Title VII: How to Break the Law without Really Trying

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COMMENT

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The success of the labor movement in the United States is largely due to federal legislation. In 1932 Congress enacted the Norris-LaGuardia Act which precluded the employer from using his most successful weapon—the labor injunction. In 1935 Congress passed the Wagner Act which guaranteed to working men the right to organize and join labor unions and protected this right from various forms of employer interference. The Wagner Act gave such a tremendous impetus to the labor movement that in 1949 Congress passed the Taft-Hartley Act. This Act imposed various obligations on labor unions to ensure that their economic strength was not deleteriously employed. Subsequently, in 1959, Congress enacted the Landrum-Griffin Act which imposed a number of fiduciary obligations on labor unions and provided union members with the right to select their own leaders. At first glance it would appear that this comprehensive and complicated legislative scheme was sufficient to protect all workers and provide them with the means for "securing for themselves the blessings of life, liberty and happiness." This, however, was not the case, for the Industrial Revolution did not include America's blacks.

The civil rights movement of the late 1950's exerted great pressure on Congress to enact legislation which would secure fundamental personal rights to minority Americans. Congress responded by passing the Civil Rights Act of 1957. The reports of the Commission on Civil Rights, established pursuant to the Act of 1957, were instrumental in having Congress pass the Civil Rights Act of 1964. Title VII of the Act of 1964 imposes a myriad of obligations on employers and other organizations and outlines various procedures to be followed by an aggrieved party in seeking redress of his Title VII rights. This article will examine these procedural requirements and also the rules established by the various courts in determining the legality of certain business practices. This examination will involve a discussion of the more important cases that have interpreted Title VII. While the number of cases analyzed is limited,

1. For an excellent discussion of labor's early problems see J. Commons and E. Gilmore, A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY (19th ed. 1910).

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nevertheless, the rationale and tests evolved by these cases are applicable to all the proscriptions of Title VII. The purpose of this article is to present employers with a series of viable tests and guidelines by which they will be able to judge the legality of their business practices. Before beginning this analysis and examining these tests, it is necessary that the various provisions of Title VII be examined and understood.

Title VII

Title VII proclaims that it is the right of every employee to seek and obtain employment with any employer. In order to effectuate this purpose Title VII delineates three specific categories of "persons," employers, employment agencies, and labor unions. It provides that any discrimination practiced by them in connection with an employee's race, religion, color, sex, or national origin is an unlawful employment practice. An employer is defined as "a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." The term "employment agency" as used within Title VII is interpreted as applying "to any person [who] regularly undertake[s] with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer." Employment agencies are precluded from classifying or refusing to refer an employee for employment because of his race, religion, color, sex or national origin. A labor organization is defined as one which is engaged in an industry affecting commerce and which exists for the purpose of dealing with employers concerning grievances, labor disputes or other terms or conditions of employment. Labor organizations are forbidden to discriminate against any em-

8. The term "employee" as used herein also includes prospective employees unless the contrary is explicitly stated.
9. 42 U.S.C. § 2000e-2 (1964). It took Congress over 20 years to enact a fair employment practices bill. Representative Vito Marcantonio introduced the bill in Congress in March of 1941. This unsuccessful attempt was followed by hundreds of others until finally Congress passed the Civil Rights Act of 1957, which was the forebear of Title VII.
10. Title VII defines the term "person" as follows:
   The term "person" includes one or more individuals labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.
11. The word "discrimination" is not defined in Title VII. For some suggested types of discrimination that are forbidden by Title VII, see Affeldt, Title VII in the Federal Courts—Private or Public Law, 15 VILL. L. REV. 1 (1969).
13. Id.
14. Id. at § 2(b).
15. Id. at § 2(d), (e).
ployee because of his race, religion, color, sex or national origin by (1) excluding or expelling him from membership; (2) limiting, segregating or classifying its membership and refusing to refer him for employment; and (3) causing an employer to discriminate against him in violation of the Act.16

Congress recognized, however, that certain enterprises could not adequately function if they were forced to hire employees who did not possess certain qualifications, such as sex, religion or national origin. Accordingly, Congress provided that an employer may discriminate against employees without committing an unlawful employment practice in three situations: (1) where sex, religion or national origin is a bona fide occupational qualification;17 (2) where the employee is a member of the Communist party;18 (3) where a position is subject to the requirements imposed in the interests of national security and the employee fails to meet these criteria.19 Furthermore, Congress restrictively defined the term "employer" so that it effectively includes only eight percent of the nation's employers.20 This restrictive definition denies the protection of Title VII to 44 million of the nation's employees.21 The term "employer" was further restricted by Congress in that it specifically exempted the United States, a state or political subdivision thereof, or a bona fide private membership club from the Act's coverage.22

Section 705 of Title VII establishes the Equal Employment Opportunity Commission [EEOC] and enumerates its powers.23 Essentially the EEOC's authority in enforcing the Act is limited to the power of persuasion, i.e., it attempts to achieve voluntary compliance with the Act through conciliation.24 Although the EEOC's enforcement powers are limited, its investigatory powers are far reaching. Section 710(a) grants the EEOC the authority "to examine witnesses under oath and to require the production of documentary evidence relevant or material to the charge under investigation."25 The EEOC can have its subpoenas enforced against any recalcitrant party by petitioning the United States district court in which the person is found or is transacting business and requesting the court to order the party’s compliance.26

16. Id. at § 2(c).
17. Id. at § 2(e).
18. Id. at § 2(f). The constitutionality of this provision is doubtful in light of the Supreme Court's decision in Aptheker v. Secretary of State, 378 U.S. 500 (1964).
19. Id. at § 2(g).
20. 110 CONG. REC. 13090 (1964) (remarks of Senator Humphrey).
21. Id.
23. Id. at § 4(f).
24. Id.
25. Id. at § 9(a).
26. Id. at § 9(b).
The EEOC becomes involved in discrimination cases when an aggrieved party or a member of the EEOC files a charge pursuant to Section 706(a).\textsuperscript{27} Section 706(b) provides that when an alleged unlawful employment practice is committed within a state or political subdivision thereof, and that state or subdivision has a law prohibiting such a practice, then the aggrieved party must first file his complaint in the state. After the state has held and terminated its proceedings, or after the expiration of sixty days, whichever occurs first, the aggrieved party may then file his charge with the EEOC. Subsection (e) of Section 706 permits an aggrieved party to bring a civil suit when the EEOC's conciliation attempts have failed and also allows the court to permit the Attorney General to intervene as a matter of right in a private case if he certifies that the case is of general public importance.

Section 706(f) of the Act grants jurisdiction to the federal courts to adjudicate "cases and controversies" arising under Title VII, and provides the proper venue for these cases.\textsuperscript{28}

Once a private suit has been commenced the EEOC may intervene as an amicus curiae. This action has no statutory basis but the courts have adopted the attitude that the EEOC would be helpful in reaching a decision and framing the appropriate relief.\textsuperscript{29} In addition to appearing as an amicus, the EEOC recently has successfully intervened in a private suit under the criteria established by the Federal Rules of Civil Procedure.\textsuperscript{30} Although permissive intervention by the EEOC is not an adequate substitute for stricter enforcement powers, nevertheless, it does provide a statutory framework whereby the EEOC can more easily determine its own destiny.

Enforcement of the substantive rights of employees therefore, can be obtained by: (1) the EEOC's conciliation efforts; (2) a private civil suit; or (3) a civil suit instituted by the Attorney General.

