transfer to a less strenuous position, one that was not otherwise open to him under the terms of the employer's seniority system. When the employer failed to

877. § 101(9)(B), 42 U.S.C. § 12111(9)(B) (2006).

878. 34 C.F.R. § 104.12(c); 45 C.F.R. § 84.12(c) (2010).

879. § 101(10)(A), 42 U.S.C. § 12111(10)(A) (2006).

880. § 101(10)(B), 42 U.S.C. § 12111(10)(B) (2006).

881. 136 Cong. Rec. H2470, H2475 (daily ed. May 17, 1990) (rejecting amendment that would have established 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).

882. § 101(8), (9), 42 U.S.C.A. § 12111(9), (10) (2010).

883. 535 U.S. 391 (2002).

make an exception to the seniority system for his benefit, he sued. As the case came to the Supreme Court, it raised two questions: whether creating an exception to the employer's seniority system was required by the duty of reasonable accommodation and who had the burden of proof on this issue. On the first question the Court held that such an accommodation is sometimes required, but on the second, it held that most of the burden of proof remained on the plaintiff. The Court reasoned that the ADA does not "ordinarily" require assignment of a disabled employee contrary to the terms of a seniority system, and in the absence of other evidence, a showing to this effect entitles the employer to summary judgment.[884] 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.[885]

Before *U.S. Airways*, the federal circuits had taken a variety of different approaches to the burden of proof. Most of these variations involved slight differences in formulating what each party had to prove. Some, however, were more consequential. Two leading cases, one cited favorably by the Court, and the other passed over without citation, exemplify the different approaches. The first, *Borkowski v. Valley Central School District*,[886] was decided under the Rehabilitation Act, and the second, *Vande Zande v. Wisconsin Department of Administration*,[887] 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

884. *Id.* at 406.
885. *Id.*
886. 63 F.3d 131 (2d Cir. 1995).
887. 44 F.3d 538 (7th Cir. 1995).

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."[888] 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."[889] 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* 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";[890] the defendant "then must show special (typically case-specific) circumstances that demonstrate undue hardship."[891] 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 judg-

888. *Borkowski*, 63 F.3d at 138.
889. *Vande Zande*, 44 F.3d at 543.
890. *U.S. Airways*, 535 U.S. at 401 (citing cases).
891. *Id.* at 402.

ment. 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 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.*,[892] 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 remained upon the plaintiff to establish that she was "otherwise qualified" for the position that she sought from the employer. This difference has now been confirmed by the ADAAA, which provides that nothing in the ADA "alters the standards for determining eligibility for benefits under State worker's compensation laws or under State and Federal disability benefit programs."[893]

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.[894] 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;[895]

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892. 526 U.S. 795 (1999).

892. § 501(e), 42 U.S.C.A. § 12201(e) (2010).

894. 42 U.S.C. § 1981a(a)(3) (2006).

895. 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).

others impose a duty upon employers only to respond to reasonable proposals.[896] 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.

896. 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).

V. Other Prohibitions Against 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 today: § 1981, which grants to all persons the same right "to make and enforce contracts . . . as is enjoyed by white citizens";[897] § 1983, which creates a private right of action for deprivations of federal rights under color of state law;[898] and § 1985(3), which prohibits conspiracies to deny equal protection of the laws.[899]

An entire treatise could be devoted to these laws, and particularly to § 1983,[900] 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 § 1981, which prohibits all forms of racial discrimination, whether public or private, in making contracts. The exact scope of § 1981 has been a matter of controversy, only recently resolved by the Civil Rights Act of 1991. For many years, § 1981 was thought to

897. 42 U.S.C. § 1981 (2006).
898. *Id.* § 1983 (2006).
899. *Id.* § 1985(3).
900. *See infra* text accompanying notes 930–42.

prohibit only state action in denying the right to contract, until the Supreme Court reached a contrary conclusion in interpreting a companion statute, § 1982, which prohibits discrimination with respect to property rights. The Court interpreted § 1982 to reach private discrimination in real estate transactions,[901] and this precedent was soon extended to § 1981. In *Johnson v. Railway Express Agency*,[902] the Supreme Court broadly interpreted § 1981 to provide a remedy for employment discrimination that is procedurally independent of Title VII. The Court later expanded § 1981 still further, to reach discrimination on the basis of national origin, in addition to discrimination on the basis of race.[903]

Despite these expansive decisions, the Court has limited § 1981 to claims of disparate treatment, excluding claims of disparate impact,[904] and other federal courts have generally held that § 1981 imposes no greater burden on employers than does Title VII.[905] The statute also supports litigation only by a party or a would-be party to a contract, thus excluding the sole shareholder and president of a corporation from bringing a claim for racial discrimination in breaching a contract with the corporation.[906] Section 1981 does support claims of retaliation,[907] but the lower federal courts are divided on whether it covers discrimination against aliens.[908]

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901. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437–39 (1968).

