HEARINGS ON H.R. 4000, THE CIVIL RIGHTS ACT OF 1990—Volume 1

JOINT HEARINGS

BEFORE THE

COMMITTEE ON EDUCATION AND LABOR

AND THE

SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

ONE HUNDRED FIRST CONGRESS

SECOND SESSION

HEARINGS HELD IN WASHINGTON, DC, FEBRUARY 20 AND 27, 1990

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HEARING ON H.R. 4000, THE CIVIL RIGHTS ACT OF 1990

TUESDAY, FEBRUARY 20, 1990

HOUSE OF REPRESENTATIVES, COMMITTEE ON EDUCATION AND LABOR, AND THE COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS,
Washington, DC.

The Committee on Education and Labor and the Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, met in joint session, in Room 2175, Rayburn House Office Building, at 10:35 a.m., Hon. Augustus F. Hawkins [Chairman of the Education and Labor Committee] presiding.

Education and Labor members present: Representatives Hawkins, Martinez, Hayes, Sawyer, Payne, Poshard, Mfume, Goodling, Coleman, Petri, Gunderson, Fawell, and Smith of Vermont.

Judiciary members present: Representatives Edwards, Conyers, Kastenmeier, Schroeder, Sensenbrenner, and James.

Education and Labor staff present: Reginald C. Govan, counsel; Gregory R. Watchman, associate counsel; Eric P. Jensen, staff director, Subcommittee on Employment Opportunities; Randel Johnson, minority labor counsel; Kathy Marshall, minority professional staff member; and Tracy Hatch, minority professional staff member.

Judiciary staff present: Catherine Leroy, counsel; Stuart J. Ishimaru, assistant counsel; Ivy Davis, assistant counsel; and Kathryn Hazeem, minority counsel.

[The text of H.R. 4000 follows:]

I

101ST CONGRESS
2D SESSION

H. R. 4000

To amend the Civil Rights Act of 1964 to restore and strengthen civil rights laws that ban discrimination in employment, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 7, 1990

Mr. HAWKINS (for himself, Mr. EDWARDS of California, Mr. FISH, Mr. GEPHARDT, Mr. GRAY, Mr. HOYER, Mr. FORD of Michigan, Mr. GAYDOS, Mr. CLAY, Mr. MILLER of California, Mr. MURPHY, Mr. KILDEE, Mr. WILLIAMS, Mr. MARTINEZ, Mr. OWENS of New York, Mr. HAYES of Illinois, Mr. SAWYER, Mr. PAYNE of New Jersey, Mrs. LOWEY of New York, Mrs. UNSOELD, Mr. RAHALL, Mr. FUSTER, Mr. MFUME, Mr. ACKERMAN, Mr. AKAKA, Mr. ANDREWS, Mr. ATKINS, Mr. AUCOIN, Mr. BATES, Mr. BEILENSON, Mr. BERMAN, Mrs. BOGGS, Mr. BONIOR, Mr. BOUCHER, Mrs. BOXER, Mr. BRENNAN, Mr. BRYANT, Mr. BUSTAMANTE, Mr. CARDIN, Mr. COLEMAN of Texas, Mrs. COLLINS, Mr. CONTE, Mr. CONYERS, Mr. COURTER, Mr. CROCKETT, Mr. DELLUMS, Mr. DE LUGO, Mr. DIXON, Mr. DURBIN, Mr. DYMALLY, Mr. ESPY, Mr. EVANS, Mr. FASCELL, Mr. FAUNTROY, Mr. FEIGHAN, Mr. FLAKE, Mr. FOGLIETTA, Mr. FORD of Tennessee, Mr. FRANK, Mr. GEJDENSON, Mr. GILMAN, Mr. GONZALEZ, Mr. GREEN, Mr. HORTON, Mr. HUGHES, Mr. JOHNSON of South Dakota, Mr. KASTENMEIER, Mr. KENNEDY, Mrs. KENNELLY, Mr. KLECZKA, Mr. KOSTMAYER, Mr. LANTOS, Mr. LEACH of Iowa, Mr. LEHMAN of Florida, Mr. LEVIN of Michigan, Mr. LEVINE of California, Mr. LEWIS of Georgia, Mr. MCDERMOTT, Mr. MCHUGH, Mr. MCNULTY, Mr. MARKEY, Mr. MATSUI, Mr. MAVROULES, Mr. MINETA, Mr. MOODY, Mrs. MORELLA, Mr. MORRISON of Connecticut, Mr. MRAZEK, Mr. NEAL of Massachusetts, Ms. OAKAR, Mr. OWENS of Utah, Mr. PANETTA, Ms. PELOSI, Mr. RANGEL, Mr. RICHARDSON, Mr. ROSE, Mr. ROWLAND of Connecticut, Mr. ROYBAL, Mr. SABO, Mr. SAVAGE, Ms. SCHNEIDER, Mrs. SCHROEDER, Mr. SHAYS, Mr. SIKORSKI, Ms. SLAUGHTER of New York, Ms. SNOWE, Mr. SOLARZ, Mr. STAGGERS, Mr. STARK, Mr. STOKES, Mr. STUDDS, Mr. SYNAR, Mr. TORRES, Mr. TOWNS, Mr. TRAFICANT, Mr. UDALL, Mr. WEISS, Mr. WHEAT, Mr. WILSON, Mr. WOLPE, Mr. WYDEN, Mr. YATES, and Mr. WASHINGTON) introduced the following bill; which was referred jointly to the Committees on Education and Labor and the Judiciary

MAY 16, 1990

Additional sponsors: Mr. BENNETT, Mr. BOEHLERT, Mr. BOSCO, Mr. BROWN of California, Mr. COYNE, Mr. DEFAZIO, Mr. DOWNEY, Mr. DWYER of New Jersey, Mr. ECKART, Mr. FAZIO, Mr. FROST, Mr. GIBBONS, Mr. GLICKMAN, Mr. HAMILTON, Mr. HOCHBRUECKNER, Mr. JACOBS, Mr. JOHNSTON of Florida, Mr. JONES of North Carolina, Mr. JONTZ, Ms. KAPTUR, Mr. MCCLOSKEY, Mr. MCMILLEN of Maryland, Mr. MACHTLEY, Mr. MOAKLEY, Mr. PALLONE, Mr. PENNY, Mr. POSHARD, Mr. SANGMEISTER, Mr. SCHEUER, Mr. SWIFT, Mr. TRAXLER, Mr. VISCLOSKY, Mr. WALGREN, Mr. HALL of Ohio, Mr. BORSKI, Mr. CARPER, Mr. CONDIT, Mr. DICKS, Mr. DINGELL, Mr. ENGEL, Mr. HOAGLAND, Mr. LEHMAN of California, Mr. MANTON, Mr. MAZZOLI, Mr. OBERSTAR, Mr. PEASE, Mr. PERKINS, Mr. PRICE, Mr. SCHUMER, Mr. SERRANO, Mr. SHARP, Mr. SLATTERY, Mr. TORRICELLI, Mr. VENTO, Mr. WAXMAN, and Mr. YATRON

Deleted sponsor: Mr. HALL of Texas (added March 26, 1990); deleted March 29, 1990)

A BILL

To amend the Civil Rights Act of 1964 to restore and strengthen civil rights laws that ban discrimination in employment, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Civil Rights Act of 1990".

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—Congress finds that—

(1) in a series of recent decisions addressing employment discrimination claims under Federal law, the Supreme Court cut back dramatically on the scope and effectiveness of civil rights protections; and

(2) existing protections and remedies under Federal law are not adequate to deter unlawful discrimination or to compensate victims of such discrimination.

(b) PURPOSES.—The purposes of this Act are—

(1) to respond to the Supreme Court's recent decisions by restoring the civil rights protections that were dramatically limited by those decisions; and

(2) to strengthen existing protections and remedies available under Federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination.

SEC. 3. DEFINITIONS.

Section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e) is amended by adding at the end thereof the following new subsections:

"(l) The term 'complaining party' means the Commission, the Attorney General, or a person who may bring an action or proceeding under this title.

"(m) The term 'demonstrates' means meets the burdens of production and persuasion.

"(n) The term 'group of employment practices' means a combination of employment practices or an overall employment process.

"(o) The term 'required by business necessity' means essential to effective job performance.

"(p) The term 'respondent' means an employer, employment agency, labor organization, joint labor-management committee, or those Federal entities subject to the provisions of section 717.".

SEC. 4. RESTORING THE BURDEN OF PROOF IN DISPARATE IMPACT CASES.

Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–2) is amended by adding at the end thereof the following new subsection:

"(k) PROOF OF UNLAWFUL EMPLOYMENT PRACTICES IN DISPARATE IMPACT CASES.—

"(1) An unlawful employment practice is established under this subsection when—

"(A) a complaining party demonstrates that an employment practice results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such practice is required by business necessity; or

"(B) a complaining party demonstrates that a group of employment practices results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such practices are required by business necessity, except that—

"(i) if a complaining party demonstrates that a group of employment practices results in a disparate impact, such party shall not be required to demonstrate which specific practice or practices within the group results in such disparate impact; and

"(ii) if the respondent demonstrates that a specific employment practice within such group of employment practices does not contribute to the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

"(2) A demonstration that an employment practice is required by business necessity may be used as a defense only against a claim under this subsection.".

SEC. 5. CLARIFYING PROHIBITION AGAINST IMPERMISSIBLE CONSIDERATION OF RACE, COLOR, RELIGION, SEX OR NATIONAL ORIGIN IN EMPLOYMENT PRACTICES.

(a) IN GENERAL.—Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–2) (as amended by section 4) is further amended by adding at the end thereof the following new subsection:

"(l) DISCRIMINATORY PRACTICE NEED NOT BE SOLE MOTIVATING FACTOR.—Except as otherwise provided in this title, 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 such practice was also motivated by other factors.".

(b) ENFORCEMENT PROVISIONS.—Section 706(g) of such Act (42 U.S.C. 2000e–5(g)) is amended by inserting before the period in the last sentence the following: "or, in a case where a violation is established under section 703(l), if the respondent establishes that it would have taken the same action in the absence of any discrimination".

SEC. 6. FACILITATING PROMPT AND ORDERLY RESOLUTION OF CHALLENGES TO EMPLOYMENT PRACTICES IMPLEMENTING LITIGATED OR CONSENT JUDGMENTS OR ORDERS.

Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–2) (as amended by sections 4 and 5) is further amended by adding at the end thereof the following new subsection:

"(m) FINALITY OF LITIGATED OR CONSENT JUDGMENTS OR ORDERS.—

"(1) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements a litigated or consent

judgment or order resolving a claim of employment discrimination under the United States Constitution or Federal civil rights laws may not be challenged in a claim under the United States Constitution or Federal civil rights laws—

"(A) by a person who, prior to the entry of such judgment or order, had—

"(i) notice from any source of the proposed judgment or order sufficient to apprise such person that such judgment or order might affect the interests of such person; and

"(ii) a reasonable opportunity to present objections to such judgment or order;

"(B) by a person with respect to whom the requirements of subparagraph (A) are not satisfied, if the court determines that the interests of such person were adequately represented by another person who challenged such judgment or order prior to or after the entry of such judgment or order; or

"(C) if the court that entered the judgment or order determines that reasonable efforts were made to provide notice to interested persons.

A determination under subparagraph (C) shall be made prior to the entry of the judgment or order, except that

if the judgment or order was entered prior to the date of the enactment of this subsection, the determination may be made at any reasonable time.

"(2) Nothing in this subsection shall be construed to—

"(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure;

"(B) apply to the rights of parties to the action in which the litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal government; or

"(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction.

"(3) Any action, not precluded under this subsection, that challenges an employment practice that implements a litigated or consent judgment or order of the type referred to in paragraph (1) shall be brought

in the court, and if possible before the judge, that entered such judgment or order.".

SEC. 7. STATUTE OF LIMITATIONS; APPLICATION TO CHALLENGES TO SENIORITY SYSTEMS.

(a) STATUTE OF LIMITATIONS.—Section 706(e) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–5(e)) is amended—

(1) by striking out "one hundred and eighty days" and inserting in lieu thereof "2 years";

(2) by inserting after "occurred" the first time it appears "or has been applied to affect adversely the person aggrieved, whichever is later,";

(3) by striking out ", except that in" and inserting in lieu thereof ". In"; and

(4) by striking out "such charge shall be filed" and all that follows through "whichever is earlier, and".

(b) APPLICATION TO CHALLENGES TO SENIORITY SYSTEMS.—Section 703(h) of such Act (42 U.S.C. 2000e–2) is amended by inserting after the first sentence the following new sentence: "Where a seniority system or seniority practice is part of a collective bargaining agreement and such system or practice was included in such agreement with the intent to discriminate on the basis of race, color, religion, sex, or national origin, the application of such system or practice

during the period that such collective bargaining agreement is in effect shall be an unlawful employment practice.".

SEC. 8. PROVIDING FOR DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION.

Section 706(g) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–5(g)) is amended by inserting before the last sentence the following new sentences: "With respect to an unlawful employment practice (other than an unlawful employment practice established in accordance with section 703(k))—

"(A) compensatory damages may be awarded; and

"(B) if the respondent (other than a government, government agency, or a political subdivision) engaged in the unlawful employment practice with malice, or with reckless or callous indifference to the Federally protected rights of others, punitive damages may be awarded against such respondent;

in addition to the relief authorized by the preceding sentences of this subsection, except that compensatory damages shall not include backpay or any interest thereon. If compensatory or punitive damages are sought with respect to a claim arising under this title, any party may demand a trial by jury.".

SEC. 9. CLARIFYING ATTORNEYS' FEES PROVISION.

Section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–5(k)) is amended—

(1) by inserting "(1)" after "(k)";

(2) by inserting "(including expert fees and other litigation expenses) and" after "attorney's fee,";

(3) by striking out "as part of the"; and

(4) by adding at the end thereof the following new paragraphs:

"(2) A court shall not enter a consent order or judgment settling a claim under this title, unless the parties and their counsel attest that a waiver of all or substantially all attorneys' fees was not compelled as a condition of the settlement.

"(3) In any action or proceeding in which any judgment or order granting relief under this title is challenged, the court, in its discretion, may allow the prevailing party in the original action (other than the Commission or the United States) to recover from the party against whom relief was granted in the original action a reasonable attorney's fee (including expert fees and other litigation expenses) and costs reasonably incurred in defending (as a party, intervenor or otherwise) such judgment or order.".

SEC. 10. PROVIDING FOR INTEREST, AND EXTENDING THE STATUTE OF LIMITATIONS, IN ACTIONS AGAINST THE FEDERAL GOVERNMENT.

Section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16) is amended—

(1) in subsection (c), by striking out "thirty days" and inserting in lieu thereof "ninety days"; and

(2) in subsection (d), by inserting before the period ", and the same interest to compensate for delay in payment shall be available as in cases involving non-public parties".

SEC. 11. CONSTRUCTION.

Title XI of the Civil Rights Act of 1964 (42 U.S.C. 2000h et seq.) is amended by adding at the end thereof the following new section:

"SEC. 1107. RULES OF CONSTRUCTION FOR CIVIL RIGHTS LAWS.

"(a) EFFECTUATION OF PURPOSE.—All Federal laws protecting the civil rights of persons shall be broadly construed to effectuate the purpose of such laws to eliminate discrimination and provide effective remedies.

"(b) NONLIMITATION.—Except as expressly provided, no Federal law protecting the civil rights of persons shall be construed to restrict or limit the rights, procedures, or remedies available under any other Federal law protecting such civil rights.".

SEC. 12. RESTORING PROHIBITION AGAINST ALL RACIAL DISCRIMINATION IN THE MAKING AND ENFORCEMENT OF CONTRACTS.

Section 1977 of the Revised Statutes of the United States (42 U.S.C. 1981) is amended—

(1) by inserting "(a)" before "All persons within"; and

(2) by adding at the end thereof the following new subsection:

"(b) For purposes of this section, the right to 'make and enforce contracts' shall include the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.".

SEC. 13. LAWFUL COURT-ORDERED REMEDIES, AFFIRMATIVE ACTION AND CONCILIATION AGREEMENTS NOT AFFECTED.

Nothing in the amendments made by this Act shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements that are otherwise in accordance with the law.

SEC. 14. SEVERABILITY.

If any provision of this Act, or an amendment made by this Act, or the application of such provision to any person or circumstances is held to be invalid, the remainder of this Act and the amendments made by this Act, and the application of

such provision to other persons and circumstances, shall not be affected thereby.

SEC. 15. APPLICATION OF AMENDMENTS AND TRANSITION RULES.

(a) APPLICATION OF AMENDMENTS.—The amendments made by—

(1) section 4 shall apply to all proceedings pending on or commenced after June 5, 1989;

(2) section 5 shall apply to all proceedings pending on or commenced after May 1, 1989;

(3) section 6 shall apply to all proceedings pending on or commenced after June 12, 1989;

(4) sections 7(a)(1), 7(b), 8, 9, 10, and 11 shall apply to all proceedings pending on or commenced after the date of enactment of this Act;

(5) paragraphs (2) through (4) of section 7(a) shall apply to all proceedings pending on or commenced after June 12, 1989; and

(6) section 12 shall apply to all proceedings pending on or commenced after June 15, 1989.

(b) TRANSITION RULES.—

(1) IN GENERAL.—Any orders entered by a court between the effective dates described in subsection (a) and the date of enactment of this Act that are inconsistent with the amendments made by sections 4, 5,

7(a)(2) through (4), or 12, shall be vacated if, not later than 1 year after such date of enactment, a request for such relief is made.

(2) SECTION 6.—Any orders entered between June 12, 1989 and the date of enactment of this Act, that permit a challenge to an employment practice that implements a litigated or consent judgment or order and that is inconsistent with the amendment made by section 6, shall be vacated if, not later than 6 months after the date of enactment of this Act, a request for such relief is made. For the 1-year period beginning on the date of enactment of this Act, an individual whose challenge to an employment practice that implements a litigated or consent judgment or order is denied under the amendment made by section 6, or whose order or relief obtained under such challenge is vacated under such section, shall have the same right of intervention in the case in which the challenged litigated or consent judgment or order was entered as that individual had on June 12, 1989.

(c) PERIOD OF LIMITATIONS.—The period of limitations for the filing of a claim or charge shall be tolled from the applicable effective date described in subsection (a) until the date of enactment of this Act, on a showing that the claim or charge was not filed because of a rule or decision

altered by the amendments made by sections 4, 5, 7(a)(2) through (4), or 12.

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Chairman HAWKINS. The joint hearing is called to order, consisting of the Education and Labor Committee and the Judiciary Committee, Subcommittee on Civil and Constitutional Rights.

We have a long list of witnesses, and we will ask the witnesses to have their written statements printed in the record in their entirety, and to give us only highlights from them or a summary of them, so that we may have time for questions.

We anticipate a very lively hearing this morning. We certainly apologize to the witnesses if we do not do full justice to the introduction of each and every one of them, which itself would take all day because of the credentials and certainly the leadership provided by each and every one of the witnesses.

The Chair will ask that his written statement in its entirety be put into the record.

[The prepared statement of Hon. Augustus F. Hawkins follows:]

PREPARED STATEMENT OF HON. AUGUSTUS F. HAWKINS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

First I would like to welcome the many wittnesses who have accepted the committee's invitation to testify on H.R. 4000, The Civil Rights Act of 1990. Today the Committee on Education and Labor, and the Committee on the Judiciary, Subcommittee on Constitutional and Civill Rights, hold the first of several hearings on the Civil Rights Act of 1990 in examining the impact of the series of decisions of the Supreme Court last term on equal employment opportunity law, and the need to provide meaningful monetary remedies against employment discrimination. In those decisions the Supreme Court broke ranks with Congress and the consensus of the American people on our march toward the goal of equal justice and equal employment opportunity for all regardless of race, gender, religion, and national origin. Over the past quarter century, we have begun to overcome centuries of systemic discrimination. Business and labor; local state and Federal governments; the executive branch, Congress and the courts—all have worked together. And the result has been that, of almost any sector of American life, the progress toward equality has been greatest in the workplace.

All that has been threatened by the recent Supreme Court decisions. And that is why the Civil Rights Act of 1990 restores the legal protections that made this progress possible. The testimony we will hear today on the impact of the Supreme Court decisions demonstrates beyond peradventure that as a result of the Supreme Court's decisions millions of Americans no longer can count on the courts to protect them against blatent as well as subtle discrimination in the workplace.

That alone is reason enough as to why we can no longer afford to sit and wait. Inaction has been rejected by every great leader of our Nation, and by the great majority of American people, during the successful struggles to pass civil rights legislation during the past three decades.

Now, once again, it is time to set about the course of moving forward, not backward, to meet the challenges of the new era. The Civil Rights Act of 1990 sets the course for moving forward.

Our next hearing will be held on February 27, 1990 at 10:00 a.m. and will focus primarily, but not exclusively, on Section 4 of H.R. 4000 "Restoring the Burden of Proof on Disparate Cases." Chairman Edwards and I will confer and announce additional hearing dates in the very near future.

Chairman HAWKINS. The hearing today is on the Civil Rights Act of 1990. To the Chair, this would not seem to be a revolutionary stage in the history of the Nation. I think largely it's a matter of what the Congress intended in its original legislation. A few of us were here actually prior to the 1964 Civil Rights Act, and as far as the Chair is concerned, we passed a series of Acts to protect individuals and their civil rights, and not in any way to limit those rights. I think the intent of Congress is well documented in the record, and I think any change or any overturning of that original intent is dangerous to the economy at this time. For economic,

moral and social reasons we want to go back and make sure that the courts will not in any way tamper with the original intent of the Acts.

The Chair would like to yield at this time to Mr. Edwards, who is Chairman of the Subcommittee on Civil and Constitutional Rights of the Judiciary Committee. Then we will alternate and have opening statements.

Mr. Edwards.

Mr. EDWARDS. Thank you, Mr. Chairman. I congratulate you for calling this hearing so promptly on this important bill.

Mr. Chairman, in the last year we witnessed sweeping changes in the world. In China and South Africa, in Eastern Europe and elsewhere, people are striving for freedom and looking to the United States as a model and as a leader.

Yet, as women, minorities and many other people of America know, discrimination here in the workplace is alive and well today. We must have strong civil right laws to combat the dark shadow cast by discrimination. For many years we thought we could count on the Federal court system and the Supreme Court to enforce the laws that Congress enacted. It seems, however, that those days have passed.

Unfortunately, a majority of the Justices of the United States Supreme Court no longer share in our convictions. During the 1988-89 term, the Court handed down a number of decisions signalling a swift retreat from the principles we hold dearly. The list is long, but the result is clear: victims are being thrown out of court without a remedy at an alarming rate.

H.R. 4000 overturns six of these Supreme Court decisions. It restores the protection of the civil rights laws to previous levels, and improves existing law by providing additional forms of relief.

The civil rights laws, enacted by Congress, but as they stand today under Supreme Court interpretation, do not provide adequate protection for members of our society who need it the most. H.R. 4000 will correct a situation that has become intolerable.

Mr. Chairman, I join you in welcoming this distinguished panel of witnesses.

[The prepared statement of Hon. Don Edwards follows:]

PREPARED STATEMENT OF HON. DON EDWARDS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Today we begin a series of hearings to discuss issues related to the Civil Rights Act of 1990, a bill recently introduced in the House by Representative Gus Hawkins which amends and strengthens the Civil Rights Act of 1964 banning discrimination in employment.

In the last year alone, we have witnessed sweeping changes in the world. Images of the brave Chinese students in Tiananmen Square, the fall of the Berlin Wall, and most recently, the stirring release of Nelson Mandela in South Africa, immediately come to mind. Everywhere, people are striving for freedom, and looking to the United States as a model and a leader.

Yet, as women, minorities, and many other people of America know, discrimination in the workplace is alive and well today. We need strong civil rights laws to combat the dark shadow cast by discrimination. For many decades, we have looked to the courts to enforce the laws Congress has enacted to protect the rights of minorities and women.

Unfortunately, a majority of the justices of the United States Supreme Court no longer share in our convictions. During the 1988-89 term, the Court handed down a number of decisions signalling a swift retreat from the principles we hold so dearly.

The list is long, but the result is clear: victims are being thrown out of court without a remedy at an alarming rate.

H.R. 4000 overturns six of those Supreme Court cases. It restores the protection of the civil rights laws to previous levels. But the bill goes beyond mere restoration, providing additional forms of relief; for example, it permits punitive damages to be levied against employers that discriminate intentionally.

The civil rights laws, as they stand today under Supreme Court interpretation, do not provide adequate protection for those members of our society who need it the most. H.R. 4000 will correct a situation that has become intolerable.

Mr. Chairman, I congratulate you on scheduling these hearings so quickly and look forward to working with you on this important bill.

Chairman HAWKINS. The Chair would next yield to the ranking minority member of the Education and Labor Committee, Mr. Goodling.

Mr. GOODLING. Thank you, Mr. Chairman. I will try to keep my remarks brief, as I'm still reviewing the intricacies of the legislation that we are considering today, since the bill I believe was introduced just two weeks ago. I am confident there are probably other members still in the learning curve.

Nevertheless, I think a few points need to be made at the first hearing. First, it should be emphasized that while proponents of H.R. 4000 have tended to describe it as a response to five recently-decided Supreme Court decisions—*Wards Cove, Martin, Patterson, Lorance* and *Price Waterhouse*—the bill is, in fact, much broader than that. The bill adds punitive and compensatory damages with jury trials to title VII; extends the statute of limitations to two years for filing a charge; apparently reverses the 1977 Supreme Court case of *United Airlines* v. *Evans*; provides for recovery of expert witness fees and other litigation expenses beyond attorneys fees, which are already provided for under current law; reverses the 1987 decision by the Supreme Court in *Crawford Fittings*; and reverses two other Supreme Court decisions addressing attorneys fees, awards and settlements, and intervention.

The bill also contains some rather startling retroactivity provisions. Whatever the merits of these proposals, they are clearly beyond the scope of the five Supreme Court decisions at which H.R. 4000 is ostensibly and primarily addressed, and constitutes more than technical changes—a much abused phrase in Congress—to the law.

Putting aside these issues, I am pleased that the Administration has come forward with a proposal to address the *Patterson* and *Lorance* cases. While the lawyers advise me that the Supreme Court's decisions in these cases are quite defensible as a matter of statutory construction, the results as a matter of policy are troubling. I, therefore, will support the Administration's bill.

With regard to the remaining aspects of H.R. 4000, I look forward to the many hearings and lengthy deliberative congressional processes a bill of this magnitude certainly deserves. I say this with some hesitancy, however, as I suspect, with some dismay, that much of the ensuing debate may eventually turn on the proper role of preferential treatment based on race or sex under our civil rights laws. While the proponents of the bill will protest, I frankly do not see how Congress can possibly consider the *Wards Cove* and the *Martin* v. *Wilks* cases and avoid those issues.

The provision of H.R. 4000 directed at *Wards Cove* may well pressure employers to adopt quotas to avoid lawsuits. We will be exploring that possibility in the hearings, and the debate over *Martin* v. *Wilks* may well spill over from the sterile boundaries of the Federal Rules of Civil Procedure and constitutional due process to the propriety of consent decrees broadly providing for race- or sex-based relief. These are perhaps the most volatile and emotional issues remaining under our civil rights law, and ones which could embroil these two committees and the House as a whole in a long and not always pleasant debate.

In a time when lack of educational and training resources have probably more to do with the lack of progress of many minorities in our society than any other factor, I cannot help but wonder whether this will be a profitable use of Congress' time. Perhaps we should spend less time looking over the shoulders of the Supreme Court and more time on these very pressing problems.

I would like to close with a word about the Americans with Disabilities Act. A few months ago, although I had some doubt about certain provisions, I voted for that bill in support of its overall direction and intent. At that time, however, I assumed that the remedies under the employment provisions would be those as currently exist under title VII, basically injunctive relief and back pay. I note that H.R. 4000 would, in effect, now change these remedies to include punitive and compensatory damages. This is a troubling development, one which I believe will affect much of the support for the Americans with Disabilities Act.

Mr. Chairman, I understand that future hearings will focus on specific aspects of the legislation, and I look forward to learning more about the issues as we progress.

Chairman HAWKINS. Thank you.

The ranking minority member of the Judiciary subcommittee is Mr. Sensenbrenner. I would like to yield to him at this time.

Mr. SENSENBRENNER. Mr. Chairman, I have no opening statement.

Chairman HAWKINS. Thank you.

Does any other member who desires to make an opening statement at this time? Mr. Gunderson.

Mr. GUNDERSON. Thank you, Mr. Chairman. Let me try to——

Chairman HAWKINS. Mr. Gunderson, pardon me. I should have recognized—I'll get back to you next.

Mr. GUNDERSON. Okay.

Chairman HAWKINS. I'm alternating.

Mr. CONYERS. Mr. Chairman, may I be recognized?

Chairman HAWKINS. Yes.

Mr. CONYERS. Thank you very much.

I had an opening statement, but when I look out here at Dr. Benjamin Hooks, Julius Chambers, a former colleague, John Buchanan, and Sholom Comay, may I submit it for the record?

Chairman HAWKINS. You may.

Mr. CONYERS. Thank you very much.

Chairman HAWKINS. Mr. Gunderson.

Mr. GUNDERSON. Thank you, Mr. Chairman.

Let me try to provide some opening thoughts in plain English because I am not a lawyer and I certainly did not think that becom-

ing involved in education and labor issues would necessarily get me into constitutional law the way it has this morning.

Let me begin as well, Mr. Chairman, by commending you. Throughout your career you have been a leader in promoting equal rights for all people, and today's hearing and obviously the legislation before us continues that commitment. I want to say so publicly to you.

I share your commitment to full civil rights for all people. That is a commitment by all people in this room, I believe, although we may differ on how through law we best achieve that goal of full civil rights. Throughout my legislative career, I would like to think I take a back seat to no one on the issue of supporting civil rights. I voted to override President Reagan on the Civil Rights Restoration Act, I did the same on South Africa sanctions, voted for the Voting Rights Act, cosponsored and became an active proponent of ADA, and I was one of those few Republicans who had even been a cosponsor of the Equal Rights Amendment.

To me, real civil rights means, number one, prohibiting discrimination in the workplace or elsewhere because of one's race, color, creed or sex. Real civil rights means rewarding individuals in a fair, honest assessment based on merit, competence, skill or performance. Real civil rights means providing opportunities or rewards for an individual's actual initiative. Real civil rights means providing every citizen the equal and full protection under the law, and this includes and starts with assuring due process.

Last year's Supreme Court rulings present each of us with an opportunity to carefully assess and consider how we, as a society, might best achieve those goals. Mr. Chairman, both you and the Bush Administration deserve high praise and credit for such careful evaluations. Obviously, personally and philosophically, I must commend the Administration proposal for properly seeking the mutual goals of guaranteeing everyone their full civil rights, including the balance of keeping the due process of law one of those civil rights protections.

It is no secret that in establishing this position the Administration has found themselves at odds, even with some people in the business community, especially on cases such as *Martin* v. *Wilks*. In calling for changes to overrule *Lorance* and *Patterson*, I think both you and the Administration extend the time for protection and coverage of our civil rights laws for America's workers and I commend you for that. I would hope such bipartisan cooperation on these two issues will continue in seeking full opportunity for every citizen.

This committee knows best that litigation is only one means of seeking full civil rights, and in my opinion as a nonlawyer, it is not the best or most effective way. The full benefits of America's economic opportunity might best be gained through enhanced education and training. Our committee has led that commitment through JTPA, bilingual ed, adult ed, voc ed, the Higher Education Act, and aid to historically black colleges and institutions with special missions such as Gallaudet. We can and must do more.

Second, I would suggest the last thing we should do in this Congress is pursue strategies that only increase litigation. Between 1970 and 1989, employee litigation cases increased 2,166 percent. If

justice delayed is justice denied, one only needs to look at the most controversial case before us today, *Wards Cove*. It was filed 16 years ago in 1974. Who has received justice by that lengthy litigation?

I want to ask very candidly, is H.R. 4000 the bill to get relief for victims of discrimination, or is it going to become a bill that simply will result in plaintiff attorneys getting rich through punitive damage awards and other such remedies which are advocated?

Presently, Title VII is premised on the goal of making victims of discrimination whole by giving them back pay and benefits lost. Making whole remedies produced business compliance. Huge punitive damage awards produce litigation and jury trials. Which do we prefer?

Finally, I ask that we all walk very carefully in reviewing the *Wards Cove* issue. Unless we as a Nation are ready to endorse quotas—and I don't believe that we are—the effect of this bill would be to drive employers to resort to quotas to ensure that statistical balance. Likewise, Federal Rules of Evidence, 301, provides that while burdens of production may shift, burdens of proof have always remained on the plaintiff.

Mr. Chairman, we can and we should begin this process today to lead to full civil rights for every American and the proper protections under the law. Let's make sure our goal is to help individuals achieve their civil rights, however, without simply enhanced litigation or justice delayed, without resorting simply to strict quotas as our solution, without simply going to punitive damages as a way of trying to get even, and rather, with full protection and due process for all.

Thank you, Mr. Chairman.

Chairman HAWKINS. Mrs. Schroeder.

Mrs. SCHROEDER. Thank you, Mr. Chairman.

I want to thank you and Chairman Edwards for moving so rapidly to try and undo so many of the things that were done by the Supreme Court in the 1980s. Hopefully we can get that behind us.

Let me say I'm a little puzzled because the other side keeps saying they're backing the Administration's bill. None of us have seen that bill. Maybe they have, but my understanding is that no such bill has been introduced yet. Maybe they got to see it preliminarily, but none of us has a copy of it that I know of, Mr. Chairman. So I think that's very important to point out, that we're hearing about a bill that no one has seen—at least on this side.

Second, I think it's important to notice that the front page of the Washington Post today pointed out how women have been hitting the glass ceiling. We certainly know that all minorities have been hitting the glass ceiling since the Federal Government walked out. We have found that economic opportunities to advance have really been limited. That's why this bill is so important. Bread and roses are very important. We've been giving them roses, but no bread. So this bill gets to the bread.

I wanted to put it in the most common language I could think of, and I was looking at my mail this morning and from Denver comes these wonderful words that couldn't say it better. They summarize by saying that what happened to civil rights in the 1980s makes it very clear that women and minorities are free to be homeless and

that the rich are free to be completely reckless and always get bailed out. I think that may say why this is important to be on a fast track, and I thank you for putting it on a fast track. I hope that my colleagues can get us a copy of the other bill so we will at least know how to compare the differences.

Thank you.

Chairman HAWKINS. Any further statements?

Mr. FAWELL. Mr. Chairman.

Chairman HAWKINS. Mr. Fawell.

Mr. FAWELL. Mr. Chairman, legislation has been introduced which apparently aims to abrogate in one fell swoop five or six—I don't know, perhaps seven—U.S. Supreme Court cases. Throughout the history of the Civil Rights Act, the Supreme Court has been, I think most of us will agree, quite hospitable toward minority claims. And now, because the Court has, on the basis of certain factual settings in those five or six cases, suggested that there are outer limits to the bill of rights of minorities, there is a demand by some for the wholesale abrogation of all of these cases.

Mr. Chairman, what bothers me is that a lot of well-meaning people may, in effect, be burning a lot of books that perhaps they have not read, and perhaps they may not fully appreciate. One civil rights scholar, Theodore J. St. Antoine, has observed that some critics—and I quote—"have forgotten a primary lesson from the first year in law school, namely, that the facts of a case are often more critical in assessing the meaning of a decision than the language in the court's opinion." He adds that one should not have been so exuberant about some of the things said earlier in these civil rights cases and one should not be so disheartened about some of the things that have been said now.

Has there ever been—and I don't know the answer to this question—but has there ever been such a rush to silence the Supreme Court, and indeed, to do it retroactively? I don't know of any. Perhaps not since FDR tried to pack the Court many years ago, and maybe these are not perfect analogies. But how many of us have read the decisions? I have, but I must confess I have many questions in my mind. But more important, having read them, how many of us understand them within the historical context of civil rights law decisions since the passage of the 1964 Civil Rights Act.

Mr. Chairman, those who would eradicate in one bill the writings of these many Supreme Court decisions, which to my knowledge is new in the history of this Congress, it seems to me are—and I guess certainly the sponsors do recognize that they're asking a lot of this Congress and a lot of the people of this Nation we represent. I hope that we shall all carefully listen to the legal scholars on both sides. It's too bad you can't bring the Supreme Court Justices in here and have them testify.

In my view, and perhaps not shared by all, none of our Supreme Court Justices are indifferent to the cause of racial equality in the workplace. Legal requirements, for instance, state that a case should be well proven and not, as in the *Wards Cove* case, where I think the plaintiff's attorney just sat back and said "well, I put the statistics in and I've done my job." When a court suggests that cases ought to be proved, I don't think that should be taken as an indifference to the cause of racial justice in the workplace.

I look forward to these hearings. They seem to me a mammoth, mammoth undertaking by we in the Congress. I'm an attorney and I'm certainly confused by these cases. I will try to read and reread them. But we're undertaking a lot. I hope we go slowly, I hope we go deliberately and listen so very carefully, the people who really and truly have a better grasp than we in Congress do in regard to what these Supreme Court decisions really do mean. I think maybe the legal scholars are not half as far apart as are well-meaning laymen who just take conclusions of what they see in the newspapers about what these decisions did or did not do.

Thank you, Mr. Chairman.

Chairman HAWKINS. Thank you.

Mr. Martinez.

Mr. MARTINEZ. Thank you, Mr. Chairman. I certainly won't be as eloquent as some of my colleagues, but I certainly will be as sincere.

I was going to originally give a statement for the record that said I'm pleased with the bipartisan support, but I can see the bipartisan support going out the window. One of my colleagues said he's not an attorney and, therefore, didn't expect himself to be bound up in constitutional law. I think none of us have to be attorneys to be bound up in what's right for the people, and especially in regards to civil rights.

You know, I grew up as part of a minority group in an area that faced grave discrimination over the years. I saw that whenever an elected body sought to do something for the minorities, to give them equal opportunity and availability of rights same as everyone else, these rights were acceptable in legislation as long as it didn't interfere with those of the majority. That's a harsh statement, but from my perspective it is true.

We have seen response to legislation introduced, from the other side, saying "we'll do everything as long as we don't do anything to disturb the status quo." Well, I think that there are people on that side of the aisle as well as people on this side of the aisle that are fed up with that kind of rhetoric and are going to move forward and do something about it. It may not a massive overturn of seven cases of the Supreme Court, but do what the Supreme Court, in their lack of wisdom, didn't see as a just end or resolve to the thing that was before them.

I have seen and heard during hearings from people who are actually involved in these situations, testifying that there is rampant discrimination in the workplace as well as everywhere else. We passed a law not too long ago, reverently referred to as IRCA, in which we realized that there was a potential for discrimination. Instead of not passing the law, we went ahead and passed the law. As a result, we created that discrimination.

My subcommittee has held hearings in New York, we intend to hold them in California, where the witnesses in New York testified emphatically that there is wholesale discrimination going on because of that law. It seems that sometimes we talk in beautiful cliches like "Don't throw the baby out with the bath water" and all kinds of things. That's exactly what we end up doing.

We tried to stem illegal immigration with IRCA, but we didn't stem illegal immigration. It's still coming. But what we did do was

create a mechanism by which employers could discriminate. That's wrong for this Congress, who represent the body of the United States to have done so. I am very discouraged.

I am encouraged, though, by the fact that you have introduced legislation. Apparently there is now a move by the Administration to create alternative legislation. I have wanted to be optimistic about this Administration. I certainly wasn't about the last. I hope to remain optimistic about this Administration and what they intend to do for the people. But they have yet to prove that, not with the rhetoric and the speeches they make, but with actual actions. I don't think we're any longer going to listen to rhetoric. We're going to want results.

Mr. Chairman, I hope that you continue with at least that side of the aisle that is truly concerned for the rights of people, and hold that bipartisan support that we've heard about so far. I look forward to the witnesses today. They're all expert people who can tell you real life experiences, not the experiences we dream up up here, but the experiences that they encounter in life every day. I'm looking forward to that.

Thank you, Mr. Chairman.

Chairman HAWKINS. Any further opening statements? Let me remind the members that we have some experts out in front of us, and I hope we can reach them today. Those of us who are members of the committee on this side will have an opportunity to question them. This is not directed at anyone who has not yet spoken.

Mr. GOODLING. Or anyone who has.

Chairman HAWKINS. Mr. Payne.

Mr. PAYNE. It certainly does sound like it is directed at those who have not spoken, Mr. Chairman. But let me say very briefly, because this is so important, that I would like to indicate that I support the Civil Rights Act of 1990. This bill will restore the protections provided in Federal statutes and court interpretations from the past 25 years.

Like many of you, I was both shocked and disappointed by the series of decisions the Supreme Court handed down last year. I have vivid recollections of the struggles to achieve civil rights in the Sixties, and the excitement and pride about the enactment of the Civil Rights Act of 1964. In fact, cities in my own district still bear some of the scars of the struggle for equal opportunity. We have come too far to take even the smallest step backwards.

We must also remain mindful of the fact that not only women and minorities are the beneficiaries of the civil rights laws. The Nation benefits even more. The inclusion of women and minorities in more varied positions in the workplace and in social and political life has contributed to the success of this country, and as the demographics of the country change in the 21st century, women and minorities will be determining factors of our success.

We have all heard the numbers, but they are worthy of repeating. Eighty-five out of every 100 members of the work force by the year 2000 will be women and minorities. It only makes sense, therefore, that we offer women and minorities fair opportunity in every way. Protection against discrimination is critical in order to ensure the integration, training and advancement of women and minorities in the work force. The Civil Rights Act of 1990 would do

that. As we continue to air our concerns about the Nation's future competitiveness, we must do all that we can to make sensible investments in individuals and talents that we will be counting on.

I would just like to say that it's interesting that we hear people say that there has been no real change in the Supreme Court. It reminds me of the story of Rip Van Winkle. Although it's a fairy tale, when Rip Van Winkle went to sleep, there was a picture of King George on the wall in the colony where he lived in one of the 13 original colonies. When Rip Van Winkle woke up, there was a picture of George Washington on the wall. So, he slept through a revolution.

Now, I don't understand how we can continually look at the Supreme Court that did protect people, that people looked towards for help and support, and say that we still have a similar type Supreme Court. I think that the story of Rip Van Winkle seems to still be alive today.

Thank you, Mr. Chairman.

Chairman HAWKINS. Thank you.

Mr. HAYES. Mr. Chairman, I understood very clearly, and thank you for your remarks. I will adhere to them.

I have a prepared statement and would like to present it in full into the record of this hearing, because I come from a city that is being sued today because of its position with respect to the set-aside program to benefit minorities. I am sure the impetus from that suit came as a result of some of the recent decisions of the Supreme Court. I would like to present this for the record, if there is no objection.

[The prepared statements of Hon. Charles A. Hayes and Hon. Fred Grandy follow:]

PREPARED STATEMENT OF HON. CHARLES A. HAYES, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Thank you Mr. Chairman. I would first like to thank my Chairman, Mr. Hawkins, and our visiting Chairman, Mr. Edwards, for convening this very timely hearing. It is certainly time that we attack the Supreme Court's efforts to weaken this country's civil rights laws and I know that I am in good company wity Chairmen Hawkins and Edwards, along with my many other colleagues here today.

I believe that we will find general agreement that the legislation we will consider today, The Civil Rights Act of 1990, has been long awaited.

Last year's Supreme Court decisions regarding employment rights unravled basic job opportunities and protections for women and minorities. We know, from past experience, that strong anti-discrimination laws are needed to promote a productive and representative workforce. Removing job bias should be our priority, and this legislation directly addresses this concern.

I look forward to the testimony we will receive today and extend a warm welcome to our witnesses.

I know one thing for sure, we cannot allow and cannot accept this Administration's attempt to turn back the clock on civil rights. All Americans deserve the right to equal employment opportunity, and that is why I am supportive of this legislation.

Thank you again, Mr. Chairman.

OPENING STATEMENT

COMMITTEE ON EDUCATION AND LABOR

COMMITTEE ON THE JUDICIARY

JOINT HEARING

CIVIL RIGHTS ACT OF 1990

FEBRUARY 20, 1990

Thank you Mr. Chairman. As I admit that I am still trying to come to terms with the complexities of some of the issues raised by the civil rights bills before us today, I will keep my remarks to a minimum. I would like to thank the witnesses in advance for their testimony and for providing us with some enlightenment on the finer points of these legislative proposals.

At the outset, I would like to voice my support for the Administration's proposal and for those portions of the Hawkins-Kennedy bill that address the Lorance and Patterson decisions. Although these holdings may correctly interpret Section 1981 and Title VII as a matter of statutory construction, they cause unnecessary hardships for certain victims of discrimination and they must be corrected.

The extension of Section 1981 contained in the Administration's bill will close the gap that now exists for victims of racial harassment and for victims of racial discrimination wrought by employers with under 15 employees. Similarly, the reversal of Lorance will remove from employees the unfair burden of having to anticipate all the possible adverse effects of a seniority system at the time the system is adopted or else lose the right to challenge the system.

To the extent the Hawkins-Kennedy bill confines itself to these two decisions, I can wholeheartedly support it. However, that bill goes much further to reverse several other Supreme Court decisions where it is not so clear that unfair burdens are placed on victims of discrimination. Additionally, the Hawkins-Kennedy bill would expand Title VII in ways that have nothing to do with the Supreme Court holdings of last term and which arguably would change the entire focus of Title VII. It seems that prudence dictates that we should move slowly and with much deliberation before making radical changes to a civil rights law that many would argue has served us well for the last 25 years.

For example, the Hawkins-Kennedy bill would reverse the Wards Cove decision and would codify the disparate impact theory of Title VII violations. The extent to which the Supreme Court departed from the established case law is subject to some debate and before we make significant changes with respect to the burdens of proof for Title VII litigation, maybe we should wait to determine exactly what the impact will be on the ability of plaintiffs to successfully prosecute their claims. Similarly, the Hawkins-Kennedy bill would expand Title VII remedies to include punitive and compensatory damages. The availability of these remedies would change Title VII into something beyond the conciliation tool that now is one of its major purposes. Whether or not this is an outcome we ultimately will choose to support, it is not something that should be undertaken without serious study. Many of the Hawkins-Kennedy bill's provisions would upset the carefully balanced remedial scheme of Title VII and, as such, they should not be the subject of hasty legislation.

As I said before, I can support the Administration bill right now because it seeks only to remedy some of the glaring anomalies created by the Supreme Court's decisions in Patterson and Lorance. It removes some of the unfair burdens placed by those decisions on the victims of discrimination. I cannot support the Hawkins-Kennedy bill at this time because it goes beyond removing these unfair burdens to make significant changes to the statutory framework created by Title VII and perhaps to create new unfair burdens on other employees. I would welcome a lengthy hearing process to investigate the implications of this bill and to allow the Members of this Committee to make a reasoned and informed decision on whether or to what extent to support the changes to Title VII law that it contains.

Chairman HAWKINS. We will now hear from the first panel, which will consist of Dr. Benjamin Hooks, Executive Director of the National Association for the Advancement of Colored People; the Honorable John Buchanan, Chairman, People for the American Way Action Fund; Mr. Julius Chambers, Director-Counsel of the NAACP Legal Defense and Education Fund; and Mr. Sholom D. Comay, President of the American Jewish Committee.

The Chair will call on them in that order, beginning with our good friend Dr. Benjamin Hooks. Dr. Hooks, we welcome you to the committee.

STATEMENTS OF BENJAMIN L. HOOKS, CEO/EXECUTIVE DIRECTOR, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, BALTIMORE, MARYLAND; JOHN H. BUCHANAN, JR., CHAIRMAN, PEOPLE FOR THE AMERICAN WAY ACTION FUND, WASHINGTON, DC; JULIUS LEVONNE CHAMBERS, DIRECTOR-COUNSEL, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., NEW YORK, NEW YORK, AND SHOLOM D. COMAY, PRESIDENT, AMERICAN JEWISH COMMITTEE, NEW YORK, NEW YORK

Mr. HOOKS. Thank you very much, Mr. Chairman.

As you have stated, I will be as brief as possible and submit a written statement that covers all that I would like to say.

Chairman HAWKINS. Thank you.

Mr. HOOKS. This has been a very peculiar morning for me as I listened to these statements. Let me say, first of all, that I am Benjamin Hooks. I am the Executive Director of the National Association for the Advancement of Colored People. We represent some 500,000 members and 2300 chapters across the length and breadth of this land.

It causes me some type of agony to sit here, in this 127th year after slavery, and to see the parallel between the actions of this Supreme Court and those of the Post-Reconstruction Supreme Court.

I would remind this panel—and if we would want to read, I'd be happy to send you the Civil Rights Act of 1875, that dealt with public accommodations. A Post-Reconstruction Supreme Court struck that down. It was not until 1964 that we passed again what we had done in 1875. If I could recount the agony, the injustice, the suffering, the shame, the indignity, the inhumanity, of years and years of this country having to live under "separate but equal" because the Supreme Court refused to obey the mandates of Congress and Congress would not set the Supreme Court straight.

We have suffered so much in this country because we tried after the Civil War to do some of the very same things that we did in the 1950s and 1960s, and now it's almost unbelievable to hear expressions made now that could have been copied from the book that was written in the 1870s and 1880s.

My grandmother, who was born in 1852 and lived until 1942, went through a period after the Civil War when there was no Jim Crow, when she could ride the trains freely. And then she lived through a period where she was arrested numerous times for doing what she thought the law allowed.

I would recommend that if we want to read history, this present Supreme Court has copied the Post-Reconstruction Supreme Court and we could very well see the human suffering that happened.

And now, 25 years after the passage of the Civil Rights Act of 1964, we see the Court acting in the same fashion.

I am not going to go any further, except to say this. When I now read the paper, everywhere I look I see the winds of freedom blowing in Eastern Europe; the winds of freedom blowing in the Soviet Union; the winds of freedom even reaching South Africa and China. And to sit here in this United States of America in 1990 and see the winds of oppression blowing, it appears to me that we have been hypocritical when we applaud those actions.

I'm just happy—and I don't want to be disrespectful—that the present majority of this Supreme Court is not in charge of Eastern Europe, South Africa, or China; we would be another 100 years trying to get freedom.

The Civil Rights Act of 1990 we fully embrace—it does not constitute, in my judgment, great changes—the *Griggs* case was the law for, I believe, some 18 years. It did not cause any wholesale change. I have yet to see the tales of horror. I have not seen all of these black people replace white males as executives of the Fortune 1000 companies. I have not seen women assume any great proportion of the 15,000 directorships. I have not seen blacks and women assume all of the governorships; or even if I may be pardoned for saying it, the senatorships or the representatives. I have not seen this great problem that the present Supreme Court is dealing with.

I am hoping and praying that in the interest of justice, and in the interest of humanity, and the interest of pure common sense, this Congress will say in no uncertain terms that it will not allow a backward-moving Supreme Court to erase the plain intent of Congress. And that intent has given minorities hope; it has given encouragement. It has given those of us who have worked with vast numbers of people the ability to go into ghettos and into the places where people feel forgotten, neglected, lost, left out, to say to them that this country is a country of hope. And that if we do not redress the injustices that are being put upon us now—and I keep saying the majority of the Supreme Court because, obviously, not all of them are involved in this backward movement—then we are saying to the least, the lost, the left out, the poor, the powerless, and the poverty stricken, that we no longer care.

On behalf of the NAACP, and I think on behalf of men and women, black, white, Jew, gentile, of good will all over this Nation, we should act expeditiously in passing the bill that is before us today in order that we might redress and bring back into practice that which this Congress did against such a tremendously difficult backdrop in the last 25 years.

Thank you, Mr. Chairman, and my full statement will be submitted.

Chairman HAWKINS. Thank you, Dr. Hooks. It's a real honor to have you as the opening witness at this time and we appreciate your remarks.

[The prepared statement of Benjamin L. Hooks follows:]

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TESTIMONY

OF

BENJAMIN L. HOOKS

CEO/EXECUTIVE DIRECTOR, NAACP

BEFORE THE

COMMITTEE ON EDUCATION & LABOR AND THE SUBCOMMITTEE

ON CIVIL & CONSTITUTIONAL RIGHTS, COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

FEBRUARY 20, 1990

10:30 a.m.

Room 2175 Rayburn House Office Bldg.

Mr. Chairman and members of the Committee, I am Benjamin L. Hooks, Chief Executive Officer and Executive Director of the National Association for the Advancement of Colored People. We appreciate this opportunity to be heard on what the NAACP considers the most important piece of legislation to be introduced during this 101st Congress, "The Civil Rights Act of 1990."

On February 12th during its 81st birthday observance, the NAACP reaffirmed its mission to promote equality of opportunity in every aspect of public life--a mission of paramount importance to the more than half a million members in our 2300 branches and indeed to the 12 million black Americans in the United States. We have fought too long and too hard, for every inch of progress, to idly stand by and watch the erosion of two and a half decades of progress.

In this 127th year after slavery, I am struck by the parallels between actions of the U.S. Supreme Court in 1989 and those of the Post-Reconstruction Court. During Reconstruction seven civil rights measures were passed by the Congress--the most far-reaching of which was passed in 1875 and dealt, in the main, with public accommodations. However, the Post-Reconstruction Supreme Court declared it unconstitutional and the substance of that law later became the Civil Rights Act of 1964. It is ironic that the present Supreme Court saw fit to narrow its interpretation of Title VII of the Civil Rights Act of 1964 in 1989--the 25th anniversary of its passage.

Mr. Chairman and members of the Committee, the NAACP wholeheartedly supports the Civil Rights Act of 1990 and commends the chairmen of both committees and sponsors of H.R. 4000 for their foresight in swiftly acting to remedy what we feel is the ill-conceived and/or mischievous action of the Court in turning back the clock on equality of opportunity for all Americans by narrowing the scope of section 1981 of Title 42 of the U.S. Code and undercutting Title VII of the Civil Rights Act of 1964. Wards Cove, Patterson, Martin v. Wilks and other decisions did much to undermine and jeopardize the civil rights gains of the last two and one-half decades. The Court has sent a message throughout the nation that has chilled the hopes and aspirations of minorities and women for a fair share of economic justice. Indeed, we must admit to a heavy feeling of deja vu.

We are aware that some of the groups testifying today will be doing so based on studies they have made of the impact of the various cases on their constituients. Thus, the NAACP will share with the committee its perception of the impact these decisions have had on black Americans.

The NAACP was so disturbed by the Supreme Court's action that it passed the following emergency resolution at its 80th Annual National Convention in Detroit in July 1989:

"EMERGENCY RESOLUTION
Recent Supreme Court Decisions

WHEREAS, black Americans have been systematically discriminated against since the founding of this nation; and,

WHEREAS, it appears that the majority of the U.S. Supreme Court is intent on destroying many of the hard-won civil rights gains of the past three decades; and,

WHEREAS, no amount of legal knowledge, theory, or reasoning can justify the Court's attacks on past decisions which gave civil rights litigants a fair opportunity to prove their claims and remedy long-festering wrongs; and,

WHEREAS, the decisions in Wards Cove Packing Co. v. Antonio, Richmond v. Croson, Lorance v. AT&T Technologies, Price Waterhouse v. Hopkins, Martin v. Wilks, Patterson v. McLean Credit Union and Jett v. Dallas Independent School District will have devastating effect on those seeking relief from employment discrimination and those who rely upon minority set-asides to ensure equal economic opportunity; and,

WHEREAS, women and minorities are losing ground with each successive Supreme Court ruling; and,

WHEREAS, there is a disturbing parallel between the actions of the present Supreme Court and those taken by an earlier Supreme Court during the Post-Reconstruction era.

NOW THEREFORE BE IT RESOLVED, that the NAACP in Convention assembled calls on Congress to act swiftly to restore the laws that have been adversely affected by the recent rulings of the Court on civil rights and affirmative action issues;

BE IT FURTHER RESOLVED, that we call upon members and citizenry to, on call, mount such powerful demonstrations that the group gathered in China not long ago will look like a few compared with the millions that we mobilize;

BE IT ALSO RESOLVED, that the NAACP vigorously oppose the intention of the present majority of the U.S. Supreme Court to retract and reduce the civil rights and liberties of minorities and women, and urge the Justices to reverse their present course and dedicate the Court to the establishment of equal opportunity and justice for all.

BE IT ALSO RESOLVED, that we call upon the President to set forth the details of his civil rights agenda and to give leadership to the fight for social and economic justice."

On August 26, 1989 the NAACP sponsored a silent march of some 100,000 people in the nation's capital to protest the Supreme Court decisions.

The following analysis of the cases shows the devastation of these rulings:

PATTERSON v. McLEAN CREDIT UNION

In the Patterson case, the Court left standing, but eviscerated a section of the Civil Rights Act of 1866 that was one of the most powerful weapons of our civil rights lawyers. Section 1981's pertinent text reads, "(a)ll persons... shall have the same rights... to make and enforce contracts... as is enjoyed by white persons." In Runyon v. McCrary, 427 U.S. 160 (1976), the Supreme Court had expanded Section 1981's protection to include private contracts in addition to ones with governmental bodies and had allowed black parents to sue on behalf of their children, and force admission to segregated private schools. This law has been used to attack all sorts of discriminatory actions not

specifically prohibited by other federal or state laws. Patterson sued her employer under Section 1981, alleging a pattern of racial harassment after she was hired and a discriminatory failure to promote.

Rather than ruling on the limited issue presented, the Court issued a sweeping ruling about the entire scope of the statute. The majority set forth a doctrine that sharply limits the instances in which this law granting minorities equal rights "to make and enforce contracts" can be the basis of a lawsuit. Instead of ruling that the "make and enforce contracts" phrase covers the entire gamut of contractual relations, as seems obvious, the Court broke the wording into two distinct parts. The words "to make contracts" now only prohibits discrimination in the actual formation of a contract and covers nothing about discriminatory "performance of an established contractual obligation" after the contract's creation. Similarly, the Court held that the "right to enforce contracts" phrase embraces only a right of legal process to enforce contracts.

IMPACT ON BLACKS

This ruling greatly limits the use of Section 1981. It means, for example, that the black school child who could force

her way into a segregated school with Section 1981 could not sue under this federal law if she was subjected to all types of racial harassment and discriminatory treatment in the school after her admission. The Court's ruling makes the victory she won a very hollow one. It also has a significant impact on possible damages because the statute allowed compensatory damages to the victim of discrimination far in excess of those allowed by laws like Title VII.

Mr. Chairman, Runyon was considered sacred by the civil rights community. The mere fact that this Court chose to reconsider it without being asked is a key that all past civil rights decisions are subject to future scrutiny.

MARTIN v. WILKS

Next in the string of assaults on civil rights was the case of Martin v. Wilks, which involved the Birmingham, Alabama Fire Department, which was all white until 1968. In 1981, the city entered into a consent decree settling litigation, filed in 1974 and 1975, with a class of black plaintiffs and the Justice Department. The litigation had challenged both hiring and promotion practices. The consent decree called for the city to make

race conscious promotions as a means of eradicating the results of the "egregious" discrimination of the past, and specifically stated that it did not require the hiring or promotion of non-qualified persons. Several months after the decree, a new suit was filed charging the city with "reverse discrimination." The trial court found this new suit to be an "impermissible collateral attack."

The Supreme Court struck down the collateral attack doctrine in situations like this and said the white firefighters should be allowed to proceed with their reverse discrimination lawsuit. The Court also ruled that the original parties to the suit, minority plaintiffs and defendant employers, would have to join, as additional parties to the suit, all white workers who might be adversely affected by the terms of the decrees. The fact that the white workers had knowledge of the lawsuit and had an opportunity to intervene did not prohibit a collateral attack.

IMPACT ON BLACKS

Dozen of similar decrees around the country are now subject to similar attacks as we face the prospect of seeing the minimal gains and limited redress achieved through the courts after years of denial jeopardized by these challenges. In addition, the

burden of notifying and joining potential future litigants will fall primarily on plaintiffs as employers are not likely to willingly undertake this chore. This will make it more difficult and time-consuming for cases to be litigated with finality.

WARDS COVE v. ANTONIO

The most serious decision is Wards Cove for that ruling put the burden of proof on the victim of discrimination, no matter how stark the numerical disparity of the employer's workforce.

This case involved multi-faceted claims by salmon cannery workers in the Pacific Northwest concerning discrimination in hiring, job conditions and promotion into higher paying jobs at defendants' facilities. Employees of the canneries were segregated by race, with primarily whites holding the better, higher paying non-cannery jobs and Alaskan natives and Filipinos holding the lower paying laborer and cannery jobs. Recruitment was through separate channels. The higher paying jobs were not announced to the minority workers and most recruiting for whites took place by word of mouth.

Since the Supreme Court's decision eighteen years ago in Griggs v. Duke Power, 401 U.S. 474 (1971), most courts had agreed on certain discrimination cases. Disparate impact analysis was applied when an adverse impact was placed on a minority group protected by law.

After showing that the employer used a selection test or procedure that adversely affected minority workers, the burden of proof shifted to the employer to prove, by a preponderance of the evidence, that the use of that selection procedure furthered a legitimate business interest. The burden of proof was completely changed by Wards Cove. Under that decision, all the employer has to do is to offer some proof that the selection procedure meets a business necessity and the burden then shifts to the minority employee to prove, by a preponderance of the evidence, that the selection device does not advance a legitimate business necessity.

IMPACT ON BLACKS

Griggs was the most important decision in employment discrimination history. It has been credited as a catalyst, causing more integration in the workforce than any other single decision. The loss of this catalyst is truly devastating. The

change in the burden of proof will have a chilling effect on prospective litigants. These types of cases were difficult to prove and win before this decision. Now the likelihood of success is greatly diminished. The motivation for private attorneys to take employment discrimation cases on a contingency basis will be greatly diminished and many worthy claims can no longer be pursued simply because of the added cost of meeting this burden of proof through protracted discovery.

LORANCE v. AT&T TECHNOLOGIES

This decision is a ruling regarding when the time period for filing a claim based upon a discriminatory seniority system with EEOC begins to run.

IMPACT ON BLACKS

The Lorance decision forces minorities to anticipate the potential adverse impact of employment. They must file charges with EEOC and begin litigation when they have not yet been injured by a policy change and may not have any reasonable basis

for anticipating that they will be harmed. They are required "to sue anticipatorily or forever hold their peace." The Court has placed another hurdle before minority group members seeking to vindicate their rights to a workplace free of discrimination.

The intrinsic bias of the Court's reasoning is reflected in a comparison of the Lorance decision and the Wilks decision, which were issued on the same day. On the one hand, a white male can attack a decree at any time he decides he is adversely affected. On the other hand, minorities and women are faced with a strict time limitation which runs from the time of the underlying conduct without regard to whether they had any reasonable basis for anticipating any injury. The 5-4 majority seems obsessed with the idea that meaningful civil rights law might in some way infringe on the rights of some white male somewhere and, to prevent this hypothetical injustice, they are willing to throw years of moderately effective laws out the window, trampling on the rights, hopes and dreams of our nation's minorities.

The significance of the Civil Rights Act of 1990 cannot be overstressed. In our view, it is a monumental movement in the right direction as it restores the rights of minorities and women in the workplace. It addresses directly those decisions, Patterson, Martin v. Wilks, Wards Cove and others that weakened the protections against discrimination needed by all Americans.

We are disturbed by the shifting from the employer of the burden of proving the legitimacy/nonlegitimacy of a business practice that has an adverse impact on a minority group protected by the law, even though the information is best known to the employer. We feel a challenge not only to the cause and ideals of the NAACP, but to the ideals of all Americans.

As we read the Patterson decision, that refused to include on-the-job racial harassment within the prohibition of Section 1981, we feel a challenge to the basic ideal of our democracy that workers should be free of harassment on the job. I daresay that before the Patterson decision, most employees believed there existed, at least, an implied agreement between employer and worker against all types of harassment, including racial harassment, even though some employers may have elected to breach that contract.

As a result of the Court's effective evisceration of consent decrees entered into to end discrimination, we also feel a challenge to this nation's ideal of equal opportunity. The stories were clear, the numbers were there to establish that something must be done to integrate our fire and police departments. Consent decrees are a part of the solution.

Consent decrees are a part of the protection for victims of discrimination in hiring and promotions. Yet, somehow this cure for discrimination has been twisted into a possible cause of discrimination. The five Justices have opened the gate widely for challenges to court approved remedies to end discrimination.

The Civil Rights Act of 1990 will correct these problems; it restores what was and strengthens the protections and remedies available for victims. This legislation tells employers that where a discriminatory motive has been proven, the court may fashion the appropriate remedy under Title VII. The Civil Rights Act of 1990 refuses to make a mockery of one's ability to bring claims of discrimination before administrative agencies. It embraces realistic deadlines to allow victims to react to discrimination-- to allow the victims to become aware that they indeed have been discriminated against. This legislation upholds the broad construction of civil rights laws. It refuses to blame the victims of discrimination.

The NAACP fully embraces the Civil Rights Act of 1990 as a message of hope. We urge all members of Congress and all of America to join us in making America a better place. We are prepared to run the full course.

Mr. Chairman and members of the Committee, I thank you for this opportunity to be heard.

Chairman HAWKINS. The next witness is the Honorable John Buchanan.

We welcome you back to the committee in a different position, but it's nice to have you returning.

Mr. BUCHANAN. Thank you, Mr. Chairman, Chairman Edwards, and members of the committees. It's always a privilege to testify before the Mr. Edwards' subcommittee, which has such a long and distinguished record of working toward making the promises on paper of the Bill of Rights and the Constitution become realities in the world for American citizens.

It is a special privilege to testify before the Committee on Education and Labor on which I did serve for some years. It was my special privilege to serve with Chairman Hawkins. He is retiring from Congress at the end of this term and has a long and distinguished record in the area of civil rights.

I can think of no more fitting tribute to Chairman Hawkins than for this Congress to enact the important civil rights legislation which I am here to discuss.

I come before you today on behalf of the 285,000 members of People for the American Way Action Fund, which it is my privilege to chair, to urge your support for the Civil Rights Act of 1990—legislation designed to restore and strengthen important civil rights protections for Americans in the workplace. And I do ask that my full written statement be included in the record, Mr. Chairman.

Chairman HAWKINS. Without objection, so ordered.

Mr. BUCHANAN. Thank you, Mr. Chairman.

We believe the case for the legislation is compelling. Our conclusion is based on two studies by People for the American Way, which I would like to summarize for you today.

First, we have analyzed dozens of recent civil rights cases that cite the Supreme Court's 1989 employment discrimination decisions, and found clear evidence of the decisions' adverse impact on Americans who are seeking legal redress against unfair treatment at work.

In our report on "The Human Impact of the Supreme Court's Civil Rights Retreat" we have illustrated how justice is being denied to the victims of workplace discrimination.

I ask that the full study be included in the record, Mr. Chairman.

Chairman HAWKINS. Without objection, it is so ordered.

[The document follows:]

JUSTICE DENIED

The Human Impact of the Supreme Court's Civil Rights Retreat

Printed by the National Education Association

INTRODUCTION

Shortly after a series of 1989 Supreme Court decisions weakened America's fair employment laws, President Bush said: "If the decisions actually turn out to hamper civil rights enforcement... obviously I would want to take steps to remedy the situation."

Just seven months later, there is clear evidence of these decisions' adverse impact on Americans who are seeking legal redress against unfair treatment at work. Drawing from a review of dozens of civil rights cases that cite the Supreme Court decisions, this report spotlights several cases that have been directly and adversely affected by the Court's actions. The report describes additional cases where justice was denied because of a pre-existing weakness in our civil rights law. Together, these human stories show the compelling need for the Civil Rights Act of 1990, new legislation designed to restore and strengthen civil rights protections.

The Supreme Court has blunted the effectiveness of the two most important laws that stand between Americans and employers who practice discrimination. The first is Section 1981 of Chapter 42 of the U.S. Code, the only federal law that allows a victim of racial bias in the workplace to sue the perpetrator for compensatory and punitive damages. (Compensatory damages are designed to provide victims with financial redress for harm done to them; punitive damages are used to punish and deter employers found guilty of particularly egregious discrimination.) Section 1981 is a promise that Congress made more than a century ago to newly freed slaves that they would be treated fairly in the workplace and in other contractual relationships. Yet, in its *Patterson v. McLean Credit Union* decision, the Court sharply reduced the scope of Section 1981, barring many Americans from seeking the strong legal remedies this law alone provides.

The second important law, Title VII of the 1964 Civil Rights Act, protects against workplace discrimination on the basis of race, color, religion, gender and national origin. Unlike Section 1981, it does not provide relief in the form of damages; it offers more limited relief, such as back pay or reinstatement in a job. In a battery of decisions bearing on Title VII discrimination (*Wards Cove Packing Co. v. Atonio, Price Waterhouse v. Hopkins, Lorance v. A.T.& T. Technologies, Inc.* and *Martin v. Wilks*), the Court put heavy legal burdens on Americans who must rely on this remedy for workplace bias.

In the wake of these setbacks, these are the harsh realities of fighting workplace discrimination in today's America:

• **Legalized discrimination on the job.** Before the Court's action, court decisions held that all forms of on-the-job racial discrimination and harassment were illegal under Section 1981. Today, Section 1981's protections only cover the making of job contracts -- protections that end, in most cases, on the first day of work. After that, even the most blatant discrimination may go unremedied under federal law.

• **Onerous burden of proof.** Before the Court's 1989 action, as a result of a unanimous Supreme Court decision in 1971, employers bore the burden of establishing that practices that harmed minorities or women were essential to the needs of business. Now employees must prove that such discriminatory practices have no business justification.

• **Loophole for discrimination.** Before the Court's action, established legal principles suggested it was always unlawful for prejudice to play a role in a job decision. Today, to escape liability completely, all the employer may have to do is show that there was a second, lawful reason for making such a decision.

• **Open season on anti-discrimination plans.** Before the Court's action, fair employment settlements and court-ordered remedies usually represented a permanent resolution of bias cases. Now these plans can be challenged at any time, even years later, by anyone who claims to be affected, spawning endless litigation and re-litigation.

• **Unfair deadlines for challenges.** Because of the Court's action, when an employer adopts a policy that could be discriminatory, employees must file charges against the employer within a very tight time limit (no more than 300 days). Yet employees may not feel any impact of such policies until years after they're adopted -- by which time it's too late to challenge them, the Court said.

The Court's decisions thwart the intent of Congress in passing the civil rights laws: to guarantee fair employment treatment to every American. Dissenting in the *Patterson* case, Justice Brennan wrote that the Court's narrow interpretation of civil rights law is "antithetical to Congress' vision of a society in which contractual opportunities are equal." Dissenting in another decision, Justice Stevens accused the court of "turning a blind eye to the meaning and purpose of Title VII."

This report details the serious civil rights reversals wrought by the Court, provides case histories that illustrate their impact on working Americans, and explains the solutions proposed in the Civil Rights Act of 1990. This new legislation aims to rebuild the nation's civil rights laws so that they can effectively protect all Americans against workplace discrimination. The law includes major provisions aimed at repairing the damage done by the Supreme Court, and an additional major provision designed to provide necessary strength and consistency in the law.

The Civil Rights Act of 1990 will:

• Restore the federal prohibition against racial or ethnic discrimination at any point in the employer - employee (or other contractual) relationship.

• Return the burden of proof to the employer to show the business necessity for a practice that has a proven discriminatory impact.

• Make it clear that it is always illegal for an employer to use race, ethnicity, gender or religion as a motivating factor in employment decisions.

• Preserve the stability and certainty of court-approved plans designed to remedy discrimination.

• Reestablish fair rules for determining when victims of discrimination must file their claims.

• Assure all victims of intentional discrimination -- whether based on race, religion, ethnicity or gender -- the right to sue the perpetrators for damages.

THE CASE FOR THE CIVIL RIGHTS ACT OF 1990: A HUMAN IMPACT STATEMENT

Legalized Discrimination on the Job

Many Americans can no longer sue for damages even when they have suffered the most egregious discrimination on the job, because federal law no longer provides this remedy. In the *Patterson* case, the Supreme Court narrowed the scope of Section 1981 so that it now protects only against discrimination in the "making of contracts" -- which the Court says includes nothing more than hiring and some promotions for employees. Not covered at all is a worker's treatment on the job.

Human Impact. The Court's action has already derailed more than 100 employment discrimination claims. For example:

- A black resident of Birmingham, Alabama, was subjected to severe racial discrimination while employed at an otherwise all-white equipment company. In one incident, the company's owner placed a sandwich on the floor during a lunch and said, "Here you go, my nigger." On at least two occasions, the owner kicked the employee for alleged work-related errors.

Despite the employee's prior experience in many needed skills, he was denied promotion, and actually demoted, because of his race. His one brief stint as shop foreman ended when the owner hired an inexperienced white man for the job, justifying the switch by saying that it was unseemly for a black to be in such a high position.

Before the Supreme Court's action in *Patterson*, a federal district court found

the employer guilty of discrimination under Section 1981 and awarded the victim more than $150,000 in damages. As a direct result of *Patterson*, however, the decision was thrown out on appeal. (The victim cannot sue under Title VII because the employer has fewer than 15 employees.) Even if he is able to win some relief later for discrimination in promotion, the court of appeals made it clear that the blatant harassment he suffered is now legal under the Supreme Court's interpretation of civil rights law.

• The president of a small Washington, D.C. computer firm went to court when he contended that he lost a major contract because of religious discrimination. Although the contractor had always deemed the computer firm's services satisfactory, this longstanding arrangement was abruptly terminated several months after the contractor's manager learned that the firm's president is Jewish. An appeal to the manager's superiors to reconsider produced no results.

After the Court's *Patterson* decision, a district court ruled that even if the victim could prove that the contract was terminated solely because of blatant religious discrimination, he no longer had any remedy under Section 1981.

In the first few months following the *Patterson* decision, such claims were being dismissed at the rate of one per day, according to a November 1989 report from the NAACP Legal Defense and Educational Fund (LDF). The cases disrupted involved people of diverse backgrounds: black, Hispanic, native Hawaiian, Chinese, Filipino, and Jewish. *Patterson*'s devastating effects on the ability of the law to provide them with justice were summed up in a district court ruling regarding black plaintiffs who contended that they had been insulted, harassed and demoted because of bias: "Such conduct is contemptible. After *Patterson*, however, it is not actionable. At least, not under Section 1981."

Far fewer victims of discrimination will even be able to file Section 1981

cases in the wake of the *Patterson* ruling. The issues it raises about the law's scope "will breed conflict and confusion among the lower courts," according to the LDF study. "[T]hat very turmoil is often sufficient, for inexorable economic reasons, to dissuade counsel from handling these cases," the LDF study concludes.

Legislative Solution. The Civil Rights Act of 1990 restores Section 1981's protections to the full extent originally intended by Congress. It will bar discrimination at any point in the employer-employee or other contractual relationship-- hiring, promotion, on-the-job treatment, and termination of employment.

Onerous Burden of Proof

Americans who suffer discriminatory impact from an employer's practices face an almost insurmountable challenge in proving their case in court due to the Supreme Court's *Wards Cove* decision. The Court's action affects cases where firms disproportionately exclude minorities or women from employment. Under a unanimous 1971 Supreme Court decision by the Burger Court in the *Griggs v. Duke Power Co.* case, if an employer wanted to fight charges of discrimination in such a case, it was up to the employer to prove that such policies have a business necessity.

The *Griggs* case was a foundation stone of fair employment law; much of the progress made in the last two decades has been built on that decision. But *Wards Cove* effectively overturned the *Griggs* ruling, which had worked successfully for 18 years. As a result, today, the burden has shifted to employees who must prove a negative: that there is no legitimate business justification for a discriminatory practice.

The *Wards Cove* ruling was sharply criticized in an unusually strongly

worded dissent written by Justice Blackmun, joined by Justices Brennan and Marshall: "One wonders whether the majority still believes that [discrimination] is a problem in our society, or even remembers that it ever was."

Human Impact. The *Wards Cove* decision is already hampering legal challenges in discriminatory impact cases. For example:

• A woman in Evanston, Illinois was denied the opportunity to become a firefighter when the scoring of one application hurdle -- a test of agility -- was arbitrarily adjusted upward. When she first took the test, a timed physical drill involving crucial activities such as ladder-climbing, she was passed. Since she was not among those hired that year, she tried again two years later. The second time, although she improved her time on the agility test, she was failed. The reason: the city had raised its scoring standard for no reason it was able to justify in court.

The new scoring method was so tough that, based on their 1980 scores on the same test, seven firefighters already on duty would have been failed. The steeper scoring proved to have a grossly disproportionate impact on women applicants: in 1983, less than 13 percent of female applicants passed the agility test, compared with 93 percent of male applicants. As of 1988, there were no women among Evanston's 106 firefighters.

The female applicant took the city of Evanston to court on behalf of all prospective women firefighters to challenge the discriminatory impact of the scoring of the agility test. Before the Supreme Court's *Wards Cove* ruling, the district judge had found that the city had failed to justify its method of scoring the test, that the woman had proved discriminatory impact, and that relief should be awarded. After *Wards Cove* was handed down, however, the court of appeals vacated this decision, noting that while the city had failed to present a convinc-

ing rationale for the test scoring, "it is the plaintiff that has the burden of persuasion" that no legitimate end was served. While she persists in pursuing her case, *Wards Cove* has seriously delayed and impeded her efforts to achieve justice.

• In Chicago, a black bank examiner charged that his employer engaged in racially discriminatory practices in training and promotion. The examination used to determine promotions had a discriminatory impact, blocking or delaying black employees from moving up the company's ladder. White employees had an 85 percent "pass" rate on the exam, while black employees had only a 39 percent "pass" rate. Only 35 out of 2,000 commissioned examiners nationwide were black. The test lent itself to subjective grading: it had no set questions, no set right or wrong answers, no fixed passing grade or time limits, and was abandoned as soon as it was challenged in court.

The black bank examiner sued his employer on behalf of himself and other black examiners. He won his case in district court, which ordered the employer to stop using any tests with discriminatory impact, to report to the court on efforts in that area, and to provide back pay and promotions to specific victims. But then, almost immediately after the Supreme Court's *Wards Cove* decision, the court of appeals ruled that the lower court had put the burden of persuasion on "the wrong party, the employer," and wiped out the lower court's judgment. The case was later settled, but for less relief in some areas than was originally ordered by the district court -- markedly less with respect to preventing future discrimination.

Legislative Solution. The Civil Rights Act of 1990 would restore the earlier standard established in the *Griggs* decision: once an employee proves that a practice has significant discriminatory impact, the burden of proof would return to the employer to show the business necessity for the practice.

Loophole for Discrimination

A vital deterrent to bias in the workplace was weakened severely by the Supreme Court's *Price Waterhouse* decision. Under basic legal principles, employers were liable for their discriminatory actions against employees, even if other more legitimate considerations were also mixed into their motives in making such decisions as refusing to hire them or give them promotions. This meant that even if the legitimate reasons precluded giving an employee the job or the promotion, the employer would be called to account for the discriminatory action. Although the Court's decision in *Price Waterhouse* is unclear, it appears to suggest that as long as employers can prove they had a legitimate reason for an action that is also tinged with bias, the law turns a blind eye toward the racist or sexist aspect of their actions.

Human Impact. The major impact of *Price Waterhouse* has not yet been felt, as courts express widespread confusion about the meaning of the Supreme Court's decision. To illustrate the potential impact of this decision, here is a description of how two pre-1989 mixed motive cases might have come out differently under *Price Waterhouse*:

• A black male employee of the Department of Agriculture applied for and was denied promotion to a supervisory position. He was the only black applicant for the job, and the three-person, all-white selection committee was dominated by an individual who had labelled the employee a "black militant" and who had referred to another black employee as "boy" and "nigger." The court found that even though the committee had legitimate reasons not to promote the black applicant, he still deserved injunctive relief and legal fees under Title VII because he was clearly a victim of overt bigotry. As one member of the court wrote, "the employer should not be able to exculpate its proven, invidious discriminatory practices" by proving that other issues were at play.

Today, in the wake of *Price Waterhouse*, this case might end very differently, with the employer getting off scot-free and able to use the same bigoted person in future selection decisions.

• A black woman in Kansas City, Missouri, was subjected to a sexist barrage of questions when interviewing for a job in a an airline's commissary. The manager asked her a number of questions -- concerning such subjects as her marital status, number of children, child care arrangements and future childbearing plans -- that were not asked of male applicants for the same position. A mother of four, she was turned down for the job. After filing suit, however, she gained both legal fees and an injunction against such future discrimination in hiring, although the court ruled that she was not entitled to the job she applied for.

After *Price Waterhouse*, however, it is unclear whether any relief at all would have been awarded in her case.

Legislative Solution. The Civil Rights Act of 1990 would make it always illegal for an employer to use race, ethnicity, gender or religion as a motivating factor in employment decisions. The Act would provide for court-ordered relief when such a violation is proven, thus protecting against discrimination without forcing employers to hire, promote or rehire individuals who are unqualified.

Open Season on Anti-Discrimination Plans

Settlement agreements and court-ordered remedies that are already working to stop discrimination were rendered vulnerable to unlimited attacks by the Supreme Court's *Wilks* decision. It had long been thought that such decrees were

immune from further legal challenges. However, the ruling opens the door to endless lawsuits by saying that individuals who want to challenge such remedies can do so even years after the fact, and even if they were not a party to the original lawsuit.

Human Impact. Civil rights attorneys predict that *Wilks* will discourage employers from reaching civil rights settlements, because of the open-ended prospect of endless litigation. "The *Wilks* ruling exposes every consent decree to attack and completely destabilizes the entire field of employment discrimination laws," according to Eleanor Holmes Norton, former chair of the Equal Employment Opportunity Commission. The destabilizing effect is already being felt:

• A successful court-ordered policy designed to remedy blatant discrimination in Albany, Georgia's city jobs was challenged by a white male who was turned down for a job. Since 1976, Albany has implemented a promotion policy that seeks to compensate for proven historic bias against blacks. Almost a decade later, a white male litigant who was not involved in the original case went to court to attack this remedy. At first, he got nowhere: a 1988 district court opinion dismissed the challenge. The judge -- noting that the challenger admitted in court that the black man who was hired was qualified -- called the case "an isolated attack on a broad-sweeping plan which has been operating smoothly for years."

But after the Supreme Court handed down *Wilks*, an appeals court overturned the lower court ruling, allowing the case to be reopened. The appeals court acknowledged that, as a result, the city of Albany could face "a substantial risk of incurring double, multiple or inconsistent obligations."

Legislative Solution. The Civil Rights Act of 1990 would correct the

effect of the *Wilks* decision by setting fair standards to be met by interested persons who weren't parties to the original lawsuit but who wish to challenge court-approved plans to remedy discrimination. The standards will provide that nonparties who could be affected are given notice and an opportunity to be heard when such remedies are proposed. They will also bar further challenges once the standards have been met. Thus, the bill will protect the due process rights of interested non-parties without allowing continual re-litigation of these remedies.

Unfair Deadlines for Challenges

The Supreme Court's *Lorance* decision arbitrarily cuts off anti-discriminatory efforts by setting an unreasonable time limit for challenges to employer policies that may be discriminatory. The Court's action affects the starting point for the time period (at most 300 days) during which employees can challenge such policies under Title VII. Under *Lorance*, this time "clock" now starts to run when the policy is adopted by an employer, not when employees begin to feel the effects, which may not happen for years.

The Court's action requires employees to predict somehow the impact of a new policy on their longterm future at work, and to file a lawsuit long before they feel any effect. As Justice Marshall wrote in his dissent in *Lorance*, "employees must now anticipate, and initiate suit to prevent, future adverse applications ... no matter how speculative or unlikely these applications may be." After the time limit is up, employees who have been unable to foresee this impact have no remedy left to them, and discriminatory policies become immune from legal challenge, as a result of *Lorance*.

Human Impact. The full effect of this decision has not yet been felt. As

civil rights attorney Judith Winston of the Women's Legal Defense Fund explains, employees "may not realize they have been hurt" by *Lorance* until it is already too late to challenge an employer's policy, putting employees in a "no-win situation." Lower court decisions suggest considerable confusion about the scope of *Lorance*: although the Supreme Court case concerned a seniority policy, it appears that lower courts may interpret this ruling far more broadly -- as effectively setting a new, shorter time limit for challenges to many employment policies. For example:

• A woman working at an aircraft factory in Pennsylvania was denied a series of promotions, which prompted her to file a discrimination charge against her employer in 1987. She contended that since at least 1984, the company had continuously operated a system which discriminated against female employees, including imposing extra training requirements on women and offering them fewer promotions.

As a result of the Supreme Court's *Lorance* decision, a federal judge ruled that he was "constrained" to dismiss her challenge to the allegedly discriminatory promotion system. Even if the system was indeed discriminatory and continued to deny her promotions on that basis years after it was adopted, the judge explained, *Lorance* required him to throw out any challenge to the system not brought within less than a year of its initial adoption.

Legislative Solution. The Civil Rights Act of 1990 would correct the effects of the *Lorance* decision by reestablishing fair rules for determining the time period in which victims of discrimination must file claims. The Act provides for a longer period to file such claims than under present law after *Lorance* and would prevent the improper foreclosing of challenges to employer practices that may be discriminatory.

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Unequal Treatment for Victims

Apart from the damage inflicted by the Supreme Court, our nation's civil rights laws contain a serious flaw: equal redress for proven discrimination is not available to all groups. Victims of racial discrimination in the making of contracts can sue for compensatory and punitive damages under Section 1981, as well as other forms of relief (such as back pay) under Title VII. In contrast, other victims of discrimination -- such as those who suffer sexual harassment on the job -- are limited to the Title VII remedy (back pay or reinstatement). As a result of this anomaly, some employees who have suffered egregious treatment have been unable to win fair compensation. For example:

• A female warehouse worker in Oak Creek, Wisconsin was subjected to nearly four years of extreme sexual harassment from the mostly male workforce, while her employer took no effective action. Male co-workers exposed their buttocks to her, made obscene gestures and subjected her to offensive language. Despite her repeated complaints, no one was disciplined and no investigation was undertaken. Her harassers stepped up the abuse, posting dozens of sexually-explicit drawings of her that other co-workers later described as "cruel" and "downright degrading." Again, despite her protests, no effective action was taken.

After taking a medical leave of absence, she filed a complaint with the Equal Employment Opportunity Commission. A company investigation led to the discharge of several employees who had engaged in the harassment campaign. But for the victim, the story was not over: she suffered severe physical symptoms which her doctor said were "due to her harassment at work."

In a 1984 decision, a federal judge concluded that this "sustained, malicious and brutal harassment...was more than merely unreasonable; it was malevolent

and outrageous." Yet, under Title VII, the only relief she received was less than $2,800 in back pay. She could get no damages under federal law to compensate her or punish those who had systematically abused her.

• A female car sales representative in West Palm Beach, Florida suffered sexual harassment and grossly unfair treatment at work. When she declined to date a male co-worker, he and other (male) sales representatives conspired to cut her off from new customers. They made personal, derogatory remarks to her, sometimes in the presence of customers. When she wore pants to work, one salesman said to her: "We're going to take your pants off and put a skirt on you," and "we're going to take your clothes off to see if you are real." Her immediate supervisor allowed derogatory remarks about her to be made in his presence, and used physical force in disciplining her.

When she complained to the general manager, his response was to threaten to fire both her and her harasser. Despite this history of proven harassment, she was unable to win any significant compensation under federal law for what she suffered, since she cannot obtain damages under Title VII.

Legislative Solution. The Civil Rights Act of 1990 would amend Title VII to allow victims to sue for compensatory and punitive damages, where employers have intentionally violated the law. Jury trials would be available where damages are sought.

CONCLUSION

Immediately after the Supreme Court's stunning reversals on civil rights, President Bush suggested that these were merely "technical" refinements of the law. Seven months later, it is clear that the harsh impact on human lives is anything but "technical." The Court did not fine-tune the machinery of justice; it threw a monkey wrench into its most crucial workings. The casualties have been the victims of workplace discrimination.

Equal justice has been an American dream from the time of our founding. America's government "gives to bigotry no sanction, to persecution no assistance," said George Washington to a Jewish congregation in 1790. "Injustice anywhere is a threat to justice everywhere," wrote Dr. Martin Luther King, Jr. in 1963 as he battled legal discrimination against black Americans.

As we approach a new century, America's long march toward justice is nearing a rendezvous with demographic destiny. During the 1990s, only two of ten new workforce entrants will be white males born in the United States. As minorities, women and immigrant Americans expand their role in our workforce, the economic as well as social health of our nation will hinge on our ability to tap human potential, not curb human opportunity. Our civil rights laws carry forward a vital national mission, and they must be restored and strengthened. That is the essential purpose of the Civil Rights Act of 1990.

Mr. BUCHANAN. Second, we commissioned the DC law firm of Arnold & Porter to provide a legal analysis of some of the combined effects of four decisions—*Lorance* v. *AT&T Technologies*, *Wards Cove Packing Company* v. *Atonio*, *Price Waterhouse* v. *Hopkins*, and *Martin* v. *Wilks*—on Title VII, part of the most important civil rights legislation of this century.

Our legal analysis concludes, however, that the Court's four Title VII decisions have a substantial cumulative negative impact on the overall effectiveness of Title VII in combating employment discrimination.

The decisions affect each major stage of a Title VII proceeding: initiating a claim, proving it in court, and obtaining relief. At each stage, the Court's decisions have erected new barriers, making it significantly more difficult for victims of discrimination to succeed, and contradicting prior case law.

Since a successful Title VII claim must overcome these barriers at each stage of the proceeding, the cumulative impact of the Court's decisions threatens to substantially weaken Title VII's overall effectiveness.

This study also clearly shows that the Administration's interpretation of *Wilks* and *Wards Cove* is clearly wrong. These decisions dramatically alter Title VII case law and make it much more difficult to obtain relief from discrimination.

We seek here in those instances to restore well established law.

Mr. Chairman, I also ask that this study be included in its entirety in the record.

Chairman HAWKINS. Without objection, so ordered.

[The study follows:]

People For The American Way
ACTION FUND

THE OVERALL IMPACT OF THE SUPREME COURT'S 1989 DECISIONS ON TITLE VII OF THE 1964 CIVIL RIGHTS ACT

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February 1990

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Introduction and Summary

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 200e-17 (1982), has been called the "most important part" of the "most important civil rights legislation of this century."[1] Title VII and the court decisions which have interpreted it have resulted in an interconnected series of significant rules and principles relating to the initiation, proof, and remedies for employment discrimination claims. Working together, these rules and principles have made Title VII a "mighty engine" that is gradually working towards the "elimination of discrimination based on irrelevant personal characteristics from the industrial life of our country."[2]

Twenty-five years after the enactment of Title VII, however, the Supreme Court issued four decisions directly affecting the substantive interpretation of Title VII.[3] Decided by a closely

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[1] N. Schlei, Foreword to B. Schlei & P. Grossman, Employment Discrimination Law at vii (2d ed. 1983).

[2] Id. at xii-xiii.

[3] These decisions include Lorance v. AT&T Technologies, 109 S. Ct. 2261 (1989); Wards Cove Packing Co. v. Antonio, 109 S. Ct. 2115 (1989); Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989); and Martin v. Wilks, 109 S. Ct. 2180 (1989). In addition, the Court issued a decision in Independent Federation of Flight

[Footnote continued on next page]

divided Court in each case, these rulings have potentially broad impact on Title VII, ranging from rules concerning when employment discrimination cases can be initiated to rules relating to final relief. Because of the potentially broad and interconnected impact of these holdings on Title VII, the People For The American Way Action Fund has commissioned this study of the overall impact of the Court's 1989 Title VII decisions on Title VII.