The Attorney General is empowered by the language of Section 707(a) to bring a civil action whenever he has reasonable cause to believe that any person or group of persons is engaged in a "pattern or practice" of discrimination

\begin{itemize}
\item \textsuperscript{27} \textit{Id.} at § 5(a).
\item \textsuperscript{28} \textit{Id.} at § 5(f). Section 706(f) states that the venue for Title VII cases shall be:
\begin{enumerate}
\item [1] In judicial district in the State in which the unlawful employment practice is alleged to have been committed,
\item [2] in the judicial district in which the employment records relevant to such practice are maintained and administered, or
\item [3] in the judicial district in which the plaintiff would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office.
\end{enumerate}
\item \textsuperscript{29} \textit{Virgil v. American Tel. & Tel. Co.}, 61 CCH Lab. Cas. 99 9321 (D. Colo. 1969).
\end{itemize}
in violation of Title VII. After the EEOC's conciliation efforts have failed and a civil suit is filed, the federal courts are empowered to 'enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay.'

Traditionally the only pecuniary relief that the courts have awarded to discriminatees has been back pay. In "pattern and practice" cases the Attorney General has generally not sought back pay for the allegedly aggrieved parties. The Justice Department is apparently of the opinion that "pattern and practice" cases serve only a precedent making function and that back pay is therefore inappropriate. This rationale does not apply to private civil cases for the raison d'etre of the Section 706 suit is the complete vindication of the plaintiff's Title VII rights. Several commentators have suggested, however, that discriminatees be awarded a type of general compensatory damage. Such a remedy it is suggested, is clearly within the scope of the court's power to order such affirmative action as may be appropriate. The appropriateness of a compensatory damage remedy, while having a certain emotional appeal, is replete with legal difficulties. First, the legislative history does not support it. Second, the injury which the award would seek to correct, i.e., psychological injury, would probably be too remote. Third, recovery for psychological injuries would run counter to the National Labor Relations Board practice on which the remedial provisions of Title VII were modeled. Any compensatory damage remedy, therefore, whether founded on contract or tort theory, has not and should not be allowed in "pattern and practice" cases or in private suits.

Procedural Issues

Proper Parties

Title VII litigation has been inundated with procedural problems because of the various requirements established in Section 706 of the Act. These problems arise when the EEOC's conciliation efforts have failed to eradicate the alleged
discriminatory practices and the aggrieved party institutes a civil suit. Prior to 1970 it was generally held by the courts that the only proper defendants in a Section 706 civil action were those who had been previously named as respondents in the charges filed with the EEOC. In Bowe v. Colgate-Palmolive Co. the court stated that:

It is a jurisdictional prerequisite to the filing of a suit under Title VII that a charge be filed with the EEOC against the party to be sued. This provision serves two important purposes. First, it notifies the charged party of the asserted violation. Secondly, it brings the charged party before the EEOC and permits effectuation of the Act's primary goal, the securing of voluntary compliance with the law.

Using this approach the court held that the party not named in the EEOC charge could not be held liable for damages and accordingly should be dismissed from the case. Subsequent cases upheld this rationale and further stated that Section 1 of the Civil Rights Act of 1866 was inapplicable to Section 706 cases. The court in Smith v. North American Rockwell Corp. went to great lengths to distinguish the Supreme Court's holding in Jones v. Alfred H. Meyer Co. from Section 706 cases. The Smith court reasoned that in Jones the Supreme Court was interpreting Section 2 of the Act of 1866 and the plaintiff in Smith was seeking a determination of his case under Section 1. The Smith court also observed that in previous cases the Supreme Court had ample opportunity to apply Section 1 but had declined to do so. The court also pointed out that Title VII would be redundant and unnecessary if Section 1 made private discrimination unlawful. The Smith court, therefore, concluded that (1) the statutory structure evidenced a congressional preference for administrative investigation and conciliation to a Section 706 civil suit and,

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38. 416 F.2d 711 (7th Cir. 1969).
40. 42 U.S.C. § 1981 (1964) [hereinafter cited as Act of 1866]. Section 1981 states: All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. Section 1982 states: All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.
42. 392 U.S. 409 (1968).
that Section 1 applied only to actions under the "color of state law." This rationale has recently been overturned.

In Waters v. Wisconsin Steel Works, the Seventh Circuit reversed a lower court and held that in certain circumstances an aggrieved party could maintain a Section 706 suit under Section 1 of the Act of 1866. The court reasoned that Section 1 forbade racial discrimination in the making and enforcing of contracts and concluded that it was applicable to both unions and employers since the relationship between the employee, the union and the employer is essentially one of contract. The court rejected all of the defendant's arguments and stated:

Because of the strong emphasis which Congress placed upon conciliation, we do not think that aggrieved persons should be allowed intentionally to bypass the Commission without good reason. We hold, therefore, that an aggrieved person may sue directly under section 1981 if he pleads a reasonable excuse for his failure to exhaust EEOC remedies.

The Waters court recognized that Congress was probably unaware of the existence of Section 1 when it enacted Title VII. It is for this reason that the court's holding is limited. However, the Third Circuit in the case of Young v. International Telephone & Telegraph Co. was not as restrictive in interpreting Section 1. In Young the court said:

Conciliation features of Title VII, implemented by EEOC, should not be entirely disregarded in the course of that suit under Section 1981. There is ample scope, within the traditional bounds of discretion in the application of equitable remedies, for the district courts to develop on a case by case basis an accommodation between their jurisdiction under Section 1981 and the conciliation efforts of

46. The defendants argued (1) that a cause of action could not be maintained under Section 1 of the Act of 1866 because this would virtually destroy the provisions of Title VII; (2) that Title VII was intended by Congress to be a comprehensive scheme to eliminate racial discrimination in employment and that therefore the provisions of Section 1 of the Act of 1866, if applicable, were impliedly repealed; (3) that property rights have traditionally been subject to greater governmental regulation than other private activity.
48. 438 F.2d 757 (3d Cir. 1971).
the commission. . . . By fashioning equitable relief with regard to
the availability of conciliation and by encouraging in appropriate
cases a resort to the EEOC during the pendency of Section 1981
cases the courts will carry out the policies of both statutes.49

The Third Circuit viewed Title VII as being a continuation of, and not a
substitute for, Section 1. It apparently rejected the Seventh Circuit’s opinion
with respect to congressional unawareness of Section 1’s existence. Thus
construed, the Young decision provides an aggrieved party with two options,
i.e., (1) file an unlawful employment practice charge with the EEOC, or (2)
sue his employer directly under Section 1.

The Seventh Circuit’s approach would appear to be the more reasonable for
the language of Title VII and its legislative history support it. The national
policy against employment discrimination is better effectuated by having the
EEOC promulgate certain specific guidelines and seek employer compliance
with them than by having the federal courts decide on a case by case basis
how to best rid the nation of employment discrimination. The applicability of
Section 1 has not arisen in any cases of discrimination based on sex or religion,
and arguments could be made that it does not apply since Section 1 speaks
only to racial discrimination.