902. 421 U.S. 454 (1975).

903. Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604 (1987).

904. General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982). Section 1981 also supports claims of reverse discrimination. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 285–96 (1976).

905. *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 § 1981).

906. Domino's Pizza, Inc. v. McDonald, 546 U.S. 470 (2006).

907. CBOCS v. Humphries, 128 S. Ct. 1951 (2008).

908. *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 § 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).

Another restrictive decision by the Supreme Court, in *Patterson v. McLean Credit Union*,[909] eventually led Congress to amend § 1981 in the Civil Rights Act of 1991. Relying on the literal terms of § 1981 as it then read, the Court in *Patterson* held that § 1981 covered only discrimination in the formation of contracts, not in their performance, as in the claim of racial harassment in *Patterson* itself.[910] This decision is probably better explained as expressing long-standing doubts about the extension of § 1981 to private discrimination.[911] In any event, Congress put all these doubts to rest by adding a provision explicitly extending § 1981 to private discrimination[912] and another provision overruling *Patterson* and extending § 1981 to all aspects of the contractual relationship.[913] After some initial decisions holding that § 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.[914]

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*,[915] which held that claims under § 1981 against state officials must be brought under § 1983. The Court in *Jett* reasoned that § 1981 only created a right, whereas § 1983 explicitly provided a remedy for actions of state officials, and so the latter governed the method of enforcing the right.[916] The new provisions in § 1981 do nothing to disturb this reasoning, although the general expansion of § 1981 might be thought to override the limitations under § 1983, particularly various immunities.[917] The circuits are

909. 491 U.S. 164 (1989).

910. *Id.* at 175–78.

911. *See* Gerhard Casper, Jones v. Mayer*: Clio, Bemused and Confused Muse*, 1968 Sup. Ct. Rev. 89.

912. 42 U.S.C. § 1981(c) (2006).

913. *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).

914. Skinner v. Maritz, Inc., 253 F.3d 337, 342 (8th Cir. 2001) (citing cases).

915. 491 U.S. 701 (1989).

916. *Id.* at 731–36.

917. *See infra* text accompanying notes 936–39.

divided on this question, as they are on others about the effect of the Civil Rights Act of 1991.[918]

Unlike Title VII, § 1981 does not require exhaustion of administrative remedies,[919] but like Title VII after the 1991 amendments, it provides damages as a remedy[920] and gives rise to a right to jury trial under the Seventh Amendment.[921] Some, but not all, claims under § 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."[922] In *Jones v. R.R. Donnelley & Sons Co.*,[923] the Supreme Court applied this general statute of limitations to claims under § 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 § 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 hiring[924] and are governed by the statute of limitations for tort claims for personal injuries, adopted from the state in which the district court sits.[925] Regardless of which statute of limitations applies—the state statute or the general federal statute—it applies to a claim under § 1981 independently of any administrative proceedings commenced by the plaintiff under Title VII.[926] The limitation period be-

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918. *Compare* Fed'n of African Am. Contractors v. City of Oakland, 96 F.3d 1204, 1209, 1214 (9th Cir. 1996) (§ 1981(c) allows claims directly against state actors under doctrine of respondeat superior), *with* Butts v. Volusia Cnty., 222 F.3d 891, 894 (11th Cir. 2000) (no such direct action against state actor allowed).

919. *See* Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 460–61 (1975).

920. *Id.* at 460.

921. *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).

922. 28 U.S.C. § 1658 (2006).

923. 541 U.S. 369 (2004).

924. *See supra* text accompanying notes 896-98.

925. 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).

926. Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 462–65 (1975).

gins to run on claims under § 1981 at the same time as the limitation period on any claims under Title VII,[927] but the time periods under each statute are different and are computed independently of one another.[928] The net effect of these similarities and differences is to encourage plaintiffs and their lawyers to take advantage of both statutes if they can.

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.[929] Both Title VII claims and § 1981 claims, but not other claims, support an award of expert fees.[930]

Section 1983

The modern law of § 1983 begins with *Monroe v. Pape*,[931] 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 § 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, § 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, § 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

927. Chardon v. Fernandez, 454 U.S. 6 (1981).

928. 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 463–83. Some circuits have refused to allow recovery for such violations under § 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).

929. 42 U.S.C. § 1988 (2006). *See supra* text accompanying notes 604–20.