The study was conducted primarily by attorneys and researchers at the Washington, D.C. law firm of Arnold & Porter, led by attorneys Barbara Holden-Smith and Dawn Jablonski, with assistance from the PFAW Legal Department. It focuses on an analysis of the Court's four Title VII decisions, relevant case law prior to these decisions which may have been affected, and cases decided in the lower courts citing these rulings through January 12, 1990, approximately seven months after the decisions were rendered. LEXIS, NEXIS, and other computerized data bases were used in the research.

[Footnote continued from previous page]
Attendants v. Zipes, 109 S. Ct. 2732 (1989), which affects the availability of attorneys' fees in certain employment discrimination cases, and in Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989), which concerns the interpretation of 42 U.S.C. § 1981 (1982). These two decisions are not discussed in this analysis.

As discussed more fully below, this analysis has concluded that the Court's four Title VII decisions have a substantial cumulative negative impact on the overall effectiveness of Title VII in combatting employment discrimination. The decisions affect each major stage of a Title VII proceeding: initiating a claim, proving it in court, and obtaining relief. At each stage, the Court's decisions have erected new barriers, making it significantly more difficult for victims of discrimination to succeed, contradicting prior case law. Since a successful Title VII claim must overcome these barriers at each stage of the proceeding, the cumulative impact of the Court's decisions threatens to substantially weaken Title VII's overall effectiveness.

With respect to the initiation of Title VII claims, for example, the decision in Lorance v. AT&T Technologies[4] held that a claim challenging a discriminatory seniority policy must be brought within 300 days of the date of the policy's enactment, even if employees are not injured or affected until years later. Lower courts have already indicated that Lorance may also apply to other types of discriminatory job rules. As a result, many persons injured by discriminatory employment rules may never even have an opportunity to

[4] 109 S. Ct. 2261 (1989).

challenge them in court, as cases decided since Lorance indicate.

In order to avoid the impact of Lorance, some plaintiffs may be forced to challenge job rules as soon as they are adopted and before they have actually been applied. As the courts have suggested prior to Lorance when discouraging such lawsuits, this could result in unnecessary claims which are difficult for courts to adjudicate and for plaintiffs to prove. The Court has made proof of employment discrimination claims substantially more difficult in any event, however, as a result of its decisions in Wards Cove Packing Co. v. Antonio[5] and Price Waterhouse v. Hopkins.[6]

Wards Cove and Price Waterhouse have significantly undermined the effectiveness of the two most commonly utilized methods of proving discrimination under Title VII: "disparate impact" and "disparate treatment." Until Wards Cove, employment tests and other practices were held to violate Title VII where they had a substantial disparate impact on minorities and where employers could not demonstrate that such practices were justified by a business necessity. As a result of Wards Cove, however, employers no longer need

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[5] 109 S. Ct. 2115 (1989).

[6] 109 S. Ct. 1775 (1989).

provide such proof, and the plaintiffs must now prove that discriminatory practices are not justified by a legitimate business reason. As discussed below, Wards Cove effectively reversed an eighteen-year unanimous precedent of the Burger Court and has already had a substantial negative impact in a number of lower court cases.

Another key method of proving discrimination under Title VII has been demonstrating disparate treatment of an employee or job applicant on the basis of race or other prohibited criteria. Prior to Price Waterhouse, most courts held that employees were liable for discriminatory actions even if other nondiscriminatory considerations were also mixed into their motives in making job decisions. This meant that even if legitimate reasons precluded giving an employee a promotion, for example, the employer would still be liable for discrimination and could be enjoined from using discriminatory promotion methods in the future. Under Price Waterhouse, however, as long as employers can prove they had a legitimate reason for an action in which bias also played a role, they can escape liability altogether and no action can be taken to prevent or remedy the discriminatory aspects of their conduct.

Assuming that a Title VII claim can overcome the barriers of the initiation and proof stages erected by

Lorance, Wards Cove, and Price Waterhouse, the final stage is securing effective relief, either through settlement or court order. This stage has been made significantly more problematic as a result of the Court's decision in Martin v. Wilks.[7] Prior to Wilks, most courts held that a consent decree or court order entered in a discrimination case could not be collaterally attacked or challenged. In Wilks, however, the Court opened the door to endless lawsuits by ruling that individuals who want to challenge such remedies may do so even years after the fact, and even if they sat by and did nothing when the relief was originally entered. During the period of this study alone, an average of one new challenge to an existing employment discrimination remedy was brought every three weeks after Wilks. Several challenges filed prior to Wilks have been extended or revived as a result of Wilks. The decision threatens to extend the litigation of Title VII suits almost endlessly, and substantially discourage settlement of such claims because of such post-settlement litigation. This result is directly contrary to Congress' intent to encourage settlement of Title VII decisions, and cumulatively makes it much more difficult

[7] 109 S. Ct. 2180 (1989).

to establish and obtain relief against employment discrimination.

The remainder of this report will analyze in more detail each of the Court's four Title VII decisions in 1989, including the extent to which each decision conflicts with prior case law and has affected litigation in the lower courts. While each decision individually has important negative effects, the primary conclusion of this analysis is that the combined effect of the Court's 1989 decisions threatens to substantially weaken the effectiveness of Title VII.

Lorance v. AT&T Technologies

In Lorance v. AT&T Technologies, Inc., 109 S. Ct. 2261 (1989), the Court, in a 5-3 decision held that a claim challenging a facially neutral seniority policy, alleged to be intentionally discriminatory is barred if not brought within 300 days of the policy's adoption. The statute of limitations begins to run, the Court held, from the date of the policy's enactment and not from the time the plaintiff is first injured by the policy. As a result of Lorance, plaintiffs must now challenge a discriminatory seniority policy at the time of its adoption, which may be long before they are ever injured by such a new policy. Moreover, lower courts have already suggested that Lorance may be applied to other employment policies and decisions. Thus, Lorance threatens to have serious disruptive effects on Title VII law and on the ability of Title VII plaintiffs to have their day in court.

A. The Lorance Decision

In Lorance, female employees of AT&T claimed that they had been demoted from their jobs as "testers" pursuant to a seniority provision, which had been deliberately adopted by the male-dominated union and AT&T to prevent women from transferring into the higher

paying, and traditionally male, tester job category. The seniority policy was neutral on its face, but the plaintiffs claimed that it had been adopted with the goal of protecting the status of the present male testers against the arrival of predominately female transfers from the plant floor. The new provision forced employees who were transferring to tester jobs to forfeit their accumulated plant seniority. Because the plaintiffs had lost their plant seniority when they became testers, they were demoted from their jobs, while male testers with less plant-wide seniority were not.

Even though none of the plaintiffs had been affected by the policy at the time the policy was adopted, and indeed, two of the plaintiffs were not even testers at the time, the Court, in affirming the decisions of the district and appellate courts, held that the statute of limitations ran from the date of adoption, and not from the date the plaintiffs were demoted pursuant to the seniority policy.[8]

The Court limited its holding to facially neutral policies, and stated that a policy which is explicit in discriminating against women or minorities can be challenged after the policy affects the particular

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[8] Lorance, 109 S. Ct. at 2267.

plaintiff.[9] Thus, where a policy is facially discriminatory, each application of the policy to the detriment of the particular plaintiff would start the limitations period anew.[10] The Court, however, failed to acknowledge that few if any seniority policies will explicitly state that they were adopted with the intent to discriminate. Thus the Lorance rule threatens to allow most, if not all, established seniority policies with discriminatory impact to remain immune from challenge. Moreover, as Justice Marshall noted in dissent, this distinction between facially neutral and facially explicit discriminatory policies "serves only to reward those employers ingenious enough to cloak their acts of discrimination in a facially neutral guise, identical though the effects of this system may be to those of a facially discriminatory one." Id. at 2271 (Marshall, J., dissenting).

B. The Impact of Lorance

The damage of the Lorance decision is not limited to "immunizing seniority systems from the requirements of Title VII,"[11] for Lorance threatens to affect Title VII non-seniority cases as well. A review of

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9 Id. at 2269.

10 Id. at 2269 n.5.

11 Id. at 2273 (Marshall, J., dissenting).

recent lower court decisions applying and discussing Lorance shows that the courts are already beginning to look to the Lorance holding to determine when the statute of limitations begins to run on claims that are not based on allegedly discriminatory seniority policies.

For example, in Davis v. Boeing Helicopter Co.,[12] Mary Davis alleged that the defendant Boeing Helicopter Company unlawfully discriminated against her on the basis of her sex by denying her promotions from a labor grade 4 to a labor grade 7. Davis was hired as a labor grade 4 on January 3, 1983. On October 12, 1984, she first became eligible for a promotion to labor grade 7. From that time until her promotion in March 1985, plaintiff had been denied promotions five times. She alleged that the defendant's failure to promote her sooner was discriminatory because it was the result of policies that required females to complete training not required of males, and that allowed males to be promoted to higher grades more readily than females. She also alleged that she would have progressed considerably further within the company if she had been male.

Even though the plaintiff did not allege that the seniority policy was responsible for the company's

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[12] No. 88-0281 (E.D. Pa. Oct. 24, 1989) (LEXIS, Genfed Library, Dist file).

failure to promote her, the district court nevertheless applied Lorance and held that, because the system of promoting employees based on a seniority listing of eligible individuals was in effect at least as early as 1984, her claim was barred by the statute of limitations.[13]

Other lower court decisions, while not resting their holdings specifically on Lorance, have cited and discussed that case in the context of reviewing the timeliness of non-seniority claims. For example, in Malhotra v. Cotter & Co.,[14] the plaintiff, an accountant of East Indian ancestry, brought a Title VII suit claiming that on ten separate occasions between 1979 and 1984, the employer had refused to promote him because of his ancestry. In the course of holding, for other reasons, that the limitations period had run on the plaintiff's claims, the Seventh Circuit Court of Appeals cited Lorance for the proposition that "Title VII's statute of limitations begins to run when the employer implements a discriminatory policy (or the plaintiff is hired by an employer who has such a policy in force)."[15]

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13 Davis, LEXIS at 4-5.

14 885 F.2d 1305 (7th Cir. 1989).

15 Id. at 1310.

In Artis v. U.S. Industry,[16] the plaintiff claimed that the employer installed an engine lathe in 1981 but refused to give the plaintiff instructions on how to run the machine. During 1982, thirteen machinists, including plaintiff, were laid off. Plaintiff was the most senior of these machinists and the only black person. Later in 1983, the employer needed machinists to run the engine lathe and asked three white machinists who had more seniority than plaintiff but who had not been laid off, but who also did not have training on the engine lathe, whether they would be willing to run the lathe. These machinists refused. The employer then decided to recall two other machinists who had less seniority than the plaintiff but who had had training on the engine lathe. Later in 1983, plaintiff brought suit claiming that the employer had refused to train him on the lathe because of his race and that the employer had recalled the two white machinists with inferior seniority.

In a motion for summary judgment, the defendants argued that the plaintiff's failure to train claim was time-barred. In ruling on the motion, the court held that, in order to dismiss plaintiff's claims under Lorance, the court must find that not only was the

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16 720 F. Supp. 105 (N.D. Ill. 1989).

plaintiff's claim outside the limitations period, but also the defendant must (1) demonstrate that the plaintiff knew or should have known at the time of the original action that he had suffered or would suffer "concrete" harm; and (2) that the defendant must demonstrate that the plaintiff knew or should have known at the time of the original action that it was discriminatory.[17] The court ruled that material issues of fact related to the plaintiff's knowledge remained, and therefore the defendant was not entitled to summary judgment.[18] However, the court noted that Lorance "certainly imposes a burden on potential plaintiffs to anticipate the consequences of present actions."[19]

Similarly, in EEOC v. City of Chicago,[20] the court in an Age Discrimination in Employment Act case held that the plaintiff's claims were not time-barred under the continuing violation doctrine. In discussing whether Lorance applied to the case at all (because Lorance involved a seniority system which raises distinct employment issues), the court noted that "rightly or wrongly most lower courts" have interpreted

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17 Artis, 720 F. Supp. at 107.

18 Id.

19 Id. at 108.

20 51 FED ¶ 39,421 N.D. Ill. (November 1989).

prior Supreme Court decisions, which also involved only seniority systems, to apply to a variety of employment practices other than seniority policies. The court therefore felt compelled to decide whether Lorance applied to the case before it. While the court decided that Lorance did not apply, the decision was based on the fact that Lorance involved a facially neutral policy while the case before the court involved a facially discriminatory one.

Prior to Lorance, most circuit courts had held that even though an allegedly discriminatory policy had been put into effect long before the plaintiff brought suit, the plaintiff's claim was not barred so long as the policy had been applied to the plaintiff during the limitations period under the "continuing violation" theory. In order to establish a continuing violation of Title VII, most courts have ruled a plaintiff must show some application of the illegal policy to the plaintiff (or to the class) within the 180 days preceding the filing of the complaint. See Perez v. Laredo Junior College, 706 F.2d 731, 733-34 (5th Cir. 1983) ("if the statutory violation occurs as a result of a continuing policy, itself illegal, then the statute does not foreclose an action aimed at the company's enforcement of the policy within the limitations period"), cert. denied, 464 U.S. 1042 (1984); Cook v. Pan American World

Airways, Inc., 771 F.2d 635, 646 (2nd Cir. 1985) (running of statute delayed until statute begins to run after the "last discriminatory act in furtherance" of "continuous pracice and policy of discrimination"), cert. denied, 474 U.S. 1109 (1986); McKenzie v. Sawyer, 684 F.2d 62, 72 (D.C. Cir. 1982) (maintenance of discriminatory system or one of related acts must fall within limitations period); Williams v. Owens-Illinois, Inc., 665 F.2d 918, 924 (9th Cir.) (distinguishing between continuing discriminatory policies and continuing impact of discrete acts of discrimination), cert. denied, 459 U.S. 971 (1982).

These cases establish the principle that, although an employee may have suffered an injury when first classified on the basis of a discriminatory policy or practice, each application of that policy or practice which adversely affects the employee constitutes an independent act of discrimination for which the statute of limitations starts to run anew. In addition to the problems Lorance raises for challenges to seniority and other employment policies, it raises the possibility that these helpful lower court precedents will be undermined, thus seriously eroding the continuing violation doctrine.

Finally, Lorance may produce premature litigation, filed early in an effort to avoid Lorance, which could foreclose later, better grounded Title VII challenges. Some plaintiffs may file lawsuits against employer policies as soon as they are adopted, before realizing what impact, if any, such policies may have. As one court has explained in warning against such actions:

> It is unwise to encourage lawsuits before the injuries resulting from the violations are delineated, or before it is even certain that injuries will occur at all. A claim of conjectural future injury is much more poorly suited to adjudication than one in which the application of the discrimination and the injury caused thereby are more clearly established.

Johnson v. General Elec., 840 F.2d 132, 136 (1st Cir. 1988).

Wards Cove Packing Co. v. Antonio

The Supreme Court's decision in Wards Cove Packing Co. v. Antonio,[21] makes it significantly more difficult to challenge systemic practices which are discriminatory because they have a disparate impact on racial or other grounds. In order to establish a prima facie case of disparate impact under Title VII after Wards Cove, a plaintiff has the burden of proof of making a stringent statistical showing of disparate impact and identifying specific practices which cause the disparity and specifically show a significantly disparate impact on employment opportunities for non-whites as a result of each of the identified challenged practices.

Even more important, Wards Cove overrules the Supreme Court's unanimous decision in Griggs v. Duke Power Co.,[22] and its progeny, and relieves an employer of the burden of persuading the court that practices with significant discriminatory impact in fact are justified by business necessity. It is now deemed sufficient that an employee merely advance a nondiscriminatory business reason for such practices. A

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21 109 S. Ct. 2115 (1989).

22 401 U.S. 424 (1971).

plaintiff can seek to rebut the alleged nondiscriminatory business reason by showing an alternative that is less discriminatory and equally as effective in meeting legitimate employer goals. However, in light of Wards Cove, courts are unlikely to opt for such alternatives.

A. The Decision in Wards Cove

In Wards Cove, non-white cannery workers sued two companies that operate seasonal salmon canneries in remote areas of Alaska, alleging that various employment practices led to racial stratification of workers and denial of employment in non-cannery company positions on the basis of race. There were two types of jobs at the canneries: "cannery jobs," unskilled positions on the cannery lines, and there were various "non-cannery jobs," generally classified as skilled positions.

Filipinos employed pursuant to an agreement with a local union and Alaska natives residing in villages near the canneries filled the cannery jobs, while non-cannery jobs were filled with predominantly white workers hired off-season from the companies' base offices. The predominantly white, non-cannery workers were generally paid more than the unskilled, predominately minority, cannery workers. The plaintiffs alleged a variety of employment practices, contending that "nepotism, a rehire preference, a lack of objective

hiring criteria, separate hiring channels, [and] a practice of not promoting from within,"[23] were responsible for severe racial stratification of workers and denial of employment in non-cannery company positions on the basis of race.[24]

Plaintiffs' proof included evidence that the defendant maintained racially separate hiring posts, dormitories, and cafeterias, as well as job categories. On appeal, the Ninth Circuit concluded that the plaintiffs had established a prima facie case of discrimination based on these disparities and the employer therefore had the burden to prove that the disparate impact caused by the employer's practices was justified by business necessity.[25]

The Supreme Court reversed in a 5-4 decision. The Court held that statistical evidence of a high percentage of minority workers in cannery jobs and a low percentage of minority workers in non-cannery jobs did not establish a prima facie case of disparate impact in violation of Title VII.[26] The Court rejected as inadequate a comparison between the starkly different

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23 Wards Cove, 109 S. Ct. at 2120.

24 Id.

25 Antonio v. Wards Cove Packing Co., 827 F.2d 439 (9th Cir. 1987), rev'd, 109 S. Ct. 2115 (1989).

26 Wards Cove, 109 S. Ct. at 2123-24.

racial compositions of the cannery and non-cannery work forces. The majority decision in Wards Cove requires Title VII plaintiffs to produce statistically valid evidence of disparate impact; a statistically valid comparison "between the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs."[27] Where labor market statistics are "difficult if not impossible to ascertain . . . certain other statistics . . . are equally probative."[28]

The Wards Cove majority provided further evidentiary burdens for plaintiffs bringing Title VII disparate impact claims. For a prima facie case, plaintiffs must first demonstrate disparate impact statistically; then they must also identify the particular employment practice that produces disparate impact[29] and must "specifically [show] that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites."[30]

Once plaintiffs meet these additional burdens of proof, the Court explained, employers are then compelled

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27 Wards Cove, 109 S. Ct. at 2121.

28 Id. An example of such other statistics would be "measures indicating the racial composition of 'otherwise qualified applicants' for at-issue jobs".

29 Id. at 2125.

30 Id.

to produce evidence of business justification. The burden on defendants is a burden of production only, however, for Wards Cove establishes that plaintiffs bear the burden of persuasion at all times.[31] If an employer is able simply to adduce some evidence that a challenged practice significantly serves the legitimate employment goals of the employer, the plaintiffs, to prevail, must persuade the finder of fact of the availability of a less discriminatory alternative selection practice that would be "equally as effective" in serving the employer's legitimate employment goals.[32]

The Supreme Court warned the lower courts that they are less competent than employers in restructuring business practices and therefore they should ordinarily be reluctant to order an alternate selection practice. It ruled that "[f]actors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the employer's legitimate business goals."[33]

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31 Wards Cove, 109 S. Ct. at 2126.

32 Id. at 2126-27.

33 Id. at 2127, citing Watson v. Fort Worth Bank and Trust, 108 S. Ct. 2777, 2790 (1988).

B. The Impact of Wards Cove on Prior Title VII Case Law

Wards Cove toppled the unanimous decision of the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971).[34] Griggs established that even an employer acting in good faith may violate Title VII if its practices operate to exclude minorities. Making it clear that a neutral practice operating to exclude minorities will be lawful only if justified by a valid business purpose, the Court stressed in Griggs that "[t]he touchstone is business necessity."[35] "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."[36] The holding in Wards Cove is directly contrary to this Congressional directive.

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[34] The chipping away of Griggs' foundation began in 1988 with Watson v. Fort Worth Bank and Trust, 108 S. Ct. 2777 (1988).

[35] Griggs, 401 U.S. at 431; accord Wards Cove, 109 S. Ct. at 2129 (Stevens, J., dissenting).

[36] Griggs, 401 U.S. at 432. Numerous court decisions since Griggs had followed this rule, and held that defendants must prove that a selection device is essential to job performance if it produces a disparate impact under Griggs. These decisions were effectively overruled by Wards Cove. See, e.g., Dothard v. Rawlinson, 433 U.S. 321, 331-32 n.14 (1977); Watkins v. Scott Paper Co., 530 F.2d 1159, 1168 (5th Cir.), cert. denied, 429 U.S. 861 (1976); United States v. Bethlehem Steel Corp. 446 F.2d 652, 662 (2d Cir. 1971).

Wards Cove also contradicts previous Supreme Court opinions by barring the use of evidence of racial stratification in the workforce. Previous Supreme Court case law "demonstrate[s] that in reviewing statistical evidence, a court should not strive for numerical exactitude at the expense of the needs of the particular case."[37] Requiring practice-by-practice statistical proof of causation to establish a prima facie case is "unwarranted" because a plaintiff necessarily has the burden of connecting the injury to an act of the defendant.[38] However, "the act need not constitute the sole or primary cause of the harm . . . . Thus in a disparate impact case, proof of numerous questionable employment practices ought to fortify an employee's assertion that the practices caused racial disparities."[39]

C. The Impact of Wards Cove in the Lower Courts

Since Wards Cove changes the evidentiary and burden of proof standards in proving Title VII violations, plaintiffs will attempt to adjust their evidence in an effort to meet Wards Cove's statistical requirement, and court decisions often may not discuss

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[37] Wards Cove, 109 S. Ct. at 2133 (Stevens, J., dissenting).

[38] Id. at 2132.

[39] Id. at 2132-33.

the exact impact Wards Cove has had on the outcome of specific litigation. Nevertheless, in a period of only seven months, three appellate court decisions and a number of other cases suggest that Wards Cove has already had a severe adverse impact on Title VII cases.

Three recent court of appeals decisions show that Wards Cove has already had a severe adverse impact on Title VII cases. In Allen v. Seidman,[40] plaintiffs representing a class of black bank examiners employed by the Federal Deposit Insurance Corporation (FDIC) sued the FDIC under Title VII, alleging that a formal test used as a tool in promoting bank examiners from one pay level to a higher pay level resulted in a disparate impact. The evidence had demonstrated that blacks had only a 39% "pass" rate on the exam while whites had an 83% "pass" rate, and that only 35 of 2000 commissioned examiners were black.[41] Based on Griggs and the disparate impact test, the district court found for plaintiffs and granted comprehensive relief.

Although the court of appeals agreed with the district court that the plaintiffs had demonstrated a disparate impact, the court of appeals reversed the lower court decision and remanded as a result of Wards

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40 881 F.2d 375 (7th Cir. 1989).

41 Id. at 378.

Cove. Because "the Supreme Court [in Wards Cove] ha[d] changed the ground rules for disparate-impact litigation as they were understood by most lower courts," the court of appeals reversed the lower court because it had apparently placed the burden of persuasion as to the question of the FDIC's business necessity defense on the employer.[42]

Wards Cove also forced minority plaintiffs to return to the courtroom in the companion case of Evans v. City of Evanston,[43] a class action brought on behalf of women applicants for city firefighter positions. The district court found that the city did not justify its method of scoring a physical agility test where the passing grade was one standard deviation above the mean score. Based on that standard, the test had had an extreme disparate impact on women, resulting in the disqualification of over 87% of female applicants but only 7% of male applicants.[44] The evidence also showed that seven firefighters already on duty would

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[42] Allen, 881 F.2d at 381. Indeed, the court in Allen suggested that the "business necessity" defense in the wake of Wards Cove should perhaps be renamed the "issue of legitimate employer purpose." Id. Subsequent to the court of appeals decision in Allen, the case was settled by plaintiffs for less relief than ordered by the district court.

[43] 881 F.2d 382 (7th Cir. 1989).

[44] Evans v. City of Evanston, 621 F. Supp. 710, 712 (D.C. Ill. 1985).

have failed the test based on the method of scoring used, and that the named plaintiff had passed the test two years earlier with a lower score, but then was failed because of the scoring method at issue.[45] The district court found the test to violate Title VII and ordered relief.

After Wards Cove, however, the court of appeals reversed. The court explained that "while it is quite likely that [the lower court judge] thought the scoring method [was] no good,"[46] the language of the lower court opinion might have placed the burden of persuasion on the city and, therefore, a remand was necessary to answer the question of whether the plaintiff had shown that the method of scoring the test was unreasonable under the standard of Wards Cove.

The Fifth Circuit case of Bernard v. Gulf Oil Corp.,[47] demonstrates the practical problems imposed by the Wards Cove requirement that plaintiffs have the burden of proving (a) that the challenged practice does not significantly serve legitimate employment goals; or (b) that a less discriminatory alternative is equally

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45 Evans v. City of Evanston, 695 F. Supp. 922, 925, 928 (N.D. Ill. 1988), vacated, 881 F.2d 382 (7th Cir. 1989).

46 Evans, 881 F.2d at 385.

47 890 F.2d 735 (5th Cir. 1989).

effective. The plaintiffs in Bernard were challenging the adoption of a policy reclassifying workers at one of Gulf's refineries. The court of appeals specifically found that the reclassification resulted in many white workers being promoted while many black workers were demoted.[48] This was the result of the elimination of two positions to streamline the lines of progression in the refinery. "Craft helpers" were reclassified as "mechanical trainers", a promotion, upon passing a simple test. "Mechanical helpers" were reclassified as "utility men", a demotion.

The policy unquestionably had an adverse impact on minorities; most of those employees promoted to mechanical trainers were white, while most of those employees demoted to utility men were black.[49] The Court of Appeals found, however, that the district court was not clearly erroneous in finding that although the reclassification may have had an adverse impact on blacks, plaintiffs had failed to prove it was not justified by legitimate business purposes under Wards Cove.[50]

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48 Bernard, 890 F.2d at 738.

49 Id. at 738.

50 Id. at 740.

Following Wards Cove, the Bernard court placed the burden of persuasion on the minority plaintiffs to prove that the reclassification did not significantly serve legitimate employment goals of Gulf.[51] The court found that the alternative proposed by the plaintiff class[52] was not shown by the plaintiffs to be equally as effective as the adopted reclassification in meeting Gulf's objectives.

The district court had found that: "Gulf wanted to simplify the lines of progression through reorganizing, and wanted to increase the number of craft trainees, leading to an increase in the number of persons who were trained to handle all aspects of a craft."[53] The court of appeals stated that Gulf had a legitimate business reason for its ultimate choice of a reclassification option, that is, "it wanted to reclassify as trainees those workers with the most craft experience so they would need less training."[54] This cost consideration is relevant under Wards Cove in

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51 Bernard, 890 F.2d at 740.

52 The alternative proposed by the plaintiff class was to demote all craft helpers to utility men and draw the mechanical trainees from the pool of demoted mechanical helpers and craft helpers. Id. at 741.

53 Id.

54 Id.

determining an alternative that is "equally as effective."[55]

The combination of the burden of persuasion remaining on the plaintiff at all times and the requirement that the proposed alternative be equally as effective and no more costly was a burden too great for the minority plaintiff class to bear given the emphasis placed by the Wards Cove Court on cost and its qualification of the business justification defense, despite the clear discriminatory impact of the employment practice in Bernard.

The adverse impact of Wards Cove is also seen in EEOC v. Carolina Freight Carriers Corp.,[56] where the bench trial was held in the three days following the issuance of the Wards Cove decision. The Equal Employment Opportunity Commission (EEOC) sued Carolina Freight Carriers Corporation (Carolina Freight) on behalf of Francisco Rios, an employee of Carolina Freight. Among other things, the EEOC alleged that Carolina Freight violated Title VII by maintaining a discriminatory employment practice. Carolina Freight

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55 See Wards Cove, 109 S. Ct. at 2127 (citing Watson). The Allen court commented that the "business necessity" defense is "now a misnomer, since the 'defense' does not require a showing of necessity and is no longer an affirmative defense". Allen, 881 F.2d at 377.

56 51 Fair Empl. Prac. Cas. (BNA) 364 (1989).

had a policy of refusing to hire any applicant with a criminal conviction which resulted in an active prison sentence, no matter how far in the past. The EEOC challenged this policy for its disparate impact upon Hispanics.

Citing Wards Cove, the court found that the EEOC failed to prove a disparate impact caused by Carolina Freight's conviction policy because it used improper statistics.[57] The statistics should relate to the national origin composition of at-issue jobs and the national origin composition of the relevant labor market; but the EEOC had failed to adequately define the relevant labor market in its studies.[58] The court also found that Carolina Freight had met its burden of production by establishing a legitimate nondiscriminatory justification for its conviction policy.[59]

The court recognized that even though defendant had met its burden of production as to business justification, the plaintiff could still prevail by demonstrating the availability of alternative, equally effective employment practices that had a less

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57 Carolina Freight, 51 Fair Empl. Prac. Cas. (BNA) at 376-77.

58 Id.

59 Id. at 377-78.

restrictive impact on Hispanics.[60] The EEOC had contended that Carolina Freight's business needs did not justify a lifetime bar to employment because of a conviction resulting in a prison sentence. The EEOC proposed as an available option for Carolina Freight a five to ten year limit on consideration of convictions as opposed to the lifetime bar policy that was adopted. However, this alternative was not even considered by the court because "apparently on the mistaken view that the defendant carried the burden of persuasion on this issue, the plaintiff failed to adduce proof that such a limited conviction policy would be either equally effective in deterring employee theft or have a less restrictive effect on the hiring of Hispanic truck drivers."[61] Thus, because Wards Cove established that the burden of persuasion remains with the plaintiff at all times, the EEOC's proof fell short on the alternative it proposed. Taking note of the Wards Cove admonition that Courts should be reluctant to "restructure business practices," the court refused to overturn or further probe Carolina Freight's conviction policy.[62]

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60 Id. at 379.

61 Carolina Freight, 51 Fair Empl. Prac. Cas. (BNA) at 379.

62 Id.

In Lu v. Woods,[63] an Asian-American employee brought an employment discrimination suit alleging, among other things, a claim of national origin discrimination based on the disparate impact theory. Plaintiff was a foreign service officer with the Agency for International Development ("AID") and claimed that since 1984 he was not promoted to a more highly compensated level because he is Chinese. Although plaintiff's statistical evidence addressed the under-representation of Asian-Americans in both AID's work force generally and in "high ranked" positions at AID, the allegedly high proportion of Asian-Americans in "low ranked" positions at AID, and the "unfavorable treatment" that Asian-Americans receive from AID's Selection Board, the court found that the plaintiff failed to satisfy his initial evidentiary burden.[64] Because the plaintiff failed to identify the precise practices alleged to be responsible for the disparate impact in the entire AID workplace and did not specify precisely how each identified practice had resulted in the alleged disparity, as required by Wards Cove, the

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63 717 F. Supp. 886 (D.D.C. 1989).

64 Lu, 717 F. Supp. at 891.

plaintiff failed to establish a prima facie case of disparate impact.[65]

D. Conclusion

Wards Cove has already had profound adverse impact on reported Title VII lawsuits. Wards Cove's overall impact, however, goes far beyond the cases reported to date. These reported cases do not reflect the many lawsuits that may not be filed or those that will be filed and dismissed as a result of the increased burden of proof which Wards Cove imposes upon Title VII plaintiffs. For example, a recent report indicates that as a result of Wards Cove, the EEOC has delayed, and may not even file, a suit on behalf of over 100 Mexican farmworkers in California who were allegedly discriminated against by their employer.[66]

As University of California professor of business administration Johnathan Leonard has explained, lawsuits brought under Griggs to challenge systemic discrimination have had a major impact in "reshap[ing] American employee practices" which have had a

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[65] Id.

[66] San Jose Mercury News, July 3, 1989, at 1C. Specifically, the employer allegedly fired the workers for purportedly failing to provide accurate name and social security number information, but then rehired them as entry level workers, depriving them of seniority pay and benefits.

discriminatory impact.[67] But "these are exactly the cases," Professor Leonard has concluded, "that have had the wind taken out of their sails" by Wards Cove.[68]

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67 Id.

68 Id.

Price Waterhouse v. Hopkins

The Supreme Court's decision in Price Waterhouse v. Hopkins,[69] also will have a significant adverse effect on a plaintiff's ability to prove a Title VII violation. The literal language of the decision suggests that blatant discrimination may not violate Title VII when a defendant demonstrates that it would have made the same specific employment decision in the absence of discrimination.

A. The Price Waterhouse Decision

Ann Hopkins, a senior manager at the accounting firm of Price Waterhouse, had a superior record of achievement at the firm, but nevertheless was passed over for partnership. Based on evidence showing that Hopkins and other female partnership candidates had been evaluated in sexist terms, such as that she "overcompensated for being a woman" and was too "macho," the district court found, after a full trial on the merits, that the decision not to admit her to partnership had been impermissibly tainted by sexual stereotyping.[70] However, the district court also found

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69 109 S. Ct. 1775 (1989).

70 Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1119-20 (D.D.C. 1985), aff'd in part, rev'd in part, 825 F.2d 458 (D.C. Cir. 1987).

that the Price Waterhouse firm legitimately took into account interpersonal skills in making its partnership decisions.[71] It stated that Price Waterhouse could avoid equitable relief only by proving, through clear and convincing evidence, that it would have made the same decision to deny Hopkins admission to partnership absent the illegal stereotyping and based on the legitimate reason alone.[72] The district court further held that the firm had failed to meet this burden. The court of appeals affirmed.[73]

The Supreme Court reversed, holding that the standard of proof in a Title VII action, as in most other civil actions, is the lower preponderance of the evidence standard, and not the higher clear and convincing evidence standard.[74] In reaching this decision, the Court also established new evidentiary standards for analyzing cases in which an adverse employment decision has been based on both discriminatory and legitimate motives. Under the Court's new standards, an employer in such "mixed motive" cases bears the burden of proving that it would

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71 Id. at 1120.

72 Hopkins, 618 F. Supp. at 1120.

73 Price Waterhouse v. Hopkins, 825 F.2d 458 (D.C. Cir.), rev'd, 109 S. Ct. 1775 (1989).

74 Price Waterhouse, 109 S. Ct. at 1793.

have made the same decision in the absence of the discriminatory motive. If the employer can meet this burden, it "may avoid a finding of liability."[75]

In some respects, the Price Waterhouse decision represented a victory for plaintiffs. The victory stems from the Court's recognition that the employer, and not the plaintiff, should bear the burden of showing what the employment decision would have been in the absence of the illegal discrimination. However, the victory was seriously diminished by the Court's holding that this same decision evidence goes to defeating liability and not, as the plaintiffs had urged, to determining the remedy. A literal reading of the Court's decision suggests that an employer may escape all consequences, including injunctive relief, of engaging in a clearly discriminatory practice under such circumstances.

B. The Effects of Price Waterhouse

Interpreted in this way, Price Waterhouse represents a radical departure from prior case law. Previously, lower courts have held that, in mixed motive cases, a "same decision" showing could defeat a plaintiff's claim for remedies such as restatement, promotion, backpay and the like, but once the plaintiff has proven that the discriminatory motive played a part

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75 Id. at 1787.

in the adverse decision, the plaintiff would be entitled to injunctive relief and attorneys' fees.[76] The decision in Price Waterhouse, however, appears to directly contradict these holdings.

Because the Court did not specifically address the question of injunctive relief in a mixed motive case, it is not clear whether that remedy would still be available in "same decision" cases.[77] Theoretically, if injunctive relief is not available, an employer that has engaged in a practice of blatant discrimination may go

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[76] See, e.g., Bibbs v. Block, 778 F.2d 1318 (8th Cir. 1985); King v. Trans World Airlines, Inc., 738 F.2d 255 (8th Cir. 1984); Ostroff v. Employment Exchange, Inc., 683 F.2d 302 (9th Cir. 1982); and Nanty v. Barrows Co., 660 F.2d 1327 (9th Cir. 1981).

[77] It should be noted that, in cases decided since Price Waterhouse, lower courts have exhibited confusion over the kind and quality of evidence necessary to rise to the level of the "direct evidence" Price Waterhouse requires before the burden of proof shifts to the defendant to make out the same decision defense. See, e.g., Randle v. LaSalle Telecommunications, Inc., 876 F.2d 563 (7th Cir. 1989) (plaintiffs' direct evidence of racial intent did not meet the Price Waterhouse threshold, even though the plaintiffs had produced evidence of various remarks showing racial animus); Jackson v. Commonwealth Edison, No. 87-C-4449, slip op. at 6 (N.D. Ill. July 6, 1989) (WESTLAW, 1989 WL 105273) (district court found Price Waterhouse "puzzling" and wondered whether the Supreme Court had merely forgotten or ignored circumstantial evidence). However, none of the cases reported after Price Waterhouse have specifically addressed the issue of whether a plaintiff in a mixed motive case is entitled to injunctive relief and attorneys' fees if the defendant succeeds in carrying its burden of proof on the issue of whether the same decision would have been made in the absence of discrimination.

completely free because it is able to consistently defeat the particular plaintiff's claim based on the same decision defense. Review of the facts of several previously decided cases of this type shows the significant negative impact of Title VII that this aspect of Price Waterhouse threatens to create.

In Bibbs v. Block,[78] Thomas Bibbs, who is black, applied for but was denied a promotion to a supervisory position in the Agricultural Stabilization and Construction Service (ASCS), a division of the Department of Agriculture. Seven people applied for the promotion, all of whom, except for Bibbs, were white. The selection committee was composed of three people, all of whom also were white. One member of the committee, whom the district court found to be the "key figure" in the selection process, had referred to Bibbs as a "black militant" and had referred to another black print shop employee as "boy" and "nigger." The committee unanimously picked a white candidate for the promotion on the basis of wholly subjective criteria.

The district court found that Bibbs' history of disciplinary and interpersonal problems played a part in the decision not to select him, and so denied Bibbs' claim. The Eighth Circuit Court of Appeals, however,

78 778 F.2d 1318 (8th Cir. 1985).

found that the ASCS had violated Title VII and remanded the case for a finding on remedy, but with promotion and back pay to be awarded only if the ASCS was unable to prove that it would have made the same decision absent the racially discriminatory motive. The appeals court also ordered the district court to enter an injunction prohibiting ASCS from future or continued discrimination against Bibbs on the basis of his race, as well as an award of attorneys' fees. As one judge noted in a concurring opinion, "the employer should not be able to exculpate its proven invidious discriminatory practices," by proving that it also based its decision on other factors.[79] However, under the language of Price Waterhouse, Bibbs could not obtain either injunctive relief or attorneys' fees even though the appeals court found that the ASCS violated Title VII.

In King v. Trans World Airlines, Inc.,[80] Ernestine King, a mother of four, had been employed by TWA as a probationary kitchen helper in the Kansas City dining and commissary, but was terminated during a reduction-in-force. Because as a probationary worker she was not subject to automatic recall, she later filed several applications for employment in the dining and

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79 Id. at 1327 (Lay, C.J., concurring).

80 738 F.2d 255 (8th Cir. 1984).

commissary department. During an interview for the position, the manager of the department asked her questions about her pregnancy during her probationary employment, her marital status, the number of children she had and whether they were illegitimate, her child care arrangements, and her future childbearing plans. The evidence showed that such questions were not asked of males during interviews and indeed that TWA had a policy against asking these types of questions of males or females. Even though TWA hired 10 kitchen helpers. during the month of December, late in that month the manager told King there were no openings.

King also offered as evidence in her case the testimony of a former TWA personnel department employee, Francine Gill. According to Gill, who was employed by TWA for two years as an interviewer, the dining and commissary department manager frequently discussed with her his concern about childcare with respect to female, but not male, applicants. The manager also instructed Gill not to send him female applicants "who did not have their childcare problems worked out." Moreover, the manager routinely rejected female applicants with children if other applicants were available.

Based on this clear evidence of sex discrimination, the appellate court remanded the case to the district court with instructions to enter an

injunction in the plaintiff's favor "against future, or continued, sex discrimination."[81] Yet, despite the blatant discrimination shown, King arguably would not be entitled to any such remedy or attorneys' fees under Price Waterhouse if TWA could show it would have made the same decision not to rehire her. TWA would thus be able to continue practices found to be discriminatory.

The Ninth Circuit in Ostroff v. Employment Exchange, Inc.,[82] also found liability for illegal sex discrimination in a mixed motive case. Here, the plaintiff, Miriam Ostroff, brought a Title VII action against an employment agency. Ostroff had called the agency about an advertised position as an executive secretary and received a curt reply that the job was already filled. Later that day, her husband called the agency and was told the job was still open and was invited to apply.

The appeals court held that Ostroff had proven discriminatory treatment, but remanded the case to the district court so that the defendant could have the opportunity to show that it wouldn't have hired plaintiff anyway because she did not have a college

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81 Id. at 260.

82 683 F.2d 302 (9th Cir. 1982).

degree.[83] Here, for discriminatory reasons, Ostroff was denied even the opportunity to apply for a job and the appeals court held that, at the least, an injunction should be "issued regardless of Ostroff's qualifications."[84] Price Waterhouse appears to invalidate this holding.

Finally, Nanty v. Barrows Co.,[85] involves another Ninth Circuit holding threatened by Price Waterhouse. In this case, Herbert Nanty, a Native American, was denied a job as a delivery truck driver. He applied in person for the job and was told it had already been filled, but he was never asked about his qualifications for the job. Had the employer done so, he would have found that Nanty had all of the necessary qualifications. Three days after Nanty had been turned away, two whites were hired for the job.

The court of appeals remanded the case to the district court with instructions to enter an injunction prohibiting the company from discriminating against Nanty again and to award Nanty attorneys' fees.[86] Because the company also argued that Nanty had not been

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83 Id. at 305.

84 Id. at 304.

85 660 F.2d 1327 (9th Cir. 1981).

86 Id. at 1334.

hired based on the job criteria of neatness, articulacy and personableness, the appeals court also instructed the district court to make a finding as to whether Nanty was entitled to a job given the subjective criteria upon which the company allegedly based its decision.[87] As a result of Price Waterhouse, the award of the injunction and attorneys' fees would apparently not be available if the district court found that the company would not have hired Nanty because, in the company's view, he was not neat, articulate, or personable.

After Price Waterhouse, it is unclear whether relief would be available to the plaintiffs in any of these cases despite the proven egregious discrimination. Under the literal language of Price Waterhouse, an employer who discriminates may escape liability altogether merely because it is able to show that it would have made the same employment decision.[88]

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[87] Id.

[88] In addition, because courts often look to Title VII case law in deciding cases brought under Title VIII, see, e.g., United States v. Hunter, 459 F.2d 205, 217-18 (4th Cir.) (citing Title VII employment cases), cert. denied, 409 U.S. 934 (1972), it is possible that Price Waterhouse may eventually erode the protections available in the housing discrimination area as well. Under current standards "[r]ace is an impermissible consideration in a real estate transaction, and it need only be established that race played some part in the refusal to deal." Moore v. Townsend, 525 F.2d 482, 485 (7th Cir. 1975). In adopting this standard, the Sixth Circuit Court of Appeals stated that "other circuits

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Martin v. Wilks

In Martin v. Wilks,[89] the Supreme Court ruled that persons not made a party to a consent decree in a Title VII case may at any later time challenge the consent decree in a separate lawsuit. The Court's holding rejected the overwhelming majority rule of the circuits that such collateral attacks are impermissible. The decision undermines the finality of a multitude of consent decrees, as well as court orders, in Title VII cases. Long resolved cases are now susceptible to challenge by persons who knowingly chose not to intervene in the litigation. The decision will thus substantially affect the ability to obtain stable and effective relief in Title VII cases.

According to Wilks, the only way to preclude a person "affected" by a consent decree from challenging the consent decree in a subsequent suit years later is

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have clearly and repeatedly found liability when race was only one factor, rather than the sole reason for refusal to sell." Green v. Century 21, 740 F.2d 460, 464 (6th Cir. 1984). Courts may well substitute the new Price Waterhouse Title VII standard for the current long-standing rule applied in housing discrimination cases.

89 109 S. Ct. 2180 (1989).

by mandatory joinder of that person as a party.[90] Thus, the burden is on existing parties to identify all those persons who may be affected by the consent decree and join them as parties, a procedural rule thought to be unworkable by 32 states, the Virgin Islands, and the District of Columbia.[91] The detrimental effect of Wilks has already been demonstrated in the lower courts.

A. The Decision in Martin v. Wilks

The events that led to Martin v. Wilks began in 1974 with a suit in federal court by black individuals and a branch of the NAACP against the city of Birmingham, Alabama, and the Jefferson County Personnel Board. Plaintiffs alleged racial discrimination in hiring and promotion practices in the city's fire department under Title VII and other federal law. After extensive negotiations and prior to trial, however, the parties were able to settle the suit through agreeing to certain consent decrees which included goals for hiring and promotion of black firefighters.

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90 Id. at 2185-86 (discussing Federal Rule of Civil Procedure 19).

91 Amicus brief for Alabama, Arkansas, California, Connecticut, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Rhode Island, South Carolina, Texas, Vermont, Virginia, West Virginia, Wisconsin, Wyoming, the District of Columbia and the Virgin Islands, Martin v. Wilks, 109 S. Ct. 2180 (1989).

Fourteen years after the consent decrees, however, white firefighters brought suit against the city and the Board alleging that they were being denied promotions which were being received by blacks as a result of reliance on the consent decrees. The district court, following the general rule of the circuits, held that the white firefighters were precluded from challenging decisions made in accordance with the prior consent decrees. The court of appeals reversed, however, and the Supreme Court affirmed. The Court held that non-parties to a consent decree could freely challenge employment decisions taken later in accordance with such consent decrees.

B. The Impact of Martin v. Wilks on Prior Case Law

It was a well accepted legal maxim prior to Martin v. Wilks that collateral attacks on consent decrees in Title VII cases were not permitted.[92] Circuit courts generally agreed that the uncertainty caused by the threat of inconsistent or contradictory proceedings "undermine[s] the concept of a final judgment and [violates] the policy of promoting settlement in Title VII actions."[93] Employees failing

[92] Dennison v. City of Los Angeles Dept. of Water and Power, 658 F.2d 694, 695 (9th Cir. 1981).

[93] Marino v. Ortiz, 806 F.2d 1144, 1146 (2d Cir. 1986), aff'd, 484 U.S. 301 (1988).

to timely intervene could not object to the implementation of consent decrees in the First, Second, Third, Fifth, Sixth, Seventh and Ninth Circuits.[94] Only the Eleventh Circuit in Wilks itself allowed employees failing to timely intervene to upset the finality of a consent decree by a later challenge, the position adopted by the Supreme Court in Wilks.[95]

C. The Impact of Martin v. Wilks in the Lower Courts

Lower courts and parties in employment discrimination cases are already feeling the impact of Wilks. Mann v. City of Albany, Ga.[96] illustrates the vulnerability of court decrees as a result of Wilks. After finding illegal discrimination in Albany, Georgia's hiring and employment patterns, a federal court decree was adopted in 1976 in Johnson v. City of

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[94] See, e.g., Deveraux v. Geary, 765 F.2d 268 (1st Cir. 1985), cert. denied, 478 U.S. 1021 (1986); Marino v. Ortiz, 806 F.2d 1144 (2d Cir. 1986), aff'd by an equally divided court, 108 S. Ct. 586 (1988); Society Hill Civil Ass'n v. Harris, 632 F.2d 1045 (3rd Cir. 1980); Thaggard v. City of Jackson, 687 F.2d 66 (5th Cir. 1982), cert. denied, 454 U.S. 900 (1983); Stotts v. Memphis Fire Dep't., 679 F.2d 541 (6th Cir. 1982), rev'd on other grounds sub nom. Firefighters Local Unit No. 1784 v. Stotts, 467 U.S. 561 (1984); Burns v. Bd. of School Commissioners, 437 F.2d 1143 (7th Cir. 1971); Dennison v. City of Los Angeles Dep't. of Water and Power, 658 F.2d 694 (9th Cir. 1981).

[95] In re Birmingham Reverse Discrimination Employment Litigation, 833 F.2d 1492 (11th Cir. 1987), aff'd sub nom. Martin v. Wilks, 109 S. Ct. 2180 (1989).

[96] 883 F.2d 999 (11th Cir. 1989).

Albany, Ga.[97] In 1985, a white employee who had not received a promotion sought to challenge the decree in a separate suit. The district court initially dismissed the challenge, noting that the plaintiff admitted that the black male who had received the job was in fact qualified and that the suit was an "isolated attack on a broad-sweeping plan which has been operating smoothly for several years."[98] After the Court's decision in Wilks, however, the court of appeals reversed and allowed the challenge to proceed.

Mann is the first in what promises to be a long line of cases permitting collateral attacks upon consent decrees and court decrees. Issues once thought finally litigated will be relitigated and relitigated.[99]

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[97] 413 F. Supp. 782 (M.D. Ga. 1976). The Johnson court found that the evidence was "more than sufficient" to establish a prima facie case of discriminatory employment practices by the city and its officials. Id. at 799. There was both actual and statistical evidence that black persons were hired into only the lowest paying, nonsupervisory jobs while skilled jobs were reserved for whites. Blacks were not paid equal wages for equal work and were not promoted. All appointed city officials were white, and employee facilities, restrooms, coffee pots, etc. were segregated by race. Id. at 799-800.

[98] Mann v. City of Albany, 687 F. Supp. 583, 588 n.6 (M.D. Ga. 1988).

[99] In addition to Mann, a number of other cases challenging employment discrimination decrees filed before the decision in Wilks will continue to be litigated as a result of Wilks. See, e.g., Henry v. City of Gadsden, Ala., 715 F. Supp. 1065 (N.D. Ala.
[Footnote continued on next page]

A number of new "reverse discrimination" cases have already been filed in various localities in both state and federal courts in reliance upon Wilks. Although comprehensive statistics are not available, during the period of this study alone at least ten such challenges have been filed across the country, a rate of one every three weeks, and more are expected.[100]

For example, in Peterson v. Oakland,[101] a class of white and Hispanic male firefighter applicants brought suit pursuant to the decision in Martin v. Wilks, collaterally attacking a consent decree of May 1, 1986 in the case of Nero v. City of Oakland[102] on the

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[Footnote continued from previous page]
1989) (rejecting on the merits challenge to consent decree in employment discrimination case); Jansen v. City of Cincinnati, No. C-1-89-079 (S.D. Ohio Feb. 6, 1989) (filing challenge to fifteen-year old consent decree in employment discrimination case).

100 Indeed, in late January, just after the period during which this study was conducted, four new challenges were filed, including one against the San Francisco Unified school district, one against the San Francisco community college district, and two against the city of Memphis concerning the police and fire departments, respectively. See Davis v. City and County of San Francisco, No. C-915348 (Cal. Super. Ct.) (removed to federal court and renumbered C-90-0286-TEH); Fowler v. City and County of San Francisco, No. C-915350 (Cal. Super. Ct.) (removed to federal court and renumbered C-90-0288-DLJ); Aiken v. City of Memphis, No. 90-2069 HA (W.D. Tenn. Jan. 23, 1990); Davis v. City of Memphis, No. 90-2068 HA (W. Penn. Jan. 23, 1990).

101 No. 92784 (N.D. Cal. July 27, 1989).

102 No. C35-8448-WHO (N.D. Cal. 1986).

grounds that it unlawfully discriminates against them on the basis of race and gender. This is despite the fact that over three years earlier, the court in Nero found that employment practices used by the city which led to the suit had a discriminatory impact on minorities and preliminarily enjoined their continued use.[103]

The effect of Martin v. Wilks has also been felt in San Francisco, California. In Ratti v. City and County of San Francisco,[104] white police officers claim race discrimination in the implementation of a consent decree approved ten years earlier in Officers for Justice v. Civil Service Comm'n of San Francisco.[105] This challenge also comes despite the fact that the court in Officers for Justice "issued preliminary orders finding the . . . selection practices and procedures for entry-level and Sergeant positions to be discriminatory

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103 On or about December 13, 1985, the court heard a motion for a preliminary injunction which resulted in this finding by the court. See Peterson v. City of Oakland, Cal., No. C-89-2784 (N.D. Cal., July 27, 1989).

104 No. C-89-3577-RFP (N.D. Cal. Jan. 12, 1990).

105 473 F. Supp. 801 (N.D. Cal. 1979), aff'd., 688 F.2d 615 (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983). The case has been removed to the U.S. District Court for the Northern District of California. Although not expressly attacking the consent decree itself, plaintiffs allege defendant's conduct constitutes violations of the Government Code of California §§ 12900 et seq.; Article I, Section VIII of the California constitution; the Fourteenth Amendment of the United States Constitution; and 42 U.S.C. 1981 (1982).

and in violation of federal law."[106] Although the parties entered into the consent decree to "avoid the delay and expense of contested litigation,"[107] Wilks will allow disgruntled police officers to force relitigation of issues settled in Officers for Justice more than 10 years ago.

A parallel case is presently pending in state court on behalf of white male firefighters in San Francisco. In Van Pool v. City and County of San Francisco,[108] a class of white firefighters is challenging the implementation of a consent decree.[109] This consent decree was implemented to remedy discrimination against minorities by the City and the San Francisco fire department, and Martin v. Wilks allows a challenge to what was once thought a final determination of an appropriate remedy after a finding of discrimination against minorities.[110]

In addition to Wilks itself, there is yet another challenge as a result of Wilks in Alabama. In

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106 Officers for Justice, 473 F. Supp. at 809.

107 Id.

108 No. 903108 (Cal. Super. Ct. Nov. 21, 1989).

109 Davis v. San Francisco, 656 F. Supp. 276 (N.D. Cal. 1987).

110 The allegations in Van Pool parallel that in Ratti, however, the federal claims are omitted because the action is presently in state court.

Williams v. Bailey,[111] plaintiffs are white deputy sheriffs alleging race and sex discrimination against them because of promotion of blacks and women to sheriff's sergeant pursuant to a March 1983 consent decree with Jefferson County, Alabama entered in the Wilks litigation. Plaintiffs are white male employees of the Jefferson County sheriff's department who were not promoted to sergeant of the sheriff's department. Plaintiffs allege that hiring practices adopted as a result of the consent decree are illegal, although the consent decree was adopted to prevent further discrimination by the sheriff's department in the hiring and promoting of persons who are not white males.

Three separate collateral attacks on consent decrees are now pending in the city of Boston. In Stuart v. Roach,[112] 37 individually named plaintiffs are suing the city of Boston, its mayor, the commissioner of its police department and the director of personnel administration, all parties to a consent decree extended by the court on October 31, 1985 which provided for goals, timetables, and other relief with respect to appointments to the rank of sergeant. The white plaintiffs in Stuart allege legal violations because

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111 No. CV-89-PT-1241-S (N.D. Ala. July 19, 1989).

112 No. 89-2348-MC (D. Mass. Oct. 23, 1989).

they were not promoted to the rank of sergeant. Plaintiffs demand a form of relief that would be in direct contravention of the goal of the consent decree, "to remove all vestiges of discrimination from the process of promoting police officers" in the city of Boston.[113]

Plaintiffs in Fagan v. City of Boston[114] are challenging a consent decree approved by a federal court in 1973 in response to claims of discrimination in the recruiting and hiring of Boston police.[115] That court found "that the proposed decree [was] just, reasonable, and in the public interest, and more likely than any other proposed solution to give the people of the Commonwealth of Massachusetts effective, non-discriminatory, dedicated, and honorable police forces."[116] In 1971, the court afforded "ample opportunity" for intervention, and all were allowed to intervene upon request.[117] The Attorney General, the

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113 Massachusetts Ass'n. of Afro-American Police, Inc. v. Boston Police Dept., 106 F.R.D. 80, 82 (D. Mass.), aff'd, 780 F.2d 5 (1st Cir. 1985), cert. denied, 478 U.S. 1020 (1986).

114 No. 89-2076-N (D. Mass. Sept. 21, 1989).

115 Castro v. Beecher, 365 F. Supp. 655 (D. Mass. 1973).

116 Id. at 660.

117 Id. at 656.

Massachusetts legislature, and some individuals reportedly contemplated intervention, but despite a "barrage of publicity" that "raised every possible real or fanciful objection," no one not already a party chose to intervene.[118] Approval of the consent decree came after extensive litigation and much publicity. Yet Wilks will allow disruption of a consent decree 16 years after it was entered and which has already been found to "[make] effective the guarantee in the United States Constitution of the equal protection of the laws."[119]

A parallel suit has been brought by Boston firefighters in Mackin v. The City of Boston[120] challenging the court decree in Boston Chapter, NAACP, Inc. v. Beecher.[121] After finding that plaintiffs had made a prima facie case showing discrimination in the use of certain entrance exams and that the defendants had failed to show job relationship of the examinations justifying their use, the lower court in Beecher ordered relief eliminating the discriminatory practices of the city with respect to hiring of persons for fire department positions and calling for goals and

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118 Id.

119 Castro, 365 F. Supp. at 660.

120 No. 89-2025-N (D. Mass. Sept. 14, 1989).

121 371 F. Supp. 507 (D. Mass.), aff'd, 504 F.2d 1017 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975).

timetables to remedy past discrimination. The First Circuit affirmed, specifically rejecting contentions that the relief imposed by the District Court was unconstitutional and prohibited by Title VII. The court of appeals explained that the "relief imposed by the district court . . . [went] no further than to eliminate the lingering effects of previous practices that bore more heavily than was warranted on minorities."[122] The court also found Title VII was not violated since relief undertaken in order to redress past discrimination is permitted.[123] Thus, after specific findings of the First Circuit in 1974 that the decree entered by the district court earlier in the year was both constitutional and did not violate Title VII, Wilks allows plaintiff firefighters to relitigate issues decided on their merits over 15 years earlier.

In Ohio, as a result of Wilks, litigation commenced over 17 years ago, and resolved one year later in a consent decree, will be relitigated. In Bembenek v. Winkle,[124] the district court determined that the goal of a 1974 consent decree -- complete

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122 Boston Chapter, NAACP, Inc. v. Beecher, 504 F.2d 1017, 1027 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975).

123 Id. at 1028.

124 No. 3:90CV7016 (N.D. Ohio Jan. 17, 1990).

integration of the Toledo police and fire divisions -- had not been met. The court ordered the hiring of all qualified minority applicants for a class of firefighter trainees in order to "send a strong message . . . to the entire [Toledo] community."[125] In January, 1990, 30 non-minority firefighters, relying upon Wilks, brought suit challenging the actions taken pursuant to the August 1989 court order, although the hiring of minority applicants was determined to be necessary so that the goal of the 1974 consent decree could be achieved.

Vogel v. City of Cincinnati[126] challenges a 1981 consent decree, the purpose and intent of which was to "insure that blacks and women are not disadvantaged by the hiring, promotion, assignment and other employment policies and practices of the [Cincinnati Police Division]."[127] Wilks sanctions this challenge to a consent decree over eight years old despite the fact that the consent decree was entered into in part "to avoid protracted and unnecessary litigation."[128]

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125 Brown v. Winkle, Case No. C 72-282, (N.D. Ohio Aug. 21, 1989) (Memorandum and Order of Judge Young).

126 No. C-1-89-683 (S.D. Ohio Nov. 14, 1989).

127 United States v. City of Cincinnati, Ohio, No. C-1-80-369, slip op. at 3 (S.D. Ohio Aug. 13, 1981) (consent decree).

128 Id.

During the period of this study, a lawsuit was also filed challenging consent decrees in Memphis, Tennessee. In Ashton v. City of Memphis, No. 97640-3 (Chancery Ct. Aug. 28, 1989) (removed to federal court and renumbered 89-2863 HA), a group of white police employees effectively challenged promotion procedures resulting from consent decrees in employment discrimination suits filed in the 1970s. See United States v. City of Memphis, No. C-74-286, and Afro-American Police Ass'n. v. City of Memphis, No. C-75-380.

D. The Overall Effect of Wilks

Wilks has opened to challenge consent decrees and court orders once thought final in cities all over the country. First to be subject to the Wilks attack will be court approved decrees that resulted from lawsuits alleging employment discrimination.[129] Dennis Lynch, a University of Miami School of Law professor, has noted that Wilks "opens up the door to a ton of litigation" with people "filing lawsuits like crazy."[130]

The implications of Wilks are not limited to the public sector. Consent decrees entered into by corporate employers are also now subject to challenge.

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129 News and Sun-Sentinel, June 18, 1989, at 1A.

130 Id.

There are 32 such consent decrees in Illinois alone, the finality of which is now uncertain.[131]

Furthermore, Wilks may significantly discourage employers and employees from settling discrimination grievances without going to trial because employers must show that all parties were invited to join in the agreement. This would be difficult, perhaps impossible, as to unspecified future employees. As Sue Meisinger, vice president of the American Association of Personnel Administration, has predicted, the result may well be to cause employees to "go all the way through the litigation process" in many cases which could otherwise be settled.[132] As a result of Wilks, EEOC attorney John Rowe has commented, there is no incentive to "buy peace" through settlement because the peace bought by entering into a consent decree is so easily disrupted.[133] Wilks will thus significantly discourage settlement as well as disrupting already resolved litigation, contrary to the intent of the Congress in enacting Title VII.[134]

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131 Chicago Tribune, June 20, 1989.

132 Id.

133 Id.

134 See Carson v. American Brands, 450 U.S. 79, 88 n.14 (1981) (noting Congress' "strong preference for encouraging voluntary settlement" of Title VII claims).

E. Conclusion

In its 1989 Title VII decisions, the Supreme Court undid much of what the Congress, the Burger Court and the lower federal courts had done to end discrimination in employment through enforcement of Title VII of the Civil Rights Act. The 1989 decisions make it far more difficult for employees to prove discrimination and obtain relief for discrimination in court. The decisions make it far easier for employers to defend discrimination cases, and far easier for non-minorities to challenge consent decrees which settled discrimination cases.

Mr. BUCHANAN. If I may, Mr. Chairman, I would like to give you some examples from these studies.

In overturning a unanimous 1971 Supreme Court decision by the Burger Court, the *Wards Cove* decision shifts a difficult burden of proof to employees who suffered discriminatory impact from an employer's practices. As a result, employees faced the impossible task of proving that discriminatory practices are not job-related.

A recent case shows the unfairness of this ruling. Prospective female firefighters in a Chicago suburb challenged the discriminatory impact of the scoring of an agility test. The new scoring method had a grossly disproportionate impact on women applicants. Before the Supreme Court's *Wards Cove* ruling, the District Judge had found that the city had failed to justify its method of scoring the test, that the women had proved discriminatory impact, and that relief should be awarded.

After *Wards Cove* was handed down, however, the Court of Appeals vacated this decision, noting that while the city had failed to present a convincing rationale for the test scoring, "it is the plaintiff that has the burden of persuasion that no legitimate end was served."

Settlement agreements and court-ordered remedies that have been working to stop discrimination have been rendered vulnerable to unlimited attacks by the Supreme Court's *Wilks* decision. The ruling opens the door to endless lawsuits by saying that individuals who want to challenge such remedies can do so years after the fact, even if they were not a party to the original lawsuit, and even if similar or identical cases have already been dealt with.

For example, in 1976, the City of Albany, Georgia implemented a promotion policy that sought to compensate for proven historic bias against blacks. Almost a decade later, a white male litigant, who was not involved in the original case, went to court to attack this remedy. At first, he got nowhere. In 1988, a district court dismissed the challenge.

The judge, noting that the challenger admitted in court that the black man who was hired was qualified, called the case "an isolated attack on a broad-sweeping plan which has been operating smoothly for years."

But after the Supreme Court handed down *Wilks*, an appeals court overturned the lower court ruling, allowing the case to be reopened. The appeals court acknowledged that as a result, the City of Albany could face "a substantial risk of incurring double, multiple or inconsistent obligations."

Apart from the damage inflicted by the Supreme Court, our nation's civil rights laws contain a serious flaw. Equal redress for proven discrimination is not available to all groups. Victims of racial discrimination in the making of contracts can sue for compensatory and punitive damages under Section 1981, as well as other forms of relief, such as back pay under Title VII.

Other victims of discrimination, such as those who suffer sexual harassment on the job, are limited to the Title VII remedy, that is, back pay or reinstatement.

As a result of this anomaly, some employees who have suffered egregious treatment have been unable to win fair compensation.

My written testimony and our study cite examples that demonstrate the need for the legislation's inclusion of remedies for victims of intentional discrimination that violates Title VII. With each passing day, victims of workplace discrimination are joined by growing numbers of Americans who find themselves without legal protection against discrimination on the job.

The impact of the Supreme Court's stunning reversals on civil rights is serious. As we approach a new century, nine out of ten new workforce entrants will be minorities and women. The economic and social health of our nation will hinge on the ability to tap their potential.

Our civil rights laws carry forward a vital national mission and they must be restored and strengthened. This is the essential purpose of the Civil Rights Act of 1990. It deserves your expeditious consideration. Justice delayed will continue to be justice denied.

We are confident that the Congress is up to the task.

Thank you, Mr. Chairman.

[The prepared statement of John H. Buchanan, Jr. follows:]

Testimony of John H. Buchanan, Jr.

Chairman

People For the American Way

on

The Civil Rights Act of 1990

before the

House Committee on Education and Labor and

Committee on the Judiciary, Subcommittee on Civil and Constitutional Rights

February 20, 1990

2000 M Street, NW, Suite 400, Washington, D.C. 20036 (202) 467-4999

Mr. Chairman and members of the Committee it is a special privilege to testify before this committee on which I proudly served. It was my special privilege to serve with Chairman Hawkins, who is retiring from Congress at the end of this term and has a long and distinguished record in the area of civil rights. I can think of no more fitting tribute to the Chairman than for this Congress to enact the important civil rights legislation which I am here to discuss. I come before you today on behalf of the 285,000 members of the People For the American Way Action Fund to urge your support for the Civil Rights Act of 1990, legislation designed to restore and strengthen important civil rights protections for Americans in the workplace.

We believe that the case for the legislation is compelling. Our conclusion is based on two studies by People For which I would like to summarize for you today.

First, we have analyzed dozens of recent civil rights cases that cite the Supreme Court's 1989 employment discrimination decisions and found clear evidence of the decisions' adverse impact on Americans who are seeking legal redress against unfair treatment at work. In our report on "The Human Impact of the Supreme Court's Civil Rights Retreat," we have illustrated how justice is being denied to the victims of workplace discrimination. Let me cite a few of these:

* As a result of the Patterson decision, discrimination on the job has been legalized. In one such case that illustrates the plight of victims, a major contract for a small Washington, D.C., computer firm was terminated when the contractor learned that the computer firm's president is Jewish. In this case, the district court ruled that even if the victim could prove that the contract was terminated solely because of blatant religious discrimination, he no longer has any remedy under Section 1981.

* In overturning a unanimous 1971 Supreme Court decision by the Burger Court, the Wards Cove decision shifts a difficult burden of proof on employees who suffer discriminatory impact from an employer's practices. As a result, employees face the impossible task of proving that discriminatory practices are not job-related. Another recent case shows the unfairness of this ruling: prospective female firefighters in a Chicago suburb challenged the discriminatory impact of the scoring of an agility test. The new scoring method had a grossly disproportionate impact on women applicants. Before the Supreme Court's Wards Cove ruling, the district judge had found that the city had failed to justify its method of scoring the test, that the woman had proved discriminatory impact, and that the relief should be awarded. After Wards Cove was handed down, however, the court of appeals vacated this decision, noting that while the city had failed to present a convincing rationale for the test scoring, "it is the plaintiff that has the burden of persuasion" that no legitimate end was served.

* Settlement agreements and court-ordered remedies that have been working to stop discrimination have been rendered vulnerable to unlimited attacks by the Supreme Court's Wilks decision. The ruling opens the door to endless lawsuits by saying that individuals who want to challenge such remedies can do so even years after the fact, and even if they were not a party to the original lawsuit.

For example, a successful court-ordered policy designed to remedy blatant discrimination in Albany, Georgia's city jobs was challenged by a white male who was turned down for a job. Since 1976, Albany has implemented a promotion policy that seeks to compensate for proven historic bias against blacks. Almost a decade later, a white male litigant who was not involved in the original case went to court to attack this remedy. At first, he got nowhere: a 1988 district court opinion dismissed the challenge. The judge -- noting that the challenger admitted in court that the black man who was hired was qualified -- called the case "an isolated attack on a broad-sweeping plan which has been operating smoothly for years." But after the Supreme Court handed down Wilks, an appeals court overturned the lower court ruling, allowing the case to be reopened. The appeals court acknowledged that, as a result, the city of Albany could face "a substantial risk of incurring double, multiple or inconsistent obligations."

Apart from the damage inflicted by the Supreme Court, our nation's civil rights laws contain a serious flaw: equal redress for proven discrimination is not available to all groups. Victims of racial discrimination in the making of contracts can sue for compensatory and punitive damages under Section 1981, as well as other forms of relief (such as back pay) under Title VII. Other victims of discrimination -- such as those who suffer sexual harassment on the job -- are limited to the Title VII remedy (back pay or reinstatement). As a result of this anomaly, some employees who have suffered egregious treatment have been unable to win fair compensation. For example:

* A female car sales representative in West Palm Beach, Florida, suffered sexual harassment and grossly unfair treatment at work. When she declined to date a male co-worker, he and other male sales representatives conspired to cut her off from new customers. They made personal, derogatory remarks to her, sometimes in the presence of customers. Her immediate supervisor allowed derogatory remarks about her to be made in his presence, and used physical force in disciplining her.

When she complained to the general manager, his response was to threaten to fire both her and her harasser. Despite this history of proven harassment, she was unable to win any significant compensation under federal law for what she suffered, since she cannot obtain damages under Title VII.

With each passing day, these victims of workplace discrimination are joined by growing numbers of Americans who now find themselves without legal protection against discrimination on the job. Mr. Chairman, I ask that the full impact study be place in the hearing record.

Secondly, Mr. Chairman, we commissioned the Washington, D.C. law firm of Arnold of Porter to provide a legal analysis of the combined effect of the four decisions of Lorance v. A.T.& T. Technologies, Wards Cove Packing Company v. Atonio, Price Waterhouse v. Hopkins and Martin v. Wilks on Title VII of the Civil Rights Act, which has been called the "most important part" of the "most important civil rights legislation of this century."

Our legal analysis concludes, however, that the Court's four Title VII decisions have a substantial cumulative negative impact on the overall effectiveness of Title VII in combatting employment discrimination. The decisions affect each major stage of a Title VII proceeding: initiating a claim, proving it in court, and obtaining relief. At each stage, the Court's decisions have erected new barriers making it significantly more difficult for victims of discrimination to succeed, and contradicting prior case law. Since a successful Title VII claim must overcome these barriers at each stage of the proceeding, the cumulative impact of the Court's decisions threatens to substantially weaken Title VII's overall effectiveness.

With respect to the initiation of Title VII claims, for example, the decision in Lorance v. A.T.& T. Technologies held that a claim challenging a discriminatory seniority policy must be brought within 180 days of the date of the policy's enactment, even if employees are not injured or affected until years later. Lower courts have already indicated that Lorance may also apply to other types of discriminatory job rules. As a result, many persons injured by discriminatory employment rules may never even have an opportunity to challenge them in court, as cases decided since Lorance indicate.

Our legal analysis concludes that the Court has also made proof of employment discrimination claims substantially more difficult as a result of its decisions in Wards Cove Packing Co. v. Atonio and Price Waterhouse v. Hopkins. Until Wards Cove, employment tests and other practices were held to violate Title VII where they had a substantial disparate impact on minorities and where employers could not demonstrate that such practices were justified by a business necessity. As a result of Wards Cove, however, employers no longer need to provide such proof, and the plaintiffs must prove that discriminatory practices are not justified by a legitimate business reason, as I have already discussed. Our study demonstrates that Wards Cove effectively reversed an eighteen year old unanimous precedent of the Burger Court and has already had a substantial negative impact in a number of lower court cases.

Another key method of proving discrimination under Title VII has been demonstrating disparate treatment of an employee or job applicant because of race or other prohibited criteria. Prior to Price Waterhouse, most courts held that employees were liable for discriminatory actions even if other non-discriminatory considerations were also mixed into their motives in making job decisions. This meant that even if legitimate reasons precluded giving an employee a promotion, for example, the employer would still be liable for discrimination and could be enjoined from using discriminatory promotion methods in the future. Under Price Waterhouse, however, as long as employees can prove they had a legitimate reason for an action in which bias also played a role, they can escape liability altogether and no action can be taken to prevent or remedy the discriminatory aspects of their conduct.

Assuming that a Title VII claim can overcome the barriers at the initiation and proof stages erected by Lorance, Wards Cove, and Price Waterhouse, the final stage is securing effective relief, either through settlement or court order. This stage has been made significantly more problematic as a result of the Court's decision in Martin v. Wilks. Prior to Wilks, most courts held that a consent decree or court order entered in a discrimination case could not be collaterally attacked or challenged. In Wilks, however, as I have previously mentioned, the Court opened the door to endless lawsuits by ruling that individuals who want to challenge such remedies may do so even years after the fact, and even if they sat by and did nothing when the relief was originally entered. During the period of our study alone, an average of one new challenge to an existing employment discrimination remedy was brought every three weeks after Wilks. Several challenges filed prior to Wilks have been extended or revived as a result of Wilks. The decision threatens to extend the litigation of Title VII suits almost endlessly, and to substantially discourage settlement of such claims because of such post-settlement litigation, contrary to Congress' intent to encourage settlement of Title VII litigation. Meaningful settlement of Title VII claims is likely to be discouraged by all four of the Court's Title VII decisions, which cumulatively make it much more difficult to establish and obtain relief against employment discrimination.

Again, I ask that the full study be included in the record.

The impact of the Supreme Court's stunning reversals on civil rights is serious. As we approach a new century, nine out of ten new workforce entrants will be minorities and women. The economic and social health of our nation will hinge on the ability to tap their potential. Our civil rights laws carry forward a vital national mission, and they must be restored and strengthened. This is the essential purpose of the Civil Rights Act of 1990. It deserves your expeditious consideration. Justice delayed will continue to be justice denied. We are confident that the Congress is up to the task.

People For The American Way
ACTION FUND

Note: This is the Introduction and Summary only of the full report on the overall impact of the Supreme Court's 1989 Title VII decisions. The full report will be available on February 20, 1990.

INTRODUCTION AND SUMMARY

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., has been called the "most important part" of the "most important civil rights legislation of this century."[1] Title VII and the court decisions which have interpreted it have resulted in an interconnected series of significant rules and principles relating to the initiation, proof, and remedies for employment discrimination claims. Working together, these rules and principles have made Title VII a "mighty engine" that is gradually working towards the "elimination of discrimination based on irrelevant personal characteristics from the industrial life of our country."[2]

Twenty-five years after the enactment of Title VII, however, the Supreme Court issued four decisions directly affecting the substantive interpretation of Title VII.[3] Decided by a closely divided Court in each case, these rulings have potentially broad impact on Title VII, ranging from rules concerning when employment discrimination cases can be initiated to rules relating to final relief. Because of the potentially broad and interconnected impact of these holdings on Title VII, the People For The American Way Action Fund has commissioned this study of the overall impact of the Court's 1989 Title VII decisions on Title VII.

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[1] N. Schlei, Foreword to B. Schlei and P. Grossman, Employment Discrimination Law (2d ed. 1983) at vii.

[2] Id. at xii, xiii.

[3] These decisions include Lorance v. A.T. & T, Wards Cove Packing v. Atonio, Price Waterhouse v. Hopkins, and Martin v. Wilks. In addition, the Court issued a decision in Independent Federation of Flight Attendants v. Zipes, which affects the availability of attorneys' fees in certain employment discrimination cases, and in Patterson v. McLean Credit Union, which concerns the interpretation of 42 U.S.C. §1981. These two decisions are not discussed in this analysis.

The study was conducted primarily by attorneys and researchers at the Washington, D.C. law firm of Arnold & Porter, led by attorneys Barbara Holden-Smith and Dawn Jablonski, with assistance from the PFAW Legal Department. It focuses on an analysis of the Court's four Title VII decisions, relevant case law prior to these decisions which they may have affected, and cases decided in the lower courts citing these rulings through January 12, 1990, approximately seven months after the decisions were rendered. LEXIS, NEXIS, and other computerized data bases were used in the research.

As discussed more fully below, this analysis has concluded that the Court's four Title VII decisions have a substantial cumulative negative impact on the overall effectiveness of Title VII in combatting employment discrimination. The decisions affect each major stage of a Title VII proceeding: initiating a claim, proving it in court, and obtaining relief. At each stage, the Court's decisions have erected new barriers making it significantly more difficult for victims of discrimination to succeed, contradicting prior case law. Since a successful Title VII claim must overcome these barriers at each stage of the proceeding, the cumulative impact of the Court's decisions threatens to substantially weaken Title VII's overall effectiveness.

With respect to the initiation of Title VII claims, for example, the decision in Lorance v. AT&T Technologies held that a claim challenging a discriminatory seniority policy must be brought within 180 days of the date of the policy's enactment, even if employees are not injured or affected until years later. Lower courts have already indicated that Lorance may also apply to other types of discriminatory job rules. As a result, many persons injured by discriminatory employment rules may never even have an opportunity to challenge them in court, as cases decided since Lorance indicate.

In order to seek to avoid the impact of Lorance, some plaintiffs may be forced to seek to challenge job rules as soon as they are adopted and before they have actually been applied. As the courts suggested prior to Lorance in discouraging such lawsuits, this could result in unnecessary claims which are difficult for courts to adjudicate and for plaintiffs to prove. The Court has made proof of employment discrimination claims substantially more difficult in any event, however, as a result of its decisions in Wards Cove Packing Co. v. Atonio and Price Waterhouse v. Hopkins.

Wards Cove and Price Waterhouse have significantly undermined the effectiveness of the two most commonly utilized methods to prove discrimination under Title VII: "disparate impact" and "disparate treatment." Until Wards Cove, employment

tests and other practices were held to violate Title VII where they had a substantial disparate impact on minorities and where employees could not demonstrate that such practices were justified by a business necessity. As a result of Wards Cove, however, employees no longer need provide such proof, and the plaintiffs must prove that discriminatory practices are not justified by a legitimate business reason. As discussed below, Wards Cove effectively reversed an eighteen year old unanimous precedent of the Burger Court and has already had a substantial negative impact in a number of lower court cases.

Another key method of proving discrimination under Title VII has been demonstrating disparate treatment of an employee or job applicant because of race or other prohibited criteria. Prior to Price Waterhouse, most courts held that employees were liable for discriminatory actions even if other non-discriminatory considerations were also mixed into their motives in making job decisions. This meant that even if legitimate reasons precluded giving an employee a promotion, for example, the employer would still be liable for discrimination and could be enjoined from using discriminatory promotion methods in the future. Under Price Waterhouse, however, as long as employees can prove they had a legitimate reason for an action in which bias also played a role, they can escape liability altogether and no action can be taken to prevent or remedy the discriminatory aspects of their conduct.

Assuming that a Title VII claim can overcome the barriers at the initiation and proof stages erected by Lorance, Wards Cove, and Price Waterhouse, the final stage is securing effective relief, either through settlement or court order. This stage has been made significantly more problematic as a result of the Court's decision in Martin v. Wilks. Prior to Wilks, most courts held that a consent decree or court order entered in a discrimination case could not be collaterally attacked or challenged. In Wilks, however, the Court opened the door to endless lawsuits by ruling that individuals who want to challenge such remedies may do so even years after the fact, and even if they sat by and did nothing when the relief was originally entered. During the period of this study alone, an average of one new challenge to an existing employment discrimination remedy was brought every three weeks after Wilks. Several challenges filed prior to Wilks have been extended or revived as a result of Wilks. The decision threatens to extend the litigation of Title VII suits almost endlessly, and to substantially discourage settlement of such claims because of such post-settlement litigation, contrary to Congress' intent to encourage settlement of Title VII litigation. Meaningful settlement of Title VII claims is likely to be discouraged by all four of the Court's Title VII decisions, which cumulatively make it much more difficult to establish and obtain relief against employment discrimination.

The remainder of this report will analyze in more detail each of the Court's four Title VII decisions in 1989, including the extent to which each decision conflicts with prior case law and has affected litigation in the lower courts. While each decision individually has important negative effects, the primary conclusion of this analysis is that the combined effect of the Court's 1989 decisions threatens to substantially weaken the effectiveness of Title VII.

Chairman HAWKINS. Thank you, Mr. Buchanan.

The next witness is Mr. Julius Chambers, Director-Counsel, NAACP Legal Defense and Education Fund.

Mr. Chambers, we welcome your appearance before the committee.

Mr. CHAMBERS. Thank you, Chairman Hawkins, and Chairman Edwards.

Like Mr. Buchanan, I also want to acknowledge the tremendous role that Congressman Hawkins has played in enforcing civil rights for all people. This may, in fact, because of his decision to retire, be the last time that I will be able to testify before him on this committee. The NAACP Legal Defense Fund is really pleased with the work that he has done to help make it possible for minorities across this country and women to believe that they have a chance for equal rights in all walks of life.

Today, I am testifying in support of H.R. 4000, the Civil Rights Act of 1990. I am going to confine my comments to the Supreme Court's decision in *Patterson*.

As you recall, in *Patterson*, the Court held in effect that a black person seeking relief under Section 1981 would be limited to a claim that he or she was discriminated against in the making of a contract or in some practices that inhibited his or her ability to enforce the contract.

No other claims, according to the Court, would be cognizable under Section 1981.

As we argued—I personally argued that case on behalf of Mrs. Patterson—we think the Court was plainly wrong. The plain language of Section 1981 makes clear that one is entitled to use Section 1981 for enforcement of claims dealing with contracts, and that covers more than simply the making of a contract. It covers all of the terms and conditions of a contract. That is certainly what the Supreme Court had held previously, and it is what all lower Federal courts upheld prior to the 4th Circuit and the district court's opinions in *Patterson*.

They plain language of the statute, then, was ignored by the court.

The court also ignored the legislative history of Section 1981. Congress, in enacting Section 1981, wanted to prohibit discrimination against blacks who were equally hired by plantation owners, but were discriminated against and harassed on the job. That was the focus of that congressional inquiry and that legislation.

The court simply ran against all prior decisions of the Supreme Court, as well as lower courts. In short, it ignored the prior judicial precedents interpreting Section 1981.

Finally, the Court ignored the prior legislative history of this Congress in looking at Section 1981 with Title VII and other legislation dealing with civil rights acts, like the Attorney Fees Act of 1976. Interestingly, the Court ignored most of this history in reaching its decision. It certainly didn't look at the legislative history when Congress was enacting 1981 originally.

The effect of *Patterson* has been devastating. We prepared a report that is attached to the written submission which we ask that you also permit to become a part of this record.

Chairman HAWKINS. Without objection, it is so ordered.

Mr. CHAMBERS. This shows that between the date of the *Patterson* decision and November 20, 1989, over 96 claims of discrimination have been dismissed by lower Federal courts based on *Patterson*. We would like to supplement that report with dismissals taking place between November 1, 1990, and February 9, 1991. An additional 92 claims have been dismissed by lower Federal courts in 38 different cases.

We, therefore, have a total of 158 claims dismissed under Section 1981 since the Supreme Court's decision in *Patterson*. In most instances, these claims have been dismissed without any inquiry about the merits that the plaintiffs are trying to present.

One example is that of Ms. Patterson, who prosecuted that case, and the lower district court dismissed the case *sua sponte*, with no hearing, based exclusively on that court's interpretation of *Patterson*.

Ms. Patterson, therefore, has no recourse, despite the evidence she presented and the claim she wanted to pursue.

If we look at the types of claims that have been dismissed, we see even a greater need for this legislation dealing with Section 1981. These cases involve harassment claims like those of Ms. Patterson, claims of dismissal on the basis of race and claims affecting a broad range of people, not just black people, as our written submission demonstrates.

If you look more specifically at an example, I ask you to look at the *McGinnis* case that is discussed in our report, a case where the district court found that Mr. McGinnis had been blatantly discriminated against by his employers, subjected to a racially derogatory environment, and subjected to misconduct on the basis of race. These findings are not silenced on appeal and Mr. McGinnis is now, because of the Supreme Court's decision in *Patterson*, without any remedy because he is employed by an employer with less than 15 employees and there is now no Federal statute providing any kind of relief for Mr. McGinnis.

There are in this country over 11 million employees who face the same kind of problem as Mr. McGinnis: no possible relief.

What the Supreme Court told us in *Patterson* is that an employer, like Mr. McGinnis' employer, could hire him and then subject him to all kinds of harassment and dismiss him without any kind of recourse. That is not the type of outcome the Congress anticipated in enacting Section 1981, nor is it what I think this Congress would like to see happen today.

Lower courts have a real dilemma and we see that in decisions of lower courts. In Chicago, district courts have reached very opposite decisions almost on the same day, one holding that *Patterson* required dismissal of a claim and another holding it did not.

In Denver, Colorado, the courts are reaching opposite results because of the confusion caused.

The real problem—or one of the major problems with *Patterson*, though, is its impact on the ability of individuals to enforce their claims. Lawyers are inhibited from prosecuting claims because of the fear that they will not receive a fair review in the Federal courts. Lawyers are inhibited because of threats by several Federal courts of Rule 11 sanctions for prosecuting claims under Section 1981.

We now have thousands of minority employees going without any recourse because they can't find a lawyer to prosecute the claim and lawyers are afraid to prosecute those claims because of what the court ruled in *Patterson*.

We are pleased to see that the government suggests that something must be done with Section 1981. We are not certain what that is and would like the opportunity of commenting on the bill once it is submitted. The government suggests, for example, in its written submission, that it is interested in looking at performances, breach of contracts and terminations. We are not certain what these terms would entail and would like an opportunity to comment once we get a chance to review the bill.

We also would like to submit another report we are working on and that is dealing with the impact of *Wards Cove* and we also would like to submit a report on the broad construction that is included in this bill, Section 11.

Mr. Chairman, with those comments, I again appreciate the opportunity to appear before the committee and would like for the record to reflect that the NAACP Legal Defense Fund strongly urges passage of this legislation.

[The prepared statement of Julius Levonne Chambers follows:]

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STATEMENT

OF

JULIUS LEVONNE CHAMBERS, DIRECTOR-COUNSEL
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

BEFORE

THE COMMITTEE ON EDUCATION AND LABOR OF THE
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

THE IMPACT OF THE SUPREME COURT'S DECISION IN
PATTERSON V. MCLEAN CREDIT UNION

ON

FEBRUARY 20, 1990

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STATEMENT

of

Julius LeVonne Chambers, Director-Counsel
NAACP Legal Defense and Educational Fund, Inc.,
Concerning the Impact of the Supreme Court's Decision in
Patterson v. McLean Credit Union

Before

The Committee on Education and Labor of the
The United States House of Representatives
February 20, 1990

Chairman Hawkins, and distinguished members of the Committee. My name is Julius Chambers and I am the Director-Counsel of the NAACP Legal Defense and Educational Fund. I am here to testify in support of H.R. 4000, the Civil Rights Act of 1990, which seeks to restore our nation's fair employment laws in the wake of a series of recent Supreme Court rulings which cut back dramatically on the scope and effectiveness of those laws.

My testimony today addresses one of those rulings, Patterson v. McLean Credit Union[1], in which five members of the Court held that § 1981 of the Civil Rights Act of 1866[2] no longer bars

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[1] 105 L. Ed. 2d 132, 109 S. Ct. 2363, 57 U.S.L.W. 4705 (1989).

[2] 42 U.S.C. § 1981 provides:

> "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."

employers from subjecting black workers to racial harassment or other forms of intentional discrimination on the job. Section 12 of the Civil Rights Act of 1990 would restore the law in this area by reaffirming Congress' manifest intent that the right granted by § 1981 "to make and enforce contracts" without regard to race covers all aspects of and all benefits, terms and conditions of a contractual relationship.

In the employment context, this would restore § 1981's coverage of racial discrimination in hiring, promotions, harassment, demotions, discharges, retaliation and every other aspect of employment. As is true with the other provisions in H.R. 4000, there is simply no doubt as to the urgent need for this amendment. In November of last year, we issued a report describing the devastating and immediate impact of the Patterson ruling. I have copies of that report and would like to submit it as part of the record. The trends we identified in November have continued. I want to emphasize today a few of the many harsh results we have seen since the Patterson decision was handed down. I will also explain why I think the Supreme Court was wrong in that case.

The Patterson Decision Itself

The plaintiff in Patterson was a black female employee of a Raleigh, North Carolina credit union who testified at trial that she was subjected throughout her 10 years with the company to abusive and demeaning treatment, and denied equal pay, training and promotion, because of her race. She testified that Robert

Stevenson, the President and General Manager, warned her when she was first interviewed "that I was going to be working with all white women . . . and that probably they wouldn't like me because they weren't used to working with blacks." In fact, however, it was Stevenson and her supervisors who subjected Brenda Patterson to blatant racial discrimination, rather than her co-workers.

Stevenson told her several times that "blacks are known to work slower than whites by nature," and he repeatedly suggested a white would be able to do her job better than she could, according to her testimony. Patterson, a college graduate, also testified that she was regularly given more work than white employees; that she was required to do demeaning tasks -- such as dusting and sweeping the office -- never asked of whites; that she was denied pay increases automatically given to whites; that she was routinely passed over for training and promotion opportunities by whites with less seniority; and that she was scrutinized more closely and criticized more than were white employees.

Company witnesses did not deny this general policy of racial discrimination. After Stevenson met one black applicant, he called a supervisor to ask: "Why the hell didn't you tell me this person was black?" Patterson's supervisor confirmed that Stevenson had stated on numerous occasions that he did not want to hire blacks. During the entire time Patterson worked at McLean Credit Union, all of the supervisors were white.

The district court ruled that a claim for racial harassment

is not actionable under § 1981 and did not allow that part of the case to go to the jury. The Supreme Court ultimately upheld that determination. A majority of the Court held that § 1981's guarantee of non-discrimination in the making and enforcement of contracts "extends only to the formation of a contract, but not to problems that may arise later from the conditions of continuing employment," such as racial harassment or discrimination in the terms and conditions of the job.[3] Not only is this holding contrary to both the plain meaning of the statute[4] and the legislative history,[5] but it ignored a

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[3] The Court also held that § 1981 does not apply to an intentionally discriminatory denial of promotion unless the promotion would create "a new and distinct relation between the employee and employer." The Patterson decision did not address the application of § 1981 to claims involving discharges, demotions or retaliation.

[4] The plain language of § 1981 makes clear that the statute protects against racial discrimination in the terms and conditions of employment contracts. Under § 1981, persons of all races are guaranteed the "same" right to make and enforce contracts. A contract of employment is merely a combination of many terms and conditions, and it either explicitly or implicitly covers at least the fact of employment, the nature of the work, the salary, the working hours, the work rules and penalties, and the location of the job. As the Supreme Court noted in Hishon v. King & Spaulding, 467 U.S. 69, 74 (1984):

> "Because the underlying employment relationship is contractual, it follows that the 'terms, conditions, or privileges of employment' clearly include benefits that are part of the employment contract."