Statute of Limitations

Section 706(d) of Title VII establishes various time restrictions within which
an aggrieved party must file a charge with the EEOC.50 The courts have held
that these requirements are jurisdictional prerequisites to a subsequent civil
suit.51 However, several important exceptions to the filing requirements have
been recognized. The Seventh Circuit in Cox v. United States Gypsum Co.52
held that aggrieved parties had timely filed their charges with the EEOC where
the unlawful employment practice was of a continuing nature. The court stated

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49. Id. at 764.
50. 42 U.S.C. § 2000e-5(d) (1964) provides:
   A charge under subsection (a) of this section shall be filed within ninety days after the
   alleged unlawful employment practice occurred, except that in the case of an unlawful
   employment practice with respect to which the person aggrieved has followed the
   procedure set out in subsection (b), of this section, such charge shall be filed by the
   person aggrieved within two hundred and ten days after the alleged unlawful employment
   practice occurred, or within thirty days after receiving notice that the State . . . has
   terminated [its] proceedings.

Subsection (b) of Section 706 referred to above requires that if a state in which the alleged unlawful
employment practice occurred has a statute prohibiting discriminatory employment practices, the
aggrieved party must first file a charge with the state.
52. 409 F.2d 289 (7th Cir. 1969).
various reasons for its conclusion the most important of which were (1) the
EEOC had considered the charges as being timely filed and, (2) the employer
had bound himself by his collective bargaining agreement to consider an
employee's seniority when recalling laid off workers. The court emphasized the
fact that the employer had breached his collective bargaining contract by
recalling employees with less seniority than the aggrieved parties. Therefore,
every time the employer recalled an employee who had less seniority, he
breached the collective bargaining agreement and violated Title VII.53

The Fifth Circuit has created another important exception to the jurisdic-
tional criteria established in Section 706(d). In Culpepper v. Reynolds Metals
Co.,54 the court held that the applicable statutory period was tolled while the
plaintiff was pursuing his remedies under a collective bargaining agreement.
The court cited two of its prior decisions55 and emphasized that "the central
theme of Title VII is private settlement [of alleged unlawful employment
practices] as an effective end to employment discrimination."56 The court
further stated:

It would, therefore, be an improper reading of the purpose of Title
VII if we were to construe the statute as did the district court to
permit the short statute of limitations to penalize a common
employee, who at no time resting on his rights attempts first in good
faith to reach private settlement without litigation in the elimination
of what he believes to be an unfair, as well as an unlawful practice.57

A major practical problem is created by the EEOC's inability to attempt
conciliation within the prescribed statutory period—its investigative backlog
is one and one-half years.58 Some Section 706 case defendants have attempted
to take advantage of this situation by asserting that an aggrieved party must
commence his action within 90 days after he files his charge with the EEOC
or be barred from maintaining it.59 This limitation is derived by adding the
60 day period which Title VII allots for the EEOC's conciliation efforts to
the 30 day period within which an aggrieved party is required to file his action
after he receives notification from the EEOC that its compliance efforts have

53. See also Sciaiuffa v. Oxford Paper Co., 310 F. Supp. 891 (D. Me. 1970); Austin v. Reynolds
Metals Co., 2 FEP Cas. 451 (E.D. Va. 1970). However, continuing violations have been expressly
rejected by other courts; Younger v. Glamorgan Pipe & Foundry Co., 310 F. Supp. 195 (W.D.
54. 421 F.2d 888 (5th Cir. 1970).
55. Otis v. Crown Zellerback, 398 F.2d 496 (5th Cir. 1968); Jenkins v. United Gas Corp.,
400 F.2d 28 (5th Cir. 1968).
56. 421 F.2d 889.
57. Id. at 890.
failed. The courts, however, have uniformly rejected this argument.\textsuperscript{60} The leading case in this area is the Ninth Circuit's decision in \textit{Cunningham v. Litton Industries},\textsuperscript{64} in which the court said:

\begin{quote}
The 30 to 60 day period prescribed in the statute in which the EEOC is to act should be interpreted as directory and not mandatory in nature. Commission action and issuance of notice within 60 days is not a condition precedent to an aggrieved person's right to sue in federal district court. . . .
\end{quote}

We hold that the 30 day period within which suit may be filed in Federal district court begins to run when the aggrieved party receives notice of failure to effect voluntary compliance from the EEOC, regardless of the period of time the Commission has taken to process the charge.\textsuperscript{62}

Similarly, where the EEOC has not acted on a complaint, the courts are in agreement that a plaintiff may preserve his action without awaiting a "cause" or "no cause" finding or a conciliation attempt by the EEOC as long as it has sent the plaintiff a "suit letter."\textsuperscript{63} The results in these cases appear to be in accord with congressional intent and substantially resolve the major practical problem encountered in the private enforcement of Title VII. If the statutory language were strictly construed, private enforcement of Title VII would be nonexistent. The jurisdictional prerequisites to a Section 706 civil suit are, therefore, (1) the failure of the EEOC to effect voluntary compliance with the proscriptions of Title VII through conciliation and subsequent notification to the plaintiff of its failure, and (2) the aggrieved party's filing his complaint within 30 days after receiving notification of the EEOC's failure to achieve voluntary compliance.\textsuperscript{64}

\textit{Reasonable Cause Finding by the EEOC}

Another procedural issue that is currently receiving considerable attention is whether an aggrieved party can maintain a Section 706 civil suit when the EEOC has determined that there is no reasonable cause to believe that an unlawful employment practice has been committed. Previous court cases have

\textsuperscript{60} Cunningham v. Litton Indus., 413 F.2d 87 (9th Cir. 1969); Miller v. Int'l Paper Co., 408 F.2d 283 (5th Cir. 1969); Choate v. Caterpillar Tractor Co., 402 F.2d 357 (7th Cir. 1968).
\textsuperscript{61} 413 F.2d 887 (9th Cir. 1969).
\textsuperscript{62} Id. at 890.
\textsuperscript{64} Martinez v. Nat. Linen Service, 2 FEP Cas. 300 (S.D. Tex. 1969).
held that the EEOC must notify the aggrieved party that its voluntary conciliation efforts have failed. These cases have held that the finding of reasonable cause would of necessity be part of the jurisdictional element of notice that the EEOC had been unable to effect reconciliation. Therefore, they concluded that the EEOC could not logically notify the aggrieved party of its failure at reconciliation since it was never attempted. In Green v. McDonnell-Douglas Corp., the district court examined the legislative history of Title VII and concluded that it was the intent of Congress that the EEOC first determine reasonable cause existed to conclude that an unlawful employment practice had occurred. The court examined the original House bill which provided that an aggrieved party could bring suit if he obtained the permission of a member of the EEOC even if the charge was rejected as having no merit. The court concluded that the deletion of this provision by the Senate was significant.

A better reasoned opinion however, is that of the Third Circuit in Fekete v. United States Steel Corp. The Fekete court also examined the legislative history of Title VII but concluded that judicial review of administrative proceedings was more desirable than administrative absolutism. The Third Circuit relied heavily upon the case of Grimm v. Westinghouse Electric Corp. In Grimm the court stated:

Only by permitting plaintiff to bring a private suit despite a Commission finding of no reasonable cause can this court give effect to the established principle that a grievant may not be prejudiced by any conduct of the Commission. [Citations omitted.] Only by permitting plaintiff to bring suit can this court preserve the statutory scheme whereby the right to equal employment opportunity is to be secured by individuals.

The Fekete decision subjects the employer to the possibility of litigation after the EEOC has failed to find him guilty of an unlawful employment practice. While the decision is in accordance with the principles of judicial review of the administrative process, its practical effect on employers is negligible. Few plaintiffs will be tempted to sue their employers when the EEOC, which resolves all doubts in favor of the employee, has concluded that the employer has not violated the proscriptions of Title VII.