930. 42 U.S.C. § 1988 (2006); § 706(k), 42 U.S.C. §§ 2000e-5(k), 1988(c) (2006).

931. 365 U.S. 167 (1961). *See generally* Martin A. Schwartz & Kathryn R. Urbonya, Section 1983 Litigation (Federal Judicial Center 2d ed. 2008).

discrimination, not to practices with disparate impact.[932] Evidence of disparate impact may be used to prove intentional discrimination, as it may under Title VII, but an additional inference 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,[933] the Constitution takes a more flexible approach, prohibiting classifications on the basis of sex unless they have an "exceedingly persuasive justification."[934] 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.[935] 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.[936]

In addition to satisfying the substantive requirements of the constitutional prohibitions against discrimination, plaintiffs under § 1983 must overcome several further obstacles in order to obtain relief, particularly in the form of damages. If the defendant is a separate unit of government (like a city or county), it is not considered part of the state immune from monetary relief under the Eleventh Amendment,[937] but liability depends on whether the alleged discrimination resulted from the execution of of-

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932. Washington v. Davis, 426 U.S. 229, 238–39 (1976).

933. Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 200–01 (1991).

934. United States v. Virginia, 518 U.S. 515, 531 (1996).

935. 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).

936. Hampton v. Mow Sun Wong, 426 U.S. 88 (1976); Mathews v. Diaz, 426 U.S. 67 (1976).

937. Quern v. Jordan, 440 U.S. 332, 338 (1979).

ficial policy or custom.[938] 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 sued in a personal capacity for the remaining forms of relief, both damages and injunctive or declaratory relief.[939] To obtain relief against the officer in a personal capacity, the plaintiff must also overcome a defense of official immunity, either absolute or qualified.[940]

The statute of limitations for § 1983 is borrowed from state law. In *Wilson v. Garcia*,[941] the Supreme Court held that all claims under § 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 § 1983 but reasoned that uniform and definite limitation in each state was preferable to varying and uncertain limitations for different claims.[942] With the exceptions noted earlier, attorney's fees can be recovered in § 1983 actions in the same circumstances as under Title VII.[943]

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.[944] Like the other Reconstruction civil rights statutes, § 1985(3) suffered a century of neglect before it was revived by the Supreme Court. In *Griffin v. Breckenridge*,[945] the Court interpreted § 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

938. City of St. Louis v. Prapotnik, 485 U.S. 112, 128 (1988); Owens v. City of Independence, 445 U.S. 622, 657 (1980).

939. *See, e.g.,* Hafer v. Melo, 502 U.S. 21 (1991).

940. *See, e.g.,* Scheuer v. Rhodes, 416 U.S. 232 (1974).

941. 471 U.S. 261 (1985).

942. *Id.* at 271–75.

943. *See supra* text accompanying notes 604–20.

944. 42 U.S.C. § 1985(3) (2006).

945. 403 U.S. 88, 102 (1971).

against groups defined in those terms. Thus, nonunion workers are not among the groups protected by the statute.[946]

A further limitation on § 1985(3) also follows from the element of "class-based, invidiously discriminatory animus" required to establish a violation of the statute. The statute covers deprivation of rights that overlap 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*,[947] the Supreme Court held that § 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 § 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."[948] 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.[949] 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.[950]

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946. United Bhd. of Carpenters, Local 610 v. Scott, 463 U.S. 825, 835 (1983).

947. 442 U.S. 366 (1979).

948. 29 U.S.C. § 206(d)(1) (2006).

949. Schultz v. Wheaton Glass Co., 421 F.2d 259, 265 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970).

950. Corning Glass Works v. Brennan, 417 U.S. 188, 196–97, 204–05 (1974).

A leading case, *Corning Glass Works v. Brennan*,[951] illustrates how the burden of proof operates under the Equal Pay Act. That case concerned 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.[952] 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.[953] 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

951. *Id.* at 197–205.
952. 29 U.S.C. § 206(d)(1) (2006).
953. *Id.*

work. This conclusion holds even if women are paid less than men for doing work that is more valuable. The plaintiff, however, need not prove that women perform exactly the same work as men, only work that is "substantially equal" to the work of men.[954] 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."

Legislation, however, is pending in Congress to increase the employer's burden of proving defense (iv), allowing any difference in pay that is based on "any other factor other than sex." The Paycheck Fairness Act, passed by the House of Representatives, but not the Senate, would substitute proof of "a bona fide factor other than sex, such as education, training, or experience," and require proof of three additional elements: that the factor "is not based upon or derived from a sex-based differential in compensation"; that it "is job-related with respect to the position in question"; and that it "is consistent with business necessity."[955] If enacted, this provision would increase employers' liability under the Equal Pay Act and perhaps affect liability under Title VII as well. As noted earlier 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.[956] Plaintiffs under Title VII can recover even if they work in substantially different jobs from those held by members of the opposite sex. Under the Paycheck Fairness Act, employers would have a heavier burden of proving defense (iv) under both the Equal Pay Act and Title VII.