[5] The legislative history of § 1981 shows that Congress in 1866 was not primarily interested in protecting blacks from discrimination in hiring. In fact the former slaveowners were all too eager to hire black labor. These southern planters devised schemes to continue employing black labor under the same onerous terms and conditions that prevailed prior to emancipation. Congress intentionally drafted § 1981 as a broad and comprehensive provision, directed at a variety of practices, including the harsh

consistent line of cases construing § 1981 to prohibit racial discrimination in the terms and conditions of employment.[6]

The effect of Patterson was to overrule or limit many if not most of the lower court decisions of the last two decades regarding the meaning and scope of § 1981. As a result of the Court's grudging and untenable construction of this remedial civil rights statute, the court leaves open the possibility that employers who hire blacks will be free under § 1981 -- and free altogether in a significant number of federal cases -- to require black employees to work in a hostile and segregated work environment and to subject them to other racial abuse. As for Brenda Patterson, the one part of her case which the Supreme Court remanded to the district court was dismissed completely,

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treatment of black workers, refusals to pay black workers, conspiracies to fix a maximum wage for black labor, and laws that allowed black employees to be whipped and compelled them to work from "sunrise to sunset." The majority opinion in Patterson did not advert to this legislative history in concluding that § 1981 should be restricted to discrimination at the formation stage of an employment contract.

[6] For example, just two years before Patterson, in Goodman v. Lukens Steel Co., 482 U.S. 656 (1987), the Supreme Court upheld a finding that § 1981 had been violated by, inter alia, toleration by both the employer and the union of racial harassment of black employees. In Johnson v. Railway Express Agency Inc., 421 U.S. 454, 459-60 (1975), the Court applied § 1981 to a case in which the issues raised -- seniority rules, job assignments and racial segregation -- concerned the terms and conditions of employment, like those raised by Brenda Patterson. Except for the Fourth Circuit, which decided Patterson, the lower federal courts had unanimously concluded that discrimination in the terms and conditions of employment was actionable under § 1981. See, e.g., Nazaire v. Trans World Airlines, Inc., 807 F.2d 1372, 1380 (7th Cir. 1986); Wilmington v. J.I. Case Co., 793 F.2d 909 (8th Cir. 1986); Carter v. Duncan-Huggins, Ltd., 727 F.2d 1225, 1233 (D.C. Cir. 1984).

without any opportunity for briefing, on January 24, 1990.

The Number of Dismissals After Patterson

The Court's June 15, 1989 decision severely restricting the scope of § 1981 struck swiftly and sharply throughout the lower federal courts. Between June 15 and November 1, 1989,[7] at least 96 claims of intentional race discrimination were dismissed by federal courts because of Patterson, in most cases without ever having been tried on the merits.[8] Since November, at least 62 additional claims have been dismissed, resulting in a total of at least 158 dismissed claims. The actual total number of claims dismissed because of Patterson since June 15, 1989 is probably much higher than 158, for a number of reasons,[9] but the exact number is not known. A list of the cases in which the first 96 claims were dismissed is included in our report and I will provide the Committee with an updated list of the cases in which

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[7] Excluding Saturdays, Sundays, Holidays, the federal courts were open a total of 97 days during this period.

[8] A few of the cases discussed in our report were dismissed under Patterson after trial. E.g. Morgan v. Kansas City Area Transportation Authority, 1989 U.S. Dist. LEXIS 10482 (W.D. Mo. 1989) (overturning $60,000 jury verdict for victim of discriminatory discharge).

[9] These numbers only cover reported cases where the court wrote an opinion dismissing the claim. In addition to these cases, there appear to be a significant number of cases in which § 1981 claims have been dismissed in one-line orders where no written opinion was issued, or in oral rulings from the bench. Because information on these types of dismissals is extremely difficult to collect, they have not been counted in the total number of dismissals I have provided. Also, courts in a number of cases have dismissed multiple claims without specifying how many there were or what their nature might have been. E.g. Woods v. Miles Pharmaceuticals, 1989 U.S. Dist LEXIS 7642 (N.D. Ill. 1989).

additional claims have been dismissed since November.

Characteristics of the Dismissed Claims

Of the 96 dismissed claims listed in our report, 22 involved racial harassment -- the type of claim the Supreme Court threw out in Patterson. However, 31 dismissed claims involved allegations that the plaintiff was fired from his or her job because of race, notwithstanding that the Supreme Court has on numerous occasions applied § 1981 to discharge claims.[10] The total also included 16 promotion or transfer claims, 8 retaliation claims, and 6 demotion claims.

Because § 1981 has been held to apply not just to blacks, but to all racial and ethnic groups, Patterson leaves a broad range of persons exposed to discriminatory conduct for which there is no longer a § 1981 remedy, or in many cases a meaningful remedy at all. Among the § 1981 claims dismissed under Patterson have been allegations of racial discrimination against Hispanic,[11] native Hawaiian,[12] Chinese,[13] Filipino,[14] Cuban,[15] and

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[10] See, e.g., McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 275 (1976); St. Francis College v. Al-Khazraji, 481 U.S. 604 (1987); Johnson v. Railway Express Agency, 421 U.S. 454, 459-60 (1975).

[11] Gonzalez v. The Home Insurance Co., 1989 U.S. Dist. LEXIS 8733 (S.D.N.Y. 1989).

[12] Leong v. Hilton Hotels, 50 FEP Cas. 738 (D. Haw. 1989).

[13] Risinger v. Ohio Bureau of Workers' Compensation, 883 F.2d 475 (6th Cir. 1989).

[14] Brackshaw v. Miles, Inc. 1989 U.S. Dist. LEXIS 12820 (N.D. Ill. 1989).

Jewish[16] plaintiffs.

Although they include a variety of different types of claims and plaintiffs, the dismissed claims have a number of common characteristics. First, all involved allegations of intentional discrimination on the basis of race, because § 1981 has been held to require proof of such intent. Second, a significant number of the dismissed claims involved blatant racial abuse by the employer, against which § 1981 has served in the past as the only meaningful protection. I will give some examples of this. Third, in each case the dismissed claim involved the type of invidious racial prejudice -- whether it was overtly communicated or not -- which Congress has repeatedly said it wants to see eliminated completely from the American workplace.

Examples of Dismissed Claims

Decisions handed down since Patterson provide shocking examples of the type of racial harassment, abuse and other forms of discrimination for which § 1981 no longer provides a remedy.[17] Terrell McGinnis, the plaintiff in McGinnis v. Ingram Equipment Co., Inc., 888 F.2d 109 (11th Cir. 1989), was the only black employee in a company in Jefferson County, Alabama that sells and

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[15] Alvarez v. Norden Systems, Inc., 1989 U.S. Dist. LEXIS 9954 (S.D.N.Y. 1989).

[16] Sofferin v. American Airlines, Inc., 1989 U.S. Dist. LEXIS 9632 (N.D. Ill. 1989).

[17] Examples in addition to those described here are included in the report LDF issued in November on the impact of the Patterson ruling.

services garbage trucks in four southern states. McGinnis, a trained welder and auto mechanic, was subjected to extreme abuse, physical danger and humiliation, and eventually discharged, because of his race. The following are just a few examples of the shocking treatment McGinnis received at the hands of the company's owner and manager:[18]

(1) Despite his skills, McGinnis often served as the company's janitor and general flunky. He was required to clean the bathrooms and to keep black customers out of them: "When the niggers come in, don't let them use the bathroom. Tell them it's out of order."

(2) In front of white customers in a restaurant, the owner placed his lunch sandwich on the floor and told McGinnis, "Here you go, my nigger."

(3) On several occasions the owner wrongly accused McGinnis of misconduct and kicked him so hard that he required medical attention for the swelling and pain.

(4) He alone was required to wash the personal cars of other employees, sit at the rear of the room at social functions, and dispose of a truck load of fetid chickens.

(5) The owner called him a "nigger" and "black s-o-b" and then pointed a gun at this head and told him to do what he said, frightening McGinnis so much that he threw up his hands and said, "Yes sir, yes sir."

Although the district court awarded McGinnis $156,000 in damages, the court of appeals ruled after Patterson that such "claims of harassment and discriminatory work conditions are no longer actionable under section 1981." The only claim left in the case is a possible claim for denial of promotion. Because the company has fewer than 15 full-time employees, it is not

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[18] These are from the factual findings entered by the trial court, 685 F.Supp. 224 (N.D. Ala. 1988) and left undisturbed by the court of appeals.

covered by Title VII of the Civil Rights Act of 1964 and McGinnis has no other remedy.

Bunny Kishaba, one of four plaintiffs in Leong v. Hilton Hotels, 50 FEP Cases 738 (D. Haw. 1989), is a Hawaiian woman of Asian ancestry. She was the executive secretary for Hilton's Senior Vice President, Earl McDonough, whose repeated racist remarks were not disputed in her lawsuit. Referring to local Asians and Hawaiians, McDonough stated in front of Kishaba that "locals tend to be slow, lazy and laid back," are "not capable of being supervisors," are "incompetent," and are like "the spics in New York." McDonough also demeaned Kishaba in front of caucasian secretaries, whom he treated with respect, and more than once told her to get a job with another company. He told Kishaba that she could not appreciate art because she had never traveled and stated contemptuously that "I have to have the only secretary who does the hula." McDonough warned that "if you people," -- referring to local Hawaiians and Asians -- "if you people don't shape up, I'll get rid of all of you."

After finding that McDonough "continuously treated Kishaba in a racist manner" and forced her to resign, the district court ruled in April, 1989 that Kishaba had a viable claim for compensatory and punitive damages under § 1981. 50 FEP Cases at 736. Just three months later, after Patterson was decided, the district court ruled that whether the result of such racist conduct is "constructive discharge or simply an extraordinarily stressed or depressed employee," the victim no longer has a claim

under § 1981. Kishaba's § 1981 claims and her request for damages were dismissed. 50 FEP Cases at 741.

In Mason v. Coca-Cola Bottling Co., 1989 U.S. Dist. LEXIS 10533 (D. Kan. 1989), the company conceded that co-workers of Gary Mason, the plaintiff, had told "numerous racial jokes and used frequently racial epithets toward [him] and that plaintiff let it be known that these racially offensive practices upset him." Among the more recent incidents was a co-worker's comment that he had "never seen a depressed nigger before," after Mason's wife gave birth to a still-born child. A supervisor of Mason's also empathized with a customer's complaints that Mason, a black man, was serving her, saying "you know how they are." The district court dismissed Mason's § 1981 claims in light of Patterson.

Title VII Remedies Are Often Unavailable

One of the justifications cited by the majority in Patterson for narrowly construing § 1981 was a desire to avoid "unnecessary overlap between Title VII and § 1981." Noting that Title VII actions may not be filed in court until there has first been an administrative review and opportunity for conciliation, and that § 1981 has no such requirement, the Court said its narrow reading of § 1981 would "preserve the integrity of Title VII's [mediation and conciliation] procedures without sacrificing any significant

coverage of the civil rights laws."[19]

In fact, however, Patterson has already sacrificed "significant coverage" of the civil rights laws. Terrel McGinnis, whose case in Alabama I described, is only one of 11 million American workers who have no Title VII protection because the companies they work for employ fewer than 15 people and are thus exempt from Title VII coverage. By narrowing § 1981 in Patterson, the Supreme Court nullified the only federal anti-discrimination law applicable to these millions of workers. As a direct result, some of the most blatant and offensive examples of racial discrimination are no longer prohibited by any federal law.

In addition, there have been numerous claims dismissed in light of Patterson which did not arise in the employment context and for which § 1981 provided the only possible federal remedy. For example, in Gonzalez v. The Home Insurance Co., 1989 U.S. Dist. LEXIS 8733 (S.D.N.Y. 1989), the complaint alleged that the defendant insurance companies had rejected insurance clients represented by the plaintiff insurance agency because the owners of the agency were Hispanic, and that the insurance companies had placed discriminatory requirements on plaintiffs but not white

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[19] As Justice Brennan pointed out in his dissenting opinion in Patterson, the Court had previously noted in Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 461 (1975) that "the remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent." The majority's reasoning in Patterson is completely at odds with this prior ruling.

agents. In Nolan's Auto Body Shop, Inc. v. Allstate Insurance Co., 718 F.Supp. 721 (N.D. Ill. 1989), the plaintiffs claimed that Allstate had cancelled an agreement for insurance repair work because the owners of the garage where the work was to be done were black. In Clark v. State Farm Insurance Co., 1989 U.S. Dist. LEXIS 10666 (E.D. Pa. 1989), the plaintiff asserted that State Farm had refused to pay her insurance claim because she is black. The only federal statute which prohibits the alleged discrimination in these cases § 1981, but in each case the claim was nonetheless dismissed under Patterson.

Chaos in the Lower Courts After Patterson

Although Patterson has resulted in the dismissal of hundreds of claims and has caused the lower courts to question the validity of almost every claim under § 1981,[20] the decision also left many unresolved questions which have created chaos and uncertainty in the lower courts and further obstacles for victims pursuing relief for discrimination. Prior to Patterson, the federal courts had held that virtually all forms of racial

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[20] As discussed in LDF's November report on the impact of Patterson (beginning at page 20), a number of lower court decisions read as though the central purpose of Patterson was simply to throw out as many § 1981 race discrimination claims as possible. Although some courts have allowed plaintiffs to amend their complaints to include allegations that may now be required by Patterson, other courts have dismissed § 1981 claims with an alacrity bordering on enthusiasm. Many of the orders dismissing Patterson claims, including the one issued on remand in Patterson itself, were issued sua sponte; the defendants never filed any request for dismissal, and the plaintiffs were neither notified that dismissal was being considered nor afforded any opportunity to submit a brief on the meaning of Patterson.

discrimination in employment violated § 1981. The decision in Patterson makes only two things clear about the scope of § 1981: a racially motivated refusal to hire violates § 1981, and racial harassment after an employee has been hired does not.

Patterson leaves in an entirely confused state the application of § 1981 to other discriminatory employment practices. How the line is to be drawn between promotion decisions which are covered and those which are not is entirely unclear. The majority opinion makes no reference to the large number of pre-Patterson employment cases under § 1981, including, for example, the Court's own prior decisions applying § 1981 to claims of discriminatory discharges.[21] Patterson, as a consequence, has spawned a host of novel and unprecedented issues about the meaning of § 1981 which has led to conflict and confusion among the lower courts and which in the ordinary course of litigation could easily require a decade or more to resolve.

This chaos became apparent within months of the Patterson decision. As described more fully in our report, different judges in the same court reached opposite conclusions regarding the scope of § 1981 within days of each other. Confusion and inconsistent rulings became the rule, not the exception, in lower

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[21] See, e.g., Johnson v. Railway Express Agency, 421 U.S. 454, 459-60 (1975); McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 275 (1976). Virtually every federal circuit court of appeals prior to Patterson had affirmatively stated that terminations were covered by § 1981. See, e.g., Estes v. Dick Smith Ford, Inc., 856 F.2d 1097, 1100-01 (8th Cir. 1988); Connor v. Fort Gordon Bus. Co., 761 F.2d 1495, 1498-99 (11th Cir. 1985).

courts throughout the country, leading Circuit Court of Appeals Judge Richard Posner to ask "[h]ow many plaintiffs can successfully negotiate the treacherous and shifting shoals of present-day federal employment discrimination law." Malhotra v. Cotter & Co., 50 FEP Cases 1474 (7th Cir. 1989).

The Broader Impact of Patterson

The judicial decisions described above are necessarily limited to the race discrimination claims of individuals who are able to find an attorney who would take on their cases, and continue to pursue them, despite the Patterson decision. In the wake of Patterson private attorneys are substantially and avowedly less willing to handle § 1981 cases, regardless of whether they are convinced that they could prove that racial discrimination had indeed occurred. In the long term this deterrent effect is likely to be more important, and far reaching, than lower court opinions interpreting Patterson.

Patterson has had this impact, in part, because it is perceived as reflecting and forecasting an unwillingness on the part of federal courts to award relief in § 1981 cases, if not civil rights cases generally. The confusion alone over which employment practices are now covered by § 1981 is often sufficient, for obvious economic reasons, to dissuade counsel from handling these cases.

In addition, private attorneys are also being deterred from handling or pursuing these cases because of fear that the court will impose sanctions on them under Rule 11 of the Federal Rules

of Civil Procedure. We have already seen a number of examples of this. Further, the decision in Patterson and the confusion which it created have diminished significantly the possibility of settling § 1981 claims. Settlement negotiations and agreements tentatively arrived at have collapsed as a result of Patterson.

CONCLUSION

The Patterson decision has had very serious and regrettable consequences for the men and women who have to live with the intractable realities of racial discrimination. Our entire legal system is correctly premised on a recognition that individuals and officials shape their conduct in light of the likely legal consequences of those actions. When the Supreme Court reduces the likelihood that employers who discriminate can be called to account for their practices, or when it restricts the remedies that even a successful civil rights plaintiff can win, the balance of considerations that affect how employers will act is shifted considerably.

The majority in Patterson insisted that its decision "should not be interpreted as signaling one inch of retreat from Congress' policy to forbid discrimination." But in practical terms the Court rendered § 1981 almost useless as a weapon against many forms of invidious discrimination. This is not time for tampering with the civil rights measures that have had some measure of success. The hard won rights of black Americans -- of all Americans -- to equal opportunity should not be subject to reconsideration, even in the highest court in the land.

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March 9, 1990

Honorable Augustus F. Hawkins
Chairman
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Dear Congressman Hawkins:

During my testimony on H.R. 4000 on February 20, 1990, you asked me to submit an update to our November 20, 1989 report on the devastating impact of the Supreme Court's decision in Patterson v. McLean Credit Union. I am enclosing a 4-page list entitled "Additional Cases Dismissed Under Patterson v. McLean Credit Union" and ask that it be included in the record along with this cover letter.

Our initial report showed that at least 96 claims brought under 42 U.S.C. § 1981 were dismissed as a result of Patterson between June 15, 1989 and November 1, 1989. This number does not include an unknown number of claims dismissed without a written opinion from the court. Our update report covers the period through February 23, 1990. By that time, at least 105 additional claims brought under § 1981 had been dismissed because of the Patterson ruling.

In sum, the Patterson ruling has resulted in the dismissal of at least 201 claims of discrimination in just eight months.

It was a pleasure to appear before your committee on this important legislation. Please let me know if I can be of any further assistance.

Very truly yours,

Julius LeVonne Chambers

JLC:oet

Enclosure

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Additional Cases Dismissed Under Patterson v. McLean Credit Union

As of February 23, 1990

KEY

H	Harassment
D	Discharge
DM	Demotion
P	Promotion/Transfer
R	Retaliation
N7	Discriminatory practice not covered by Title VII
M	Miscellaneous discriminatory treatment
F	Contract formation
*	Cases decided prior to but not included in original report

Summary
Number of Claims Dismissed, by Type

Harassment	22
Discharge	37
Demotion	2
Promotion/Transfer	10
Retaliation	4
Miscellaneous discriminatory treatment	24
Contract formation	6
TOTAL	105

TYPE	CLAIMS DISMISSED
M	Alexander v. Jefferson Parish, 1990 U.S. Dist. LEXIS 1326 (E.D. La. Feb. 6, 1990).
D, M	Boykin v. Golden Rule Ins. Co., 1990 U.S. Dist. LEXIS 536 (N.D. Ill. Jan. 16, 1990).
P	Brown v. American Food Service Corp., 1990 U.S. Dist. LEXIS 1214 (E.D. Pa. Feb. 6, 1990).
D	Carroll v. General Accident Ins. Co. of America, 1990 U.S. Dist. LEXIS 423 (5th Cir. Jan. 16, 1990).
D *	Carter v. Aselton, 50 F.E.P. Cases 251 (M.D. Fla. 1989).

D, F	Carter v. O'Hare Hotel Investors, 1989 U.S. Dist. LEXIS 13156 (N.D. Ill. Nov. 1, 1989).
D	Coleman v. Domino's Pizza, Inc., 1990 U.S. Dist. LEXIS 259 (S.D. Ala. Jan. 9, 1990).
D	Cook v. Marriott Corp., 51 F.E.P.Cases 922 (D.N.J. 1989).
H, M	Council v. City of Topeka Fire Department, 1990 U.S. Dist. LEXIS 1315 (D. Kan. Jan. 11, 1990).
H, M	Cruz v. Standard Motor Products, Inc., 1989 U.S. Dist. LEXIS 15197 (D. Kan. Nov. 16, 1989).
D	Davis v. Piggly Wiggly Southern, Inc., No. CV687-52, slip op. (S.D. Ga. Dec. 19, 1989).
D	Dumas v. Phillips College of New Orleans, Inc., 1989 U.S. Dist. LEXIS 14188 (E.D. La. Nov. 21, 1989).
H, D, DM	Duse v. International Machines Corp., No. B-84-455, slip op. (D. Conn. Feb. 5, 1990).
D, P	Easley v. General Motors, No. IP89-154-C, slip op. (S.D. Ind. Nov. 2, 1989).
D *	Eklof v. Bramalea, Ltd., 1989 U.S.Dist. LEXIS 12836 (E.D. Pa. Oct. 27, 1989)
H	Foster v. Atchison, topeka & Santa Fe Railway, 1990 U.S. Dist. LEXIS 1338 (D. Kan. Jan. 9, 1990).
H	Fuller v. Buhrke Industries, 1990 U.S. Dist. LEXIS 1535 (N.D. Ill. Feb. 12, 1990).
H, M *	Gamboa v. Washington, 50 F.E.P. Cases 524 (E.D. Ill. 1989).
D, F, N7	Gersman v. Group Health Association, Inc., 725 F.Supp.573 (D.D.C. 1989).
H, D	Gonzalez v. National Railroad Passenger Corp. 1989 U.S. Dist. LEXIS 11108 (E.D. Pa. Sept. 18, 1989).

D, M	Goodson v. Cigna Insurance Company, 1990 U.S. Dist. LEXIS 680 (E.D. Pa. Jan. 23, 1990).
H, P, M(5)	Griddine v. Dillard Department Stores, U.S. 51 F.E.P. Cases 306 (W.D. Mo., 1989).
D	Guerrero v. Preston Trucking Co., Inc., 1989 U.S. Dist. LEXIS 15175 (N.D.Ill. Dec. 20, 1989).
D	Gunn v. General Foods Corporation, 1990 U.S. Dist. LEXIS 1449 (N.D.Ill. Feb. 9, 1990).
H, D, R *	Hannah v. Coca-Cola Bottling Co., 1989 U.S. Dist. LEXIS 7200 (E.D. Pa. June 26, 1989).
D	James v. Dropsie College, a/k/a/ Annenberg Research Institute, 1989 U.S. Dist. LEXIS 14103 (E.D.Pa. Nov. 22, 1989).
D	Johnson v. United States Elevator Corp., 51 FEP Cases 305 (E.D. Mo.1989).
D, F	Jones v. ANR Freight System, Inc., 1990 U.S. Dist. LEXIS 501 (N.D. Ill. Jan. 17, 1990).
D	Joseph v. Zachary Manor Nursing Home, 1990 U.S. Dist. LEXIS 755 (M.D. La. Jan. 22, 1990).
H, P, R, M(3)	Lewis v. B.P. Oil, Inc., 1990 U.S. Dist. LEXIS 787 (E.D. Pa. Jan. 26, 1990).
H, P *	Lynch v. Belden and Co., Inc., 882 F.2d 262 (7th Cir. 1989)
H, M	McDaniel v. Fairman, 1989 U.S. Dist. LEXIS 14530 (N.D.Ill. Dec. 5, 1989).
H, M, DM	McGinnis v. Ingram Equipment Co. Inc., 888 F.2d 109 (11th Cir. 1989).
M, D	McKee v. Leininger Midstates Paving Co., 1989 U.S. Dist. LEXIS 15603 (N.D.Ill. Dec. 21, 1989).
P(2), M	Mayfield v. Micon System, Inc., 1989 U.S. Dist. LEXIS 15964 (E.D. Tex. Oct. 16, 1989).
D	Meyers v. City of Cincinnati, 51 FEP Cas. 1458 (S.D. Ohio 1990).

H(2)	Miller v. Shawmut Bank of Boston, 726 F. Supp. 337 (D. Mass. 1989).
D, F	Mingle v. Piggly Wiggly Southern, Inc., No. CV687-010, slip op. (S.D. Ga. Dec. 19, 1989).
D, F	Mobley v. Piggly Wiggly Southern, Inc., No. CV687-66 slip op. (S.D. Ga. Dec. 19, 1989).
D	Owens v. Foot Locker, 1989 U.S. Dist. LEXIS 13574 (E.D. Pa. Nov. 14, 1989).
H, N7	Perry v. Command Performance, 1989 U.S. Dist. LEXIS 14258 (E.D. Pa. Nov. 22, 1989).
H	Pressley v. Haeger, 1989 U.S. Dist. LEXIS 13914 (N.D. Ill. Nov. 15, 1989).
D, R, F	Sherman v. Burke Contracting, Inc., 1989 U.S. App. LEXIS 520 (11th Cir. Jan. 15, 1990).
D	Singleton v. Kellogg Company, 1989 U.S. Dist. LEXIS 17920 (6th Cir. Nov. 29, 1989).
M	Snowden v. Millinocket Regional Hospital, 1990 U.S. Dist. LEXIS 252 (D. Me. Jan. 9, 1990).
D	Steward v. National Broadcasting Co., 1990 U.S. Dist. LEXIS 979 (N.D. Ill. Jan. 31, 1990).
D	Stinson v. American Sterilizer Co., 51 F.E.P. Cases 816 (M.D. Ala. 1989)
M	Teran v. El Paso Natural Gas Co., 51 F.E.P. Cases 423 (W.D. Tex. 1989)
D	Thompson v. Johnson & Johnson Management Information Center, 725 F. Supp. 826 (D.N.J. 1989).
M	Verhagen v. Olarte, 1989 U.S.Dist. LEXIS 13881 (S.D.N.Y. Nov. 17, 1989)
H(4), D(4), P(2), M(4)	White v. Federal Express Corp., 1990 U.S. Dist. LEXIS 1052 (E.D. Va. Jan. 30, 1990).
P	Williams v. Chase Manhattan Bank, 1990 U.S. Dist. LEXIS 327 (S.D.N.Y. Jan. 17, 1990).

H, D — Yates v. Western Electric Co., Inc., 1989 U.S. Dist. LEXIS 14940 (D. Kan. Nov. 30, 1989).

D — Zeiour v. Chevron U.S.A., Inc., 1989 U.S. Dist. LEXIS 13656 (E.D. La. Nov. 8, 1989).

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THE IMPACT OF PATTERSON v. McLEAN CREDIT UNION

A Report By The
NAACP Legal Defense and Educational Fund, Inc.
November 20, 1989

SUMMARY

This study assesses the impact in the lower federal courts of the June 15, 1989 decision in Patterson v. McLean Credit Union. Between June 15, 1989, and November 1, 1989, at least 96 section 1981 claims were dismissed because of Patterson. Although the central holding of Patterson was that racial harassment was not forbidden by section 1981, most of the dismissals have involved forms of discrimination other than racial harassment.

Type of Discrimination	Claims Dismissed
Discharge	31
Promotion	16
Retaliation	8
Demotion	6
Miscellaneous Employment	6
Non-Employment	7
Harassment	22

These dismissal orders were entered in a total of 50 different cases.

The dismissals were not limited to claims of discrimination against blacks. Also dismissed were race discrimination claims by Hispanic, Chinese, Filipino, Hawaiian and Jewish plaintiffs. None of the claims thrown out under Patterson were class actions, none were based on a discrimination effect theory, and none -- so far as can be ascertained from the opinions -- was seeking quota or other affirmative action remedies. The only affirmative action dispute affected by Patterson was Torres v. City of Chicago, in which a federal court dismissed because of Patterson a lawsuit challenging a Chicago minority set aside program.

The decision in Patterson has raised a host of novel and difficult legal issues regarding the scope of section 1981. The lower courts are already sharply divided about those questions, and resolution of these complex problems is likely to require years of litigation. The ability of private attorneys to litigate these issues has been impaired by a pattern of sua sponte dismissals, and by a well-founded fear of Rule 11 sanctions.

For unexplained reasons, approximately one-third of all dismissals and dismissal orders have been issued by the federal court in Chicago.

Introduction

On June 15, 1989, the United States Supreme Court in Patterson v. McLean Credit Union[1] abruptly and substantially reduced the protections which federal law had until then afforded against intentional discrimination on the basis of race. The statute at issue in Patterson, 42 U.S.C. § 1981, which derives from the 1866 Civil Rights Act, prohibits racial discrimination in the making and enforcement of contracts. Until the Patterson decision federal district and appellate courts had been virtually unanimous in construing section 1981 to forbid all forms of intentional racial discrimination in contractual relations, including all forms of racial discrimination in employment. Patterson effectively overruled or limited many if not most of the lower court decisions of the last two decades regarding the meaning and scope of section 1981.

Patterson itself involved, inter alia,[2] a claim of racial harassment in employment. The plaintiff, a black female former employee of a Raleigh, North Carolina credit union, alleged that she had been subjected to a long series of abusive comments and treatment because of her race. Ms. Patterson claimed that the firm's president repeatedly admonished her that "blacks are known

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[1] 105 L.Ed.2d 132, 109 S.Ct. 2363, 57 U.S.L.W. 4705 (1989).

[2] The plaintiff also alleged that she had been denied a promotion because of race. The Patterson majority held that some but not all promotion claims could still be brought under section 1981.

to work slower than whites by nature," because "some animals [are] faster than other animals."[3] Ms. Patterson also asserted that she was regularly given more work than white employees, and that she was required to do demeaning tasks never asked of whites.[4] The majority opinion in Patterson held that such intentionally discriminatory practices were permitted by section 1981. The majority insisted that the section 1981 guarantee of non-discrimination in the making of a contract "extends only to the formation of a contract, but not to problems that may arise later from the conditions of continuing employment."[5] The Court reasoned that the section 1981 right to non-discrimination in the enforcement of a contract did not apply to the racially motivated breach of a contract, but encompassed only "protection of a legal process ... that will address and resolve contract-law claims without regard to race."[6]

The Patterson decision gave rise to a dispute as to the practical significance of this new construction of section 1981. Justice Kennedy, writing for the majority, insisted, "Neither our words nor our decisions should be interpreted as signaling one inch of retreat from Congress' policy to forbid discrimination in the private, as well as the public, sphere."[7] Justice Brennan

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[3] 105 L.Ed.2d at 174 (Brennan, J., concurring and dissenting).

[4] Id.

[5] 105 L.Ed.2d at 150.

[6] 105 L.Ed.2d at 151.

[7] 105 L.Ed.2d at 158.

objected, on the other hand, that "[w]hat the Court declines to snatch away with one hand, it takes away with the other."[8] Justice Stevens argued that the majority's interpretation of section 1981 was "dramatically askew" from prior decisions, "replacing a sense of rational direction and purpose in the law with an aimless confinement to a narrow construction."[9] The Administration expressed an unwillingness to support legislation to overturn Patterson until and unless experience demonstrated that the decision was having a significant impact.

This study undertakes to assess what the practical impact of Patterson has been on civil rights litigation in the federal courts during the first four and one half months since that decision was handed down. Among the federal court decisions applying Patterson since June 15, only a small minority are yet officially reported. A much larger number of those decisions can be found through LEXIS and FEP Cases (BNA). Also included in the study were several slip opinions which have not yet appeared in LEXIS or any official or unofficial reporter. The assessment which follows draws, as well, on interviews with several dozen attorneys handling existing section 1981 claims.

The Number of Dismissals

The impact of Patterson can be measured most readily by considering the number of race discrimination claims that have

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8 105 L.Ed.2d at 158-59.

9 105 L.Ed.2d at 180.

been dismissed by the lower courts, without ever being tried[10] and resolved on the merits, solely because of the Patterson decision. Between June 15, 1989 and November 1, 1989,[11] at least 96 such race discrimination claims have been dismissed by federal judges because of Patterson.[12] These dismissal orders were entered in a total of 50 different cases. The actual number of dismissed claims is, for a number of reasons,[13] higher than 96, but the precise figure cannot readily be ascertained. A list of cases in which section 1981 claims have been dismissed under Patterson is set forth at the end of this report.

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[10] A few of the cases discussed below were dismissed under Patterson after having been tried on the merits. E.g. Morgan v. Kansas City Area Transportation Authority, 1989 U.S. Dist. LEXIS 10482 (W.D. Mo. 1989) (overturning $60,000 jury verdict for victim of discrimination discharge).

[11] Excluding Saturdays, Sundays, Holidays, the federal courts were open a total of 97 days during this period.

[12] In ascertaining the number of section 1981 claims that have been dismissed, we have considered as distinct the claims of several different plaintiffs in the same lawsuit, e.g. Anderson v. United Parcel Service, 1989 U.S. Dist. LEXIS 12195 (N.D. Ill. 1989), and different types of discrimination claims brought in one suit by a single plaintiff, e.g. Dangerfield v. The Mission Press, 50 FEP Cas. 1171 (N.D. Ill. 1989). We treated as involving only a single claim cases in which a plaintiff sued several defendants because of a single discriminatory act, e.g. Sofferin v. American Airlines, 717 F.Supp. 597 (N.D. Ill. 1989), or in which several plaintiffs were allegedly injured by a single discriminatory act, e.g. Gonzalez v. The Home Insurance Co., 1989 U.S. Dist. LEXIS 8733 (S.D.N.Y. 1989).

[13] There are a number of decisions which dismiss multiple claims, but do not specify how many there were or what their nature might have been. E.g. Woods v. Miles Pharmaceuticals, 1989 U.S. Dist LEXIS 7642 (N.D. Ill. 1989). There appear to be a significant number of instances in which section 1981 claims have been dismissed without written opinions in one line orders, or have been dismissed by judges from the bench.

The race discrimination claim dismissed in Patterson itself involved racial harassment; there is, as is explained below, considerable confusion regarding what other forms of racial discrimination are and are not forbidden by section 1981. Somewhat surprisingly, however, the largest category group of claims dismissed under Patterson are not harassment claims at all. The largest group of claims that have been thrown out as a result of Patterson concerns allegations that a plaintiff was fired because of his or her race; some 31 of the dismissals are of this sort. A total of 22 racial harassment claims have been dismissed in the wake of Patterson, as have 16 claims alleging that promotions or transfers were denied on account of race. Patterson has led, as well, to the dismissal of 8 retaliation claims, and 6 demotion claims.[14]

The Characteristics of the Dismissed Claims

Prior to Patterson, the lower courts and the Supreme Court had interpreted section 1981 to protect not just blacks, but all racial and ethnic groups.[15] Thus, the decision in Patterson, narrowing the types of discrimination forbidden by section 1981, has affected claims by a wide range of plaintiffs. Among the section 1981 claims dismissed under Patterson have been

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[14] The cases in each category can be ascertained from the table printed at the end of the study.

[15] St. Francis College v. Al-Khazraji, 481 U.S. 604 (1987); (Arabs); Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1985) (Jews); McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976) (Whites).

allegations of racial discrimination against Hispanic,[16] native Hawaiian,[17] Chinese,[18] Filipino,[19] Cuban,[20] and Jewish[21] plaintiffs. In a significant number of the dismissed racial harassment claims, the plaintiffs were black women who also alleged they had been the victims of both racial and sexual harassment;[22] because of the practical difficulty of distinguishing between these two forms of discrimination, racial harassment claims prior to Patterson may have provided an indirect but potentially important adjunct to the limited and often inadequate remedies available under Title VII for sexual harassment.

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[16] Gonzalez v. The Home Insurance Co., 1989 U.S. Dist. LEXIS 8733 (S.D.N.Y. 1989).

[17] Leong v. Hilton Hotels, 50 FEP Cas. 738 (D. Hawaii, 1989).

[18] Risinger v. Ohio Bureau of Workers' Compensation, 883 F.2d 475 (6th Cir. 1989).

[19] Brackshaw v. Miles, Inc. 1989 U.S. Dist. LEXIS 12820 (N.D. Ill. 1989).

[20] Alvarez v. Norden Systems, Inc., 1989 U.S. Dist. LEXIS 9954 (S.D.N.Y. 1989).

[21] Sofferin v. American Airlines, Inc., 1989 U.S. Dist. LEXIS 9632 (N.D. Ill. 1989).

[22] E.g., Dangerfield v. The Mission Press, 50 FEP Cas. 1171 (N.D. Ill. 1989) (plaintiff Kimble); Busch v. Pizza Hut, Inc., 1989 U.S. Dist. LEXIS 11974 (N.D. Ill. 1989); Brooms v. Regal Tube Co., 881 F.2d 412 (7th Cir. 1989); Harris v. Home Savings Ass'n, 1989 U.S. Dist. LEXIS 7015 (W.D. Mo. 1989); Matthews v. Freedman, Darryl and McCormack, Taylor, & Co., 882 F.2d 83 (3d Cir. 1989); Mathis v. Boeing Military Airplane Co., 50 FEP Cas. 688 (D. Kan. 1989).

Although involving a variety of different types of claims and plaintiffs, the dismissed claims have a number of common characteristics. First, all alleged intentional discrimination on the basis of race. This was to be expected, since the Supreme Court held in 1982 that section 1981 forbids solely intentionally discriminatory practices, and has no application to practices with only a discriminatory effect.[23] Second, all of the dismissed claims were individual actions, although in a few instances several aggrieved individuals joined in the same lawsuit. The decisions provide no basis for ascertaining why no class actions were involved. Third, there is no indication in these decisions that the plaintiffs were seeking as a remedy any form of affirmative action; for practical and legal reasons such affirmative action remedies in employment discrimination cases are sought primarily in class actions.

One of the dismissed claims did involve affirmative action, but not as a court ordered remedy. In Torres v. City of Chicago, 1989 U.S. Dist. LEXIS 9503 (N.D. Ill. 1989), Patterson was invoked to prevent a plaintiff from challenging the legality of a minority set aside program. The district court explained:

> The relevant facts are not in dispute. Torres is a black Hispanic female who owns and operates Legal Secretarial Services, Ltd. On July 2, 1984, Torres entered into a written contract with the City in which Legal Secretarial Services agreed to provide the City with temporary telephone switchboard operators on an "as required" basis.... On

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[23] General Building Contractors v. Pennsylvania, 458 U.S. 375 (1982).

> November 4, 1984, Torres received a telephone call from Francisco DuPrey, then the Deputy Director of the Mayor's Office of Inquiry and Information. During their conversation, DuPrey informed Torres that unless she could prove that black Americans control 51 percent or more of her business, the City would cancel her contract.... On November 6, 1984, DuPrey informed Torres that the City terminated her contract because s[h]e was Hispanic rather than black.

1989 U.S. Dist. LEXIS 9503 at 1-2. The district court dismissed Torres' complaint on the ground that, under Patterson, "Section 1981 ... does not apply to post-formation conduct where, as here, a contract allegedly is breached." Id. at 3.

The decisions handed down since Patterson illustrate the egregious nature of the forms of harassment, and other discrimination, for which section 1981 no longer provides a remedy. The action in Brooms v. Regal Tube Co., 881 F.2d 412 (7th Cir. 1989), was brought by a 36 year-old black female who had been employed as an industrial nurse at Regal Tube Company for 16 months beginning in 1983. The district court found that during the course of her employment Brooms' supervisor, Charles Gustafson, subjected her to repeated explicit racial and sexual remarks, and in one instance directly propositioned her. On two occasions Gustafson displayed to Brooms illustrations of interracial sexual acts, and told her that she was hired to perform the kind of sexual acts depicted. On the second occasion, after Gustafson threatened to kill her, Brooms fled screaming and suffered a fall down a flight of stairs. She thereafter left Regal Tube and received two months of disability

pay for severe depression brought on by the repeated harassment, which left her unable to work on a permanent basis for several years. The litigation was pending in the Seventh Circuit when Patterson was decided; the court of appeals summarily dismissed the complaint, reasoning that the alleged harassment was lawful under section 1981.

> It is undisputed that Brooms' section 1981 claim does not relate to "conduct at the initial formation of the [employment] contract" or to "conduct which impairs the right to enforce contract obligations...." Thus, Brooms' section 1981 claims appear to be foreclosed by Patterson and the claim must be dismissed.

881 F.2d at 424.

In Leong v. Hilton Hotels, 50 FEP Cas. 738 (D. Hawaii 1989), the district court applied Patterson to dismiss the complaint of B. Kishaba, a Hawaiian woman of Asian extraction:

> It is undisputed that [Kishaba's supervisor] McDonough made many derogatory and discriminatory remarks about various ethnic groups....McDonough referred to a Japanese person as a "Jap" and compared local people to "the spics in New York," stating that locals are "not capable of being supervisors" and are "incompetent".... Kishaba witnessed racist behavior of a more subtle kind. When a Jewish group attempted to contact the executive office, McDonough told her to have D'Rovencourt take care of it because "he's our resident." She asserts that there was no doubt from his manner that he meant "resident Jew" ... McDonough told her ... "in a contemptuous way" that "I have to have the only secretary who does the hula." Additionally, McDonough frequently used the term "you people" in such phrases as "what's the matter with you people"" or "if you people don't shape up, I'll get rid of all of you." Kishaba states that "there was no doubt whatever that his references to

> "people" were to local Asians and Hawaiians.... McDonough adopted a rude and aggressive behavior with Kishaba, yelling at her frequently and demeaning her in front of other employees.

50 FEP Cas. at 739. The district court held that Patterson required dismissal of Kishaba's claim, reasoning that racial harassment, even racial harassment resulting in constructive discharge, was legal under section 1981.

In Mason v. Coca-Cola Bottling Co., 1989 U.S. Dist. LEXIS 10533 (D.Kan. 1989), the defendant conceded that co-workers of its employee, Mr. Mason, had told "numerous racial jokes and used frequently racial epithets toward [him] and that plaintiff let it be known that these racially offensive practices upset him." Among the more recent incidents was a co-worker's comment that he had "never seen a depressed nigger before," after Mason's wife gave birth to a still-born child. A supervisor of Mason had also empathized with a customer's complaints that Mason, a black man, was serving her, saying "you know how they are." The district court dismissed Mason's section 1981 claims in light of Patterson. In Dangerfield v. Mission Press, 50 FEP Cas. 1171 (N.D. Ill. 1989), several black plaintiffs claimed that their employer alternately harassed, demoted and terminated them in violation of section 1981. Two of the plaintiffs alleged that officials of Mission Press refused to assign work to them, or assigned work for which they were not trained, and then verbally abused them as "stupid" and "lazy." One plaintiff claimed that the defendant demoted him while allowing a lateral transfer for a

white employee in a comparable position. All three claimed that Mission Press subjected them to intense supervision not given to white employees. The district court held that "[s]uch conduct is contemptible. After Patterson, however, it is not actionable. At least, not under § 1981." 50 FEP Cas. at 1172.

The majority in Patterson insisted on a narrow construction of section 1981 in order to avoid overlapping the separate prohibitions and remedies of Title VII.

> Interpreting § 1981 to cover post-formation conduct unrelated to an employee's right to enforce her contract, such as incidents relating to the conditions of employment .. would ... undermine the detailed and well-crafted procedures for conciliation and resolution of Title VII claims ... where conduct is covered by both § 1981 and Title VII, the detailed procedures of Title VII are rendered a dead letter .... We should be reluctant ... to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute.[24]

A significant number of the claims that have been dismissed in the wake of Patterson, however, involved discriminatory practices that were not covered by Title VII at all. In Gonzalez v. The Home Insurance Co., 1989 U.S. Dist. LEXIS 8733 (S.D.N.Y. 1989), the complaint alleged that the defendant insurance companies had refused to be represented by the plaintiff insurance agency because the owners of the agency were Hispanic. In Nolan's Auto Body Shop, Inc. v. Allstate Insurance Co., 718 F.Supp. 721 (N.D. Ill. 1989), the plaintiffs claimed that Allstate had cancelled an

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[24] 105 L.Ed.2d at 153.

agreement for insurance repair work to be done at a garage because its owners were black. The plaintiff in Clark v. State Farm Insurance Co., 1989 U.S. Dist. LEXIS 10666 (E.D. Pa. 1989), asserted that State Farm had refused to pay her legitimate insurance claim because she was black. See also Ragin v. Steiner, Clateman and Associates, 714 F. Supp. 709, 713 (S.D.N.Y. 1989) (racially oriented advertisement); Torres v. City of Chicago, 1989 U.S. Dist LEXIS 9503 (N.D. Ill. 1989). In all of these cases Title VII was plainly inapplicable. The only federal statute which arguably forbad the alleged discrimination was section 1981, but in each case the claim was nonetheless dismissed under Patterson.

A number of other dismissals involved employment discrimination claims which, for a variety of reasons, were not actionable or could not be remedied under Title VII. In Guerra v. Tishman East Realty, 1989 U.S. Dist. LEXIS 6744 (S.D.N.Y. 1989), the district court held, in light of Patterson, that it was legal under section 1981 for a racially motivated third party to coerce or induce an employer to fire a black worker. In Washington v. Lake County, Illinois, 717 F.Supp. 1310 (N.D. Ill. 1989), the judge who threw out the plaintiff's section 1981 claim also held that the plaintiff could not sue his allegedly racially motivated supervisor under Title VII because the supervisor was not an "employer" within the meaning of Title VII. In Mason v. Coca-Cola Bottling Co., 1989 U.S. Dist. LEXIS 10533 (D. Kan. 1989), the district court not only dismissed the plaintiff's

section 1981 harassment claims, despite acknowledging the undisputed racial harassment that had occurred, but also dismissed the plaintiff's Title VII claim on the ground that, in the court's view, Title VII did not provide a remedy for all racial harassment, but only for racial harassment that "destroy[ed] the emotional and psychological stability of the [plaintiff]."

The majority in Patterson assumed that the availability of a section 1981 remedy would induce plaintiffs to deliberately disregard the conciliation procedures established by Title VII. Frequently, however, the plaintiffs whose claims were dismissed under Patterson had indeed attempted to invoke those very Title VII procedures. In Sofferin v. American Airlines, 717 F. Supp. 597 (N.D. Ill. 1989), and Hall v. County of Cook, Illinois, 719 F. Supp. 721 (N.D. Ill. 1989),[25] the plaintiffs inadvertently forfeited their Title VII claims by filing their administrative charges with the wrong agency. In three cases the plaintiffs properly filed their administrative charges with EEOC, but were held to have delayed too long in doing so. Byrd v. Pyle, No. 87-3547 (CRR), D.D.C. (slip opinion, Sept. 1, 1989); Brackshaw v. Miles, 1989 U.S. Dist. LEXIS 12820 (N.D. Ill. 1989); Mason v. Coca-Cola Bottling Co., 1989 U.S. Dist. LEXIS 10533 (D. Kan. 1989). In some cases the plaintiff carefully filed proper Title VII charges before suing under both Title VII and section 1981

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[25] Telephone Interview, November 1, 1989, with Thomas Buess, Chicago, Illinois, counsel for plaintiff.

because of the more efficacious remedies at times available under section 1981. Section 1981 is particularly important in harassment cases, since monetary relief often cannot be obtained in a harassment case brought under Title VII alone; in a number of the section 1981 harassment cases the plaintiff had also filed a timely Title VII claim.[26] In several other cases a section 1981 claim appears to have been joined with a Title VII claim for the purpose of obtaining a jury trial.[27]

Lower Court Opinions Interpreting Patterson

The impact of Patterson is complicated considerably by the fact that the majority opinion raises far more questions than it resolves. Prior to Patterson the federal courts had held that virtually all forms of racial discrimination in employment violated section 1981. The decision in Patterson leaves clear only two things about the scope of section 1981: a racially motivated refusal to hire violates an employee's rights under section 1981, and a practice of racial harassment, adopted after an employee was hired, does not. The Supreme Court's decision leaves in an entirely confused state the application of section 1981 to other discriminatory employment practices. The majority opinion apparently contemplates that some but not all promotion

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[26] Brackshaw v. Miles, Inc., 1989 U.S. Dist. LEXIS 12820 (N.D. Ill. 1989); Harris v. Home Savings Ass'n, 1989 U.S. Dist. LEXIS 7015 (W.D. Mo. 1989); Washington v. Lake County, Illinois, 717 F.Supp. 1310 (N.D. Ill. 1989).

[27] Bush v. Union Bank, 1989 U.S. Dist. LEXIS 10936 (W.D. Mo. 1989); Cooperidge v. Terminal Flight Handling, 50 FEP Cas. 812 (W.D. Tenn. 1989).

claims will remain within the scope of section 1981; whether few or many promotion decisions are still covered by section 1981, and how the line is to be drawn, are entirely unclear. The majority opinion makes no reference, favorable or unfavorable, to the large number of pre-Patterson section 1981 employment cases, including, for example, the Court's own prior decisions applying section 1981 to claims of discriminatory discharges.[28] Patterson, as a consequence, has spawned a host of novel and unprecedented new issues about the meaning of section 1981, issues which in the ordinary course of litigation could easily require a decade or more to resolve, and which will breed conflict and confusion among the lower courts.

The disagreements and uncertainty that will inevitably flow from the Patterson decision became apparent within a matter of months. In Colorado, for example, District Judge Arraj concluded in Padilla v. United Air Lines, 716 F. Supp. 485 (D. Colo. July 5, 1989), that racially discriminatory dismissals still violate section 1981 because "termination affects the existence of the contract, not merely the terms of its performance," and that the plaintiff's § 1981 discriminatory

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28 Johnson v. Railway Express Agency, 421 U.S. 454, 459-60 (1975); McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 275 (1976); Delaware State College v. Ricks, 449 U.S. 250 (1980); St. Francis College v. Al-Khazraji, 481 U.S. 604 (1987); Goodman v. Lukens Steel Co., 482 U.S. 656 (1987). Virtually every federal circuit court of appeals prior to Patterson had affirmatively stated that terminations were covered by section 1981. E.g. Estes v. Dick Smith Ford, Inc., 856 F.2d 1097, 1100-01 (8th Cir. 1988); Connor v. Fort Gordon Bus. Co., 761 F.2d 1495, 1498-99 (11th Cir. 1985).

firing claim was therefore good after Patterson. Judge Babcock of the same District Court, on the other hand, expressly rejected Judge Arraj's interpretation of section 1981 and Patterson, dismissing a § 1981 termination claim case similar to that in Padilla. "I respectfully disagree with my colleague's rationale . . . [d]iscriminatory discharge occurs after the commencement of the employment relationship and does not affect the employee's right to make or enforce contracts." Rivera v. A.T. & T. Information Systems, 719 F. Supp. 962 (D. Colo. 1989).

On August 14, 1989, Judge Rovner of the federal District Court in Chicago held that section 1981 does not forbid an employer from dismissing an employee in retaliation for having complained about racial discrimination. "Because [this] Court has determined that plaintiff's discharge is not actionable under section 1981, the fact that the discharge may have been retaliatory has no impact on the Court's holding." Hall v. County of Cook, Illinois, 719 F. Supp. 721 (N.D. Ill. August 14, 1989). The next day Judge Duff, also of the District Court in Chicago, reached the opposite conclusion, holding that discriminatory discharges do violate section 1981, ruling in a case in which two white plaintiffs were allegedly terminated in retaliation for their complaints to company management about racial discrimination in hiring. English v. General Development Corporation, 717 F. Supp. 628 (N.D. Ill. 1989). The Ninth Circuit, and one opinion in the Southern District of New York

agree with Judge Rovner.[29] The Seventh Circuit, and a district court opinion in Colorado agree with Judge Duff.[30]

In Patterson the Supreme Court held that "[o]nly where the promotion rises to the level of an opportunity for a new and distinct relation between the employee and the employer is such a claim actionable under section 1981." 105 L.Ed.2d at 156. This "new and distinct relation" was entirely a novel concept in the law, and is certain to elicit imaginative and divergent theories among the lower courts.[31] As of today there appear to be several different interpretations of this phrase. The Fourth Circuit holds that the combination of increased responsibility and increased salary render a promotion a "new and distinct

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[29] Overby v. Chevron USA, Inc., 882 F.2d 470 (9th Cir. 1989) ("Though an argument could be concoted that [retaliation] impedes, in some broad sense, Overby's access to the EEOC, the court in Patterson counseled against stretching the meaning of section 1981 . . ."); Alexander v. New York Medical College, 50 FEP Cas. 1729 (S.D.N.Y. 1989)("retaliatory discharges . . . take place after the initial employment contract is made").

[30] Malhotra v. Cotter & Co., 50 FEP Cas. 1474 (7th Cir. 1989) ("clearly, when an employer punishes an employee for attempting to enforce her rights under section 1981, this conduct impairs the employee's ability to enforce her contract rights") (section 1981 would become "meaningless" if such claims were excluded)(Cudahy, J., concurring); Jordan v. U.S. West Direct Co., 50 FEP Cas. 633 (D. Colo. 1989)(section 1981 protects an employee subjected to retaliatory harassment because of his instigation of an investigation regarding discrimination).

[31] One district judge observed that this language in Patterson was "certain to generate substantial litigation before the line is marked out with any precision." Crader v. Concordia College, 1989 U.S. Dist. LEXIS 12114 (N.D. Ill. 1989).

relation".[32] Judge Posner, in a recent Seventh Circuit opinion, argued that a promotion involved a "new and distinct relation" if the position was one for which a non-employee could also have applied.[33] A Colorado district court opinion holds that whether a promotion would rise to the level of a "new and distinct relation" is a question of fact for the jury or other trier of fact.[34] Another group of decisions holds that an ordinary promotion is not actionable under section 1981, and limits "new and distinct relation" to changes like that occurring when a law firm associate becomes a partner, "a transformation from employee to employer."[35] Anderson v. United Parcel Service, 1989 U.S. Dist. LEXIS 12195 (N.D. Ill. 1989), rejected a section 1981 promotion case because the promotion involved a significant change in duties, but only a minor increase in salary; Williams v. National Railroad Passenger Corp., 716 F. Supp. 49 (D.D.C. 1989), rejected a section 1981 promotion claim because the promotion involved a significant increase in salary, but only a minor change in responsibilities. Two district court judges have

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32 Mallory v. Booth Refrigeration Supply Co., 882 F.2d 908 (4th Cir. 1989); see also Green v. Kinney Shoe Corp., 1989 U.S. Dist. LEXIS 10736 (D.D.C. 1989).

33 Malhotra v. Cotter & Co., 1989 U.S. App. LEXIS 13843, p. 13 (7th Cir. 1989).

34 Luna v. City and County of Denver, 718 F. Supp. 85 (D.Colo. 1989).

35 Sofferin v. American Airlines, 717 F. Supp. 597 (N.D. Ill. 1989); see also Dicker v. Allstate Life Insurance Co., 1989 U.S. Dist. LEXIS 12482 (N.D. Ill. 1989); Crader v. Concordia College, 1989 U.S. Dist. LEXIS 12114 (N.D. Ill. 1989).

expressly disapproved the standard advocated by Judge Posner in Malhotra; both of these judges, somewhat surprisingly, sit within the Seventh Circuit.[36] A number of other district opinions dismiss section 1981 promotion claims without ever articulating any standard at all regarding what constitutes a "new and distinct relation."[37]

There has been a divergence, as well, in the more general approach the lower courts have taken to the problems and issues raised by Patterson. Judge Richard Posner, a Reagan-appointee of a fairly conservative persuasion, has expressed concern as to "[h]ow many plaintiffs can successfully negotiate the treacherous and shifting shoals of present-day federal employment discrimination law." Malhotra v. Cotter & Co., 50 FEP Cas. 1474 (7th Cir. 1989). Several lower court decisions have recognized the need to allow section 1981 plaintiffs to amend their complaints to include additional allegations that may now be required by Patterson.[38] Other courts, however, have in the wake of Patterson dismissed section 981 claims with an alacrity

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[36] Dicker v. Allstate Insurance Co., 1989 U.S. Dist. LEXIS 12482 (N.D. Ill. 1989); Crader v. Concordia College, 1989 U.S. Dist. LEXIS 12114.

[37] Greggs v. Hillman Distributing Co., 50 FEP Cas. 429 (S.D. Tex. 1989); Brown v. Avon Products, Inc., 1989 U.S. Dist. LEXIS 12142 (N. D. Ill. 1989); Newman v. University of the District of Columbia, 1989 U.S. Dist. LEXIS 12346 (D.D.C. 1985).

[38] E.g. Hannah v. The Philadelphia Coca-Cola Bottling Co., 1989 U.S. Dist. LEXIS 7200 (E.D.Pa. 1989); Prather v. Dayton Power & Light Co., 1989 U.S. Dist. LEXIS 10756 (S.D. Ohio 1989); English v. General Development Corp., 717 F. Supp. 628 (N.D. Ill. 1989).

bordering on enthusiasm. Between June 15 and July 31, 1989, a majority of the orders dismissing Patterson claims were issued sua sponte; the defendants never filed any request for dismissal, and the plaintiffs were neither notified that dismissal was being considered by the court nor afforded any opportunity to submit a brief on the meaning of Patterson.[39] Sua sponte dismissals of civil claims are a debatable practice even when the law is crystal clear; in section 1981 cases, given the ambiguity of Patterson and the possibility that plaintiffs might be able to offer material additional allegations, sua sponte dismissals seem uniquely inappropriate.

A number of lower court decisions read as though the central purpose of Patterson was simply to throw out as many section 1981 race discrimination cases as possible. In Sofferin v. American Airlines, Inc., 717 F. Supp. 597 (N.D. Ill. 1989), the plaintiff contended that promotion from a "probationary" to a "tenured" position involved a new and distinct relation within the meaning of Patterson. Judge Norgle rejected that contention, in part, on the ground that it would permit too many promotion claims to remain actionable under section 1981:

> Plaintiff's [contention] . . . would create an exception which would swallow up the rule announced in Patterson, subjecting innumerable claims of discriminatory working conditions, which the Court

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[39] See Sofferin v. American Airlines, Inc., 717 F. Supp. 597; Guerra v. Tishman East Realty, 1989 U.S. App. Dist. LEXIS 6744 (S.D.N.Y. 1985); Woods v. Miles Pharmaceuticals, 1989 U.S. Dist. LEXIS 7643 (N.D. Ill. 1989); Riley v. Illinois Dept. of Mental Health, 1989 U.S. Dist. LEXIS 7686 (N.D.Ill. 1989).

> considered better addressed by Title VII's comprehensive scheme, to review under § 1981.

(Emphasis added) In Nolan's Auto Body Shop, Inc. v. Allstate Insurance Co., 718 F. Supp. 721 (N.D. Ill. 1989), the plaintiffs alleged that, after their first contract with Allstate was terminated for racial reasons, they asked Allstate to enter into a new contract, and that this request was denied because they were black. The district court did not suggest that a race based refusal to make such a new contract would somehow fall outside the literal language of section 1981 itself. Rather, Judge Bua dismissed this claim because of his fear that too many contract termination cases could successfully be repleaded in this manner:

> Patterson's distinction between preformation discrimination -- actionable under § 1981 -- and postformation discrimination -- not actionable under § 1981 -- would be obliterated under plaintiffs' theory of recovery. Discrimination plaintiffs could turn postformation conduct into preformation conduct simply by alleging that they sought a "new" contract reinstating the terms of a prior agreement.

(Emphasis added). The court evidently regarded as irrelevant the possibility that such an allegation might indeed be true. In Dangerfield v. The Mission Press, 50 FEP Cas. 1171, the plaintiffs alleged that their employer intended, at the time it contracted with them, to impose on them discriminatory terms of employment. Judge Hart insisted that such discrimination be regarded as legal under section 1981, fearful that it would otherwise be too easy for a plaintiff to state a cause of action:

> If a plaintiff can rely on post formation conduct to show the employer's state of mind at the time of

> contracting, and thereby sue under § 1981, then Patterson is essentially a nullity. In every suit, a plaintiff could allege that the employer intended all along to discriminate based on race, and that the post formation conduct is proof of unspoken intent. Section 1981 would in that case be used to expose the exact same conduct as Patterson disallows. . . . Plaintiff, in other words, would accomplish indirectly what Patterson directly prohibits.

(Emphasis added). This passage reads as though Patterson had declared that on-the-job discrimination and racial harassment were forms of protected activity with which the federal courts, at least in a section 1981 case, were not to interfere.

There has been an inexplicable flurry of dismissals in the federal district court in Chicago. Approximately one-third of all orders dismissing section 1981 claims have been issued by federal judges in Chicago, four times as many orders as in the next largest city, the two district courts for New York City. More dismissal orders have been entered in Chicago, and more section 1981 claims have been dismissed there, than in the next six largest (in terms of dismissals) cities combined. This has occurred, in part, because a majority of all sua sponte dismissal orders in the country have been issued by Chicago federal judges.[40] It is unclear whether these orders, or the other

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[40] Conley v. University of Chicago Hospitals, 50 FEP Cas. 1145 (N.D. Ill. 1989); Riley v. Illinois Dept. of Mental Health, 1989 U.S. Dist. LEXIS 7688 (N.D. Ill. 1989); Sofferin v. American Airlines, 717 F. Supp. 597 (N.D. Ill. 1989); Woods v. Miles Pharmaceuticals, 1989 U.S. Dist. LEXIS 7042 (N.D. Ill. 1989).

Chicago federal court dismissals,[41] are the result of some coincidence of benign factors, or reflect a substantive view of section 1981 or civil rights claims in general.

The Broader Impact of Patterson

The judicial decisions described above are necessarily limited to the race discrimination claims of individuals who are able to find an attorney who would take on their cases, and continue to pursue them, despite the decision in Patterson. Our discussions with attorneys across the country indicate that Patterson has had a palpable deterrent effect on attorneys asked to represent, or already representing, civil rights plaintiffs. In the wake of Patterson private practitioners are substantially and avowedly less willing to handle section 1981 cases, regardless of whether they may be convinced that they could prove that racial discrimination had indeed occurred. Lawyers who were already handling section 1981 cases when Patterson was filed are encouraging their clients to abandon those claims. In the long term this deterrent effect of Patterson is likely to be more

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41 Anderson v. United Parcel Service, 1989 U.S. Dist. LEXIS 9954 (N.D. Ill. 1989); Bush v. Pizza Hut, Inc., 1989 U.S. Dist. LEXIS 11974 (N.D. Ill. 1989); Dangerfield v. Mission Press, 50 FEP Cas. 1171 (N.D. Ill. 1989); Brown v. Avon Products, 1989 U.S. Dist. LEXIS 17142 (N.D. Ill. 1989); Hall v. County of Cook, 719 F. Supp. 721 (N.D. Ill. 1989); Nolan's Auto Body Shop v. Allstate Insurance, 718 F. Supp. 721 (N.D. Ill. 1989); Torres v. City of Chicago, 1989 U.S. Dist. LEXIS 9503 (N.D. Ill. 1989); Dicker v. Moore, 1989 U.S. Dist. LEXIS 12482 (N.D. Ill. 1989); Brackshaw v. Miles, Inc., 1989 U.S. Dist. LEXIS 12820 (N.D. Ill. 1989); Williams v. Edsal Mfg., 1989 U.S. Dist. LEXIS 12602 (N.D. Ill. 1989); Crader v. Concordia College, 1989 U.S. Dist. LEXIS 12114 (N.D. Ill. 1989).

important, and far reaching, than lower court opinions interpreting that decision.

Patterson has had this impact, in part, because it is perceived as reflecting or presaging an unwillingness on the part of the federal courts to award relief in section 1981 cases, if not civil rights cases generally. In most of the possible section 1981 cases considered by private attorneys, the meaning of Patterson and section 1981 are far from clear. But that very turmoil is often sufficient, for inexorable economic reasons, to dissuade counsel from handling these cases. Private attorneys who handle civil rights cases, of course, do not get paid unless the claim is successful. Success need not be a certainty, but when the probability of success falls too low, it makes no financial sense for a lawyer to take or pursue the case. Patterson has not guaranteed the failure of section 1981 promotion, transfer, discharge, dismissal, retaliation or salary claims, but the confusion wrought by Patterson has created a legal environment in which today, and for the foreseeable future, some meritorious section 1981 cases will not be brought simply because of that turmoil. Patterson will affect, as well, private enforcement of Title VII, because there are forms of discrimination, such as racial harassment, which Title VII forbids, but for which Title VII itself provides no substantial monetary remedy. Doubts created by Patterson are likely to discourage the filing of combined Title VII - section 1981 harassment claims; without the section 1981 element of those

cases, the remaining Title VII claim will often not be worth pursuing, for either plaintiffs or their counsel. The extent to which Patterson has deterred or discouraged lawyers in pending litigation is reflected in cases in which plaintiffs' counsel conceded that their section 1981 claims were no longer viable,[42] or in which plaintiffs' counsel simply did not respond when the viability of those claims were challenged by the defendant or the court.[43]

Private attorneys are also being deterred from handling or pursuing these cases because of fear that the federal courts will impose sanctions on them under Rule 11 of the Federal Rules of Civil Procedure. Rule 11 sanctions are limited, at least in theory, to the filing or pursuit of frivolous claims. But in the wake of Patterson it is far from clear which section 1981 claims will be regarded by the courts as frivolous. In Nolan's Auto Body Shop v. Allstate Insurance Co., 718 F.Supp. 721 (N.D. Ill. 1989), for example, Judge Bua denounced as a "disingenuous pleading" an allegation that a plaintiff, who originally complained of contract termination, had sought to reinstate that contract. Several other cases, however, hold that termination claims may be recast in just this manner to conform to the

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[42] Brackshaw v. Miles, Inc., 1989 U.S. Dist. LEXIS 12820 (N.D. Ill. 1989); Torres v. City of Chicago, 1989 U.S. Dist. LEXIS 9503 (N.D. Ill. 1989).

[43] Carroll v. General Motors, 1989 U.S. Dist. LEXIS 10481 (D. Kan. 1989); Copperidge v. Terminal Freight Handling, 50 FEP Cas. 812 (W.D. Tenn. 1989); Mason v. Coca-Cola Bottling Co., 1989 U.S. Dist. LEXIS 10533 (D. Kan. 1989); Matthews v. Freedman, Darryl, McCormick, Taylor & Co., 882 F.2d 83 (3d Cir. 1989).

requirements of Patterson.[44] In Matthews v. Freedman, Darryl and McCormick, Taylor & Co., 882 F.2d 83 (3d Cir. 1989), the Third Circuit imposed sanctions on an attorney who failed to withdraw an appeal in a section 1981 discharge case, asserting that Patterson "was patently dispositive of the issues" and that the appeal, in the wake of Patterson, was obviously "frivolous." A number of district courts, on the other hand, continue to sustain discharge claims after Patterson.[45] Rule 11 sanctions are not, of course, a certainty after Patterson; a defense motion for sanctions was recently denied, for example, in Dicker v. Allstate Insurance Co., 1989 U.S. Dist. LEXIS 12482 (N.D. Ill. 1989). But the possibility that they will be sought in a given case will almost inevitably color the judgment of counsel.

The decision in Patterson, and the confusion which it has created, have also diminished significantly the possibility of settling section 1981 claims. In a number of pending section 1981 cases, settlement negotiations, or settlements tentatively arrived at, have collapsed as a result of Patterson. The settlement of a meritorious civil rights claim ordinarily requires that the relevant law and fact be reasonably clear, so that counsel for the parties can arrive at a similar assessment

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[44] Padilla v. United Airlines, 716 F. Supp. 485 (D. Colo. 1989); Jones v. Pepsi-Cola General Bottlers, 1989 U.S. Dist. LEXIS 10407 (W.D. Mo. 1989).

[45] In addition to the cases cited in the previous footnotes, see Birdwhistle v. Kansas Power and Light Co., 1989 U.S. Dist. LEXIS 9227 (D. Kan. 1989); Gamboa v. Washington, 716 F. Supp. 353 (N.D. Ill. 1989).

of the likely outcome of further litigation. In the wake of Patterson, however, the scope of section 1981 is an open question; today a civil rights defendant has good cause to hope that virtually any section 1981 claim will be dismissed, if not in the district court then on appeal. As a consequence, section 1981 cases which would have been settled but for Patterson will now be tried instead.

CONCLUSION

It is not our intent to reargue the technical legal issues addressed by the Supreme Court in Patterson. The majority opinion, whether or not one agrees with it, is at the least an ingenious academic exercise in the conceivable. But is an exercise that has had very serious and regrettable consequences for the men and women who have to live with the intractable realities of racial discrimination.

Patterson has not in a single blow returned the nation to the deplorable ideas and practices embraced by the Supreme Court in Plessy v. Ferguson. But our entire legal system is correctly premised on a recognition that individuals and officials shape their conduct in light of the likely legal consequences of those actions. When the Supreme Court reduces the likelihood that discriminatory employers can be called to account for their practices, or restricts the remedies that even a successful civil rights plaintiff can win, the Court shifts the balance of considerations that affect how employers will act.

The majority in Patterson insisted it had not retreated so much as one inch from the national policy to forbid intentional racial discrimination. But effective protection against invidious discrimination, like effective protection of the national security, can be imperiled as much by a weakened defense as by an overt policy of tolerating repeated assaults. This is not time for tampering with the arsenal of remedial measures that have made possible the civil rights progress of the last two decades. Creativity and flexibility continue to have an important role to play in the evolution of the law. But the hard won right of black Americans, of all Americans, to equal opportunity should not be subject to rehearing or reconsideration, even in the highest court in the land.

Eric Schnapper

Cases Dismissed Under Patterson v. McClean Credit Union

As of November 1, 1989

Key:

H Harassment
D Discharge/Termination
DM Demotion
P Promotion/Transfer
R Retaliation
N7 Discriminatory practice not covered by Title VII
M Miscellaneous discriminatory treatment

Summary
Number of Claims Dismissed, by Type

Harassment	22	Discharge	31
Demotion	6	Promotion/Transfer	16
Retaliation	8	No Title VII coverage	7
Misc. employment	6	TOTAL	96

D DM R Alexander v. New York Medical College, 50 FEP Cas. 1729 (S.D.N.Y. 1989).

D Alvarez v. Norden Systems, Inc., 1989 U.S. Dist. LEXIS 9954 (S.D.N.Y. August 24, 1989).

P (5) Anderson v. United Parcel Service, 1989 U.S. Dist. LEXIS 12195 (N.D.Ill. October 5, 1989). (5 plaintiffs).

H D Becton v. Burlington Northern Railroad Co., 878 F.2d 1436 (6th Cir. 1989).

H P D Brackshaw v. Miles, Inc., 1989 U.S. Dist. LEXIS 12820 (N.D.Ill. 1989).

H Brooms v. Regal Tube Company, 881 F.2d 412 (7th Cir. 1989).

D P Brown v. Avon Products, 1989 U.S. Dist. LEXIS 12142 (N.D.Ill. 1989).

H Bunyan v. Fleming Food Co., No. 88-9652 (E.D.Pa.)(order from the bench, September 27, 1989).

H(2) D Busch v. Pizza Hut, Inc., 1989 U.S. Dist. LEXIS 11974 (N.D.Ill. 1989).

D Bush v. Union Bank, 1989 U.S. Dist. LEXIS 10936 (W.D.Mo. 1989). (3 plaintiffs)

P — Byrd v. Pyle, No. 87-3547 (CRR)(D.D.C.)(Slip opinion, September 1, 1989).

D — Carroll v. General Motors, 1989 U.S. Dist. LEXIS 10481 (D.Kans. 1989).

D — Carter v. Aselton, 50 FEP Cas. 251 (M.D.Fla. 1989).

N7 — Clark v. State Farm Insurance, 1989 U.S. Dist. LEXIS 10666 (E.D.Pa. 1989).

D — Conley v. University of Chicago Hospitals, 50 FEP Cas. 1145 (N.D.Ill. 1989).

D — Copperidge v. Terminal Freight Handling, 50 FEP Cas. 812 (W.D. Tenn. 1989).

H D P — Crader v. Concordia College, 1989 U.S. Dist. LEXIS 12114 (N.D.Ill. 1989).

H D DM R (3) — Dangerfield v. Mission Press, 50 FEP Cas. 1171 (N.D.Ill. 1989). (3 plaintiffs)

P (3) — Dicker v. Allstate Life Insurance Co., 1989 U.S. Dist. LEXIS 12482 (N.D.Ill. 1989).(3 plaintiffs)

N7 (2) — Gonzalez v. Home Insurance Co., 50 FEP Cas. 1173 (S.D.N.Y. 1989).

D P M — Greggs v. Hillman Distributing, 719 F.Supp. 552; 50 FEP Cas. 429 (S.D.Tex. 1989).

H M N7 — Guerra v. Tishman East Realty, 1989 U.S. Dist. LEXIS 6744 (S.D.N.Y. 1989).

D — Hall v. County of Cook, Illinois, 719 F.Supp. 721 (N.D.Ill. 1989).

H — Harris v. Home Savings Association, 1989 U.S. Dist. LEXIS 7015 (W.D.Mo. 1989).

D M — International City Management Assoc. Retirement Corp. v. Watkins, 1989 U.S. Dist. LEXIS 12201 (D.D.C. 1989).

D — Jackson v. Commonwealth Edison, 1989 U.S. Dist. LEXIS 10514 (N.D.Ill. 1989).

D — Jones v. Alltech Associates, 1989 U.S. Dist. LEXIS 10422 (N.D.Ill. 1989).

DM — Jordan v. U.S. West Direct Co., 50 FEP Cas. 633 (D.Colo. 1989).

H(2) D DM Leong v. Hilton Hotels, 50 FEP Cas. 738 (D.D.C. 1989).

H Mason v. Coca-Cola Bottling Co., No. 88-2636, U.S. Dist. LEXIS 10533 (D.Kans. 1989).

H M Mathis v. Boeing Military Airplane Co., 719 F.Supp. 991; 50 FEP Cas. 689 (D.Kans. 1989).

H D Matthews v. Freedman, Darryl and McCormick, Taylor & Co., 882 F.2d 83, 50 FEP Cas. P874 (3rd Cir. 1989).

R Matthews v. Northern Telecom, Inc., 1989 U.S. Dist. LEXIS 12926 (S.D.N.Y. 1989).

H Miller v. Aldridge, 1989 U.S. Dist. LEXIS 9747 (1989).

D Morgan v. Kansas City Area Transportation Authority, 1989 U.S. Dist. LEXIS 10482 (W.D.Mo. 1989).

P Newman v. University of the District of Columbia, 1989 U.S. Dist. LEXIS 12201 (D.D.C. 1989).

N7 Nolan's Auto Body Shop v. Allstate Insurance, 718 F.Supp. 721 (N.D.Ill. 1989).

H Obago v. Union of American Hebrew Congregations, 1989 U.S. Dist. LEXIS 9055 (S.D.N.Y. 1989)

R Overby v. Chevon USA, Inc., 884 F.2d 470, 50 FEP Cas. 1211 (9th Cir. 1989).

D Prather v. Dayton Power & Light, 1989 U.S. Dist. LEXIS 10734 (S.D.Ohio 1989).

N7 Ragin v. Steiner, Clateman & Assoc., 714 F.Supp. 709 (S.D.N.Y. 1989).

H Riley v. Illinois Dept. of Mental Health, 1989 U.S. Dist. LEXIS 7686 (N.D.Ill. 1989).

H Risinger v. Ohio Bureau of Workers' Compensation, 883 F.2d 475 (6th Cir. 1989).

D Rivera v. AT&T Information Systems, 719 F.Supp. 962 (D. Colo. 1989).

P D Sofferin v. American Airlines, Inc., 717 F.Supp. 597 (N.D.Ill. 1989).

N7 Torres v. City of Chicago, 1989 U.S. Dist. LEXIS 9503 (N.D.Ill. 1989).

H D Washington v. Lake County, 717 F.Supp. 1310; 50 FEP Cas. 1247 (N.D.Ill. 1989).

D (2) Williams v. Edsal Manufacturing Co., 1989 U.S. Dist. LEXIS 12606 (N.D.Ill. 1989).(2 plaintiffs)

P M R Williams v. National Railroad Passenger Corp., 716 F.Supp. 79 (D.D.C. 1989).

M R Woods v. Miles Pharmaceuticals, 1989 U.S. Dist. LEXIS 7642 (N.D.Ill. 1989).

Chairman HAWKINS. Mr. Chambers, the Chair would like to inquire as to when the two additional reports will be ready and will be submitted to us?

Mr. CHAMBERS. We think we can present them next week, Mr. Chairman.

Chairman HAWKINS. By unanimous consent, we will hold the record open so that those reports will be included in the hearing today.

Mr. CHAMBERS. Thank you, Mr. Chairman.

Chairman HAWKINS. Thank you.

The next witness is Mr. Sholom Comay, President of the American Jewish Committee. Mr. Comay, we are delighted to have you before the committee.

Mr. COMAY. Thank you, Mr. Chairman.

Mr. Chairman, Chairman Edwards, members of the committee and of the subcommittee, I am Sholom Comay and I am President of the American Jewish Committee. The American Jewish Committee is proud to be one among the many supporters of the legislation that you are taking up today. We are united in our goal to end the racial, religious, ethnic and gender discrimination which impairs our country's ability to guarantee to each of its citizens the kind of fairness which our Constitution envisions.

The Civil Rights Act of 1990 presents Congress with the opportunity to begin to rectify and to respond to several egregious decisions handed down by the Supreme Court during its 1988-89 term. By passing this bill, Congress will send the important signal that justice must not be denied, that this country will neither tolerate nor support discrimination in employment, and that, in fact, for the ethical, moral and economic well-being of our Nation, such discrimination cannot be allowed. I am pleased and honored to be here this morning to be able to affirm this very important message.

I come before you wearing two hats today, and I would like to make a point about each of those hats. First, I come before you as the senior executive of a business, a corporation which employs some 600 people, and I know what running a business, meeting a payroll, supervising employees, and especially being accountable to shareholders, is all about.

One of the things which I would like to convey to you this morning is that, in my judgment, there is no reason why American business ought not support this bill. I believe that it is in the interest of American business to strongly support the measure. The business community benefits from equal employment opportunity because it gives us a better and a stronger work force, and because a society and a government which supports such a goal will be stronger for it and, therefore, we in business will be stronger for it.

I also come before you today as President of the American Jewish Committee, which is an organization committed to the promotion of civil rights and human rights in the United States and around the world. Founded in 1906, the American Jewish Committee is the pioneer human relations agency in the United States.

As a major part of our work, we have a long and proud history of striving for equal opportunity for all people in this pluralistic society.

As part of the commitment of the American Jewish Committee to civil rights, we believe very strongly in affirmative action, where it is both appropriate and necessary to remedy past wrongs and to ensure that the disadvantaged have a full and fair opportunity to become part of the mainstream of society. We believe that these purposes can be served by reasonable goals and timetables, in contrast to rigid quotas, which we oppose, because we believe that quotas undermine the concept of individual merit and the principle of equal opportunity itself. On the other hand, goals and timetables are effective—and very often necessary—tools to measure and to ensure the effectiveness of an affirmative action program.

Why do I bring this up? I bring it up in order to emphasize that nothing in the Civil Rights Act of 1990 either creates or condones the institution of quotas. Rather, the Act focuses on providing remedies for discrimination and assurances that stumbling blocks will not be placed in the path of those who are the victims of discrimination. As an agency firmly opposed to quotas, the American Jewish Committee does not hesitate in fully and enthusiastically supporting the Civil Rights Act of 1990.

Before turning to the specifics of the legislation, I think it is important to emphasize that behind these specifics, behind the very dry legalisms in the bill, are people. That's why the bill addresses the need to restore and to strengthen civil rights protection for people whose lives will be—and already have been in many instances—dramatically impacted by the weakening of our laws against employment discrimination. We should add and emphasize our concern for the well-being of this country, which is premised on our being a strong and pluralistic society based on equal opportunity for everyone.

Now, what does the Civil Rights Act of 1990 seek to accomplish? It protects Americans against race discrimination on the job and through contracts; it restores an appropriate burden of proof in disparate impact cases; it facilitates prompt and orderly resolution of challenges to employment practices which were installed to implement consent decrees and court orders; it clarifies that job bias is always illegal; it grants to women and to religious and ethnic minorities the right to recover damages for intentional employment discrimination, which are now available to racial minorities; it corrects the statute of limitations; it restores fair and effective enforcement of civil rights; and, very importantly, it reaffirms a more generous rule of construction in civil rights cases.

Taken together, the provisions of the Civil Rights Act of 1990 will restore and will strengthen civil rights practices. This is a necessary and appropriate response to the adverse decisions of the Supreme Court's 1988–89 term. This Act will make employment discrimination suits easier to bring and less subject to challenge than they have been since the Court's rulings.

The Civil Rights Act of 1990 is essential to achieve the goal of a discrimination-free workplace. Therefore, the American Jewish Committee very strongly endorses this legislation.

Thank you.

[The prepared statement of Sholom D. Comay follows:]

Testimony

of

Sholom D. Comay, President
American Jewish Committee

on

H.R. 4000
The Civil Rights Act of 1990

Before

The Education and Labor Committee
and
The Subcommittee on Civil and Constitutional Rights
of the
Judiciary Committee

of the

U.S. House of Representatives

February 20, 1990

Representative Hawkins, Representative Edwards, Committee and Subcommittee members, good morning. Thank you for the opportunity to address you today on the Civil Rights Act of 1990. The American Jewish Committee is proud to be one among many supporters of this legislation appearing before you. We are united in our goal to end the racial, religious, ethnic and gender discrimination that occurs today which impairs this country's ability to guarantee to all its citizens the fairness envisioned in the Constitution.

The Civil Rights Act of 1990 presents Congress with the opportunity to begin to rectify and respond to several egregious decisions handed down by the Supreme Court during its 1988-89 term. These decisions have weakened America's fair employment laws, thereby making it more difficult for Americans to seek legal redress against unfair treatment at work. By passing this bill, Congress will send the important signal that justice must not be denied, that this country will neither tolerate nor support employment discrimination and that in fact, for the ethical, moral and economic well-being of this nation, such discrimination must not be allowed. I am pleased and honored to be here to affirm this very important message.

Before I turn to the specifics of the legislation there are two points I wish to make, one for each of the hats I wear as I sit here today. First, I come before you as a senior executive of a business which employs some 600 people. I know what running a business,

meeting a payroll, supervising employees and being accountable to shareholders are all about. I am here to tell you that there is no reason why American business should not support this bill. In fact, it is in the interest of American business to strongly support this measure. The business community has and will benefit from equal employment opportunity because a society and government which supports such a goal will be the stronger for it.

Future trends support this position. Studies indicate that by the year 2000, 50% of new job applicants will be women and racial or ethnic minorities. If the United States is to compete in an increasingly competitive and interdependent world, we need a strong, motivated and productive labor force, not one which is hobbled by the shackles of employment discrimination. The Civil Rights Act of 1990 would help return to employees the right they held, before recent Supreme Court decisions, to seek relief from on-the-job discrimination. The Civil Rights Act also would help guarantee that employees would receive an equal opportunity to succeed in their jobs and would also help them to better protect themselves from invidious attack.

I also come before you today as President of the American Jewish Committee, a national organization committed to the promotion of human rights in the United States and around the world. Founded in 1906, the AJC is the pioneer human relations agency in the U.S.

As a major part of our work, we have a long and proud history of striving for equal opportunity for all people in our pluralistic society. For example, as in many other civil rights cases, the AJC filed an amicus brief in Brown v. Board of Education. In fact, in the Supreme Court's historic decision in Brown, AJC-sponsored research was cited to prove the destructive effects of segregation and prejudice on the development of children. AJC also has been active in Congressional battles in support of civil rights legislation. We strongly endorsed and advocated for several bills including the Civil Rights Act of 1964, the Voting Rights Act of 1965, and more recently, the Civil Rights Restoration Act of 1987 and the Americans with Disabilities Act, the latter of which passed the Senate and is now in the House. We also are a founding member of the Leadership Conference on Civil Rights.

Let me now make another point which I will explain shortly. As part of AJC's commitment to civil rights, we strongly believe that affirmative action is at times both appropriate and necessary to remedy past wrongs and to ensure that the disadvantaged have a full and fair opportunity to become part of mainstream society. We believe these purposes can be served by reasonable goals and timetables -- in contrast to rigid quotas, which we oppose because we believe that quotas undermine the concept of individual merit and the principle of equal opportunity itself. On the other hand, goals and timetables are effective -- and often necessary -- tools to measure and ensure the effectiveness of an affirmative action program.

Why do I say all of this? Because I want to emphasize that nothing in the Civil Rights Act of 1990 creates or condones the institution of quotas. Fairly read, and I emphasize fairly read, the bill is not even about reasonable goals and timetables. Instead, it focuses on providing remedies for discrimination and assurances that stumbling blocks will not be placed in the path of those who are its victims. As an agency firmly opposed to quotas, the AJC does not hesitate in fully and enthusiastically supporting the Civil Rights Act of 1990.

Before I turn to the specifics of the legislation, I want to emphasize that behind these specifics, behind the somewhat dry legalisms in the bill that address the need to restore and strengthen civil rights protections, are people: People whose lives will be, and already have been, dramatically impacted by the weakening of laws against employment discrimination. And this says nothing about the well-being of America which benefits from a strong pluralistic society based on equal opportunity for all.

What does the Civil Rights Act of 1990 seek to accomplish? It:

- Protects Americans against race discrimination on the job and in private contracts;

- Restores the burden of proof in disparate impact cases;

- Facilitates prompt and orderly challenges to consent decrees and court orders;

- Clarifies that job bias is always illegal;

- Grants women and religious and ethnic minorities the right to recover damages for intentional employment discrimination now available to racial minorities;

- Corrects the statute of limitations;

- Restores fair and effective civil rights enforcement; and

- Reaffirms generous rule of construction in civil rights cases.

Perhaps as important as any provision in the bill is the section which directs that civil rights laws be construed so as to achieve their purpose of eliminating discrimination and effectuating remedies. That section asserts, in essence, the message of the entire bill -- that civil rights laws should be read generously and expansively, so as to end discrimination in this country. Once passed, the purpose of the Act will be clear: Congress intends to, and will, act forcefully when the Supreme Court interprets legislation that would make it more, rather than less, difficult for victims of discrimination to seek and

obtain relief. In light of the dismal record of the Supreme Court's last term, we consider this provision in many ways to be the cornerstone of the Act.

The Civil Rights Act of 1990 provides, as well, a necessary correction to the Supreme Court's recent restrictive reading, in Patterson v. McLean Credit Union Co., of the Civil Rights Act of 1866. That latter Act, as you know, prohibits racial discrimination in the making and enforcing of contracts. The new Act will make clear that the 1866 legislation is intended to prohibit racial discrimination in the carrying out of a contractual relationship, such as the discriminatory denial of job privileges or racial harassment on the job.

Further, the Act allows a plaintiff to prove employment discrimination in a Title VII case by demonstrating that a facially nondiscriminatory employment practice results in "disparate impact on the basis of race, color, religion, sex or national origin." The plaintiff loses, however, if the employer demonstrates that the challenged practices are a "business necessity," that is, essential to effective job performance. This section of the Act is intended to undo the consequences of Wards Cove Packing Company, Inc. v. Atonio, in which the Court placed the burden on the plaintiff of proving both disparate impact and lack of business necessity.

Contrary to what some will argue, providing remedies for unjustified employment practices which result in disparate impact has nothing whatsoever to do with quotas. Title

VII, as it was interpreted prior to Wards Cove, in the light of the Supreme Court's 1971 unanimous decision in Griggs v. Duke Power Company, and as it will be again interpreted once the bill before us becomes law, did not require that employers adopt immutable percentages for minorities and women in the workforce. Rather, it required only that, upon a showing of disparate impact, employers demonstrate the business necessity for the practices leading to that impact. It is obvious to me, as an employer, that the burden of proof as to that business necessity should rest on the employer. An employer is far better placed to show the need for those standards than an employee is to show that there is no such need.

Moving on, the Act protects consent decrees or judgments established through bargaining or under court order, which remedy claims of employment discrimination, whether by a program of affirmative action or otherwise. Typically, such so-called "collateral" actions arise when white employees or would-be employees challenge a remedial preferential program created by a consent decree in the settlement of a suit by black plaintiffs against an employer. In Martin v. Wilks, the Supreme Court held that white fire fighters could bring such a new lawsuit in order to attack the eight year old settlement of a Title VII action against Birmingham, Alabama. As a result, employers are greatly dissuaded from settling discrimination cases because the settlement is never closed to later challenges by nonparties. Under the Act, stability will be restored to current decrees settling Title VII cases, as those decrees, once final, will be subject to challenge only in a limited number of cases. Business welcomes such finality. Let me also note that

this section, more than heretofore, establishes the procedures under which a nonparty will be entitled to be heard as to the merits of a proposed judgment or decree before it is rendered or instituted.

The Act also allows employees to bring a Title VII challenge to employment practices, including most labor agreements, at such time as they are adversely affected by those practices. This is intended to remedy the Court's holding in Lorance v. AT&T Technologies, Inc., which calculated the time within which a challenge to an agreement must be brought from the time of initial entry into the challenged plan or agreement.

Moreover, the Act explicitly provides for monetary damages under Title VII when a plaintiff proves intentional employment discrimination. This section is intended, in part, to allow assessment of damages for discrimination, even when a plaintiff would not be entitled to the already-available remedy of back pay, because discrimination was only one of several factors in a challenged job decision. This section of the Act provides a remedy to the Court's decision in Price Waterhouse v. Hopkins, which seems to allow an employee no recourse when discrimination, while implicated in an employment decision, is only one of several factors.

In some additional provisions, the Act generally allows for punitive damages where it can be shown that the discrimination is motivated by malice. The Act also allows a plaintiff to recover interest on a judgment against the government on the same terms as

interest may be obtained from a private party.

Finally, the Act, dealing with issues raised by the Zipes and Jeff. D. cases, does much to ensure that a victim of discrimination will continue to be able to recover from the defendant attorney's fees expended by the victim in vindicating his rights. Thus, with respect to the former case, the courts will be afforded the discretion to award attorneys' fees as against the original defendant in a case where the plaintiff must defend a successful result from attack by third parties. As to Jeff. D., the Act makes it more difficult for a defendant to require, as a condition of settlement, that plaintiffs waive their right to attorney's fees. These last provisions do much to reverse rulings which have undoubtedly deterred attorneys from bringing meritorious actions on behalf of victims of discrimination.

Taken together, the provisions of the Civil Rights Act of 1990 will restore and strengthen civil rights practices. It is a necessary and appropriate response to the adverse Supreme Court decisions of the 1988-89 term. The Act will make employment discrimination suits easier to bring and less subject to challenge than under the current state of law after the Court's rulings.

The Civil Rights Act of 1990 is essential to achieve the goal of a discrimination-free workplace. As such, the American Jewish Committee strongly endorses this legislation.

Chairman HAWKINS. Thank you, Mr. Comay.

I suppose you're a good witness to begin with. Let the Chair direct one question. I would hope the other members can confine themselves to five minutes so we can get through the great number of members who are present.

I was very pleased at your comments, Mr. Comay, on quotas, because I know we have heard that today and we're going to hear it all throughout this debate. That's going to be the "buzz word" of the opposition—not that it's in the bill, but that it may lead to that in some mysterious way in the future. As a businessman, as you testified, I assume you use goals and timetables in your business, do you not?

Mr. COMAY. Yes, we do, Mr. Chairman.

Chairman HAWKINS. So that you have been able to do it without imposing quotas, which I think is in line with the testimony before this committee for years by AT&T, General Electric, and General Motors. Every business person who has come before this committee has indicated that they use goals and timetables. Those who didn't support the concept, I suppose, have filed for bankruptcy and are out of business. So there is nothing strange about it. I appreciate your testimony as a business person to try to set the record straight. It's going to be discolored, I am quite sure, by these wild charges. Only time constraints keeps the Chair from trying to address some of the other questions. But we certainly appreciate the witnesses who have thus far testified.