67. The only debate touching this problem is found at 110 Cong. Rec. 14186-92 (1964).
68. 424 F.2d 331 (3d Cir. 1970).
70. Id. at 990.
Effect of Arbitration

The courts have generally held that the aggrieved party is not required as a jurisdictional prerequisite to resort to the grievance and arbitration procedures of a collective bargaining agreement before pursuing his Title VII remedies. The rationale for this decision was explained in the case of Evans v. Local 2127, IBEW. The Evans court concluded that the aggrieved party was seeking redress of a statutory right and not a right which accrued to him under a collective bargaining agreement. The court reasoned, therefore, that the Supreme Court's decision in Republic Steel Corp. v. Maddox, which required an aggrieved party to exhaust his contractual remedies, was inapplicable. Similarly, the courts have uniformly rejected the idea that an aggrieved party must elect which of his remedies to pursue, i.e., the arbitration procedure of the collective bargaining agreement or a Section 706 civil suit. The only real limitation imposed on an aggrieved party by the courts in filing a Section 706 civil suit is the possibility of double recovery. An aggrieved party is precluded from maintaining a private suit if the possibility exists that he would be unjustly enriched.

A more difficult problem is presented, however, when an aggrieved party has carried his grievance through the arbitration process to a final determination. The Fifth and Seventh Circuits have held that the arbitrator's award is not final and binding on the aggrieved party and that he may sue privately, while the Sixth Circuit has reached the opposite conclusion. The Fifth and Seventh Circuits agree that “determinations under a contract grievance-arbitration process will involve rights and remedies separate and distinct from those involved in judicial proceedings under Title VII.” The Sixth Circuit maintains that relitigation of the dispute would work to undermine the national policy favoring arbitration. In Dewey v. Reynolds Metals Co., the court said:

This result would sound the death knell to arbitration of labor

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73. 379 U.S. 650 (1965).
75. Id.
76. Hutchings v. United States Indus., Inc., 428 F.2d 303 (5th Cir. 1970); Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969).
78. Hutchings v. United States Indus., Inc., 428 F.2d 303, 311 (5th Cir. 1970).
79. 429 F.2d 324 (6th Cir. 1970).
disputes, which has been so usefully employed in their settlement. Employers would not be inclined to agree to arbitration clauses in collective bargaining agreements if they provide only a one way street, i.e., that the awards are binding on them but not on their employees.80

The Supreme Court granted a writ of certiorari in Dewey and affirmed the Sixth Circuit's decision by an equally divided Court.81 There were no opinions issued and the case has no precedent value but it is obvious from the four-to-four decision that the positions of the Fifth and Seventh Circuits and the Sixth Circuit have merit.

While the issue of multiple forums and multiple remedies remains, the problem is not insoluble. The National Labor Relations Board resolved this identical issue in Spielberg Manufacturing Co.82 by deciding that it would refuse to exercise its jurisdiction to set aside an arbitration award issued pursuant to a collective bargaining agreement even though the alleged grievance was arguably an unfair labor practice. The criteria established by the National Labor Relations Board in Spielberg were that the arbitration process had to be "fair and regular, all parties hav[ing] agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act."83 A Spielberg type doctrine could be adopted by the EEOC.84 However, because the EEOC has neither enforcement powers nor the power to prevent an aggrieved party from filing a private suit, the federal courts must be convinced that this type of procedure will effectuate the purposes of Title VII and reduce the caseload of both the EEOC and the courts.

Scope of Class Actions

The last significant, and perhaps the most difficult, procedural problem presented to the courts has been the permissible scope of the class action. The courts have weighed various and conflicting considerations, the most important of which have been the desirability of avoiding separate litigation through the use of broad class actions and the recognition that individual discrimination may require plant wide solutions versus the concern that broad class actions may extend the scope of the individual's charge before the EEOC and thus effectively bypass its procedures. The various cases discussing this issue have resolved the problem in favor of allowing class actions but limiting the members

80. Id. at 332.
81. Supra note 77.
82. 112 N.L.R.B. 1080 (1955).
83. Id. at 1082.
of the class. The leading case in this area is *Oatis v. Crown Zellerbach Corp.* where the Fifth Circuit laid down two requirements for the maintenance of a class action: (1) the action must meet the requirements of Rules 23(a) and (b) of the Federal Rules of Civil Procedure; and (2) the issues raised before the court must have been raised before the EEOC. Class actions have also been upheld in cases where all the members of the class were in the same status, *i.e.*, all dischargees or all employees or all seeking the same type of relief. However, some courts have refused to limit the members of the class according to their employment status. These courts reason that this classification is unnecessary since the court can realign the parties in accordance with their real interests, or grant different types of relief to the members of the class depending on their status.

**Substantive Issues**

**Seniority Systems**

The overt discrimination practiced by many of the employers covered by Title VII ceased on July 2, 1965, the effective date of the Act. However, certain industrial institutions and programs retained the vestiges of past discrimination. Congress, in delegating to the EEOC the initial responsibility for ensuring compliance with Title VII, provided it with authority to use "informal methods of conference, conciliation and persuasions." Congress granted the real power to enforce the substantive provisions of Title VII to the federal courts who are authorized to "order such affirmative action as may be appropriate." Before analyzing the various cases in which the courts have interpreted and applied this power, the interpretive memorandum of Senators Clark and Case should be considered. That memorandum states:

85. 398 F.2d 496 (5th Cir. 1963).
86. Id. at 499.
89. FED. R. CIV. P. 23(c)(4).
91. For employers and unions having 100 or more employees or members Title VII's protection became applicable on July 2, 1965. During each of the three succeeding years coverage was extended to employers and unions having 75, 50, or 25 employees or members respectively, until all employers and unions with at least 25 employees or members were covered on July 2, 1968. 42 U.S.C. §§ 701(b) and (c), 716(a) (1964).
First, it has been asserted that Title VII would undermine vested rights of seniority. This is not correct. Title VII would have no more effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be fired first, such a provision would not be affected in the least by Title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes . . . Title VII . . . is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all white working force when the Title comes into effect the employer's obligation would be simply to fill vacancies on a non-discriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes, for future vacancies or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier.92

The most troubling issue confronting the courts under Title VII is whether seniority systems and testing procedures, though non-discriminatory on their face, violate Title VII by perpetuating the effects of past discrimination. Although the language of the interpretative memorandum of Senators Clark and Case would appear to negate the illegality of pre-Act discrimination, the courts have, in some instances arrived at contrary results.

Seniority, one of the most important concepts in labor relations, may take various forms in an industrial plant.93 It may be based on time spent anywhere in the plant, i.e., plant seniority, or in a particular department, i.e., departmental seniority or in a "line of progression." Notwithstanding its importance, however, the employee's right to seniority is contractual in nature and, therefore, not absolutely vested.94 An employee's seniority rights may be modified considerably by the execution of a new collective bargaining agreement between the employer and the union. This modification is valid if the union has not breached its duty of fair representation.95 Title VII recognizes the utility of seniority systems and permits employers to apply different standards to their employees if the criteria are based on a "bona fide" seniority system. Title VII provides that a seniority system is "bona fide" if the disparity of treatment that it accords to employees is not the result of an intention to

Thus, when an aggrieved party alleges that a seniority system is discriminatory, the courts are required to determine whether or not the system is "bona fide." There are two requirements that a seniority system must meet in order to satisfy the criteria of Title VII. First, it must serve a valid business purpose and, second, it must not be the result of an intention to discriminate. An examination and analysis of how the courts have interpreted the term "bona fide" and what "appropriate orders" they have issued when a system was determined not to be "bona fide" is, therefore, appropriate.