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 em-

954. *Schultz*, 421 F.2d at 265.

955. S. 797, § 3, 112th Cong., 1st Sess. (2011).

956. *See supra* text accompanying notes 328–30.

ployees exempt from coverage of the FLSA.[957] The FLSA authorizes criminal actions for "willful" violations and civil actions, both public and private, against employers.[958] Although the Equal Pay Act prohibits unions from causing employers to violate the statute, it provides no civil remedies against unions.[959]

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.[960] Public actions come in two forms. Under § 16(c),[961] the EEOC can sue for back pay and an equal amount in liquidated damages to be awarded in the discretion of the district court. Under § 17,[962] the EEOC can sue for injunctive relief, including an order for back pay, but not liquidated damages.[963] 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 § 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.[964] Private individuals are entitled to back pay and, in the discretion of the district court, an equal amount in liquidated damages.[965] They are also entitled to an award of attorney's fees.[966] 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.[967]

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957. 29 U.S.C. §§ 203, 213, 216–217 (2006). 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. Sec'y of Labor, 471 U.S. 290, 303–06 (1985).

958. 29 U.S.C. § 216(a) (2006).

959. *Id.* §§ 216–217. *But see* Hodgson v. Sagner, Inc., 326 F. Supp. 371 (D. Md. 1971) (remedy awarded against union).

960. 29 U.S.C. §§ 216 (2006); Reorganization Plan No. 1 of 1978, § 1, *reprinted in* 5 U.S.C. app. at 206 (2006), *and in* 92 Stat. 3781 (1978).

961. 29 U.S.C. § 216(c) (2006).

962. *Id.* § 217.

963. *E.g.,* Brennan v. Bd. of Educ., 374 F. Supp. 817 (D.N.J. 1974).

964. 29 U.S.C. § 216(b)–(c) (2006).

965. *Id.* §§ 216(b), 260.

966. *Id.* § 216(b).

967. *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); LaCh-

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.[968] Unreasonable conduct alone is not enough to support a longer limitation period.[969] The FLSA also provides for a complete defense of reliance on written policy[970] 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.[971] Despite these provisions for liquidated damages, the most distinctive feature of the Equal Pay Act is the narrowness of its prohibition: only for sex discrimination, only in pay, and only in jobs that are substantially equal.

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.[972] Like § 503 of the Rehabilitation Act,[973] the executive order is enforced by the Office of Federal Contract Compliance Programs (OFCCP) in the Department of Labor. Unlike § 503, 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,

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appelle v. Owens-Illinois, Inc., 513 F.2d 286 (5th Cir. 1975) (opt-in class action allowed on ADEA claim under same provision).

968. McLaughlin v. Richland Shoe Co., 486 U.S. 128, 131–35 (1988).

969. *Id.* at 135 n.13.

970. 29 U.S.C. § 259 (2006).

971. *Id.* § 260.

972. 3 C.F.R. 339 (1964–1965), *reprinted as amended in* 42 U.S.C. § 2000e (2006).

973. 29 U.S.C. § 793 (2006). *See supra* text accompanying note 764.

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.[974] 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.[975] The regulations elaborate on each of these three requirements and add further requirements as well, and compliance is enforced by administratively imposed sanctions.[976] 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.[977]

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 against contractors to enforce their obligations under the executive order.[978] The OFCCP can also seek awards of back pay in administrative enforcement proceedings.[979] Private individuals cannot sue under the executive order, although in limited circumstances, they can sue to require the OFCCP to take enforcement action.[980]

The process of administrative enforcement lends a degree of flexibility to the OFCCP regulations on affirmative action, reducing the incen-

974. 41 C.F.R. §§ 60-1.5(a)(1), -1.40(a) (2006).

975. *Id.* §§ 60-2.11, -2.12.

976. *Id.* §§ 60-1.26, -1.27, -2.13, -2.14, -2.20 to -2.26.

977. *Id.* pt. 60-4.

978. *Id.* § 60-1.26.

979. *Id.* § 60-1.26(a)(2).