I will yield at this time to Mr. Goodling.

Mr. GOODLING. I will help you expedite it by not asking any questions. I would just make two very quick observations.

I notice much of the testimony dealt with the *Patterson* decision and the need for it to be changed.

Now, I will admit—oh, she's gone—that the gentlelady from Colorado hasn't seen it as yet, and I apologize for that because the majority has always given us "months" to see whatever they were putting together, and they have even asked us to participate. Why, in the Budget Committee, we even get to see the budget sometimes two minutes before we're asked to vote on it. So I apologize. If we stay in session long enough, with the number of days in a week and the number of hours in a day, we might even get something introduced tomorrow. But there is no question that the Administration is in agreement with those who were testifying in relationship to *Patterson*.

I would just hope, since many lawyers have told me they don't make any money off of Title VII, that all of you would just make sure we don't write anything, as we do so often in Congress, that's full employment with high pay to lawyers. I'm tired of seeing those kind of bills. We should be able to write something in such a manner that they don't get to make money off of Title VII.

Thank you, Mr. Chairman.

Chairman HAWKINS. Thank you.

I would like to yield to Mr. Edwards. Mr. Edwards, if the Chair sometimes, without thinking, refers to "this committee," I am accustomed to being Chairman of the Education and Labor Committee and forget sometimes that this is a joint hearing.

Mr. EDWARDS. I thank the Chairman.

Chairman HAWKINS. I apologize for that remark.

Mr. EDWARDS. You're everybody's Chairman, Mr. Chairman.

Chairman HAWKINS. Thank you.

Mr. EDWARDS. I have no questions. I thank the witnesses. They have been very helpful.

Chairman HAWKINS. Mr. Gunderson.

Mr. GUNDERSON. Thank you, Mr. Chairman. Unfortunately, I do have some questions, but they are meant in the total positive sense of trying to resolve this issue. I want to say that you are a distinguished panel and, frankly, it's been a privilege to be in front of you between two hearings, but also to read your testimony.

I want to go back to *Wards Cove* because I think *Wards Cove* is going to be the issue on whether we get a bipartisan consensus on this civil rights movement or not. We have got to talk about it.

Mr. Comay, I hope you're aware of Justice White's statement in the case, where he said clearly the net effect, the only practical option for many employers would be to adopt racial quotas. But let me go back and go through the whole scenario for you.

If you start with the fact that disparate impact, in and of itself, becomes the basis, whether you have to identify the practice or not—and I will use an example. In my home district we have a brewery, beer. In that same community we have a very large Hmong population. I think they will tell you that I will do anything I can to help them and to eliminate any kind of prejudice that exists. Let's assume, however, that very few of them have jobs at the brewery. Let's assume that by virtue of that someone decides to file a case against the brewery, saying you're discriminating against hiring the Hmong people.

Now, don't get into any of the reasons for it; don't say whether it's the employment interview process, application progress, whether it's standards for carrying the kegs—and as you know, Hmong people tend to be small in stature, et cetera. I don't know if they've even applied for the jobs, frankly. But, first of all, you automatically, by virtue of the numbers, have a case, whether you have to identify any practice or not.

The second thing that becomes clear here is that then all of a sudden you have to prove business necessity, essential to the business. I've been trying to think of any criteria that meets "essential" to the conduct of that business. You know, I would like to say as a Republican that it's essential that George Bush be President, but I can't even say that. I mean, I can't think of an essential criteria out there that meets that kind of a test. To my understanding, we haven't had that test before. It would be very difficult for the brewery to prove it is essential that it retains the people that it does versus hiring somebody else.

The third question that comes into play under *Wards Cove*, or at least the legislation in front of us, is burden of proof. It isn't producing the evidence to say, look, "x" amount applied for a job, or "x" amount asked to be in this particular area of the production facility. That isn't the question any more. The question now is to prove that you did not discriminate. I'm not sure how a business proves, per se, that it did not discriminate in this case.

The net effect, when you add those three up, and then you add the Title VII punitive damages, the potential for a high monetary

damage that exists, businesses are going to go up to the front. They're going to say we're just going to adopt quota guidelines that will prevent cases ever being filed.

Now, as a business person, how do we prevent that scenario from happening?

Mr. COMAY. Mr. Gunderson, fortunately or unfortunately, I have had lots of years of experience in dealing with exactly those problems, because among my other responsibilities in our business, I am responsible for equal employment compliance.

I can tell you what really happens in the real world, that we do look to statistical evidence, as best we're able to gather it, of what the minority populations in our area that are qualified for the particular jobs in question are, because frankly, without that, we don't have a guideline to measure whether we're doing well or doing poorly. We don't know whether we're exposed. But to do that, to use those kinds of data as guidelines for what we ought to do, is very, very far from a quota. I don't——

Mr. GUNDERSON. But don't you agree—and I want to have a discussion here. Don't you agree that statistics themselves can be the basis for filing a case, not indicating what the practice is that is pursuing discrimination, but statistics themselves under this bill becomes an adequate basis for filing a case?

Mr. COMAY. Mr. Gunderson, it is my sense, speaking as a businessman and as a lawyer, that since *Griggs* v. *Duke Power*, statistics have been relevant to the bringing of a civil rights case in an appropriate factual situation.

Mr. GUNDERSON. But you also had to indicate the actual practice in the past.

Mr. COMAY. Yes. The fact of the matter is, when we object to the use of quotas—and we at the American Jewish Committee have been as vigorous as any organization in this country in objecting to the rigorous use of quotas—that simply is not what we're talking about. We are talking about quotas that restrict any more than a limited number of people of any group from achieving whatever it is they're trying to achieve, be it an employment place, a place in a university, or any other forum where discrimination is found.

When we talk about using the absence of disparate impact as guidelines, we're talking about giving ourselves, as business people, the basic information we need to guide our human resources people in measuring whether or not they are complying with the law, which we very badly want them to comply with.

I don't know of any company that would ever suggest to its employment people "we want you to have 6.2 percent of this minority and 8.1 percent of that minority." That simply is not the way hiring decisions are made. We're trying to establish guidelines that tell us whether we are responding to the work force in our areas of employment that are qualified for jobs that we're trying to fill. I don't think this bill in any way weakens that practice, and I certainly think it's a falsehood to say that it establishes quotas or it mandates businesses to establish quotas.

Mr. GUNDERSON. I don't think you and I have any difference in our goal, in listening to you. I think you and I want to be at the same place. Our concern is, how do we get there from where we are.

I would suggest again to you and ask you to consider that if statistics themselves are a basis, without referring to the actual practice or procedure of discrimination—job description, application process, whatever—and if, secondly, the business has to prove that automatically the people they have there, that it's essential for the business that they have those people rather than somebody else, and if, third, the burden of proof has now switched not to the plaintiff to show that this brewery is discriminating but, rather, the burden of proof is on the brewery to show that they're not discriminating, and then you add fourth to that the potential for punitive damages, no business person in this country is going to allow things to just take their normal course. They're going to take preventative action, which is going to be quotas. That's my concern.

My time is up. I'm going to make the open invitation that you, if you are so willing, and any others who want to resolve this issue with us, because I think we agree on the goal, to meet with myself and others to try to resolve this, I would appreciate it very much.

Mr. COMAY. If I may respond very briefly, first of all, I'm not sure the extent to which the punitive damages language in the bill is directly related to the disparate impact language of the bill. That's not clear. I think that requires—I wouldn't simply assume that this bill creates punitive damages for disparate impact.

Secondly, I don't think it is ever incumbent upon us to show, as you indicated in your question, that the people we hire are essential for the operation of our business. What we try to do is to tell our employment people that whatever standards they use, whatever tests they use, whatever practices they use in selecting one applicant from another applicant, should, in fact, be related to and, in fact, essential to the running of our business. We don't want them using standards that aren't related to how we run our business. We're not going to have the best work force if they use those standards. I would suggest that the standards that the bill suggests are, indeed, the kind of standards that we want our employment people to use because they're going to give us a work force best suited for our business and our needs.

In terms of the burden of proof, it seems to me very unfair to require a plaintiff to prove that a business which doesn't hire that plaintiff had a business necessity, or whatever standard it uses, when it is the business that has all of the information and all of the understanding as to why it uses the standards and tests it does.

I don't mind having that burden of proof because, in fact, I have imposed that standard or that test or that requirement. That seems to me to be the only fair way to apportion the burden of proof in such a case.

Mr. CHAMBERS. Mr. Chairman?

Mr. EDWARDS. (Presiding.) Mr. Chambers.

Mr. CHAMBERS. I don't want to prolong this, but I would just like permission to respond to the question in writing that Mr. Gunderson has raised.

I think Mr. Comay has really pointed out the problem. I think the Congressman has the premises all wrong. I would like permission to respond and to point out the real problem that you are missing in the question that you're presenting.

Additionally, in the damage aspect, as Mr. Comay pointed out, in the bill itself it doesn't cover the situation you're talking about. It specifically excludes it. So with the permission of the committee, I would like to respond in writing.

Mr. EDWARDS. Without objection, so ordered.

Mr. GUNDERSON. Just send me a copy of it, though, not just to the committee.

Mr. EDWARDS. Mr. Hooks.

Mr. HOOKS. Mr. Chairman, if I may, I would like to be excused. I made it known to the Chairman that I could not stay any longer than a certain hour.

But before I leave, I don't know that I have ever, in my years of practice, heard a better explanation than Mr. Comay has given. If one listens to that very well, it explains completely and fully, not only from the viewpoint of a civil rights lawyer, but from a man who is involved in business. The thing that is most striking is that a company that employs a thousand people in a city that has a work force that is, let's say, 40 percent black, and has no employment of a single black in that work force, they are free just to go by and the plaintiff has to prove somehow. All it does is what we used to call shifting a temporary burden. If you have a thousand whites and no blacks, tell us why. If it's reasonable, it may work. But as Mr. Comay has so marvelously pointed out—and when I get my next case involving myself, I want to hire him as my lawyer.

Mr. EDWARDS. Thank you, Dr. Hooks. You are excused and we appreciate you being here.

I might point out that punitive damages in the bill are available only to remedy intentional discrimination upon a showing of recklessness or malice. They are not applicable in disparate impact cases.

Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman.

I want to first of all say good-bye to Dr. Benjamin Hooks. He happens to reside sometimes in the City of Detroit, as well as Baltimore, New York and other places. But I am happy that his testimony is on the record. We have taken care of *Patterson*. We have explained *Wards Cove* and *Griggs*. I would like to just turn to the *Price Waterhouse* case, where we attempt to clarify the prohibition against impermissible consideration of protected factors. That is, employers should not be able to use race as a motivating factor in employment decisions, regardless of their motive.

Now, surely nobody sitting up here could take exception to that. That's a question, not a statement. But do any of you, as witnesses, have any clarifying discussion before we see what the Republicans are going to introduce, so maybe we can clean that one up, too, as we wait anxiously for them to drop the next shoe in terms of what kind of bill they may be getting ready to introduce.

Mr. Chambers.

Mr. CHAMBERS. I would like to respond quickly.

First, in *Price Waterhouse*, involving the mixed motive case, the decision suggests that if the employer with the more limited burden of proof comes in with some legitimate explanation which would have motivated the employer's action under any circumstances, the employer is then free of any liability. We think that is

absolutely horrendous. To have an employer proven to have discriminated intentionally absolved of any liability because the employer comes in with some limited burden of responding to that proof, suggesting that it would have done something anyway, I think promotes the type of discrimination that we're trying to proscribe.

What the Act says is that if one proves intentional discrimination by the employer, there is a possibility of recovering. The recovery itself should be limited. That is what we think the Act required before the *Price Waterhouse* decision.

There was a question earlier about shifting burdens of proof. In civil rights cases, we have had shifting burdens of proof in a number of cases. In the teacher dismissal cases, for example, where we had a great horde of black teachers dismissed, the school districts proceeded to desegregate schools. The court adopted a standard that presented that kind of proof. That is, there was a disproportionate dismissal of black teachers and the burden of proof would shift to the school board to explain why it was dismissing these teachers.

In the *Price Waterhouse* case, if a plaintiff proves there was intentional race, gender, or religious discrimination, and the employer comes in and says that he would have done it anyway for another legitimate reason, the court previously had held that that employer had to meet a clear, cogent, and convincing standard of proof, which the Supreme Court lowered in *Price Waterhouse*, and the employee had a possibility of recovering something for that proven discrimination. We think that's the way the statute should be.

Mr. CONYERS. Mr. Buchanan.

Mr. BUCHANAN. Thank you. I, too, would like to respond.

Prior to *Price Waterhouse*, most courts held that employers were liable for discriminatory actions, even if other nondiscriminatory considerations were also mixed into their motives in making job decisions. This meant that even if legitimate reasons precluded giving an employee a promotion, for example, the employer would still be liable for discrimination and could be enjoined from using discriminatory promotion methods in the future.

Under *Price Waterhouse*, however, as long as employers can prove they had a legitimate reason for an action in which bias also played a role, they can escape liability altogether and no action can be taken to prevent or remedy discriminatory aspects of their conduct.

I want to also point out to my distinguished friend that the remedy would be for discriminatory actions, not thoughts.

Mr. CONYERS. These first three cases seem to be pretty elementary on their face. I don't think you have to go to law school to figure out the logic of what we're after.

The next two cases deal with having prompt decisions and challenges to consent decrees, so that we have a finalization of a case, and that a reverse discrimination claim can't come in months and years after a discrimination case has been settled—that's the *Martin* v. *Wilks* case—and then to have the statute of limitations begin to run when a discriminatory practice has occurred or when

one has been adversly affected by it—that's *Lorance* v. *AT&T*. And these are the five cases that comprise the package.

This isn't even new law. I mean, we're not even creating new rights. All we're doing is taking the best of the Supreme Court practices that have been codified and used for many, many years. So I am hopeful that this kind of hearing, Mr. Chairman, and the kind of discussion will evolve into a sense of logic and fairness that will lead us to as quick a resolution of the merits of this bill as possible.

I thank the witnesses for their patience. You know, this is like deja vu. This seems like about the one-thousandth time I have gone over this. I mean, what kind of lessons do we have to give, or how do we break it down? Just because something says it's a court case doesn't mean that it's arcane or difficult to comprehend. These are questions that don't require a constitutional lawyer. They call for elements of simple fairness. When you hear the real life facts on which these cases are based, you don't have any question about what's happening.

Now, in *Patterson* v. *McLean*, Mrs. Patterson, who is from Virginia, she has gone through law school as a result of this case, which she won 15 or 20 years ago. Now she's out in the field helping us, I know.

So I want to say that I don't know how many more times in all of our lifetimes we have to keep going around and around on what, to me, would make sense at a high school level. For all of those who think that we don't have a bipartisan bill, look at the cosponsors. We've got lots of Republicans on this bill. I don't know what they're thinking about. The Republicans are on this bill. At least they were at a press conference in the Senate and they said they were on the bill. So we have the bipartisan bill. We want to just get as many people that are fair thinking as possible to listen to what we're talking about.

Mr. EDWARDS. I thank the gentleman. The gentleman's time has expired.

Mr. Petri.

Mr. PETRI. Thank you, Mr. Chairman.

I am not sure the members of the panel can answer this question, but let me ask it. Just on the procedural level, when the Supreme Court took the five cases up separately and decided them each separately, why should the Congress take them as a block and then go beyond them? Wouldn't it make sense for us to consider separate bills dealing with each case, and insofar as expanding remedies and making all kinds of changes which really go way beyond the five cases are concerned, consider that as a separate measure as well? If this is driven by Supreme Court cases, why not just take up those cases?

I guess it's a tactical question. People who are in favor of this thought maybe the whole would be greater than the sum of the parts, but maybe it will be less. I would just like you to respond as to why we should have one up or down vote on five cases, plus a lot of procedural changes in the civil rights area, as opposed to considering them on their individual merits.

Mr. COMAY. Congressman Petri, it seems to me the Court had no choice. The Court is dealing obviously on a case-by-case basis and

must take up seriatim the cases that come before it. Congress, on the other hand, it seems to me, has to deal with the aggregate effect this group of decisions has had on the civil rights laws, a very vital part of this country's legal system.

The fact that the Court chose in one term to take up a large number of cases which collectively had the effect of substantially weakening the enforcement of the civil rights laws, it seems to me creates a justification for Congress to deal with the problem. The problem is what's happened to the civil rights laws. Those cases have to be taken in the aggregate to determine what that impact was, and it seems to me the appropriate way of dealing with it legislatively is to deal with the overall problem. I think that's what this bill tries to do.

Mr. PETRI. So that answer goes to putting the five cases together, but then why would we also want to expand the remedies and make the various other procedural changes that are contained in this bill that have nothing to do directly with the five cases?

Mr. BUCHANAN. First, let me concur with the answer already given, but point up the history of the situation to my friend. I mean, the Congress and the courts have sought in years past to correct generations of injustice in the case of minorities, especially black Americans, and centuries of injustice in the case of women and other groups that are victims of discrimination.

In that process, the Court led the way for 25 or 30 years. It was the Burger Court in *Griggs* v. *Duke Power Company* in a decision written by Justice Burger that unanimously overturned, in essence, *Wards Cove*. Until the 1980s, in the 1960s and 1970s, I think it's fair to say that Republicans and Democrats alike, in the White House and Department of Justice, were really crusaders for civil rights in many instances, certainly strongly on the side of civil rights in a series of cases.

The Court was the resort to which we looked. Now we must look to the Congress because first there came the sea change, a position of the Department of Justice. Under Mr. Meese and under Mr. Reynolds, the Department of Justice began to come down on the other side of civil rights cases. I think that was a clear change and trend.

Now comes the new Court, appointed during those same years, at least changed to a new majority during those same years in its first session, and it is clear there is a sea change in the posture of the Court. That's why we have to look to the Congress. We are simply trying to accomplish in this bill every reasonable thing we can, mostly restoring the state of law as it was, but adding some new equities we believe as well.

Mr. PETRI. Thank you.

Mr. CHAMBERS. May I also respond to that, Mr. Chairman?

I concur with the previous two speakers. Additionally, I would like to raise two things. First, Congress in 1964 was looking at a pervasive problem of discrimination against blacks and other minorities and women and sought in to enact legislation to address this pervasive problem in Title VII. It covered minorities, it covered women, it covered religious discrimination, among others.

What you are doing here is responding to several Court decisions that were contrary to what we believe the original intent of Con-

gress was in enacting these statutes. So just because there were five decisions doesn't preclude this Congress from addressing these problems in one bill.

Additionally, you can't think of enforcement of civil rights claims in isolation. Who brings the lawsuit? What encourages the party to bring the lawsuit? What can the party recover? What incentives are there to encourage employers to comply with the Act without litigation? Litigation is time-consuming and expensive. It is difficult for minorities and women to find a lawyer to bring a lawsuit. These cases take time and they cost not only dollars but they cost in terms of the mental state of the claimant who is prosecuting the claim.

The provisions in this Act seek to provide some means to enable the party to bring a lawsuit. In one decision of the Supreme Court two terms ago, it was decided that one couldn't recover the expert fees. We all know one can't litigate these cases without bringing in experts. An expert costs money, and if the party can't recover the cost of litigating those claims, there is very little incentive for the party to prosecute the claim.

Second, women are constantly subjected to harassment on the job. Employers don't respond unless there is some basis. If Miss Patterson had prevailed under Title VII, the Court would have told her "you're entitled to back pay." If she hadn't lost her job, she would have brought this lawsuit, litigated it for years, and recovered nothing. She wouldn't have been able to recover for the expert and would have had limitations in terms of the fees. Lawyers out in the field can't bring a lawsuit.

Somebody suggested you're making lawyers rich. We are barely encouraging a few lawyers, even with this legislation, to bring these lawsuits. I litigated a case for years and ended up with an average of $10 an hour. That wouldn't begin to make means for making one rich.

The last thing I would mention, on the mixed motive case, those who have questions, I would ask you to consider this proposition. I put up a sign and say "No white people need apply." A white person applies and is rejected. I come to court and I say I didn't accept this person because he didn't have a Ph.D. Is that white claimant entitled to any relief under *Price Waterhouse*? And if so, what is it? Without this bill, we preclude that party from prosecuting a claim for some effective relief. That's one of the reasons why *Price Waterhouse* is bad.

Mr. EDWARDS. The time of the gentleman has expired.

Mr. Payne.

Mr. PAYNE. I have no questions at this time.

Mr. EDWARDS. Mr. Fawell.

Mr. FAWELL. Thank you, Mr. Chairman.

Despite some of the comments to the contrary, the joinder of all of these cases in one bill still seems to me an immense occurrence and something that hasn't occurred before. Do any of you gentlemen at the table remember a similar undertaking by Congress, where in one fell swoop we are to eradicate the writings of five or six Supreme Court decisions? Maybe it's good. Maybe that's what we should be doing. But I don't recall it ever having been done. It does awe me, and I don't see the decisions as being simplistic and

elementary that can be understood by a high school student. At least this lawyer has a lot of trouble grasping all the facts in all these cases.

Mr. BUCHANAN. Mr. Chairman, I doubt if there is historic precedent for what happened in the first term of this new Court. What the Court did was to reverse established law. Most of what this bill does is simply to restore that which was there before in law, which was overturned in a single session by this Court.

Now, indeed, I do not expect this to be the end. This is major civil rights legislation, but it is comparable to other major civil rights legislation. The only difference in this case is we're trying to gain back ground that has just been lost in a single term of the Court.

Mr. FAWELL. Let me ask a question specifically on *Wards Cove*, because each of these cases I think have a lot of very important decisions. Mr. Comay, I didn't quite follow your answers to Mr. Gunderson, and I'm sure it's my inability perhaps that is the cause for that. But the Court, as I understood it, in *Wards Cove*, did say that the plaintiff has to show a specific or a particular job criterion or procedure that has had a significant adverse impact upon the employment opportunities of a protected class.

Now, there is another group that is concerned—and apparently the attorney that tried that case just walked in and put in statistics which simply showed a racial imbalance in the work force, and then sat back in the chair and rested. I doubt that Mr. Chambers would have tried the case that way. It's bad facts that make the law; we all know that.

Do you accept the *Wards Cove* case, in stating that a plaintiff is not going to be able to go in and just show racial imbalance and then sit back and think you've got a burden of proof that had been shifted. You have got to take a little bit more diligence and you have got to be able to show one or more specific examples wherein the employment practices have brought about the discrimination.

I could see maybe the burden shifting and affirmative defense going over to the employer. Do you agree with that or not?

Mr. COMAY. Mr. Fawell, I don't understand this legislation to mean what I think you're suggesting that it means. I think what the legislation is directed at is that where a plaintiff shows disparate impact, not racial imbalance but disparate impact, and where the employer raises as a defense that the company relied upon a particular standard to judge whether or not to hire that plaintiff, that it is the burden of the employer to show that that standard by which the plaintiff was rejected for employment was one which is necessary for the business, essential to the way that business operates.

Mr. FAWELL. I don't mean to interrupt but my time is short.

Then how does one prove a prima facie case? You have to show disparate impact. How do you prove disparate impact as a prima facie matter before there's a shifting of the burden, before the affirmative defense has to be taken? Can you do it simply by bringing in statistics that show a racial imbalance? So you're agreeing with the Court that you've got to go farther than that. You have got to suggest or allege and show at least some employment prac-

tices which would be the barrier to having a racially baianced work force.

So you don't disagree with *Wards Cove* in that first step?

Mr. COMAY. Mr. Fawell, I don't put it in terms of what *Wards Cove* said. I don't believe that the language of the statute is unreasonable, where it requires that a complaining party demonstrate that a group of employment practices results in a disparate impact on the basis of race, color, religion, sex or national origin, and then requires that the respondent demonstrate that such practices were required by business necessity. That seems to me tc be a very logical and a very fair way of apportioning the burden in such a case.

Mr. FAWELL. One of the fears that I think is expressed by some is, as I have indicated, that all a plaintiff's attorney has to do is to come in and basically show the racial imbalance and sit back and say I've done my job. I don't think any of us want to see that occur. That, in effect, is a quotas kind of a situation. You've done your prima facie case by simply saying that, unless you employers seek a safe harbor, having a racially balanced work force that coincides with the racial balance is in your total potential work force, than you've done something wrong. I wanted to make that point.

Secondly, it seems to me that having the plaintiff go through that kind of a burden, at least to have some allegations of specific employment practices which are objected to, we get to the question of whether we adopt a legitimate employment goal that the employer would have even the affirmative defense to show, followed by the plaintiff being able to, if he does that, show other tests or selection devices without a similarly undesirable racial effect. That seems to me to be what *Wards Cove* was talking about.

If I understand you correctly, you're saying no, we've got to have the employer, the defendant, having a greater burden than that. We have to show that the particular employment practice to which objection is made is absolutely essential to the job performance.

Is that what you're saying, that the employer must, insofar as the complained of employment practice, has to show it—before he can justify that, he must show that it's absolutely essential to the job performance, rather than just a legitimate employment goal?

Mr. COMAY. Mr. Fawell, what I'm trying to say, very simply, is that as between the plaintiff and the defendant employer, when it comes to the issue of showing business necessity for a certain practice which the plaintiff, by the words of this statute, has demonstrated to result in a disparate impact, that in showing this necessity the employer is in a much better position to deal with it evidentially and factually.

Mr. FAWELL. But how do you define "business necessity?"

Mr. COMAY. Well, the courts have ruled in many, many cases that there's——

Mr. FAWELL. It's been rather mixed, you would agree?

Mr. COMAY. Oh, yes. It's like in many fields of the law——

Mr. FAWELL. Would you adopt what I understand to be in H.R. 4000, that business necessity is defined as an employment practice essential to the job performance, rather than a legitimate employment goal? Because employers can come back and say we can't meet that kind of a burden. If you're going to throw that on us, we will opt out, take safe harbor, go with quotas, and we're not going

to battle this thing on that basis. I understand that employees are concerned about the other side.

Which side do you come down on?

Mr. COMAY. I come down very firmly on the side of the bill in the way it expresses the language. I do not believe that employers——

Mr. FAWELL. Excuse me. That's essential to the job performance?

Mr. COMAY. I look at that as a way of expressing what business necessity means for the very reason you cited, that the courts are not always very clear and very consistent in defining business necessity.

If I apply for a job and I am rejected for that job because of an employment practice which I can demonstrate had a disparate impact on me, perhaps because of my religion, and the employer who didn't hire me contends that there was some business necessity to that job requirement that screened me out of the job, I don't think it's unfair that he show that that job requirement is essential to the operation of his business.

Mr. EDWARDS. The time of the gentleman has expired. I presume we will be examining this particular interesting question in some depth again.

Mr. Hayes.

Mr. HAYES. Thank you, Mr. Chairman. In the absence of the light which we usually have during these full committee hearings, it is sort of encourages some of us to be abusive about the time we utilize. I don't want to be guilty of that.

I don't have any questions, but I just want to make a comment to the effect that it is obvious we're on a backward march on civil rights in this country. If we weren't, there wouldn't be any need for this legislation. I think it's a move in the right direction. I certainly am glad to hear the panelists support it. But there is a big gap between the testimony and making this law come to fruition. I hope you would join with us, who are really supportive of the legislation here, to get massive support for this kind of bill. Otherwise, it will never come into fruition, or if it does, you wouldn't hardly recognize it.

Thank you very much, Mr. Chairman.

Mr. EDWARDS. Thank you, Mr. Hayes.

Mr. James.

Mr. JAMES. Thank you very much.

I have asked some of the attorneys to define for me compensatory damages for me. Would anyone care to take a stab at it. Mr. Comay, what is your understanding of how far compensatory damages would go under Federal law? Does it go just to out-of-pocket expenses in a contractual situation, such as an employee/employer contract, or does it go beyond to include cases for pain and suffering or anything of that nature?

Mr. COMAY. I'm not the best person to answer that.

Mr. CHAMBERS. I think the bill contemplates covering pain and suffering, as well as out-of-pocket expenses. It does provide that it does not include back pay. That is a provision——

Mr. JAMES. You are aware that under general State law many States would not ever allow compensatory damages for pain and suffering in an action for breach of contract. In my State, the basic exception to not allowing damages for pain and suffering would be

specifically for intentional infliction of mental distress—in the case of physical contact or something of that nature. I haven't read the law in a while. Generally speaking, for a contract breach—an employment contract—there is no such thing as pain and suffering.

Does anyone know definitively where we would look for a definition of compensatory damages? Would look to the statute or to true case law?

Mr. CHAMBERS. There are a number of cases that permit recovery of compensatory damages under these circumstances. Under Section 1981, for example.

Mr. JAMES. Well, Section 1981 and Section 1985 allows for punitive damages.

Mr. CHAMBERS. Yes, Section 1981, Section 1983.

Mr. JAMES. You're saying intentional infliction of mental distress is included under those sections?

Mr. CHAMBERS. Discrimination based on race or color. Sections 1981 and 1983 permit one to recover damages, including compensatory damages. There are definitions in the various decisions of the Court interpreting those statutes.

Mr. JAMES. I wasn't aware that under 1981 or 1983 there was anything for compensatory damages other than for punitive damages or for actual damages caused. In other words, I am only familiar with the terminology of pain and suffering as it relates to a personal injury, not as it relates to a breach of contract. And even under 1981 and/or 1983 in Federal court, I don't believe pain and suffering is compensable. But since I haven't looked at that law in so many years, I don't want to make that assertion. I have asked the attorneys here if they could clarify that.

Mr. Comay, could you help clarify that to any extent?

Mr. COMAY. I'm sorry, but I simply don't have a clear enough understanding of the cases to comment intelligently on what the courts have held compensatory damages to cover.

Mr. JAMES. I, frankly, don't either. That's why I'm asking. It was confusing to me. If you're allowing damages for pain and suffering and are putting in a contingency fee basis you've got an entirely different enticement, especially when you talk in terms of sex discrimination. You may very well be getting into an area that no one intends, by offering an especially lucrative and attractive situation to attorneys that no one anticipates, thereby creating such a business expense that an employer would not be able to not obtain insurance. You might even make a very enticing and attractive situation on the flip side of the coin as well, even if you establish quotas—because I assume there is no immunity there, even if they're a perfect reflection of the community in which you're doing business. Is it correct that those quotas would not guarantee immunity from suit? You could still have a discrimination suit.

Mr. COMAY. I don't think quotas are involved in any way, either as proof for the plaintiff or as proof for the defendant.

Mr. JAMES. What I'm submitting is that if the business wanted to insulate itself absolutely from discrimination, and it established a mathematical quota system for every minority, that establishment of a quota system in itself could not in itself insulate the employer; is that correct?

Mr. COMAY. I agree with you. I don't think that quotas would be a safe harbor under this statute. That's why I don't think quotas are involved in this.

Mr. JAMES. Because you may very well have a majority group say they were discriminated against. In other words, quotas themselves are artificial by nature, suggesting that somebody is being discriminated against because you're relying on them.

Mr. COMAY. Again, it seems to me that we're talking about disparate impact, and we're talking about a plaintiff being able to prove disparate impact and thereby shifting the burden of proof to the employer to prove business necessity for the disparate impact or for the particular employment practice.

I simply don't see, logically, how quotas are involved in any sense in that judgment.

Mr. JAMES. Fine. Then you would agree with me that it wouldn't protect you. My concern is that if we provide a very attractive situation, Such as allowing for pain and suffering under compensatory damages—as you said it did—I hope it doesn't, but as you submitted that it did, and if you attract a certain portion of the plaintiff's bar to that as a really profitable case—which earlier Mr. Chambers said he averaged $10 an hour. That would be my experience for the average practitioner handling that kind of case, which I think is sad.

But on the other hand, if you attract a contingency fee type of situation, to an open-ended type of damages, I fear that possibly two results may occur, one of which may be a very large business expense, a noninsurable type of scenario, and the other a lack of predictability. So I would ask that we have some kind of a definition. Because the attorneys on either side of the aisle have not been able to supply me on such short notice the answer to that, I wonder if some of you might answer that question, if you could, at some time in the future, and give me a definitive answer.

Mr. EDWARDS. I would point out to the gentleman from Florida that the next panel has a witness that will go into that particular issue.

Mr. JAMES. Okay. Very good.

Thank you so much. I want to thank you all for your helpful testimony. I just don't know the answer to those questions and I was unable to find it.

Mr. EDWARDS. Mr. Mfume.

Mr. MFUME. Thank you, Mr. Chairman.

I don't have any particular questions of this panel. I do want to thank them for their testimony, for taking the time today, in a very deliberate fashion, to spell out things that many of us who have worked on this legislation feel very strongly about.

I am proud to be an original cosponsor of the Civil Rights Act of 1990, and I certainly want to commend you, Mr. Chairman, and Chairman Hawkins and Chairman Conyers for the level of commitment that you have brought to moving us to this particular point.

I have personally believed, Mr. Chairman, that perhaps beginning on or about the time of the infamous *Bakke* case, that things have been, as my colleague from Illinois pointed out a moment ago, on a back slide. Alan Bakke may have been the plaintiff, but we all were the defendants. And whether it was reverse discrimination or

other precedents that occurred after that, the notion of doing away with quotas, some believing that affirmative action was wrong and outdated, I guess I could go on and on, up until the Supreme Court decisions of last year, I think it's obvious and clear to many people in this Nation that legislatively it is up to the Congress of the United States to pretty much do what the Supreme Court has shirked from in terms of its responsibility, I think, in protecting the rights of other people.

Mr. Chairman, I do have a statement and seek unanimous consent that it be entered into the record.

Mr. EDWARDS. Without objection, so ordered.

[The statement of Hon. Kweisi Mfume follows:]

H.R. 4000--THE CIVIL RIGHTS ACT OF 1990
Statement: Hon. Kweisi Mfume 7th District Maryland
Before Full Education and Labor Committee
February 20, 1990

Mr. Chairman, who would ever have thought that just twenty-five short years after the historic passage of the Civil Rights Act of 1964, that Congress and the nation would again have to focus its energies and resources toward safeguarding a law that millions of Americans have come to recognize as an inalienable right that every citizen is entitled to regardless of race, creed, religion sex, national origin, disability or creed.

During the contentious years of the Civil Rights Era, great men such as Justice Thurgood Marshall--then chief counsel of the National Association for the Advancement of Colored People-- and the legendary 101st Senator Clarence M. Mitchell, Jr. knew that when the time came to present their civil rights cases to the highest court in the nation, that they would at least receive a fair and impartial hearing. In fact, up until the latter portion of the 1980's decade, the Supreme Court was viewed as a friend of not only African-Americans, but also as a friend to every group represented within this hearing room today.

Mr. Chairman, I did not come here this morning to preach to the

choir, however I do wish to convey to you, our committee colleagues and hearing panelists, that over the last three years I have become increasingly concerned about the direction and precedent some of the high court's more recent decisions.

For example, last year the minority business community was rocked by the blatant assault on many state and local minority business set aside programs. The Richmond vs. Croson decision, like many others, was sanctioned by the court's own demand, not because of a national consensus or out cry over the issue of minority business set asides. Richmond vs. Croson unleased a plethora of challenges and litigation against a particular community that has for decades been excluded from equal access and full participation in the economic vitality of this nation.

The sad reality that Richmond vs. Croson has wrought, is very similar to the decisions that precipitated H.R. 4000. The burden of proof in now placed upon the victim to prove past discriminatory practices and exclusionary procedures. It is time that such vindictive ideological assaults on the gains of minorities and women in this great nation is put to an end. It matters not that the decision was cast in Washington, D.C. or in Richmond, Virginia, a threat toward justified gains in the nation's capital, is a threat against equality and equal application of the law everywhere and we must send a clear message to those whose intent is to turn back the clock, that they have awaken a sleeping tiger.

Mr. Chairman, I am proud that H.R. 4000 was introduced not only during Black History month, but also because this year culminates you illustrious and valiant career as one of the vanguards of equal rights and opportunity for all Americans in the U.S. House of Representatives. Additionally, I am pleased to welcome the distinguished Executive Director of the Baltimore based National Association for the Advancement of Colored People (NAACP), Dr. Benjamin Hooks, who has traveled here to testify on the need and urgency of this bill.

Already over 150 of our colleagues have co-sponsored H.R. 4000. This demonstrates to me that millions of Americans support the provisions of this measure which sets about preventing and maintaining the illegality of discriminatory employment practices and job harrassment. Additionally, Americans support the other provisions which will lay the burden of proof back on businesses to prove that they do not descriminate, a id send a broad and clear message that job bias is abhorring and illegal. Finally, and perhaps most importantly, everyone should have the right to challenge employment discrimination and seek punitive damages from malicious and degrading employment practices.

Mr. Chairman, I applaud the amendments you have offered in the Civil Rights Act of 1990 and eagerly await to hear form our distinguished panelists.

Mr. EDWARDS. Are there any more questions of this distinguished panel? If not, we thank you very much. It's been very, very helpful.

The next panel consists of Judith Lichtman, President of the Women's Legal Defense Fund here in Washington; Marcia D. Greenberger, Managing Attorney, National Women's Law Center, Washington, DC; Meyer Eisenberg, Chairman, National Legal Affairs Committee, Anti-Defamation League, Washington; and Barbara Arnwine, Director, Lawyers' Committee for Civil Rights Under Law, also here in Washington.

We will hear from the witnesses as I listed them. We are very honored and pleased to have our friend, who has been an expert witness in many civil rights matters in the past, Judy Lichtman, President of the Women's Legal Defense Fund. Ms. Lichtman, you are welcome and you may proceed.

STATEMENTS OF JUDITH LICHTMAN, PRESIDENT, WOMEN'S LEGAL DEFENSE FUND, WASHINGTON, DC; MARCIA D. GREENBERGER, MANAGING ATTORNEY, NATIONAL WOMEN'S LAW CENTER, WASHINGTON, DC; MEYER EISENBERG, CHAIRMAN, NATIONAL LEGAL AFFAIRS COMMITTEE, ANTI-DEFAMATION LEAGUE, WASHINGTON, DC; BARBARA ARNWINE, DIRECTOR, LAWYER'S COMMITTEE FOR CIVIL RIGHTS UNDER LAW, WASHINGTON, DC

Ms. LICHTMAN. Thank you very much, Mr. Chairman, and the committees.

Congress first expressed its commitment to a work place free from discrimination by passing the Civil Rights Act of 1964. This Act, bolstered by its 1972 and 1978 amendments, began slow but steady progress towards the elimination of discrimination against women and racial, ethnic, and religious minorities.

Over the past 25 years, the courts have generally contributed to this progress by recognizing the Act's remedial purpose and by fairly interpreting its statutory provisions.

Last year's Supreme Court decisions represented a significant departure from this history of progress in pursuit of the goal of equal employment opportunity, and Congress must not retreat from its commitment to this ideal and must not allow a judicial dismantling of the advances made thus far.

The composition of the labor force has changed dramatically as the number and percentage of working women has skyrocketed. This trend promises only to intensify, with women making up a majority of the labor pool by the year 2000. The United States must enable working women to tap their full potential without hindrance of discrimination to develop a work force that can compete in the world market.

Most women work because their families need their income to survive. Women also work because they want to participate fully in public life. Discrimination against women in the work place threatens not only the economic, physical, emotional, and social well-being of the women themselves, but also that of their families, and equal employment opportunity laws are thus necessary to preserve the economic and emotional security of the American family.

Women still face significant discrimination on the job: sexual harassment, pregnancy discrimination, occupational segregation, the lack of access to leadership positions. Strong anti-discrimination laws are necessary to protect and advance women's full and equal participation in the work force.

The Civil Rights Act of 1990 is necessary to counteract last year's Supreme Court decisions devastating women's ability to protect their rights to equal employment opportunity. In *Hopkins* v. *Price Waterhouse*, the Court allowed an employer to escape liability even when it considered an impermissible factor, such as gender discrimination, when making an employment decision, so long as it can show that it would have made the same decision in the absence of that impermissible factor.

Price Waterhouse provided women with a qualified victory in its acknowledgment that evidence of sex stereotyping is legitimate evidence of gender discrimination, and that once a woman demonstrates that gender was a factor in the employment decision, the burden shifts to the employer to avoid liability.

But, as the same time, *Price Waterhouse* sends an unfortunate message that a little bit of discrimination is allowable as long as the employer had other plausible reasons for an employment decision. Such a holding allows employers to escape liability for blatantly discriminatory conduct, providing them with no incentive to stop discriminatory actions. Moreover, it leaves the victim of such employment discrimination without any remedy. This holding seriously undermines the statutory objectives of equal employment law.

The Civil Rights Act of 1990 recognizes that the intent of Title VII is to prohibit such impermissible considerations in making employment decisions, while ensuring that victims of such discrimination should not receive remedies to which they may not be entitled, such as reinstatement to a job for which they are not qualified.

In summation, Mr. Chairman, I would like permission to submit a more lengthy statement and a report that we are doing at the Women's Legal Defense Fund about the impact of the *Price Waterhouse* case for the record within the next several days, and I will submit a more complete statement as well.

Mr. EDWARDS. Without objection, so ordered. And we thank you for your testimony.

[The prepared statement of Judith Lichtman follows:]

TESTIMONY OF JUDITH L. LICHTMAN,
PRESIDENT, WOMEN'S LEGAL DEFENSE FUND,
IN SUPPORT OF H.R.4000, THE CIVIL RIGHTS ACT OF 1990

My name is Judith L. Lichtman. I am President of the Women's Legal Defense Fund, an organization founded in 1971 to assist women in combatting workplace discrimination on the basis of gender. In addition, we are committed to the development of public policy that will allow women to cope with the multiple responsibilities of work and family and to achieve equality and social justice in all aspects of our society. In working toward the goal of economic justice for women, WLDF advocates for strong laws, regulations, and policies to guarantee that women's participation in the labor force, and in society as a whole, is free of sex discrimination.

Mr. Chairman, I am pleased to appear before the House Committees on the Judiciary and Education and Labor to testify in support of H.R.4000, the Civil Rights Act of 1990. Indeed, I am happy to share with you the many reasons why it is essential to enact this bill expeditiously and why it should command the overwhelming support of both Houses of Congress. Although I welcome this opportunity, I also recognize how unfortunate it is that I am not here to ask you to enact bold <u>new</u> initiatives to enhance even further the lives of working women and men. Instead I am here to ask you to revisit old ground, to restore and strengthen that which had been quite well established in the law until recently. I am asking that you reaffirm in clear and

unassailable terms your longstanding commitment to equal employment opportunity and equal justice under the law for all.

The Civil Rights Act of 1990 introduces no new or revolutionary concepts into Title VII law. On the contrary, the proposed legislation would re-establish and strengthen legal principles that have long been a part of the jurisprudence of fair employment. When this bill becomes law, it will send a clear and simple message to the people of this country: employment discrimination against women, people of color, and religious and ethnic minorities, when proven, will not go unremedied. The remedies available for such proven discrimination will be adequate to compensate the victim for harm suffered and to discourage outrageous conduct and practices in the future. Employers will again appropriately shoulder the burden of demonstrating that employment "practices . . . fair in form but discriminatory in operation"[1] are a business necessity or they will be in violation of Title VII (when they will then be required to adopt practices that do not result in unlawful discrimination). A worker harmed by discrimination will have the ability to challenge such conduct and seek its redress. Finally, the law will provide, in an orderly manner consistent with constitutional due process guarantees, a remedial scheme to ensure finality of Title VII court orders.

Congress must not retreat from its 25-year commitment to equal employment opportunity. Congress made clear its commitment

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[1] See Griggs v. Duke Power Co., 401 U.S. 424 (1971).

to a workplace free from discrimination in enacting Title VII of the Civil Rights Act of 1964.[2] This began a slow but steady elimination of employment discrimination against women, racial, ethnic, and religious minorities -- barriers that had denied these groups entrance to many factories and offices began to give way to equal employment opportunity. The courts contributed to this progress by giving weight to the remedial purposes of the equal employment opportunity laws and by fairly interpreting the statutory provisions to effectuate those lofty objectives. These efforts were broadened with the passage of the 1972 amendments to Title VII[3] -- extending the coverage of equal employment laws for the first time to government offices at every level, schools, colleges and universities. We thus began to see those institutions reflect among their employees the diversity that is a hallmark of this country's greatness.

Can anyone doubt that the enactment of antidiscrimination laws following the Civil War and in the latter half of this century demonstrated the depth of this nation's commitment to achieving the democratic ideal that is now being pursued with great vigor in countries all over Eastern Europe? As a nation, we set the course for a world democratic view that enables every woman and man to have the opportunity to fulfill their potential and to control their economic destiny. However, unless this Congress sends a clear message that it will not turn back the

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[2] 42 U.S.C. 2000e, et seq.

[3] P.L. 92-261, eff. March 24, 1972.

clock nor turn its back on the right of all Americans to be free from discrimination on the basis of gender, race, color, ethnicity, and religion, it risks relinquishing the leadership that we have earned in the field of human and civil rights. Will we now go backward while others move forward to establish and secure democracy and opportunity in their countries? We cannot.

Make no mistake about it, the 1989 Supreme Court decisions at issue here represent a significant departure from the history of progress since 1964 in pursuit of equal employment opportunity. These employment decisions send the message that it is no longer important to protect the rights of women and racial and religious minorities in the workplace. Rather than applying the law to eliminate intentional discrimination and barriers that effectively result in race and sex discrimination, these decisions impede the ability of victims of unlawful discrimination to vindicate the very rights that the antidiscrimination laws seek to protect.

The cost of allowing unlawful discrimination to go unaddressed by the federal government is much too high. It is a cost that our nation cannot sustain without tremendous damage to our economic and moral health. As we move towards the year 2000, the role to be played in the workforce by women, people of color, and immigrants is commanding more and more attention. These groups will comprise a clear majority of the labor pool by the year

2000.[4] The degree to which our country productively utilizes their skills, both potential and actual, in the offices, factories, laboratories, and other employment sites of this country may mean the difference between competing effectively in the world market and falling further and further behind as an economic world power. Gender, race, national origin, and religious discrimination in employment is counterproductive to our national interest -- it squanders valuable human resources and imperils the nation's growth and economic viability.

If anyone doubts that women are a crucial segment of the American work force and will become even more essential in the future, one need only remember that women constituted 45 percent of all employed workers in 1988 -- women are exactly half of the black work force and almost 40 percent of the Hispanic work force.[5] By the end of the century, more than 60 percent of all women will be working and 47 percent of the total work force will be made up of women.[6]

The increase in the number of working mothers is similarly dramatic. Seventy-two percent of all mothers of school-aged children now work outside of the home for pay, an increase from

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[4] Johnson and Packer, Workforce 2000: Work and Workers for the Twenty-first Century (Hudson Institute 1987).

[5] Women's Bureau, Office of the Secretary, U.S. Dept. of Labor, Twenty Facts on Women Workers, Fact Sheet No. 88-2, 1 (1988). See also Workforce 2000 at 85, Table 3-4, predicting women's share of the work force at 45.8 percent in 1990.

[6] Id.

55 percent in 1975.[7] These women work because they must support themselves and their families. Discrimination thus threatens not only the economic, physical, emotional, and social well-being of these women themselves, but also that of their families.

Why do I think it important to call attention to the plight of these women in the context of the Civil Rights Act of 1990? Because it is clear that we cannot return to the days when there were no effective laws against sex discrimination in employment. We cannot purport to have laws that guarantee freedom from employment discrimination while allowing procedural and technical roadblocks to render vindication of that right nearly impossible.

Collectively, the Supreme Court decisions addressed by the Civil Rights Act of 1990 have made it more difficult for women and men who have been the victims of unlawful discrimination to prove their cases. For example, the decision in Patterson v. McLean Credit Union prevents women of color from successfully claiming racial harassment under Section 1981, essentially permitting a whole range of discriminatory acts which are not contemplated in the formation of an employment contract. The Civil Rights Act of 1990 will restore the reach of Section 1981 to allow for a federal remedy for women of color and other racial minorities who are harassed on the job. The Act will further strengthen Title VII by providing the mirror image of Section 1981 remedies -- compensatory and punitive damages -- for cases

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[7] Occupational Segregation: Understanding the Economic Crisis for Women, (Chicago: Women Employed Institute, 1988), p.2.

of intentional discrimination based on gender, national origin, and religion as well as race.

In Wards Cove Packing Co. v. Atonio, the Court shifted to the plaintiff the burden of showing the absence of any business reason for an employment practice with a discriminatory effect, substantially reducing employees' ability to prevail in "disparate impact" cases. This, for example, reduces women's ability to challenge arbitrary height and weight requirements and strength tests which have unfairly restricted women's access to nontraditional jobs. The Wards Cove holding also severely limits plaintiffs' ability to bring "pattern and practice" cases against employers engaging in systemic discrimination, by requiring that the employee prove the discriminatory effect of each and every practice rather than by demonstrating their cumulative discriminatory effect. The Civil Rights Act of 1990 restores women's ability to prove claims of such systemic employment discrimination.

In Martin v. Wilks, court orders vindicating the rights of women and men to be free of workplace discrimination are left vulnerable and uncertain by allowing non-parties to launch repeated challenges, unrestricted by time limits. The Civil Rights Act of 1990 will restore finality to fair employment litigation by outlining an orderly and fair process for preventing endless collateral challenges to court-approved dispositions.

The Supreme Court in Lorance v. AT&T Technologies requires plaintiffs to act on possibly discriminatory policies as soon as they are adopted by their employer whenever there is a mere possibility that they would be affected adversely by such policies in the future. The Civil Rights Act of 1990 removes this unreasonable and unrealistic burden on employees by lengthening the time for filing a discrimination complaint and by allowing this time to be measured from the point at which a discriminatory practice adversely affects the victim.

I have recounted in just the broadest way the damage these decisions have had on established Title VII law. As these hearings progress, you will be hearing more of the details from both the victims of discrimination and experts in the field of civil rights and employment law. I would like, therefore, to devote the remainder of my testimony to describing the impact of the Court's decision in Price Waterhouse v. Hopkins[8] and its implications for future Title VII claimants unless corrected by Section 5 of the Civil Rights Act of 1990.[9]

Ann Hopkins was a senior manager at Price Waterhouse, a major national accounting firm, when she was proposed for promotion to partnership in 1982. She had brought more business to the firm than any of the 87 other partnership candidates that

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[8] Hopkins v. Price Waterhouse, 490 U.S. ____, 109 S. Ct. 1775, 104 L.Ed.2d 268 (1989).

[9] Attached as an appendix to my written testimony is WLDF's memorandum, "The Impact of Price Waterhouse v. Hopkins, which more fully discusses the implications of the Supreme Court's decision.

year (all of whom were men). She generated approximately $44 million dollars worth of business annually. Nevertheless, Price Waterhouse decided to "hold over" the decision on her advancement until the next year. That year, her peer review evaluations contained mixed reviews: some praised her for "outstanding performance" while others criticized her "macho" and "abrasive" manner.

The next year, Price Waterhouse refused even to propose Hopkins for partnership. One partner involved in the decision-making process told her that her "professional" problems would be solved if she would "walk more femininely, talk more femininely, wear make-up, have her hair styled, and wear jewelry." She was also told that she needed a "course in charm school" to qualify for partnership.

The district court found that Price Waterhouse had unlawfully discriminated against Ann Hopkins on the basis of sex by allowing partners' sex-stereotyped comments to influence the partnership decision. The Court of Appeals affirmed. Both courts determined that an employer who allowed a discriminatory motive to play a part in an employment decision must prove by clear and convincing evidence that it would have made the same decision in the absence of the discrimination.

The Supreme Court affirmed the Court of Appeals in part and reversed in part. The Court agreed that plaintiff Hopkins' evidence of sex stereotyping was sufficient to carry her burden as to the presence of an impermissible factor, gender discrimination, in the decision-making process. It further agreed that

the plaintiff's proof that an impermissible factor played a motivating part in an adverse employment decision shifts the burden to the defendant to show that it would have made the same decision in the absence of the unlawful motive.

Of central concern to plaintiffs who have demonstrated the presence of an impermissible factor, however, is the Court's holding that proof offered by the employer that it would have made the same decision absent its discriminatory motive (e.g., that it would not have hired or promoted the plaintiff anyway because of her lack of qualifications) can defeat a plaintiff's claim of liability altogether. The Supreme Court plurality held that:

> when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account.[10]

It is this holding that carries the potential of severely undermining Title VII's protections against even blatant, intentional sex, race, religion, and national origin discrimination in employment.

Thus, the Supreme Court's holding in Price Waterhouse threatens to allow proscribed employment discrimination to go unsanctioned. The plurality characterizes the shifting of the burden of persuasion to the employer, following the plaintiff's establishment of intentional and impermissible discrimination, as

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[10] 109 S.Ct. 1775, 1795.

an "affirmative defense" to a finding of liability.[11] Therefore, under the plurality's formulation, by persuading the fact-finder that it would have made the same decision absent the discriminatory motive, the employer escapes Title VII liability altogether.

Congress made clear that Title VII is violated whenever sex or race is shown to be an impermissible factor in the employment decision when that law was originally proposed.[12] And, in the past, the Supreme Court has recognized the twin objectives underlying antidiscrimination laws such as Title VII: to deter employers from discriminatory conduct and to redress the injuries suffered by the victims of discrimination.[13]

However, under Price Waterhouse, Title VII's statutory objectives will be undermined as employers' discriminatory conduct escapes liability and victims of discrimination receive no redress. Unless clarified to be consistent with the legislative purposes of Title VII, this decision will result in proven yet unremedied instances of gender, racial, color, religious, and national origin prejudice -- prejudice, in effect, excused and condoned by the courts.

If Title VII and other fair employment laws are to have any real meaning, then proven victims of discrimination must be able

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[11] 109 S.Ct. at 1792.

[12] See Remarks by Senator Humphrey, 110 Cong. Rec. 13,088 (1964); remarks by Senator Case, 110 Cong. Rec. 13,837-38 (1964).

[13] Albermarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975).

to secure a remedy, while perpetrators of clear discrimination must be held liable for their violations. The Price Waterhouse decision imperils this principle. Under this ruling, even Ann Hopkins, who exposed the role of sex-stereotyping in Price Waterhouse's partnership decision-making process, may receive no relief when the case is ultimately concluded.[14] The viability of antidiscrimination laws thus depends upon Congressional response.

By holding that employers can completely escape liability even where their conduct is clearly in violation of Title VII, the Court has provided a way to excuse or condone discrimination. Price Waterhouse sends a message that a little overt sexism or racism is okay, as long as it was not the only thing on the employer's mind. Without clarification, the result in mixed-motive cases will contradict, and eventually undermine, cases disapproving facial discrimination in hiring. This will only send a message to employers and employees alike that Title VII is extremely limited in application, even in cases where there is proof of explicit discrimination. This message clearly subverts

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[14] Because it determined that the Court of Appeals had erroneously held the defendant to a "clear and convincing" standard in finding Title VII liability, the Supreme Court ultimately remanded Price Waterhouse to the district court. 109 S.Ct. at 1795. These further proceedings will allow Price Waterhouse to try to show by a preponderance of the evidence that it would have taken the same action absent its impermissible consideration of gender. If it so proves, Ann Hopkins might well receive no relief whatsoever, despite acceptance by all of the courts of her direct evidence of sex discrimination.

Title VII's purpose in eliminating impermissible discrimination from the workplace.

The Civil Rights Act of 1990 will not allow impermissible and intention sex, race, religious, or national origin discrimination to be excused. The bill recognizes that it is the intent of Title VII to prohibit such impermissible considerations in making employment decisions. The bill thus provides that in those instances where discrimination has been a motivating factor in an employment decision, there will be a finding of liability. Section 5 of the Act does not impose liability for an employer's discriminatory thoughts; instead, liability attaches only when the plaintiff proves that discrimination was a motivating factor in an employer's decision.

At the same time, the bill recognizes the need to ensure that persons subjected to such discrimination should not be the beneficiaries of remedies to which they are not entitled. Thus, where the employer proves that the same decision would have been made in the absence of the discriminatory motive, section 5 of the Civil Rights Act of 1990 would not permit a remedy ordering reinstatement, hiring, back pay, or promotion. Instead, a court could order, among other things, declaratory relief, injunctive relief, changes in the employment decisionmaking process, or changes in grievance procedures. These types of relief accomplish the two-fold objectives of fair employment law -- they force the employer to disregard characteristices such as race, gender, national origin, and religion while simultaneously

vindicating the victim of proven discrimination. Moreover, society as a whole benefits from the elimination of discriminatory conduct from the nation's workplaces.

A review of these cases should make clear why it is imperative to enact the legislative proposal embodied in H.R.4000. The Civil Rights Act of 1990 is necessary to restore and strengthen the laws that have been instrumental in the struggle to eliminate employment discrimination. As a nation, we have come a long way from the days when jobs could be legally restricted "for men only" and when signs in windows and by water fountains could specify "for whites only." However, women as a group still earn only two-thirds of what men earn and occupational segregation by sex continues to flourish. Employment agencies still steer white workers to the most prestigious and high-paying jobs within corporate America without consideration for the qualifications of nonwhite applicants.[15]

The country has a long way to go yet to make equal employment opportunity a reality for all. Let us not be derailed from our objective -- an American workforce and employment landscape free from unlawful discrimination on the basis of sex, race, national origin, color, and religion. Passage of the Civil Rights Act of 1990 will reaffirm this principle and return us to a path of progress towards achieving this goal.

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[15] See Sixty Minutes (CBS television broadcast, February 11, 1990) (New York employment agencies discriminating against better qualified black women and referring white women to executive secretary jobs even though they did not perform as well on typing tests -- a skill essential to adequate job performance).

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THE IMPACT OF PRICE WATERHOUSE V. HOPKINS

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THE IMPACT OF PRICE WATERHOUSE V. HOPKINS

I. INTRODUCTION

In a 6-3 ruling issued on May 1, 1989, the Supreme Court in Price Waterhouse v. Hopkins[1] held that an employer can escape a finding of Title VII liability even when it has been motivated by an impermissible factor, e.g., gender discrimination, as long as it can demonstrate that it would have made the same decision in the absence of the impermissible factor.

Generally, a "mixed-motives" discrimination case such as Price Waterhouse arises when a plaintiff proves that sex, race, religion, color, or national origin was an impermissibly influential factor in the challenged employment decision, while the employer asserts that it would have made the same employment decision based on other lawful motives despite any impermissible discrimination. The significance of this type of case lies in the fact that by definition, it involves employers that are motivated at least in part by factors that are prohibited by Title VII.

As a result of the Price Waterhouse holding, an employer may now defeat liability completely by showing by a preponderance of the evidence that it would have made the same decision for lawful reasons, even though the plaintiff has demonstrated that intentional discrimination was a factor influencing the decision.

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[1] 490 U.S. ____, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989).

Such would be the outcome even in cases involving blatantly discriminatory conduct. Under these circumstances, the employer will not be held legally responsible for proven discrimination. Moreover, the victim will likely end up with no remedy at all.

Price Waterhouse v. Hopkins: Factual and Procedural Background

Ann Hopkins was a senior manager at Price Waterhouse, a major national accounting firm, when she was proposed for promotion to partnership in 1982. She had brought more business to the firm than any of the other 87 partnership candidates that year (all of whom were men), generating approximately $44 million dollars worth of business annually. Nevertheless, Price Waterhouse decided to hold over the decision on her advancement until the next year. That year, her peer review evaluations contained mixed reviews: some praised her for "outstanding performance" while others criticized her "macho" and "abrasive" manner.

The next year, Price Waterhouse refused even to propose her for partnership. One partner involved in the decision-making process told her that her "professional" problems would be solved if she would "walk more femininely, talk more femininely, wear make-up, have her hair styled, and wear jewelry." She was also told that she needed a "course in charm school" to qualify for partnership.

The district court found that Price Waterhouse had unlawfully discriminated against Ann Hopkins on the basis of sex

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by allowing partners' sex-stereotyped comments to influence the partnership decision.[2] The Court of Appeals affirmed.[3] Both courts determined that an employer who allowed a discriminatory motive to play a part in an employment decision must prove by clear and convincing evidence that it would have made the same decision in the absence of the discrimination.

The Supreme Court affirmed the Court of Appeals in part and reversed in part. The Court agreed that plaintiff Hopkins' evidence of sex stereotyping was sufficient to carry her burden as to the presence of an impermissible factor, gender discrimination, in the decision-making process.[4] It further agreed that the plaintiff's proof that an impermissible factor played a motivating part in an adverse employment employment decision shifts the burden to the defendant to show that it would have made the same decision in the absence of the unlawful motive.[5]

Of central concern to plaintiffs who have demonstrated the

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[2] 618 F. Supp. 1109, 1119-20 (1985).

[3] 825 F.2d 458 (1987).

[4] 109 S.Ct. 1775, 1790-91 (Brennan, J.); id. at 1799-1800 (O'Connor, J., concurring).

[5] 109 S.Ct. at 1787-88 (Brennan, J.); id. at 1795 (White, J., concurring); id. at 1798 (O'Connor, J., concurring). The Court reversed the lower courts in holding that a defendant need only prove by a preponderance of the evidence, rather than by clear and convincing evidence, that the same decision would have been made absent consideration of the impermissible factor. Id. at 1794-95.

presence of an impermissible factor,[6] however, is the Court's holding that proof offered by the employer that it would have made the same decision absent its discriminatory motive (e.g., that it would not have hired the plaintiff anyway because of lack of qualifications) can defeat a plaintiff's claim of liability altogether. The Supreme Court plurality held that:

> when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account.[7]

It is this holding that carries the potential of severely undermining Title VII's protections against even blatant, intentional sex, race, religion, and national origin discrimination in employment.

II. THE SUPREME COURT'S HOLDING IN PRICE WATERHOUSE v. HOPKINS THREATENS TO ALLOW PROSCRIBED EMPLOYMENT DISCRIMINATION TO GO UNSANCTIONED.

By shifting the burden of proof to the employer at the

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[6] As Title VII makes clear, the use of sex, race, color, national origin, or religion is not impermissible as part of an employer's affirmative action program. As the Supreme Court has recognized, part of Title VII's purpose is to encourage employers to examine their own practices to eliminate unlawful discrimination. E.g., Albermarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975). Indeed, Section 706(g) of Title VII identifies affirmative action as a lawful remedy. Consequently, the discussion of employer liability under Price Waterhouse and the Civil Rights Act of 1990 in no way implicates liability for an employer's permissible consideration of sex, race, or other criteria as part of an affirmative action effort.

[7] 109 S.Ct. at 1795.

liability rather than at the remedy stage, this holding allows proscribed employment discrimination to go unsanctioned. The plurality characterizes the shifting of the burden of persuasion to the employer, following the plaintiff's establishment of intentional and impermissible discrimination,[8] as an "affirmative defense" to a finding of liability.[9] Therefore, under the plurality's formulation, by persuading the fact-finder that it would have made the same decision absent the discriminatory motive[10], the employer escapes Title VII liability altogether.[11]

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[8] While the plurality opinion held that the plaintiff need only prove that the impermissible consideration was a "motivating factor," 109 S.Ct. at 1787-88, 1790-91, the five Justices who concurred and dissented stated that the plaintiff must prove that the impermissible motive was a "substantial factor" in the decision-making process. Id. at 1795 (White, J., concurring); id. at 1798, 1804-05 (O'Connor, J., concurring); id. at 1806 (Kennedy, J., dissenting, and joined by Rehnquist, C.J., and Scalia, J.).

[9] 109 S.Ct. at 1792.

[10] The type of evidence which the employer must introduce in order to sustain its burden of proof is unclear from the opinions. Justice Brennan, writing for the plurality, suggests that: "As to the employer's proof, in most cases, the employer should be able to present some objective evidence as to its probable decision in the absence of an impermissible motive." 109 S.Ct. at 1791 (footnote omitted; emphasis added). However, Justice White, in concurring, posits that "there is no special requirement that the employer carry its burden by objective evidence....[Where] the employer credibly testifies that the action would have been taken for the legitimate reasons alone, this should be ample proof." Id. at 1796 (emphasis added). In addition, Justice O'Connor, in her concurrence, writes that: "The employer need not isolate the sole cause [the permissible reason] for the decision, rather it must demonstrate that with the illegitimate factor removed from the calculus, sufficient business reasons would have induced it to take the same employment action." Id. at 1804; contrast Wards Cove Packing Co. v. Atonio, 109 S.Ct. 2115 (1989) (requiring the plaintiff to identify the precise cause of discrimination in a disparate impact context). Finally, Justice Kennedy states that "the Court

Congress made clear that Title VII is violated whenever sex or race is shown to be an impermissible factor in the employment decision when that law was originally proposed: "What this bill does . . . is simply to make it an illegal practice to use race [or any of the other impermissible characteristics] as a factor in denying employment."[12] There is no doubt that Congress considered impermissible reliance on gender or race in making employment decisions an evil in itself: "The bill simply eliminates consideration of color [or other forbidden criteria] from the decision to hire or promote."[13] And, the Supreme Court has recognized the twin objectives underlying antidiscrimination laws such as Title VII: 1) to deter employers from discriminatory conduct which harms society as a whole; and 2) to remedy the injuries suffered by the victims of discrimination.[14]

Under Price Waterhouse, Title VII's statutory objectives will be undermined as employers' discriminatory conduct escapes liability and victims of discrimination receive no redress. Unless clarified to be consistent with the legislative purposes of Title VII, this decision will result in proven yet unremedied

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does not accept the plurality's suggestion that an employer's evidence need be 'objective' or otherwise out of the ordinary." Id. at 1806.

[11] 109 S.Ct. at 1786.

[12] Remarks by Senator Humphrey, 110 Cong. Rec. 13,088 (1964).

[13] Remarks by Senator Case, 110 Cong. Rec. 13,837-38 (1964).

[14] Albemare Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975).

instances of gender, racial, color, religious and national origin prejudice -- prejudice, in effect, excused and condoned by the courts.

As an example of the sort of discriminatory conduct that the Price Waterhouse decision would insulate from liability, consider the following scenario:[15] An engineering firm advertises a job opening for an advanced engineer, but ends its advertisement with the words, "Blacks need not apply." A black woman, ignoring the obvious discrimination, applies for the job, but is told that the position has been filled. However, she discovers later that the job actually had not been filled at the time of her application, and that a white man had been hired for the job several days afterward. Under Price Waterhouse, the discriminatory employer would escape all liability for its actions merely by demonstrating that it had another reason for refusing to hire the black applicant -- for example, if she did not have the requisite graduate degree.

Consider also the following example:[16] Four whites and two blacks are vying for the same job opportunity. The employer's decision-making is highly biased by explicit racial stereotypes. Black candidate "A", the most qualified candidate for the job,

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[15] See Civil Rights Act of 1990: Hearings on H.R. 4000 before the House Committee on Education and Labor, 101st Cong., 2d Sess. (February 20, 1990) (statement of Julius Chambers, Executive Director, NAACP Legal Defense and Educational Fund, Inc.).

[16] This example was developed by Sarah E. Burns and Alison Wetherfield of the NOW Legal Defense & Education Fund and appears in their November 5, 1989 memorandum on the Price Waterhouse decision.

becomes disgusted by the denigrating process and departs in an effort to find employment in a non-discriminatory workplace. Black candidate "B" persists in seeking the job, but is rejected. In suing for discrimination, black candidate "B" proves that the process was highly biased due to the use of explicit racial stereotypes. The employer successfully defends the discrimination charge by using the argument that white candidate "C" was objectively better qualified for the job than black candidate "B". Under Price Waterhouse, no liability attaches. The discriminatory employer has no incentive to discontinue the harmful practice and black candidate "A" is discouraged from returning to compete for a job opening, although clearly more qualified than white candidate "C". Society loses the benefit of black candidate "A"'s superior skills. Finally, the infliction of harm to both black candidates' emotional integrity and self-esteem, aside from the loss of employment prospects, remains unrecognized and unremedied.

A related and specific result of this Price Waterhouse analysis is that employers can engage in intentional discrimination, without fear of penalty, against those who possess minimal or questionable job qualifications or whose work performance may not be up to par. Without question, all employers should be free to evaluate job performance and to dismiss or decline to promote employees if performance or job qualifications fall below acceptable levels. However, poor performance or a lack of adequate qualifications should not

become an invitation to inflict on these applicants and employees intentional and often blatantly discriminatory behavior.

Indeed, in shifting the burden of persuasion to defendants at the liability stage of the litigation, the plurality ignored a number of lower courts that resolved the issue of the plaintiff's qualifications at the relief stage.[17] In these cases, if the employer proved that the plaintiff was not qualified for the job, then the remedy for the employer's discriminatory conduct was limited to declaratory and injunctive relief, costs and attorney's fees (and, in Section 1981 cases, damages). In so ruling, lower courts recognized that such relief is necessary to deter employers from acting in an overtly discriminatory manner in the future, regardless of whether the ultimate decision not to hire or promote a person is justified in a particular case.[18]

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[17] E.g., Bibbs v. Block, 778 F.2d 1318 (8th Cir. 1985) (discussed infra); King v. TWA, 738 F.2d 255 (8th Cir. 1984) (discrimination in interview process not cured by employer's legitimate reasons for not hiring plaintiff); Fadhl v. City and County of San Francisco, 741 F.2d 1163 (9th Cir. 1984) (employer's sex-stereotyped comments and disparate treatment supported a finding of liability; plaintiff's on-the-job errors went only to remedy); Ostroff v. Employment Exchanges, Inc., 683 F.2d 302 (9th Cir. 1982) (issue of qualifications affects relief ordered -- employer should be enjoined against sex-biased treatment in the future regardless of the plaintiff's qualifications); see also Brodin, The Standard of Causation In The Mixed-Motive Title VII Action: A Social-Policy Perspective, 82 Colum.L.Rev. 292 (1982).

[18] The Price Waterhouse plurality cited its earlier decision in Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977), as support for shifting the burden at the liability, rather than at the remedy, stage of litigation. Mt. Healthy involved the discharge of a schoolteacher both for exercising his first amendment rights and for permissible reasons. The Court there held that once the plaintiff had shown that his constitutionally protected speech was a substantial or

The Eighth Circuit provided one of the clearest examples of this framework in Bibbs v. Block.[19] In that case, black employee Thomas Bibbs was denied a promotion to a supervisory position in the Agricultural Stabilization and Construction Service (ASCS). Of the seven employees applying for the promotion, all except Bibbs were white. All three members of the selection committee were also white. The member of this committee found to be the "key figure" in the selection process had referred to Bibbs as a "black militant" and had referred to another black employee as

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motivating factor in the adverse treatment, the employer then had the burden to prove by a preponderance of the evidence that it would have reached the same decision in order to avoid liability for a constituional violation. 429 U.S. at 287.

However, in a number of cases brought under 42 U.S.C. section 1981, lower courts have distinguished cases involving antidiscrimination statutes from the Mt. Healthy situation, citing the dual deterrent and remedial purposes underlying fair employment laws:

> "The Mt. Healthy 'same decision' analysis rests on the assumption that the only goal is to compensate victims of civil rights violations. . . . The deterrent purposes which also underlie Section 1981 would be thwarted in many cases if an employer were able to avoid liability completely by showing that his intentional racial discrimination happened in this particular instance to be "harmless." The Mt. Healthy 'same decision' analysis is quite unlikely to provide the 'spur or catalyst which causes employers . . . to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges' of their racially discriminatory practices." (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975).

Edwards v. Jewish Hospital of St. Louis, 855 F.2d 1345, 1351-52 (8th Cir. 1988); see also Estes v. Dick Smith Ford Inc., 856 F.2d 1097, 1102 n.2 (8th Cir. 1988). This is precisely the sort of purpose-based analysis that must be considered when evaluating an employer's liability for impermissible discrimination.

[19] 778 F.2d 1318 (1985).

"boy" and "nigger." On the basis of entirely subjective criteria, the committee unanimously selected a white candidate for the promotion.

The district court found that Bibbs was not selected, at least in part, because of his history of disciplinary and interpersonal problems on the job, and thus denied his claim. The Eighth Circuit, however, found the employer liable for a Title VII violation. It remanded the case for a determination of remedy, instructing that the promotion and back pay were to be awarded only if the employer were unable to prove that it would have made the same decision absent discrimination. The Court of Appeals further ordered the district court to enjoin the employer from future or continued discrimination against Bibbs on the basis of race and instructed the lower court to consider the award of attorney's fees.

Bibbs demonstrates how an employer's liability for impermissible discrimination can be separated from a remedy determination, thus fulfilling Title VII's twin objectives of deterrence and redress. Under this framework, proof of bias creates liability and a presumption in favor of relief. It does not automatically compel a specific remedy in an individual instance, but the employer should bear a heavy burden to prove that the applicant or employee who was subjected to a discriminatory practice did not actually suffer as a result.

The Supreme Court itself applied this framework in

International Brotherhood of Teamsters v. United States,[20] a Title VII class action case. The Court there held that Title VII was violated once impermissible consideration of sex or race was shown to be a factor in the employment decision,[21] and that proof such a discriminatory motive "changed the position of the employer to that of a proved wrongdoer."[22] Once discrimination is found, an individual class member enjoys a "rebuttable presumption in favor of relief,"[23] and the burden shifts to the "employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons."[24] The same sort of analysis should apply to the individual plaintiff who demonstrates the presence of an impermissible factor in the

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[20] 431 U.S. 324 (1977); cf. Franks v. Bowman Transportation Co., 424 U.S. 747 (1976) (class representative can obtain injunctive relief even if it becomes clear after trial that that particular plaintiff was not the victim of discrimination). This sort of analysis has appeared in Supreme Court constitutional jurisprudence as well. In Carey v. Piphus, 435 U.S. 247 (1978), the Court held that a violation of procedural due process may occur even in the absence of actual injury, although the remedy for the violation must be fashioned to avoid a windfall.

> "By making the deprivation of [certain absolute] rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury . . . ."

435 U.S. at 266. Society's interest in a workplace free from discrimination similarly dictates for the establishment of such a framework for evaluating liability and remedy.

[21] 431 U.S. at 335 n.15.

[22] Id. at 360 n.45.

[23] Id. at 359 n.45.

[24] Id. at 362.

decision-making process.[25]

Permitting the employer to present evidence as to what the employment decision would have been (absent consideration of the impermissible motive) during the relief stage, rather than the liability stage, preserves the employer's freedom of choice in specific business decisions without requiring the court to look the other way when presented with proven intentional discrimination. No applicant or employee may expect, nor does Title VII require, that an unqualified applicant or inadequate employee be hired or retained in a job as a remedy for an employer's impermissible discriminatory conduct. Instead, relief can be fashioned with consideration for a plaintiff's qualifications while simultaneously recognizing the illegal conduct of the employer.

Rather than order reinstatement, hiring, back pay, or promotion, the court can order declaratory relief, injunctive relief, attorney's fees, changes in the decision-making process,

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[25] The brief filed by the Department of Justice in Price Waterhouse advocates this analysis as well:

> "[I]t is proper to place the burden on the defendant to prove that a given employment decision would have been the same in a discrimination-free environment. If the defendant makes such a showing, the plaintiff is made whole by an award of attorney's fees and an injunction against future discrimination. In effect, the defendant is ordered to cease discriminatory activity, which enhances the plaintiff's employment opportunities in the future.

Brief of the United States, No. 87-1167, p.23 (citations omitted).

or changes in grievance procedures.[26] For example, injunctive relief, if awarded, can protect the victim from further discrimination.[27] The value to the victim of such non-monetary relief cannot be measured in dollars but rather in psychological satisfaction by recognizing the wrong and indignity of discrimination. Moreover, society as a whole benefits from the elimination of harmful and discriminatory practices in the nation's workplaces.

In recent months, several cases have been decided in the lower courts that demonstrate the state of confusion in mixed-motive litigation created by the Price Waterhouse decision. Furthermore, applying the Price Waterhouse holding to cases decided prior to the Court's decision demonstrates how the ruling could be used to controvert the purposes underlying Title VII, allowing clearly discriminatory conduct to go unremedied. The remaining sections of this memorandum discuss these developments.

III. EXAMPLES OF HOW PRICE WATERHOUSE HAS AFFECTED "MIXED

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[26] In a footnote, the plurality opinion in Price Waterhouse suggests that it did not address the availability of relief such as that enumerated above because the plaintiff did not request such relief at trial. 109 S.Ct. at 1785 n.5.

[27] Because plaintiffs also often sustain actual and compensable damages, Section 8 of the proposed Civil Rights Act of 1990 would provide for compensatory damages where plaintiffs prove intentional discrimination on the basis of race, sex, national origin, or religion. S. 2104 and H.R. 4000, 101st Cong., 2d Sess. sec. 8 (1990).

MOTIVES" DISCRIMINATION CASES UNDER TITLE VII

Since the Price Waterhouse decision, several courts have been confronted with Title VII mixed-motive cases raising the possibility of proven yet unremedied discrimination remaining unsanctioned by the courts.

Nichols v. Acme Markets, Inc.[28] illustrates the gaps created in the fair employment laws by the Price Waterhouse decision. Plaintiff Nichols, a black woman, was fired by her employer when she punched a customer after the customer used racial slurs against her and slapped her in the face. However, when a white male employee beat a child customer, causing head injuries requiring seven stitches, the company took no immediate disciplinary action. Only after the child's mother complained about the worker's continued employment two weeks later did the company discipline him, and then all it did was to suspend him temporarily. The district court denied the defendant's motion for summary judgment, noting that the record supported an inference that the employer's decision to terminate plaintiff's employment was based on a mixture of legitimate and illegitimate considerations.[29] At trial, however, the defendant employer may avoid all liability by showing that it would have fired the plaintiff even absent impermissible considerations.

Similarly, in Brown v. Amoco Production Co.,[30] the district

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28 712 F. Supp. 488 (1989).

29 Id. at 493 n.2.

30 1989 U.S. Dist. LEXIS 8952 (E.D.La. 1989).

court dismissed the plaintiff's Title VII race discrimination case upon the presentation of the employer's evidence that it would have fired the plaintiff in any case. Mr. Brown, a black male, showed, through statistical evidence, that Amoco employed a disproportionately low number of black employees. In addition, the court found that a co-worker's affidavit and the conduct and testimony of Mr. Brown's supervisor indicated that an impermissible motive may have played a part in the termination decision. In response, the employer presented evidence of Brown's errors in performing his assigned tasks and of his poor relationship with his supervisor. Despite the district court's finding that the supervisor's actions were "clearly suspect," the Court cited Price Waterhouse and stated that the employer may avoid liability where the employer shows that the discrimination did not significantly influence the employment decision.[31] Brown's suit was dismissed.

Perry v. Kunz[32] provides a final example. Laverne Perry, a 65-year-old black female, alleged that her employer institution, its superintendent, its personnel officer, and two of her supervisors engaged in a campaign to discriminate against her on account of her race, sex, and age, resulting in her termination after twenty years of employment as a food service helper.[33] Ms. Perry had submitted a coworker's affidavit containing

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[31] Id. at 126.

[32] 878 F.2d 1056 (8th Cir. 1989).

[33] Only the ADEA claim was presented to the district court.

statements to the effect that the supervisors commented on Perry's age and that, when they failed to get Perry to resign, they fired her. The district court granted summary judgment to the employer because Ms. Perry did not show that she met the job qualifications in addition to her specific allegations of disparate treatment. The Court of Appeals, however, concluded that the district court had improperly allocated the burdens of proof in this disparate treatment claim. Giving credence to Ms. Perry's allegations of age discrimination, and likewise crediting a finding of the Personnel Advisory Board that Ms. Perry "was incompetent, inadequate, careless or inefficient in the performance of her work and duties," the appellate court cited Price Waterhouse in reversing and remanding.

Thus, this case is once again before the district court in the following posture: Ms. Perry can demonstrate that she was terminated, at least in part, because of age discrimination. Despite unrebutted evidence of such discrimination, however, the employer can easily escape liability altogether by presenting evidence that it would have fired Ms. Perry anyway. Ms. Perry has certainly incurred expense, lost time, and lost dignity as a result of the original discrimination; yet she may end up with no vindication for her injury even though she has proved intentional discrimination.

IV. APPLYING PRICE WATERHOUSE TO EARLIER COURT OF APPEALS CASES FURTHER DEMONSTRATES HOW THE COURT'S HOLDING WILL ALLOW IMPERMISSIBLE DISCRIMINATION TO ESCAPE SANCTION.

An examination of cases adjudicated prior to the Price

Waterhouse opinion further underscores the need to clarify the intent of Title VII in light of the Supreme Court's decision.[34] For example, in Fields v. Clark University,[35] professor Rona Fields challenged the decision to deny her tenure to the the university's sociology department as the product of impermissible sex discrimination. When Ms. Fields rebuffed the sexual advances of a recently tenured professor, she was told "that's no way to get tenure." The male professor then voted against tenure for Ms. Fields, along with five other male department members, all of whom had sexually harassed her and denigrated her professional status. The district court accepted Ms. Fields' strong evidence of the male professors' pervasively sexist attitude to demonstrate that sex was a motivating factor in her tenure denial. Nevertheless, the Court of Appeals reversed the district court's remedy award of reinstatement and back pay, remanding for findings as to whether the university would have granted Ms. Fields tenure absent gender discrimination. If the case had been decided under Price Waterhouse, the university would have been insulated from all liability if it succeeded in proving that it would have denied tenure to Ms. Fields for another, legitimate reason. Moreover, if the university had made such a showing, Ms.

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[34] This discussion draws heavily from the work of Sarah E. Burns and Alison Wetherfield of the NOW Legal Defense & Education Fund, as appears in Appendix A of their November 5, 1989 memorandum on the Price Waterhouse decision. See also People for the American Way, The Overall Impact of the Supreme Court's 1989 Decisions on Title VII of the 1964 Civil Rights Act 40-45 (1990).

[35] 817 F.2d 931 (1st Cir. 1987).

Fields could have been denied any relief to enjoin further discrimination in future tenure decisions.

In Nanty v. Barrows Co.,[36] also decided before Price Waterhouse, Herbert Nanty, an Apache, was denied employment as a furniture delivery truck driver despite possessing the advertised requisites -- experience in handling and unloading furniture, a class A chauffeur's license, and a good driving record. When Mr. Nanty appeared in person to apply for the job, he was told that the position was filled. He was not interviewed for the job, nor did he receive an application. However, the job had in fact remained unfilled. Three days later, two white men were hired for the job. The Court of Appeals instructed the lower court to enjoin the employer from future or continued discrimination against Mr. Nanty and to award him attorney's fees. It also remanded the case for further consideration as to whether Mr. Nanty was qualified for the job given the employer's subjective criteria of neatness, articulateness, and personableness. Had the case been decided after Price Waterhouse, however, the case might well have prevented an entry of injunctive relief and award of attorney's fees to remedy such egregious facial discrimination -- if the district court had concluded that the employer had rejected Mr. Nanty's application on the basis of legitimate criteria.

Similarly, in Ostroff v. Employment Exchange,[37] the Ninth

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[36] 660 F.2d 1327 (9th Cir. 1981).

[37] 683 F.2d 302 (9th Cir. 1982).

Circuit drew a crucial distinction between the right to protection from discrimination and the right to receive a certain job. When Miriam Ostroff inquired as to the availability of an executive secretary position with a state agency, she was curtly told that the job had been filled. However, when Ms. Ostroff's husband inquired as to the availability of the job shortly afterward, he was told that the position was still available. Although Ms. Ostroff did not possess the requisite qualifications for the job, the lower court held that the false information as to the job's availability was motivated by gender discrimination. The Court of Appeals ruled that an injunction against the defendant's discriminatory conduct should issue regardless of Ms. Ostroff's qualifications. Price Waterhouse jeopardizes precisely such prevention of unlawful discrimination.

V. CONCLUSION

If Title VII and other fair employment laws are to have any real meaning, then proven victims of discrimination must be able to secure a remedy, while perpetrators of clear discrimination must be be held liable for their violations. The Price Waterhouse decision imperils this principle. Under this ruling, even Ann Hopkins, who exposed the role of sex-stereotyping in Price Waterhouse's partnership decision-making process, may receive no relief when the case is ultimately concluded.[38] The

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[38] Because it determined that the Court of Appeal had erroneously held the defendant to a "clear and convincing" standard in finding Title VII liability, the Supreme Court

viability of anti-discrimination laws thus depends upon Congressional clarification.

By holding that employers can completely escape liability even where their conduct is clearly in violation of Title VII, the Court has provided a way to excuse or condone discrimination. Price Waterhouse sends a message that a little overt racism or sexism is okay, as long as it was not the only thing on the employer's mind. Without clarification, the result in mixed-motive promotion cases will contradict, and eventually undermine, cases disapproving facial discrimination in hiring. This will only send a message to employers and employees alike that Title VII is extremely limited in application, even in cases where there is proof of explicit discrimination. This message clearly subverts Title VII's purpose in eliminating impermissible discrimination from the workplace.

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ultimately remanded Price Waterhouse v. Hopkins to the district court. 109 S.Ct. at 1795. These further proceedings will allow Price Waterhouse to try to show by a preponderance of the evidence that it would have taken the same action absent its impermissible consideration of gender. If it so proves, Ann Hopkins might well receive no relief whatsoever, despite acceptance by all of the courts of her direct evidence of sex discrimination.

Mr. EDWARDS. The next member of the panel to testify will be Marcia D. Greenberger, Managing Attorney, National Women's Law Center.

Ms. GREENBERGER. Thank you, Mr. Chairman. I have also a request to submit my written remarks for the record, and because of the number of questions that have been raised with respect to damages, I hope to be able to go through in my oral remarks today the way that the Civil Rights Act of 1990 would strengthen Title VII with respect to damages, how it would operate in practice, and I will simply say at this point that the National Women's Law Center strongly supports the Civil Rights Act of 1990 in all of its respects, and let me move on to the question of damages and how it works.

I would like to discuss, really, three aspects of the damages issue: first, what the bill requires; second, why damages are so important to add to Title VII; and, third, how we expect it will work from our past experience in this area.

First, let me talk a bit about what the bill requires, and it is in section 8 of the bill that the damages provision is contained. Let me say, to start with, that the damages provision is modeled directly after Section 1981. It was very heartening to hear the expressions of support that seem quite unanimous, in fact, with respect to overruling the *Patterson* case, which, of course, is a Section 1981 case. What is at issue in this legislation is to make those remedies which are available in Section 1981, and which there seems to be a consensus should be available across the board in Section 1981 with respect to employment discrimination against protected minorities, applicable under Title VII to the protected groups that do not receive the protection under Section 1981 itself.

Therefore, under the Civil Rights Act of 1990, let me start out by saying that the damages provision on the face of the bill itself applies only to cases of intentional discrimination, not to cases where there is disparate impact. There has been much discussion this morning about the question of statistical proof, about quotas, about affirmative action. That is not a set of relevant discussions with respect to damages. Because if one looks at section 8 of the legislation, it says in its introductory section that with respect to Title VII the following new sentence would be added: "With respect to an unlawful practice" and then there are parentheses, "other than an unlawful employment practice established in accordance with section 703(k)" 703(k) is the set of employment practices that deal with disparate impact where statistics and the like become relevant—damages do not apply in that category of cases, either compensatory or punitive damages.

So, in the Civil Rights Act of 1990 we are only talking about applying damages where there is actual intent to discriminate shown by the plaintiff. The plaintiff must prevail in showing that there was actual intent to discriminate, as is the case in Section 1981, and only under those circumstances would damages apply.

Second, the question is what are the kinds of damages applicable in the Civil Rights Act of 1990, and again the answer is clear, it is modeled after Section 1981. The same kind of damages under the same kind of circumstances.

First, compensatory damages. Compensatory damages are available under Section 1981. They would be available to groups not protected in Section 1981 under the Civil Rights Act of 1990. Compensatory damages have a well articulated meaning in case law, certainly under Section 1981, which is the model here. They deal with out-of-pocket expenses, certainly. So that where there are medical bills, for example, those bills would be covered, which is not the case, unfortunately, under Title VII right now. They deal with other consequential damages as well, generally termed emotional distress, humiliation. That could be analogous to the pain and suffering that was raised earlier, but they are generally termed in the context of consequential damages. So that there would be, where there is emotional distress and humiliation, damages to cover that kind of injury as well. That is what compensatory damages would require.

Now there is a second category of damages provided for in Section 1981, also provided for in the Civil Rights Act of 1990 under Title VII, and that is with respect to private employers where there is an unlawful employment practice, not only where there was intent to discriminate shown, but where there was malice or reckless or callous indifference to the civil rights of the victim. Only then would punitive damages be awarded against the respondent. That is an extremely difficult standard to meet. It is the standard now in Section 1981.

It applies for two reasons: First, to punish the employer where there is that kind of actual malice, callous indifference, and to deter that employer and others from that kind of extreme discrimination in the future. The history of Section 1981 has shown that in many circumstances only compensatory damages are awarded, and not punitive damages. It is fair to say also that the history of Section 1981 has shown that even when punitive damages are awarded the awards are not very high, so that the situation where a civil rights lawyer winds up having to take a case for modest fees is not altered in the least with respect to the history of Section 1981 and the availability of both compensatory and punitive damages.

I want to turn now to why it is so important to extend the Section 1981 damages remedy now available to Title VII protected groups that cannot take advantage of Section 1981's provisions. The National Women's Law Center has issued a report, and I believe that copies of the report have been available to the members of the committees, that reviews what has happened, what our history has been under Title VII in the absence of a damages provision. And it is fair to say that in the number of years that we have done reports and testified with respect to pieces of civil rights legislation, never before have we had to chronicle in such painful detail outrageous and painful examples of discrimination suffered by individuals across this country with no remedies available for that discrimination.

There is an executive summary of the report which details some of these examples. The examples are described in more detail in the body of the report. I just wanted to pick out a few to describe to you how serious the problem is.

There is, for example, a 1981 reported case, and I will say our report only deals with cases that have actually been reported with

printed decisions in the Federal Reporters. There are many other cases that have not been the subject of written court decisions, and, obviously, many instances in this country of similar problems of discrimination where no case was brought at all.

In any event, let me tell you for a moment about the example of Helen Brooms, who is described in the executive summary of our report on page 2 and in the text of our report on page 9. She was severely sexually and racially harassed on the job. She was shown sexually explicit photographs. Her supervisor threatened her life. She went racing out to escape him. She fell down a flight of steps, trying to escape him. She subsequently suffered severe depression. The judge in this case found that depression was a direct cause of the discrimination that she suffered, but because of the limitations of Title VII she was not able to receive any damages for her medical bills or in any way receive damages for the severe injuries that she suffered as a result of the discrimination under Title VII.

A second example, Ramona Arnold, a police officer. There were signs posted in the police department about the fact that women do not make good police officers, including on the car of her supervisor. Again, sexually explicit photographs were posted with her name on them. The court in that case found that she was suffering from high blood pressure. She, again, had a severe medical condition, requiring bills and the like, because of the discrimination she suffered. But because of the absence of a Title VII remedy that applied to sex discrimination in that case, she was not able to receive any damages.

There are other examples described in the case in our report as well, the case of Gail Derr, who was told by her supervisor that women should not have career aspirations if they have young children at home. That supervisor did not explain to her how she was supposed to support those children at home without career aspirations, but that was his view. She was demoted. She, as a result, loss serious career opportunities and was not able to receive damages for that kind of court-found discrimination in her case as well.

There are other examples, again, as I said, too many painful examples of shocking facts and circumstances, where the plaintiff was able to recover nothing because of the absence of damages under Title VII.