The first Title VII case to challenge the legality of a promotion system, which was based on departmental seniority, was *Quarles v. Philip Morris, Inc.* The specific issue presented to the court in *Quarles* was "whether the restrictive departmental transfer and seniority provisions of the collective bargaining agreement are intentional, unlawful employment practices because they are superimposed on a departmental structure that was organized on a racially segregated basis." In resolving this issue the court considered various factors, the most significant of which was the effect of the interdepartmental transfer system on the employees and on the operation of the defendant's business.

The defendant's business was composed of four different departments and the job classifications in each department were ranked in a definite order for purposes of determining progression. The higher ranked jobs were filled by advancing employees based on their departmental seniority, merit and ability. An advanced employee was provided with a 90 day probationary period in which to demonstrate his qualifications. If the employee failed to attain the requisite expertise, he was returned to his previous position. The court evaluated this system, considered its ramifications and concluded that:

> Operation of the company's business on departmental lines with restrictive departmental transfers serves many legitimate management functions. It promotes efficiency, encourages junior employees to remain with the company because of the prospects of advancement, and limits the amount of retraining that would be necessary without departmental organization.

Notwithstanding these valid "business purposes" the court held that the departmental seniority provisions when applied to the transfer and advancement opportunities of Negroes were unduly restrictive. The *Quarles* court, in

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98. *Id.* at 512.
99. *Id.* at 518.
100. The Negro who desired a transfer from his present position to one more lucrative had two options. First, he could wait until he had accumulated a sufficient amount of employment seniority to avail himself of the company's transfer system. The transfer provision allowed six
arriving at its decision, considered the case of *Whitfield v. United Steelworkers of America* and, while concurring in its result, distinguished it on the grounds of substantial employer interest. In *Whitfield* an interdepartmental transfer system based on departmental seniority was upheld because the court found that: (1) there was no inter-relation of skills between the employees of the different departments, and (2) promotion within a department depended on the skills one had previously learned in his prior position. The court in *Quarles* concluded that these special circumstances were not present in the case before it.

The *Quarles* court apparently reasoned that the employer would not suffer any substantial injury if an employee seeking advancement did not possess, at the time of his application, the qualifications necessary for the job. The court concluded that since every advanced employee was allowed a ninety day probationary period in which to develop and/or achieve the necessary level of competence, the only deleterious effect on the employer was a slightly more costly and time consuming advancement process. In essence, therefore, the court weighed the business interests of the employer against the discriminatory effects produced by the seniority system and concluded that the system must fall. The “appropriate order” issued by the court provided that all qualified Negroes would be allowed to transfer into other departments and that their departmental seniority would be the same as their employment seniority. The *Quarles* test, the comparing of the employer’s business purpose with the discriminatory effect produced on the horizontal and vertical mobility of minority workers has been accepted and applied by other courts.

The *Quarles* test was applied by the court in the case of *United States v. H.K. Porter Co.*, but it resulted in a different determination—it refused to abolish a departmental seniority system. In arriving at this conclusion the court relied heavily on three factors: (1) the possibility of upward mobility of Negroes was present—indeed many had advanced into positions previously held by employees to transfer every six months. Second, he could apply to management for a transfer but if he received it all of his previous departmental seniority would be lost. This loss of departmental seniority would subject the transferee to being laid off first in the event of an economic slowdown. However, if the transferee were threatened with layoff, he could return to his previous department. Notwithstanding all of these provisions, the transferee was still required to satisfy the ability and merit requirements of his new position.

101. 263 F.2d 546 (5th Cir.), cert. denied, 360 U.S. 902 (1959). In Whitfield the plaintiffs brought suit under Section 301 of the Taft-Hartley Act, 29 U.S.C. § 185 (1964), alleging that the union had breached its duty of fair representation.


whites; (2) Negroes could transfer into new departments and then back to their original departments without any loss of either departmental or plant seniority; and (3) the lines of progression in the various departments evidenced a significant difference in skills and ability which was only achieved by successfully performing a subordinate job within a particular department. The court upheld the substantiality of the employer's interest and said:

The plant-wide transfer and bidding plan sought by the plaintiff would similarly mean that an employee who has been working in another department performing duties unrelated to the duties of the vacant job would be entitled to claim the job. This might be a perfectly proper result in a case where the circumstances otherwise justified it and where the jobs in the departmental progression lines are not dependent on the prior jobs in the line for training and experience for the job to be filled.\footnote{104}

Section 703(h) states that a seniority system cannot be "bona fide" if it is based on an intention to discriminate.\footnote{105} However, the phrase "intention to discriminate" may be interpreted as requiring a plaintiff to prove specific discriminatory intent, \textit{i.e.}, a private law approach, or it may be construed to allow the courts to infer a discriminatory intent from the natural and probable consequences of an employer's actions, \textit{i.e.}, a public law approach.\footnote{106} One proponent of the public law approach states:

The wording of the Act seems to support a public law interpretation. Section 703(a)(2) and 703(c)(2), which prohibit unlawful classifications, speak in terms of a functional test which looks to the results and not in terms of a conceptual test which looks to private culpability. The phrase "tend to deprive" or "otherwise adversely affect" are phrases emphasizing consequences. Although it is true that the remedial provision, section 706(g), refers to "intent" the legislative history supports the conclusion that the thrust of this "intent" was directed to a volitional, not an anti-racial act.\footnote{107}

The courts have generally supported the public law approach. The Fifth Circuit, in the case of \textit{Papermakers Local 189 v. United States},\footnote{108} gave a great impetus to the public law approach which had been initiated by the \textit{Quarles} court. In


\footnote{105. 42 U.S.C. § 2000e-2(h) (1964).}

\footnote{106. This approach is not new. The public law approach obtains under the National Labor Relations Act.}


\footnote{108. 416 F.2d 980 (5th Cir. 1969).}
Papermakers the defendant company, Crown Zellerbach, argued that it had no intention to discriminate and sought to support this argument by demonstrating that all of the company's progression lines had been opened to Negroes. The company explained that all the Negroes were at the bottom of these progression lines because of past discrimination and that this situation was not evidence of a present intent to discriminate. In rejecting the defendant's arguments the court said:

We find unpersuasive the argument that, whatever its operational effects, job seniority is immune under the statute because not imposed with the intent to discriminate. Section 703(h), ... excludes from the strictures of Title VII different working terms dictated by "bona fide" seniority systems "provided that such differences are not the result of an intention to discriminate because of race. . . ." Here, however, if Crown did not intend to punish Negroes as such by reinstituting job seniority, the differences between the job status of Negroes hired before 1966 and whites hired at the same time would have to be called the "result" of Crown's earlier, intentional discrimination.109

Thus, the courts in determining the validity of seniority systems compare the relative worth of the employer's business purpose in maintaining the system with the discriminatory effect produced on minority workers. Various factors, such as past discrimination, the difference and degree of the skills required to perform a particular job, safety factors and any procedures taken by the employer to correct any racial imbalance that might exist among his employees are all weighed carefully by the courts.