980. *See* Legal Aid Soc'y v. Brennan, 608 F.2d 1319 (9th Cir. 1979), *cert. denied*, 447 U.S. 921 (1980).

tives 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.[981] 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 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.[982] 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

981. *E.g.*, Ne. Constr. Co. v. Romney, 485 F.2d 752, 757–58 (D.C. Cir. 1973); Contractors Ass'n v. Sec'y of Labor, 442 F.2d 159, 171 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

982. 40 U.S.C. § 121(a) (2006).

sanctions may be imposed on federal contractors.[983] 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*,[984] 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.[985] 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 § 504, provides an example of this form of regulation.[986] This provision itself was modeled on Title VI of the Civil Rights Act of 1964,[987] which prohibits racial discrimination by recipients of federal funds. Title IX of the Education Amendments of 1972[988] 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."[989] 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.[990] This decision applied to all statutes mod-

983. § 718, 42 U.S.C. § 2000e-17 (2006). *See* Robert P. Schuwerk, Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. Chi. L. Rev. 723 (1972).

984. 441 U.S. 281, 303–08 (1979).

985. *E.g.,* Liberty Mut. Ins. Co. v. Friedman, 639 F.2d 164 (4th Cir. 1981).

986. 29 U.S.C. § 794 (2006).

987. 42 U.S.C. §§ 2000d to 2000d-4 (2006).

988. 20 U.S.C. §§ 1681–1685 (2006).

989. 42 U.S.C. § 2000d-3 (2006).

990. Grove City Coll. v. Bell, 465 U.S. 555, 570–74 (1984).

eled 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.[991] 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.[992] Most recently, the Supreme Court has also denied a private right of action for enforcing these regulations.[993]

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.[994] 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.[995] Private plaintiffs can nevertheless bring individual actions to enforce Title IX, as well as Title VI.[996]

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,[997] the Railroad Revitalization and Regulatory Reform Act,[998] and the Housing and Community Development Act of 1974.[999] 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

991. 20 U.S.C. §§ 1687, 1688 (2006); 42 U.S.C. § 2000d-4a (2006).

992. Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 584, 607 n.27 (1983) (opinion of White, J.).

993. Alexander v. Sandoval, 532 U.S. 275, 282–93 (2001).

994. N. Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982).

995. 20 U.S.C. §§ 1682, 1683; 42 U.S.C. §§ 2000d-1, d-2 (2006).

996. Cannon v. Univ. of Chicago, 441 U.S. 677, 717 (1979); Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 70–71 (1992). *But see* Barnes v. Gorman, 536 U.S. 181, 184–88 (2002) (punitive damages cannot be awarded against state agencies under ADA and Rehabilitation Act in claims modeled on Title VI).

997. 42 U.S.C. § 6709 (2006).

998. 49 U.S.C. § 306 (2006).

999. 42 U.S.C. § 5309 (2006).

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 Act[1000] and the Railway Labor Act.[1001] 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.[1002] They do not, however, prevent certification of a union that has engaged in discrimination.[1003] 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.[1004] The National Labor Relations Act also contains a special provision to accommodate employees who have religious objections to paying dues to a union pursuant to a union security clause.[1005]

The availability of implied remedies under other statutes has been limited by the Supreme Court's decision in *NAACP v. Federal Power Commission*.[1006] 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.

1000. 29 U.S.C. §§ 151–169 (2006).

1001. 45 U.S.C. §§ 151–163 (2006).

1002. Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944).

1003. Handy Andy, Inc., 228 N.L.R.B. 447 (1977).

1004. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

1005. 29 U.S.C. § 169 (2006).

1006. 425 U.S. 662 (1976).

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The Federal Judicial Center

About the Federal Judicial Center

The Federal Judicial Center is the research and education agency of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620–629), on the recommendation of the Judicial Conference of the United States.

By statute, the Chief Justice of the United States chairs the Center's Board, which also includes the director of the Administrative Office of the U.S. Courts and seven judges elected by the Judicial Conference.

The organization of the Center reflects its primary statutory mandates. The Education Division plans and produces education and training programs for judges and court staff, including video programs, publications, curriculum packages for in-court training, and Web-based programs and resources. The Research Division examines and evaluates current and alternative federal court practices and policies. This research assists Judicial Conference committees, who request most Center research, in developing policy recommendations. The Center's research also contributes substantially to its educational programs. The two divisions work closely with two units of the Director's Office—the Systems Innovations & Development Office and Communications Policy & Design Office—in using print, broadcast, and on-line media to deliver education and training and to disseminate the results of Center research. The Federal Judicial History Office helps courts and others study and preserve federal judicial history. The International Judicial Relations Office provides information to judicial and legal officials from foreign countries and assesses how to inform federal judicial personnel of developments in international law and other court systems that may affect their work.