I can imagine no better use of resources that the courts could be put to than to root out this kind of discrimination, which is really a shameful blot on our Nation and cannot and should not be tolerated.

I want to close with a quote from a judge who sat and heard one of these cases. The quote appears on page 37 of our report. It dealt with the case of Johnnie Mae Mitchell, who was racially and sexually harassed by her supervisor. Despite the finding of a Title VII violation, no damages were able to be awarded, and the Federal judge said that in his view it was an indictment of Title VII that there were no damages available.

He said, and I am quoting, "There is little incentive for a plaintiff to bring a Title VII suit when the best that she can hope for is an order to her supervisor and to her employer to treat her with the dignity she deserves and the costs of bringing her suit. One can expect that a potential claimant will pause long before enduring

the humiliation of making public the indignities she has suffered in private when she is precluded from recovering damages for her perpetrator's behavior. It is, however, the responsibility of Congress, rather than this Court, to recognize and repair this deficiency in the statute." There is no better time, when attention has been focused on the importance of Section 1981, to also look at the glaring omission in Title VII with respect to a damages remedy, and we urge therefore that the Civil Rights Act of 1990 be quickly enacted into law and include a damages provision that is long overdue.

Thank you.

[The prepared statement of Marcia D. Greenberger follows:]

NATIONAL WOMEN'S LAW CENTER

TESTIMONY OF MARCIA GREENBERGER,
MANAGING ATTORNEY OF THE NATIONAL WOMEN'S LAW CENTER
BEFORE THE COMMITTEE ON EDUCATION AND LABOR AND THE
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS
REGARDING THE CIVIL RIGHTS ACT OF 1990
February 20, 1990

Good Morning. I am Marcia Greenberger, managing attorney of the National Women's Law Center. I am here to urge strongly your support of H.R. 4000, the Civil Rights Act of 1990.

This legislation is vitally necessary for two reasons. First, it restores the state of the employment discrimination laws which were eviscerated by recent Supreme Court decisions. Furthermore, it strengthens such laws to ensure that individuals are free from discrimination in the workplace.

The National Women's Law Center's seventeen-year history of working to eliminate sex discrimination in the workplace brings me here to attest that we need strong employment discrimination laws as much today as we did when they were originally passed. Sex discrimination remains a serious barrier for women seeking equal opportunity in the workplace. Even the briefest review of the facts supports this contention:

- A study by the National Academy of Sciences attributes a significant percentage of the wage gap between men and women to sex discrimination. At a time when more and more women are entering the ranks of the poor and the "working poor", discrimination has no place in our society or in our economy.

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- Women who want to achieve greater economic security by entering traditionally male fields still have made only limited progress. As of 1988, only 9% of all working women were employed in what is considered "nontraditional" occupations. This category is a broad one, including such diverse positions as architects, lawyers, auto mechanics, plumbers and truckdrivers. One example of enormous difference between male and female representation in certain high-paying fields was presented in the 1987 Supreme Court case of Johnson v. Transportation Agency of Santa Clara County, where Ms. Johnson was the only female skilled craft worker out of 238 such workers in the county agency.

- Sexual harassment is a severe problem for a large percentage of women. Since 1980, more than 38,500 sexual harassment cases have been filed with the Equal Employment Opportunity Commission. A 1980 study by the U.S. Merit Systems Protection Board, which was updated in 1988, shows that 42% of women had experienced sexual harassment on the job in the two years prior to the survey. A recent Working Woman survey revealed that more than a third of Fortune 500 companies, the corporations that one would expect might be the most enlightened about workplace discrimination, have been sued for sexual harassment, and almost one quarter have been sued repeatedly.

- Sexual stereotyping stands as a very real barrier between women and full opportunities, as many employers still hold set notions about the types of work women can and should do. One recent example is a woman who was demoted by her supervisor

who declared that it was "dangerous" for women to get too much education, and scolded her for working when she had two children. Derr v. Gulf Oil Corp., 796 F.2d 340 (10th Cir. 1986).

The Civil Rights Act of 1990 contains provisions designed to strengthen existing discrimination law, and to reverse several harmful Supreme Court decisions. I will briefly outline five of these decisions and their particular impact on women.

- Ward's Cove v. Atonio, in which the Court substantially increased the burden on plaintiffs proving "disparate impact" discrimination claims. Disparate impact suits have been extremely important to women trying to overcome arbitrary requirements for employment, which while ostensibly neutral on their face, disproportionately exclude women. A classic example is the minimum height and weight requirements for police officers which kept police departments all-male enclaves for many years.

- Price Waterhouse v. Hopkins, in which the Court stated that some intentional discrimination in employment decisions can be permissible if the adverse employment decision was also based on non-discriminatory grounds. Under this decision, an employer who fires, or fails to hire or promote an employee in part for discriminatory reasons can escape Title VII liability entirely if it can show that it would have taken the same action if the discrimination had not been present. Therefore, an employer who has a policy of not promoting women could retain this policy indefinitely so long as it could show that the particular woman challenging the policy did not deserve the promotion. The Act

clearly states that employers cannot escape any liability for intentional discrimination simply by showing that they would have made the same decision anyway. Rather, under the bill, while a particular remedy such as promotion may be unavailable if the employment decision would have been made absent the discrimination, remedies to cure the actual discrimination would remain, such as an injunction against the refusal to consider any women for promotion in the future.

- Martin v. Wilks, where the Court removed the finality and certainty of court-approved consent decrees designed to remedy past discrimination by approving their subjection to endless litigation. Many women, such as those in San Francisco's police department, North Carolina's highway patrol, and virtually all of Memphis Tennessee's city jobs, have benefited and still benefit from such court-approved decrees designed to remedy years of sex discrimination. Without foreclosing the possibility of later appropriate challenges, the Act restores the much-needed general finality of such decrees so that employers will not be subject to ongoing litigation when they seek to rectify past discrimination.

- Lorance v. AT&T, in which the Court denied a woman her day in court because it determined that she was too late in filing her discrimination claim. Because of its exceedingly narrow reading of the law, the Court declared that Ms. Lorance should have anticipated that she was going to be demoted for discriminatory reasons three years before the event took place

and filed her challenge at that time. The Act remedies this narrow reading of the law by stating that people can file claims up to two years after they have been affected by the discrimination, with a precise application of this principle to collectively-bargained seniority systems.

- Patterson v. McLean Credit Union, where the Court denied a woman the right to sue her employer for racial harassment under §1981, ruling that racial discrimination which takes place any time after an employee is hired is not unlawful under this statute. The restoration of the integrity of §1981 is particularly needed by women of color, who suffer from the "double jeopardy" of race and sex discrimination. The Act makes clear that all forms of racial discrimination in employment are unlawful under this statute.

While overturning the adverse effects of prior Supreme Court cases is a major purpose of this legislation which the National Women's Law Center strongly supports, I have been asked to focus my testimony on the second important purpose of the Civil Rights Act of 1990: to correct anomalies in the law which have been demonstrated to severely weaken Title VII's effectiveness. It is this aspect of the legislation, in particular the damages provision of the proposed legislation, that I will address in more detail now.

The Civil Rights Act of 1990 would allow victims of intentional discrimination to seek damages under Title VII, as those suffering racial discrimination may under §1981. I want to

make very clear that, as is true under §1981, under the bill the damages remedy is only available to victims of intentional discrimination. Some have claimed the bill would apply a damages remedy to disparate impact cases. However, Section 8 of the proposed legislation expressly provides that disparate impact cases are not subject to damages.

Currently, Title VII does not allow any discrimination victims to seek any damages. A successful Title VII plaintiff is limited to the following relief: injunctions against future discriminatory behavior, reinstatement to the job if he or she was wrongfully fired, not promoted, or not hired in the first place, and/or no more than two years of back pay if the victim can prove that he or she lost wages as a result of the discrimination.

The remedies currently available under Title VII can prove woefully inadequate to many victims of discrimination. The National Women's Law Center's report entitled "Title VII's Failed Promise: The Impact of the Lack of a Damages Remedy" extensively chronicles case after case in which courts have found in reported decisions that individuals have been discriminated against by their employers, and yet the victims have gotten minimal or no relief under Title VII. A copy of this report is attached to my testimony, and I ask that it be included in the record. The lack of a damages remedy means that discrimination victims cannot recover for medical bills, emotional trauma, and lost

opportunities, even if they are directly caused by the discrimination.

I will summarize briefly here only a few of the examples described in more detail in our report. One victim of Title VII's failed promise is Helen Brooms, a nurse who was severely sexually harassed by her supervisor, who showed her pornographic pictures and informed her that she was hired to perform the acts depicted. When she complained to her supervisor's superior about the harassment, the superior, rather than halting the harassment, compounded the problem by making further insulting and highly inappropriate comments to Ms. Brooms. Finally, Ms. Brooms' supervisor grabbed her and threatened to kill her; she was physically injured when she fell down a flight of stairs escaping him. Consequently, Ms. Brooms suffered serious emotional and medical problems, requiring extensive medical treatment. Although the court found that her employer had violated Title VII by these actions, she recovered no compensation for her medical injuries or her distress. Brooms v. Regal Tube Co., 881 F.2d 412 (7th Cir. 1989).

The case of Helen Brooms is not an isolated one; similar cases are reported all over the country involving a wide range of discriminatory behavior. For example, Gail Derr was demoted from her job as a lease analyst by her supervisor, who told her that she had no business pursuing a career when she was the mother of two. She recovered nothing in her Title VII suit, despite a finding by the court that she had been discriminated against.

Derr v. Gulf Oil Corp., 796 F. 2d 340 (10th Cir. 1986). Rodney Compston, a millwright, got along well with his supervisor until his supervisor learned he was of Jewish descent. Thereafter, the supervisor became hostile and repeatedly hurled religious epithets at him. Even though the court found that Mr. Compston had been discriminated against, and that he had suffered mental anguish and humiliation as a result of the discrimination, Mr. Compston recovered only the nominal sum of $50 because damages were not available under Title VII. Compston v. Borden, Inc. 424 F. Supp. 157 (S.D.Ohio 1976). Curtis Cowan was passed up for promotion to manager three times because he was black. However, he recovered nothing under Title VII because the court determined he would not have earned more as a manager during the relevant time period. Had §1981 not been available, his humiliation, distress, and unrealized higher future earnings would have gone unredressed. Cowan v. Prudential Ins. Co. of America, 852 F.2d 688 (2d Cir. 1988).

The effect of a lack of a damages remedy extends far beyond the reported case law. For every reported case in which a discrimination victim received no compensation for her injuries, there are many more that never reached the courtroom because no meaningful relief was available even if the victim did prove discrimination. As the court observed in Mitchell v. OsAir, Inc., 629 F. Supp. 636 (N.D.Ohio 1986),

> There is little incentive for a plaintiff to bring a Title VII suit when the best she can hope for is an order to her supervisor and to her employer to treat her with the dignity

> she deserves and the costs of bringing her suit. One can expect that a potential claimant will pause long before enduring the humiliation of making public the indignities she has suffered in private. . . when she is precluded from recovering damages for her perpetrators' behavior. It is, however, the responsibility of Congress, rather than this Court, to recognize and repair this deficiency in the statute.

Id. at 643.

In that case, the court was unable to grant any relief at all to a woman who had conclusively proven sexual harassment because Title VII did not allow an award of damages.

Not only does the lack of a damages remedy deter bona fide discrimination victims from vindicating their rights, it fails to provide employers with a meaningful incentive to comply with the law. The Supreme Court stated in Albemarle Paper Co. v. Moody, 425 U.S. 405, 418 (1975) that Title VII's remedies are intended to advance the dual statutory goals of 1) eliminating effects of past discrimination and 2) preventing future discrimination. As my previous testimony has shown, because of the absence of a damages remedy, the first goal is all too often not attained. Furthermore, the latter goal of deterring future discrimination by employers is often unmet as well. Employers can condone or perpetrate discrimination knowing that, even if they are found guilty of discrimination, the pricetag on such unlawful practices is very small indeed.

Let us suppose that an employer intentionally pays a female employee less than her male counterparts, and for several years denies her promotions that she deserves simply because she is a

woman. If she sues under Title VII and wins, the most that the employer will have to pay her is the difference between her actual wages and what she would have made if no discrimination had taken place. The woman is entirely uncompensated for the years of humiliation, stress, and career losses she suffered from being underpaid and denied promotions that she deserved. Further, as for the employer in this example who practiced longstanding intentional discrimination, because it was discrimination based on gender and therefore not covered under §1981, the employer would escape liability for much of the injury it caused, and thereby be provided with little incentive to root out and eliminate discriminatory practices in the future.

The damages remedy provided in the Civil Rights Act, because it is modeled precisely after the remedies available under §1981, is both reasonable and effective. The inclusion of a damages remedy in Title VII ensures that victims of all types of prohibited discrimination receive adequate relief for the harm they have suffered.

Under the bill, as is the case in §1981, two types of damages are available. First, compensatory damages are available to provide a victim of intentional discrimination with compensation for the injuries suffered because of the discrimination. Elements such as medical bills, lost career opportunities and emotional distress are included. Further, the proposed legislation provides that punitive damages may be assessed in particularly egregious discrimination cases. Where

defendants have acted with malice, or with callous indifference to the right of individuals to be free from discrimination in the workplace, punitive damages may be imposed. The punitive standard in the proposed legislation is drawn directly from the standard applicable in §1981. See Smith v. Wade, 461 U.S. 30, 56 (1983); Block v. R.H. Macy, 712 F.2d 1241, 1246 (8th Cir. 1983); Stallworth v. Shuler, 777 F.2d 1431, 1435 (11th Cir. 1985); Yarbrough v. Tower Oldsmobile, Inc., 789 F.2d 508, 514 (7th Cir. 1986).

Finally, even though I have emphasized that the Title VII damages remedy mirrors that provided in §1981, there are two important respects in which the Title VII remedy is more limited. First, §1981 applies to all employers, while Title VII applies only to those employers with fifteen or more employees. It has been estimated that over 11 million workers in over four million firms are not covered by Title VII, and therefore will not have a Title VII damages remedy. Second, Title VII brings with it a conciliation process not available under §1981 which would apply to any Title VII damages claim.

Damages are a reasonable and long-overdue remedy for victims of intentional employment discrimination who have suffered serious harm as a direct result of the discrimination. Furthermore, the addition of damages to Title VII ensures that all victims of unlawful discrimination have comparable remedies available to them, sending a strong message to the nation that all forms of discrimination are intolerable in our society.

The evidence is clear. Sex discrimination, like other forms of discrimination, is a serious problem in our society, and the Civil Rights Act of 1990 is a vitally important tool for eradicating such discrimination. I urge you to pass the Act promptly. Thank you.

NATIONAL WOMEN'S LAW CENTER

Title VII's Failed Promise:

The Impact of the Lack of a Damages Remedy

A Report by the

National Women's Law Center

Caroline D. Newkirk
Ellen J. Vargyas
Marcia D. Greenberger

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EXECUTIVE SUMMARY

Title VII of the Civil Rights Act of 1964, a key part of the federal scheme to assure equal opportunity in employment, prohibits employment discrimination on the basis of race, sex, color, religion and national origin. Title VII provides victims of discrimination a range of remedies for the injuries they have suffered but it does not include monetary damages. Because of Title VII's central role in the battle against discrimination in the workplace, and because of the attention currently focused on it as a result of last spring's restrictive Supreme Court decisions, the National Women's Law Center has undertaken a review of the impact of the lack of a damages remedy in Title VII. This study clearly demonstrates that the remedies available under Title VII are inadequate: many victims of employment discrimination are not compensated for the injuries they suffer, and employers are not deterred from discrimination.

Under the current law, a discrimination victim who proves that his or her rights have been violated under Title VII has the following remedies available: reinstatement to the job if he or she was wrongfully fired, not promoted, or not hired in the first place, court orders prohibiting future discriminatory behavior, and/or awards of not more than two years of back pay if the victim lost wages because of the discrimination. It does not include monetary compensation for injuries such as medical bills or emotional distress which result from the discrimination. Nor

does it include punitive damages -- monetary awards against wrongdoers for particularly egregious discriminatory acts. This is in spite of the fact that other civil rights statutes provide such remedies. As a direct result, many proven victims of unlawful employment discrimination receive little or no recompense for the injuries they suffer. At the same time, many discriminatory employers have little incentive to come into compliance with the law, because they know that they stand to lose relatively little even if they are judged in violation of the law.

The following points summarize the major conclusions of the report and offer several real-life examples of their impact:

1. Individuals who suffer medical and/or psychological harm as a direct result of unlawful discrimination are not compensated for those injuries

- Helen Brooms was severely sexually and racially harassed on the job until she finally quit after her supervisor showed her sexually explicit photographs and threatened her life. She fell down a flight of stairs trying to escape him and subsequently suffered a severe depression. The court found that her rights had been violated, but because of the limitations of Title VII she received no compensation at all for her medical injuries. [Brooms v. Regal Tube Co. (1989)].

- Ramona Arnold, a police officer, suffered severe anxiety, depression and stroke-level high blood pressure as a result of a campaign of sexual harassment by her fellow officers

and supervising officers. Although the court held that she had been severely discriminated against, she received nothing for these injuries. [Arnold v. City of Seminole, Okl. (1985)].

2. Because of Title VII's limitations, many victims receive no compensation of any type, even when they prove they have suffered severe discrimination

- The court found that Hortencia Bohen, a fire dispatcher, had "endured extreme and ongoing sexual harassment", including unwanted sexual touching by her co-workers and being told by her supervisor that what she really needed was to be raped in the bushes. Nonetheless, she received no relief under Title VII. [Bohen v. City of East Chicago, Indiana (1986)].

- Ray Wells received no relief under Title VII for what the court called "vicious, frequent, and reprehensible" racial harassment. He was called "nigger" on the job, and was harassed so severely by white co-workers in the company lunchroom that he felt compelled to eat lunch with another black worker in a separate room. EEOC v. Murphy Motor Freight Lines (1980)].

- Gail Derr quit her job after she was unfairly demoted by her supervisor. He told her that it was "dangerous" for women to get too much education and scolded her for having career ambitions when she had two children. Despite the fact that the court found she had been unlawfully discriminated against, Ms. Derr received no compensation because of Title VII's limitations. [Derr v. Gulf Oil Corp. (1986)].

• Curtis Cowan received nothing under Title VII after he had been passed up for promotion to a managerial position three times because he was black. The court denied Mr. Cowan back pay because he would not have earned more as a manager during the relevant, short-term time period, and Title VII provided no remedy for the humiliation he suffered or the long-term prospects he lost. [Cowan v. Prudential Insurance Co. of America (1988)].

3. State law does not provide a sufficient alternative: state tort laws typically include requirements which are extremely difficult to satisfy, and many victims are barred by state worker's compensation laws from suing their employers in tort altogether

• Charlotte Hunter's supervisor told her to come to a company meeting on the weekend. When she arrived, she was the only one there, and her supervisor raped and beat her. She lost her state tort claim against her employer -- and all realistic hope of damages -- because the court determined the supervisor was not acting in the scope of his employment when he raped her, a requirement for winning the case under the state tort law. [Hunter v. Countryside Assn. for the Handicapped, Inc. (1989)]

• Elizabeth Paroline's state tort claim against her employer for the unwanted touching, kissing, and suggestive remarks of her supervisor was dismissed because the conduct was not sufficiently "outrageous" to meet the very high tort standard of prohibited conduct. [Paroline v. Unisys Corp. (1989)]

• Helen Brooms, the nurse whose case is discussed above, was prevented altogether from suing her employer in tort because the court ruled that state worker's compensation law barred such suits. [Brooms v. Regal Tube Co. (1989)].

4. The experience with 42 U.S.C. §1981, the post-Civil War statute which prohibits racial discrimination in employment contracts, shows how important a damages remedy is to combat discrimination [1]

• Alice Brice was repeatedly passed over for promotion and otherwise discriminatorily treated. Under §1981, she recovered $50,000 in compensatory damages for a serious medical and nervous condition she suffered as a result of the discrimination and $15,000 in punitive damages. Ms. Brice would not have recovered these damages if she had sued under Title VII. [Williams v. Owens-Illinois, Inc. (1982)].

• Charles Grubb was demoted and fired from his 18-year job as a laundry manager because his employer's new manager believed a black man had no business supervising whi'e women. Mr. Grubb recovered $25,000 under §1981 for his emotional distress. He would not have been able to recover for his emotional distress under Title VII. [Grubb v. Foote Memorial Hospital (1985)].

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[1] It should be noted that §1981 has been severely limited by the Supreme Court's decision in Patterson v. McLean Credit Union (1989). The §1981 cases above would probably come out differently if they had been brought post-Patterson.

- Also under §1981, Ina Alston received $25,000 for pain and suffering, and $65,000 for humiliation after she was subject to pay discrimination and demotion because of her race. These damages would not have been available under Title VII. [Alston v. Blue Cross and Blue Shield of Greater New York (1985)].

Conclusion

Title VII has a two-pronged goal: it seeks to eliminate the effects of past discrimination and to deter future discrimination. The record shows that both of these goals are severely compromised when, because there is no damages remedy, discrimination victims go uncompensated for injuries they suffer as a direct result of prohibited discrimination.

Mr. EDWARDS. Thank you very much, Ms. Greenberger.

The third member of this panel is Meyer Eisenberg, Chairman, National Legal Affairs Committee, Anti-Defamation League.

Mr. Eisenberg, you are welcomed.

Mr. EISENBERG. Thank you, Mr. Chairman. The fact that I am chairman of the National Legal Affairs Committee, of course, means that I am a lawyer, and like most lawyers we are here to help you. I think that it is important that this committee is facing so promptly the implications of the Supreme Court cases which have been decided over the past term.

We believe that this Act is true to the letter and the spirit of the original Civil Rights Act of 1964, that it offers necessary and important Federal protections to potential victims of discrimination and does so sensibly and reasonably, without resort to quotas or numerical preferences which can themselves become discriminatory and which we have for many years opposed.

We do not believe that this bill, properly interpreted, should result in quotas or in their functional equivalents. Several provisions of this Act are noteworthy, and one of those provisions involves *McLean Credit Union*, which has already been discussed with this committee, and I think generally has not raised the kinds of issues or controversy which has been raised by the second important provision of this Act, which deals with *Wards Cove*, and I would like to go to the *Wards Cove* issue.

This section of the bill addresses employment discrimination which may result from what appears to be neutral practices or policies, rather than a clearly articulated or demonstrable intent to discriminate. Our experience clearly indicates that the results of these more subtle practices are often a signal of the presence of discrimination. Under the Civil Rights Act of 1990, once an employee points to practices related to hiring or promotions which result in disparate impact, which, by the way, is not defined in the bill, the employer must show either that the practices are neutral and not discriminatory or that they were indeed justified by "business necessity" and that they were "essential" to effective job performance.

The word "essential," which has been questioned here, as included in this bill should be interpreted we believe to mean that the practices play a substantial role in selection and are clearly related to important job qualifications which result in the applicant being better qualified or better able to perform the job. Otherwise, "essential" becomes a test too difficult to meet under almost any circumstances, and we do not understand that to be the purpose of this legislation. We should not fall into the trap that a showing of disparate impact results in an almost irrebuttable presumption of that violation.

This effectively reverses, not all, but a significant portion of the Supreme Court's decision in *Wards Cove*, by shifting the burden from the employee to the employer after disparate impact is shown. The burden placed on the employer by this bill is not and should not be so onerous that there is no way he or she can overcome it. Statistics alone should not result in an irrebuttable, or a functionally irrebuttable presumption of misconduct against the employer.

We do not interpret this provision—and the legislative history should be clear—to mean that an employer is faced with an impossible task in undertaking to rebut the evidence of disparate impact once it has been shown and the burden of proof has shifted to the employer. The employer should be able to show that his or her standards and practices are not discriminatory. Importantly, he or she must address these practices not just singly, but as a package.

We are pleased that this bill does not affect the Supreme Court's determination that in a disparate impact case the proper statistical comparison is between racial, religious, and other composition of qualified persons in the relevant labor market and those holding jobs in the workplace at issue.

ADL regards passage of the Civil Rights Act of 1990 in its current form to be a most important priority of the 101st Congress. The Civil Rights Act of 1990 affords this committee and the Congress an opportunity to reaffirm the Nation's historic commitment to civil rights. As we enter this final decade of the 20th century, it is unfortunate that discrimination still limits work opportunities for many citizens and that legislation of this kind is still needed. But it is needed.

At the same time it is fortunate that we have leaders in the Congress of the United States like yourself, Mr. Chairman—Mr. Edwards, and the other members of this committee who have recognized the necessity and are prepared to act, and we urge the Congress to act promptly.

And I thank the committee for giving us the opportunity to appear here. I also ask that the full statement be included in the record. Thank you, Mr. Chairman.

[The prepared statement of Meyer Eisenberg follows:]

Statement

of

ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH

on

H.R. 4000, The Civil Rights Act of 1990

BEFORE THE

House Committee on Education and Labor

and the

House Committee on the Judiciary,

Subcommittee on Civil and Constitutional Rights

February 20, 1990

Mr. Chairmen and Members of the Committees, my name is Meyer Eisenberg and I am the Chairman of the National Legal Affairs Committee of the Anti-Defamation League. With me today is Jess Hordes, the League's Washington Representative. We are pleased to be here to offer testimony in support of H.R. 4000, the Civil Rights Act of 1990.

The Charter of the Anti-Defamation League, adopted in 1913, states that one of the organization's primary objectives is "to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against and ridicule of any sect or body of citizens." In fulfilling that mandate, ADL has fought long and hard to secure laws which will guarantee every American equality of opportunity and treatment regardless of religion, skin color, ethnicity, national origin, or other immutable characteristics.

We are pleased to lend our support to the proposed Civil Rights Act of 1990, because we believe this Act is true to the letter and spirit of the original Civil Rights Act of 1964. It offers necessary and important federal protection to potential victims of discrimination and does so sensibly and reasonably -- without resort to quotas or numerical preferences which can themselves become discriminatory and which we have for many years opposed. We do not believe that this bill, properly interpreted, should result in quotas -- or their functional equivalents.

Several provisions of the Act are especially noteworthy. One such provision, intended to reverse the Supreme Court's narrow interpretation of the Civil Rights Act of

1866 in Patterson v. McLean Credit Union, __ U.S. __ , 109 S. Ct. 2363 (1989), recognizes that discriminatory harassment on the job is no less objectionable than discrimination at the time of hiring. The Supreme Court in Patterson wrongly limited relief to discrimination at the time of entering the employment contract. This bill corrects that too-narrow reading of the law. In ADL's view, there can be no doubt that federal legal protection against discrimination should not end when employment begins. The legislation before you appropriately recognizes that victims of on-the-job discrimination are equally worthy of protection from discrimination.

A second important section of this bill addresses employment discrimination which may result from what appear to be neutral practices or policies, rather than a clearly articulated or demonstrable intent to discriminate. Our experience clearly indicates that the results of these more subtle practices often signal the presence of discrimination.

Under the Civil Rights Act of 1990, once an employee points to practices related to hiring or promotions which he or she believes result in a disparate impact, the employer must show either that the practices are neutral and not discriminatory or that they were indeed justified by a business necessity -- that is they were essential to effective job performance.[1] This effectively reverses a portion of the Supreme Court's decision in Wards Cove v. Atonio, ____ U.S. ____, 109 S. Ct. 2115 (1989), by shifting the burden

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[1] The word "essential" should be interpreted to mean the practices play a substantial role in selection and are clearly related to important job qualifications which result in the applicant being better qualified or better able to perform the job.

from the employee to the employer after disparate impact is shown. The burden placed on the employer by this bill, however, is not so onerous that there is no way he or she can overcome it. Statistics alone should not result in an irrebuttable presumption of misconduct against the employer.

We do not interpret this provision -- and the legislative history should be clear -- to mean that an employer is faced with an impossible task in undertaking to rebut the evidence of disparate impact once it is shown and the burden of proof has shifted to the employer. The employer should be able to show that his or her standards and practices are not discriminatory. Importantly, he or she must address these practices not just singly, but as a package. We are pleased that this bill does not affect the Supreme Court's determination that in a disparate impact case the proper statistical comparison is between the racial, religious, or other composition of qualified persons in the relevant labor market and those holding jobs in the workplace at issue.

The proposed legislation also effectively addresses the Supreme Court's decision in Martin v. Wilks, ____ U.S. ____, 109 S. Ct. 2180 (1989), which held that plaintiffs who were not parties to a seven-year-old discrimination lawsuit could challenge the consent decree which ended that suit. While there is no question that every individual should be entitled to his day in court, the effect of the Court's decision has been to undermine the stability and certainty of court-ordered remedies in discrimination cases.

When an individual has had an opportunity to intervene through reasonable notice of litigation affecting his or her rights, and that individual chooses not to be heard, ADL

does not believe it unfair to bar litigation of the same issues again at some distant point in the future. We therefore also support those provisions of the Civil Rights Act of 1990 which effectively overturn the Martin decision. In our view they adequately protect the rights of anyone potentially affected by a consent decree while simultaneously restoring a sense of stability and security to such decrees.

In this context, however, it is important to note that ADL's support for the stability of court-ordered remedies in discrimination cases does not reflect support for consent decrees which employ quotas or numerical preferences. On the contrary, ADL staunchly opposes affirmative action plans which employ quotas, preferential treatment, and proportional representation as remedies to discrimination. Only those plans which compel equality of opportunity -- not equality of result -- will earn the League's endorsement, because, in our view, equal protection of the law should guarantee that no one's race, religion, or gender will be used as the determining factor in the conferral of benefits or penalties. We will continue to support affirmative action plans which emphasize individual rights, individual merit, and equality of opportunity.

ADL regards the passage of the Civil Rights Act of 1990 in its current form to be a most important priority for the 101st Congress. The Civil Rights Act of 1990 affords this Committee and the Congress an opportunity to reaffirm this nation's historic commitment to civil rights. As we enter the final decade of the 20th century, it is unfortunate that discrimination still limits work opportunities for many citizens and that legislation of this kind is still needed. At the same time, it is fortunate that we have

leaders in the United States Congress who have recognized this necessity -- and are prepared to act. We urge Congress to promptly approve this important legislation.

Thank you very much.

Anti-Defamation League of B'nai B'rith
Washington, D.C. Office

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Assistant Director

May 21, 1990

The Honorable Augustus Hawkins
Chairman
Committee on Education and Labor
2181 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Hawkins:

I very much appreciated the opportunity to testify on behalf of the Anti-Defamation League before your committee on February 20, 1990 in support of H.R. 4000, the Civil Rights Act of 1990. I understand that my testimony and questions and answers which followed it will be included in the record and I am writing to clarify and amplify my statements for this important measure's legislative history.

The Supreme Court's decision in Wards Cove v. Atonio was discussed in my testimony and during the subsequent question and answer period. As I stated, ADL believes the provisions of H.R. 4000 addressing that decision are sound, and fairly allocate the burdens of proof in a case of disparate impact. The plaintiff must identify an employment practice or group of practices that have an adverse impact on classes of individuals protected under Title VII. The defendant then has an opportunity to demonstrate that one or more of these practices do not cause the disparate impact, or that they are justified by "business necessity," as defined by the statute.

To clarify my remarks, I wish to emphasize that ADL believes an essential component of the plaintiff's burden is to prove the causality between the challenged practices and the disparate impact. It is not enough to simply present statistics showing, for example, the absence of any significant percentage of minorities in a workforce and point to a group of employment practices. As I (and other witnesses on our panel) indicated during the question and answer period, the burden of proof can only be met by the plaintiff's showing the causal relationship between the statistics and the practice. Our understanding of H.R. 4000

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is that the bill incorporates this requirement.

Therefore, the record should reflect that in all my testimony and the subsequent discussion of the bill with Committee members, my references to the plaintiff's burden of proving disparate impact are intended to include the requirement of showing causality.

Sincerely,

Meyer Eisenberg
Chairman
National Legal Affairs Committee
Anti-Defamation League

ME:jb

Chairman HAWKINS. The next witness is Ms. Barbara Arnwine, Director of the Lawyer's Committee for Civil Rights Under Law. Ms. Arnwine?

Ms. ARNWINE. Thank you, Mr. Chairman, and members of the committee and of the subcommittee. Thank you for the opportunity to testify before you on H.R. 4000, the Civil Rights Act of 1990. I request that my full written statement be included in the record. I will read portions of it.

Chairman HAWKINS. Without objection, so ordered.

Ms. ARNWINE. At the outset, let me state that the Lawyer's Committee strongly supports passage of the Civil Rights Act of 1990 in its entirety. This legislation is urgently needed to restore and strengthen the statutory protections for victims of employment discrimination. Today, we have been asked to speak briefly about Section 6 of the Act. Section 6 is entitled "Facilitating prompt and orderly resolution of challenges to employment practices implementing litigated or consent judgments or orders." It addresses the Supreme Court decision in *Martin* v. *Wilks*. I will first review with you why the Lawyer's Committee believes this section is needed and then how the section meets that need.

In a 5-4 ruling, on June 12, 1989, in *Martin* v. *Wilks*, the Supreme Court held that a person could not be precluded from filing a separate lawsuit challenging a consent decree unless that person had been made a party to the consent decree action, even if that party had previously had an opportunity to be heard by the court prior to the entry of the decree. Let me emphasize that nothing in *Martin* v. *Wilks* disturbs the long line of Supreme Court decisions supporting affirmative action in appropriate circumstances, nor does it attempt to change the law of affirmative action to embody the ideological position that we saw in today's statement from the Justice Department that only proven, identified individual victims of discrimination are entitled to affirmative relief.

The Lawyer's Committee for Civil Rights Under Law filed the original *Martin* v. *City of Birmingham* lawsuit in January of 1974 on behalf of black employees of—and applicants for employment—with the City of Birmingham. Prior to the lawsuit, black persons were almost totally excluded from civil service jobs with the city. After two trials, two appeals, a finding of discrimination in hiring, and the introduction of massive evidence of discrimination in promotions in the fire department and in other departments of the City of Birmingham, in 1981 the Lawyer's Committee and the Department of Justice agreed to consent decrees with the city and its personnel board to resolve 7½ years of heated litigation.

Notice of this proposed consent decree was published widely in the largest Birmingham newspapers. The judge held a fairness hearing to hear the views and the positions of all parties. In the *Martin* case, the white fire-fighters bringing that case deliberately sat on the sidelines during all of these proceedings. Although it was clear to everyone at the time how the decrees would work, starting seven months after the decrees were entered several white fire-fighters and others filed new lawsuits attacking the very first promotions of blacks in the history of the Birmingham Fire Department and other departments.

Although the white fire-fighters had a 5-day trial in 1985 on the merits of their claims of discrimination, the Supreme Court rejected the rule of the overwhelming majority of the circuit courts of appeals and said that persons who claim reverse discrimination can continue to file lawsuits attacking the decrees no matter what opportunity they had to be heard before the entry of the decree.

To quote briefly from the decision itself, it says, "The position has sufficient appeal to have commanded the approval of the great majority of the Federal courts of appeals, talking about the doctrine of impermissible collateral attack, but we agree with the contrary view expressed by the Court of Appeals for the Eleventh Circuit in this case."

Prior to the *Martin* decision, circuit courts that believed you could not have impermissible collateral attack were the Second Circuit Court of Appeals, the Third Circuit, the Fourth Circuit, the Fifth Circuit, the Sixth Circuit, and the Ninth Circuit. Only one other circuit, the Seventh, ever had gone the other way.

The *Martin* litigation is now over 16 years old, with no end in sight. The *Martin* decision threatens to lead to renewed litigation over any and every consent decree and litigated order where persons claimed they were adversely affected, no matter how much time has passed since the original lawsuit, and no matter how many chances the adversely affected persons had to participate in the original lawsuit.

In addition, by holding out the likelihood of interminable litigation and exposure to multiple liability, even after settlement, the decision undermines the congressional preference for settlement of employment discrimination lawsuits. The decision destroys the vital concept of finality of litigation. Instead, the courts are already overburdened, face increasing dockets with lawsuits seeking to relitigate claims already heard. Employer groups representing every level of public and private employers urged the court not to adopt the position announced in the *Martin* decision because of its anticipated disruptive impact and unnecessary waste of precious resources on matters resolved many years earlier.

The Lawyer's Committee has conducted a study of the aftermath of the Supreme Court decision in *Martin*. We would like to move our study entitled "Impact of the Supreme Court Decision in *Martin* v. *Wilks*" into the record.

Chairman HAWKINS. Without objection, so ordered.

[The study entitled "Impact of the Supreme Court Decision in *Martin* v. *Wilks*" follows:]

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IMPACT OF THE SUPREME COURT DECISION IN

MARTIN v. WILKS

Contact: Stephen L. Spitz, Esq.

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February 20, 1990

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The Impact of Martin v. Wilks

I. SUMMARY

In a 5-4 ruling on June 12, 1989 in Martin v. Wilks, the Supreme Court held that a person could not be precluded from filing a separate lawsuit challenging a consent decree unless that person was made a party to the consent decree action - even if that person had had an opportunity to be heard by the court prior to the entry of the decree.[1]

Everyone agrees that people whose rights may be affected by a decree should have a fair opportunity to have their "day in court" prior to the entry of the decree.[2] The issue raised by the Supreme Court's decision, instead, is whether there should be reasonable and orderly procedures to protect those rights prior to the entry of a decree or whether people should be allowed to relitigate the same claims over and over again without end.

The Martin decision has already resulted in numerous long-settled cases being re-opened to the prospect of perpetual litigation. The decision threatens to lead to renewed litigation over any and every consent decree and litigated order[3] where

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[1] 490 U.S. ____, 104 L.Ed.2d 835, 109 S.Ct. 2180 (1989)

[2] Indeed, that is precisely what happened in the Martin case. See discussion of facts below.

[3] The decision applies equally to both consent decrees and to litigated judgments and orders where no consent decrees are involved.

persons claim they were "adversely affected" no matter how much time has passed since the original lawsuit and no matter how many chances the "adversely affected" persons had to participate in the original lawsuit.[4] In addition, by holding out the likelihood of interminable litigation and possible multiple liability even after settlement, the decision undermines the Congressional preference for settlement of employment discrimination lawsuits and destroys the vital concept of finality of litigation. Instead, the Martin decision has led and will continue to lead to an unnecessary waste of precious judicial and other resources on issues resolved years earlier. Many employers are strongly opposed to the rule announced in this decision because of its disruptive impact.

II. FACTS

The Martin litigation has already lasted over sixteen years, with no end in sight. Martin v. City of Birmingham was filed by the Lawyers' Committee for Civil Rights Under Law on January 7, 1974, on behalf of black employees of, and applicants for employment with, the City of Birmingham and Jefferson County,

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[4] The four dissenters noted that "(t)here is nothing unusual about the fact that litigation between adverse parties may, as a practical matter, seriously impair the interests of third persons who elect to sit on the sidelines. Indeed, in complex litigation this Court has squarely held that a sideline-sitter may be bound as firmly as an actual party if he had adequate notice and a fair opportunity to intervene and if the judicial interest in finality is sufficiently strong." 104 L.Ed.2d 835 at 863. (Justice Stevens dissenting, joined by Justices Brennan, Marshall and Blackmun).

Alabama.[5] The Martin action alleged race discrimination in hiring and promotions. In May of 1975, the United States Department of Justice filed a related case - United States v. Jefferson County - alleging that blacks and women were victims of race and sex discrimination by the City of Birmingham, Jefferson County and a number of smaller jurisdictions. Martin, United States v. Jefferson County, among other cases, were consolidated for discovery and trial. After two trials and two appeals, a finding

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[5] A related case claiming race discrimination by the City was also filed in January 1974 by the Ensley Branch of the NAACP in Birmingham - Ensley Branch NAACP v. Seibels. At the time these cases were filed, there were virtually no black persons in any of the jobs in the "classified" civil service of the City of Birmingham, which includes virtually all jobs other than laborer jobs, such as police officers, firefighters, truck drivers and secretaries. As late as 1958, the job announcements for positions in the classified service expressly said that "[a]pplicants must be white." Although, as a result of litigation, the City stopped using such job announcements, the discrimination continued. In the Fire Department, for example,

* Blacks were actively discouraged from applying for firefighter positions.

* The City did not hire a black firefighter until 1968.

* The City did not hire another black firefighter until 1974, although during that six-year period it hired 170 white firefighters.

* Entry-level examinations discriminated against black applicants.

* By 1976, only nine (1.4%) of the City's 630 firefighters were black.

* By 1981, only 9.3% of the firefighters were black, and none of the 140 lieutenants, captains and battalion chiefs was black.

The same pattern existed throughout the City workforce.

of discrimination in hiring[6] and the introduction of massive evidence of discrimination in promotions in the Fire Department[7] and in other City departments, the Martin plaintiffs and the Department of Justice entered into consent decrees with the City of Birmingham and their civil service agent, the Jefferson County Personnel Board, in 1981. These consent decrees included affirmative action goals for the hiring and promotion of blacks and women in City jobs.

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[6] Ensley Branch, NAACP v. Seibels, 13 Empl. Prac. Dec. (CCH) ¶11,504 (N.D. Ala. Jan. 10, 1977), aff'd in part and rev'd in part, 616 F.2d 812 (5th Cir.), cert. denied, 449 U.S. 1061 (1980). The Ensley Branch suit was filed in 1974, and was consolidated with Martin and United States v. Jefferson County for trial.

[7] The evidence of promotional discrimination adduced at the 1979 trial was egregious. For example,

* To be eligible to take promotional examinations, employees had to receive "passing" promotional potential evaluations that were subjectively graded by supervisors (all of whom were white), and in the Fire Department, black employees received "failing" scores four times more often than did white employees.

* There were also time-in-grade requirements to be eligible to take promotional examinations, but because blacks had been excluded from entry-level positions, in 1979 only one black firefighter, compared to 361 white firefighters, met those requirements.

* One "seniority point" was added to the examination scores of applicants for promotion for each year of their employment in any position in the classified service - not necessarily in the same chain for promotion - which discriminated against black employees because they had been excluded from the classified service.

As a result of these and other practices, no black person had ever been promoted in the Fire Department prior to the 1981 consent decrees.

Prior to entry of the decrees in August of 1981, counsel for the Birmingham Firefighters Association (B.F.A.) appeared in court on behalf of the B.F.A. and its President at a fairness hearing[8] and objected to the decrees on the ground that the affirmative action goals constituted illegal and unconstitutional race discrimination against white males. The Court considered this and other objections to the decrees and ruled that the decrees were fair and lawful.[9]

Starting eight months after the consent decrees were entered, several lawsuits were filed by white male city employees of the Fire Department and of other departments claiming, among other things, that the City was engaging in "reverse discrimination" in promotions because of the consent decrees. It is important to note that the Fire Department lawsuits contested the promotions of the very first blacks in the history of the Fire

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[8] Notice had been given of the proposed decrees and the fairness hearing to "all interested persons."

[9] Counsel for the B.F.A. declined the Court's invitation to offer any evidence at the fairness hearing. Counsel for the B.F.A. also failed to move to intervene at any time prior to the fairness hearing. The motion to intervene of the B.F.A. after the fairness hearing was denied by the district court as untimely. United States v. Jefferson County, 28 FEP Cases 1834 (N.D. Ala. 1981). The denial of intervention was affirmed on appeal and the BFA did not file for a writ of certiorari. United States v. Jefferson County, 720 F.2d 1511 (11th Cir. 1983). At the fairness hearing, a group of black employees objected to the decrees as inadequate and the white firefighters opposed any race-conscious relief. The Court overruled both sets of objections.

Department.[10] The claims of the white male firefighters and one white male engineer were tried first. In December 1985, after a five day trial which followed the taking of dozens of depositions, the district court dismissed the claims of the white male firefighters and the engineer as lacking merit and found that the challenged promotions were required by the City decree.[11] The Eleventh Circuit Court of Appeals reversed and remanded for another trial on the ground that the white male plaintiffs had a right to continue to litigate their separate lawsuits, and that the trial court may have dismissed their claims, in part, on the improper ground that they did not have a right to collaterally attack the consent decrees.[12]

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[10] The same counsel represented both the Birmingham Firefighters Association (B.F.A.) at the fairness hearing in the Martin case and the individual white male firefighters in the "reverse discrimination" cases. All of the white male plaintiffs in the "reverse discrimination" cases were members of the B.F.A. at the time of the fairness hearing in Martin. The same arguments were made with respect to the consent decrees in the "reverse discrimination" complaints, as in the objections at the fairness hearing. In part because of these facts, the Martin plaintiffs and the City argued that the "reverse discrimination" plaintiffs already had their "day in court."

[11] In re Birmingham Reverse Discrimination Employment Litigation 39 Fair Empl. Prac. Cas. (BNA) 1431 (N.D. Ala. Dec. 20, 1985). Chief Judge Sam C. Pointer, Jr. found, inter alia, that there would have been racial discrimination against blacks and that the white male engineer would have been promoted, because he was white, if the Consent Decrees had not existed. The district court held that collateral attacks are impermissible, and, in the alternative, that the claims of the "reverse discrimination" plaintiffs were without merit.

[12] In re Birmingham Reverse Discrimination Employment Litigation, 833 F.2d 1492 (11th Cir. 1987), reh'g denied, 841 F.2d. 399 (11th Cir. 1988).

The Supreme Court granted each of the petitions for a writ of certiorari filed by the Martin plaintiffs, by the City and by the Personnel Board on the single issue of whether persons, having had an opportunity to be heard prior to the entry of a consent decree, nevertheless have a right to file separate lawsuits challenging such a decree.

The Lawyers' Committee and the City of Birmingham argued before the Supreme Court that the white firefighters did not have the right to undermine the finality of the settlement embodied in the consent decrees, given that they had had notice of the decrees and an opportunity to be heard prior to the entry of the decrees. The Court, in a 5 to 4 decision on June 12, 1989, rejected this argument.[13] Chief Justice Rehnquist, writing for the Court, held that such collateral attacks are permissible, rejecting the overwhelming majority rule of the Circuit Courts of Appeal.[14]

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[13] 490 U.S. ____, 104 L.Ed.2d 835, 109 S.Ct. 2180 (1989)

[14] See e.g. Marino v. Ortiz, 806 F.2d 1144, 1146-47 (2d Cir. 1986), aff'd, 108 S. Ct. 586 (1988) (per curiam); Culbreath v. Dukakis, 630 F.2d 15, 22-23 (1st Cir. 1980); Goins v. Bethlehem Steel Corp., 657 F.2d 62, 64 (4th Cir. 1981), cert. denied, 455 U.S. 940 (1982); Striff v. Mason, 849 F.2d 240, 245 (6th Cir. 1988); Stotts v. Memphis Fire Dept, 679 F.2d 541, 558 (6th Cir. 1982), rev'd on other grounds sub nom. Firefighters Local 1784 v. Stotts, 467 U.S. 561 (1984); Dennison v. City of Los Angeles Dep't of Water & Power, 658 F.2d 694, 696 (9th Cir. 1981); Thaggard v. City of Jackson, 687 F.2d 66, 68-69 (5th Cir. 1982), cert. denied sub nom. Ashley v. City of Jackson, 464 U.S. 900 (1983); Grann v. City of Madison, 738 F.2d 786, 795 (7th Cir.), cert. denied, 469 U.S. 918 (1984); EEOC v. McCall Printing Corp., 633 F.2d 1232, 1237 (6th Cir. 1980); Black and White Children of the Pontiac School Sys. v. School Dist., 464 F.2d 1030 (6th Cir. 1972) (per curiam) ("Black and White School Children"); Burns v. Board of School Comm'rs, 437 F.2d 1143, 1144 (7th Cir. 1971) (per

III. THE GENERAL IMPACT OF MARTIN v. WILKS

The Court's 5-4 ruling effectively ends finality for a host of litigated and consent decrees not only in the area of employment discrimination, but also in every other kind of litigation where there may be persons "adversely affected" by a court order. Long-settled cases are thus now open to periodic challenge by those dissatisfied with results, even if those persons knowingly had bypassed opportunities to intervene in the litigation.[15] This decision raises the prospect of repeated re-litigation of underlying claims.

In an interpretation of Rule 19 of the Federal Rules of Civil Procedure, the majority ruled that the only way to preclude a person "affected" by the provisions of a decree from challenging the decree in a subsequent suit is by mandatory joinder of

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curiam); Prate v. Freedman, 430 F.Supp. 1373, 1375 (W.D.N.Y.), aff'd mem., 573 F.2d 1294 (2d Cir. 1977), cert. denied, 436 U.S. 922 (1978); O'Burn v. Shapp, 70 F.R.D. 549, 552-53 (E.D. Pa.), aff'd mem., 546 F.2d 417 (3d Cir. 1976), cert. denied, 430 U.S. 968 (1977); Freeze v. ARO, Inc., 503 F.Supp. 1045, 1047-48 (E.D. Tenn. 1980); Jefferson v. Connors Steel Co., 25 Empl. Prac. Dec. (CCH) ¶31,602 at 19,486 (N.D. Ala. Jan. 19, 1981); Austin v. County of DeKalb, 572 F.Supp. 479, 481 (N.D. Ga. 1983). Other than the Eleventh Circuit, the only other Circuit to rule in favor of collateral attacks pre-Martin v. Wilks was a panel of the Seventh Circuit in Dunn v. Carey, 808 F.2d 555, 559-60 (7th Cir. 1986). Claims in all of the above cases, among others, are now subject to reopening because of the Martin v. Wilks decision.

[15] The Court had previously held that notice and the opportunity to be heard were sufficient to preclude people from later challenging a judicial determination, consistent with due process. See e.g. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-15 (1950); Mathews v. Eldridge, 424 U.S. 319, 333 (1976).

that person as a party, even if the person chose not to intervene. Moreover, instead of requiring persons who know their interests will be affected and who desire to be heard to come forward prior to the entry of a court order, the decision places the burden on the existing parties - including both plaintiffs and employers - to identify potentially affected persons and to join them as parties against their will.[16]

Justice Stevens, writing for the four dissenters, strongly opposed the decision because it would "subject large employers who seek to comply with the law by remedying past discrimination to a never-ending stream of litigation and potential liability. It is unfathomable that either Title VII or the Equal Protection Clause demands such a counterproductive result."[17]

Prior to the decision, numerous employers and employer groups filed amicus briefs urging the Supreme Court not to create such a procedural rule, on the grounds that it is expensive, unworkable, disruptive and unfair. These employers included thirty-two States, the Virgin Islands, and the District of Columbia, as well as numerous organizations representing state and local governmental employers and private employers throughout the country - the National League of Cities, the National

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[16] Thus, persons who do not believe they have a sufficient interest to be parties to the litigation nevertheless will be forced to be parties and, in many instances, will have to pay lawyers to represent them even though they are not being accused of any wrongdoing by anybody.

[17] 104 L.Ed.2d 835 at 863.

Governors' Association, the U.S. Conference of Mayors, the Council of State Governments, the International City Management Association, the National Conference of State Legislatures, the National Association of Counties and the Equal Employment Advisory Council (EEAC) (a national association of private employers comprising a broad segment of the business community nationwide). The only employer to file a brief supporting collateral attacks was the United States Department of Justice, which suddenly switched sides in 1984 and sued the City of Birmingham for promoting blacks under the Decrees the Justice Department itself had negotiated in 1981.[18]

The likely effects of the Martin v. Wilks ruling include an increased reluctance by both plaintiffs and defendants to settle cases, or at least without costly and extensive pre-

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[18] This happened in 1984 during the tenure of W. Bradford Reynolds, Assistant Attorney General for the Civil Rights Division of the Department of Justice during the Reagan Administration, despite the following:

* The Birmingham consent decrees were sought by, and entered during, the Reagan Administration.

* Mr. Reynolds stated the following, under oath, in hearings before the Senate Judiciary Committee in 1985, in response to a question by Senator Heflin of Alabama: "I did not disagree with the decree in any way between the time that it was submitted to the court and the time the court entered the decree." (Hearings before the Committee on the Judiciary, United States Senate, Ninety-Ninth Congress, First Session on the Confirmation of William Bradford Reynolds to be Associate Attorney General of the United States, June 4, 5 and 19, 1985, p. 907).

* The Department of Justice specifically promised in writing in the decrees to defend the lawfulness of the relief in the decrees against collateral attack.

settlement litigation, including the joinder of numerous additional parties. In addition, both supporters and opponents of the ruling agree that, as a result of the ruling, employment discrimination cases will be much more difficult to litigate.[19] The impact of the decision has been, to date, substantially greater in cases involving public employers using the results of tests (regardless of whether or not the tests are job-related) to list the order of the test-takers. This is because rank-ordering creates stronger expectations of hire, and especially, promotion. Because incumbent employees are more likely to claim an interest in the implementation of the decree than applicants, they are also more likely to file "reverse discrimination" lawsuits. In addition, at least one public sector employee association has funded and supported such collateral attacks.[20]

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[19] Mr. Reynolds' former deputy at the Department of Justice - Charles Cooper - who personally represented the Department in switching sides in the Birmingham litigation in 1984 - stated that the Martin decision was a "home run" for white men. "Every time someone gets passed over [for promotion] they have a new cause of action and a lawsuit," said Cooper, adding that "the process of entering consent decrees with racially preferential relief is going to be considerably more difficult" because of the Martin ruling. The Washington Post, June 13, 1989 at A4. Benna Solomon, Chief Counsel of the State and Local Legal Center, who filed an amicus brief in the Supreme Court on benalf of numerous state and local government organizations in support of the position of the City of Birmingham, said that the Martin decision "is going to make it extremely difficult to litigate, much less conclude, employment discrimination lawsuits because [bringing in all potentially affected parties] is not really feasible in the real world in many of these cases and that is the only avenue that the court will accept for precluding subsequent litigation of the same issue." The Washington Post, June 13, 1989 at A4.

[20] A June 15, 1989 memorandum from Alfred K. Whitehead, President of the International Association of Firefighters (IAFF) to all IAFF State, Provincial, and Local Union Presidents stated

It is far from clear what mechanism the Supreme Court majority expects parties to employ in terms of joining or otherwise precluding potentially affected parties from further litigation. Even after joinder of all known affected persons and extensive litigation, however, the Martin decision would still allow for litigation years later by any person who was not a party to the original proceeding. Finally, the decision has made at least some employers more reluctant to agree to affirmative action plans because of increased fear of incessant "reverse discrimination" litigation and multiple liability.

The impact of the Martin decision is particularly severe because of another case the Court decided shortly after Martin. Although the issue was not before the Court, the Supreme Court surprisingly stated in this case - Independent Federation of Flight Attendants v. Zipes - that because of its decision in Martin v. Wilks, Title VII plaintiffs defending decrees in collateral lawsuits "have no basis for claiming attorney's fees" against anyone in such lawsuits.[21] (Justice Marshall, in

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that "the International's Executive Board supported the (Martin v. Wilks) litigation financially through the approval of an EDF grant to Local 117 (Birmingham, Alabama), and further approved a request to file an amicus curiae ('friend of the court') brief on behalf of the firefighters who filed a complaint against the City and the Board seeking injunctive relief against enforcement of the decrees. ... The International believes that every person whose livelihood is affected... by a consent decree which he has not signed should have (the) right (to challenge the appropriateness of the consent decree)."

[21] 491 U.S. ____, 105 L.Ed.2d 639, 649, 109 S.Ct. ___(1989). Five members of the Court agreed with this statement.

dissent, called this "conclusory dicta of the worst kind".)[22] The five person majority suggested that since Title VII plaintiffs would "still face the prospect of litigation without compensation for attorney's fees before the fruits of their victory can be secure", it may not be too much of an additional disincentive to bringing Title VII litigation if plaintiffs cannot recover against intervenors.[23]

Justice Marshall, in his dissent, stated that the likely consequences of the Zipes decision will be for defendants to rely on intervenors to raise many of their defenses, thus minimizing fee exposure. Without hope of compensation for such expenditures, "many victims of discrimination will be forced to forego remedial litigation for lack of financial resources. As a result, injuries will go unredressed and the national policy against discrimination will go unredeemed." [24]

The Zipes ruling effectively denies attorney's fees to the victims of discrimination in all cases where they have had, or will have, to defend decrees in "reverse discrimination" litigation. Instead of providing an incentive for attorneys to represent Title VII claimants by providing attorney's fees when plaintiffs prevail, this decision would allow for endless litigation, without compensation, after relief is secured. The combined impact of Martin and Zipes is devastating to the

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[22] Id. 105 L.Ed.2d at 659 n.6.

[23] Id. at 649.

[24] Id. at 660.

prospects of securing and maintaining meaningful relief for the victims of employment discrimination.

IV. EXAMPLES OF LITIGATION SPAWNED BY MARTIN v. WILKS

Since the Supreme Court decision in Martin, new "reverse discrimination" cases have been filed in numerous localities including Birmingham, Alabama; Boston, Massachusetts; Cincinnati, Ohio; San Francisco, California; Toledo, Ohio; Memphis, Tennessee and Oakland, California, among others. Pre-existing "reverse discrimination" litigation has received a new lease on life and will continue for the foreseeable future. Issues that once seemed long resolved have now been reopened for repetitious litigation. Some of these cases will be discussed below.

A. BIRMINGHAM, ALABAMA

The Birmingham "reverse discrimination" litigation is proceeding anew in the district court after the Supreme Court decision in Martin v. Wilks. This litigation is likely to continue for many more years. Hearings and conferences have been held on September 1, 1989, November 21, 1989 and January 3, 1990, with intensive discovery again underway.[25] A trial on some of the dozens of pending claims is anticipated in 1990, with others

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[25] For example, depositions of eight City Council members in office at the time of the entry of the Decrees in 1981 started on January 29, 1990, with depositions of the City Attorney and the City's lead outside counsel scheduled to begin on February 15, 1990. Numerous motions, interrogatories and requests for documents have also been filed by counsel for the white fire-fighters.

held in abeyance until a later time.[26] In addition to numerous interventions of new plaintiffs in the existing litigation, another case has been initiated in Birmingham since the Supreme Court decision. Two white Deputy Sheriffs working for the Jefferson County Sheriff filed a lawsuit on July 19, 1989 alleging race and sex discrimination against them because blacks and women were finally promoted in more than token numbers to the first-level of supervision in the Sheriff's Department - Sheriff Sergeant. The plaintiffs in this new case claim that the Consent Decree with Jefferson County, Alabama, entered in March 1983 in the Martin litigation and the 1981 Personnel Board decree are unlawful.[27]

B. BOSTON, MASSACHUSETTS

Three "reverse discrimination" suits were filed in Boston in the early fall of 1989 - all attempting to reopen long-standing consent decrees, which in turn had ended years of litigation. Thirty-four (34) white male firefighter applicants filed a lawsuit on September 12, 1989, alleging race discrimination in hiring of blacks and Spanish-surnamed persons because of

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[26] Numerous "reverse discrimination" cases, each involving many claims, remain to be tried after the next trial - which will involve some of the Fire Department claims and one engineering department claim. The cases which will still be pending after the next trial involve most of the largest city departments, including the Fire Department, the Police Department and the Streets and Sanitation Department, among others.

[27] Williams v. Bailey, CV-89-PT-1241-S (N.D. Ala.). The portion of the case which went to the Supreme Court in Martin v. Wilks did not include any claims arising out of the County Consent Decree. Sheriff Bailey has been Sheriff of Jefferson County since January of 1963.

a decree entered in 1974 after a trial in 1973.[28] Thirty-five (35) white male police officer applicants filed a lawsuit on September 21, 1989 alleging race discrimination because of a consent decree entered in 1973.[29] Finally, thirty-four (34) incumbent white police officers filed a lawsuit on October 19, 1989 alleging race discrimination because "promotions to the rank of sergeant have been made in accordance with the consent decree" originally entered in 1980 and extended in 1985.[30]

C. SAN FRANCISCO, CALIFORNIA

Four new "reverse discrimination" cases have been filed against the City of San Francisco since the Martin v. Wilks

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[28] Mackin et. al. v. City of Boston et. al., Civil Action No. 89-2025-N challenges the Consent Decree entered in Boston Chapter, NAACP, Inc. v. Beecher, 371 F. Supp. 507 (D. Mass 1974), aff'd 504 F.2d 1017 (1st Cir. 1974), cert. denied 421 U.S. 424 (1975).

[29] Fagan et. al. v. City of Boston et. al., Civil Action No. 89-2076-N challenges the Consent Decree entered in Castro v. Beecher 365 F. Supp. 655 (D. Mass. 1973); See also Boston Chapter, NAACP v. Beecher, 679 F.2d 965, 968 (1st Cir. 1982). In 1971, the district court in Castro found race discrimination in the use of non-validated intelligence tests by Boston for police officer positions. The court also ruled that the tests were not rationally related to the capacity of applicants to be trained for or to perform police officer jobs. Castro v. Beecher, 334 F.Supp. 930 (D. Mass. 1971). The Consent Decree in Castro being challenged in Fagan was entered on April 15, 1973.

[30] Stuart et. al. v. Roach, et. al., No. 89-2348 Mc. challenges the Consent Decree dated October 31, 1985 in Massachusetts Association of Afro American Police, Inc. (MAAAP) v. Boston Police Department, 106 F.R.D. (D. Mass 1985), aff'd 780 F.2d 5 (1st Cir. 1985), cert. denied. 478 U.S. 1020 (1986). The MAAAP case was filed on March 2, 1978. According to the 1980 Consent Decree in the MAAAP case, which was attached as an Exhibit to the Stuart complaint, in March 1978, only 5.8 percent of the police officers, 1% of the police sergeants and none of the police lieutenants or captains were black. (Consent Decree, p. 2).

decision - involving the Fire Department, the Police Department, the public school system and the community college system. These cases continue indefinitely already lengthy litigation over discrimination in the City of San Francisco.

In the first filed of the San Francisco cases, white police officers brought a lawsuit in state court claiming race discrimination deriving from the implementation of a 1979 Consent Decree which in turn resolved a case filed in April 1973.[31] The case has been removed to the U.S. District Court for the Northern District of California. A second lawsuit was filed on November 21, 1989 by white firefighters - indirectly challenging the implementation of a decree which "ended" litigation that was initiated in 1970.[32] The plaintiffs in the original San Francisco firefighters case[33] (blacks, Hispanics, Asians and women) have already spent considerable time and money defending

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[31] Ratti v. The City and County of San Francisco, No. 911141 (Superior Court of Cal. for the City and County of San Francisco). Ratti was removed to the U.S. District Court for the Northern District of California - No. C-89-3577 RFP. A second amended Complaint was filed on January 12, 1990 in U.S. District Court. Ratti challenges the decree entered in Officers for Justice v. City and County of San Francisco, 473 F. Supp. 801 (N.D. Cal. 1979), aff'd 688 F.2d 615 (9th Cir. 1982), cert. denied sub nom Byrd v. Civil Service Commission of the City and County of San Francisco, 459 U.S. 1217 (1983).

[32] Van Pool v. City and County of San Francisco, No. 903108 (Superior Court for the City and County of San Francisco), Van Pool challenges the Consent Decree entered in U.S. and Davis v. San Francisco, 656 F.Supp. 276 (N.D. Cal. 1987), aff'd, 890 F.2d 1438 (9th Cir. 1989). An amended Complaint was filed on January 17, 1990 in U.S. District Court for the Northern District of California C-89-4304.

[33] Davis, supra.

affirmative action relief obtained from the San Francisco Fire Department against attack by white males.

The City has engaged in active discovery in the police case, including depositions of all six of the named plaintiffs to date. None of the plaintiffs could recount any incidents to support their allegations of harassment or that unqualified minorities have been promoted instead of qualified individuals. Precious City resources are being diverted to defend these "reverse discrimination" cases - resources which could be used to develop valid tests and meeting other goals of the Consent decree, not to mention other City problems. In addition, the case has become a rallying point for resistance to the desegregation of the San Francisco Police Department. Disgruntled white police officers have appeared for examinations, but then have not taken the exams. They have told the test administrators that they are there merely to preserve their legal rights.

In late January 1990, two cases were filed in state court by white teachers and teacher applicants against, respectively, the San Francisco Unified School District[34] and the San Francisco Community College District[35] claiming discrimination on

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[34] Davis et al. v. The City and County of San Francisco et al., C-915348 (Superior Court of California for the City and County of San Francisco). There is a 1983 Consent Decree in San Francisco NAACP et al. v. San Francisco Unified School District C-78-1445-WHO (N.D.Cal. 1983), which provides, in part, that the School District maintain certain goals in the employment of teachers.

[35] Fowler et al. v. The City and County of San Francisco et al., 915350 (Superior Court of California for the City and County of San Francisco).

the basis of race, sex and/or national origin in the hiring of teachers. Both of these cases were filed in state court and removed to the U.S. District Court for the Northern District of California.[36]

The experience in San Francisco, among other locales, is that the "reverse discrimination" cases have been counter-productive to one of the principal policy rationales articulated by the Supreme Court for encouraging settlement of litigation - to end rancor and to facilitate a peaceful and rapid solution to the nation's racial, ethnic, and gender problems.

D. OAKLAND, CALIFORNIA

A little more than one month after the Supreme Court decision in Martin v. Wilks, on July 27, 1989, ten white and Hispanic male applicants for firefighter positions, and Local 55 of the International Association of Firefighters, sued the City of Oakland, California, and its officials alleging that a May 1986 consent decree unlawfully discriminates against them on the basis of race and gender. The Complaint in this case explicitly states that the case is brought "pursuant to the decision" in Martin v. Wilks "as a collateral attack" upon the 1986 Consent Decree, "which imposed race-and-gender conscious remedies for future hiring into the Oakland Fire Department."[37] As the

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[36] Davis is now C-90-0286-TEH (N.D.Cal.). Fowler is now C-90-0288-DLJ (N.D.Cal.).

[37] Complaint in Petersen et al. v. The City of Oakland, California et al. C-89-2784-WHO (N.D. Cal., July 27, 1989), ¶5 and ¶6, p. 3. The Petersen case collaterally attacks the Consent Decree entered in the case of Nero v. City of Oakland, Civ. No.

existing Consent Decree is the primary vehicle for the entry of women and Asians into the Fire Department, this attack has disrupted the orderly process for the desegregation of the department. In addition, the City and black, Asian and women's firefighter organizations have had to divert their resources from tasks such as recruitment of qualified applicants to fighting this rear-guard attack on a decree settled years ago.

E. ALBANY, GEORGIA

Another example of the adverse consequences of the Martin v. Wilks decision can be seen in a continuing case arising from the City of Albany, Georgia. As far back as 1971, two black employees of Albany's water department contacted union representatives to complain about blatant race discrimination in the City - including segregated restrooms, segregated water fountains and lesser pay for blacks than for whites for the same job.[38]

After a labor strike over the issue of unequal treatment of black and white employees, several black public works and water, gas and light employees initiated a class action suit against the City of Albany alleging a pattern or practice of race discrimination against black job applicants, incumbent black employees and blacks who were discharged in violation of 42 U.S.C. §1981 and §1983 and the Fourteenth Amendment.[39] Title VII

C-85-8448-WHO, which was entered on May 1, 1986, according to the Complaint (¶5 on p. 3).

[38] Johnson et al. v. City of Albany, Georgia, 413 F.Supp. 782 (M.D. Ga. 1976).

[39] Id., 413 F.Supp. at 787.

of the Civil Rights Act became applicable to the City of Albany and to other state and local governmental employers on March 24, 1972 and the complaint was accordingly amended to include Title VII claims.[40] After four years of litigation, including a trial, the district court in Johnson v. City of Albany concluded that "[f]rom an overall standpoint in every respect white employees and applicants for employment were favored over black employees and applicants for employment."[41] The district court issued a comprehensive injunction in 1976 which included affirmative action relief.[42]

In 1985, J. Dale Mann, a white male, filed a "reverse discrimination" suit claiming he was a victim of race discrimination because of a hiring decision made pursuant to the Johnson decree. The district court held Mann bound by the Johnson decree because the City "virtually represented" Mann's interests in the Johnson litigation.[43] Following Martin v. Wilks, the Eleventh Circuit ruled this holding to be in error and remanded the case to the district court, where, after almost twenty years, the Albany litigation continues. If Martin v. Wilks had been decided the other way, the Mann case would have been dismissed and the Albany litigation would finally have been over.

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[40] Id., 413 F.Supp. at 787-788.

[41] Id., 413 F.Supp. at 799, cited in Mann v. City of Albany, Georgia, 883 F.2d 999, 1000 (11th Cir. 1989).

[42] Mann, supra, 883 F.2d at 1000-01.

[43] Id. 883 F.2d 999 at 1003 citing Mann v. City of Albany, 687 F.Supp. 583, 587 (M.D. Ga. 1988).

F. TOLEDO, OHIO

On January 16, 1990, in Toledo, Ohio, nine (9) white applicants for firefighter positions with the City of Toledo filed a lawsuit alleging that they should have been appointed to firefighter positions under their interpretation of a 1974 consent decree.[44] The plaintiffs assert that they were not parties to a August 21, 1989 court order which modified the way hiring for black and white firefighter trainees was done under the decree. The plaintiffs challenge procedures established in the August 1989 Order.

G. CINCINNATI, OHIO

Two "reverse discrimination" cases are now pending against the City of Cincinnati because of the Martin v. Wilks decision. The first of these cases was filed in February 1989 before Martin,[45] but received new life after the Martin decision despite previous Sixth Circuit rulings against collateral attacks.[46] The plaintiffs in this case are white firefighter

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[44] Bembenek et al. v. Winkle et al., 3:90CV-7016 (N.D.Ohio) (January 16, 1990). The Consent Decree at issue was originally entered in 1974 resolving an action filed seventeen years ago. See Brown v. Neeb, 644 F.2d 551 (N.D.Ohio 1981). The Consent Decree has been modified from time to time by the Court with the latest revision being August 21, 1989. Brown v. Winkle C 72-282 (N.D.Ohio 1989).

[45] Jansen et al. v. The City of Cincinnati et al., C-1-89-079, (S.D.Ohio, February 2, 1989).

[46] See e.g. Striff v. Mason, 849 F.2d 240, 245 (6th Cir. 1988), Stotts v. Memphis Fire Dep't, 679 F.2d 541, 558 (6th Cir. 1982), rev'd on other grounds sub. nom. Firefighters Local 1784 v. Stotts, 467 U.S. 561 (1984); E.E.O.C. v. McCall Printing Corp., 633 F.2d 1232, 1237 (6th Cir. 1980).

applicants who allege race discrimination because of a Consent Decree originally entered in 1974. The second case was filed on October 5, 1989 (post-Martin) and alleges race and sex discrimination against white males in police department hiring because of what the plaintiff contends is a misapplication of a 1981 Consent Decree.[47] The Fraternal Order of Police had intervened as a party in the litigation which led to the 1981 decree.[48]

H. GADSDEN, ALABAMA

To our knowledge, to date, there has been only one district court ruling on the merits subsequent to the Supreme Court decision in Martin v. Wilks regarding a collateral attack on a consent decree. This case arose out of Gadsden, Alabama.[49] The ruling has been appealed to the Eleventh Circuit Court of Appeals.[50] Although blacks comprise approximately 20% of the population of Gadsden, prior to 1979, Gadsden never had a black firefighter. In 1978, a lawsuit was filed against Gadsden challenging the exclusion of blacks from firefighter jobs. A consent decree resulted providing for race-conscious hiring. In 1987, white firefighters filed suit attacking this decree.

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[47] Vogel v. City of Cincinnati No. C-1-89-683 (S.D.Ohio, November 14, 1989).

[48] U.S. v. City of Cincinnati, No. C-1-80-369 (S.D. Ohio, August 13, 1981).

[49] Henry v. City of Gadsden, Alabama 715 F.Supp. 1065 (N.D.Ala. June 30, 1989).

[50] No. 89-7521 (11th Cir.) (pending). Oral argument was held on January 25, 1989.

On June 30, 1989, after a trial, the district court entered judgment in favor of the City of Gadsden finding that "there had been no blacks - the inexorable zero - in the Gadsden Fire Department" and that the rights of the white firefighters were not unnecessarily trammeled ("plaintiffs have already been positioned so that, in all likelihood, they will be promoted to the position of driver ahead of the blacks against whom they complain").[51] Although the "reverse discrimination" case was finally adjudicated by the trial court, the case is still pending on appeal after two and one-half years of litigation and is likely to continue for some time.

I. MEMPHIS, TENNESSEE

Three "reverse discrimination" cases challenging actions taken under consent decrees have been filed against the City of Memphis, Tennessee since the Supreme Court decision in Martin v. Wilks. The first of these cases was filed in August 1989 by twenty-six (26) white male police officers alleging race discrimination in promotions to the position of Investigator made in 1988 because of consent decrees entered in 1979 and 1981.[52] A

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[51] 715 F.Supp. at 1068.

[52] Ashton v. City of Memphis No. 97640-3 (Chancery Court of Shelby County, Tennessee) (August 28, 1989). This state court case was removed to U.S. District Court - 89-2863 HA (W.D.Tenn.). The Ashton case challenges promotions made pursuant to a 1979 consent decree entered in Afro-American Police Association v. City of Memphis C-75-380 (W.D.Tenn. 1975) which involved hiring and promotions in the Memphis Police Department and a 1981 consent decree entered in U.S. v. City of Memphis, C-74-286 (W.D.Tenn.). The 1981 consent decree amended a November 1974 consent decree entered in U.S. v. City of Memphis. The decrees

second case was filed in late January 1990 by twenty-five (25) white male police officers alleging race discrimination in promotions to the position of Investigator made in 1989 because of the same 1979 and 1981 consent decrees.[53] A third lawsuit, also filed in late January 1990, involves the Memphis Fire Department. This case was brought by two (2) white male firefighters who allege race discrimination in promotions to Fire Lieutenant and Fire Investigator, respectively, because of consent decrees entered in 1977 and 1981.[54]

J. OMAHA, NEBRASKA

In 1979, a lawsuit brought by the Brotherhood of Midwest Guardians, an organization of black police officers, by individual black police officers and by an individual black applicant for a police officer position alleged race discrimination in hiring and promotions by the City of Omaha, Nebraska.[55]

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in U.S. v. City of Memphis involved relief for race and sex discrimination in various departments of the City of Memphis.

[53] Aiken v. City of Memphis, 90-2069 HA (W.D.Tenn. January 23, 1990).

[54] Davis v. City of Memphis, 90-2068 HA (W.D.Tenn. January 23, 1990). The Davis case challenges promotions made under a 1980 consent decree in Stotts v. City of Memphis, C-77-2104 (W.D.Tenn.) and under the 1981 decree in U.S. v. Memphis, supra. The 1980 Stotts decree resolved litigation initiated in 1977. See Stotts v. Memphis Fire Department, 679 F.2d 579 (6th Cir. 1982) for a history of the Stotts and U.S. v. Memphis litigation. See Stotts v. Memphis Fire Dept., 679 F.2d 541, 570-579 (6th Cir. 1982), rev'd on other grounds sub nom. Firefighters Local 1784 v. Stotts, 467 U.S. 561 (1984) for the text of the 1974 consent decree in U.S. v. City of Memphis and the 1980 consent decree in Stotts.

[55] Brotherhood of Midwest Guardians, Inc. et al. v. City of Omaha et al. C.A. No. 79-0-528 (D.Neb.).

In 1980, the United States filed a lawsuit against the City of Omaha alleging a pattern and practice of race discrimination in the Omaha Police Division.[56] These two lawsuits were settled in a consent decree entered on October 23, 1980.

In 1984, five (5) years before Martin v. Wilks, the Eighth Circuit Court of Appeals affirmed the dismissal of a "reverse discrimination" case filed by a white male applicant for a firefighter position with the City of Omaha on the ground that the City acted pursuant to a "bona fide affirmative action plan".[57] At least two "reverse discrimination" cases initiated in 1988 are still pending against the City of Omaha concerning promotions in the police department pursuant to the 1980 decree - one involving promotions to Police Lieutenant and the other involving promotions to Police Sergeant.[58] In addition, at least five (5) cases have been filed since the Supreme Court decision in Martin v. Wilks on the administrative level with the Nebraska Equal Opportunity Commission and the E.E.O.C. by white males claiming race discrimination in the Omaha Police Division in promotions to Police Sergeant because of the 1980 consent

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[56] U.S. v. City of Omaha, et al. C.A. No. 80-0-631 (D.Neb.).

[57] Warsocki v. City of Omaha, 726 F.2d 1358, 1360 (8th Cir. 1984).

[58] Donaghy v. City of Omaha, C.A. 88-0-321 (D.Neb. April 26, 1988) and Wade and Invener v. City of Omaha, 871568 (Douglas County District Court for the State of Nebraska, September 16, 1988).

decree.[59]

K. CLEVELAND, OHIO

In Cleveland, Ohio, a consent decree was entered on January 31, 1983 resolving litigation initiated in 1980 regarding race discrimination in the Cleveland Fire Department.[60] Two "reverse discrimination" cases were filed in 1986 by six individual white firefighters and a local firefighters association alleging race discrimination in promotions because of the decree.[61] Despite the fact that the association was a party to the consent decree litigation, because of Martin v. Wilks, these cases are both still pending after almost three years of "reverse discrimination" litigation[62] and nine (9) years of litigation

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[59] All of these cases were filed administratively in September or October 1989.

[60] Firefighters v. Cleveland, 478 U.S. 501 (1986).

[61] Local 93, International Association of Firefighters, et al. v. City of Cleveland, et al., C-86-2858 (N.D. Ohio, July 8, 1986) and Copperman et al. v. City of Cleveland, C-86-2399 (N.D. Ohio, June 5, 1986). A motion to dismiss was filed by the City of Cleveland on August 15, 1986. The Court did not rule on the motion prior to Martin v. Wilks. After Martin was handed down, the Court asked for supplemental briefs on the applicability of Martin. This motion is still pending. No motion to dismiss was filed in Copperman, pending the outcome of the motion filed in Local 93. The cases have been treated as consolidated by the court.

[62] Indeed, the Court appeared to be saying in Martin that the firefighters can make a claim as a party to the consent decree litigation and make the same claim again in separate post-decree litigation, as long as they do not sign the consent decree:

> "A voluntary settlement in the form of a consent decree between one group of employees and their employer cannot possibly 'settle,' voluntarily or otherwise, the conflicting

over race discrimination in the Cleveland Fire Department.

V. CONCLUSION

The impact of the Martin v. Wilks decision is clear. Cases settled long ago are subject to endless litigation even by people who had opportunities to participate in the original lawsuit. New settlements are discouraged because of employers exposure to multiple liability. The courts, already over-burdened, face increasing dockets with lawsuits seeking to relitigate claims already heard. The concept of finality in employment discrimination litigation has been destroyed.

> claims of another group of employees who do not join in the agreement. This is true even if the second group of employees is a party to the litigation:
>
> '[P]arties who choose to resolve litigation through settlement may not dispose of the claims of a third party ... without that party's agreement. A court's approval of a consent decree between some of the parties therefore cannot dispose of the valid claims of nonconsenting intervenors. Firefighters v. Cleveland, 478 US 501, 529, 92 L Ed 2d 405, 106 S Ct 3063 (1986).'"

Martin v. Wilks, supra, 104 L.Ed.2d at 848.

Ms. ARNWINE. The impact of the *Martin* decision is clear. Long-settled cases are being reopened, with the prospect of perpetual litigation in communities throughout the country. Dozens of cases are now clogging the courts, challenging court orders because of the *Martin* decision.

After years of litigation which finally produced racial progress, city after city is facing the trauma of reopening old wounds. For example, since the Supreme Court ruled this past June the cities of San Francisco and Oakland, California, have been hit with five new court cases between them, and Memphis and Boston with three each. The city of Omaha, Nebraska, is facing at least seven court or administrative challenges to consent decrees. There are now six different consent decree challenges pending against the city of Birmingham, Alabama, and two more against Jefferson County, Alabama. At least three cities in Ohio alone—Cincinnati, Cleveland, and Toledo—have been sued for reverse discrimination since *Martin*. Smaller cities such as Gadsden, Alabama, and Albany, Georgia, are also seeing long-resolved cases reopened by new litigation.

I would like to take as an example of what has happened since this decree the situation in Boston, Massachusetts. Since the decision in *Martin* there have been three challenges brought to separate consent decrees resolving racial discrimination cases. One is a 1974 consent decree. Another is a 1973 consent decree. Here people are seeking to reopen almost two decades of litigation. A 1971 court finding that found that the City of Boston discriminated against its own minority citizens on the basis of race in the use of nonvalidated intelligence tests, and another case, a 1980 consent decree regarding promotions is being challenged because of promotions that are being made in accordance with the consent decree.

Prior to this decree's existence only one black person had ever been promoted in the whole history of the Boston Police Department. There is no controversy. We all believe that people whose rights may be affected by a decree should have a fair opportunity to have their day in court prior to the entry of that consent judgment or order.

The issue raised by the Supreme Court's decision, however, is whether there should be reasonable and orderly procedures such as those contained in this legislation to protect those rights prior to the entry of a decree, or whether people should be allowed to relitigate the same old claims over and over again without end.

Section 6 of the Act does not overrule *Martin* v. *Wilks*. What it does do is follow the suggestion of the Court majority that Congress, if it so desires, pass a special remedial scheme designed to protect the rights of nonparties before the entry of a decree and "expressly foreclosing successive litigation by nonlitigants."

As the Court acknowledged, this kind of legislation already exists in areas such as bankruptcy and probate law. Because of *Martin* such a statute is now needed for employment discrimination litigation. Section 6 of the Civil Rights Act of 1990 strikes a careful balance to ensure that the rights of everyone are protected in a timely and orderly fashion. The legislation protects the interests of the parties in the courts in certainty and finality by barring repeated

post-decree lawsuits over matters already litigated where the fair and orderly procedures outlined above are followed.

The legislation also avoids inconsistent results and promotes judicial efficiency by mandating that lawsuits challenging court orders be brought in the court and, if possible, before the judge that entered the order. We think Section 6 of this legislation is both fair and orderly and will restore needed stability to employment discrimination law.

Chairman Hawkins, we would like permission to update our study periodically. These cases are happening at a very fast pace. There are new developments weekly, and we feel it would be appropriate to keep this committee apprised of developments.

[The prepared statement of Barbara Arnwine follows:]

LAWYERS' COMMITTEE
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BEFORE THE COMMITTEE ON EDUCATION AND LABOR AND THE SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE COMMITTEE ON THE JUDICIARY OF THE HOUSE OF REPRESENTATIVES

FEBRUARY 20, 1990

TESTIMONY OF BARBARA R. ARNWINE, EXECUTIVE DIRECTOR OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW ON H.R. 4000, THE CIVIL RIGHTS ACT OF 1990

Mr. Chairmen and Members of the Committee and of the Subcommittee:

Thank you for the opportunity to testify before you on H.R. 4000, the Civil Rights Act of 1990.

A. INTRODUCTION

The Lawyers' Committee for Civil Rights Under Law is a nationwide civil rights organization, with local offices in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Francisco and Washington, D.C. It was formed by leaders of the American bar in 1963, at the request of President Kennedy, to provide legal representation to black persons who were being deprived of their civil rights. Over the past twenty-seven (27) years, the Lawyers' Committee and its local affiliates have represented the interest of blacks, Hispanics and women in hundreds of class actions in the fields of employment discrimination, voting

rights, equalization of educational finance and municipal services and school desegregation. Well over a thousand members of the private bar, including former Attorneys General, former presidents of the American Bar Association, and other leading lawyers, have assisted us in these efforts.

B. SUPPORT OF LEGISLATION

At the outset, let me state that The Lawyers' Committee strongly supports passage of the Civil Rights Act of 1990 - in its entirety. This legislation is urgently needed to restore and strengthen the statutory protections for victims of employment discrimination. Today, we have been asked to speak briefly about Section 6 of the Act. Section 6 is titled: "Facilitating Prompt and Orderly Resolution of Challenges to Employment Practices Implementing Litigated or Consent Judgments or Orders". It deals with the Supreme Court decision in Martin v. Wilks.[1] I will first review with you why the Lawyers' Committee believes this Section is needed and then how the Section meets that need.

C. MARTIN v. WILKS AND ITS IMPACT

In a 5-4 ruling on June 12, 1989, in Martin v. Wilks, the Supreme Court held that a person could not be precluded from filing a separate lawsuit challenging a consent decree unless that person had been made a party to the consent decree action - even if that person had previously had an opportunity to be heard by the court prior to the entry of the decree. Let me emphasize that nothing in Martin v. Wilks disturbs the long line of Supreme

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[1] 490 U.S. ____, 104 L.Ed.2d 835, 109 S.Ct. 2180 (1989).

Court decisions supporting affirmative action in appropriate circumstances.

The Lawyers' Committee for Civil Rights Under Law filed the original Martin v. City of Birmingham lawsuit in January 1974 on behalf of black employees of, and applicants for employment with, the City of Birmingham. Prior to the lawsuit, black persons were almost totally excluded from civil service jobs with the City. After two trials and two appeals, a finding of discrimination in hiring and the introduction of massive evidence of discrimination in promotions in the Fire Department and in other departments of the City of Birmingham, in 1981 the Lawyers' Committee and the Department of Justice agreed to consent decrees with the City and its Personnel Board to resolve seven-and-one half years of heated litigation. The white firefighters sat on the sidelines during all of this. Although it was clear to everyone at the time how the decrees would work, starting seven months after the decrees were entered, several white firefighters and others filed new lawsuits attacking the very first promotions of blacks in the history of Birmingham Fire Department and other departments.

Although the white firefighters had a five-day trial in 1985 on the merits of their claims of discrimination, the Supreme Court rejected the rule of the overwhelming majority of the Circuit Courts of Appeals and said that persons who claim "reverse discrimination" can continue their lawsuits attacking the decrees no matter what opportunity they had to be heard

before the entry of the decree. The Martin litigation is now over sixteen (16) years old with no end in sight.

The Martin decision threatens to lead to renewed litigation over any and every consent decree and litigated order where persons claim they were "adversely affected", no matter how much time has passed since the original lawsuit and no matter how many chances the "adversely affected" persons had to participate in the original lawsuit. In addition, by holding out the likelihood of interminable litigation and exposure to multiple liability even after settlement, the decision undermines the Congressional preference for settlement of employment discrimination lawsuits. The decision destroys the vital concept of finality of litigation. Instead, the courts, already overburdened, face increasing dockets with lawsuits seeking to relitigate claims already heard. Employers groups representing every level of public and private employers had urged the court not to adopt the rule announced in this decision because of its disruptive impact and unnecessary waste of precious resources on matters resolved years earlier.

The Lawyers' Committee has conducted a study of the aftermath of the Supreme Court decision in Martin. The impact of the Martin decision is clear: Long-settled cases are being reopened to the prospect of perpetual litigation in communities throughout the country. Dozens of cases are now clogging the courts challenging court orders because of Martin v. Wilks. After years of litigation which finally produced racial progress,

city after city is facing the trauma of reopening old wounds.

For example, since the Supreme Court ruled this past June, the cities of San Francisco and Oakland, California have been hit with five new court cases between them and Memphis and Boston with three each. The City of Omaha, Nebraska is facing at least seven (7) court or administrative challenges to consent decrees. There are now six (6) different consent decree challenges pending against the City of Birmingham, Alabama and two more against Jefferson County, Alabama. At least three cities in Ohio alone (Cincinnati, Cleveland and Toledo) have been sued for "reverse discrimination" since Martin. Smaller cities, such as Gadsden, Alabama and Albany, Georgia, are also seeing long-resolved cases reopened by new litigation.

I would like to mention what has happened in Boston, Massachusetts since the decision was handed down in June 1989 to highlight the impact of the Martin case:

* White male firefighter applicants have sued charging race discrimination in the hiring of blacks and Spanish-surnamed persons because of a 1974 consent decree.

* White male police officer applicants filed a lawsuit seeking to re-open a 1973 consent decree. These people seek to reopen, after almost two decades, the 1971 court finding that found that the City of Boston discriminated against its own citizens on the basis of race in the use of non-validated intelligence

tests by the Boston Police Department.

* White police officers attacked a 1980 consent decree because promotions "have been made in accordance with the consent decree." Prior to this decree, only one black person had ever been promoted in the history of the Boston Police Department.

D. WHAT THE LEGISLATION WILL DO

Everyone agrees that people whose rights may be affected by a decree should have a fair opportunity to have their "day-in-court" prior to the entry of the decree. The issue raised by the Supreme Court's decision, instead, is whether there should be reasonable and orderly procedures, such as those contained in this legislation, to protect those rights prior to the entry of a decree or whether people should be allowed to relitigate the same claims over and over again without end.

Section 6 of the Act does not overrule Martin v. Wilks. What it does do is follow the suggestion of the Court majority that Congress, if it so desires, pass a "special remedial scheme" designed to protect the rights of non-parties before the entry of a decree and "expressly foreclosing successive litigation by non-litigants."[2] As the Court acknowledged, this kind of legislation already exists in areas such as bankruptcy and probate law.[3] Because of Martin, such a statute is now needed for employment

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[2] Martin, supra., 104 L.Ed.2d 835 at 844-845 n.2.

[3] Ibid., See also e.g. Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 110 (1968).

discrimination litigation.

Section 6 of the Civil Rights Act of 1990 strikes a careful balance to insure that the rights of everyone are protected in a timely and orderly fashion. The legislation protects the rights of persons challenging consent decrees in the following key respects:

1. Full rights of intervention in the consent decree litigation are preserved. Thus, a person could participate fully in the original discrimination case as a party whenever a court thinks that is appropriate, even if it is after the entry of the decree. The legislation restores the sensible pre-Martin option for the non-party to decide whether to join the lawsuit, rather than force the parties to join additional persons.

2. In order to insure that the rights of decree challengers are protected, the legislation provides notice and an opportunity to be heard by the Court to interested persons and/or adequate representation of a person's interest before the stopping of any post-decree challenges.

3. Even where such notice has been given, persons can still file separate lawsuits even after the entry of the decree to claim that the decree was a product of collusion or fraud, is transparently invalid or was entered by a court which lacked subject matter juris-

diction.

The legislation protects the interests of the parties and the courts in certainty and finality by barring repeated post-decree lawsuits over matters already litigated, where the fair and orderly procedures outlined above are followed. The legislation also avoids inconsistent results and promotes judicial efficiency by mandating that lawsuits challenging court orders be brought in the court, and if possible, before the judge, that entered the order.

We think Section 6 of this legislation is both fair and orderly and will restore needed stability to employment discrimination law.

Chairman HAWKINS. Thank you, Ms. Arnwine.

Ms. ARNWINE. And thank you.

Chairman HAWKINS. I understand that completes the list of witnesses on this panel.

Mr. Eisenberg, as I understand it, the Anti-Defamation League does oppose affirmative action as well as goals and timetables, but supports the proposal before us, and specifically supports overturning *Martin* v. *Wilks*. In your opinion—I think the question should be viewed in that light—would overturning *Martin*, in your opinion, encourage affirmative action or discourage it?

Mr. EISENBERG. I would think that it would encourage it. It would seem to me that we support this because it is disruptive to legitimate affirmative action and the attempts of the courts to correct discrimination; it opens up to collateral attack decrees which have been enforced over a period of time and proceedings in which the persons who were affected by those decrees have had an opportunity and notice to participate. What happens is that it becomes impractical on a broad range, as Ms. Arnwine has indicated, to defend these all over the country. So it seems to me that that is one of the reasons why we support overturning that case.

Chairman HAWKINS. Let me ask you a second question then. We have one statement made, I think, by one of the members today, and certainly it is included in some of the testimony submitted to the committee, and I quote the statement: "Employers are bound to conclude that it is cheaper and safer to rely on quotas." How would you respond to that assertion?