Employment Tests

The complexity of modern manufacturing processes has caused American industry to utilize various testing methods to determine which of its employees to hire and/or promote.110 These tests fall into three general categories: (1) the skill test; (2) the achievement test; and (3) the aptitude test. The legality of the first two categories is not questioned. Both employers and minority groups agree that a secretary must know how to type and bricklayer must know how to lay bricks. The difficulty arises over the aptitude test, and it is tests of this nature that will be considered.

The purpose of the general aptitude test is to predict an employee's success

109. Id. at 995-96.
or failure on the job by ascertaining his general level of intelligence. The relevant statistics indicate that these tests tend to be culturally oriented and as such present an opportunity for covert discrimination.\footnote{111} It is not surprising, therefore, that the legality of aptitude tests has generated considerable controversy. At one extreme, minority groups contend that standard aptitude tests are an illegal form of discrimination because minority groups, most of which suffer from cultural deprivation, are placed at a competitive disadvantage. Conversely, the employers, while generally agreeing that minority groups do suffer a competitive disadvantage, assert that they are entitled to hire and/or promote only those employees who are qualified. In the case of \textit{Myart v. Motorola, Inc.},\footnote{112} an Illinois hearing examiner adopted the rationale espoused by the minority groups and invalidated an employer's aptitude test. Congress, however, was not sympathetic to the notion that an employer would be discriminating and thus violating the proposed Title VII, by administering an otherwise fair aptitude test which some groups might find easier than others. The interpretative memorandum of Senators Clark and Case states:

\begin{quote}
There is no requirement in title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications.\footnote{113}
\end{quote}

This interpretative statement notwithstanding, Senator Tower introduced an amendment to Section 703(h) to vitiate the rationale of the \textit{Motorola} decision.\footnote{114} This amendment was subsequently adopted and the testing provision of Title VII, as enacted, states:

\begin{quote}
[N]or shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.\footnote{115}
\end{quote}

The theory espoused by the minority groups, however, was not defunct and, in fact, was partially revivified by the EEOC in its Employment Testing Guidelines.\footnote{116} The guidelines established by the EEOC provide that an aptitude

\begin{thebibliography}{9}
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\item\textsuperscript{111} M. Mitchell, L. Albright and F. McMurray, \textit{Biracial Validation of Selection Procedures in a Large Southern Plant}, Proceedings of the 76th Annual Convention of the American Psychological Ass'n. (1968).
\item\textsuperscript{112} The opinion is reproduced in full at 110 Cong. Rec. 9030-33 (1964).
\item\textsuperscript{113} Id. at 7213 (remarks of Senator Clark).
\item\textsuperscript{114} Id. at 13724 (remarks of Senator Tower).
\item\textsuperscript{115} 42 U.S.C. § 2000e-2(h) (1964).
\item\textsuperscript{116} 35 Fed. Reg. 1233 (Aug. 1, 1970) [hereinafter cited as Guidelines].
\end{thebibliography}
test will be deemed to be discriminatory unless: "(a) the test has been validated and evidences a high degree of utility . . . and (b) the person giving or acting upon the results of the particular test can demonstrate that alternative suitable hiring, transfer or promotion procedures are unavailable for his use."  The guidelines further provide that any test-based differential in rates of rejection that exists can only be justified by demonstrating the relevance of the test to the position sought. The relevancy requirement is broadly interpreted if, in all probability, the employees will be advanced within a reasonable period of time. In this situation the employees are considered to be applying for the higher level position.  

The courts, in attempting to determine the validity of aptitude examinations, have applied the Quarles rule, business necessity as compared with discriminatory effect. Considering the confused legislative history, the guidelines promulgated by the EEOC and the obvious merits of the various competing theories, a conflict among the circuits was inevitable.

The legality of the EEOC's testing criterion that aptitude tests be job-related, came under the judicial scrutiny of the Fourth Circuit in the case of Griggs v. Duke Power Co.  In Griggs the employer was a corporation engaged in the manufacture and transmission of electric power. The employer's operation was divided into various subdivisions with the Dan River subdivision being the subject of the controversy. The work force at Dan River was divided into five main departments: (1) operations; (2) maintenance; (3) laboratory and testing; (4) coal handling; and (5) labor. The labor department was the lowest paid department and the one in which all of the defendant's Negro employees worked. In 1955 the employer instituted a new hiring and advancement policy which required all new employees to possess a high school education or its equivalent. The employees in the labor department, however, were specifically exempt from this requirement. Subsequently, the defendant amended this policy by providing that an employee who was on the company payroll prior to 1965 could become eligible for transfer and promotion by successfully completing an aptitude and mechanical ability test. At the time this case was decided only four Negroes had become eligible to transfer under the employer's system.  The plaintiffs asserted that these testing requirements were discriminatory and invalid because there was no evidence of a valid business purpose and the tests were not job related.

A majority of the Fourth Circuit decided that the employer's testing

117. Id. at § 1607.3.
118. Id. at § 1607.4(a).
119. 420 F.2d 1225 (4th Cir. 1970).
120. Id. at 1229.
requirements, as they applied to pre-1965 employees, were violative of Title VII. The court emphasized that many white employees possessed high school educations and were hired into departments other than labor. They were not, therefore, subject to the defendant's testing requirements. The court concluded that by requiring the Negro employees who were hired prior to 1965 to pass the aptitude and mechanical ability tests the employer had successfully locked these employees into the labor department. The testing requirements were, therefore, invalidated with respect to the Negro employees hired prior to 1965.

In deciding that the testing requirements of the defendant were valid as applied to Negroes hired after 1965, Judge Boreman, writing for the majority, concluded that employment tests did not have to be job related. The majority, however, limited its holding by stating:

This decision is not to be construed as holding that any educational or testing requirement adopted by any employer is valid under the Civil Rights Act of 1964.121

In holding that an aptitude test need not be job related, the majority applied the criteria provided in Title VII, i.e., is the test intended to discriminate and is it bona fide. The court held that the test was not intended to be used as a subtle tool for discrimination and based this conclusion on the fact that the testing policy was instituted nine years prior to the passage of the Act. The court also noted that the company had ceased its discriminatory practices and thus concluded that the tests were instituted and administered in good faith. The court decided that the testing requirements were bona fide because they satisfied the Quarles rule. The court broadly construed the business purpose criterion of that rule and stated:

The company had an obvious business motive and objective in establishing the high school requirement, [and testing requirement] that is, hiring only personnel who had a reasonable expectation of ascending the promotional ladders into supervisory positions thereby eliminating road blocks which would interfere with movement to higher classifications and tend to decrease efficiency and morale throughout the entire work force.122

The Griggs majority also concluded that the legislative history did not support the EEOC's direct job relation theory and stated:

At no place in the Act or in its legislative history does there appear a requirement that an employer may utilize only those tests which measure the ability and skill required by a specific job or group of jobs. In fact the legislative history would seem to indicate clearly

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121. Id. at 1235 n.8 (emphasis in original).
122. Id. at 1233 n.2.
that Congress was actually trying to guard against such a result. An amendment requiring a "direct relation" between the test and a "particular position" was proposed in May 1968, but was defeated. We agree with the district court that a test does not have to be job related in order to be valid under § 703(h).111

In applying the Quarles rule the Griggs majority did not consider the effect of the testing provisions on minority groups. The majority mistakenly agreed with the plaintiffs and held that if the testing requirements fulfilled a valid business purpose, the effect produced was irrelevant. Judge Sobeloff, who concurred in part and dissented in part, was more perceptive. After eschewing the validity of the employer's business purpose, he stated:

On the other hand, it cannot be ignored that while this practice does not constitute forthright racial discrimination, the policy disfavoring the outside employees has primary impact on blacks.124

Judge Sobeloff, in correctly applying the Quarles rule, accorded due deference to the effect produced by the defendant's testing requirements, and would have invalidated them.125

The Griggs decision notwithstanding, the EEOC continued to insist that employers comply with the criteria established in its guidelines, i.e., that tests be job related. This continued insistence resulted in further judicial consideration of this criterion, and in Hicks v. Crown Zellerbach Corp.,126 the District Court for the Eastern District of Louisiana upheld the EEOC's position. Only two of the six issues presented to the Hicks court concerned the defendant's testing procedures and, accordingly, only these will be considered.127

Commencing in 1963, all applicants for employment in the production and maintenance departments at Crown's Bogalusa facilities were required to successfully complete a battery of standardized tests. In 1964 this requirement was extended to employees seeking to transfer into more desirable departments which had previously been segregated and reserved for whites. In 1965, J. Hicks, in an attempt to transfer into another department, took and failed the required tests. Shortly thereafter, he filed an unlawful employment practice charge with the EEOC. The EEOC, after failing to secure Crown's compliance with its guidelines, notified Hicks of his right to bring a civil suit. Hicks filed a class

123. Id. at 1235.
124. Id. at 1247.
125. Previous cases had also reached the result espoused by Judge Sobeloff. See Dobbins v. Local 212, IBEW, 292 F. Supp. 413 (S.D. Ohio 1968).
127. Id. at 316.
action on behalf of himself and all others similarly situated. The plaintiffs in Hicks asserted two grounds in challenging the validity of Crown's testing procedures: (1) the effect of the requirement was to exclude a disproportionate number of Negroes; and (2) the tests did not adequately or successfully predict job performance. The court, in attempting to determine the validity of the testing requirements, directed its attention to the defendant's intention in administering the test and to the test's "bona fide" qualifications. The court concluded, and the plaintiffs agreed, that the defendant had not adopted the tests to covertly discriminate. In deciding whether the testing procedures were bona fide the court utilized the business necessity rule of Quarles.

The Hicks court, in applying the Quarles rule, narrowly construed the term business necessity and concluded that the only valid business purpose that a test could serve was to accurately predict an employee's ability to perform in a particularly position. In narrowly defining the term "business necessity" the court was inevitably led to conclude that the EEOC's "job related" criterion was valid. The court justified its restrictive interpretation by stating:

The choice of appropriate tests for an employer is a difficult procedure requiring careful study and evaluation. Without such study, even experienced professional psychologists concede that they can do no more than make guesses which are often completely wrong. Moreover, the uncertainty surrounding test use is aggravated when tests are given to a mixed racial group which has been educated in segregated schools because tests assume that persons have had relatively equal exposure to educational materials. This makes careful professional study even more essential in such a situation. Without such study no employer can have any confidence in the reasonableness or validity of his tests; and he therefore cannot in good faith assert that business necessity requires that these tests of unknown value be used. The Hicks court also noted that its restrictive interpretation was in accordance with, and indeed commanded by, the Fifth Circuit's decision in Local 189, Papermakers v. United States. Thus, the Quarles rule, as construed and applied by the Fourth and Fifth Circuits, resulted in different conclusions.

The Supreme Court granted a writ of certiorari in Griggs to resolve the conflict inherent in applying the Quarles rule. In deciding Griggs, the Supreme Court had two possible choices: (1) broadly interpret "business

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128. The passing rates on the tests given were as follows: test 1-37.3 percent for whites, 9.8 percent for blacks; test 2-64.9 percent for whites, 15.4 percent for blacks.
129. 319 F. Supp. at 319.
130. 416 F.2d 980 (5th Cir. 1969).
necessity" but nevertheless reverse *Griggs* because of the overwhelming discriminatory effect produced; or (2) narrowly interpret “business necessity” and apply the *Hicks* rationale. The court chose the latter alternative.

The question presented to the Court in *Griggs* was one of first impression. After briefly reciting the factual background, Chief Justice Burger, in writing for a unanimous Court, observed that the tests utilized by the defendant “were not directed or intended to measure the ability to learn to perform a particular job or category of jobs.” The Chief Justice also stated that the objective of Congress in enacting Title VII was “to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.” These factors when considered with the inferior education received by Negroes in segregated schools led the Court to invalidate the testing procedures utilized by the Duke Power Company. The Court rejected the defendant’s argument that Section 703(h) specifically allowed an employer to use any professionally developed test as long as it was not used with an intention to discriminate. The Chief Justice said that the company’s lack of discriminatory intent was not controlling because Congress had aimed “the thrust of the Act to the consequences” of a hiring and/or promotion practice. Thus, the Court officially adopted the public law approach in construing the phrase “intention to discriminate.” The Court also expressed its disfavor with broad testing devices and said:

The facts of this case demonstrate the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as fixed measures of capability. History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. The Court, however, specifically left undecided the issue of the validity of a testing requirement that takes into consideration the capability necessary for successfully performing in a superior position. The validity of employment tests according to the Chief Justice is determined by business necessity. “If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.” The *Griggs* decision, as thus summarized, is an in toto adoption of the *Hicks* rationale.

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132. *Id.* at 434.
133. *Id.*
134. *Id.*
135. *Id.*
Guidelines for the Employer

The purpose of Congress in enacting Title VII was to eliminate discrimination in employment from the private sector of our economy. The federal courts and the EEOC have taken this congressional command and successfully challenged many long established business practices. Many employers have been unpleasantly surprised to discover that one or more of their business practices violated Title VII. Unless an employer carefully analyzes all the elements of his labor relations policies, he may discover that he has "broken the law without really trying."

The Supreme Court's decision in Griggs, while only expressly deciding the legality of employment aptitude tests, provides an excellent framework for analyzing the legality of other business practices. The criteria provided in Title VII, and applied by the Court in Griggs, for determining the validity of employment practices are (1) that the practice, i.e., the employment test, seniority system, or preference for a particular sex or religion, be bona fide, and (2) that the practice not be the result of an "intention to discriminate." The Griggs decision clearly adopts the "public law" interpretation of the phrase "intention to discriminate." Simply stated, this means that an employer will be held responsible for any discrimination that results from the natural and probable consequences of his actions. The Griggs decision also demonstrates that the Court will narrowly interpret and apply the "business necessity" test. Any employment practice, which is arguably an unlawful employment practice, will only be sustained if it is directly related to the "safe and efficient" operation of the employer's business. The application and interpretation that this test receives, however, is determined by the business practice under consideration.

The legality of seniority systems under this "safe and efficient" criterion depends on the following factors: (1) a significant difference in the degree of skills and abilities needed to perform a particular job; (2) achievement of these skills and abilities depends on the successful completion of a subordinate job; (3) upward mobility for minority workers is possible; and (4) if the system is departmental, that minority workers are not penalized for transferring into other departments and then back to their original department. These criteria emphasize the "safe" aspect of the "business necessity" test. If the employer wishes to rely on the "efficient" part of that test his evidence will have to meet a much heavier burden.