Mr. EISENBERG. I think that that is an excuse, Mr. Chairman. If we interpret the word "essential" in the sense in which I believe that it should be interpreted and was meant to be interpreted as not establishing a conclusive presumption, where the idea of this legislation was that if there was disparate impact shown, demonstrated, that the burden would shift, what happens then? If the employer is precluded from then coming forward with legitimate evidence which indicates that, in fact, there is an important role for his practice, if you make that a conclusive presumption, then I think the critics will be correct.

But that is not what I believe this legislation is designed to do. The legislation is designed to put the burden, once disparate impact is shown, on the employer. The employer can then come forward and show that in fact the practices which he has used are, this legislation says, essential or necessary to conducting his business. And we would interpret that, because it needs some further interpretation, as I indicated during my testimony, to mean that the practices play a substantial role in selection and are clearly related to important job qualifications which result in the applicant being better able to do that which he is supposed to do on the job. You have got to give some reasonable content to the words in the legislation, and that the legislative history will show in regard to the word "essential."

Chairman HAWKINS. Thank you. Mrs. Greenberger, I think in your testimony you did refer to the *Wards Cove* case, and I think you gave a classic example, where a police department had issued a minimum height regulation or requirement which had the effect,

obviously, of excluding women or leading in that instance to an all-male force as being a classic example.

In that instance, as I understand it, quotas were really not touched at all. It was just merely the height requirement that led to the disproportionate result.

Ms. GREENBERGER. That is absolutely right.

Chairman HAWKINS. In that case the plaintiffs did not have a burden as the employer was, really, relieved of the burden of proof. But isn't that really a good example of how that requirement would operate in that the plaintiffs would be denied an opportunity there of proving their case, but would be really burdened with the proof which was fairly simple? Would you indicate that as a good example of what we are talking about, how the burden of proof would shift, then it would be up to that employer to show that height was actually necessary or required?

Ms. GREENBERGER. That is certainly true, Chairman Hawkins. There has been a history of employers seizing what may seem to be convenient but in the end arbitrary requirements that have served to screen out women and minorities from important job opportunities, and that has certainly been the case for height and weight requirements for both women and certain minority groups as well.

And, unfortunately, in a *Wards Cove* context, not only would the burden shift back to the women and minorities who have already proven that height or weight test, as an example, has screened out qualified women or minorities, but they would have to then prove a negative: that the employer couldn't have used other screening devices that would have been better.

I think what we have seen in our history is a lot of conveniences that employers have used often without thinking about them and without realizing what their impact is and, as a result, without requiring employers to go through their employment practices themselves.

I do want to respond to a comment earlier about litigation, and certainly being able to bring a court action is very important. And one of the things that is so centrally important about the Civil Rights Act of 1990 is to make sure that the rules of the game are fair when cases are brought in court.

But I would submit that just as important, if not even more important, is to put the incentive back on employers where it has been to review their own practices long before there is any court case, and that what we really rely on in this country is having rules, and having the rules of the game spelled out with some clarity, so that court cases aren't needed. So that we have an adherence to the law that is voluntary in nature, and I think with the Civil Rights Act of 1990 we will, hopefully, be back to a situation where employers will be examining their own employment practices to be sure that they are not unfairly screening out protective groups.

Chairman HAWKINS. Thank you. Ms. Lichtman, since I have you here, I would like to get your response to a statement that I read this morning from the Department of Justice testimony in which they oppose a rule which allows a liability finding in mixed motive cases, because—and this is a direct quote—"damages should not be based solely on the discriminatory thoughts of an agent of the em-

ployer which have no consequence to the employee." I couldn't quite understand it.

Maybe it will be better explained this afternoon. But I couldn't understand what they meant when they said "based solely on the discriminatory thoughts of an agent of the employer." I thought we were dealing with practices and not thoughts, but that struck me as being somewhat of a rather unusual statement, one which I hope we will get a better explanation of. But I wanted to get your response to that assertion.

Ms. LICHTMAN. Well, in reading it late this morning, I did underline exactly those same words and went back to what I think is the clear wording of the statute. The Civil Rights Act of 1990, Section 5, reads in part, "... except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for an employment practice."

I can't believe that the language of the statute could be any clearer. We are not talking about thoughts, we are talking about acts. Basically, the Justice Department says that recovery of damages is solely based on thinking bad thoughts, and I think that is just ridiculous, reading the words of the statute.

The Court and the Justice Department both seem to recognize that in the *Price Waterhouse* case Ann Hopkins showed much more than the presence of evil thoughts. She, indeed, proved that there was direct evidence that sex played a part in the decision-making process. There was action. There was a decision-making process.

This legislation doesn't confer liability and damages for thinking bad thoughts. Rather it holds that an employer is liable for allowing impermissible factors to play a role in that decision. So we are talking about decision-making or practices or acts, not what people think.

Chairman HAWKINS. Well, it was so unusual to me because I recall 40 years ago when I sponsored a State bill similar to Title VII at the State level I was accused of trying to legislate on the thoughts of people, and I conceded then that one may have an evil thought and keep it to yourself, nobody is going to disturb that. You can't possibly reach it. But when you begin to act out that dangerous thought in an act, then that was the only thing we were trying to legislate. And I was surprised that here it is almost 50 years later I get the same argument being raised.

Mr. Eisenberg?

Mr. EISENBERG. Yes. I want to support what Ms. Lichtman said. I think that by talking in terms of discriminatory thoughts, what the Deputy Attorney General is really confusing is intent, and we always look at intent, which if you look at Section 5(a)(1) of the bill, which he quoted, was a motivating factor for any employment practice. So the question is: was this intent? And we always deal with intent in all sorts of situations.

Chairman HAWKINS. Thank you. So that you may have lust for a woman, but if you try to rape her, it is another matter.

I would yield to Mr. Goodling at this point.

Mr. GOODLING. I have no questions, Mr. Chairman.

Chairman HAWKINS. Mr. Fawell?

Mr. FAWELL. Thank you, Mr. Chairman.

As I again look at this bill, I wish I had the right to make a motion for a separate trial on each of these cases, but I don't have that right. Nor do I have the right to cross-examine for as long as I would like to be able to cross-examine. So it is a frustrating thing to a fellow who just practiced country law for a number of years to have references made by the testimony here—it was well-expressed testimony—in regard to *Wards Cove*, in regard to *Price Waterhouse*, and also the *Martin* case, and in each one you jot down all kinds of questions about your feelings on it.

Let me just take *Martin* v. *Wilks*. It was very ably expressed, but there is another side to the story. And we must remember these are 5-to-4 split decisions by very eminently capable people who are not bad guys at all on either side. They are trying to do the job. And as I look, as I heard the testimony, Ms. Arnwine, which you ably expressed in regard to *Martin* v. *Wilks*, I couldn't help but jot down the fact that this holding is nothing more nor less than a reaffirmation. This is the other, the loyal opposition, now speaking, as the Court put it, in our deep-rooted historic tradition that everybody should have his own day in court. The Court's decision said nothing critical about civil rights suits. It was written strictly in terms of proper civil procedure, and that is all that it dealt with. And the principle that a court cannot bind you to a judgment if you are not before it is one so firmly rooted in fundamental notions of due process that any attempt, even by Congress, to circumvent it is likely to be struck down as unconstitutional.

Now there is the other side. There are good, solid arguments on both sides—and that pertains only to the case of *Martin* v. *Wilks*. It seems to me that, I repeat, that we are just trying to do so very, very much to get rid of five or six cases and we don't understand. I don't think—anybody can possibly understand the potential damage that can occur as a result of what we are trying to do.

Mr. Eisenberg, I heard your statements in regard to *Wards Cove*, where you had said it is not an irrebuttable presumption. I am still not clear, in reference to the bill that is, I guess, not technically before us. We are really talking in generalities today. But I am still concerned about the *Wards Cove* decision, which, as I understand it, tells an attorney who is going to try that case you have got to do more than just bring in statistics here. When you are talking about the employment practices of the employer, you are not going to have a prima facie case or any kind of burden shifts until such time as you identify the specific employment practices which, in your opinion, is a barrier, causes the disparate impact that we are talking about.

Have you had the opportunity to review the legislation and do you construe it to mean that "Yes, indeed, the plaintiff is going to have to prove those specific employment practices which in his opinion or her opinion actually brings about the disparate impact?"

Mr. EISENBERG. No, I do not believe that the legislation provides for that. I think the legislation provides that if the plaintiff can show disparate impact, and I think you are correct in saying that disparate impact is not defined, but if they can show disparate impact, the burden then shifts to the employer.

Mr. FAWELL. Does he have to show that whether or not those who are allegedly suffering disparate impact are even qualified?

Does he have to put any type of causal connection, proximate cause such as qualifications?

Mr. EISENBERG. I do not think that the legislation means to eliminate an examination of qualifications. I think that the question then goes to whether or not it is essential to his business, and whether it was necessary for the performance of the person's job.

Mr. FAWELL. What, in your opinion, shifts the burden over to a defendant? Or does the defendant start with the burden of proof in the case?

Mr. EISENBERG. No.

Mr. FAWELL. Something must shift the burden. What shifts the burden?

Mr. EISENBERG. The showing of the disparate impact.

Mr. FAWELL. That is all?

Mr. EISENBERG. That is correct.

Mr. FAWELL. Just racial imbalance?

Mr. EISENBERG. No. No. I think that——

Mr. FAWELL. All right. What more? What more must I put in——

Mr. EISENBERG. Mr. Comay indicated that disparate impact does not necessarily equal racial imbalance. It would seem to me that——

Mr. FAWELL. What more would you advise an attorney then that he is going to have to put in, more than just the simple statistics of a racial imbalance?

Mr. EISENBERG. Well, I think that he has to show a—well, first of all, he doesn't just have to show racial imbalance. He has to show disparate impact, and I think that is different. Because I think disparate impact should mean a really significant variance.

Mr. FAWELL. Well, then is he going to have to take certain employment practices and show that these employment practices do indeed have a significant effect upon producing this disparate impact?

Mr. EISENBERG. No. The burden then shifts to the employer, as I read the statute.

Mr. FAWELL. But what shifted it? I mean, what type of proof——

Mr. EISENBERG. The showing of the significant variance. The disparate impact itself was enough to shift the burden of proof.

Mr. FAWELL. What proves disparate impact?

Mr. EISENBERG. Well, the statistics prove the disparate impact.

Mr. FAWELL. So we are back to quotas again.

Mr. EISENBERG. No, we are not back to quotas. We are very much opposed to quotas.

Mr. FAWELL. What shifts the burden then? I hate to repeat myself.

Ms. GREENBERGER. I think if we look at the statute, perhaps, there would be very specific answers to the questions that you are raising. And, if we look at the section of the statute that deals—Section 4, that deals with the burden of proof and disparate impact cases, first, if one reviews (k), "Proof of Unlawful Employment Practices and Disparate Impact Cases," the first part of that sets out what is the plaintiff's burden in coming forward, and there under (1) it says: (a) "A complaining party must demonstrate that an employment practice results in a disparate impact."

So first, in connection to the question you asked, does there even have to be a causal connection, the plain meaning and language of the statute says that it is the complaining party which must demonstrate that the practice results in a disparate impact. So that is a clear cut answer to the question.

There is also a definition of what "demonstrates" means, which means carrying the burden of proof or persuasion. So there is a heavy burden on that plaintiff to show a causal connection and that burden is the ultimate burden that the plaintiff must carry with respect to disparate impact.

We have a long history of litigation with respect to what disparate impact means in cases, and disparate impact does not mean a showing simply of a disparity between the composition, say, of a work force and the particular composition in the particular job at issue. There is case law, which is not being changed at all by this statute, with respect to a showing of disparate impact and which has been reviewed in a way that shows that it is simply not saying, for example, in the context of sex discrimination that because there may be a population of over 50 percent women that a particular job category needs to be comprised of 50 percent women. That has never been what the law has required. There have been in numerous cases very specific fine tuning of what a showing of disparate impact means, and that is not being changed at all by this legislation.

Mr. FAWELL. Well, I hope you are right, and I would agree with what you have said. The plaintiff should be required to have specific allegations.

Ms. GREENBERGER. And that is what the language of the statute says as well.

Mr. FAWELL. Unfortunately, I haven't had time to look at the bill, so I am definitely not as apprised as you are. The copy of the bill which I have before me indicates that an unlawful employment practice is established under this subsection when, and that is (a), which is the wording that you just gave to me, and then (b) says "when a complaining party demonstrates that a group of employment practices results in a disparate impact."

Ms. GREENBERGER. Yes.

Mr. FAWELL. Now there you could just simply allege all of the employer's employment practices and say that these employment practices result in a disparate impact. Shift the burden to him to then come up and show that nowhere in there is there anything that would bring this about. And bear in mind that the burden that he has as far as any employment practice is concerned, you must show it is absolutely essential to the business. So he has got quite a burden, it would seem, under this legislation.

Ms. GREENBERGER. Let me say with respect to (b), and I did underline it to respond to the question and then skipped over it, and I apologize. With respect to a group of employment practices, again the complaining party has to "demonstrate" that that group results in a disparate impact. It is not simply "saying," it is "demonstrating"—meeting the burden of proof.

And let me give you an example again in the area of sex discrimination, which is the area that I am most familiar with, of why it is so important to look at employment practices as a whole, because

that is, in fact, how they operate in practice. In the context of sex discrimination in non-traditional jobs for women, women who are seeking well-paying jobs that have been traditionally held by men, let's look, for example, at the police departments. There may have been a combination of factors that have served, and there have been a combination of factors that have served to exclude women from those jobs. There are the height and weight tests. There are also the views of those who were in charge of hiring that police officers should not be women, and the views of those who think that women with children should not be working outside the home. There are combinations of those things.

When those practices all work in combination to exclude women from either being hired or being promoted, then it is the burden of the complaining party, the women in that case, to demonstrate that that group of practices, and the plaintiff has to articulate what specific practices she has in mind, have resulted in, using again the language of the statute—resulted in the discriminatory impact.

Mr. FAWELL. Well, I see my Chairman is about to bring the gavel down, and I don't blame him for that, but I do want to just leave these last words to you. In *Wards Cove* what the plaintiff did do is, as in subsection (b) seems to be authorized to be done, he just listed all of the employment practices without specifying which ones actually had the detrimental effect and produced the proximate cause of discrimination.

I am concerned about that because that is a clarification in *Wards Cove*. They pointed out that you must specifically set forth which of the employment practices you are complaining about, and you have to show that it has a significant effect upon or toward discriminating against one of the protected classes of people.

So I hope we can, throughout all these hearings, all agree as to what the specific proofs are that a plaintiff must undertake before that burden shifts. It ought to be certainly—as you seem to agree, certainly specific points that are proven. Then the burden should—I think may—shift.

Ms. GREENBERGER. Certainly, the plaintiff has to articulate the particular practices. What is problematic with respect to *Wards Cove* was that the majority of the Court was saying that the plaintiff has to disaggregate each of those practices and prove the specific disparate impact of each one separately. That is what is so damaging, and that is the only aspect of the group practices which is being changed by this legislation.

Mr. FAWELL. Thank you.

Chairman HAWKINS. Mr. Edwards?

Mr. EDWARDS. I just have one question. This is sort of the heart of the matter, as we have found out in this valuable discussion this morning.

Give me a typical complaint, where the plaintiff is a black person who feels that he or she has been discriminated against in applying for a job. What would the complaint allege in this case?

Ms. ARNWINE. You are talking about under the new *Wards Cove* definition?

Mr. EDWARDS. Under this bill, yes.

Ms. ARNWINE. I think the complaint would pretty much allege what they currently tend to allege. It would allege that the employer has discriminated against people on the basis of race by the use of an employment process that has resulted in disparate impact or has adversely affected the interests of minority applicants, if it were an application case, or promotions, if it were a promotional case.

What you would have to show there is that you would have to identify that overall employment process, what it encompasses and what it involves. Generally, it could involve anything from tests to interviews to psychological examinations to other sorts of criteria, including, of course, physical fitness, that comes into play in the total employment process.

The danger of the *Wards Cove* decision that this legislation is designed to deal with is that it is very hard as a plaintiff's attorney, and as a plaintiff who has been discriminated against, to figure out at what point you got thrown out of that process. Sometimes you don't know if it was, in fact, your test scores, because some tests are very complicated; they may have three different portions of a test.

For example, a test might have a written examination portion. It may have an essay examination portion. It may, in fact, have what they call a "practice lab," where you have to sit before a panel and pretend that you are engaged in whatever the job is that you are applying for. You don't know necessarily where you got cut out. You don't actually know, most psychological tests don't even tell you the results of the test. It is very—therefore, very difficult to figure out what the "particular" effect was that kept you out of the employment workplace, but what you do know is that of all the applicants who applied, that X numbers were minority and that for some strange reason all the people who, the majority of the people who are white appear to have passed this employment process but the minorities for some inexplicable reason did not pass.

What this does is set up a process whereby through the allegations of your complaint the employer has to come forth and show and demonstrate their employment process and that that employment process was essential. I will give you some good examples.

An employer decides that they have for many years employed people who were police officers and they required a high school diploma, and suddenly out of nowhere they institute a new requirement saying that anyone who wants to be a police officer not only must have a high school diploma but must have an AA degree in criminal justice. Seems real neutral on its face, except for when you look at who in fact are attending those programs.

I think that that is the kind of evidentiary battle you get into in a disparate impact case. And let me say this. The disparate impact cases are not easy cases. You do not waltz into a courtroom and say, "Well, Your Honor, they hired people and I see that they have 80 whites and, you know, 3 blacks," and you have proven a case. That is not the way it occurs.

There are court rules, for example, called the 80 percent rule, where you have to demonstrate the disparate impact and the adversity between whites and blacks. You bring in statistical experts who do that. It is a very complicated and complex set of litigation.

I don't think that it should ever be thought that this is somehow an attempt to just take societal discrimination and pull it into the workplace. What it attempts to do is to set up a very rational process whereby you discern whether or not a person has engaged in racial discrimination.

Mr. EDWARDS. That is very helpful.

Thank you, Mr. Chairman.

Chairman HAWKINS. Mr. James?

Mr. JAMES. Yes. Thank you very much. I want to thank you all for your very enlightening testimony.

It has been very helpful and you are, obviously, all very informed about the issues under the statute. The first question I have concerns the ADA—The Americans With Disabilities Act. Much of the discussion we had in the Constitutional Subommittee and I think most of the Congressmen would verify this—was, "Well, it will only be applied as under Title VII which does not allow the mental anguish cause of action." Much time was spent on that. That was the end in coming up with the Americans With Disabilities Act because that was probably the single most discussed issue.

But the ADA relies on Title VII. Am I correct in assuming that this modification to Title VII will change the net effect of all of that discussion in regard to the Americans With Disabilities Act pertaining to the damages section?

Ms. GREENBERGER. I think there is a general principle at work here.

Mr. JAMES. I would think that would be a yes or no, wouldn't it?

Ms. GREENBERGER. Well, I think that—to be an accurate answer and a fair answer, I think that the general principle at work is that when there are forms of discrimination that have been shown to require a remedy that is not in existence, and that we firmly believe is the case with respect to Title VII, and when we have had a history of experience in a statute like Section 1981 where we have shown and demonstrated that it is a remedy that works well, there should be a principle of parity at work. So that when there are forms of discrimination that are indistinguishable——

Mr. JAMES. Excuse me just a minute. You may have misunderstood my question and I have a very limited period of time.

Is it or is it not correct that under the American Disabilities Act, that we will now be expanding the remedies to include mental anguish under ADA as well as Title VII because ADA incorporates Title VII? Is that right?

Ms. GREENBERGER. My understanding is that the ADA does make reference to Title VII remedies.

Mr. JAMES. Okay. Well, thank you.

Ms. GREENBERGER. And I think very clearly it should and that when we have——

Mr. JAMES. Thank you. I did not ask you whether it should or not. I was just asking if it did. Thank you.

Were you aware that that was much the subject of much discussion in the hearings?

Ms. GREENBERGER. I was not aware, actually, until I saw the Justice Department's written testimony this morning, which was very distressing, to say the least. The only thing they said with respect to damages was that somehow or other some deal had been worked

out. It is not a deal that I am familiar with in the least, except for the deal of parity, which is why I started out with that answer.

Where there are areas of discrimination that this country cannot tolerate, and that is as true for disability discrimination as it is for race, as it is for sex discrimination, where there is a proven need for damages, if they are a part of Title VII they should be a part for all groups.

Mr. JAMES. Please understand, I am not trying to argue the merits of the argument, or the nonmerits on either side. Okay. I am simply trying to establish the interrelationship between ADA and Title VII. Many of the Congressmen were operating under certain assumptions that are no longer valid in regard to ADA, if Title VII is changed because of the specific language used.

That would be fair to say, would it not?

Ms. GREENBERGER. I would think the basic assumption is that disability discrimination should be treated like other discrimination. And if that would be the same operative understanding, then that would be the point of linking it to Title VII.

Mr. JAMES. Okay. So ADA, then it would expand it to cause of actions at law rather than administratively? I am really asking a technical issue of law. Rather than an administrative determination by the Attorney General, you would now be dealing with a jury trial and with a cause of action similar to Section 1981 under ADA as well?

Ms. GREENBERGER. Well, all I can say, and that has certainly been true and is an express provision in Title VII, that a defendant has a right to a jury trial where damages are being raised, and that would be the case in any protected category. That there would certainly be a right to a jury trial on the part of the defendant——

Mr. JAMES. Right.

Ms. GREENBERGER. [continuing] if the defendant chose to request it, as well as the plaintiff.

Mr. JAMES. All right. Now, in this statute there is no limitation whatsoever on attorney's fees is there? It could be a contingency fee contract associated with it? Is that the way you read it?

Ms. GREENBERGER. A contingency fee.

Mr. JAMES. Do you know what a contingency fee contract is?

Ms. GREENBERGER. Yes, although I don't practice in private practice. But I am familiar with the fact that that is often the way that plaintiffs without the resources to get lawyers are able to, because of a contingency fee contract and no other way.

Mr. JAMES. Right. It is a very often employed technique where there is an open-end-type of damages situation.

You are aware that in the very small cases that contingency fee contracts are not generally employable and that an hourly rate is more attractive in some cases than contingency fee?

Ms. GREENBERGER. Well, it probably depends on the nature of the case, certainly.

Mr. JAMES. Right. Okay. So has anyone on the panel or anyone anywhere have any evidence of what we may be looking at dollars-and-cents-wise if we expand this potential liability and apply the powers and the privileges and the cause of action, let's say, of 81 to——

Ms. GREENBERGER. Yes, there has been a review and the numbers are very modest, to say the least.

Mr. JAMES. Did they include ADA in that?

Ms. GREENBERGER. Well, ADA certainly—I am talking about actual experience, not speculation about what may or may not happen. And what we have seen in Section 1981 is that the average damages—both compensatory and punitive— are less than $40,000, so that is a very modest case——

Mr. JAMES. You mean per case?

Ms. GREENBERGER. Yes.

Mr. JAMES. How many cases—do you have any record of how many cases have either been settled or gone to trial under 81?

Ms. GREENBERGER. It raises an important point because Section 1981 applies to all employers, and Title VII has a 15-employee cutoff. So, actually, this is a much more modest provision in terms of its ultimate effect, whether through ADA or Title VII, than Section 1981 is now. So there is a large—we heard the figure of 11 million employees, who wouldn't be covered under damages now under Title VII.

Mr. JAMES. Right.

Chairman HAWKINS. Mr. James, I think your time has expired.

Mr. JAMES. Could I ask one more question? One more short question that I assume and hope will have a very short answer?

Chairman HAWKINS. Yes.

Mr. JAMES. The question is, under 81, what is the distinction between Title VII and 81 as far as race discrimination? Do they get any kind of improved status at all under 81 other than, obviously, the burden of proof scenario, that they didn't already have under 81?

This change in Title VII, is there an improvement?

Ms. GREENBERGER. Well, I think what would be very important is that the Title VII enforcement mechanisms and conciliation aspects would be available so that, hopefully, we wouldn't need as many lawsuits and we would have the conciliatory process at work.

Mr. JAMES. I was talking about the cause of action itself. As far as damages, et cetera, is there any difference between the proposed here and what was under 81?

Ms. GREENBERGER. The intent standard would be the same under Title VII and Section 1981.

Mr. JAMES. Thank you very much. Thank you all.

Chairman HAWKINS. Mr. Mfume?

Mr. MFUME. Thank you very much, Mr. Chairman. I will try to be as brief as possible.

I was sitting here listening to much of the testimony and thinking at the same time of Howard Beach and Forsythe County, Georgia, the Citadel, charges of discriminatory recklessness against racial and religious minorities, a new outbreak of anti-Semitic activity, skinheads, the resurgence of the "Good Ol' Boy" network—and all of that sort of cumulatively underscored for me the urgency of the legislative mission that is before this committee and before this Congress.

I was listening to the well-intentioned questions of my colleague, Mr. Fawell, who I consider to be one of the more deliberate and well-thought-out Members of this body, and it raised for me the re-

ality that we still have a very long way to go on this bill in order to reach some sort of legislative even ground where we are all singing on the same sheet of music.

Ms. Greenberger, Ms. Arnwine, Mr. Eisenberg, Ms. Lichtman, you offered suggestions to this committee as to how we might be better able to fine tune it.

Mr. Eisenberg, I appreciated the levity of your consoling remarks that, "Relax, we are all attorneys. We are here to help you." I kind of thought that the Justice Department went up to the White House and said the same thing. We got the Administration's bill a little while ago. I have not read it over. I assume that there are differences, differences that will certainly have to be worked out. And I would certainly hope that all of you on this panel and your respective organizations, all of which I have a great deal of respect for, would use your available resources and your available reach to assist those of us who are attempting to move this legislation as it is through the Congress by reaching people across the length and breadth of this Nation and explaining that this is not bad legislation, that this is legislation in the finest tradition of this Nation and that, while there are obvious differences in terms of interpretation, that it is better for us to sit down at events like this or in forums such as this to try to work through those.

Now, let me just say I have talked with some employers who have made the basic assumption, based on a set of interpretations that I don't think are completely accurate, that this legislation will disadvantage them, that this legislation is burdensome, and that this legislation was meant solely to tie their hands. And there have been others who have taken this sort of uneasiness and gone about the process of whipping up a frenzy, trying to convince people that this legislation works against employers.

I would ask that any of you or all of you take just a moment in your own way and speak, if you will, both to this committee and to employers who are listening and watching these hearings, and explain pretty much as you see it how this legislation would not do that, and how this legislation does not disadvantage, or will not serve as a disadvantage to them and would not be burdensome as they, unfortunately, may have been led to believe.

Mr. LICHTMAN. well, let me try in 25 words or less, maybe, to answer your question without attempting to run through each of the provisions specifically and try to take them in their totality.

The purpose of this legislation in a sense is a little bit sad because it is to take us back to an interpretation of the 1964 Civil Rights Act that encouraged and anticipated the protection of women, of minorities, of various religious groups. It is the various actions of the Court in its last session that require us to take a look again at the civil rights laws that were intended for the broadest possible protections for those individuals stated, and that narrowed them. And so what we are really saying with this legislation is we wish we were pushing forward with some major new initiative. What we are really saying is that we want an interpretation of the civil rights laws in employment that protect the very people that they were intended to protect in 1964.

And I think the employers of this country in some very significant measure agree with that, have taken very many voluntary ac-

tions. I think Mr. Comay earlier this morning spoke as a businessman from the vantage point of the ways that the 1990 Act will help him be a good corporate citizen.

Mr. MFUME. Ms. Arnwine?

Ms. ARNWINE. Yes. I think that another really important purpose of this Act is to, in fact, clarify what are people's obligations under the law. I think one of the difficulties that has been created by the Supreme Court decisions from last June is that it has created a lot of confusion in the circuit courts and in the district courts. We have seen, as a result of *Wards Cove* cases that we won back in 1972—where relief has, in fact, been provided to over 3,000 people—challenged currently on the grounds that somehow because we did not show that each person who interviewed a black person said to them, "Well, we won't hire you because of your race," that we didn't show that specificity, that somehow that case should be undone.

That is very burdensome. It is expensive litigation. It is time-consuming. It promotes no public will, no public good.

The *Martin* decision, as we demonstrated in our testimony, has in fact resulted in many public employers, and I am not talking about private employers, I am talking about public employers, now spending the taxpayers' money, once again demonstrating that a consent decree that they entered into many, many years ago, sometimes two decades ago, are legitimate. That is taxpayer money that is being expended. It is considerable controversy and crisis and tension, racial tension, that is being regenerated in those communities over those cases. It is to our benefit to have a law that, in fact, meets the constitutional requirement of providing a day in court, but makes it clear in the context of Title VII when that occurs and what people's obligations are and when they come forth and when they can be heard and how they are heard.

I think that the law attempts to clean up all the confusion that has been reaped as a result of this last term of the Court, and it also attempts to set forth a very orderly process, so that in the future our cases and our energies will not be consumed by trying to relitigate matters, as in the *Wilks* case, or even to relitigate matters as a result of the *Wards Cove* decision.

Mr. MFUME. Thank you, Mr. Chairman. And I thank the panel again for their time and their testimony.

Mr. EISENBERG. Mr. Chairman, I just want to respond to Mr. Mfume and also to clarify something that I said before. In response to Mr. Fawell, I indicated that the disparate impact numbers themselves could establish a sufficient prima facie case, but I did not mean to imply that there should be no showing of causal connection, which, in the language that Ms. Greenberger pointed out, results in a disparate impact.

But what I was concerned about was showing, in response to Mr. Mfume, why employers should not worry as much as some people imply they should. Yes, there should be some showing of causal connection, but 1(b) which talks about a group of employment practices resulting in disparate impact, that use of a package of practices raises the question as to what causal connections there are and whether effectively there is a reduction in the showing of causality that is necessary, and that probably is so.

But that should not be enough to frighten employers in response to Mr. Mfume's comment, in terms of saying "we have got an impossible burden." What I was trying to show in response to Mr. Fawell was that even if you have a showing of disparate impact, and that is not just numbers, that there still is an opportunity for employers to come back and to show that indeed it was substantially job-related and he is not foreclosed from showing that. It seems to me that that is an important point in showing that this is not just an issue where you show the numbers and that is the end of the ball game.

Chairman HAWKINS. That is very, very true. I am glad you clarified it. A lot of the employers have been winning those cases too, so I don't think we need to shed any tears. But it is obvious, and I think Mrs. Arnwine very well said it, for years now, maybe 30 years or so, some individuals have been waiting for this single guy on the Supreme Court today to be named so as to reverse unanimous decisions by a 5-to-4 decision. So we needn't worry too much, I suppose, by only one individual having changed the entire complexion from a unanimous decision to 5-to-4. So some of us, I think I would certainly say that we have a more able jurist here, Mr. Fawell, with whom I disagree. But certainly one man can do it, and that is precisely what has happened, and it is pretty obvious that some of those who previously voted in favor of the Burger court or most of these decisions have now changed their views.

So it is somewhat of a pathetic thing to think that one or two people on the Court can make that distinction.

Have everybody had an opportunity? Mr. Smith?

Mr. SMITH OF VERMONT. Thank you for offering the opportunity, Mr. Chairman, but I have no questions.

Chairman HAWKINS. Well, thank you.

Well, may I thank the witnesses for your very splendid testimony. We appreciate it and we certainly have benefited from what you have done for us today. Thank you.

The HAWKINS. The next panel will consist of the Honorable Don Ayer, Deputy Attorney General, Department of Justice, Washington, DC.

Mr. Ayer, we are certainly pleased to have you, and we apologize for the great amount of time we have spent heretofore. We usually spend all of the time on the first panel and then we begin to diffuse the enthusiasm as we go along, but perhaps you will just pep us up.

Mr. AYER. I will try, your honor.

Chairman HAWKINS. Try to do so. Thank you.

STATEMENT OF THE HONORABLE DON AYER, DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. AYER. Thank you, Chairman Hawkins. I am very pleased to be here to set forth the position of the Bush Administration and the Justice Department on the pending H.R. 4000 and also more generally on the Supreme Court decisions of last term.

I have submitted a full statement, which I would ask to be put into the record, and I will try to speak both more briefly and a

little more informally, and, hopefully, allow more substantial time for questions if there are any.

Chairman HAWKINS. Without objection, the full statement will be entered in the record at this point.

Mr. AYER. It is my own view and that of this Administration that there is no matter more important in the process of government than assuring the fair treatment of our citizens, including the protection against present discrimination and assuring that strong remedies exist for harms that have been done by discrimination in the past.

The issues that are presented by the five Supreme Court decisions which have been discussed here today, and are really the subject matter of H.R. 4000, are difficult decisions. They are not easy concepts to come to understand, and each of them needs to be evaluated on its own terms and thought about with some care.

While the Administration does not agree with the bottom line conclusions that the Court has reached with regard to a couple of the decisions—that is to say, we favor changes from them—each of the decisions of the Supreme Court represents a very credible and a very serious and thoughtful effort to come to grips with the problems that are presented there.

The one approach to this legislation that I think is totally inappropriate, and indeed irresponsible, would be to simply wave one's hand, conclude that the Supreme Court has somehow been seriously misguided in a sort of general sense, and simply adopt something that offers itself as an answer to that general misguidedness that the Supreme Court has been involved in.

As I say, these are difficult issues and these are issues that properly call for a serious debate on each of the matters that is presented. I am happy to be here today, hopefully to participate in that debate on an issue-by-issue basis.

We in the Administration begin our thinking about this legislation with, I think, a fundamental principle, which is a moral principle that grows out of our history and is now firmly embedded in the fabric of our law. That is the proposition that people, in most instances, should not be dealt with by the government or by private individuals in accordance with the color of their skin or in accordance with certain other, basically irrelevant traits which they possess and which are matters beyond their control.

This nondiscrimination principle, which I think all of us here and everyone of good will would agree is fundamental to our Nation, is a goal toward which we still must aspire. I don't think there is anyone here, and there are not, I think, people in the Administration, who believe that we have arrived where we need to be, that we don't have any further problems to deal with, that basically the problem of discrimination has been taken care of. Indeed it has not.

But, in pursuing that goal, it is necessary to think carefully about how you are going to go about achieving it, in order to avoid sacrificing the goal in the pursuit that you are undertaking. One part of that striving, of that quest for a nondiscriminatory society, involves a strong opposition to intentional discrimination wherever it presents itself. That is a very fundamental point that we dare

not lose sight of lest we lose sight of the very goal that we are trying to achieve.

At the same time, we in the Administration accept the view of the Supreme Court that in certain instances race conscious remedies may be appropriate, at least at this time in our history. The Supreme Court has made that clear, but in doing so it has made clear that that sort of an approach is only appropriate in very narrow circumstances and under a very carefully supervised approach to dealing with a problem.

More specifically, the Supreme Court has indicated that whenever the Government is going to get involved in any sort of a race-conscious remedy, whether it be a quota or some other kind of an action looking specifically at the race of particular people, it must in most instances at least, be based upon a history of discrimination which has been identified and pointed to in a careful way. Then, in dealing with that history, whatever the race conscious remedy is, it must be, as the Court has said many times, narrowly tailored to fit that particular history of discrimination.

What I have just said comes out of, among other decisions, most recently the Supreme Court's decision in the *Croson* case, which I am pleased to see that the proposed H.R. 4000 does not, at least at this point, undertake to alter in any way.

So it is with this background that we come to the situation presented by this legislation: on the one hand, intentional discrimination is the biggest single target that we wish to eradicate; on the other hand, in very limited circumstances, approached in certain ways it may be necessary and it may be appropriate to allow race conscious remedies.

With those principles in mind, the Department of Justice has done precisely what the Attorney General and the President called for last summer. We have reviewed these decisions and we have monitored their application in the context of cases across the country. And following that process, which really is an ongoing process because our Civil Rights Division is constantly monitoring the application of the civil rights laws as part of its job, we have concluded that two significant changes are necessary to the law as a result of the Supreme Court decisions. And I should say that those two changes are substantially in accord with changes recommended by H.R. 4000. I think in details they may differ slightly. Indeed, in one detail I think our change, in fact, is broader and works a greater benefit to civil rights plaintiffs than does that of H.R. 4000. But they are essentially very similar.

The first concerns the *Patterson* decision, which has already been discussed at some length here today. We agree that the *Patterson* decision left, essentially, an anomaly in the law in that Section 1981 following *Patterson* covers only intentional racial discrimination in the making and enforcing of contracts.

I am not saying that the reading the Supreme Court gave those words, because those are the words of the statute, was an unreasonable reading, although the brief of the United States, in whose preparation I participated, took a slightly broader view. But we are very emphatically saying that following *Patterson*, as a matter of policy, a change is necessary.

It is necessary because we believe that intentional racial discrimination should have available strong remedies, not just where the discrimination is in the making of contracts and not just also where there is discrimination concerning enforcement, but in terminations of contracts, in the terms and conditions of contracts, essentially discrimination in connection with the carrying out and execution of contracts.

To see why that is necessary, you need only think of two hypothetical cases. One, on the one hand, a person is entering in, let's say, not to an employment contract but some sort of a contract to do business with a local government. In one instance someone is turned down on the basis of race and then does, indeed, under the Supreme Court interpretation have a remedy, notwithstanding the *Patterson* decision.

Another person is not turned down, receives the contract, but in the carrying out of that contract and, indeed, finally in a willful termination of the contract by the local governmental body there is throughout a pattern of racial abuse and mistreatment, harassment, based solely on the contracting party's race.

We think it is very important that that second person have the same remedies that the first person has—that racial harassment, as in the *Patterson* case, be covered by Section 1981, and for that reason we are supporting legislation which is, I think, in all practical respects the same as the legislation presented by H.R. 4000.

The second area where we affirmatively believe that change is necessary concerns the Supreme Court's decision in *Lorance* v. *AT&T Technologies*. That case relates to the context of seniority provisions. Just to state it briefly, in that situation the Supreme Court recognized that if a seniority provision on its face discriminates on some ground prohibited under Title VII, then each and every time that seniority provision is applied and affects someone's rights that application is a new violation of Title VII. That means that the statute of limitations will run anew from that date and that the person who is affected will have a right to come to court, bring an action and say I was affected by intentional discrimination based on any of the characteristics protected by Title VII.

But the case before the Court was not one that involved a statute that was facially discriminatory, as indeed I think it is highly unlikely that something in a seniority provision, which is essentially a contract that is given to employees, is very rarely going to be facially discriminatory. You are not going to see provisions of contracts, either collective bargaining or other types of contracts, that state on their face that blacks will be treated differently from whites or women will be treated differently from men.

Most situations are going to involve discrimination that is apparent unless you understand the motivation behind the adoption of the provision and also understand the context in which it operates. That was the situation in the *Lorance* case. Justice Scalia wrote an opinion, which again was contrary to the position which the United States took in an amicus brief filed in that case, wherein he said that the only actionable violation in the absence of facially discriminatory seniority provision occurs when the provision is adopted. Suppose such a provision is adopted in 1980. The 300-day statute of limitations then runs out during 1980 or 1981. Someone

comes to work in 1987, who was not even thinking of going to work there, let alone working at the particular plant, in 1980. They have no opportunity ever to bring an action.

We believe that even the person who was there in 1980 when it was adopted, if it is first applied to them in an adverse way at some later date, that event should trigger the running of the statute because it constitutes a new violation of Title VII. And so our change, like that of H.R. 4000, essentially allows this person who comes in, even in the face of a facially neutral provision, to bring an action based upon the particular application.

I say that our provision here is slightly broader than that of H.R. 4000. The reason is that H.R. 4000 applies, as I understand it, only in the context of collective bargaining agreements. Our provision applies in the context of seniority provisions, period, without regard to whether they are adopted in negotiations with a collective bargaining unit or simply adopted by an employer in dealing with his employees without the intervention of any union.

The same nondiscrimination principle which motivates our views that these two changes are necessary also cause us to strongly oppose changes embodied in H.R. 4000 in four particular areas. Specifically, we are against the changes proposed with regards to the *Wards Cove* decision, with regard to *Martin* v. *Wilks*, with regard to *Price Waterhouse*, and also the change, which I think it is clear from the testimony today, does not respond to any decision of the Supreme Court last term, the proposal to simply rewrite Title VII and reconceptualize it into a statute that no longer looks primarily to a mediational process with equitable relief and back pay, but rather turns it into an engine of litigation which will allow much broader damages and fundamentally change the character of a remedial scheme which has been very effective over its 25-year life.

I would like to just say a few words on each of these points and then respond to questions, if there are any, as to our position in these four areas.

Our concern with regard to *Wards Cove* and the changes concerning *Wards Cove* is that in altering the three fundamental principles that are enunciated in the *Wards Cove* decision: first, that the plaintiff must identify a particular hiring practice or promotion criteria; second, that the burden of proof remains on the plaintiff and does not shift to the defendant, in accordance with the way the burdens are allocated in disparate treatment, cases; and, third, that the proper burden is one of showing, as the Court put it, whether a challenged selection practice serves in a significant way the legitimate employment goals of the employer—that is the standard under the *Wards Cove* decision—in changing all of these, it is our view that H.R. 4000 would put employers in the position of having burdens that in almost every case they will be unable to carry and will recognize they are unable to carry.

We disagree with the changes on all three of these aspects of *Wards Cove.* We most intensely disagree with the change that would make the standard one of essentiality. A few minutes ago I heard someone suggest that "essential" really does not mean essential, it means something less. But I think we ought to say what we mean. I think most of us know what the word "essential" means,

and "essential" means "something you cannot do without." And by telling the employer that once there is a showing of impact made he must prove that the device in issue is one that he simply cannot run his business without, you are going to be telling the employer that he cannot win that case, and you are going to be telling the employer that if he is smart what he is going to do is make sure he does not ever find himself with a disparate impact. And that triggers our concern about intentional discrimination.

If we are going to eradicate intentional discrimination in this country, as I said before, we agree that in isolated, specific and well-articulated instances, race conscious remedies may be necessary, and they are approved by the Supreme Court in those sorts of contexts.

But what is proposed here is a scheme of burdens that will leave employers thinking, quite rightly: We just can't win, and we had better get our numbers right all the way across the board or we are going to get sued, we are going to incur enormous legal fees, and, ultimately, we are going to lose, so we are just not going to get into this at all.

With regard to *Martin* v. *Wilks*, we are dealing with a fundamental right of people to their day in court. The statute as proposed relates to—it states itself in terms of notice, and it first starts out in a way that I can understand, talking about somebody having actual notice of the proceeding. He can be bound, the statute proposes. And then it says that even if he does not have notice, if his interests are adequately represented by others, whatever that exactly means, well then he can be bound.

Then it goes right off the chart and it says, if somebody did not have notice and was not adequately represented, but nonetheless somebody made a reasonable effort to give them notice, well then they can also be bound. That I think raises a serious due process problem.

More fundamentally, though, the whole approach of singling out a particular area of litigation and changing the burdens on litigants, which exist under the Federal Rules of Civil Procedure in terms of who has what burdens of joinder, is a practice that I think does not have very much to recommend it.

This is not a circumstance where the specter of these cases never being finally resolved I think is a reasonable concern. Number one, the issues in the case, once it is decided involving particular parties, and the issues are properly on the table in that litigation, then the decisions that are rendered by a court, no matter who the parties are to the decisions, they do not have a res judicata effect as to those who are not parties. They do not prevent another person from coming into court. But they do have a stare decisis effect. They are a legal precedent. And, to the extent that they have dealt properly with the issues in the case, they stand as an authority to rely on to rebut or defeat the claim that someone may bring later.

The fear is raised that someone may come in later and raise a constitutional right as a basis for a challenge to a litigation, and it is suggested that we should try to stop that somehow because that is going to be disruptive. But the only way that that is going to be seriously disruptive is if that person has a constitutional right that has been violated. If he does not have such a constitutional right,

then his coming into court and asserting it will only produce some amount of litigation, until he is tired of paying for it. If he does not have a case on the merits that is strong under the Constitution or under some statute, he is going to lose, and the consent decree is not going to be set aside.

Thus the fear of disruption by a litigant coming in and making a case is a fear, essentially, that the correct legal position may in fact triumph. I cannot believe that those proposing this bill want that to be the law. It seems to me clear that, if there is a viable constitutional issue to be raised, then we all ought to want that, and we ought to want people who are asserting that kind of a right to have the chance to come in and raise it.

As you all know, I think, the *Price Waterhouse* opinion, which is also undone by this legislation, was written by Justice Brennan and it was joined by all of the most liberal members of the Court. The more conservative members of the Court did not join Justice Brennan's opinion. The position he took is that where there is a mixed motive shown for an adverse action like a discharge, and that is to say, the plaintiff comes in and shows that the employer in taking the action had the person's race, let us say, in mind, and also had in mind the fact that a particular employee was not a good employee and had performed poorly in the past—the employer has the burden of proving that the same result would have been reached without any improper discriminatory motivation. That was the view that the Supreme Court took, is that the employer must carry that burden of proof. But, Justice Brennan said, when the employer carries that burden of proof they have shown that their rights concerning this particular discharge, were not adversely affected as a result of any racial or other improper discrimination.

What H.R. 4000 does is to say that notwithstanding that burden being carried by the employer, and notwithstanding the fact that the employee would have received exactly the same treatment and been discharged in exactly the same way whether or not there had been any improper motive on the part of the employer, this bill says that even if that is true, even if this motivation or this bad thought on the part of the employer had nothing to do with causing the harm, nonetheless the plaintiff can collect damages from the employer.

Now we are not dealing here with a harassment situation. If you are dealing with harassment, then you can collect damages, or you should be able to in some context. But we are not dealing with harassment. That is not the issue that is presented. It is a question here of what caused the discharge that is challenged by this lawsuit.

So it is I think fair to say that the remedy proposed by H.R. 4000 provides damages for impure thoughts on the part of an employer. Thoughts, that is, that did not cause the harm that is alleged, they simply went through his mind and were a part of the mix in his head at the time the action was taken.

Lastly, I would like to say a bit about the bill's reconceptualization of Title VII. I am hardly one to lecture this panel and this chairman on Title VII and its history, either in terms of its adoption or in terms of the very useful role that it has played in this country over the past 25 plus years. But I must say I believe very

strongly that this legislation would rather summarily and with very serious consequences cast aside very valuable remedies that Title VII put into effect which have served us well and in part have served us well because they are precisely what they are and are limited in certain ways in the manner that they are.

Part of the theory behind Title VII was that employees ought to have machinery that will give them a reasonable shot, at least in many cases, of getting back into the positions that they were entitled to, that they were wrongly denied. Many plaintiffs—not all, but many plaintiffs—want their jobs back. Many plaintiffs want to go back and work for the same employer. They want the promotion that they were wrongly denied. They want to have their life put back together in a way that is going to minimize the disruptive effects of bad motive, of discriminatory motive that we are all trying to eradicate.

By taking away the limited remedies, if you will, of Title VII the equitable focus of the relief under Title VII of providing back pay, injunctions, of ordering people back to work and making them whole, and substituting for that in any case where you can show discriminatory intent or where you can show recklessness or, as the bill describes it, callous disregard, by adding the remedy of punitive damages, and, of course, by doing both of those things, by turning this whole Title VII remedy into a jury trial situation, what will be done is to prolong significantly the entire litigation process under Title VII. It will expand the vision of lawyers representing plaintiffs who have dollar signs in their eyes, for themselves as well as for their clients. By extending the statute of limitations from what is generally 300 days now to two years, again you have the same effect of dragging the process out.

By doing it across the board in all areas of discrimination covered by Title VII, this proposal I believe will destroy much of the good effect that Title VII has had for plaintiffs, particularly for plaintiffs who simply want to be done right. They simply want their jobs back. They simply want to be put in the position that they had a right to be put in and they want it to happen soon. They do not want it to happen three years from now. They are not looking to have a pot of money dumped on their head in three or four or five years, they are looking to get their job back, and go back and be a constructive citizen given what they were entitled to.

This proposal would seem to put very little value on all that has been accomplished under Title VII because it simply says: We don't need that any more. We can push that aside. The plaintiffs who benefited by that scheme of remedies, we will just let them go after more money. And we in the Administration believe that that is something that plaintiffs, defendants, and I think reasonable people who think about it will regret if and when it is accomplished by this bill.

That really completes the affirmative statement that I would like to make. There are other provisions in the bill that I have not dealt with, I know. There are a fair number of specific provisions that do not arise out of decisions. But without any further presentation on my part, I would be happy, Mr. Chairman, to take any questions anyone may have.

[The prepared statement of Hon. Don Ayer follows:]

Department of Justice

STATEMENT

OF

DONALD B. AYER
DEPUTY ATTORNEY GENERAL

BEFORE

THE

COMMITTEE ON EDUCATION AND LABOR

AND THE

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS

CONCERNING

H.R. 4000
THE CIVIL RIGHTS ACT OF 1990

ON

FEBRUARY 20, 1990

It is a pleasure to appear before the Committee today to discuss last Term's Supreme Court rulings involving civil rights issues and to consider the issue of what legislative action is appropriate at this time. We in the Administration are strongly committed to opposing discrimination wherever we find it. Racism cannot be treated as a problem that is behind us. As the President said in his State of the Union message: "Every one of us must confront and condemn racism, anti-Semitism, bigotry and hate. Not next week, not tomorrow, but right now. Every single one of us."

We congratulate Congress for enacting, with Administration backing, the Hate Crimes Statistics Act, which will help us to get a better picture of this problem and to focus our resources where they are most needed. In the first year of this Administration, the Department of Justice indicted some 89 defendants in 56 separate cases for criminal civil rights violations. We filed or participated in 34 cases under the new Fair Housing Act amendments, which only became effective as of March 12. And we filed a dozen employment discrimination cases. As our activities suggest, we are using vigorously the tools available to us and, for the most part, we find those tools effective.

The Supreme Court last Term issued some thirteen decisions that touched one aspect or another of civil rights law. In some

of these cases, the government had urged the position adopted by the Court. In others, the Court disagreed with the government. Thereafter, the President and Attorney General both pledged last June that the Administration would carefully monitor the application of these decisions in the lower courts to determine their effect on meritorious civil rights claims and respond accordingly.

We have done exactly that. Based on our own studies and comments from groups, including the NAACP Legal Defense and Education Fund, we have concluded that of the five most significant decisions, two reach results that merit legislative action. Thus, we believe that Congress should amend the law to require a different result than that reached by the Supreme Court in Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989), and Lorance v. AT&T Technologies, Inc., 109 S. Ct. 2261 (1989). Accordingly, the Administration is supporting legislation to be introduced today to address the problems created by these cases. With regard to three other cases, based on our review of how these rules have been applied,[1] we see no need for corrective action.

In supporting legislative action in some areas and opposing it in others, we are guided by a fundamental principle that grows

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[1] These decisions are Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989); Martin v. Wilks, 109 S. Ct. 2180 (1989); and Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989). We also oppose any legislation aimed at City of Richmond v. A.A. Croson & Co.

out of our history, and is now a part of the fabric of our law: that people should not be judged or dealt with according to the color of their skin or certain other irrelevant personal traits. We take this as a common value that all decent people can agree upon. I will begin by discussing those areas where we think this principle dictates the enactment of new legislation.

In Patterson v. McLean Credit Union, supra, an employee sued pursuant to 42 U.S.C. 1981, alleging that her employer had harassed her on the job, failed to promote her, and ultimately discharged her, all because of her race. The Court held that Section 1981 is limited by its terms to prohibiting discrimination in "mak[ing] and enforc[ing] contracts," and does not extend to "problems that may arise later from the conditions of continuing employment." Patterson, 109 S. Ct. at 2372. Thus, the Court held, the statute prohibits discrimination -- whether governmental or private -- in the formation of a contract and in the right of access to a legal process that will enforce established contract obligations without regard to race. According to the Court, however, plaintiff's allegations of harassment on the job addressed only conditions of employment and were not actionable pursuant to Section 1981.

The amicus brief filed by the Department of Justice, on which my name appears, argued for a somewhat broader reading of Section 1981, which would have extended its coverage to claims of harassment that would constitute a violation of state contract law. Our review of the cases applying Patterson over the last

eight months further leads us to the conclusion that the Court's reading leaves a gap in the fabric of our civil rights laws that must be filled. We therefore support corrective legislation to ensure that section 1981 will apply to the performance, breach, and termination of contracts to the same extent that it does to their making and enforcement. At the same time, we believe that it is appropriate to codify the holding of Runyon v. McCrary, 427 U.S. 160 (1976), that section 1981 prohibits private, as well as governmental discrimination.

In Lorance v. A. T. & T. Technologies, Inc., supra, female employees challenged a seniority provision pursuant to Title VII, claiming that it was adopted with an intent to discriminate against women. Although the provision treated all similarly situated employees alike, it produced demotions for plaintiffs, who claimed that the employer had adopted it with the intent to discourage women from entering a particular line of employment. The Supreme Court held that the claim was barred under Title VII's statute of limitations, because the time for plaintiffs to file their complaint began to run when the employer adopted the allegedly discriminatory seniority system. The Court distinguished the situation where a seniority system discriminates on its face, acknowledging that in such a circumstance each application of the policy constitutes a new violation. However, where, as in the case before it, the provision is neutral on its face (although discriminatory both in

purpose and effect), the Court concluded that only the initial enactment constitutes a violation.

The United States and EEOC filed an amicus brief, on which my name appeared, supporting plaintiffs. We argued that the plaintiffs' demotions were not merely the inevitable effects of the prior allegedly discriminatory adoption of the seniority system, but were instead direct, present applications of the seniority system, the effects of which had until then been only theoretical, and, as such, were "unlawful employment practices" that independently triggered Title VII's statute of limitations.

The rule adopted by the Court could have the result of shielding intentionally discriminatory seniority systems from attack by people who never have had an opportunity to challenge them. The discriminatory reasons for adoption of a seniority system may become apparent only when the system is finally applied to affect the employment status of the employees that it covers. Moreover, such an application surely focuses the controversy between an employer and an employee more sharply and permits more precise litigation. In addition, a rule that limits challenges to the period immediately following adoption of a seniority system will promote unnecessary and unfocused litigation. Employees will be forced to challenge the system before it has produced any concrete impact, or forever remain silent. Other employees, who are hired after the statute has run following adoption of a seniority system, will be barred from ever challenging the adverse consequences of that system,

regardless how severe they may be. Such a rule fails to protect sufficiently the important interest in eliminating employment discrimination that is embodied in Title VII. The Administration therefore supports an amendment to section 706(e) of Title VII of the Civil Rights Act of 1964 that would restart the period for filing a charge each time an employee was injured by the application of a seniority system that was alleged to have been adopted with discriminatory intent.

We urge Congress to move quickly to enact these two important changes. At the same, we strongly believe that four other major changes proposed by H.R. 4000 should not be adopted. We are convinced that three of last Term's decisions -- Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2180 (1989); Martin v. Wilks, supra; and Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989) -- should be left intact. In Wards Cove, the Court addressed three important issues concerning the burdens of proof in a lawsuit alleging that an employer's hiring practices have had the effect of discriminating in violation of Title VII. After reaffirming that statistics may form the basis for a prima facie case of disparate impact and that the statistics must compare the employer's workforce to the pool of qualified job candidates, the Court addressed the issue of causation. The Court held first that a plaintiff must identify the specific employment practices that have produced the challenged disparate impact. Thereafter, the Court addressed the burdens imposed on the parties once a plaintiff has established a prima facie case

of discrimination. It held that the employer's burden is to produce evidence that the "challenged practice pursues, in a significant way, the legitimate employment goals of the employer." Wards Cove, 109 S. Ct. at 2125-2126. Finally, the Court held that the burden of persuasion always remains with the plaintiff, and that the plaintiff may defeat the employer's evidence by showing that reasonable alternatives would serve the employer's purpose equally well.

This seems to us to be a sensible and efficient allocation of litigation responsibilities. Asking the plaintiff to identify the specific practices that produce a disparate impact before employers are asked to justify them is consistent with traditional rules allocating burdens of proof. This allocation of responsibilities strikes us as more efficient than allowing plaintiffs simply to allege that a hiring system produces a disparate impact and forcing employers to demonstrate that each individual employment practice within that system does not have a disparate impact. In view of the liberal discovery rules and the record-keeping requirements of the Uniform Guidelines on Employee Selection Procedures, 29 CFR 1607.1 et seq. (1988), we do not think that this requirement of specificity should unduly burden plaintiffs.

Indeed, the Court's prior "disparate impact cases have always focused on the impact of particular hiring practices on employment opportunities for minorities," Wards Cove, 109 S. Ct. at 2124, and plaintiffs have always targeted those specific

practices. See Griggs v. Duke Power Co., 401 U.S. 424 (1971) (high school diploma requirement); Dothard v. Rawlinson, 433 U.S. 321 (1977) (height and weight requirements for prison guards); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1977) (employment tests and seniority systems); Connecticut v. Teal, 457 U.S. 440 (1982) (written examination); Watson v. Fort Worth Bank & Trust, No. 86-6139 (June 29, 1988) (subjective judgment of supervisor).

In our view, the Court also correctly held that the Court's formulation of the applicable substantive standard is fully justified as an appropriate balancing of the interests of employers and employees. Courts have used varying terminology in defining that standard. The standard molded by the Court from those prior formulations has sufficient teeth to ensure that employers do not use practices of dubious business utility, while not pressuring employers to resort to hiring and promotion quotas, and respecting the needs of employers to preserve legitimate management prerogatives. We find it unlikely that this formulation of the standard for a business justification will preclude the assertion of meritorious claims, particularly since the plaintiff may still prevail by showing that other reasonable business practices would satisfy the employer's need without producing a discriminatory effect.

Likewise, we think that the burden of persuasion remains with the plaintiff throughout a disparate impact case, just as it does in a case alleging intentional discrimination, see Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256-258

(1981), and just as it generally does when causation is an element of a violation. See Restatement (Second) of Torts 433B (1965). We think it would be unjustifiable to impose a greater burden on an employer who is alleged to have violated Title VII by employing a practice that produced a disparate impact than on one who is alleged to have engaged in purposeful discrimination.

We are convinced that the Court thoughtfully balanced the competing interests and produced a workable distillation of some eighteen years of precedents applying the disparate impact standard. Indeed, the Court in large part adopted the approach urged by a brief filed by the United States. We believe that plaintiffs will be able to pursue successfully meritorious claims, and employers will not be unduly burdened in defending claims of discrimination and will not be encouraged to resort to quotas to ward off the threat of lawsuits based on statistical imbalances.

At the same time, we believe strongly that the changes proposed in H.R. 4000 would have serious adverse consequences. By altering all three of the conclusions reached by the Supreme Court, and placing on the employer the ultimate burden of identifying his own practices leading to a statistical imbalance and proving them to be "essential" to the conduct of his business, the proposal puts an employer in a nearly impossible position. It would be difficult for an employer not to adopt a silent practice of quota hiring and promotion in an effort to

protect himself from the real probability of litigation and liability wherever a statistical imbalance is shown.

Martin v. Wilks, supra, arose in the context of a civil rights action, but it turned on principles of fairness and access to court that apply in every area. The Court held that firefighters, who had not been parties to a consent decree that mandated racial preferences, could have their day in court to contend that the decree violated their civil rights. The Court rejected the so-called collateral attack doctrine, pursuant to which some courts had held that once a decree was entered, it could not be challenged, even by individuals who had not been parties to the original lawsuit.

The Court's decision turned on a straightforward application of the Federal Rules of Civil Procedure and underlying notions of due process. The Federal Rules establish procedures for joinder of all interested parties in a case. Under those procedures, anyone who is not joined in the lawsuit and given an opportunity to appear in court to protect his or her rights cannot be bound by the final judgment. The Court's decision is a reaffirmation of the fundamental notion that everyone, regardless of race or gender, is entitled to his or her day in court. The Department of Justice advocated the position adopted by the Court. I did not work on that brief, but I signed a similar brief arguing the same approach a year earlier in Marino v. Ortiz.

We think that this decision should have a salutary effect. By requiring early joinder of all those who may be adversely

affected by a lawsuit, the decision should enable courts to consider the full range of interests affected by a proposed decree. The decision should lead to fairer, more carefully considered, and unassailable remedies for discrimination. It will discourage defendants from settling discrimination cases by bargaining away third party rights, rather than making whole the actual victims of discrimination. In addition, the participation of all of the affected parties in formulation of a decree should aid in its implementation. Successful, voluntary compliance with Title VII may depend upon the cooperation of a broad range of individuals. Involving as many of those individuals as possible in formulating the decree will lead to smoother and more effective implementation of the remedy for discrimination.

The proposed legislation relating to Wilks would reverse, in the context of civil rights consent decrees, the usual practice under our system of civil litigation. Instead of requiring that outsiders be joined by the parties to litigation if they are to be bound, the legislation would put the burden on outsiders to inject themselves into a dispute between others. Persons with no current interest in issue must be on the lookout for on-going litigation whose resolution may at some point impact upon them.

Neither the burden on these non-litigants to join or be bound, nor the burden on the judicial system of such expanded and unfocused lawsuits, is wise as a matter of policy. Nor do we believe that it is fair to bind, as the proposed bill does, anyone who has actual notice of the lawsuit, or who lacks actual

notice but whose interests are adequately deemed protected by others, or, failing that, wherever "reasonable efforts" are made to give actual notice. Indeed, we believe that serious due process issues are presented.

In Price Waterhouse v. Hopkins, No. 87-1167 (May 1, 1989), the Court ruled in favor of a woman who alleged that she had been denied partnership by her accounting firm on account of her sex. The Court there faced a so-called mixed motive case in which plaintiff alleged that her sex had supplied part of the motivation for her rejection for partnership. The Court held that once she had established by direct and substantial evidence that sex played a part in the decision, the burden shifted to the employer to show that it would have reached the same decision had sex not been considered.

The proposed legislation takes the startling step of allowing a damage recovery based solely on the discriminatory thoughts of an agent of the employer, which have no consequence to the plaintiff. For, contrary to the Court's conclusion that Title VII is not violated where the employer proves that the adverse action would have resulted even in the absence of any discriminatory motive, the proposed legislation recognizes a violation and a damage remedy in that circumstance. I believe that this would be the first instance ever in American law where damages could be recovered solely for thinking bad thoughts.

We also need to be clear on one other point. As this Committee is aware, the President and the Attorney General have

strongly supported the Americans with Disabilities Act (ADA) and worked closely with Members of Congress and the disability community to devise the version that passed the Senate with Administration support. I was not personally a party to that process. Accordingly, others are in a better position to answer detailed questions concerning it. However, I do think it is important to make the following point.

Title I of the ADA, as agreed to, dealing with employment, incorporates by reference remedies available under Title VII. It was very clear at the time of our discussions that the fact that these remedies were limited to injunctions, back pay and other equitable relief that can be obtained without triggering the Constitution's civil jury requirement was critical to the Administration's agreement. In light of the fact that legislation altering these remedies has now been introduced, our continuing support for ADA hinges on clarification that the remedies provisions of ADA will not be affected by the proposed Kennedy-Hawkins amendment of the remedies available under Title VII. This will require amending the reference to Title VII in the Senate version of the ADA. We look forward to cooperating with this Committee and others to assure that the goal of bringing 43 million disabled Americans into the mainstream of American life through passage of the ADA -- a goal that we all share -- is not thwarted by disagreements about other areas of the law.

In summary, we believe that the Supreme Court acted prudently and correctly -- and in reasonable interpretation of existing statutes and case law -- in its decisions in the Wards Cove, Wilks, and Price Waterhouse decisions. These decisions should be allowed to stand.

At the same time, with regard to Patterson and Lorance, we urge Congress to act quickly to enact our proposals. It is apparent that the Administration and the sponsors of H.R. 4000 are in substantial agreement on these issues, and we propose that the Administration's bill therefore be acted upon expeditiously.

I would be pleased to respond to any questions.

Chairman HAWKINS. Well, thank you, Mr. Attorney General. I must confess that your testimony is quite different from the original characterization of these decisions as being technical. I understand you indicated at that time that you would monitor their impact. Have you been monitoring the impact? And have you released any reports that would be helpful to this committee?

Mr. AYER. We have indeed been monitoring the decisions, Mr. Chairman.

Chairman HAWKINS. Have you issued any reports or do you have any to be issued?

Mr. AYER. Well, we are proposing legislation in order to deal with the problems that we have found.

Chairman HAWKINS. It seems to me you would have led out, rather than waiting for us and responding to the legislation that we introduced.

Mr. AYER. Well, we think we have done, during the time from last summer until now, we think we have been conscientiously looking at the decisions both in terms of what they say and how they affect other cases, and it strikes us as a reasonable response to propose legislation which we think remedies the problems that do exist.

Chairman HAWKINS. As I understand it, you are very close to H.R. 4000. Two changes that I think you indicated had been made are somewhat identical, the *Patterson* case and also the seniority provision issue.

In the one case, the Section 1981 issue, you indicated that your approach was broader than is H.R. 4000. Would you indicate in what way is it broader?

Mr. AYER. Well, Mr. Chairman, my understanding is that—let me locate the provision of H.R. 4000. My understanding is that H.R. 4000 refers to—okay, the proposed language in H.R. 4000 states "where a seniority system or seniority practice is part of a collective bargaining agreement and such system or practice was included in such agreement with intent to discriminate," so that presumably the effect of this language pretty clearly is limited to the circumstance where a seniority practice or provision is part of a collective bargaining agreement.

We see no reason to limit the fix for *Lorance* to that circumstance. The same problem exists whenever an employer promulgates a seniority provision, and whether or not it is part of a collective bargaining agreement it seems to us to be something that we ought to fix. We ought to make a remedy available. So that is what we are proposing.

Chairman HAWKINS. Well, conceding that that may be broader, I think you overlooked the general rule that we had previously inserted prior to that paragraph. H.R. 4000 has a general rule affecting all practices. You have the effect of confining it to the seniority system. That doesn't strike me as being broader. Let's say it is an offset or at least is somewhat equal.

But I seem to have trouble with your designation of this as being an expansion of protections. We have, obviously, indicated that we were trying to restore the protections that we thought were enjoyed and had been enjoyed for almost two decades. But you seem to assert that you are expanding those protections, and that rather

concerns me, how you are expanding protections, whether or not that is somewhat misleading as to what you are actually doing.

Mr. AYER. All I am speaking about, Mr. Chairman, is the language used in the H.R. 4000 and the language which we will propose concerning the case of *Lorance* v. *AT&T Technologies*, and the only point I am making is that we are proposing correcting what we think is a bad result wherever it occurs, whether it occurs in a collective bargaining context or not, and the H.R. 4000 proposal is limited on its face, and I think quite clearly, to circumstances where there is a collective bargaining agreement.

I think it is easy enough for this body to modify that, and I would suggest that it might be done. But it is a very narrow point that I am making, but nonetheless it is a point that I think is valid.

Chairman HAWKINS. Well, if we could simply go back to the original intent of Congress as expressed in Title VII, we would be content. You don't seem to take us back to that, but then proclaim to the world that you are expanding. And what we are trying to do is simply go back to what the Congress originally intended, and I think I have lived through those decades when we debated this. I recall that there was lengthy debate, and I don't know of anything in the debate that shows the same type of intent that these cases last year attempted to interpret. I would like to see some documentation that the congressional intent was contrary to what the law was before the 1989 cases.

Mr. AYER. Well, I do think it is clear that Title VII did not intend to make it a violation to simply have an imbalance in a work force. I think that is quite clear from the legislative history of Title VII from Senator Humphrey's——

Chairman HAWKINS. Well, does your bill attempt to codify the "when applied" or the "continuing violation" theory for all of the cases? If it does, then it seems to me you could claim expansion. But does it?

Mr. AYER. You mean with regard to *Lorance*?

Chairman HAWKINS. Yes.

Mr. AYER. I don't believe it does, no. I mean, that is not the point that I was making.

Chairman HAWKINS. Well, it seems a point you could have made, if you are going to defend an expansion of protections. I have a particular reference to the language on page 9 of H.R. 4000, when we say "or has been applied to affect adversely the person aggrieved, whichever is later," to make it applicable as a general rule to all practices. Now that to me would be broader than what you are asserting you are doing in that particular section of your bill, and I don't see that you are doing it.

Mr. AYER. I guess I didn't quite catch that, Mr. Chairman.

Chairman HAWKINS. Well, you indicated that the section that you refer to was much broader than ours, and then you referred only to the seniority system. You didn't go beyond the seniority system.

Let's say other cases are involved or other practices. Have you given a broader application to those other cases or have you simply applied it only in this instance to seniority systems?

I was trying to get some clarification of what you meant by a broader proposal that is before you. I don't think you can really match what we're doing. For example, do you know whether the *Lorance* rule has been applied to preclude challenges to other employment practices such as, let's say, promotions? Is there any reason to limit the *Lorance* fix to seniority systems?

Mr. AYER. Well, that's the only issue that is dealt with in *Lorance*. I mean, I think——

Chairman HAWKINS. We're not dealing exclusively with *Lorance*. That was the concept. But in your proposal, are you attempting to go beyond that to preclude challenges to other employment practices, including promotions?

Mr. AYER. To include?

Chairman HAWKINS. Yes.

Mr. AYER. I have trouble relating to it. Neither H.R. 4000 nor our bill——

Chairman HAWKINS. I'm not talking about H.R. 4000. I'm talking about the proposal in your statement, that you're broader in your application.

Mr. AYER. I think my statement is very clear, Mr. Chairman. It is that in connection with the *Lorance* decision, I think both the majority and the Administration see it as something that needs to be changed. My point about having a broader fix or a broader remedy in our proposal is simply that. I am not asserting that our legislation makes broader or more numerous changes than yours. Lord knows, I don't believe that's true.

Chairman HAWKINS. Well, let's go beyond the two cases. Your position, I take it, on the other three cases is that you're satisfied with the Supreme Court decisions on the other three cases, and you consider that no legislative action is warranted on the other three cases.

Mr. AYER. That's correct. I mean, I think it is not primarily a matter of being satisfied. I think we need to be clear that the Administration, I guess at least at some of the times it was perhaps the Reagan Administration, depending on when the briefs were written, submitted briefs in support of the decisions resched.

Chairman HAWKINS. Did you sign briefs in the Court opposing the civil rights claimants in the other three cases?

Mr. AYER. Well, I personally was not involved in the *Wards Cove* case. I was involved in *Martin* v. *Wilks* in working on the brief. I was not involved in the *Price Waterhouse* case, either. But I was involved with regard to *Patterson*, where we supported the plaintiff, and with *Lorance*, where we supported the plaintiff, and *Martin* v. *Wilks*, where we supported I guess again the plaintiff—that is to say, the parties who wanted to bring an action.

Chairman HAWKINS. In asking that, I was referring to the Administration. Did the Administration oppose the claimants in those three cases?

Mr. AYER. Well, in two of those cases, or in *Martin* v. *Wilks*, the Administration filed a brief supporting the right of the claimants; that is to say, those who wanted to have their day in court. In *Wards Cove*, the United States filed a brief essentially on most elements supporting the conclusion that the Court reached. And in *Price Waterhouse*, we actually filed a brief that took a position

which I guess in one way was more pro-plaintiff and in one way less pro-plaintiff. But it——

Chairman HAWKINS. Did you support the white firemen in one of those instances in trying to upset the court decree?

Mr. AYER. That's correct.

Chairman HAWKINS. You did.

Mr. AYER. We supported their right to come to court. We did not support their substantive claim that it should be overturned.

Mr. AYER. Did you file a brief in that case?

Mr. AYER. The Government did, yes.

But it is important to distinguish between supporting their right to come to court and believing that the decree should be overturned, because at no point did we take that position.

Chairman HAWKINS. General, we have monitoring responsibility over the EEOC. For the past eight years we've had some problems with the EEOC. As a matter of fact, the legislation was amended to provide that would be the lead agency.

Do you know what position the EEOC has on these cases, what participation they've had, because that is the agency charged with enforcement under Title VII. It seems a little strange to me that they have not come forward. You are representing the Department of Justice; or are you speaking for EEOC as well?

Mr. AYER. I am speaking for the Administration. I believe——

Chairman HAWKINS. Does that include the EEOC?

Mr. AYER. I believe it does, yes. We have spoken with representatives of the EEOC about this. My understanding is that they are in support of the position which we are presenting.

Chairman HAWKINS. It's strange that they haven't come before the committee because, actually, that's what got them in trouble and certainly got Mr. Thomas in trouble for his disagreements with the courts for the past several years. Inasmuch as we made EEOC the lead agency and charged it with enforcement of the Act, I'm a little——

Mr. AYER. Have they been invited to appear?

Chairman HAWKINS. Well, they have a standing invitation, yes. [Laughter.]

I understand they were specifically invited as well, and Secretary Dole as well.

Were they included in the discussions on the construction of this proposal?

Mr. AYER. We have discussed it with them, yes.

Chairman HAWKINS. So they were a part of it and they have agreed to it. They have been invited to appear before the committee. We'll follow up if you think they should testify because we would like to get them on the record as well.

Mr. AYER. I think the committee should extend whatever invitations it thinks are appropriate.

Chairman HAWKINS. I yield to Mr. Goodling.

Mr. GOODLING. I am not going to ask questions because I don't want to be a lay person getting the issue totally confused, because I don't understand all the legal terms. My "legal beagle" is here just waiting to ask questions.

I do, however want to tell you how much I appreciate the speed with which you were able to handle this situation, realizing that

these decisions were just made, if I understand it correctly, in the middle of last year. Having served under four different Administrations and watched many others, I think it is remarkable that you were able to get sign-offs in this short amount of time. I've never seen that happen before, no matter whether it was a Democratic Administration or a Republican Administration. I want to compliment you for being able to pull that off, since it just took place the middle of last year.

I look forward to working with you and with the committee so that we don't make matters worse but, as a matter of fact, improve the situation.

I'm going to allow all of my time to the two gentlemen to my right.

Chairman HAWKINS. Mr. Edwards.

Mr. EDWARDS. Thank you, Mr. Chairman. I welcome Mr. Ayer, also.

Were you in the Department of Justice when the Civil Rights Restoration Act was considered?

Mr. AYER. I was in the Department at one place or another. I was probably out in California as U.S. Attorney, I think. That would have been in what, 1986?

Mr. EDWARDS. Yes. Do you recall that bill, or were you invited to——

Mr. AYER. I do remember it, but I was either—I came in the middle of the year to be back here, so I may have missed that in the spring.

Mr. EDWARDS. On all of the civil rights bills in the 1980s, the Administration was just generally opposed to all of them. On the 1981 Voting Rights Extension, the Attorney General refused to testify. We never did get him to testify. On the Fair Housing bill, we couldn't get any assistance at all. Of course, on the Civil Rights Restoration Act, the President vetoed the bill and the bill was enacted over his veto. So we have generally a very hostile Administration to civil rights legislation.

Is it your testimony that the Bush Administration is changing its ways and is generally in favor of good civil rights legislation?

Mr. AYER. Well, I would hate to say that we're changing our ways and thus casting aspersions on all that went before, but what I can tell you because I am now involved in the process is that there is a very pro civil rights attitude in the Department of Justice and within the Administration.

Mr. EDWARDS. And you would disagree with all of these civil rights experts who have been engaged in civil rights laws for the last 30 or 40 years. All of the civil rights laws have worked out very well, the greatest things that ever happened in America, and yet you just say they're wrong.

Mr. AYER. Well, no, we agree with them on two major points.

Mr. EDWARDS. On two of the easiest cases, Mr. Ayer. Really, those are ten cent cases compared to the ones you disagree with.

Mr. AYER. I don't think that's true. I think the *Patterson* case is as important as any of these decisions, and the remedy is as important as any of them. I disagree with that.

I think in a democracy people have an obligation to think for themselves, and we are trying to think carefully and thoughtfully

about each of these decisions, and have taken a position which, frankly, I think merits a great deal of consideration. I think that anybody who believes that the principle of freedom from intentional discrimination is important has got to be given pause by changes such as those embodied in this bill concerning *Wards Cove*, where he has to come in and show that something is essential to his doing business. It's perfectly clear to me that many, if not all, employers are going to respond to that and say "I just can't take this risk. I have just got to get the right number of people of the right groups in my work force, because otherwise I'm going to get sued and I'm going to be liable and it's going to be a disaster."

I mean, I think that everybody who is worried about intentional discrimination has to at least be concerned about that. They don't have to agree with us, but that has got to be a concern. Just brushing over the significance of the word "essential," to me, is a rather cavalier approach to a very important issue.

Mr. EDWARDS. Well, where does the Administration stand on affirmative action, the use of race-conscious, numerical goals and timetables?

Mr. AYER. I think where we stand, that I can enunciate for you, is that we are aware of the law as it has been laid down by the Supreme Court, that authorizes the use of various kinds of race-conscious remedies in certain situations. We do not have, I guess, what can be described as a sort of blanket, one-shot answer to that question. We believe there are many circumstances where those kinds of approaches are not justified. There are many circumstances. The *Croson* situation in the City of Richmond was one of those. We are, on the other hand, defending in particular instances, set-aside programs which we believe are justified, and in other areas as well.

I think the real point that I would like to make, as clear as I can, is that the principle of nondiscrimination is so important that it is not possible to give a simple blanket answer to the question that the Congressman has asked. I can't simply say we're for them or we're always against them, because neither of those things is true. I think what we have to do, as with this bill, and with these Supreme Court decisions, so with any sort of race-conscious remedies, you have got to take them one at a time and you have to look at what you're doing and you have to worry about it. You have got to think about it. You have got to decide whether, under those circumstances, that is something that might be justified. I must say, in many circumstances it is not something that is justified.

Mr. EDWARDS. Did you read Mr. Fried's article in this morning's Post?

Mr. AYER. Yes, I did.

Mr. EDWARDS. And do you agree with that, generally?

Mr. AYER. I think, in principle, I do. Actually, I think it was in yesterday's Post, wasn't it, or Sunday's.

Mr. EDWARDS. And you think his statement is true, that the bill would allow a plaintiff to win a civil rights case before a jury if he showed that an employer was not hiring in proportion to the number of available minority workers?

Mr. AYER. That's our point, yes. I think there's a very great risk of that, a very great risk. The reason is the point I made earlier,

primarily, that the primary focus is that essentiality of the practice becomes the test. Once an adverse or disparate impact is shown, then the employer, under this bill, has the burden of coming in and showing that that particular practice or that range of practices that has that effect is essential to his doing his business.

How can he prove it's essential? What does he have to do, prove that he's going to go out of business if he doesn't use that practice? You would think that's what it means. Unless we're going to take the word "essential" and we're going to redefine it to mean helpful but not essential, or some other phrasing that plainly doesn't mean essential, I think he is exactly on point, Congressman Edwards.

Mr. EDWARDS. Thank you, Mr. Chairman.

Chairman HAWKINS. Mr. Gunderson.

Mr. GUNDERSON. Thank you, Mr. Chairman. Let me follow up on Mr. Goodling's statement, Mr. Attorney General. I not only want to welcome you here to the Ed and Labor side of things, which you probably won't have as many experiences to testify before as probably you would want, but secondly, to really commend you in regards to your action both in terms of the speed which you have tried to put together I think a very thoughtful response, but also one that I think is more than justifiable when we try to balance this whole issue of everybody's civil rights within the course of guaranteeing everybody due process.

I want to go back to the questions I asked this morning, because I think they really focus on where all this is going to end up, and that is on this whole issue of *Wards Cove*. It just seems to me that we really, if we aren't careful—and I would hope everybody here agrees on the same goals—we have got to spend some time on the specifics because, in the absence of that, I think the language in the bill ends up in quotas. People say they're not for quotas, unless they want to admit up front that they are.

Let me ask you this question. In your opinion, to what degree does *Wards Cove* signify a departure from prior case law?

Mr. AYER. Well, starting with what I think is the most important issue that we're dealing with here—and that is the ultimate standard that we're going to apply—are we going to apply the essential standard, which is in the bill, or are we going to apply the language that is in *Wards Cove* itself, talking about "whether a challenged practice serves in a significant way the legitimate employment goals of the employer."

If you look back at the decisions of the Supreme Court that use words essentially to set forth that standard, you look first at the *Griggs* case in 1971, which some of the literature I've seen surprisingly describes as having been reversed by the *Wards Cove* decision. I think that is plainly false. *Griggs* itself uses two phrases. It uses the phrase "business necessity" and secondly uses the phrase "manifest relationship to the employment"—that is, describing how the particular test has to relate to the job.

The Court uses the words "business necessity" a number of times in its decisions. It also uses the expression "manifest relationship," which I think anyone would agree is slightly different at least than the concept of necessity.

It also uses in the *Albemarle Paper* case in 1975 the phrase "job related." Again, it uses the phrase "job related" in *Dothard* v.

Rawlinson in 1977. Again it uses "job related" in the *Beazer* case in 1979, and again it uses the phrase "manifest relationship" in *Connecticut* v. *Teal*, I believe in the 1980s. I think that is a fair representation of what the Court has relied on as the appropriate standard.

Now, I would concede that the standard is not one that has a great deal of precision about it. I think, frankly, the language used by the Supreme Court, which I just read, which is more than just a phrase—that is to say, whether the practice serves in a significant way the legitimate employment goals of the employer, and then goes on to say that a mere unsubstantial justification will not suffice. It isn't enough for the employer to just sort of throw off some explanation for why he wants to use this test. It has to serve in a significant way the legitimate employment goals of the employer.

Well, that, I think, is very close to, if not indistinguishable from, the concept of manifest relationship, the concept of job relatedness, that is embodied in numerous of the Supreme Court's decisions. As I say this, I am not giving you a sort of a "cherry-picked" edit of the Supreme Court's decisions. I've said they also do use the phrase "business necessity," but they use it in conjunction with these more specific terms. So I think it's fair to infer what they meant by it when they used it. Again, I would say I think that is the most important element that we're dealing with here, that standard.

The two other issues that we're dealing with—one of them relates to the obligation of the plaintiff to identify a particular selection device, a particular test or whatever. If you go back and look at the Supreme Court's decisions relating to this, the ones I have just recited, for example, and some others, you will see that the Supreme Court has always been deciding cases focusing on specific hiring practices.

Now, I won't tell you that they say specifically prior to *Wards Cove* that that is a must, that that is a requirement. I'm not aware that they do. They might, but I'm not aware that they do. But in fact, in their cases, they are dealing with specific practices. That was the understood practice. That was the understood burden that plaintiffs had to carry, and that was the burden that they did try to carry. What *Wards Cove* does is to recognize, as a matter of law, that that is the burden that they must carry. That, to me, is not any sort of an unreasonable departure. It is simply stating what the rule has always been recognized to be in terms of the practice that has been followed.

Finally, with regard to the burden of proof, I would agree that there are phraseologies in various of the Supreme Court's decisions that can be understood—and the Supreme Court acknowledged this—that can be understood as shifting the burden of proof. But they can also be understood as not shifting the burden of proof to the defendant, to the employer. They use phases such as burden of showing, burden of proving, talking in terms of the employer rebutting by a demonstration that something is job related, talking about the employer demonstrating.

In the Supreme Court's *Sweeny* decision, which was not a disparate impact case but, rather, was a disparate treatment case, the Court discusses all of these phraseologies, "showing," "proving," "demonstrating," to decide and focus there on the question of

whether the burden actually shifts to the defendant, to the employer, in a disparate treatment case, where the Court concluded, as it has now finally concluded, that it does not shift to the employer. The Court reconciled these phraseologies with a conclusion that the burden of proof never shifts.

So I guess the short answer is yes, there is language in some of the Supreme Court decisions which could be read as shifting the burden of proof; on the other hand, there is no good reason at all why, in a disparate treatment case, the burden of proof should always be on the plaintiff—and that is very clearly where it is, and there's no dispute about that—it's been clear at least since 1981—and yet, in a disparate impact case, where plaintiff does not have to show intent, as they do in a disparate treatment case, somehow the plaintiff should also get an added advantage of not only having to prove intent but also of shifting the burden of proof to the defendant.

Lastly on that particular issue, the Federal Rules of Evidence, Federal Rule 301, talks in terms of the effect that a presumption has on the burden of proof. It lays out very clearly in generic terms, not focusing on civil rights cases or any other kind of case, but in general terms it says that the effective of a presumption is not to shift the burden of proof. The effective of a presumption is to shift the burden of production; that is, the burden of going forward and presenting evidence. The Supreme Court, in *Wards Cove*, recognized that the burden of production does shift. The burden of production on the issue of job relatedness, substantial relation, whatever the exact phrasing is, when there's an impact shown, that burden does shift to the employer. But it's not the burden of proof. It's the burden of going forward.

So the bottom line is, on two of the three issues, I think there is no credible argument at all that *Wards Cove* is a substantial departure. On the third one, the burden of proof, there is language in Supreme Court decisions which certainly could be read either way. But there are excellent reasons which the Court gives for reading it the way the Court does.

Chairman HAWKINS. Mr. Gunderson, I think your time is up.

Mr. GUNDERSON. I think my five minutes are shorter than some other five minutes on this panel.

Chairman HAWKINS. You've had ten minutes, actually.

Mr. Fawell.

Mr. FAWELL. Thank you, Mr. Chairman.

I would like to continue in the area that Mr. Gunderson has been zeroing in. I don't know if you were there this morning when I asked several questions about the effect of H.R. 4000, and I have the provisions here before me as they pertain to *Wards Cove*. But I asked several questions, such as what would be the burden of proof insofar as the plaintiff was concerned. Well, there is no shift in overall burden, but you state a shift in going forth with the evidence.

Wards Cove, as I understand it, made it clear that specific and particular job criteria that had a significant adverse effect on the employment opportunities of a protected class was an obligation that the plaintiff had in proceeding to prove his case. As you read

the provisions of House Resolution 4000, that has been eliminated, is that it?

Mr. AYER. My understanding of House Resolution 4000 is that the plaintiff would no longer need to single out a particular hiring practice, that they could simply identify an overall process that had many steps and show an impact based on the whole process.

Mr. FAWELL. And then the obligation of coming forth with evidence would be upon the employer?

Mr. AYER. Well, the obligation of not only coming forward with evidence, but once an impact is shown with regard to, say, the whole hiring process, the employer would have the obligation of proving that his hiring process, which has been shown to have an impact, either that it doesn't have an impact—they can negate that by somehow proving that there is no impact, or they can do it piecemeal. They could say we have five parts to our hiring process and could come in and show that as to three of them there was no impact, that essentially the selection rate was the same across the board without any statistical imbalance. And then, as to the other two, the employer just hypothetically could show essentially yes, well, as to these, there is an impact, and they could identify that impact, and then the employer would have the burden of proving that those two hiring practices are essential to I guess the conduct of their business.

If, for example, a particular test is useful to the employer, but they could have used another test, maybe it wouldn't have worked quite as well, maybe the employees wouldn't have been quite as well qualified in certain ways, but maybe some other test would have allowed the employer to continue to function, then I guess it wouldn't be essential. That is why I say the employer is being handed an impossible burden.

And let me just say that the fact that the employer is being given an impossible burden, maybe it is unfair to the employer, but we are not primarily focusing on the unfairness to the employer. We are much more worried about the unfairness to everybody out there who wants a job and most of all, wants to be judged on their own merit, on their own abilities, on their own whatever it is they have to bring to bear on a particular activity. Those are the people we are worried about. And what we are going to see is employers engaging in rational but regrettable self-preservation behavior. They are simply going to say: Look. I have got to get by. I have got to live under this system of rules, and in order to do that I simply cannot afford to have imbalances arise that I cannot defend. So I am not going to let it happen.

Mr. Fawell. Well, I would agree the demand that you have to show that an employment practice is absolutely essential is almost an impossible burden and thus probably would cause many an employer to just throw up his hands and say I will seek a safe harbor and try to simply have a racially balanced work force, which would coincide generally with a work force that is theoretically available out there.

Mr. AYER. It would not be only racially balanced either. It would be across the board.

Mr. FAWELL. I am still not clear in my mind then that plaintiff has to—at least this House Resolution 4000 hasn't changed the fact

that the plaintiff has the obligation to commence proofs. That is true, is it not?

Mr. AYER. To commence what?

Mr. FAWELL. Commence proofs. He or she, the complaining party, has to bring in some kind of proof to demonstrate that a group of employment practices, and I am reading from the bill now, "results in a disparate impact on the basis of race, color, religion, sex, or national origin." How does he go about this other than just coming up with statistics?

Mr. AYER. There is no quarrel with that. I mean, I think that is—the quarrel is with allowing the plaintiff to attack a group of practices. Our position is not one that opposes statistical proof. Statistical proof is a vital part of the discrimination remedial machinery in this country both in disparate treatment cases and in disparate impact cases.

Mr. FAWELL. I would agree. It is evidence, obviously.

Mr. AYER. Absolutely. No question.

Mr. FAWELL. But, if there is just statistics and nothing more, has he sustained his—under this bill, has he sustained his prima facie case so that you have shifted the burden now to the employer?

Mr. AYER. Well, that is what the bill says. One of the reasons not to shift the burden of proof to the employer is that Title VII does not contemplate that it is violated simply by a showing of an imbalance, and it is our view that the disparate impact theory is made consistent with the intent of Title VII in that respect by leaving the burden on the plaintiff to show that there is not some job-related justification for this practice, so that the plaintiff's case actually becomes what it has been I think generally viewed as, and that is, you must show an imbalance, but it also is critical for the plaintiff to prevail that the practice not be reasonably justifiable on the basis of some nondiscriminatory reason. And when you put those two together you get beyond mere imbalance as the predicate of a violation.

Mr. FAWELL. Yes. But I gather, then, under H.R. 4000 the plaintiff's attorney in *Wards Cove* would have met all the burden that he was responsible to meet.

Mr. AYER. Well, except that the—I think the underlying statistical proof there was highly deficient, and I don't read H.R. 4000 as changing the statistical analysis. At least I don't see any language in here that undertakes to do that.

Mr. FAWELL. No, I wouldn't either. But I would assume that in most cases, if not all, you would have to go a bit further than statistical analysis, would you not? Or am I wrong there?

Mr. AYER. Well, we agree that you should and that that burden of proof on the plaintiff to show the absence of job-relatedness is the thing that they must do further.

Mr. FAWELL. So, in other words, you might find that yes, there is a statistical imbalance, it doesn't relate very favorably to the people who are out there who are potentially ready for work, but there would have to be proof such as, by the way, I have a qualified, things of this sort——

Mr. AYER. Well, I think that is certainly relevant and important in defining how you prove the case. I think when you try to make a disparate impact case or even a separate treatment case using sta-

tistics it is very important that you look to a qualified pool from which you are drawing. Otherwise your comparisons are completely out of kilter.

Mr. FAWELL. Well, would H.R. 4000, in your opinion, demand, for instance, that there be proofs of qualification? Granted that it is always proper evidence to bring in statistics. Can a plaintiff just get away with just plain bringing in the statistics and then resting?

Mr. AYER. Well, I do not see anything in H.R. 4000 that addresses one way or the other the question of whether the labor pool has to be qualified or not. The point you are making is very important because if you misconceive the statistical analysis, as was done by the lower courts in *Wards Cove*, you end up finding people liable where there is simply no basis at all on which to find any possible liability.

Mr. FAWELL. Well, if I am right or if what I suspect may be the case, then it would seem to me you start with a presumption based on quotas and then you have the impossible burden of rebutting that. It is technically rebuttable, as Mr. Eisenberg had mentioned, but as a practical matter you have got to prove the essentiality of the particular employment practice, and there I think you quite correctly point out it is pretty difficult.

The only other question—we just don't have the time to do all that we would like to do. But referring your attention to page 5 of the House Resolution 4000, which refers to discriminatory practice need not be the sole motivating factor, which is going into *Price Waterhouse* corrections, I believe, and apparently if there is any evidence of an unlawful employment practice, then even though the evidence does show the person would have been, for instance, fired anyway on other grounds, apparently you still have a cause of action going then.

Mr. AYER. That is our understanding. And it is, frankly, very surprising that anybody would want to put that into law, but that is what we see.

Mr. FAWELL. Is it not true, under Section 1981 cases that is an established defense, that employers have always had the right to come in in a given case and say we have got proof of the fact but for this—well, let's say a case I know that was pending in our office in reference to political activity. He was fired because of alleged political activity and things of this sort, and, of course, the employer, being in that instance a county, came back and said, Well, he would have been fired anyway, and that was a supreme fact in that case which we had to overcome. I am no longer a part of that office but it is still pending in the appellate court, back in the Seventh District in Illinois.

Now how does this all fit in with the amendments that have been referred to by Ms. Greenberger, for instance? The fact that we are going to have now—she would like to have Title VII be just like Title 1981 and be able to have compensatory damages and punitive damages, including what is called punitive on the basis of callous indifference, which wows me. I have never heard that before.

I guess what I am driving at is that in a situation where you may have a de minimis kind of discrimination charge could one then also go ahead on the basis of that de minimis allegation of dis-

crimination proceed to seek compensatory and/or punitive damages on that?

Mr. AYER. I think so. The way I read it.

Mr. EDWARDS. [presiding] Mr. Ayer, the chair must move along, if you can make your answer short. We have more witnesses later and Mr. Smith needs to be recognized.

Mr. AYER. I will. I think when you string those two together you are absolutely right. If something is a motivating factor within the words of this statute, and it is something they had in mind even if they were going to do what they did anyway, then it would seem that you can get damages, and once you can get some recovery, presumably if you can then show that this thought that went through their mind reflected callous disregard, I assume you can get punitive damages. I don't know why not.

Mr. FAWELL. Mr. Chairman, the only reason I was mentioning this is because you basically have a not guilty so far as the employer is concerned. Because there are various motivating factors, if one of the motivating factors, no matter how inconsequential, the case would go to a jury then and you could have a judgment against you for punitive damages for callous indifference.

Mr. Chairman, I only bring these out. I see a lot of good in what is being attempted here, truly I do. But we need so much review to know what we are doing. This is just one of many little areas that as I read through this statute, and I am just now having the first opportunity to read it, and I am sure there are going to be literally scores of such questions that we, perhaps, don't have the time to be able to look at as we should.

Thank you, Mr. Chairman.

Mr. EDWARDS. The Administration has supported damages in other civil rights laws, and we have both compensatory and punitive damages in the Fair Housing Act and they have worked out very well.

Mr. Smith?

Mr. SMITH OF VERMONT. Thank you, Mr. Chairman. I will keep it to one question in the interest of time because I know the time is passing. It will be a general one. I am in the position of being a non-attorney in a torrent of words here that have to do with things that I, in terms of the profession, am not familiar with.

I have inferred from earlier testimony that there are several people who believe that opposition to H.R. 4000 or support of the Administration's bill would, in fact, be in relative terms detrimental to minorities or to those who are discriminated against in the society, and I have inferred from your testimony here today that, in fact, you see situations where in fact the passage of H.R. 4000 as it is offered to us today would in fact be detrimental to minorities or to other groups who are discriminated against in this society. And those two positions, even in relative terms, are fundamentally in contradiction to each other.

If I have got it right in terms of what you have been saying, could you give me two or three "for instances" where you believe that passage of H.R. 4000 would, in fact, not be in the best interests of groups who it purports, or individuals who it purports to protect?

Mr. AYER. Well, the biggest category that comes to mind is relating to the Title VII rewrite, and that is the point I made earlier. That the whole process is going to be turned into one that is perceived by employers accurately as more threatening of their interests because the amount that they might have to pay out is going to be much larger. It is going to be perceived less readily by individual plaintiffs, under the guidance of their attorneys, as a remedy that can be pursued quickly and with a limited recovery, because now we have the potential to go for a greater recovery. And the net effect, in practice, is going to be that it isn't going to work as well as it does now for the purpose of getting people back into their jobs.

Every once in a while people are going to get big recoveries. I don't view that as a particularly good thing. Because as they wait three, four, five, six years to get their recovery, that is unproductive time. The great big payout by the employer has its own costs, not just on the employer but on others. It is an engine of litigation that we are creating and that is bad for everybody, and also for the specific plaintiffs.

Generically, our concern about people having their day in court, about the parties in *Lorance* who under the Supreme Court decision do not get their day in court with regard to a discriminatory seniority provision, about the individuals in the *Martin* v. *Wilks* situation who are unhappy with a consent decree that has been entered into, or a court decision that has been entered into, that they are somehow injured by it at some future point. All you have to do is hypothesize different groups on different sides of these situations.

Essentially, the approach that we are advocating is one that assures people a right to a day in court as a check on a majority that may not be disposed to serve their interests, and the majority and what interests a majority is disposed to serve at any particular time varies. And it seems to us highly unwise when you are dealing with something as important as a person's constitutional right to be free from discrimination, it seems highly unwise to simply cast aside fundamental judicial protection of a right to go to court on the theory that we are not worried about the rights of whoever those people are to go to court.

Next year or next decade or next week, somebody else is going to be in court, and they are going to want their day in court. And it was not so many years ago, as others here are better aware than I am, that the shoe was on the other foot, and it was minorities and a variety of minorities who were seeking their day in court. It was important then. Well, it is just as important now, and it may well be to those very same people or to other minorities just as important again. And to dismantle the machinery on the theory that we can somehow more efficiently accomplish a social engineering goal I think is very shortsighted.

Mr. EDWARDS. Thank you very much, Mr. Ayer. We appreciate your testimony and we will be in touch with you.

Mr. AYER. Thank you very much.

Mr. EDWARDS. The last panel that we are pleased to hear today is composed of Professor Walter Oi, Department of Economics, Uni-

versity of Rochester in Rochester, New York, and Professor Jeremy Rabkin, Department of Government, Cornell University in Ithaca. We welcome both you gentlemen.

STATEMENTS OF WALTER OI, PROFESSOR, DEPARTMENT OF ECONOMICS, UNIVERSITY OF ROCHESTER, ROCHESTER, NEW YORK; AND JEREMY RABKIN, PROFESSOR, DEPARTMENT OF GOVERNMENT, CORNELL UNIVERSITY, ITHACA, NEW YORK

Mr. OI. Thank you very much. I welcome the opportunity to speak before you on this important issue.

The Civil Rights Act of 1964 is a truly important piece of legislation and it is a statistical certainty that every law will be violated. The 1964 Act established EEOC, which is charged with the almost impossible task of monitoring and enforcing compliance. The Office of Federal Contract Compliance Programs represents a major agency which is supposed to assure protection of our employment rights.

In addition to these quasi-regulatory agencies, we have decided to embrace a system of civil litigation and lawsuits to enforce compliance with the law of the land. When we embark on that venture, there are certain dangers. We have to worry about the way in which the courts will define an unfair employment practice, the evidence needed to establish guilt, what evidence will be evaluated by the courts in the light of the standards which they establish and, finally, what incentives are there for victims and potential victims to file suit?

I think what the 1990 Act, H.R. 4000, is doing is a number of things, some of which I support strongly; others of which I have serious questions and would like to raise questions about.

The basic model that I am trying to hang this on is the model of standards violations and what motivates people to violate a law. Basically it comes down to the fact of what returns do they get from the violation, whether these be criminal or otherwise, the perception of being caught if they are engaged in this act, and finally, the penalties or fines if apprehended.

The basic model has been developed by Gary Becker. It can be applied quite neatly when we deal with laws that deal with burglaries, auto thefts and the like where the occurrence of the violations can be measured with relative ease. But in the case at point, we are dealing with something more akin to libel, where there is a gray zone, or when, in fact, there has been an infringement. This creates a number of difficulties of the way in which we use this system.

Let me turn to the particular issues addressed in the instant bill. I will skip over very quickly those points in which I think the Administration and I also agree, namely sections 7, although with Section 6, on *Martin* v. *Wilks*, there is a certain similarity where there the issue is whether or not there should be finality in the right to challenge, whereas, in *Lorance*, the issue is whether or not there should be finality with respect to the right to litigate when you have—your rights have been violated.

Let me turn to the issue where I want to place the most attention. That is the issue of punitive damages and litigation expenses.

Consider a set of end victims or end potential victims, who are all the victims of a type of unfair employment practice. If we use the Learned Hand type of rule, that victim will bring suit if the expected returns, which will depend on the probability of winning the suit and the damage if he wins exceeds the cost of engaging in that litigation. We could go through the calculus as to what determines each of these things and what the present Act does, in Sections 8 and 9, is to increase the net returns of filing the lawsuit for the plaintiff and raises the net cost of certain unfair or quasi-unfair employment practices.

Now, some of these remedies are clearly needed where the enforcement agencies, EEOC, OFCC do not have the jurisdiction or the resources to enforce the law in all quarters over all 120 million employees and so forth. Under these conditions, there is clearly a necessity for this type of enforcement procedure. But now the question is, what are the dangers of this?

I can perceive at least three types of dangers. First, if we permit punitive damages and if the punitive damages get sufficiently large, there is a case of individuals who can imagine that they have suffered an unfair employment practice filing suit. Under these conditions, employers are going to have to take actions to protect themselves. I will return to this later.

Second, is there a case for punitive damages? Judge Posner in the 7th Circuit Court in his text claims, yes, that where only some fraction, q, of victims actually brings suit, then if we do not impose punitive damages, then the wrongdoers are not given the proper cost incentives to refrain. By weighting this, by the reciprocal of bringing suit, one over q, we can then provide the wrongdoers with the proper penalty to refrain from these actions, and under these conditions, Posner argues, the punitive action damages can be justified.

But I contend that discrimination is more a public bad, that the person suffering discriminatory practices of all types include not only the victims who are successful in filing suits, but the others. There is certainly a justification for imposing costs on the wrongdoers, but does it necessarily follow that these costs ought to be distributed to the particular parties?

Whenever we get to litigations, and a lot of public policies deal with a world in which we have something like a wages fund. We are worried about how to distribute a given pie and not about how to create wealth and how to increase the size of the pie.

The third danger that I see is that if punitive damages get large, then we can encourage inefficient employment practices. I think some lessons can be learned from the developments that are taking place now in unjust dismissal laws. In Montana, Mildred Flannegan brought suit against Prudential Savings for violating her employment rights and for unjust dismissal. She was awarded $1.3 million because her job was terminated. She was given six months' pay plus separation benefits, but she contended that there was emotional distress and the award of $1.3 million was given to her.

A second case in Montana, *Farrens* v. *Meridian Oil*. Here, Meridian Oil dismissed Farrens because they alleged that he was on the take, with paying inflated prices for drilling mud, was on the board of directors of the mud company from which he was getting the

materials, and on these grounds, Meridian fired him. He brought suit for unjust dismissal. The court found that the charges were not well-founded on the part of Meridian. He was awarded $2.5 million in economic losses. On appeal, the 9th Circuit Court agreed with the lower court, but reduced the size of the economic losses to $1.7 million. At the time this took place, Mr. Farrens was 34 years old, was earning a salary of $85,000.

If you look at these cases, you see that the costs were enormously high. These cases which are discussed by Alan Kruger are, according to Kruger, the things that motivated the State of Montana, backed by the Chamber of Commerce, to enact unjust dismissal legislation, which raises the cost. To date, only one State has enacted such legislation, although ten have proposed it in their State Legislatures.

If these laws become the rule of the land, they are going to restrict employment practices, cause employers to exercise more care in initial hiring and reduce the flexibility of employment, in short, resulting in more inefficient employment practices.

Let me close very quickly with my comment on Section 4, the key of H.R. 4000, as I see it, together with Sections 8 and 9. Here, the case of disparate impact. Will it cause inefficient employment practices? The danger is high because preferences differ across individuals for different types of jobs and employers—well-meaning employers may occasionally end up with an unbalanced work force. The fact that James Buster Douglas knocked out Mike Tyson—the chances of that being about one in a million, I would guess—is not sufficient grounds when we see Tyson on the mat to bring Don King up for fixing a fight.

Just looking at the numbers alone is not sufficient. We have to go to intent. Once we get to intent, if punitive damages are awarded, and presently they are not, under the law. I believe the previous witness in the previous panel pointed this out. But in spite of that, you are going to find that they will take evasive action. One is to establish hiring and promotion decisions that result in balanced work forces, balance with respect to race, sex, national origin and so forth, but also with respect to disability because the ADA Act is going to be here.

Alternatively, an employer could adopt other inefficient practices. For example, an employer could turn to a temporary help agency to staff certain positions. Under these conditions, the temporary, the temps, get no fringe benefits, almost no training and little promotion opportunities. But yet, they do not count in the regular work force.

If you look at the Japanese work forces, they all have substantial numbers of casual day workers so that they can fire, move them around while maintaining lifetime contracts for the regular employees. But if we go to a system of temporary workers, that is not going to be good for the employer; it is not going to be good for the temps who hold those jobs and, in general, it is going to result in inefficiencies.

In closing, I support the basic aim of the Act, the basic aim of nondiscrimination. I support Sections 5 and 7. Sections 8, 9 and 4 are the ones I have questions with and those are the ones that I think we need very serious study before proceeding with legislation.

Thank you.

[The prepared statement of Walter Oi follows:]

Statement

of

Dr. Walter Y. Oi

on

H.R. 4000, The Civil Rights Act of 1990

before the

Committee on Education and Labor

and the

Judiciary Subcommittee on Civil and Constitutional Rights

February 20, 1990

Civil Employment Rights: Equality and Efficiency

1. Background

> "Title VII . . . makes it illegal for an employer to discriminate against any individual with respect to hiring or the terms and condition of employment because of such individual's race, color, religion, sex, or national origin, or to limit, segregate, or classify his employees in ways that would adversely affect any employee because of the employee's race, color, religion, sex, or national origin."

This summary of the employment provision from the Civil Rights Act of 1964 appears at the beginning of the majority opinion in the Wards Cove case which as prepared by Justice White. The Civil Rights Act of 1964 is a truly important piece of legislation, but like all laws, it is a statistical certainty that the law will be violated. In order to monitor and enforce compliance, the Act established the Equal Employment Opportunities Commission, EEOC, which is charged with the nearly impossible task of protecting the employment rights of all citizens irrespective of their personal characteristics. The Office of Federal Contract Compliance Program, OFCCP, is the other major federal agency charged with the task of enforcing compliance with non-discriminatory practices and of promoting affirmative action programs. In addition to these two governmental agencies, we have relied upon civil lawsuits to enforce compliance by imposing costs upon wrong-doers. The effectiveness of civil lawsuits to achieve compliance in accordance with the wishes of the legislature depends on the way in which the courts define unfair employment practices, the evidence needed to establish guilt, the accuracy of the courts in evaluating the evidence in the light of the standards which they have adopted, and the incentives of plaintiffs to sue. The instant bill reflects the legislative displeasure with several of the recent rulings by the Supreme Court.

2. The Extent of Compliance and Its Mirror Image, the Supply of Civil Employment Rights Violations

In "Crime and Punishment: An Economic analysis", Gary S. Becker (1968) developed a model in which the supply of criminal violations per period V was a function of the returns to criminal activity which I shall denote by R, the probability of apprehension p, and the penalty or fine if apprehended F.

$$(1) \quad V = V(\overset{+}{R}, \overset{-}{p}, \overset{-}{F})$$

The signs above the variable indicate partial derivatives; i.e. an increase in the apprehension or arrest probability p will reduce the supply of violations V. We as a society can achieve

greater compliance with the law, meaning fewer violations, if we are prepared to allocate resources to law enforcement which will raise p or to impose stiffer penalties which deter potential violators. In Becker's model, p and F can be chosen to minimize the sum of damage costs due to criminal violations plus enforcement costs of apprehending and punishing violators. It is a useful model for organizing our thinking, but there are some difficulties in trying to apply the model to particular laws such as the law on civil employment rights. The offenses and violations here are not like burglaries and auto thefts where the number of violations can be measured with relative accuracy. The situation is closer to that of libel. There is a gray zone in deciding whether a particular employment practice is or is not unfair. When regulatory agencies are responsible for enforcement, they are likely to issue guidelines that tell us which practices are permissible and which constitute violations. If, however, enforcement is left to civil lawsuits, these determinations have to be made by the courts. Disputes will arise about what constitutes an unfair employment practice. When the judicial determinations are at odds with Congress, the law is likely to be amended. The costs of filing a suit are not inconsequential, and some victims may choose not to sue because the expected returns from back pay and reinstatement fall short of the expected cost. Several provisions of the instant Bill try to reduce plaintiff costs by shifting the burden of proof or by explicitly including provisions with respect to litigation expenses. This Bill simultaneously raises the net returns of filing suit for the plaintiff and increases the net costs to defendants. There is reason to suspect that some potential defendants may embrace inefficient employment practices which conform to the legislatively mandated, non-discriminatory practices but raise labor costs. I turn next to some of the issues addressed in HR-4000.

3. Statute of Limitations and Prompt Resolutions

Section 7 of the instant Bill is a response to the Court's decision in Lorance v. A.T.&T. Technologies. If the seniority system in question was a truly discriminatory employment practice, it should be challenged and corrected. That this unfair system was not challenged during the statutory period may simply be accidental; i.e. workers were uninformed about the discriminatory features of the system, or there were no minority workers. The goal of achieving less workplace discrimination can be better served by moving the effective date to the time when the aggrieved employee was affected rather than the time when the system was implemented. I have not seen any data on the comparative costs that would be imposed on plaintiffs and defendants as a result of lengthening the statutory period from 90 to 180 days. This is an empirical issue that can be resolved by reference to the pertinent data.

Section 6 on "Facilitating Prompt Resolutions...." is this Bill's response to the Court's decision in Martin v. Wilks. If

this statute had been in effect, the white fire fighters who sat on the sideline would have been denied the right to challenge of a preferential hiring policy. Under section 6, an employer is required to notify all interested parties. The interesting case is one in which an applicant for a fire fighter position who was not a resident of the locality at the time that the policy was adopted, wants to challenge it. He or she would have been denied the right to challenge if a person with similar characteristics had been notified or had been represented at the hearings preceding the policy's adoption. There are some similarities in the two cases that prompted sections 6 and 7. In the former case, section 6, the Bill chose to embrace a statutory date corresponding to the date when the preferential hiring policy was implemented, whereas in the latter case, section 7, the effective statutory date was postponed to the time when the individual was affected by the discriminatory seniority system. Are the circumstances of the two cases sufficiently different to warrant different treatments in the Congressional amendment?

4. Punitive Damages and Litigation Expenses

Consider a group of N individuals who were the legitimate victims of some discriminatory employment practice. Suppose that C is the cost of filing a lawsuit, D is the damages that she will collect if she is successful, and p is the perceived probability of winning the case. Using a Lerned Hand rule, this victim should file suit if her expected returns, pD, exceeds her expected cost C; i.e. sue if pD > C. Costs C, expected damages D and perceived win probabilities p obviously vary across the N victims. As a consequence, only a fraction of them will sue. If the employer and victim hold the same perception about the victim's win probability p, but only some fraction q < 1 of all victims elect to sue, then the expected cost to the employer of engaging in this discriminatory employment practice is, $C_i = q[pD + C_{Lf}]$ where C_{Lf} is the employer's litigation cost. In the Economic Analysis of Law, R. A. Posner argued that when only a fraction of all victims bring action, the party generating the damage costs is not faced by the right expected cost yielding the appropriate cost dis-incentive to engage in the optimal level of accident avoidance which in the present example translates into the appropriate level of non-discriminatory employment practices. Posner argued that compensatory damages should be supplemented by punitive damages so that the expected damages imposed on the wrong-doers approximates the damages that they inflict on all victims----those who sue and those who do not. Under section 6, a victim of an intentional discriminatory employment practice on the part of a private sector employer will be entitled to recover both compensatory and punitive damages. Additionally, under section 9, a successful plaintiff can recover all of his litigation expenses including attorney fees, costs for expert witnesses, and other litigation costs. The passage of this Bill will surely expand the number of litigants who claim to be the victims of real and contrived cases of labor market discrimination. I can imagine at least three problems that could

arise as a consequence of sections 8 and 9 of this Bill.

First, the large size of some punitive damage awards could elicit fraudulent claims by individuals who suffered no harm but sue on the remote chance that they might receive a gigantic award. If the damages awarded by juries and courts are sufficiently large, we are sure to attract some people who will incur the litigation expenses to participate in a lottery.

Second, the damages caused by labor market discrimination are imposed on all victims whether they elect to sue. If, however, awards are only paid to successful litigants, the rest of the victims get nothing. One can agree with Posner that the damages imposed on the wrong-doers who are successfully prosecuted, should be a multiple of the per capita damages D where the multiplier is the reciprocal of the fraction who successfully sue. There is, however, no compelling reason to pay these damages to the successful litigants if the punitive damages are intended to deter wrong-doing. The same outcome could be accomplished by funneling the punitive damages into a general fund which could be used to promote affirmative action.

Third, the size of these punitive damages could be staggering and could encourage legislation that limits losses but at a cost of encouraging firms to adopt inefficient labor market practices. Some lessons might be learned by reviewing the development of unjust dismissal laws analyzed by alan B. Kruger (1989). Kruger describes two cases where the plaintiffs were generously remunerated for their unjust dismissals.

> "In one well publicized case, (Mildred Flannegan v. Prudential Federal Savings), a 62 year-old employee was judged to have been wrongfully discharged from her job as an assistant loan counselor and therefore awarded 1.3 million dollars for punitive damages, 100,000 dollars for emotional distress, and 93 thousand dollars for economic losses by a Montana jury. Circumstances of the case were as follows: Flannegan after 34 years of service at Prudential Federal was given four months that she would be terminated because of economic conditions. She was advised subsequently, however, to attend a week long training program in Salt Lake City, Utah to prepare for a new job as bank teller. In spite of having attended the training course, Flannegan was discharged without notice or hearing less than one month after assuming a position as a teller. She was given six months pay and severance benefits. She was also later offered an opportunity to return as a part-time teller but refused. The court reasoned that flannegan's discharge violated a covenant of good faith and fair dealing implicit in employment relations. Moreover, the flannegan verdict and award were both appealed and affirmed by the Montana Supreme Court in

June, 1986.

"In another influential case, (Farrens v. Meridian Oil), Michael Farrens was discharged for allegedly purchasing drilling mud from a supplier at inflated prices, for being on the take, for exclusively dealing with the mud supplier, and for being a member of the mud supplier's board of directors. A Billings jury found these charges to be factually incorrect and awarded the 34 year-old mechanical engineer 2.5 million dollars for economic losses. After appeal, the 9th Circuit Court of appeals upheld the liability claim but ruled that the evidence supported a 1.7 million dollars for economic damages. At the time he was dismissed, Farrens was earning $85,500 a year, $53,000 salary, $11,000 bonus, and $11,500 fringes. Although the Flannegan and Farrens cases are extreme examples, they reflect the potential losses that employers face if they were challenged in unjust dismissal cases." [Kruger (1989) pp. 6-7]

The employment at will doctrine is being challenged, and the courts in several states have upheld challenges that appeal to three kinds of exceptions. Kruger contends that when the punitive damages in these unjust dismissal cases got inordinately large, the Chamber of commerce fell in line behind an unjust dismissal law that limited the liability of violators. although the law imposed additional regulatory constraints on the employer, they were prepared to accept these inefficiencies to avoid the astronomic judgements. To date, Montana is the only state to enact an unjust dismissal statute, but Kruger reported that some ten state legislatures have proposed such legislation. If these states and others enact unjust dismissal laws, firms are likely to exercise greater care in the initial hiring decision and will be forced to operate with a less flexible work force.

In passing, I direct your attention to the language in section 9 of HR400, ". . . unless the parties and the counsel attest that a waiver of all or substantially all attorney's fees was not compelled as a condition of the settlement." This provision will surely reduce the frequency of out-of-court settlements thereby raising the social costs of jury trials.

5. Disparate Impact and the Burden of Proof

In Wards Cove Packing Co. v. Atonio, the Court argued that the plaintiff had to identify the discriminatory practice which resulted in the racial segregation of the work force. Under section 4 of HR4000, the Court's position is reversed. The plaintiff can point either to a specific practice or a group of practices which led to the disparate impact. The employer can appeal to a defense of business necessity. The enactment of this section signals that Congress embraces a mechanical disparate impact theory, namely the employment statistics are sufficient to establish the presence of an unfair employment practice or

practices. Additionally, if the plaintiff can demonstrate that the practice or group of practices were "intentional", he or she can ask for punitive damages.

The preferences for different occupations or employers will clearly vary across individuals, and non-discriminatory employers will adopt hiring and promotion policies that could produce a work force whose racial or gender composition might look like a disparate impact. In my opinion, the numbers have to be accompanied by evidence of intent to discriminate before they can be used to establish guilt. If reference to a vague "group of practices" is sufficient to validate the employment statistics, I can imagine situations where an employer adopts an inefficient employment policy to avoid the risks of a civil lawsuit. The firm could, for example, rig its hiring and promotion decisions to achieve a racially balanced work force. Quotas could have achieved the same result of "equal outcomes", but Congress and the Civil Rights Commission have rejected quotas.

Alternatively, some positions could be staffed by employees from a temporary help agency. These temporary workers will not be counted in determining the racial/gender composition of the firm's regular work force. It is an inefficient employment policy not only for the employer who has little control over the temporary employees, but also for the temps who receive no fringe benefits, almost no training and little chance for promotion. If firms do turn to temporary help agencies to avoid liability for disparate impact charges, the inefficiencies will prove to be costly for both the employer and employee.

I strongly support our public policies that are designed to eliminate all discriminatory employment practices. Efforts should be made to assure that all potential employees have <u>equal access</u> to jobs. Wherever possible, we should try to adopt public policies that encourage the implementation of <u>efficient employment relations</u>. Labor markets, the courts, and our legislatures all influence the allocation of our scarce labor resources. Adoption of sections 4, 8, and 9 of HR4000 is likely to encourage litigation and inefficient employment practices which will be implemented to avoid liability. They are unlikely to have any significant effect in expanding the employment opportunities available to members of the minority groups identified in title VII.

submitted by
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February 20, 1990.

Chairman HAWKINS. Thank you, Professor.

Mr. Rabkin, I understand you have not testified. Will you proceed.

Mr. RABKIN. Yes. I just want to make three points and try to avoid repeating anything that has been said earlier.

The three main points I want to make are first, of course, this will encourage litigation; second, of course this will encourage greater reliance on quotas; and third, if you step back from it and ask what will we be getting for that, I think there is reason to be very depressed about really we will be getting from all of that extra litigation and all of that extra reliance on quotas in ordinary employment practices.

So, first, is this going to encourage litigation? You are making it easier to collect attorneys' fees in Section 9. You are making it possible to collect punitive damages, which means that you can now pursue Title VII cases on contingency fee speculation through the provisions in Section 8 and you are making it easier to win cases through various provisions in Section 4 and Section 5.

It seems to me inevitable when you make it easier to win cases and easier to make money by bringing successful cases that you are going to have more litigation. That seems to me just straightforward and obvious.

Earlier today, you had testimony—I think it was from Marcia Greenberger, who suggested that most people who bring Title VII cases are not in it for the money; that is, the attorneys are not. They are not making much money from it, she said. Nonetheless, there has been an enormous increase in the volume of Title VII litigation already and you have to wonder, if there is no money in it, why are the attorneys doing it? I think if you offer the possibility of making more money, you will have more litigation. I think that is very straightforward and clear.

The second major point I want to make is that this would be encouraging reliance on racial quotas. You have gone back and forth on this a number of times and I don't want to—the hour is very late—I don't want to repeat what has already been said.

Let me just point out that—I mean, I agree very much with Representative Fawell that the extent to which this encourages quotas depends on how you interpret phrases like disparate impact, like essential to job performance, like, group of practices. Something that nobody has mentioned, but seems to me important, is that at the end of this bill, in Section 11, you tell courts—we have to interpret these phrases which are so significant in determining the extent to which you really are pushing employers towards quotas. You are telling courts always interpret all of these ambiguous, disputable phrases in the most generous way possible from the standpoint of achieving the ends of this legislation.

It should be broadly construed to effectuate the purposes of civil rights legislation. That is one thing that I think is really going to push the courts towards more dangerous interpretations.

Second, if there are any ambiguities about what you mean by the purposes of this legislation, I think if you step back and think about what this legislation is, you are demonstrating, if you enact this, that Congress takes it very much amiss if courts rule against civil rights advocacy groups. I mean, that seems to me a lot of what

this hearing was about. People came forward and said, we are very disappointed in the courts. We are very disappointed. Congress now has to step in because the courts have not done it. If you now enact this legislation, you are sending a clear message to the courts. It is more than a message; I mean, it is a rap on the knuckles. You are saying, "You boys failed us. You did wrong. We have to correct you now," and I think that is a message which is bound to be heeded by the courts and I think it is bound to mean that interpretation of these ambiguous provisions will be pushed further towards those interpretations which really make employers feel they must have hiring by quota.

Now, the third point I want to make is, even if you say that I am being too pessimistic about this, even if you accept the interpretations that have been advanced earlier today, a number of witnesses claimed that this legislation really is just taking us back to 1988. It is not doing anything to significantly expand the amount of litigation or significantly expand the pressure on employers. It is just restoring the status quo.

Even if you look at it in that way, I think it is fair to ask, what was it you were really getting from the status quo? Was the status quo really helpful? A number of people celebrated the enactment of Title VII as one of the great achievements of the 20th century. I don't mean to belittle—Mr. Chairman, I certainly do not mean to belittle the Congress that enacted Title VII, but I think we are in danger of congratulating ourselves over good intentions and not stepping back and looking seriously at what has Title VII actually brought us. What did it bring us up until 1988?

Now, I give some string of depressing statistics in my testimony. Let me just mention a few of the most important. I took this out of a volume that the National Research Council of the National Academy of Sciences put together, which is a very sobering, very impressive volume. I think it is not axe-grinding. They tried, I think, conscientiously, to collect as much reliable data as they could to show you what is the state of, let's say, racial disparities in America.

They say right at the beginning, since the early 1970s, the economic status of blacks relative to whites has, on average, stagnated or declined. Title VII, in the good old days before the Supreme Court ostensibly changed it around, even in the good old days, Title VII was not very effective.

I think it is hard to claim that there was a tremendous increase in discrimination or in racial prejudice during the 1970s and 1980s. Nonetheless, in a whole variety of ways, life in inner cities deteriorated sharply with a whole series of social problems which became much worse. Crime increased dramatically, the breakup of families increased dramatically, drug use increased dramatically, school achievement either declined or, for part of the 1970s, improved and then fell in other respects.

On the whole, when you look at what our experience has been with civil rights litigation, it is not very encouraging. I am not urging some clear alternative here, but I think people ought to step back and ask themselves, what are we getting from reintensifying this approach to racial disparities, this approach which says, if

there is something wrong, let's have litigation and let's have employment quotas.

I think that is, on the whole, not something that has worked well for us and I think it is not going to work better just by insisting on having more of it.

Thank you.

[The prepared statement of Jeremy Rabkin follows:]

Statement

of

Prof. Jeremy A. Rabkin

Cornell University

on

H.R. 4000, The Civil Rights Act of 1990

before the

Committee on Education and Labor

and the

Judiciary Subcommittee on Civil and Constitutional Rights

February 20, 1990

Testimony of Prof. Jeremy A. Rabkin, Cornell University: Problems with the Proposed Civil Rights Act of 1990

Committee on Education and Labor and Committee on the Judiciary U.S. House of Representatives, One Hundred First Congress Washington, D.C. February 20, 1990

Thank you for this opportunity to discuss the proposed Civil Rights Act of 1990. I am not a lawyer nor do I speak on behalf of any organized advocacy group. I am a social scientist by training and I have devoted considerable attention to civil rights policy over the past decade. I have written about civil rights regulation, testified on civil rights bills at other congressional hearings and testified at hearings of the U.S. Commission on Civil Rights.

But I come before you more as a concerned citizen than a technical expert. I am very much concerned about the legislation you are now considering. It seems to me tragically misconceived.

This legislation seems to rest on two premises, both highly dubious. First the sponsors of this bill seem to believe that discrimination remains the major problem for racial minorities in this country. Second, they assume that employment quotas and ambitious lawsuits are the solution for this problem.

There is substantial reason to question both of these claims. But let me start by calling attention to the circumstances in which this bill has developed. It is true that the present bill has been embraced by many lawyers. You have no doubt heard, for example, that the American Bar Association has urged legislation of this kind. I hope

you will not be overly swayed by this. The American Bar Association is primarily a trade association and some lawyers have been doing quite extensive trade in employment discrimination cases. As the Federal Court Study Committee recently noted (*National Law Journal*, Feb. 12), the number of private discrimination claims filed under Title VII in federal district courts has increased by over 2000% since 1970. Race discrimination (or sex discrimination, for that matter) surely did not become *more* pervasive in the late 1980s than it was in 1970 -- let alone twenty times more pervasive. Instead, the amount of litigation increased because the plaintiffs bar became more adept at turning employment disputes into successful lawsuits.

The proponents of the present bill claim it is necessary to reverse a series of restrictive Supreme Court decisions from last year. It seems to be true that the Supreme Court's decisions have made it harder to pursue certain kinds of discrimination cases through the courts. But two other facts should be noticed. First, the Title VII plaintiffs bar was apparently having trouble even before the Supreme Court rulings of 1989: the annual number of private plaintiff filings in the U.S. District Courts under Title VII had actually peeked in 1984 (at almost 9,000 a year), falling off considerably (to almost 7,000) in 1985 and not fully recovering thereafter (according to figures published by the Administrative Office of the United States Courts). Second, the present bill does not simply reverse the effects of recent Supreme Court rulings. It opens quite new vistas of litigation, most notably by authorizing damage claims, including punitive damage claims, under Title VII. So, at a time when a previously burgeoning sector of the legal industry

seemed to be faltering, this bill would come to the rescue by opening wider market opportunities for litigation. Lawyers will no longer have to settle for mere lawyers fees. Title VII lawyers can now compete with ordinary tort lawyers, operating on speculation for a percentage of the damages. And if the pattern in other areas holds up here (as we have every reason to expect), lawyers will retain the lion's share of the money that changes hands.

What will be the consequences for employment? Surely this legislation will greatly increase the incentive of employers to rely on racial quotas in hiring and promotion. For they are now told that any "group" of employment "practices" -- in other words, any factor, which need not be separately specified by plaintiffs -- may leave them liable for discrimination damage awards, if such "practices" produce an unfavorable "disparate impact" on minority employment. The employer who manages to fill quotas, on the other hand, will not have to defend his standard "practices" and has a much reduced risk of liability. So many employers are bound to conclude that it is cheaper and safer to rely on quotas, even if this means some loss in productivity.

Will this produce significant employment gains for minority workers? Sad to say, the answer may be no. Pressure to adopt hiring quotas have, after all, been a part of civil rights regulation for almost twenty years. What gains have these pressures secured until now? Some studies claim that civil rights regulation has simply redistributed opportunities from unregulated (or less regulated) sectors of the employment market to the more heavily regulated sectors. But even if we take the more optimistic view and

credit past efforts with some overall expansion in employment opportunity, the larger picture remains quite discouraging.

The National Research Council of the National Academy of Sciences recently published a very detailed survey on the condition of blacks in America -- *A Common Destiny, Blacks and American Society*. It summarizes the overall experience of the last two decades -- precisely the period of most intense enforcement of antidiscrimination measures -- in stark terms: "The greatest economic gains for blacks occurred in the 1940s and 1960s. Since the early 1970s, the economic status of blacks relative to whites has, on average, stagnated or declined." (p. 6) If some people of minority backgrounds have benefitted from expanded opportunities over the last 20 years, for most inner city areas, all the civil rights efforts of recent decades have not brought an era of progress. The terrible truth is that for many black people, the last two decades have been an era of catastrophe. The National Research Council volume details the tragic trends for people at the bottom.

First, there is the collapse of normal family life. As late as the 1960s, 75 per cent of black households with a child under 18 included both husband and wife; by 1986, half of such black familes were headed by women. (p. 528) Similarly, at the start of the 1960s, out-of-wedlock births among black mothers were substantially less than 20 per cent of the total; by the mid-1980s, some 60 per cent of black babies were born out of wedlock (compared to 12.5 per cent among whites). (515-518)

Along with the collapse of the family in the inner city came an explosion of crime.

Like family breakdown, crime engulfed whites as well as blacks but the problem was much more acute among blacks. In the early 1950s, the arrest rate for blacks was 18 per thousand; by the end of the 1970s, it had soared to 100 per thousand (compared with 6 per thousand in the early 1950s and 35 per thousand in the late 1970s for whites). (457-458) Violent crime became so common that homicide emerged in the 1970s as the leading cause of death for young black men (62 per hundred thousand for blacks, aged 15-24, compared with 11 per hundred thousand for whites of comparable age). (415)

The upsurge of crime has gone along with an accelerating epidemic of drug abuse. The scale of illegal drug use is not easily measured in official statistics, but, as the National Research Council concludes, "By any measure, drug problems have greatly increased over the past 40 years." (414) A particularly sad and telling indication is the spread of the AIDS infection -- spread by IV drug users: of all children under the age of 15 who have contracted AIDS, half are black. (420)

In the area of education, too, the last twenty years have witnessed many set-backs and disappointments. [redacted] Performance on standardized tests of educational achievement was down (or stagnant) for both whites and blacks through the 1970s, which did nothing to reduce substantial gaps between black and white median scores. There has been some improvement in the 1980s. But the scale of the gap between black and white performance still dwarfs the scale of the improvement and in some areas, the gap has actually widened. (349) Similarly, high school graduation rates improved for whites and blacks, yet black

youngsters were twice as likely as whites not to finish high school. Black college enrollment rates actually peaked in the mid-1970s, displaying a "precipitous decline" thereafter, while "the college entry rates of whites rose almost continuously" (36.5 per cent of black high school graduates entered college in 1986, compared with 57 per cent of white); at the start of the 1980s, blacks were still only half as likely to have completed four years of college as whites of the same age group (11 per cent vs. 25 per cent for men) (339-340).

Much else may be summed up in this one dismaying fact: employment rates among black males in the 1980s were not only much lower than for white males but much lower than they had been for black males in earlier times. Thus, in the early 1950s the odds of being unemployed were essentially the same for young whites (ages 16-24) as for young blacks; by the 1980s, young blacks were 2.5 times more likely to be unemployed. (304) So, even in regard to employment, itself -- and then, even by the simplest criteria of having a job or not -- two decades of civil rights regulation has left a significant portion of the black community worse off than it was before.

I do not pretend that the explanation for any of these patterns is clear or simple. Some scholars have emphasized that the changing character of the economy has sharply reduced opportunities for low-skilled employment and that this has had a disproportionate impact on black workers, more of whom arrive on the job market with limited training and limited skills. Lack of employment may then increase strains on family life, exacerbating problems in the education and upbringing of the next generation.

The point I wish to emphasize is that in many ways, the problems of the inner city -- of what has been called the underclass -- are far worse today than they were 20 or 30 years ago at the outset of federal anti-discrimination efforts. Of course, I do not at all suggest that civil rights regulation has caused these problems. But I do want to emphasize -- what I think can scarcely be disputed -- that all our efforts to reduce employment discrimination over the past twenty-five years have failed to ameliorate the conditions of those left behind in the inner city. The problems of young people in the inner city -- unemployed, unskilled, seemingly bereft of hope -- surely deserve a higher priority in public policy than the complaints of people already employed and earning a living.

Yet what is the Civil Rights Act of 1990 really going to do for the inner cities? Is this bill going to do anything at all to bring back fathers and rebuild families? Is it going to do anything at all to stem the tide of drugs? Is it going to reduce the ravages of crime and violence in the inner cities? Is it going to encourage able youngsters to stay with their studies and go on to college? If the previous civil rights policy of employment quotas has done so little, why should we think this intensified version of the same policy will do much better? At best, it seems quite irrelevant to alleviating the most dismaying racial disparities in American life.

In fact, this bill may actually do harm. Let me suggest three ways. First, it sends a dangerous signal to employers. It tells employers they ought to be very careful about hiring marginal employees with minority backgrounds. It tells them that if they take a

chance on employing unskilled and inexperienced employees and the particular employees then run into problems, they may have difficulty enforcing work standards or terminating the troublesome employees -- without risking a lawsuit. Employers may not respond by openly discriminating but they may try to reduce their need for low skilled workers to reduce their risk. And this may lead to a reduction in job opportunities in precisely the most crucial areas.

Second, by intensifying resort to quotas, this legislation will inevitably suggest special preferences to many people. Preference schemes always breed resentment among people who are not preferred and this in turn will surely reduce overall support for other policies demanding sacrifice from the wider public. This is not the place to itemize truly appropriate or promising alternative policies for the inner cities. But the most obvious and urgent -- from improving the schools to pursuing the drug war -- are sure to cost more money and much of the expenditure may be perceived as "special programs" for the beneficiaries of employment quotas. "We gave at the office" -- or the at the factory -- will be the response of many people when asked to shoulder further burdens to deal with problems of the inner city.

Third, and most serious, this legislation sends terrible signals to the people most directly concerned with public policy in this area. To the established civil rights groups who have championed this legislation, it says: "More of the same is appropriate and acceptable" -- though it has plainly failed in central ways. To politicians it says, "It is enough to please the civil rights groups; you don't have to worry about whether you are

really dealing with real problems." So our policy evasions will continue.

Let me be blunt. This approach is not merely a disappointment. It is a scandal. The sponsors of this legislation are not even proposing to "throw money" at the problems, in the well-meaning, if naive fashion of Great Society programs. Instead, they propose to throw money at lawyers who may be hanging around the remotest periphery of the problems or at lawyers who are simply hanging around. A generation of inner city youth is drowning in drugs and violence and despair. Does Congress really have no better ideas than encouraging new lawsuits to intimidate employers?

It seems to me we are repeating the mistakes we have made in relation to hunger and wretchedness in the Third World. Moved by accounts of the suffering of ordinary people in underdeveloped countries, we threw money -- without paying much attention to whether our money ended up serving the poor or the dictators who oppressed them. What you are essentially doing, here, I fear, is the domestic equivalent of buying more shoes for Imelda Marcos.

Chairman HAWKINS. Thank you, Dr. Rabkin.

I would certainly agree with you that there were problems that we suffered from—increases in crime, school achievement, these things. I don't know how they are related, however, to Title VII. I could list you many of what I think were remarkable achievements of many minority groups, women who have gone into very nontraditional occupations and so forth—not as much as I would have wanted, but I think that the accomplishments of the 1970s were reasonably good.

What caused the increase in crime and lack of school achievement, I think, could be ascribed to things other than the passage of Title VII. I don't think Title VII actually promoted such things. So it is a question of what happened, what was the cause and effect. I disagree that Title VII hasn't been of some assistance, not as much as some of us anticipated, perhaps, but economic policies could be, I think, related somehow to some of the setbacks in the decade of the 1980s.

But apart from that, you indicated, I think, at the beginning of your testimony—let me refer to your written testimony. You suggest that the civil rights movement should focus less on those who have jobs, but are discriminated against in the workplace, and more on those who don't have jobs. I couldn't quite make out what particularly you were saying there and how it relates to the proposal before us because my understanding is that we are living now in a very crucial period of time in which, between now and the end of the decade, eighty-five percent of those entering the work force will be minorities, women and immigrants. If they suffer from, let's say, barriers that prevent their entering the work force based on their ability or their merit, then it seems to me we are running up against serious trouble, that we need everybody we can use and that is irrespective of color or national origin or sex.

I don't see how the recent decisions in any way will help those individuals if they don't have an opportunity to be free from discrimination and, assuming that that is true, I can't see how those Supreme Court decisions of 1989 will in any way facilitate their entrance into the labor force. You seem to take the opposite point of view for some reason and I don't understand it.

Mr. OI. If we move toward more inefficient employment practices, the size of the pie is going to get smaller, and if you look at the development and the well-being of, say, black men, the data assembled by Smith and Welch, so that until 1980, the status of black men improved steadily due in large measure to improvements in the quality of schooling. But since the 1980s, it has stagnated.

Now, the crime statistics, Christopher Jencks argues in a recent article in Focus that it is going down within each racial group and that is a set of numbers that I have not—I have looked at them, but they are at odds with what, you know, Julius Wilson and others are saying.

Chairman HAWKINS. I don't exactly agree with Mr. Jencks as being any authority. I know that in the field of education, we have very sharp differences from him and I think he has been disproved in his theory that the schools don't make a difference——

Mr. OI. Oh, I disagree.

Chairman HAWKINS. [continuing] that it is the background—if you go on that basis, then it would seem to me we are in a terrible fix.

But in terms of——

Mr. RABKIN. Could I just——

Chairman HAWKINS. Mr. Rabkin, maybe you would like to respond to that.

Mr. RABKIN. I would like to respond to that. I mean, I very much agree with what Professor Oi was just saying.

I just want to say two other things. It is not that just in general you are imposing rigidities, it is that, in particular, I think you are building into this bill here additional disincentives for employers to take a chance on unskilled, inexperienced workers, people who they are not sure of. You are really saying to them, watch out. If anything goes wrong, if you end up firing those people, you will have a lawsuit on your hands. That is the way in which I think Professor Oi is exactly right. The incentive there for employers is to say don't hire these people. Either get machines, get computers or get temps, but don't take a chance because you have made it too costly.

Chairman HAWKINS. That hasn't been my experience and I don't think the record of the 1970s bears that out. Employers will employ those who are profitable to their operation, and many of those who did act from bias later relented. I know that AT&T was a long-time opponent of civil rights as we know it or as it is known in the Civil Rights Act of 1964. But then they found out that they could integrate workers, minorities and women into their operation and they became a strong supporter of it. I think some people need the law in order to compel them or to encourage them to do what is right.

But leaving that aside, it just seems to me that under our system of government, those who are victims of discrimination or the denial of civil rights are entitled to some remedy for it and justice under the law.

We had cases that were discussed this morning, sexual harassment cases, for example, including a woman that suffered severe damages as a result of being harassed on the job——

Mr. RABKIN. Those were certainly horrifying——

Chairman HAWKINS. [continuing] who had no damages whatsoever. She suffered physical damage for the rest of her life and she had no remedy, merely because she was denied her civil rights.

Mr. RABKIN. Now, I thought those were horrifying cases, but I didn't think they were in particular cases about employment discrimination. I mean, I thought they were cases about assault, harassment, I mean, State tort law——

Chairman HAWKINS. That is the point of the civil rights protection.

Mr. RABKIN. It is if you insist on doing it that way, but it just seems to me——

Chairman HAWKINS. I count that as a part of employment, not only when the contract is made—you are pleading in another area now, but the conditions are rising out of the employment itself.

Are you saying that a woman is not entitled to be free from being harassed on the job on a sexual basis?

Mr. RABKIN. I think that kind of physical harassment ought to be severely punished, but——

Chairman HAWKINS. Do you believe she is entitled to any damages?

Mr. RABKIN. Yes. Sure.

Chairman HAWKINS. She has medical expenses and all and no remedy whatsoever?

Mr. RABKIN. I am surprised that that State does not have a cause of action under its own——

Chairman HAWKINS. I would agree with you that it is possible that a proposal of this nature may increase litigation. However, I say, as between the litigation and whether or not a person has a right to have their civil rights protected and to secure sufficient remedy for it, including damages, monetary damages for it, I think that is a risk we run.

We can't discourage litigation in the courts merely because it may be costly, when the rights of people are trampled upon. It just seems to me you have to make that choice and if it is a matter of increasing litigation——

Mr. RABKIN. Litigation could be preferred to regulation.

Chairman HAWKINS. I don't know of a—if we get into the field of regulations, you are going to open up another can of worms and I don't know that——

Mr. OI. I realize that.

Mr. RABKIN. You also are encouraging—I mean, I think there are some genuine cases of discrimination and some of them are really appalling and you really think the system demands a response, but it seems to me a big part of the problem today—I think the larger part of the problem, if you look at disparities on a statistical basis, is young people aren't receiving adequate schooling. There is a significant portion of minority youth that are just not getting into the employment market and to say that that is a problem of discrimination, I think, is fooling ourselves.

We ought to be thinking about——

Chairman HAWKINS. I would think the school issue that you bring in has a direct connection with civil rights. I think it is due to other matters. The decline in scholastic achievement may be due to something other than discrimination. I would assume there may be some discrimination in it, but we have not as a nation, in comparison with other industrialized nations, invested as much money in education, either.

Now, you could say it is due to that. I think probably some discrimination has occurred, but it is pretty obvious that those who have suffered from poverty are the ones who actually have the problem in the field of education. But I think that is altogether a different situation.

I don't want to prolong this too long. I realize that we have kept both witnesses around here for a long time today and I wish to apologize for stringing the hearing out as much as we have, but obviously, it has been something that we have invoked an open national debate, which is as it should be.

I had better yield at this time to Mr. Fawell so I don't take up all the time.

Mr. Fawell.

Mr. FAWELL. Thank you, again, Mr. Chairman.

I wish to thank both of you for your testimony. I am sure that at times you must recognize you are preaching what I would call a zero political gospel, but I think you are centering in on some thoughts that we in Congress simply have to listen to. I know it is difficult. It is much more popular to unfurl the pennants and jump upon the horse and state that all the things you are for to remove or curtail the great tragedies of life and so forth and so on. The fact that what we are doing, in your quiet and efficient language, is creating inefficient employment practices and the pie gets smaller.

You are imposing rigidities. You are imposing disincentives on employers to take chances, especially to deal with at-risk employees and one can go on and on. That is difficult when people have a crusade, as I think many see it here, which, if you will forgive me, comes close when you see the mammoth proposals that are suggested here to just plain burning books. We will not hear of this, but most in Congress will never have read these books. More than that, never have deeply reviewed all the nuances and the importance of these decisions.

Some aspects should be corrected, no doubt. I am ready to say let's expand Section 1981 to indeed give to people under those circumstances the right of a jury trial and compensatory damages.

By the way, 1981 has, ever since it has been utilized, after the *Runyon* case, has always said that if the defendant can show that this would have happened anyway, then the defendant is held harmless. Well, we are going to eradicate that too. In my view, we have a bulldozer here and we are just going to knock down every tree and shrub, and we don't know what we are doing. And I think it is unfortunate.

But I appreciate what you are saying. One of the greatest things, I believe, that has happened in America in the Eighties has been what the free enterprise system has done; while Congress has built up $3 trillion—Congress, not just Presidents, but Congress, $3 trillion of debt and we are adding a quarter of a trillion per year. What a horrendous, embarrassing record we have? We find we have created more jobs in the last eight years than all of Europe and all of Japan and all of Canada put together. We have made room for women, for Baby Boomers. In Japan, they don't allow women to work hardly.

We have done a lot of right things too, and we have built $2.7 trillion in pension funds, voluntarily created by business and so forth and so on. Doesn't make business good at all, and they are doing a lot of things wrong and so forth. But we keep chipping away, adding and adding and adding, and we won't be happy till we have killed the goose that laid the golden egg.

And we take these causes that look so great, but we just plain—nobody has had a good idea they don't carry it too far—and, boy, do we in Congress carry it too far.

I would like to have the reactions of both of you as academicians, for instance. What do you think about Congress wanting to just eliminate five to six Supreme Court decisions in one fell swoop? Is that wise to do?

Mr. OI. I will start with that. I think that where the Court is at odds with the principles of fairness and so forth, Congress has

every right to act, and Congress ought to act in those cases. The 1954 School Desegregation Act I think was a case where the courts took action before Congress, where Congress was unwilling to. And I think it can go both ways.

But I think that when you look at the steps that you are proposing now in expanding the scope of Title VII when that will also apply to the American Disabilities Act, and in the case of Disabilities, you have got an open-ended net there. Because when you talk about national origins, the number of Afghans you see out there you can count, and that is a fixed number. But when you talk about the number of people with disabilities, that is a flexible and master concept, and I think that we want to promote employment opportunities but we don't want people looking at this system as one in which they are entitled to jobs. That they have to earn that. But we want to make equal access the emphasis, where we can keep efficiency moving.

Mr. RABKIN. On the question of the Supreme Court, I am not—I don't feel very pious about the Supreme Court. I have often in the past wished that Congress had gotten out there and overturned the Supreme Court. So I don't have any objection to it in principle either.

But I do worry about the appearance of saying there is a string of decisions we didn't like and we are going to overturn them all at once. Because it seems to me the message, just listening here today, put aside partisan rhetoric outside, but even here where people were speaking rather carefully and deliberately it kept being said over and over again the Supreme Court didn't come down the way we want them to and now we have to step in and make the policy, go back.

I mean and people really were talking as if the Supreme Court's obligation is to decide the way civil rights advocacy groups want the Supreme Court to decide, and that surely is a bad understanding of the Supreme Court. I mean it is bad—it is, I think, a bad understanding of civil rights. I mean, with all respect to Benjamin Hooks and the Chairman. I mean, people—Mr. Edwards, or people who have spent their lives doing it.

Civil rights is not merely a sort of special interest program like agriculture. I mean this is something in which the whole country has a great stake, the whole country cares about it. If you are going to have a national holiday for Martin Luther King, which I think is very appropriate, then you have to admit that this is an American institution we are talking about. It is not the property of particular advocacy groups and, in particular, advocacy groups that seem, you know, very stuck on continuing to do what they did 20 years ago.

I think you have to allow for the Supreme Court saying, well, no, we see things differently. I am not saying you can't overturn it. I just am uncomfortable with what seems to be the political premise here that they are supposed to decide the way the Lawyer's Committee for Civil Rights says, and if not, we go to Congress and overturn them. That is just, I think, a very, very bad perspective on this.

Mr. FAWELL. Well, I thank you, and I do want to add this, Mr. Chairman, too. I certainly believe in the checks and balances

theory, and, obviously, in instances where they disagree with the Supreme Court has every right, and indeed they should be taking action. My only question is, five, six, seven, eight and the *Betts* decision, maybe the *City of Richmond* will be thrown in here before long.

Whoa. There isn't time. We have got to slow down a bit. I know that sounds terrible to people who deeply believe that we aren't doing all we ought to do in civil rights. I don't mean it that way.

Mr. RABKIN. Well, it encourages people to view them as a package, which I think is also a mistake. I mean they assume that if there are one or two that you take issue with, all the others are basically the same and you throw them in a package. So that is, again, I think very sloppy.

Mr. FAWELL. Well, thank you very much for your testimony. I appreciate it.

Chairman HAWKINS. Mr. Fawell—and this is not an argument, it is just a discussion. I don't think we have the feeling that we are seeking in a hostile manner to overturn the Supreme Court decisions. I don't think that is involved, really. I think that what we are concerned about, that is, at least, from my point of view, is the Supreme Court misinterpreting the original intent of the law as we passed it in Title VII in particular. They are saying that it is this intent, and I think they threw it back into our court to say clearly what we meant when we set up the machinery under Title VII. And I think that because they, in effect, did that, that is what we are addressing, and saying, "Now, look. Our intent was very clear."

I think what we have got to do is to make the law clearer to show what we originally intended. Now we may begin to differ and go back, and in a sense we are revisiting the Civil Rights Act and saying what our intent is and spelling that out. But I don't think there is any feeling that anyone is challenging the Supreme Court other than with regard to what they have said was our intent. I think they in a sense have given this opportunity to us.

Now we deal with all five cases because, in effect, that was involved in all five cases. I think if we had to deal with them separately we would be around here for another decade.

Mr. FAWELL. Well, may I say I respect the Chairman very much, and I agree with a good portion of what you say. My point is, though, that it has taken how many years for the Supreme Court, for instance, to carefully guide us along in regard to the 1964 Civil Rights Act. Even the theory of disparate impact isn't even in the statute, it was created by judicial fiat. It was nurtured. It was painstakingly brought this way and then back this way, and in an effort I think truly by the Court to do justice and as best they could see it.

And there are, no matter what the cause, outer limits. When the rights that we want to advance for one group of people, you go so far and you begin then to have some problems. And as soon as the Supreme Court began to say, "Well, there are outer limits and perhaps we have reached them," and it will take, truly, and it does take at least five years before you really understand what the opinions do say because they are based upon certain facts. In *Wards Cove*, as I have indicated, it is my view that it was poorly tried case

and it would have been won if it had been adequately handled. That is just my view.

And then to truly try to do it with five or six or seven cases, that to me is just impossible. It is impossible for Congress to understand what they are doing. It is tough enough one case at a time, but I really believe that we are going to make egregious mistakes and, like the old elephant—no pun intended—this is a donkey, I guess, in many ways. But elephant or donkey, we are in a china shop and we are going to have an immense cost with all the damage we are doing.

Chairman HAWKINS. As long as you are on this committee, we aren't going to go too far and make too big a mistake.

Mr. FAWELL. You flatter me, and overestimate.

Chairman HAWKINS. Mr. Edwards?

Mr. EDWARDS. I think the debate is very, very helpful, Mr. Chairman, and I welcome it. I think we are misstating the issue. I think that it is not something to worry about when cases of legislative interpretation are brought before the Supreme Court and the Court misinterprets the legislative intent, so Congress reverses the cases, five or six cases, in a statute. That is not the problem.

In 1964, when we enacted the omnibus civil rights bill, and, incidentally, we covered a lot of—it was an omnibus bill like this bill is, and we didn't hear the complaints that we are hearing about this bill being an omnibus bill. It worked out pretty well.

But the issue is whether or not Americans are being treated fairly and whether or not their rights are protected under the Constitution and the civil rights laws. That is the only issue we should be discussing, not whether or not we are rushing to judgment on a few decisions of the Supreme Court.

It is our information, and we are going to have a lot more witnesses, that a lot of people's rights are being violated. A lot of good suits by people badly discriminated against are being dismissed or abandoned because of these Supreme Court decisions. We are going to have some horrible examples here.

And we are not here to say, "Well, we can't rush it. It is going to take us five or six years to examine that." When we find lots of people being hurt in our country by being denied civil rights and constitutional rights, we are supposed to do something about it. That is the oath of office we take.

And this is just the beginning of our examination of the facts surrounding these suggested reforms of the civil rights laws, and I hope that we get a lot more information like we got from you two witnesses, which is certainly very helpful, and I listened with great respect to you, sir. Thank you.

Chairman HAWKINS. Well, I again, as Chair, apologize. I must say that you have had a great deal of patience.

Mr. RABKIN. Could I just respond to one thing, Mr. Chairman, that Congressman Edwards said?

Everyone feels bad when they hear a story about someone who has been badly mistreated and that person has no recourse. That is why those stories are very effective.

I am not disputing that—I mean I feel bad when I hear these stories and the person has no recourse. But if I could give you just one quick piece of advice. Don't focus too much on stories of individuals

like that. That is what lawyers do. They go into court and they say my client suffered. My client had, you know, pain and anguish. It is very dramatic and it's effective and it persuades juries and it may be true in particular cases, but when you are thinking about policy you have got to sit back and think about things that don't have individuals who might be in lawsuits, who don't have immediate dramatic focus on a particular person but still are costing the country and maybe actually costing women and minorities. You have to think about things like employment opportunities drying up. That is something you ought to be really, really disturbed about. And it doesn't show up in a story like this person was ruthlessly mistreated. It just happens that black unemployment is 2½ times white unemployment, and we don't have anyone to sue for that. So we just kind of walk away from it or we pretend it is discrimination. But that is a real problem and I think you have to focus in on general trends or market forces and the way they operate, and not let yourself be overly preoccupied with the individual case.

Chairman HAWKINS. The reports, if I might say so, that are in the record, I haven't had a chance to read through them, but my understanding is that we have countless numbers of such cases that are documented enough to show a pattern, really, that is developing. So I don't think we are going to let one case disturb us. When I get one case, something like President Reagan, he always gave us the anecdote and that anecdotal approach was largely his policy. But I think it is very impressive. But I don't think we are going to be carried away. I think we are going to listen to both sides and then make our decision.

Mr. OI. Could I raise one issue. It is that we want to get greater compliance with the law, but we want to get that compliance under this bill and Sections 8 and 9 through encouraging greater litigation, and to establish what rules constitute proof. And it is not at all clear that that is the way you are going to reduce true discrimination in the labor market, especially if firms begin to adopt hiring and promotion decisions, the use of temporary help agencies, the use of foreign labor to get around these, and the net effect of this is what would be the net effect upon discrimination and the well-being of minority workers.

I think you have to look at the whole picture as to whether or not going at it through the litigation route is the right one. That is the place where I have trouble, is that it is not at all clear that expanding Title VII is in the public interest. Perhaps expanding the resources or reorganizing EEOC, I don't know.

Chairman HAWKINS. Well, I hope you are right. We live in a society where if absolutely everybody observed the Golden Rule, perhaps we wouldn't need law at all. But, unfortunately, there are some people who don't, and it is only for those few. I think most employers, for example, uphold the law, and they have done very well under the Civil Rights Act since 1964. We were getting stability, I thought. And we have as many on that side who are pleading to settle something, and not continue a lot of litigation, by making the law clear. And I think that is all we are trying to do.

But anyway, we appreciate your testimony. Your views are certainly strong and we appreciate them. And we will certainly take the advice that you have given us and, as I indicate, as long as we have Mr. Fawell and others with their strong legal ability on this committee, I think we will come to an adjustment of this matter.

Thank you very much. That concludes the joint hearing.

[Whereupon, at 4:23 p.m., the committees were adjourned to reconvene subject to the call of the chair.]

HEARING ON H.R. 4000, THE CIVIL RIGHTS ACT OF 1990

FEBRUARY 27, 1990

HOUSE OF REPRESENTATIVES, COMMITTEE ON EDUCATION AND LABOR, AND THE COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS,
Washington, DC.

The committees met, pursuant to notice, at 9:35 a.m., in Room 2175, Rayburn House Office Building, Hon. Augustus F. Hawkins [Chairman] and Hon. Don Edwards [Chairman] presiding.

Education and Labor Committee members present: Representatives Hawkins, Clay, Murphy, Owens, Hayes, Sawyer, Payne, Unsoeld, Goodling, Gunderson, Bartlett, Fawell, Henry, and Smith.

Judiciary Subcommittee members present: Representatives Edwards, Sensenbrenner, James, and Campbell.

Education and Labor staff present: Reginald C. Govan, counsel for civil rights; Gregory R. Watchman, associate counsel; Gale Barron Black, associate counsel; Eric P. Jensen, staff director, Subcommittee on Employment Opportunities; Randel Johnson, minority labor counsel; Kathy Marshall, minority professional staff member; and Tracy Hatch, minority professional staff member.

Judiciary subcommittee staff present: Ivy Davis, assistant counsel.

Chairman HAWKINS. The joint hearing is called to order. This is a hearing of Committee on the Judiciary, Subcommittee on Civil and Constitutional Rights, chaired by my distinguished colleague, Mr. Edwards, to my left, and the Committee on Education and Labor.

We have a full agenda this morning and several of the witnesses I think have a time constraint, particularly Mr. William H. Brown III, who will be introduced later. I understand he must be at some other place at 10:45 so I would suggest Mr. Brown, at that time, regardless of what the proceedings may be on this side of the table, that you may exit in good grace and without suffering any indignity, we assume.

We are very pleased to have on the first panel both the Honorable William H. Brown III, Former Chairman of the Equal Employment Opportunity Commission, and Mr. John J. Curtin, Esquire, President-Elect of the American Bar Association.

We welcome both of the distinguished witnesses and we call on Mr. Brown first and then we hope that we will have time to question each of the witnesses. Their prepared statements in their en-

tirety will be printed in the Journal. We look forward to a very lively discussion this morning.

Bill, it's a pleasure to welcome you back to these hearings. I recognize that we are again on the other side of the table, like during many of the hearings we had earlier on the Equal Employment Opportunity Commission. While we sometimes disagree, we were very, very respective of your views, and certainly, we miss you terribly in the Federal service.

I'm sure that you're better off where you are, but we would certainly like to avail ourselves of every possible service we can. So, would you kindly proceed as you so desire.

May I interrupt just one second. I think Mr. Edwards has a statement that he would like to read into the record.

Mr. EDWARDS. Thank you, Mr. Chairman. I do ask unanimous consent that my statement be made part of the record.

Mr. Chairman, may I join you in welcoming these very distinguished witnesses that we have invited today. I'm looking forward to their testimony with great interest.

One point that I'd like to make, Mr. Chairman, is that we're going to focus on the *Wards Cove* case today. At the last hearing a number of our members expressed concern that in a disparate impact case, a prima facie case, could be made on the mere showing of racial imbalance and that would cause employers to adopt quotas.

As former Secretary of Transportation William Coleman told the Senate last week, a prima facie case consists of more than a mere showing of imbalance. Because this statement was so helpful, I ask unanimous consent to insert it into the record.

Chairman HAWKINS. Without objection, it is so ordered.

[The prepared statements of Hon. Don Edwards and Hon. William T. Coleman, Jr. follow:]

Opening Statement
Chairman Don Edwards
Joint Hearings on H.R. 4000
February 27, 1990

This morning we continue hearings on H.R. 4000, the Civil Rights Act of 1990.

Last week, I was encouraged by learn the position of the Bush Administration. The Administration supports overturning Patterson and Lorance. I am glad that the Administration studied the impact of these cases, and welcome its support. I hope the Administration' review of the other cases will lead to support for overturning them as well.

Deputy Attorney General Ayer eloquently stated the Administration's strong opposition to intentional discrimination. Thus, I am somewhat puzzled with the Administration's opposition to the sections of H.R. 4000 addressing intentional discrimination--Sections 5 and 8.

In Section 5, intentional discrimination which was a motivating factor in an employment decision would be actionable. This represents a fundamental principle, that race, color, religion, sex or national origin should not be a factor in making employment decisions. Why does the Administration favor this type of intentional discrimination?

Section 8 provides for damages in cases of intentional discrimination. Remember the context of passage of the Civil Rights Act of 1964, as Chairman Hawkins, Mr. Kastenmeier, and I do. The 1964 Act was a compromise, with compromise remedies. Although remarkable for its era of legalized segregation, the remedies under Title VII created in 1964 are a far cry from remedies we provide in today's civil rights bills.

In 1988, Congress enacted the Fair Housing Amendments Act, which finally gave teeth to the Fair Housing provisions of the 1968 Civil Rights Act. Remedies under the 1968 Act had progressed from the 1964 Act, providing for compensatory damages and up to $1000 in punitive damages. Last year, without controversy and with wide bipartisan support, we continued to provide compensatory damages, removed the cap on punitive damages, and also provided for civil penalties ranging up to $100,000.

Why, more than 25 years after the passage of Title VII and in a time of growing employment discrimination complaints, should we provide far weaker remedies under Title VII? We need to put teeth in Title VII, to serve as a deterrent to violators, and to give victims of discrimination a proper remedy. The proposed new remedies in Section 8 are modest additions, limited to cases of intentional discrimination, and punitive damages would only be available in outrageous forms of intentional discrimination.

Today, we are focusing on the Wards Cove case. At our last hearing, a number of members expressed concern that in a disparate impact case a prima facie case could be made on the mere showing of racial imbalance, and that this would cause employers to adopt quotas. As former Secretary of Transportation William Coleman told the Senate last week, a prima facie case consists more than just a mere showing of imbalance. Because his statement is so helpful, I ask unanimous consent to put it into the record at this point.

I look forward to today's testimony.

TESTIMONY OF WILLIAM T. COLEMAN, JR.
BEFORE THE SENATE COMMITTEE ON
LABOR AND HUMAN RESOURCES
FEBRUARY 23, 1990

My name is William T. Coleman, Jr.[1] I appear in support of S. 2104, which would correct the major problems created by the Supreme Court's 1989 civil rights employment decisions. It would restore the law to where it was until late spring of 1989. It would also strengthen the enforcement provisions of the existing federal guarantees of equal employment opportunity.

This legislation raises a variety of technical issues which the Committee will consider over the course of the next two weeks of hearings. I will address some of those questions later in my testimony, and subsequent witnesses, I am sure, will delve even deeper into the relevant details. There will be ample discussion, probably more than you really want at times, regarding the intricacies of the Federal Rules of Civil Procedure, the various subsections of Title VII of the 1964 Civil Rights Act, and the somewhat arcane legislative history of the Civil Rights Act of 1866.

But first I would like to put the proposed legislation in context of the welfare and the state of the

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[1]Senior Partner, O'Melveny & Myers, Chairman of the Board of the NAACP Legal Defense and Educational Fund, Inc., Secretary of Transportation in the Ford Administration.

Union, at least as I see it and, I am confident, as most freedom loving Americans see it who can be shocked at what happened at Tiananmen Square in China and can rejoice in the freedom which is developing in Eastern Europe.

There is something far more fundamental and far reaching that is at stake in these hearings, and at this juncture in the development of the law than mere technicalities and procedural issues. This year, Mr. Chairman, will be a watershed in the history of civil rights laws -- whether for good, or for ill, the Congress and the President will decide its future course. In February of 1989 no one in this room, or indeed in the White House, could have imagined that the Supreme Court could turn so dramatically away from the national consensus in favor of vigorous enforcement of federal equal opportunity laws. The Court has forcefully reminded us all of how even the most clearly written of statutes can be drained of practical effectiveness by a crabbed, capricious interpretation. We need not debate how far the Court has gone down that road to agree that it has chosen that direction for the law.

If the decisions at issue involved the interpretation of the Constitution, both the terms of the Constitution itself, and simple prudence, would suggest deference to the Court's judgment. But the issue today is the interpretation, and resuscitation, of federal statutes,

matters well within the powers and responsibilities of the Congress. I urge the Committee to correct the problems created by these decisions, and by so doing to change the ominous direction in which the construction of federal civil rights laws appears now to be headed.

I do not ask that you do so out of sympathy or compassion or guilt over past wrongs. I ask it because black Americans, after more than three centuries of contributions to this nation, are entitled to no less. Since 1607 black Americans, a majority of whose ancestors came to these beautiful and spacious shores as slaves, and many of whom fought for the United States for freedom and dignity in all the nation's wars since 1774,[2] have been trying to free themselves from the enduring effects of slavery and from over 347 years of federally and state imposed and sanctioned racial discrimination and segregation. The goal has been to achieve for themselves and their children the dream of being fully integrated into the economic, social, political, employment, business and

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[2]For example, 5,000 blacks fought for America's independence in the Revolutionary War, nearly a century before blacks themselves were freed from slavery. Over 400,000 blacks served in various units during the Civil War and more than 2.3 million blacks have fought for the U.S. in the four major wars of this century. In the Vietnam war blacks were a disproportionate percentage of the soldiers who fought and of those that were killed or wounded. Moreover, this distinguished military service over the past 215 years has been rendered in the face of tremendous hardship, discrimination and segregation within the armed services. See Black Americans In Defense of Our Country, United States Department of Defense (1985).

governmental life of this great nation. As stated above, the ancestors of the majority of black America came to these shores as slaves, under the most inhumane and cruel of conditions. But blacks labored as hard as any men or women to build this great nation out of the wilderness they found -- they cleared the forests, they tended the land, they constructed the houses. The land of opportunity to which millions of whites flocked in the Nineteenth and Twentieth Centuries had to a very significant degree been built by blacks who, despite having been in this country for generations, still could not benefit from the opportunities they had provided to others.

Black Americans today seek in our own country precisely what brings thousands of new immigrants to our shores every year -- to achieve the dream of being fully integrated into the economic, social, political, employment, business and governmental life of this great nation. From the beginning, even when slaves were forbidden to learn to read, or to seek jobs of their own choosing, blacks understood that a good education and a decent job were the keys to full participation in our democratic society. Blacks recognized from the beginning and recognize even more today that education and employment remain the essential tools by which black Americans can avoid, for themselves and for the nation, crime, inadequate housing, insufficient medical care, poor government in the community, high rates

of illegitimacy and illiteracy and all the other evils still shamefully visited upon blacks in our country in greater proportion than upon whites.

For generations -- 347 years -- the task seemed virtually insurmountable for at least three reasons. First, state and federal statutes in many instances required, sanctioned or approved race discrimination or segregation.[3] Second, the great steps taken by Congress after the Civil War were subsequently nullified by the Supreme Court, which misconstrued the Thirteenth, Fourteenth and Fifteenth Amendments and the Nineteenth Century civil rights laws.[4] Third, the practices of the federal and state governments created racial animus and bred among whites, including their children, a widespread feeling of hostility towards blacks. This adversely affected the attitudes that whites would otherwise have towards blacks, causing them in many instances not to realize that blacks have the same yearnings, feelings, ambitions and standards of conduct and

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[3]Even by the middle of the 20th century many states still had segregation statutes affecting such things as travel, hospitals, recreation facilities, washrooms on the job, public schools, miscegenation, jails and adoptions. Violations of these statutes were in some cases punishable by fines and imprisonment. See Greenberg, Race Relations and American Law, Columbia University Press 1959 (Appendix A).

[4]See, e.g., Civil Rights Cases, 109 U.S. 3 (1883); United States v. Reese, 92 U.S. 214 (1876); Plessy v. Ferguson, 163 U.S. 537 (1896).

achievement and yearnings therefor as those of their white contemporaries.[5]

In the middle of this century -- less than 36 years ago -- Brown v. Board of Education was the watershed that began a drastic change both in the law and in the attitude of government officials and private citizens alike. Thus for 36 years this nation has been trying to wipe out a sickness and infection in our society which existed for over three centuries years. Since 1954, although slowly and haltingly, the nation has moved ever closer to a society in which blacks are treated as free and equal. Congress contributed greatly to the pace and direction of that change through a series of bold legislative initiatives.[6] For years, as the nation worked through the intractable

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[5]For another distinctive, discrete minority, Shakespeare's Shylock described the issue as follows: "He hath disgraced me, and hindered me half a million; laughed at my losses, mocked at my gains, scorned my nation, thwarted my bargains, cooled my friends, heated mine enemies, and what's his reason? -- I am a Jew. Hath not a Jew eyes? Hath not a Jew hands, organs, dimensions, senses, affections, passions; fed with the same food, hurt with the same weapons, subject to the same diseases, healed by the same means, warmed and cooled by the same winter and summer as a Christian is? If you prick us do we not bleed? If you tickle us do we not laugh? If you poison us do we not die?" Shylock's alternative was "revenge". Shakespeare, Merchant of Venice, Act 3, Scene 1, lines 50 to 61. The black American, however, has sought relief through the Congress and the courts confident that since his cause is just, justice and fairness will be done.

[6]See, e.g., the Civil Rights Act of 1964, the Voting Rights Act of 1965, the Civil Rights Act of 1968, the Civil Rights Attorney's Fee Awards Act of 1976, the Voting Rights Act Amendments of 1982 and the Fair Housing Amendments Act of 1988.

realities of racial discrimination, a synergistic relationship existed between the Supreme Court and the Congress, each building on the contributions and innovations of the other. By the time of the 1983 decision in Bob Jones University v. United States,[7] Chief Justice Burger could speak with confidence of the consensus, encompassing all three branches of the federal government, that racial discrimination -- public or private -- was contrary to fundamental public policy. That consensus was shared by the vast majority of the American people, who took justifiable pride in the progress the nation had made towards racial justice.

And then in the late spring of 1989, suddenly and inexplicably, the Supreme Court of the United States, which had initiated and contributed so much of this remarkable national consensus, turned in another direction. In a few weeks the Supreme Court handed down a series of decisions that threatened the vitality and enforceability of federal equal employment laws. No one can seriously contend that the statutes at issue were framed in such a manner as to compel these decisions. On the contrary, in virtually every instance the federal circuit courts, or even the Supreme Court itself, had construed the laws in the opposite way. The pattern of these decisions, including Patterson v.

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[7]461 U.S. 574, 598 (1983).

McLean Credit Union,[8] suggests that the Court had abandoned the well-established principle that remedial civil rights statutes ought to be broadly construed. It became all too clear how easily the substance of federal civil rights laws could be strangled in technicalities.

The change was so dramatic and palpable that the Court itself found it necessary to insist, somewhat lamely, that "[n]either our words nor our decisions should be interpreted as signalling one inch of retreat from Congress' policy to forbid discrimination in the private, as well as the public, sphere."[9] Justices Marshall, Blackmun, Brennan and Stevens regarded the decisions as not a retreat, but a complete rout. Justice Blackmun commented in his dissent in Wards Cove Packing Co. v. Atonio,

> One wonders whether the majority still believes that race discrimination -- or, more accurately, race discrimination against nonwhites -- is a problem in our society, or even remembers that it ever was.[10]

As a matter of statutory construction the results in some of these decisions are, to put the matter delicately, far fetched, and in some instances, actually absurd. For example, in Patterson can it seriously be imagined that in 1866 Congress intended to forbid a private

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[8]109 S.Ct. 2363 (June 5, 1989).

[9]Patterson, 109 S.Ct. at 2379.

[10]109 S.Ct. 2115, 2136 (June 5, 1989).

employer from refusing to hire or promote a black because of race, but felt at the same time there would be nothing wrong if the employer hired a black woman and then visited her with harassment which certainly would make the contract a nullity or at least make her life a living hell? But that is the result of the Court's ruling in Patterson. Similarly, are we truly to believe, although the Court in Lorance v. AT&T Technologies[11] so held, that when Congress enacted Title VII, it intended to require an employee to challenge invidiously motivated rules years before the rules were ever applied, and years before the employee even worked in the department covered by the rules. I cannot conceive of how Congress, except as some sort of cruel joke, would have chosen to enact such self-nullifying measures.

The Justice Department has endorsed overruling Patterson and Lorance, and I welcome that decision; but I would urge the Committee still to keep these two decisions in mind in attempting to assess the general Court attitude which gave rise to the other, still controverted decisions.

Justice Stevens, in his Wards Cove dissent, expressed bafflement as to the reason for that decision. "Why the Court undertakes these unwise changes in elementary

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[11]109 S.Ct. 2261 (June 5, 1989).

and eminently fair rules is a mystery to me."[12] This bundle of retrogressive decisions is no favor to employers. In the case, for example, of disparate impact litigation under Title VII, 18 years of decisions after Griggs had refined, fleshed out and clarified the law. Employers had a reasonably clear idea of what the law required and could with some degree of confidence bring their practices into conformity with it. After Wards Cove, however, the law seems in a state of complete turmoil. A decade of additional litigation may clear all this up, but for now employers, who must balance their assessment of legal requirements against any number of competing considerations, can only have the vaguest idea of what the law requires. Change, uncertainty, and instability in the law may be intriguing, and financially rewarding, for lawyers, but it is often quite bad for our clients. To judges the arguments in 5-4 decisions like Wards Cove may be fascinating ideological struggles; a new appointment, or a few second thoughts by a swing justice, may yield get another chapter. But for individuals and firms which must conform their conduct to these decisions, such uncertainty can be quite unwelcome.

From the point of view of civil rights, of course, these retrogressive decisions are unwelcome indeed. But

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[12]109 S.Ct. at 2136.

more is wrong here than the technical merits of these decisions. It is wrong that 120 years after the adoption of the Fourteenth Amendment, and 25 years after the enactment of the 1964 Civil Rights Act, black Americans are being forced to fight all over again battles that were fought and won by past generations. Patterson has virtually eviscerated the 1866 Civil Rights Act. Wards Cove has so damaged Griggs that civil rights lawyers are reluctant to bring any more disparate impact cases. Lorance has been construed by one lower court judge as virtually legalizing systematic intentional discrimination.[13] The whole corpus of federal equal employment law is in critical condition.

Civil rights laws, of course, are not the only important social legislation in the country. But for some inexplicable reason, they are the only laws facing wholesale judicial evisceration. Other social problems, once addressed by legislation, stay solved. The Supreme Court has not indicated any inclination, for example, radically to shrink through reinterpretation the nation's laws forbidding child labor. The still intractable racial problems that the nation will face in the years ahead can never be solved if we have to devote our time and energies just to preserving the progress already made and the legislation already on the books. The national consensus regarding racial

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[13] Davis v. Boeing, 1989 West Law 127509 (E.D. Pa. 1989).

discrimination was won only after decades of suffering and at enormous cost. The nation has made a fundamental, if long overdue, decision to condemn racial discrimination, in all its forms and manifestations, and to insist that it be eradicated through all the means known to the law. That decision should not be subject to reconsideration, even in the highest court in the land.

As we discuss each case and the statutory language we seek to have adopted to change the result of the decision, one should note the following with respect to these decisions:

(1) Each deals with the interpretation of a federal statute or the Federal Rules of Civil Procedure, not the Constitution;

(2) Each was decided by a closely divided Court;

(3) In each case, as members of the Court and commentators agree, the Court cut back on principles long established by its own prior decisions, or the Court rejected the law as developed by all of the circuit courts;[14]

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[14]See, e.g., Wards Cove, 109 S.Ct. at 2130, n.14 (Stevens, J., dissenting); Martin v. Wilks, 109 S.Ct. at 2374 and n.3.

(4) In each case there was no change in the language of the statute between the original decision and the 1989 Court decisions that wrought the drastic changes; and

(5) In each case the decision made it much harder, and in some cases impossible, for minorities or women to obtain the statutory rights that they would otherwise have been entitled to under the statute.

I will now discuss the statutory language suggested to overturn the results in the Wards Cove and Price Waterhouse v. Hopkins.[15]

I

Wards Cove

I would like to focus my remarks in particular on the provisions of the proposed legislation that would overrule certain aspects of the June 1989 decision in Wards Cove Packing Co. v. Atonio. Wards Cove is concerned with the application of, and threatens the vitality of, one of the most important Title VII cases, Griggs v. Duke Power Co.[16] Indeed, Griggs in the field of employment is

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[15]109 S.Ct. 1775 (May 1, 1989).

[16]401 U.S. 424 (1971). Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), provides:

comparable to Brown in the field of education. That unanimous 1971 decision, written by then Chief Justice Warren Burger, contained two distinct and interrelated holdings. Griggs concluded, first, that Title VII forbids the use of non job-related tests, job requirements, and other selection criteria, if they have a significant adverse impact on minorities or women. Where such disparate impact exists, it is irrelevant whether or not an employer acted with a discriminatory motive. "Good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[17] The only defense would be that the practice was required by business necessity.

In addition Griggs and its progeny established a specific order and method of proof in a disparate impact case, specifically assigning the burden of proof on specific issues among the two adversary parties to the litigation.

(a) It shall be 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."

[17]401 U.S. at 432.

First, the plaintiff must establish a prima facie case by demonstrating that the disputed requirement or requirements had a significant adverse impact on minorities or women. Albemarle Paper Co. v. Moody.[18] Second, where a prima facie case has been so established, the burden of proof shifts to the employer to prove that the requirement is job related.[19] Third, if the employer succeeds in doing so, the plaintiff can still prevail if he or she can show that some alternative requirement would be equally efficacious from the employer's perspective without entailing the objectionable adverse impact.[20] This order and allocation of proof was, and is, essential to the holding of Griggs, and to its implementation in the years that followed.

Griggs and its progeny have been of enormous importance in removing, as Congress intended, "artificial, arbitrary and unnecessary barriers"[21] that had previously prevented minorities and women from entering many jobs. The tests at issue in Griggs, for example, excluded 94% of all blacks.[22] In Albemarle over half of all blacks were denied promotions due to the disputed tests, compared to only 10%

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[18]422 U.S. 405, 425 (1975).

[19]Griggs, 401 U.S. at 437.

[20]Albemarle, 422 U.S. at 426.

[21]Griggs 401 U.S. at 431.

[22]Id. 430 n.6.

of white employees.[23] In Dothard v. Rawlinson[24] the combined height and weight requirements excluded approximately 41% of all women, but only 0.24% of all men.[25] Given the potent capacity of such tests and requirements to exclude minorities and women from jobs and promotions, the continued vitality of Griggs is of enormous practical importance.

Prima Facie Case: I would like to begin with an aspect of Griggs, and of the holding in Wards Cove, which the proposed legislation does not affect in any manner -- the quantum of proof necessary to establish adverse impact. I touch on this because I understand that considerable concern was expressed about this question at another hearing earlier this week.

The specific concern, or more accurately the specific misunderstanding, that was expressed, was that a plaintiff could ordinarily establish a prima facie case of disparate impact merely by showing that an employer had a smaller proportion of minority employees than existed in the population as a whole. That was not the law as set forth in Title VII of the 1964 Act, it is not the law established by

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[23]Brief for Respondents, No. 74-389, p. 20 and n. 25a.

[24]433 U.S. 321 (1977).

[25]Id. at 329-30 and n. 12.

the Griggs decision, it was not the law before Wards Cove,[26] it is not the law after Wards Cove, and it would not be the law if this legislation is adopted.

Wards Cove makes clear, as have the lower courts for many years, that proof of a prima facie case requires two additional types of evidence. First, the plaintiff must ordinarily show what impact the requirement actually had on individuals who applied for the position at issue or took the disputed test.[27] Plaintiffs may look to some other broader pool only if the application process itself is tainted by discrimination, or if there is no application process at all. Second, the plaintiff must show what impact the disputed requirement had on qualified actual or potential applicants.[28] Of course in any disparate impact case the plaintiff, by definition, is challenging the legitimacy of one or more qualifications insisted upon by an employer, but where there are qualification requirements of undisputed legitimacy, a plaintiff must ordinarily take them into account in establishing a prima facie case.

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[26]There is one very narrow exception to this rule: if the job in question is one which virtually everyone in the general population is qualified to perform, and there is no application process, then a significant disparity between the minority representation in the workplace as compared to the general population could in certain cases be the basis of a prima facie case. See Wards Cove, 109 S.Ct. at 2121 n.6; Teamsters v. United States, 431 U.S. 324, 340 n.20 (1977); Dothard v. Rawlinson, 433 U.S. 321, 329-330 (1977).

[27]Wards Cove, 109 S.Ct. at 2123.

[28]Id., at 2122 and n.7.

Wards Cove clearly indicates that satisfying these requirements will often be difficult. Practical experience demonstrates that plaintiffs frequently have considerable difficulty establishing a prima facie case. There are in fact several hundred disparate impact cases which civil rights plaintiffs lost because they were unable to meet the stringent requirements needed to establish a prima facie case.

The Burden of Proof: Sections 3 and 4 of the bill seek to restore the rule that the burden of proof on the issue of justification in disparate impact cases is on the defendant employer. For 18 years prior to Wards Cove the burden of proof regarding job-relatedness clearly rested on the defendant employer. In Griggs in 1971 the Supreme Court held unanimously that

> Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.[29]

In Albemarle, decided in 1975, the Court emphasized that an employer must "meet the burden of proving that its tests are 'job related.'"[30] In Dothard v. Rawlinson, decided in 1977, the Court insisted that an "employer prov[e] that the

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[29]401 U.S. at 432 (emphasis added); see also id. at 431.

[30]422 U.S. at 425 (emphasis added).

challenged requirements are job related."[31] In 1982, the Court in Connecticut v. Teal held that an "employer must . . . demonstrate that any 'given requirement [has] a manifest relationship to the employment in question.'"[32]

The lower court decisions applying Griggs emphasized again and again that this burden was on the employer, not the plaintiff. That point was made in virtually every way it could be stated in the English language. These decisions insisted that the employer bore the "burden of proof," that the employer bore the "burden of persuasion," or that the employer was obligated to "prove," "demonstrate," "establish" or "show" that a disputed requirement was job related. There are a large number of lower court decisions reiterating these well established requirements and finding that a plaintiff failed to establish a prima facie because of these requirements.

As recently as November 1987 the Department of Justice openly agreed that the employer bore the burden of proof. In its amicus brief in Watson v. Fort Worth Bank,[33] the Department insisted:

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[31]433 U.S. at 329 (emphasis added).

[32]457 U.S. 440, 446 (1982) (citing Griggs, 401 U.S. at 432) (emphasis added).

[33]108 S.Ct. 2777 (1988). This brief was signed, inter alia, by the Honorable Charles Fried, Donald Ayer, and the Honorable William Bradford Reynolds (hereinafter, "Brief").

> [I]n Griggs . . . the Court said "Congress has placed on the employer the burden of showing that any given requirement . . . ha[s] a manifest relationship to the employment in question."[34]
>
> [A]n employer must show that the device challenged is "demonstrably a reasonable measure of job performance."[35]
>
> [A]n employer ordinarily must . . . demonstrate . . . that the selection process has a sufficient connection with effective job performance or efficient business operation.[36]

The Department also argued that an employer's burden ought to be greater in a disparate impact case than in a disparate treatment case:

> [T]he principle difference between disparate treatment and disparate impact analysis is the showing that a defendant must make in order to rebut a prima facie case of discrimination. In a disparate treatment case based on statistical evidence, the defendant must produce evidence of the "legitimate, non discriminatory reasons it had for the actions it took and in that way refute the inference than an improper discriminatory motive was at work . . . . By contrast, in a disparate impact case, the defendant must make the more rigorous initial showing that the selection device producing the statistical disparity has a "manifest relationship" to successful job performance or to the safe and efficient operation of its business."[37]

The lower courts and commentators[38] have recognized that Wards Cove overturned 18 years of precedent

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[34]Brief, at 8.

[35]Id. at 18 (emphasis added).

[36]Id (emphasis added).

[37]Id. at 17 (emphasis added).

[38]See, note, the Supreme Court 1988 Term, 103 Harv. L.Rev., 40, 350-361 (1989).

when it placed on the plaintiff the burden of proof regarding job relatedness. In Hill v. Seaboard Coast Line Railroad Co.,[39] the Eleventh Circuit commented that "(t)he Supreme Court's decision in Wards Cove made clear that the employer merely has the burden of production . . . and overruled the existing law in this circuit on this issue." In Allen v. Seidman[40] Judge Posner observed

> Wards Cove . . . modified the ground rules that most lower courts had followed in disparate-impact cases. Before Wards Cove it was generally believed that if the plaintiff in a Title VII case showed . . . that a criterion . . . was disproportionately excluding members of a group protected by the statute, . . . the burden shifted to the employer to persuade the judge . . . that the criterion . . . was necessary to the effective operation of the employer's business . . . . Wards Cove returns the burden of persuasion to the employee, while leaving the burden of production on the employer.

The legislation now before this Committee -- Sections 3 and 4 -- would merely restore the law to where it stood prior to the 1989 decision in Wards Cove, placing on the employer, as did Griggs, Albemarle, Dothard and Teal, the burden of proof regarding job relatedness. That allocation of the burden of proof was entirely workable over the last 18 years, and it is eminently fair. When job relatedness is at issue, the employer is in possession of

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[39]1989 U.S. App. LEXIS (5335, p. 23 n. 12, 11th Cir., Oct. 10, 1989)

[40]Slip opinion, pp. 1-2 (No. 88-1811, 7th Cir., July 27, 1989)

all the relevant evidence, and because all the key workers and supervisors are in its employ, a defendant company is in a position to conduct a validity study; it would be virtually impossible for a plaintiff to obtain the degree of cooperation from defendants knowledgeable employees necessary to conduct an "invalidity study". Wards Cove, as a practical matter, requires civil rights plaintiffs to "prove a negative" -- to demonstrate that among the enormous number of conceivable business interests, not one is connected in the requisite manner to the disputed job requirement. That is a burden that few plaintiffs could ever meet.