136. In Griggs the Supreme Court uses the phrase "job performance." This phrase is synonymous with restrictively defining and applying the "business necessity" test.
The validity of employment tests will be sustained only if the test is designed to accurately determine the employee's ability to perform the job in question in a "safe and efficient" manner. Considering the inability of the drafters of aptitude tests to agree on the significance of the test results, it is unlikely that any court will sustain them.

The preference that many employers have for hiring male over female employees or vice-versa must meet the same "safe and efficient" requirement. The Supreme Court in the case of Phillips v. Martin Marietta Corp., in which the plaintiff was refused employment because she had pre-school age children, said that Title VII did not permit "one hiring policy for women and another for men—each having pre-school age children." The Court indicated that such a hiring practice would only be valid if it was "demonstrably . . . relevant to job performance." This statement by the Court indicates its acceptance of the "safe and efficient" requirement in sex discrimination cases as applied by the Fifth Circuit in Weeks v. Southern Bell Telephone Co. In Weeks the court held "that in order to rely on the bona fide occupation qualification exception an employer has the burden of proving that . . . all or substantially all women would be unable to perform safely and efficiently the duties of the job involved." The same circuit, in Diaz v. Pan American World Airways, Inc., explained how it would apply the "business necessity" test to sex discrimination cases. The court, in holding that the female sex was not a bona fide occupational qualification for the job of flight cabin attendant, stated that discrimination based on sex is valid only where the essence of the business operation would be undermined by not hiring members of one sex exclusively. This holding places more weight on the safety aspect of the "business necessity" test. The significance of this decision, however, lies not in its application of the "business necessity" test, but in its announcement that an employer may not exclude all members of one sex because most members of that sex cannot adequately perform the job. If this rationale receives the approval of the Supreme Court a business practice which specifies a sex can never be bona fide. An employer could demonstrate to a court that 95 percent of the particular sex excluded from consideration could not safely or efficiently perform the job in question. However, because the remaining five percent might perform adequately the practice will be struck down. This can only result in a very costly and time-consuming process for the employer because all members of the excluded sex must be given a chance to fail. Considering the Diaz court's

139. Id. at 544.
140. Id.
141. 408 F.2d 228 (5th Cir. 1969).
142. Id. at 235. Emphasis added.
rationale and its application of the "business necessity" test, an employer will find it almost impossible to have his preferences for male or female employees in specific jobs sustained.

An employer's preference should be upheld where he can demonstrate a markedly higher absentee rate or lower production rate for members of the excluded sex. This information stresses the efficiency factor of the "business necessity" test and should be very carefully considered by the courts. Judges must remember that the "business necessity" test that has been stated and applied by the courts consists of two factors, safety and efficiency. The courts should weigh these factors equally, and not consider, as they now do, the safety factor as determinative.

The applicability of the "business necessity" test to an employer's preference for employees of a particular religious persuasion is largely undetermined. The cases involving religious discrimination have dealt with the treatment accorded to those already employees. These cases have held that an employer does not violate Title VII for discharging employees who fail to abide by their contractual obligations under a collective bargaining agreement for religious reasons. The "business necessity" test is capable of being applied to religious discrimination cases. The determinative factor would probably be efficiency because safety, in all likelihood, would be irrelevant. The central problem in this area will be the judiciary's allocation of the weight to be accorded to the efficiency aspect—must it go the essence of the employer's business, as the Diaz court held, or will the employer's evidence of lost profits be sufficient, as it should be.

Employers and unions that are subject to the jurisdiction of the National Labor Relations Act have a duty to bargain collectively on matters concerning wages, hours, and conditions of employment. The National Labor Relations Board has held, however, that an employer need not bargain with a union over the inclusion in a collective bargaining agreement of a clause that is violative of the law. This principle should apply to the proscriptions of Title VII. An employer should be allowed to refuse to bargain with a union if the union insists on imposing an illegal business practice on him. The employer, however, must be very careful in correctly ascertaining the application of the discriminatory practice, for if it is solely a matter of internal union administration his refusal to bargain would be illegal.
The validity of any employment practice, therefore, can readily be ascertained by answering the following two questions: (1) does the business practice serve to promote the “safe and efficient” operation of the employer’s business; and (2) does the practice produce discrimination. If utilization of the business practice does not produce discrimination, it will be validated. However, as the level of discrimination produced increases, the necessity of the employment practice must also rise—in a geometric proportion.

The Tenth Circuit case of Jones v. Lee Way Motor Freight, Inc. provides an excellent example of how the courts will answer the two required questions and the relative weight that the answers will be accorded. The issue involved in Jones was the validity of the employer’s job classification system. The company classified its employees as either “over the road” or “city” drivers and refused to allow them to transfer from one category to another. The company employed no blacks in the better paying position of “over the road” driver, while most of the whites, 80 percent, were in this category. All of the company’s black employees were “city” drivers. The plaintiffs alleged that the company’s no-transfer policy, when considered in its factual context, was discriminatory because it effectively “locked” them into inferior positions and was not predicated on a valid business purpose. Conversely, the company argued that its policy did serve valid business purposes and enumerated them as follows: (1) bad experience with transfers in the past; (2) the prohibitive cost of training both the transferee and his replacement; and (3) grievances and other related problems which might arise from job categories that were covered by separate union contracts. The Tenth Circuit agreed with the company that the reasons advanced for its policies were substantial, but nevertheless, decided that they fell short of the required “business necessity.” Clearly, the basis for the court’s decision in Jones was the discriminatory effect produced by the company’s policy. The efficiency factor of the “business necessity” test was obviously disregarded. Thus, it is apparent, that of the two necessary criteria used to determine the validity of an employment practice, i.e., business necessity and discriminatory effect, the more significant, and therefore, the more determinative is discriminatory effect. It is also clear that the safety factor of the “business necessity” test is considered more seriously than are the claims by employers of deceased efficiency.

The implication of the foregoing is that the business practices of employers that are based on pre-Act discrimination will be judged by the “business necessity” test of Hicks. The question then arises as to the validity of business

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149. The Supreme Court denied certiorari in Jones on the same day that it decided Griggs. While no inference may be legally derived from this denial, the Court’s adoption of the Hicks’ rationale in Griggs would seem to indicate that Jones would have been upheld.
practices that are not founded on prior discriminatory actions but, nevertheless produce a type of de facto discrimination. Are they to be judged by the same criteria? This question must be answered in the affirmative. The Griggs Court said that Congress aimed “the thrust of the Act to the consequences” of the business practice. There is no difference between business practices that are based on prior discriminatory actions and those that are not, for the effect produced is the same. The “public law” approach adopted by the Supreme Court indicates that prior discrimination is irrelevant and the only probative factors are “business necessity” and discriminatory effect. This in toto application of the Hicks test will necessarily lead to the invalidation of all business practices that fail to satisfy the Hicks criteria.

Conclusion

Congress vested the real power to enforce the substantive provisions of Title VII to the federal courts and they have not hesitated to use it. The courts, armed with Title VII, have entered the area of employer discretion and drastically revised business operations. In most cases the results obtained have been laudable. However, the courts do not possess any great degree of business expertise and therefore, the employer’s domain should be invaded only when necessary and then with extreme caution. In applying the “business necessity” test of Hicks the courts should give more weight to the reasons and purposes espoused by the employer. The employer’s years of experience in predicting the consequences and effects that a particular system or practice will have on his business should not be dismissed lightly. The courts must remember that all of society, and not simply the employer, must bear the burden of raising the economic standards of minority groups.

*Arthur M. Brewer*