The majority opinion in Wards Cove misuses the precedent in cases like McDonnell Douglas Corp. v. Green,[41] and Texas Dept. of Community Affairs v. Burdine[42] -- the disparate treatment cases -- to justify shifting the burden of proof on the justification issue to the plaintiff. In the disparate treatment cases plaintiff alleges that the discrimination is intentional. Once he puts in evidence sufficient to establish a prima facie case -- sufficient to overcome a motion to dismiss at the end of the plaintiff's case -- the defendant then offers reasons why what look like intentional discrimination is not. Because this proof goes to the same factual issue raised by plaintiff's initial

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[41]411 U.S. 792 (1973).

[42]450 U.S. 248 (1981).

prima facie case -- the motive of the employer in taking the disputed action -- the plaintiff continues to bear the burden of proof. In the disparate impact cases, however, there is no issue of intent, and the issue of business necessity arises only if the plaintiff has carried its burden of proof and persuasion as to disparate impact, which as was demonstrated above represents a vigorous standard of proof. In this situation, therefore, the defense is in the posture of trying to show the court that, even though disparate impact has been proven, there is nonetheless a business necessity that justifies such business practices.[9]

Accordingly, allocating the burden of proof with respect to business necessity in the disparate impact cases to defendant employers, as Justice Stevens observed in his dissenting opinion in Wards Cove,[10] is consistent with the normal rule placing that burden on the party asserting a justification defense. Congress has on occasion expressly provided by statute that the burden of establishing such a

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[9]The majority in Wards Cove got misled by Justice O'Connor's opinion in Watson v. Fort Worth Bank, 108 S.Ct. 2777 (1988). In that case it was held that subjective or discretionary employment practices challenged as violating Title VII could be attacked under the disparate impact approach. But because she was dealing with a subjective practice she thought that that was the same as intentional discrimination and therefore she wrongly applied the rules developed in McDonald Douglas Corp. v. Green rather than the rules developed in Griggs.

[10]109 S.Ct. at 2131 and n.17.

justification must be borne by the defendant. The Robinson Patman Act, for example, provides . . .

> Upon proof being made . . . that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the [Federal Trade] Commission is authorized to issue an order terminating the discrimination."[45]

The Supreme Court has adopted a similar burden-shifting rule under the Clayton Act."[46] The Equal Pay Act permits an employer, under certain specified circumstances, to utilize salary scales that discriminate, but once there is a

> showing that the employer pays workers of one sex more than workers of the opposite sex for equal work, the burden shifts to the employer to show that the differential is justified under one of the Act's four exceptions."[47]

When a state or locality subject to section 5 of the Voting Rights Act seeks approval of a change in its election laws, whether from the Attorney General or from the federal courts, that state or locality bears the burden of proving

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"[45]15 U.S.C. § 13(b).

"[46]United States v. Philadelphia National Bank, 374 U.S. 321, 363 (1963):

> "[A] merger which produces a firm controlling on undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive affects.

"[47]Corning Glass Works v. Brennan, 427 U.S. 188, 196 (1974).

that the change has neither a discriminatory purpose nor a discriminatory effect.[48] State statutes in a wide variety of circumstances shift the burden of proof to defendants concerning particular issues.[49]

Standard of Job Relatedness: The bill in Section 3 seeks to restore the requirement that the defendant shows business necessity for a rule which has a disparate impact on minorities or women. Judge Posner observed in Allen v. Seidman that Wards Cove "dilutes the 'necessity' in the 'business necessity' defense."[50] Indeed "necessity," once central to the concept of job-relatedness, seems unfortunately to have disappeared completely from the minds of those who joined the majority opinion in Wards Cove. In Griggs the Court held that Title VII requires "the removal of . . . unnecessary barriers to employment when the barriers operate invidiously to discriminate."[51] "The touchstone is business necessity."[52] In Dothard v. Rawlinson the Court reiterated that Title VII mandated

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[48]Georgia v. United States, 411 U.S. 526, 538 n. 9 (1973); Pleasant Grove v. United States, 479 U.S. 462, 479 (1987).

[49]See, e.g., Shifting the Burden of Proof in State Environmental Protection Acts: A Blessing to Environmental Plaintiffs, 8 Envtl. L. 851 (1978); Lungren, Deep Horizons -- Legislative Shifting of the Burden of Proof in Implied Covenant Cases, 24 Washburn L. J. 30 (1984)

[50]Slip opinion, p.2

[51]401 U.S. at 431

[52]Id.

removal of such "unnecessary barriers,"[53] and held unlawful the requirements there at issue because they were not "essential to effective job performance."[54] Connecticut v. Teal again emphasized the statutory directive for the elimination of "unnecessary barriers" to the employment of minorities or women.[55] As recently as Watson v. Ft. Worth Bank the Court treated as synonymous "the 'business necessity' or 'job relatedness' defense."[56]

But with the advent of Wards Cove the requirement of such necessity was abruptly and categorically rejected:

> [T]here is no requirement that the challenged practice be "essential" or "indispensable" to the employer's business for it to pass muster."[57]

The legislation before the Committee would overturn Wards Cove also in this regard, restoring "business necessity" as the affirmative defense to proof of disparate impact, and defining that phrase to mean "essential to effective job performance." "Necessity" was the touchstone of this defense in Griggs, Dothard, Teal and Watson; the phrase "essential to effective job performance" is taken

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[53]433 U.S. at 328

[54]433 U.S. at 331

[55]457 U.S. at 447

[56]108 S.Ct. at 2789.

[57]109 S.Ct. at 2125.

verbatim from the decision in Dothard. Both that phrase, and the requirement of business necessity, have been widely used by the lower courts to articulate the standard of job relatedness in a disparate impact case. Despite the wide currency of these standards, employers succeeded in large numbers of cases in meeting that requirement and sustaining the legality of tests and job requirements with a proven adverse impact.

The proposed statutory standard -- "essential to effective job performance" -- is deliberately, and undeniably more stringent than the new standard announced in Wards Cove: "whether a challenged practice serves, in a significant way, the legitimate employment goals of the employers."[58] In its brief in Wards Cove the Justice Department noted that "essential to good job performance", an alternative formulation in Dothard, was one among several varying phrases used by the Supreme Court, and correctly observed that "those varying formulations suggest either higher or lower thresholds of justification."[59] But in that brief, at least, the Department did not assert that the Dothard standard was unmeetable or unworkable. All of these formulations, I would suggest, are more evocative than specific; none could be mechanically applied to yield an absolutely predictable result. It is fair to assert that

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[58]109 S.Ct. at 2125.

[59]Brief for the United States, No. 87-1387, p.23

the Dothard standard sets a higher threshold of justification and that the Wards Cove language establishes a significantly less demanding requirement. But it would be a considerable exaggeration to assert that the Dothard standard, which for years had substantial currency in the lower courts, could never be met, just as it might be an overstatement, or at least premature, to claim that under the Wards Cove standard every disputed job requirement is certain to be upheld.

The question raised by Wards Cove and this legislation is not a choice between always, or never, upholding a contested selection criterion as job related. The issue, rather, is whether, in Judge Posner's apt phrase, there is reason to "dilute" the standard of job relatedness that has prevailed for half a generation. I submit that the change in the law worked by Wards Cove, an alteration that to an unquantifiable but palpable degree will facilitate the use of job requirements that close the doors of opportunity to minorities and women, is a change that takes the law in the absolutely wrong direction, and a change which Congress should undo.

Multi-Factor Selection Practices: Section 4 of the proposed legislation permits a plaintiff to challenge not only a specific employment practice but "a group of employment practices". This provision has provoked undue

concern and misapprehension and needs not so much a spirited defense as a more detailed exploration of the types of actual cases to which the proposal is relevant.

It is not uncommon for employers to use several different criteria in making a selection decision -- a combination of tests, for example, or separate height and weight requirements. In the majority of litigated cases, however, the employer has records from which all parties can determine how much of an adverse impact, if any, each job requirement may have had. In these cases it is of little if any importance which party has the burden of adducing evidence regarding the distinct impact of each requirement. Both parties will have access to the information, and either or both will put it in evidence. In reported cases of this variety it is often unclear, because in part it is unimportant, just which party introduced what evidence.

Where an employer utilizes a number of different job requirements, there may at the very outset of the litigation be some uncertainty regarding which of them is seriously being challenged. A prudent plaintiff's counsel framing a complaint prior to any discovery will ordinarily err on the side of challenging any requirement that might possibly have injured his or her clients. But once counsel for the parties obtain the relevant data and other evidence, it will soon become clear to all just which requirements are

and are not being challenged. Simple prudence and a desire to avoid wasting resources, not to mention Rule 11 of the Federal Rules of Civil Procedure,[60] quickly lead plaintiff's counsel to disavow any challenge to a job requirement that clearly has no adverse impact, or which obviously is job related. From a purely academic perspective one could imagine a lawsuit which challenged everything an employer had ever done, but in the real world the practical dynamics of the litigation process prevent cases from being pursued or tried in this manner. In the rare case where this might be a problem, pretrial conferences can quickly clear the air and clarify the issues.[61]

The real problem to which this aspect of the legislation is addressed arises when three circumstances are

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[60]Rule 11 requires that pleadings, motions and other court papers be signed by a party's attorney or by the party itself if unrepresented, and provides that such signature "constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion or other paper is filed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee."

[61]See Rule 16(c)(1), F.R.C.P.

all present: (1) the employer uses a combination of requirements to make a hiring or promotion decision; (2) that combination, taken together, has a net adverse impact on minorities or women; and (3) the employer does not have records from which it is possible to ascertain which requirement or requirements are responsible for that adverse impact. Wards Cove, and the proposed legislation, offer drastically different rules for resolving a case of this sort, and it is with regard to this problem that the legislation is important.

Under Wards Cove, where these three factors are present, the disparate impact claim must be dismissed. It is not sufficient that a plaintiff can show that the employer is making employment decisions in a manner which causes a substantial adverse impact; the plaintiff under Wards Cove is required, on pain of dismissal, to demonstrate which of the various specific job requirements caused that adverse impact, and to what degree. The plaintiff must "sho[w] that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites."[62] If what Wards Cove requires of a plaintiff is literally impossible, that is simply too bad.

In this regard, too, Wards Cove should be overturned. Where an employer's practices have a proven

[62]109 S.Ct. at 2125.

adverse impact, the employer under Griggs faces a duty to justify that impact. Wards Cove permits an employer to evade that duty simply by failing to keep records revealing which of several combined practices did and did not have an adverse impact. Such a rule creates a perverse incentive for employers to avoid keeping such records, and encourages them to use multiple requirements whose individual impact cannot readily be distinguished. The proposed legislation encourages employers to maintain just such records.

The rule of law contained in the bill was expressly endorsed by the Department of Justice in its brief in Wards Cove:

> Of course, a decision rule for selection may be complex: it may, for example, involve consideration of multiple factors. And certainly if the factors combine to produce a single ultimate selection decision and it is not possible to challenge each one, the decision may be challenged (and defended) as a whole.[63]

This aspect of the government's brief is consistent with the relevant EEOC guidelines, which expressly permit challenges to a "combination of measures."[64]

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[63]Brief for the United States, No. 87-1387, p.22, quoted in Wards Cove, 109 S.Ct. at 2132 n. 19 (Stevens, J., dissenting).

[64]29 C.F.R. § 1607.16 (Q).

Permitting a plaintiff under such circumstances to challenge a combination of job requirements will not lead inexorably to quotas, or entail any other dire consequences. Prior to Wards Cove five circuits adhered to the rule of law that would be enacted by the proposed legislation.[65] There is no indication that that rule caused any unfairness to litigants or social ills in the states within those circuits.

II

Price Waterhouse

The decision in Price Waterhouse contains two distinct holdings, only one of which would be affected by this legislation. The Court decided, first, that proof of the existence of a discriminatory motive will not always entitle a plaintiff to back pay or a court-ordered job or promotion. An employer can avoid liability for those forms of relief if it can prove that it also had a separate, independent legitimate motive for taking the disputed action. Thus where a plaintiff proves that he was fired because of his race, but the employer demonstrates that the

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[65]See Green v. USX Corp., 848 F.2d 1511, 1520-25 (3d Cir. 1988); Griffin v. Carlin, 755 F.2d 1516, 1523 (11th Cir. 1985); Segar v. Smith, 738 F.2d 1249, 1270-71, 1288 n.34 (D.C. Cir. 1984); Atonio v. Wards Cove, 810 F.2d 1477, 1482 (9th Cir. 1987), rev'd 104 L.Ed. 2d 733 (1989); Coe v. Yellow Freight System, 646 F.2d 444, 451 (10th Cir. 1981); see also Greenspan v. Automobile Club of Mich., 495 F.Supp. 1021, 1037 (E.D. Mich. 1981).

employee would also have been fired for incompetence, even if he had been white, the dismissed employee is not entitled to get back his or her job, or to an award of back pay. In the Court's view, the invidious motive, although demonstrably present, is not the "cause" of the dismissal in such a case. The proposed legislation will not affect this aspect of Price Waterhouse.

In addition, Price Waterhouse held that where an employer's actions are prompted by an invidious discriminatory motive, as well as by another legitimate purpose, the employer does not violate the Title VII prohibition against intentional discrimination.[46] This second holding, although seemingly quite similar to the first, has separate practical consequences. The legislation before the Committee -- Section 5 of the bill -- by clarifying the definition of what violates Title VII, would overturn this aspect of Price Waterhouse.

This second aspect of Price Waterhouse means that if a court in an individual Title VII case finds that the defendant has clearly engaged in intentional discrimination, the Court is powerless to end that abuse if the particular

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[46]The plurality opinion observes that the existence of that second motive precludes a finding that there was any "violation of the statute." 109 S.Ct. at 1787 n. 10. Justice White, in a concurring opinion, remarked "I agree with the plurality that if the employer carries this burden [of proving the existence of a second motive], there has been no violation of Title VII." 109 S.Ct. at 1796 n. 1.

plaintiff who brought the case would have suffered the disputed employment action for some legitimate, alternative reason. And this aspect of the Price Waterhouse ruling represents a substantial departure from prior case law, which clearly recognized that proven discrimination in direct violation of the statute would result, at a minimum, in liability finding and entitlement to injunctive and declaratory relief and attorneys' fees.[47] Section 5 of the bill, by defining discrimination as unlawful per se, empowers a federal court in such a situation to enjoin the proven discrimination without waiting for another plaintiff to bring an entirely new lawsuit. In many injunction suits the plaintiff is entitled to an injunction against a certain course of conduct even if it is not entitled to damages. In certified class actions, moreover, the class representative can obtain such injunctive relief even if it becomes clear, after trial, that that particular plaintiff was not the victim of discrimination. Cf. Franks v. Bowman Transportation Co. 424 U.S. 747 (1976). Conferring this remedial power on the federal courts is more consistent with the basic purpose of Title VII, as described in Price Waterhouse, to render race and sex "irrelevant to employment

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[47]See, e.g., Bibbs v. Block, 728 F.2d 1318 (8th Cir. 1985); King v. Trans World Airlines, Inc., 738 F.2d 255 (8th Cir. 1984); Ostroff v. Employment Exchange, Inc., 683 F.2d 302 (9th Cir. 1982); Nanty v. Barrows Co., 660 F.2d 327 (9th Cir. 1981); Roberts v. Fry, 29 FEP cases 1445, 1451-52 (D.D.C. 1980).

decisions", and "to condemn even those decisions based on a mixture of legitimate and illegitimate considerations."[46]

This aspect of the bill will also allow the court, or a jury, to award monetary relief other than back pay, where that would otherwise be appropriate. Even where the existence of a dual motive means that an employer's discriminatory action did not cause a loss of wages, making back pay inappropriate, that action may cause other harms which would be redressable under the new language of the bill authorizing compensatory damages. The dismissal of a black employee, for example, might be accompanied by offensive racial slurs; even where the dismissal would have occurred anyway for some other reason, the racial slurs, and the humiliation which they cause, are solely the result of the discriminatory motive, and should thus be redressable. Similarly, punitive damages may in some instances be warranted by egregious misconduct even where an award of back pay would be inappropriate.

The rule of law which the proposed legislation would write into Title VII is the very interpretation of the statute advocated by the Department of Justice in its brief in Price Waterhouse:

> [I]t is proper to place the burden on the defendant to prove that a given employment decision would have been the same in a

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[46]109 S.Ct. at 1785.

> discrimination-free environment . . . . If the defendant makes such a showing, the plaintiff is made whole by an award of attorney's fees and an injunction against future discrimination. In effect, the defendant is ordered to cease discriminatory activity, which enhances the plaintiff's employment opportunities in the future. But the defendant need not hire, reinstate, promote or provide back pay to the plaintiff. . . ."[46]

Under Section 5 the existence of a legitimate alternative purpose in a mixed motive case remains relevant, but it results, not in a finding that the employee never violated the law, but only in a limitation on the available remedy. In no event will an employer be subject to a monetary award merely because it entertained evil, discriminatory thoughts, without ever having acted on those motives.

Conclusion

No doubt others will comment on the provisions in the bill which seek to overrule or modify the decisions in Patterson, Lorance, Wilks, Zipes, and Jeff D. In my view the legislation proposed by S.2104 is eminently fair, consistent with the public interest and is required to keep the Nation on the journey started in 1954, and in 1964, to

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[46]Brief of the United States, No. 87-1167, p. 23; see also id. at 7 ("Title VII . . . allows a defendant to limit the plaintiff's remedy by showing . . . that it would have reached the same employment decision even in the absence of the illegal discrimination").

wit, the eradication of racial and sexual segregation and of discrimination against minorities and women and all effects thereof in this Country as soon as possible.

Decision Placing Burden of Proof, etc. on Employer

Contents

Burden of Proof -- to prove, etc.

Abron v. Black and Decker Mfg. Co., 439 F. Supp. 1095, 1106 (1977).
"Plaintiffs have made a prima facie case of racial discrimination, thereby shifting the burden of proof to the defendant to explain what business necessity could account for the discrimination in hiring and assignment of black employees..."

Beard v. Whitley County REMC, 656 F. Supp. 1461, 1468 (N.D. Inc. 1987).
"...the burden of persuasion shifts to the employer, who must prove the job relatedness or business necessity of the practice."

Berkman v. City of New York, 536 F. Supp. 177 (E.D. N.Y. 1982), at 205.
"...require the defendants to rebut this showing with proof that the test was legitimately job-related."
Quoting Guardians, 630 F.2d 79 (2d Cir. 1980).

Bernard v. Gulf Oil Corp., 643 F. Supp. 1494 (E.D. Tex. 1986) at 1501.
"[T]he employer must, by professionally accepted methods, prove that the test is 'predictive of or significantly correlated with important elements of work behavior that comprise or are relevant to the job....'"

Bishop v. Pecsok, 431 F. Supp. 34 (N.D. Ohio, 1976).
[Not a Title VII case; fair housing]
"Here, Pecsok failed to carry his burden of proving that his criteria furnished a reasonable measure of whether an applicant would be a 'successful tenant'." at 37

Buckner v. Goodyear Tire & Rubber Co., 339 F. Supp. 1108 (N.D. Ala. 1972).
at 1120: "The company must satisfy its burden by proving a non-discriminatory adherence to a 'best qualified' applicant policy."
at 1120: "...incumbent upon Goodyear to come forward and refute the charge with more than grandiose platitudes of their intent."

Brown v. Board of Education of Chicago, 386 F. Supp. 110, 124 n.8, (N.D. Ill. 1974).
"When a statistical proof was made that employment practices...discriminated against blacks, the burden of proof shifts to the defendant. Company to show that the questioned practice or test is related to job performance."

Brown v. Delta Air Lines, 522 F. Supp. 1218 (S.D. Tex 1980). at 1236.
"The second means of rebuttal would be to prove that the challenged practices have 'a manifest relationship to the employment in question'."

Calcote v. Texas Educational Foundation, Inc., 458 F. Supp. 231 (W.D. Tex. 1976).
at 236: "...burden shifts to the defendant to prove a legitimate business necessity."
Note: white plaintiff.

Calloway v. Westinghouse Electric Corp., 642 F. Supp. 663, 697 (M.D. Ga. 1986).
"The employer then has the burden of proving that the test is job related."

Caviale v. State of Wisconsin, Dept. of Health & Social Services, 744 F.2d 1289 (7th Cir. 1984).
at 1295: "Since Caviale established that the selection method was discriminatory in effect, the Department had the burden to prove that membership in the Career Executive Program was a job-related requirement."

Burden of Proof -- to prove, etc.

Chisolm v. USPS, 516 F. Supp. 810 (W.D. N.C. 1980).
"Defendant's practices can only be justified on a showing, the burden of proof which rests on the defendants, that the practice is required by business necessity." at p. 874.

Chrisner v. Complete Auto Transit, 645 F.2d 1251 (6th Cir., 1981).
"The burden then shifts to the defendant to prove or demonstrate a defense to the apparent discrimination." at 1256-7

Commonwealth of Pennsylvania v. O'Neil, 348 F. Supp. 1084 (E.D. Pa. 1972) at 1102.
"In the seminal case of Griggs [...], the Supreme Court established a simple and straightforward doctrine: any selection requirement or procedure which in fact disqualifies a disproportionately high percentage of blacks is illegal in the absence of affirmative proof that it bears a 'manifest relationship to the employment in question'."

Contreras v. City of Los Angeles, 656 F.2d 1267, 1271 (9th Cir. 1981).
"...burden of proof then shifts to the employer to prove that the screening test is job-related."

Craig v. Alabama State University, 804 F.2d 682 (11th Cir. 1986).
at 685: "The burden then shifts to the employer to show that the challenged employment practice..." cites Griggs
at 689: "The employer bears the burden of not only articulating but also proving business necessity through evidence." (emphasis in original)

Crawford v. Western Electric Co. Inc., 745 F.2d, 1373 (11th Cir. 1984).
at 1384: "Once a plaintiff has established the discriminatory impact of an employment practice the defendant bears the burden of proving that the practice is justified by business necessity." cites Griggs

Croker v. Boeing Co. (Vertor Div.), 437 F. Supp. 1138 (E.D. Penn. 1977) at 1182-3.
"...the burden shifts to the defendant to rebut the inference of discrimination. The defendant may attempt to do this by demonstrating that the plaintiffs' statistical showing is inaccurate or insignificant."

Dickerson v. United States Steel Corp., 472 F. Supp. 1304, 1322 (E.D. Pa.1979).
"Not only does defendant have the burden of proving that its testing procedure is job-related, by conducting validity studies, but that burden is a heavy one."

Eldrige v. Carpenter 46 N. Col. Counties JALC, 833 F.2d 1334 (9th Cir. 1988).
"...burden then shifts to the defendant to refute the data to show that no disparity exists or to prove that its practice is a business necessity."

EEOC v. Local 580, Association of Bridge, Structure, Etc., 669 F. Supp. 606 (S.D. N.Y., 1987) at 619.
"Under the case law, a test's failure to satisfy the 4/5ths rule establishes a prima facie xxxx of Title VII requiring the defendant to respond with proof that the test is job related."

EEOC v. Local 638..., 532 F.2d 821 (2nd Cir. 1976) at 825-826.
"This burden of proof [defendants] have failed to meet."
"...to sustain their burden of proving job-relatedness, [defendants must]..."

Burden of Proof -- to prove, etc.

EEOC v. Navajo Refining Co., 593 F.2d 988 (1979).
"If a prima facie case is established the burden of proof shifts to the defendant to show the criteria are job related." at 990

EEOC v. O&G Spring & Wire Forms Specialty Co., 705 F. Supp. 400, 407 (N.d. Ill. 1988).
"EEOC's case was not and could not have been rebutted 'merely through articulation of a legitimate, nondiscriminatory reason', but only [through] proof...of a nondiscriminatory explanation for the discriminatory results."

EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264, 1281 (N.D. Ill. 1986).
"The burden of proof then shifts to the Defendant to show that the job requirement has a manifest relationship to the job in question."

EEOC v. Trailways, 530 F. Supp. 54 (D. Col. 1981).
"In a disparate impact case, the employer bears the burden of proving that the practice under scrutiny results from business necessity." at 55

Eusley Branch of NAACP v. Siebels, 616 F.2d 812, 816.
"This showing [of disparate impact] shifts to the employer the burden of proving the test is job-related."

Firefighters Inst. Etc. v. City of St. Louis, 549 F.2d 506, 510 (8th Cir. 1977).
"...the burden of proof shifts to the employer to prove the job relatedness of the exam he has utilized."

Foster v. Board of School Commissioners of Mobile County, 872 F.2d 1563 (11th Cir. 1989).
at 1569-70 fn.8: "...air prior precedent, Craig v. Alabama State University, as well as prior Supreme Court precedent indicating that the employer has the burden of proving a business necessity. See e.g. Albemarle."

Gillespie v. State of Wisconsin, 771 F.2d 1035 (7th Cir. 1985) at 1039.
"Title VII forbids the use of employment tests that are discriminatory in effect unless the employer meets 'the burden of showing that any given requirement [has]...a manifest relationship to the employment in question...If an employer does then meet the burden of proving that its tests are 'job-related', it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employers legitimate interest..." (citing Albemarle)

Green v. Missouri Pac. Rr. Co., 381 F. Supp. 992 (1974) at 996.
"Assuming arguendo that plaintiff has proven a prima facie case, I find that defendant has proven that the subject policies are founded upon business necessity."

Griffin v. Carlin, 755 F.2d 1516 (11th Cir. 1985) at 1527.
"The defendant bears the burden of proving the business necessity..." Cites Albemarle.

Hamer v. City of Atlanta, 872 F.2d 1521 (11th Cir. 1989).
at 1524: "The burden shifts to the employer to prove that the test is job related."
But see at 1533 citing 10th Cir. 1972: "When the job clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show that his employment criteria are job related."

Burden of Proof -- to prove, etc.

Hardison v. TWA Inc., 527 F.2d 33, 38 (8th Cir. 1975).
"EEOC further placed upon the employer 'the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.'"
at 39: "The burden of demonstrating its ability to reasonably accommodate falls upon the employer."

Head v. Timkin Roller Bearing Co., 486 F.2d 870 (6th Cir. 1973).
at 879: "The court placed the burden of proving the absence of business necessity on the plaintiffs. This, in our opinion, was error. If an employment practice, though facially neutral, is shown to have a differential impact on minority employment, it is prohibited unless the employer can prove business necessity."

Henderson v. First National Bank, Montgomery, 360 F. Supp. 531 (M.D. Ala. 1973).
at 547: "The burden shifts to defendants to prove the test validity."

Hill v. Metropolitan Atlantic Rapid Transit Authority, 591 F. Supp. 125 (N.D. Georgia 1984).
at 129: [Test is not valid] "...unless the employer meets the burden of proving that the test is job related..."
at 130: "...the burden then shifts to the employer to show that any given requirement has a manifest relationship to the employment in question, and that the disparity is the product of non-discriminatory factors."

Horace v. City of Pontiac, 624 F.2d 765 (6th Cir. 1980).
"[U]nder Griggs...the burden of proof shifted to the defendant to show that the height standard was related to job performance."

Hung Ping Wang v. Hoffman, 694 F.2d 1146, 1148 (9th Cir. 1982).
"...burden of proof shifts to the employer to prove...practice is necessary to the efficient operation of the business."

Jackson v. Nassau Cty Civil Service Commission, 424 F. Supp. 1162 (1976).
"...the burden shifts to the employer to prove that its tests are job related."

Jackson v. Seaboard Coast Line R. Co., 678 F.2d 992 (1982).
"Once a plaintiff has established the discriminatory impact of an employment practice, the defendant bears the burden of proving that the practice is justified by a business necessity."
at 1016.

Johnson v. City of Albany, Georgia, 413 F. Supp. 782 (M.D. Ga. 1976) at 799.
"Shift to the defendant's burden of proving that their employment practices...were non-discriminatory."

Johnson v. Pike Corp. of America, 332 F. Supp. 490, 495 (C.D. Cal. 1971).
"Such a showing [business necessity] is an affirmative defense upon which the defendant has the burden of proof."

Burden of Proof -- to prove, etc.

Jordan v. Wilson, 649 F. Supp. 1038 (M.D. Ala. 1986) at 1052.
"Where there is proof of disparate impact, the employer must to more than 'articulate'. He bears the burden of proving or 'persuasion', that the [challenged practice] was a 'business necessity'." Nash 763 F.2d 1393, 1397.

Kohne v. JMCO Container Co., 480 F. Supp. 1015 (1979).
"Once the plaintiff has established the disparate impact, the burden of proof shifts to the employer." at 1036.

Kent County Sheriff's Association v. Kent County, 826 F.2d 1485 (6th Cir. 1987).
"[T]he employer must prove a business necessity for the practice..." at 1492.
[dicta - because court used disparate treatment]

Kilgo v. Bowman Transportation, Inc., 570 F. Supp. 1509 (N.D. Ga. 1983) at 1526.
"... defendant must prove by a preponderance of the evidence that the requirement in question is job related and is required by business necessity."

Krenzer v. Ford, 429 F. Supp. 499 (D. D.C. 1977).
"Once the adverse impact...has been demonstrated, the burden of proof shifts to the employer who must show that the requirement is job-related. [citations] This is a particularly heavy burden where the requirement, if not met, is an absolute bar to employment and not simply one of several relevant considerations because under such circumstances the employer must show that there is not a reasonable alternative..." at 503.

Liberles v. Daniel, 477 F. Supp. 504, 507 (N.D. Ill. 1979).
"The burden is shifted to defendants to prove that the disparities in the classification system were the result of a bona fide occupational qualification or a business necessity."

Loiseau v. Dept. of Human Resources of State of Oregon, 567 F. Supp. 1211, 1214 (1983).
"...the burden of proof then shifts to the employer to prove that the screening device is job-related. 'Failure in this proof results in judgement for the plaintiff'. Contreras v. City of Los Angeles, 656 F.2d 1267, 1271."

Maddox v. Claytor, 764 F.2d 1539 (11th Cir. 1985) at 1548.
"The parties alternately bear burdens of proof by a preponderance of the evidence...instead of mere burdens to produce.

Mele v. U.S. Dept. of Justice, 395 F. Supp. 592 (D. N.J. 1975) at 596.
"The court placed the burden of proof concerning job relatedness on the employer."

Members of the City of Bridgeport Housing Authority Police Force v. City of Bridgeport, 85 F.R.D. 624 (D. Conn. 1980) at 639.
"The defendant may rebut by proving that 'the challenged requirements are job related'."

Mieth v. Dothard, 418 F. Supp. 1169 (M.D. Ala.1976) at 1179.
"The burden shifts to the employer to prove that the..."

Nash v. Consol. City of Jacksonville, Duval County, 763 F.2d 1393 (11th Cir. 1985) at 1397.
"In an 'impact' case the employer must do more than 'articulate'. He bears the burden of proving or 'persuasion'." (cites Griggs

Burden of Proof -- to prove, etc.

Newman v. Crews, 651 F.2d 222 (4th Cir. 1981).
"The defendants therefore have the burden of proving that the challenged employment practice serves legitimate employment objectives." at p. 224

Newman v. Delta Airlines, Inc., 374 F. Supp. 238 (N.D. Ga. 1973) at 244.
"The burden of proof is on the employer to demonstrate the justification..."

Osahar v. Carlin, 642 F. Supp. 448 (S.D. Fla. 1986) at 457.
"The burden of persuasion shifts to the employer to prove business necessity and rebut the plaintiff's prima facie case..."

Payne v. Bobbie Brooks, Inc., 505 F. Supp. 707 (N.D. Ohio 1980).
"After the plaintiffs have established the disparate impact of the practice, the employer has the opportunity to prove business necessity." at 718.
[Dicta - no prima facie case found]

Peltier v. City of Fargo, 396 F. Supp. 710 (1975) at 724.
"The burden of proof now rests with the defendant to rebut the inference that sex considerations have influenced employment choices."
But see, at 725: "This defense shifts the burden back to the plaintiffs for proof of overt discrimination."

Pope v. City of Hickory, N.C., 541 F. Supp. 872 (W.D. N.C. 1981).
"If a claimant succeeds in doing so then the burden of proof shifts to the defendant to show some business necessity." at p. 879.

Powers v. Alabama Dept. of Education, 854 F.2d 1285 (11th Cir. 1988).
at 1292: cites Albemarle: "(employer must 'meet the burden of proving that its tests are job related')."
Cites Griggs: "('Congress has placed on the employer the burden of showing that any given requirement [bears] a manifest relationship to the employment.')"

Rivers v. Westinghouse Electric Corp., 451 F. Supp. 44 (E.D. Penn 1978) at 48.
"Once a prima facie case of discrimination has been established the burden shifts to the defendant to articulate legitimate nondiscriminatory reasons for the unequal treatment. The justification must be proven by a preponderance of the evidence."

Sanders v. Sherwin Williams, 495 F. Supp. 571 (E.D. Mich. 1980).
"In a disparate impact case, defendant must prove that the challenged test, procedure, or requirement,bears 'a manifest relation to the employment in question'." at 574
[Dicta - because no prima facie case found]

Scott v. City of Anniston, 597 F.2d 897, 901 (1979).
"Once the racially adverse impact of an examination is demonstrated by the statistical or other evidence, the burden of proof shifts to the employer to prove that the exam is job related."

Scott v. City of Houston, 613 F. Supp.34 (D.C. Texas 1985) at 37.
"The employer must prove that the selection procedure is justified by a legitimate business reason."

Burden of Proof -- to prove, etc.

Sengupita v. Morrison-Knudsen Co., Inc., 804 F.2d 1072, 1076 (9th Cir. 1986).
"...burden of proof then shifts to the defendant to show..."

Sledge v. J.P. Stevens & Co., Inc., 585 F.2d 625 (4th Cir. 1978).
"The burden shifts to the employer to prove that he based his employment decision on a legitimate consideration, and no an illegitimate one such as ace." at p. 635.

Stephen v. PGA Sheraton Resort, 669 F. Supp. 1573 (S.D. Fla. 1987).
at 1580: "If the plaintiff proves a prima facie case, the burden shifts to the employer to prove that the employment practice has a 'manifest relation' to the employment in question, or in other words that it is supported by 'business necessity'." "If the employer rebuts the prima facie case the burden is placed back on the plaintiff who is then given an opportunity to show that the practice is merely pretextual and that another less adverse practice is available..."
at 1581, 1582: "Once the plaintiff established a prima facie case of discrimination as to his claim of disparate impact, the burden of persuasion shifted to the defendant to prove that the plaintiff's statistical proof was unreliable..." or business necessity.

Stephen v. PGA Sheraton Resort Ltd., 873 F.2d 276 (11th Cir. 1989).
at 279: "Once a prima facie case is put forth, the employer must then show that the identified practice bears a manifest..." cites Teal and Griggs
at 279-80: "The Supreme Court has not rendered a consensus on the extent of the employer's burden....Watson...pending trial resolution of this issue, however, this Circuit must adhere to settled authority stating flatly that the employer bears the burden of proving that a practice is job related." Powers v. Alabama Dept. of Education (emphasis in original)

Swirt v. Pullman-Standard, 539 F.2d 77,104.
"Before such justification could be considered the defendants would have to prove that unpromoted blacks did in fact lack the necessary skills; that the needed skills are justified by a business necessity..."

Thomas v. Metroflight Inc., 814 F.2d 1506 (10th Cir. 1987).
"Once a plaintiff makes out the prima facie case, the burden of proof shifts to the employer to show 'business necessity'." at 1509

Thompson v. Mississippi State Personnel Board, 674 F. Supp. 198 (N.D. Miss. 1987) at 209.
"...the burden then shifts to the employer to prove that the challenged employment practice...is related to job performance."

Thornton v. Coffey, 618 F.2d 686 (1980).
"Once [plaintiff] established a prima facie case, the [defendant] had the burden of proving that the employment decision was based on a legitimate, nondiscriminatory reason." at 690.

Burden of Proof -- to prove, etc.

U.S. v. International Union of Elevator Constructors, Local #5, 538 F.2d 1012 (3d Cir. 1979) at 1017.
"In evaluating these defenses it must be kept in mind that once a prima facie case of a Title VII xxxxxxxxx has been proved, the burden shifts to the defendant to prove by a preponderance of the evidence that there is a benign explanation or justification." (Cites Franas v. Barman Transit Co., 424 U.S. 747 (1976). cf. Albemarle 422 U.S. 405 (1975) and Mcdonnell, 411 U.S. 792 (1973).

United States v. State of South Carolina, 445 F. Supp. 1094, 1112 (1977).
"The burden of proof was thereby shifted to the defendants..."

Vuyznich v. Republic National Bank of Dallas, 505 F. Supp. 224 (N.D. Texas 1980).
at 276: "The burden of proof shifts to the employer to prove that the exam is job-related." Albemarle
at 276: "It becomes the employer's burden to demonstrate the job performance validity of its practices." Washington
at 276: "The employer's burden is not satisfied by establishing merely a rational basis for a test; the test must be validated."
at 374: "The Bank continues to bear the burden of showing" [job relatedness].

Walls v. Mississippi State Department of Public Welfare, 730 F.2d 306, 315 (1984).
"Once the plaintiff has made out a prima facie case, the burden is then upon the employer to prove that an employment practice which operates to exclude a protected class is related to job performance."

Western Addition Community Organization v. Alioto, 360 F. Supp. 733, 735 (1973).
"...at this point the burden of proof that the City's selection test for Firemen H-2 has been validated as not discriminatory against minorities rests, not upon plaintiffs herein, but now upon the City itself. Griggs, supra." (emphasis in the original)

Williams v. Hevi-Duty Electric Co., 668 F. Supp. 1062, 1067 (M.D. Tenn. 1986).
"If an otherwise neutral selection device impacts adversely upon a minority, the employer has the burden of proving that the device is job-related or justified by business necessity." at 1067.
[Dicta - case decided under disp. treatment]

Wislocki-Goin v. Mears, 831 F.2d 1374 (7th Cir. 1987) at 1380.
Quoting Dothard: "Once it is...shown that the employment standards are discriminatory in effect, the employer must meet 'the burden of showing that any given requirement [has]...a manifest relationship to the employment in question....If the employer proves that the challenged requirements are job-related, the plaintiff may then show that other selection devices without a similarly discriminatory effect would also 'serve the employer's legitimate interest...'"

Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982).
"The burden of persuasion is upon the employer to prove that significant risks of harm to the unborn children of women workers from their exposure during pregnancy to toxic hazards in the workplace." at p. 1190.

Burden of Persuasion

Assin Against Discrimination v. City of Bridgeport, 454 F. Supp. 751, 754 (2d Cir. 1978).
"In the Second Circuit this shifting of the burden means defendants became saddled not only with the burden of going forward, but also with the burden of persuasion."

Boyce v. Western Electric, 540 F. Supp. 732 (N.D. Tex. 1982) at 734, n.2
"In disparate impact cases the burden of persuasion does shift to the defendant."
Note: DT case and cont. confused.

Domingo v. New England Fish Co., 445 F. Supp. 421, 436 (1977).
"Once the plaintiff in a Title VII case has presented a prima facie case of discrimination, the defendant has the burden of going forward with the evidence and the burden of persuasion. Albemarle Paper Co. v. Moody, supra, 422 U.S. at 425; United States v. Ironworkers Local 86, supra, at 551."

Eastland v. Tennessee Valley Authority, 704 F.2d 613 (11th Cir. 1983) at 619.
"Once plaintiff establishes a prima facie case, the burden of persuasion shifts to the employer."

Ellison v. Best Foods, 598 P. Supp. 1159, 1165 (E.D. Arkansas, 1984).
"The 11th Circuit has indicated the employer bears the burden of persuasion, not merely production."

James v. Stockholm Valves, 559 F.2d 310, 337 (1977).
"Given the adverse effect [of the test on blacks], the burden of persuasion shifted to the company to show the job relatedness of the test."

Kaplan v. Intern Alhance of Theatrical and Stage Employees, 525 F.2d 1354, 1358 (9th Cir. 1975).
"The burden of going forward and the burden of persuasion is shifted to the accused."

Kirkland v. Buffalo Board of Education, 487 F. Supp. 760, 769 (2d Cir. 1979).
"However, once this is accomplished, the burden of persuasion shifts to the defendant to show the practice has a 'manifest relationship to the employment in question.'" (citing Griggs 401 U.S. at 432).

Larkin v. Pullman-Standard Division Pullman Inc., 854 F.2d 1549 (11th Cir. 1988) at 1580.
"The burden not just of production but of persuasion was then on Pullman to show that the practice challenged arose from a non-discriminatory business necessity." Cites Griggs.

Lujan v. Franklin County Board of Education, 766 F.2d 917 (6th Cir., 1985).
"If a facially neutral employment practice...has a disproportionate impact on minorities, the burden of persuasion shifts to the defendant to show that the test has a manifest relationship to the employment in question." at 928 (Dicta, b/c no prima facie case was made)

Palmer v. Shultz, Cooper v. Shultz, 662 F. Supp. 1551 (D. D.C. 1987).
"Once a plaintiff has established a prima facie case of disparate impact, the burden of persuasion shifts to the employer to show..." at 1569.

Segar v. Smith, 738 F.2d 1249, 1267 (1984).
"The employer bears the burden of persuasion as to the business necessity of the practice."

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Burden of Persuasion

United States v. City of Buffalo, 457 F. Supp. 612, 619 (2d Cir. 1978).
"Upon such a showing of disproportionate impact the burden of persuasion shifts to the employer to show that any given requirement has a manifest relationship to the employment in question."

U.S. v. City of Chicago, 385 F. Supp. 543, 553 (N.D. Ill. 1974).
"Courts of appeals construing and applying Griggs...have consistently concluded that upon a showing of disproportionate impact, the likes of which has been made here, the burden of persuasion is placed upon the employer with respect to the validity of the employment practice."

U.S. v. United Association of Journeymen & Apprentices of the Plumbing Etc. Union No. 24, 364 F. Supp. 808 (D. N.J. 1973); at 828.
1) "Shifting the burden to go forward and the burden of persuasion to the defendant union to demonstrate that the standard for union membership bear a substantial relationship to job performance." Citing U.S. v. Local 169, Carpenters, 457 F.2d 210 (1972) and U.S. v. Local 86, Ironworkers, 443 F.2d 544 (9th Cir.).

United States v. United Brotherhood of Carpenters and Joiners of America, Local 169, 457 F.2d 210 (7th Cir. 1972).
214 - "On the basis that a showing of an absence or a small black union membership in a demographic area containing a substantial number of black workers raises an inference that the racial imbalance is the result of discrimination, the burden of going forward and the burden of persuasion is shifted to the accused."

Vuyznich v. Republic National Bank of Dallas, 521 F. Supp. 656 (N.D. Texas 1981).
at 660 "A defendant at all times has the burden of persuasion in proving the business necessity."
at 626 "'Business necessity' is an affirmative defense."

Walker v. Jefferson County House, 726 F.2d 1554 (11th Cir. 1984) at 1558.
"The burden of persuasion shifts to the employer to prove business necessity and rebut the plaintiff's prima facie case."

Demonstrate

Adams v. Texas & Pacific, 408 F. Supp. 156, 160 (1975).
First the plaintiff must show discriminatory impact of the test. "Only then is the employer expected to demonstrate that, despite its discriminatory effects, the test is job-related."

Bauer v. Bailar, 647 F.2d 1037 (1981).
"After such a prima facie case has been made out the burden shifts to the employer to demonstrate that the job requirement involved has a manifest relationship to the employment in question." at 1042.

Black Law Enforcement Officers Association v. City of Akron, 824 F.2d 475 (6th Cir. 1987).
"If the complaining party succeeds in carrying this burden, the defendant must then demonstrate that the procedure has a manifest relationship to the employment in question." at 481.

Bonilla v. Oakland Scavenger Co., 697 F.2d 1297, 1303 (9th Cir. 1982).
"...burden shifts to the company to demonstrate..."

Burney v. City of Pawtuckett, 559 F. Supp. 1089 (D. Rhode Is. 1983).
"...defendants must then demonstrate, by a preponderance of the evidence,..." at 1098.

Catlett v. Mo. Highway & Transportation Commission, 589 F. Supp. 929, 942 (W.D. Missouri 1983).
"The burden shifts to the employer to demonstrate that the practice has a manifest relationship to the employment in question."

Chicano Police Officers Association v. Stoner, 526 F.2d 431 (1975).
"This showing would make out a prima facie case, requiring the employer to demonstrate that his employment criteria or tests were validly job-related." at 438.

Commonwealth of Pennsylvania v. Local Union 542, International Union of Operating Engineers, 469 F. Supp. 329 (E.D. Penn. 1978), at 370.
"The burden of proof issue is slightly different where only a disparate impact claim is being considered because in such a case the defenses may be different. A defendant may seek to demonstrate inaccuracies or defects in the calculation of disparities or he [sic] may seek to demonstrate that these disparities are permissible under Title VII because of "job relatedness," for instance. [Albemarle]. In the latter circumstance the defendant bears the burden of persuading the court that there isa manifest relationship to the employment in question." [Albemarle]

Cnesta v. State of New York Office of Court Administration, 657 F. Supp. 1084 (S.D. N.Y. 1987) at 1093.
"Where a prima facie case is established, the employer must then demonstrate that 'any given requirement [has] [sic] a manifest relationship to the employment in question'..." (Connecticut v. Teal, 457 U.S. 440 at 446, quoting Griggs)

Davis v. Richmond, Fredericksburg and Potomac R. Co., 803 F.2d 1322, 1325 n.2 (4th Cir. 1986).
"When such a prima facie case has been established under this theory, a defendant may still escape liability by demonstrating that a business necessity requires the challenged practice. Griggs v. Duke Power Company, 401 U.W. 424 (1971)."

Demonstrate

Delta Airlines, Inc. v. Kramarsky, 485 F. Supp. 300, 310 (S.D. N.Y. 1980).
"A showing of 'disproportionate impact' creates a presumption of invalidity that the employer must rebut by demonstrating that the classification involved serves a legitimate function."

Dendy v. Washington Hospital Center, 581 F.2d 990 (1978).
"The burden of demonstrating job-relatedness is on defendants."

Easley v. Anheuser-Busch, Inc., 572 F. Supp. 402, 414 (E.D. Missouri 1983).
"Once a significant adverse impact is shown, the burden of persuasion shifts to the employer to demonstrate that the test is mandated by business necessity."

EEOC v. Atlas Paper Box, 868 F.2d 1487 (6th Cir. 1989).
"If the defendant has not demonstrated a justifiable business basis for its practices...then judgment should be entered for plaintiff EEOC..." at 1491.

EEOC v. Greyhound Lines, Inc., 494 F. Supp. 481, 485 (E.D. Pa. 1979).
"Once discriminating impact has been shown, the employer must demonstrate that the work requirement has 'a manifest relationship to the employment in question.'"

Evans v. City of Evanston, 621 F. Supp. 710, 812 (D.C. Ill. 1985).
"...then the employer must demonstrate that the policy is job related."

Frazier v. Consolidated Rail Corp., 851 F.2d 1447 (D.C. Cir. 1988).
"The defendant has an opportunity to demonstrate that the selection device has a 'manifest relationship' to the employment in question."
(Weird)

Guardians Association, Etc. v. Civil Service Commission, Etc., 484 F. Supp. 785, 795 (S D. N.Y. 1980).
"The burden then shifts to the employer to demonstrate that the process used is job related."

Guardians Association of New York City v. Civil Service, 633 F.2d 232 (2nd Cir. 1980).
"The burden shifted to defendants to demonstrate that the challenged examinations were job-related." at 241.

Hervey v. City of Little Rock, 599 F. Supp. 1524 (E.D. Arkansas 1984).
"The defendant employer may respond by proving 'business necessity', that is, the employer may demonstrate that the neutral role."

Jackson v. Curators of University of Mo., 456 F. Supp. 879 (1978) at 880.
"Plaintiff argues that he has made a sufficient statistical showing to shift the burden of proof and require defendants to demonstrate that the educational requirement is a business necessity."

Kunda v. Muhlenberg College, 463 F. Supp. 294 (E.D. Penn. 1978) at 311.
"If a significant statistical pattern is shown the burden shifts to the defendant to demonstrate that the given requirement bears 'a manifest relationship to the employment in question'."
(Citing Griggs)

Demonstrate

Mister v. Illinois Cent. Gulf R. Co., 639 F. Supp. 1560, 1563 (S.D. Ill. 1986).
"...the burden of proof shifts to the defendant to demonstrate a business necessity for the practice or that the practice has a 'manifest relation to the employment in question' in order to avoid a finding of discrimination....This court is inclined to follow those cases holding that the shift is one of persuasion."

Moore v. Hughes Helicopters, 708 F.2d 475, 481 (9th Cir. 1983).
"...employer must demonstrate that the employment practice is justified by business necessity."

Nash v. Consolidated City of Jacksonville, Dural County, 837 F.2d 1534 (11th Cir. 1983) at 1536.
"The burden shifts to the employer to demonstrate that the practice has a manifest relationship...or is a business necessity." Cites Teal and Griggs.
Note: extra emphasis
Result turns explicitly on this burden standard not being confused with a disp. treatment approach.

Neloms v. Southwestern Power, 440 F. Supp. 1353, 1369 (1977).
"The plaintiff may shift the burden of proof to the defendant by demonstrating that the practice or device in question has a disparate impact on members of a particular race."

Page v. U.S., 726 F.2d 1038, 1053 (1984).
"We need deal only briefly with the issue of discriminatory impact. If the plaintiff succeeds in making [a prima facie] showing, the defendant to be free of liability must then demonstrate that the challenged practice is justified by business necessity."

Rasul v. District of Columbia, 680 F. Supp. 436 (D. D.C. 1988).
"[T]he employer in this case because the burden of demonstrating that denominational qualifications for the prison chaplin position...constitute the very 'essence of the business operation'..." at 440.
Citing Diaz, 442 F.2d 385, 388 (1971), cert. denied 404 U.S. 951.

Reilly v. Prudential Property and Casualty Insurance Company, 653 F. Supp. 725, 732 (D. N.J. 1987).
"...the employer must then demonstrate that 'any given requirement [has] a manifest relationship to the employment in question,' in order to avoid a finding of discrimination...the employer's burden of justifying the employment practice does not arise until after the plaintiff has made out a prima facie case.' 706 F.2d at 120." quoting Massarsky.

Robinson v. Polaroid Corp., 732 F.2d 1010 (1st Cir. 1984).
"The employer must then demonstrate that any given requirement [has] a manifest relationship..." at 1014
[Citing Conn. v. Teal, 457 U.S. 440, 446-447]

Rowe v. Cleveland Pneumatic Co. Numerical Control, 690 F.2d 88 (6th Cir. 1982).
"Once the plaintiff has met this burden, an employer must demonstrate that the employment practice is job related." at 93.
[dicta - because court found no prima facie case]

Demonstrate

Shack v. Southworth, 521 F.2d 51 (6th Cir. 1975).
[This is 14th Amdt., not Title VII]
"The public employer must, we think...demonstrate that the means is in fact substantially related to job performance."

Spearman v. Southwestern Bell Telephone Co., 62 F.2d 509 (1981) at 512.
"If plaintiff established a prima facie case, defendant effectively rebutted it by demonstrating 'a legitimate business justification for its management evaluation process..."

Talev v. Reinhardt, 662 F.2d 888 (1981).
"The burden then falls upon the employer to demonstrate that these standards have a 'manifest relationship' to the employment in question." p. 892

U.S. v. State of Virginia, 620 F.2d 1018 (4th Cir. 1980).
"Under Griggs once the adverse impact was established, the burden passed to the Commonwealth to demonstrate that the test had a rational basis and was validated in terms of job performance." at p.1024.

Vanguard Justice Soc. v. Hughes, 592 F. Supp. 245 (D. MD. 1984).

"Once a plaintiff establishes a prima facie case, the burden shifts to the employer to demonstrate that the selection process has a 'manifest relationship'." at p. 255.

Vermelt v. Hough, 627 F. Supp. 587, 603 (W.D. Mich. 1986).
"If that showing [by plaintiff] is made the employer must then demonstrate that 'any given [employment practice has] a manifest relationship to the employment in question."
[Dicta - disp. treatment explicitly denied, disp. impact implicitly denied]

Vulcan Pioneers v. New Jersey Dept. of Civil Service, 625 F. Supp. 527, 545 (D. N.J. 1985).
"...plaintiff had indeed established a prima facie case of discrimination. Hence, the burden shifted to defendants to demonstrate the job-relatedness, or 'validity', of the test at issue."

Western Addition community Organization v. Alioto, 369 F. Supp. 77, 79 (1973).
"When it appears, as in this case, that an employment test has operated adversely against certain racial groups, then the test becomes suspect as being over-demanding and, therefore, presumptively discriminatory and unlawful, and remains so unless and until the employer meets the burden of demonstrating that the particular test is, nevertheless, not overdemanding, but truly job-related and, therefore, a necessary test for the job's performance."

Williams v. City of New Orleans, 543 F. Supp. 662 (E.D. La. 1982) at 672.
"The burden shifts to the employer to demonstrate that the practice under attack is justified by a legitimate business purpose."

Williams v. City of San Francisco, 483 F. Supp. 335 (1979).
"The burden has shifted to the defendant to demonstrate the validity of the selection process."

Wilson v. Woodward Iron Co., 862 F. Supp. 886 (N.D. Ala. 1973).
at 895: employer "carried its burden - that there is a demonstrable relationship."
Note: This is a §1981 case explicitly adopting analogous reasoning, at 895.

Establish

Antonio v. Ward's Cove Packing Co., 768 F.2d 1120, 1131 (9th Cir. 1985).
"The burden of proof then shifts to the defendant to establish that the practice has 'a manifest relationship to the employment in question'."

Bernard v. Gulf Oil, 841 F.2d 547, 467 (1988).
"...Gulf still bears the burden of establishing that these tests were job related."

Boyd v. Ozark Air Lines, Inc., 568 F.2d 50, 52 (8th Cir. 1977).
"...the burden shifted to [the employer] to establish that the minimum height requirement was a business necessity."

Coles v. Penney, 450 F. Supp. 897 (D. D.C. 1978).
"If plaintiff succeeds with his proof of adverse impact, defendants could avoid a finding [of violation of Title VII] by establishing that any of the promotional procedures which adversely affect blacks are 'significantly related to successful job performance'." at 900 [Citing Griggs]

Davis v. County of Los Angeles, 566 F.2d 1334, 1337 (9th Cir. 1977).
"Shifting the burden to the defendants to establish that the tests were job-related."

Firefighters Institute v. City of St. Louis, Missouri, 470 F. Supp. 1281 (1979) at 1284.
"Thus, the burden shifts to defendants to establish the validity, or job relatedness, of the examination process."

Gay v. Waiters and Dairy Lunchmen's Union, 694 F.2d 531, 537 (9th Cir. 1982).
"Burden shifts to the defendant to establish that the practice is established by business necessity."

Greenspan v. Automobile Club of Michigan, 495 F. Supp. 1021 (E.D. Mich. 1980).
"Defendants must establish that such a practice or policy is justified..." at 1025.

Howard v. Intern. Molders and Allied Workers, 779 F.2d 1546 (11th Cir. 1986).
at 1548: "The employer then has the burden to establish that the test is job related."

Metlakatla Indian Community v. Adams, 427 F. Supp. 868 (1977) at 871.
"Assuming arguendo that plaintiff was qualified for the position, the burden then shifts to defendant to establish that there was a legitimate, nondiscriminatory reason for the failure to promote."

Moody v. Albemarle Paper Company, 474 F.2d 134, 138 (also at p. 140) (4th Cir. 1973).
"The plaintiffs made a sufficient showing below that Albemarle's testing procedures have a racial impact. It was thus incumbent upon Albemarle to establish business necessity by showing that its testing requirements 'have a manifest relationship to the employment in question.' Griggs, at 432, 91 S.Ct. at 854."

Mosley v. Clarksville Memorial Hospital, 574 F. Supp. 224 (M.D. Tenn. 1983).
"The burden shifts to the defendant to establish that the challenged employment practice or policy is mandated by business necessity or has a manifest relationship to the employment in question." at 232.
[Dicta - because no prima facie case found]

Establish

Nance v. Union Carbide Corp., Consumer Products Division, 540 F.2d 718, 727 (4th Cir. 1976).
"The burden of establishing the job-relatedness of a test arises 'only after the complaining party or class has made out a prima facie case of discrimination...'" citing Albemarle.

Pina v. City of East Providence, 492 F. Supp. 1240 (D. Rhode Is. 1980).
"Once the plaintiff has established a prima facie case of disparate impact, the employer must then meet the burden of establishing..." at 1245.

Rich v. Martin Marietta Corporation, 522 F.2d 333, 348 (10th Cir. 1975).
Re largely subjective policies, "the defendant would have the burden of establishing the fundamental fairness of this approach." However, Court also says prima facie showing can be xxxxx if Defendant produces evidence of "objective business reasons or necessity for its failure to promote the plaintiffs."

U.S. v. City and County of San Francisco, 656 F. Supp. 276 (N.D. Cal. 1987).
"Once a plaintiff makes this prima facie showing of adverse impact, the burden then shifts to the employer to establish the validity of the employment practice." at 282.

Woods v. North American Rockwell Corporation, 480 F.2d 644, 645 n.1 (10th Cir. 1973).
"We discuss below again a related point as to whether the plaintiff Woods established a prima facie case calling on the company to establish that the test was not unlawful."

Burden to Show

Aquilera v. Cook City Police and Corr. Merit Board, 582 F. Supp. 1053, 1054-55 (N.D. Ill. 1984).
"...the burden shifts to the employer to show that the requirement has a manifest relationship to the employment in question."

Allen v. City of Mobile, 464 F. Supp. 433 (S.D. Ala. 1978).
at 438: "the focus shifts to the defendant employer who must clearly show the job relatedness..."
at 439: "burden of refuting the plaintiff's prima facie case of discrimination."

Allison v. Western Union Telegraph, 680 F.2d 1318 (11th Cir. 1982).
"Once the plaintiff has established that an employment practice results in disparate impact on a protected group. The burden shifts to the employer to show that the practice has a manifest relationship to the employment in question." at 1322.

Blake v. City of Los Angeles, 595 F.2d 1367, 1375 (9th Cir. 1979).
"burden shifts to the defendants to show that the selection device is job-related."

Burwell v. Eastern Airlines, Inc., 633 F.2d 361 (4th Cir. 1980).
"Eastern must show that its challenged practice bears a manifest relationship to the flight attendants' employment." at p. 370.

Brunet v. City of Columbus, 642 F. Supp. 1214, 1221 (S.D. Ohio, 1986).
"Title VII forbids use of employment tests that are discriminatory in effect unless the employer meets the burden of showing that any given requirement [has]...a manifest relationship to the employment in question."
"As a result of plaintiff's demonstration of adverse impact in the 1984 firefighter examination, it becomes defendant's burden to show that the tests reflect the actual requirements of the job." at 1221.

Bryant v. International Schools Series, Inc., 502 F. Supp. 477, 487 (D. N.J. 1980).
"Further, plaintiffs having established a prima facie case of disparate input, ISS must meet the burden of showing that its practices have a manifest relationship to the employment in question...."

Byrd v. Long Island Lighting Co., 565 F. Supp. 1455 (E.D. N.Y. 1983) at 1468.
Quoting Ablemarle at 425, "the court went on to hold that the employer's burden of showing this job relatedness (of test) [sic] only arises after plaintiff has made out a prima facie case [...]."

Carpenter v. Stephen Austin State University, 706 F.2d 608, 621 (1983).
Once the plaintiff has established a prima facie case, "the burden then shifts to the employer to show that the specific requirement has a manifest relationship to the employment in question." (quoting Griggs).

Carter v. Shop Rite Foods, Inc., 470 F. Supp. 1150 (N.D. Tex 1979).
at 1155: "the burden shifts to the defendant to show that the employee was denied a promotion for lawful reasons."
at 1156: "the defendant must prove its case with clear and convincing evidence."

Burden to Show

Chambers v. Omaha Girls, 834 F.2d 697 (8th Cir. 1987) at 700.
"The burden then shifts to the employer to show that the practice has a manifest relationship to the employment in question and is justifiable in the ground of business necessity."
at 701: "The employer must demonstrate that there is a compelling need...to maintain that practice..."
"Moreover, the employer may be required to show that the challenged employment practice is 'necessary to safe and efficient job performance'."

Chaney v. Southern Railway Co., 847 F.2d 718 (11th Cir. 1988).
at 724 cites Griggs 3 part test
"The burden then shifts o the employer to show that....the employer must do more than articulate a justification for the practice. It must show that the disputed practice was a business necessity."
Note: In this case burden of proof for plaintiff is specified as at 722.

Chapelle v. E.I.Dupont, 497 F. Supp. 1197 (198).
"The defendant must then show that the challenged practice is founded upon business necessity" at p.1200.

Coe v. Yellow Freight System Inc., 646 F.2d 444 (1981).
"Statistical evidence will often be sufficient to establish the disparate impact. The burden then shifts to the employer to show that its practice is 'job related'." at 451.

Commonwealth of Pennsylvania v. Rizzo, 466 F. Supp. 1219 (1979, E.D. Penn) at 1225.
Citing Dothard v. Rawlinson 433 U.S. 321 (1977), the court wrote that "the Supreme Court outlined the respective burdens of proof in disparate impact cases. [...] The court noted that [...] once it is shown that the employment standards are discriminatory in effect the employer must meet 'the burden of showing that any given requirement [has] ... [sic] a manifest relationship to the employment in question'." (Dothard court quoting Griggs).

Corley v. City of Jacksonville, 506 F. Supp. 528 (M.D. Fl 1981).
at 535: "...the employer meets 'the burden of showing that any given requirement [has]...a manifest relationship to the employment in question'."

Cormier v. P.P.G. Industries, Inc., 519 F. Supp. 211 (W.D. La. 1981) at 277.
"The burden shifts to the employer to overcome this inference...by showing the disparate impact was caused by...a job-related selection device."

Cox v. City of Chicago, 700 F. Supp. 921, 924 (N.D. Ill. 1988).
"...the defendant may rebut [the prima facie case] by showing that plaintiff's proof is flawed or by showing that the challenged standards causing the discriminatory patterns are job related."

Cuesta v. State of New York Office of Court Administration, 571 F. Supp. 392 (1983) at 395.
After the plaintiff proves adverse impact, "the burden then shifts to defendants to show that the test was job-related."

Davis v. City of Dallas, 487 F.Supp. 389 (N.D. Tex 1980).
at 392: "The city has the burden of showing that any given requirement...[has] a manifest relationship to the employment in question." Griggs at 432.

Burden to Show

Davis v. Richmond, Fredricksburg & Potomac R. Co., 593 F. Supp. 271 (E.D. Va. 1984).
"After plaintiffs have established such a prima facie case, the Defendant may escape liability by showing a business necessity." at p. 278.

Dendy v. Washington Hospital Center, 431 F. Supp. 873 (D. D.C. 1977).
"burden shifts to defendant to show that the discriminatory practice 'bear[s] a demonstrable relationship to successful'..." at 875.

Detroit Police Officers Association v. Young, 446 F. Supp. 979 (E.D. Mich. 1978).
(Reverse discrimination case)
The plaintiffs (white officers alleging discrimination) "have satisfied the burden of showing that these examinations were content valid."
[They had to prove that no discrimination had occurred in the past, so they wanted to show validity of earlier tests.]

Douglas v. Robbins & Myers, Inc., 505 F. Supp. 765 (1980) at 765.
"Once plaintiff has established the prima facie case the burden shifts to the defendant to show rational business justification for its actions."

EEOC v. International Union of Elevator Constructors, Local #5, 398 F. Supp. 1237 (1975, E.D. Penn.) at 1253.
"For Local 5 to dispel the inference of discrimination, it must show that the policies and practices controlling the issuance of work permits, admission to membership, and so on, which have undeniably had discriminatory consequences, bear a manifest relationship to legitimate union interests." (citing Griggs)

EEOC v. Local 78 United Association of Journeymen, 646 F. Supp. 318 (N.D. Okl 1986).
"Proof of disparate impact gives rise to a prima facie case of employment discrimination....The burden then shifts to the employer to show that its practice is job-related." at 325.

EEOC v. Rath Packing Co., 787 F.2d 318 (8th Cir. 1986) at 331.
"[T]he employer must meet the burden of showing that any given requirement [has]...a manifest relationship to the employment in question."

Evans v. City of Evanston, 695 F. Supp. 922, 925 (N.D. Ill. 1988).
"...the employer bears the burden of showing that its discriminatory policy or practice is necessary and manifestly related to job performance."

Fisher v. Procter & Gamble, 613 F.2d 527 544 (1980).
"When an examination has been shown to affect a racially disparate impact, the employer must show that the test is 'job related'."

Foster v. MCI Telecommunications Inc., 555 F. Supp. 330 (D. Col. 1983).
"Once the plaintiff established the prima facie case of discriminatory impact, the burden shifted to the defendant to show 'that any given requirement [has]...manifest relationship to the employment in question." at 335, quoting Dothard v. Rawlinson, 433 U.S. 321, 329.

Burden to Show

Fowler v. Schwarzwalder, 351 F. Supp. 721 (1972) at 724.
"Defendants recognize their obligation to show job relatedness, or validity, of the challenged test."
"It then becomes the duty of defendants to sustain the burden of presenting evidence to overcome the prima facie case."

Fowler v. Schwarzwalder, 348 F. Supp. 844 (1972) at 845.
"The Court has also said that the employer has the burden of showing that such tests have a manifest relationship to the employment."

Friend v. Leidinger, 446 F. Supp. 361, 367 (1977).
"Under Title VII no matter how well intentioned defendants might be, if the result of their acts or omissions in hiring, firing, promotion and the like has an adverse impact on a protected class, then the burden is placed upon defendants, by law, to show that the adverse impact was a necessary but unintended result of job-related requirements. Griggs v. Duke Power Co., 401 U.S. 424 (1971)." (emphasis in the original)

Fudge v. City of Providence Fire Dept., 766 F.2d 650 (1st Cir. 1985).
"defendant had not met the burden, then falling to it, to show..." at 652.

Garcia v. Gloor, 609 F.2d 156, 163 (1980).
"...where an employer has utilized an employment test of some other requirement not patently discriminatory and the requirement has been demonstrated by the plaintiff to be discriminatory in effect, the employer must show on defense that the requirement is justified by business necessity."

Gilbert v. City of Little Rock, 544 F. Supp. 1231, 1243 (E.D. Arkansas, 1982).
"If disparate impact is established, the burden shifts to the employer to show that the practice has a manifest relationship to the employment in question."

Giles v. Ireland, 742 F.2d 1366 (11th Cir. 1984).
at 1381: "Congress has placed on the employer the burden of showing that any given requirement must have..." (cites Griggs)
Note: Although Griggs is eventually used in this case, the court introduces its discussion with a thumbnail sketch of disparate impact analysis. In this passage it does not mention burden of proof on employer at all, rather, after the prima facie case is established, "the Court would then have been required to determine whether the policy constitutes a business necessity." at 137.

Gillespie v. State Department of Health & Social Services, 583 F. Supp. 1475, 1478 (W.D. Wisc. 1984).
"...the employer must meet 'the burden of showing that any given requirement [has]...a manifest relationship to the employment in question'."

Gomez v. City of South Bend, 605 F. Supp. 1173, 1182 (N.D. Ind. 1985).
"...the employer must show that the requirement or policy has a manifest relationship to the employment in question. If the employer shows...job related[ness], then the burden shifts back to the plaintiff to show that other selection devices would work."

Burden to Show

Gunther v. Iowa State Men's Reformatory, 462 F. Supp. 952 (1979) at 955.
"Thus a prima facie case of discrimination has been established and it becomes the defendants' burden to show that the sex-based requirement has a manifest relationship to the employment in question."

Gutierrez v. Municipal Ct. of SE Judicial Dist., 838 F.2d 1031, 1039 (9th Cir. 1988).
"No such rule will be deemed lawful unless the employer can show that it is justified by business necessity."

Hameed v. International Association of Bridge, Etc., 637 F.2d 506, 513 (8th Cir. 1980).
"The Defendant can avoid liability under Title VII by showing that the differential pass rates were caused by legitimate selection criteria which are justified by business necessity."

Hawkins v. Anheuser-Busch, Inc., 504 F. Supp. 882, at 885-886.
"Upon a prima facie showing under either [disparate impact or treatment] approach, the burden shifts to the employer to show that the questioned requirement has 'a manifest relationship to the employment in question'."

Hester v. Saither Railway Co., 349 F. Supp. 812 (N.D. Ga. 1972).
at 817: "The burden is on the employer to show the relevancy of employment tests it uses." (cites Griggs)

Hill v. United States Postal Service, 522 F. Supp. 1283 (1981).
"The employer may defend by showing that the employment practice is justified by business necessity or need."

Hornick v. Borough of Duryea, 507 F. Supp. 1091, 1100 (M.D. Pa. 1980).
"Once it is shown that the employment standards are discriminatory in effect, the employer must meet 'the burden of showing that any given requirement has a manifest relationship to the employment in question'."
Court quotes Dothard v. Rawlinson, 433 U.S. 321 (1977).

Jones v. Mississippi Department of Corrections, 615 F. Supp. 456 (D.C. Miss. 1985).
at 464: "The employer then bears the burden of showing that the specific procedure bears 'a demonstrable relationship to successful performance of the jobs for which it was used',..."

Kim v. Commandant, Defense Language Institute, 772 F.2d 521, 524 (9th Cir. 1985).
"The employers burden of showing the 'manifest relationship' arises only after the complaining party or class has made out a prima facie case of discrimination."

Kirby v. Colony Furniture Co., Inc., 613 F.2d 696, 703 (8th Cir. 1980).
"...the burden shifts to the employer to show that the practice has a manifest relationship to the employment in question."
and at 703-04: "The burden of proof is upon the employer to establish business necessity."

Burden to Show

Liberles v. County of Cook, 709 F.2d 1122 (7th Cir. 1983).
at 1131: "Because plaintiff proved a prima facie case of disparate impact, the burden shifted to IDPA and CCDPA to provide a legally-acceptable justification..."
at 1132: "The parties here dispute the precise nature of the burden of establishing a business justification. This circuit is in accord with other circuits that the employer must show that the practice is necessary to the safe and effective operation of the business."

Little v. Mester-Bill Products, Inc., 506 F. Supp. 319 (N.D. Mis. 1980).
at 332: "...defendant must show that the questioned policy bears 'a manifest relation to the employment in question', and that this business necessity may not be met by other policies which would impact less severely on the protected group."

Lowe v. City of Monrovia, 775 F.2d 998, 1004 (9th Cir. 1985).
"burden shifts to the defendant to show that the practice is justified by business necessity."

Marafino v. St. Louis County Circuit Court, 537 F. Supp. 206, 213 (E.D. Miss. 1982).
"If plaintiff satisfied that burden, the burden shifted to the Current Court to show that its policy has 'a manifest relationship' to the employment in question."

Martinez v. Oakland Scavenger Co., 680 F. Supp. 1377 (N.D. Cal. 1987).
"If plaintiffs establish their prima facie case, the burden shifts to the employer to show that 'legitimate and overriding business considerations provide justification'." at 1390, citing Bonilla 697 F.2d 1303.

McCash v. City of Grand Forks, 628 F.2d 1058, 1062 (8th Cir. 1980).
"...the burden shifts to the employer to show that the practice has a 'manifest relationship to the employment in question'."

Meadows v. Ford Motor Co., 510 F.2d 939 (6th Cir. 1975).
"The burden would then shift to show a legitimate business reason for the job refusal." at 948.

Minority Police Officers v. City of South Bend, 617 F. Supp. 1330, 1350 (D.C. Ind. 1985).
"...the defendant must show that the requirement or policy has a manifest relationship to the employment in question...[then the] burden shifts back to the plaintiff to show alternatives exist."

Morgado v. Birmingham-Jefferson County, 706 F.2d 1184 (11th Cir. 1983).
Places "the burden" on employee.
at 1189: "If [the employer] relies on the exception; he will be expected to show the necessary facts."

Myers v. Gilman Paper Corp., 392 F. Supp. 413 (S.D. Ga. 1975).
at 419: "shifted the burden to the defendant to show that the present discriminatory effects were unavoidable..."

Burden to Show

Norwalk Guardian Association v. Beres, 489 F. Supp. 449, 852 (1980).
"The burden shifts to the defendant to show that the selection procedure bears a demonstrable relationship to successful performance of the job for which it is used. (citing Albermarle Paper Co. v. Moody, 422 U.S. 405) Though the Second Circuit has described the burden as "heavy", (Bridgeport Guardians v. Civil Service Commission, 482 F.2d 1333 (2d Cir. 1973)) it subsequently indicated that it meant nothing heavier than a burden of persuasion that the examination was substantially related to job performance."

Parson v. Kaiser Aluminum, 575 F.2d 1374, 1390 (1978).
"Kaiser therefore has the burden of showing that the prior experience requirement has a 'manifest relationship' to the legitimate needs of the craft position." [quoting Griggs]

Patterson v. Youngstown Sheet & Tube Co., 440 F. Supp. 409, 413 (N.D. Ind. 1977).
"...the burden should be placed on the employer to show that this disparity is the product of nondiscriminatory factors."

Peques v. Mississippi State, 699 F.2d 760, 773 (1983).
"If such an impact is demonstrated, whether by statistics or other evidence, the defendant is called upon to show that the examination is job-related..."

Peters v. Wayne State University, 691 F.2d 235 (6th Cir. 1982).
"To defend against a claim of disparate impact, an employer must show that its practice is necessarily and closely related to a business purpose." at 239

Police Officers for Equal Rights v. City of Columbus, 644 F. Supp. 393 (S.D. Ohio, 1985).
"[I]t is then incumbent upon defendants to produce sufficient evidence showing that the exam or procedure is job-related." at 412.
"If that showing is made, the employer must then demonstrate that 'any given requirement [has] a manifest relationship to the employment in question'." at 432

Powell v. Georgia Pacific Corp., 535 F. Supp. 713 (1982) at 719.
"...once disparate impact of a practice has been show, the burden shifts to the employer to show that the practice has a 'manifest relationship' to the employment in question..."

Ramirez v. City of Omaha, 538 F. Supp. 7, (D. Nebraska 1981).
"The burden shifts to the employer to show that the practice has a 'manifest relationship' to the employment in question."

Regner v. City of Chicago, 789 F.2d 534 (7th Cir. 1986).
at 537: "Once a plaintiff has made out a prima facie case of disparate impact, the burden shifts to the defendant to rebut plaintiff's statistics or to show that the allegedly discriminatory practice is mandated by business necessity....Even if the employer can demonstrate a business necessity, a plaintiff may still prevail by showing that the employer was using the practice in question as a mere pretext for discrimination or that other selection devices without a significant discriminatory effect would also 'serve the employer's legitimate interest'..."

Burden to Show

Robinson v. Lorillard Corporation, 444 F.2d 791, 798 n.6 (4th Cir. 1971).
Quotes Griggs re burden on employer in this footnote focusing on the business necessity standard.
"In the Griggs case the Supreme Court held that 'Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question'. 401 U.S. 424, 91 S.Ct. at 854."

Rodriguez v. East Texas Motor Freight, 505 F.2d 40 (5th Cir. 1974).
"It was ETMF's burden to show that its history of hiring only white/Anglo line drivers resulted from a scarcity of available Negroes." at p. 56.

Rogers v. International Paper Co., 510 F.2d 1340, 1348 (8th Cir. 1975).
"Congress has placed on the employer the burden of showing that any given requirement [has] a manifest relationship to the employment in question."

Rule v. International Association of Bridge, etc. Workers, 568 F.2d 558, 566 (8th Cir. 1977).
"The only way to rebut the prima facie case is by showing that the challenged qualifications are job related."

Sanders v. Monsanto Co., 529 F. Supp. 704 (S.D. Tex. 1981).
at 711: "The employer must meet the burden of showing that the tests are job related."

Schultz v. Western Pub. Co., 609 F. Supp. 888, 903-04 (D.C. Ill. 1985).
"...the burden shifts to the Defendant to show that the employment criterion or practice in question is justified by a legitimate business reason."

Scott v. University of Delaware, 455 F. Supp. 1102 (1978, D. Del) at 1123.
"Once it is thus shown that the employment standards are discriminatory in effect, the employer must meet 'the burden of showing that any given requirement [has]...[sic] a manifest relationship to the employment in question." (Griggs)

The Shield Club v. City of Cleveland, 370 F. Supp. 251 (N.D. Ohio, 1972).
"Under prevailing case law this prima facie showing of racial impact shifted the burden to the defendants to show a manifest relationship between the tests given the position of patrolman." at 253.

Smith v. American Service Co., 611 F. Supp. 321 (D.C. Ga. 1984).
at 326: "The employer then must show that the neutral factor is a business necessity."

Sobel v. Yeshiva University, 839 F.2d 18 (2nd Cir.1988).
"[E]mployer's burden...to show that...manifest relationship..." at 29 [citing Griggs].

Solo Cup Co. v. Federal Insurance Co., 619 F.2d 1178 (7th Cir. 1980).
at 1186: "Once the employment standard is so shown to be discriminatory in effect, the employer then must meet the burden of showing that its standard bears a manifest relation to the job in question. If the employer can demonstrate the job relatedness of its standard, the plaintiff may then show that other selection devices without a similarly discriminatory effect will also serve the employer's interest in maintaining an efficient workforce."

Burden to Show

Spurlock v. United Airlines Inc., 330 F. Supp. 228 (D. Col. 1971).
"Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." at 235.

Spurlock v. United Airlines, Inc., 475 F.2d 216, 218 (10th Cir. 1972).
"...once the appellant had established a prima facie case of racial discrimination, the burden fell upon United to show that its qualifications for flight-officer were job-related."

Stamps v. Detroit Edison, 365 F. Supp. 87 (E.D. Mich. 1973).
"Congress has placed upon the employer the burden of showing that any given requirement must have a manifest relationship to employment." at 112.

Stewart v. General Motors Corp., 542 F.2d 445 (7th Cir. 1976).
at 449: "Where statistical evidence demonstrates a discrepancy between the racial composition of those promoted to a given job and the pool of eligible applicants which is too great to reasonably be the product of random distribution, the burden should be placed on the employe to show that this disparity is the product of nondiscriminatory factors."
at 450: "The burden would be on the defendant to demonstrate that racial disparity was the product of nondiscriminatory factors."

Thomas v. City of Evanston, 610 F. Supp. 422, 427 (D.C. Ill. 1985).
"...the employer bears the burden of showing that its discriminatory policy or practice is necessary and manifestly related to job performance."
But note: Then plaintiff has opjs to show other alternatives exist.

United States v. Chesapeake and Ohio Railway Company, 471 F.2d 582, 586 (4th Cir. 1972).
"Since the employment statistics demonstrated that pre-Act hiring racially segregated both the general yard and the Barney yard, the burden shifted to the C&O to come forward with evidence to show that it had never discriminated in hiring black brakemen.
The company, however, has failed to refute the government's prima facie case."
Burden shifting re disc. treatment.

United States v. City of Chicago, 549 F.2d 415 (7th Cir. 1977).
at 427: "Upon such a showing of disparate effect on minority applicants, the burden shifts to the employer to show that 'any given requirement[has] a manifest relationship to the employment in question' and that the 'disparity [is] the product of nondiscriminatory factors'" (citing Griggs).
at 428: "The burden would be on the City to demonstrate that the examination in fact tested job-related qualifications."

U.S. City of Milwaukee, 481 F. Supp. 1162, 1163 (E.D. Wisc. 1979).
"Then the burden shifts to the employer who must show a 'business necessity' fo the practice in question."

U.S. v. City of Yonkers, 609 F. Supp. 1281 (D.C. NY 1984) at 1285.
Once prima facie case is shown, "the employer must meet the burden of showing that any given requirement [has]...[sic] a manifest relationship in the employment in question." (Griggs)

Burden to Show

U.S. v. Local 638 Enterprise Association of Steam, Etc., 360 F. Supp. 979, 992 (S.D. NY 1973).
"The burden is on the defendants to show that the features of the present selection system are justified."

United States v. State of New Jersey, 530 F. Supp. 328, 334 (D. N.J. 1981).
"Once a selection practice, device or procedure has been shown to disproportionately exclude blacks on this panel, it is the employer's burden to show that the deice or procedure is valid or otherwise required by business necessity."

United States v. Town of Cicero, Illinois, 786 F.2d 331 (7th Cir. 1986).
at 333: "The defendant must then show that the employment practice is manifestly related to the job in question...or significantly serves some important business purpose....If the defendant cannot make this showing, the plaintiff prevails. Even if this showing is made, however, the plaintiff may present evidence to show that the proferred nondiscriminatory reasons are pretextual and thereby succeed in proving illegal discrimination."

Van v. Plant's Field Service Corp., 672 F. Supp. 1306 (C.D. Cal. 1987).
"Once it is shown that the employment standards are discriminatory in effect, the employer must meet the burden of showing that any given requirement has a manifest relationship to the employment in question." at 1313 (quoting Dothard).

Wade v. Mississippi Co-Op Extension Service, 615 F. Supp. 1574 (D.C. Miss. 1985).
at 1580: "...the employer carries 'the burden of showing that any given requirement [has]...a manifest relationship to the employment in question'." Griggs at 432.

Walls v. Mississippi State Dept. of Public Welfare, 542 F. Supp. 281 (N.D. Miss. 1982).
at 309: "...defendant must show that the questioned policy bears 'a manifest relation to the employment in question,' and that this business necessity may not be met by other policies which would impact less severely on the protected group."

Walker v. Robbins Hose Co. No. 1 Inc., 465 F. Supp. 1023 (D. Del. 1979) at 1045.
"Once it is thus shown that the employment standards are discriminatory in effect, the employer must meet 'the burden of showing that any given requirement [has]...[sic] a manifest relationship to the employment in question." (Griggs)

Watkins v. Scott-Paper, 530 F.2d 1159, 1180 (1976).
"If Scott wishes to validate any barrier to the advancement of affected class members to their rightful places, it has the burden of showing business necessity."

Williams v. American Saint Gobain Corp., 447 F.2d 561, 566-567 (10th Cir. 1971).
"Only what the courts have termed a 'business necessity' could provide a warrant for such a continuing consequence. Thus this Court said in Lee Way Motor Freight, Inc., supra, 431 F.2d at 249: 'When a policy [or a practice or a procedure] is demonstrated to have discriminatory effects, it can be justified only by a showing that it is necessary to the safe and efficient operation of the business'."

Williams v. Colorado Springs, 641 F.2d 835 (1981).
"Once the plaintiff establishes a prima facie case of discriminatory impact, the employer must meet the burden of showing that any given requirement has...a manifest relationship to the employment in question." (Quoting Dothard 433 U.S. 329) at 840.

Burden to Show

Wilmac v. City of Wilmington Firefighters, 699 F.2d 667 (3d Cir. 1983) at 670.
Quoting Crocker v. Boeing Co. (Vertol Div.) 662 F.2d 975 (1981, 3d Cir.), the court wrote that if "a plaintiff makes out a prima facie case of disproportionate impact...a [sic] defendant must offer evidence to show that the challenged requirement or device has a manifest relation to employment."

Woods v. North American Rockwell Corporation, 480 F.2d 644, 647 (10th Cir. 1973).
Circuit Court upholds District Court's finding that plaintiff failed to establish a prima facie case of discrimination in administering departmental promotion test.
This is more a burden-shifting quote by inference.
"No prima facie case of such discrimination was established as in Spurlock v. United Airlines, Inc., 475 F.2d supra at 218. Therefore the company was not called on to show that the test fulfilled a genuine business need and was permissible under 703(h) of the Act, 42 U.S.C.A. §200-e-2(h). See Griggs, supra, 401 U.S. at 432, 91 S.Ct. 424."

Woods v. Safeway Stores, Inc., 420 F. Supp. 35, 42 (1976) (quoting Griggs v. Duke Power Company, 401 U.S. 424, 431 (1971).
"If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."

Woody v. City of West Miami, 477 F. Supp. 1073 (S.D. Fla. 1979).
at 1078: "Only then does the defendant have the burden of going forward to show that this practice does not have this substantial disparate impact."
Note: Diff. test from the one usually given, i.e. business necessity.
Could be a time bomb for us in creating a new defense.

York v. Alabama State Board of Education, 581 F. Supp. 779 (M.D. Ala. N.D. 1983).
at 785: "The proper allocation of burdens is well established....If the plaintiff establishes a prima facie case, the burden then shifts to the defendant to show that the tests have a 'manifest relationship to the employment in question'."
Same language repeated by Court at later stage in case (on settlement) in York, 631 F. Supp. 78, §8 (M.D. Ala. 1986).

Yuhas v. Libbey-Owens-Ford Co., 411 F. Supp. 77, 79 (N.D. Ill. 1976).
"Under Griggs, once a plaintiff has established a prima facie case, the burden is shifted to the defendant to show that its practices fit the job."

Yuhas v. Libbey-Owens-Ford Co., 562 F.2d 496 (7th Cir. 1977).
at 498: rule with discriminatory impact "is invalid under Title VII unless defendant can show that it is job-related."

Zameens v. City of Cleveland, 686 F. Supp. 631 (N.D. Ohio, 1986).
"The burden then shifts to the defendant to show either that the plaintiff's statistical evidence is inaccurate or misleading or that there was a legitimate nondiscriminatory reason for the disparity." at 652
"If a plaintiff in a Title VII case proves a prima facie case of disparate impact, the employment practice is presumed discriminatory unless the defendant justifies its conduct." at 652.
"The burden of proof shifts to the defendant to demonstrate that the selection device is required by business necessity." at 653.

Burden to Show

"Only after the defendant proves that the test was validated, is job related, and is not discriminatory are the plaintiffs put to their burden of rebuttal." at 653.
"The city has the burden of demonstrating that the...components of the examination are valid..." at 654.

STANDARDS OF JOB RELATEDNESS

Black Law Enforcement Ass'n v. City of Akron, 824 F.2d 475, 480 (6th Cir. 1987):

Employer must show that the "procedure used measures important skills abilities and knowledge that are necessary for the successful performance of the job.

Blake v. City of Los Angeles 595 F.2d 1367, 1376 (9th Cir. 1979):

"necessary to safe and efficient performance"

Chappelle v. E.I. Dupont, 497 F. Supp. 1197, 1200 (E.D. Va. 1980):

"Whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business."

Craig v. Alabama State University, 804 F. 2d 682, 689 (11th Cir. 1986):

"The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business..."

Crawford v. Western Electric Co., Inc., 745 F. 2d 1373, 1385 (11th Cir. 1984):

"the test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business"

Davis v. Richmond Fredericksburg & Potomac Railroad Co., 803 F.2d 1322, 1325 n. 2 (8th Cir. 1986):

"a compelling business necessity requires the challenged practice"

Donnell v. General Motors Corp., 576 F.2d 1292, 1299 (8th Cir. 1978):

"the burden has been described as 'heavy' and the requirement 'must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge.'"

Easley v. Anheuser - Busch Inc. 572 F. Supp. 402, 414 (E.D. Mo. 1983):

"a compelling need to maintain that practice" (emphasis in original)

EEOC v. Atlas Paper Box Co., 868 F.2d 1487, 1490 (6th Cir. 1989):

"procedure used [must] measur[e]...important skills, abilities and knowledge that are necessary for the successful performance of the job."

EEOC v. Greyhound Lines, Inc., 494 F.Supp. 481, 485 (E.D. Pa. 1979):

"the test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business."

EEOC v. Local 14, International Union of Operating Engineers, 553 F.2d 251, 256 (2nd Cir. 1977):

"compelling reason"

EEOC v. Local 798, United Assn. of Journeymen 646 Supp. 318, 326 (N.D. Ohio 1986):

"The practice must be essential, the purpose compelling."

EEOC v. Rath Packing Co., 787 F.2d 318, 331-32 (8th Cir. 1986):

"the proper standard... is not whether it is justified by routine business considerations but whether there is a compelling need for... that practice" (emphasis in original)

Green v. Missouri Pacific Railroad Co., 523 F.2d 1290, 1298 (8th Cir. 1975):

"the system in question not only foster safety and efficiency, but must be essential to that goal" (emphasis in original)

Hamer v. City of Atlanta 872 F.2d 1521, 1533 (11th Cir. 1989):

"The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business."

Hawkins v. Anheuser - Busch, Inc. 697 F.2d, 810, 815 (8th Cir. 1983):

"employer must demonstrate that there is a compelling need... to maintain that practice." (emphasis in original)

Head v. Timken Roller Bearing Co., 486 F.2d 870, 879 (6th Cir. 1973):
"The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business."

Hayes v. Shelby Memorial Hospital 546 F.Supp. 259, 263 (N.D. Ala. 1983):
"[Defendant] must show that the practice is necessary to safe and efficient job performance"

Kincade v. Firestone 694 F.Supp. 368, 376 (M.D. Tenn, 1987):
"overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business"

Kirby v. Colony Furniture Co., Inc. 613 F.2d 696, 703 (8th Cir. 1980):
"the practice must be shown to be necessary to safe and efficient job performance"

Kohne v. IMCO Container Co., 480 F. Supp. 1015, 1035 (W.D. Va. 1979):
"Overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business."

James v. Stockhalm Valves & Fittings Co. 559 F.2d 310, 344 (5th Cir. 1977):
"The business necessity of a practice is not shown merely with evidence that it serves 'legitimate management functions... [The] system must not only directly, foster safety and efficiency of a plant, but also be essential to those goals."

Jordan v. Wilson, 649 F.Supp. 1038, 1052 (M.D. Ala. 1986):
"...the test for business necessity is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business."

Louisville Black Police v. City of Louisville, 511 F.Supp. 825, 834 (N.D. Ky., 1979):
"Policies which are unrelated to legitimate business necessities."

Manhart v. City of L.A. Dept. of Water, 553 F.2d 581, 587, 588 (9th Cir. 1976):
"essence of the business operation would be undermined."

McLosh v. City of Grand Forks, 628 F.2d. 1058, 1062 (8th Cir. 1980):
"the practice is necessary to safe and efficient job performance"

Mineo v. Transportation Management of Tennessee, 694 F.Supp. 417, 427 (M.D. Tenn., 1988):
"overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business"

Mosley v. Clarksville Memorial Hospital, 574 F.Supp. 224, 232 (M.D. Tenn., 1983):
"mandated by business necessity."

Muller v. United States Steel Corporation, 509 F.2d 923, 928 (10th Cir. 1975):
"the employer may rebut a prima facie case of the employee by showing that the maintenance of safety and efficiency requires the practice which obtains."

Nance v. Union Carbide Corp., Consumer Product Division, 397 F.Supp. 436, 455 (W.D. N.C. 1975):
"essential to overriding legitimate, non-sexual business purpose, such as safety and efficiency"

Nash v. Consol City of Jacksonville, Rural County 837 F.2d 1534, 1538 (11th Cir. 1988):
"The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business."

Neloms v. Southwestern Power 440 F.Supp. 1353, 1370 (W.D. La. 1977):
"To constitute a 'business necessity' and thus relieve the employer of liability for a practice that has a disparate impact on members of a particular race, the business practice must be essential to safety and efficiency."

Parsons v. Kaiser Aluminum, 575 F.2d 1374, 1389 (5th Cir. 1978):
"A practice which is demonstrably discriminatory in impact must: 'not only foster safety and efficiency, but must be essential to that goal.'" (emphasis in original)

Peters v. Wayne State University, 691 F.2d 235, 239, (6th Cir. 1982):
"necessity and closely related to a business purpose."

Powell v. Georgia Pac. Corp., 535 F.Supp. 713, 719 (W.D. Ark. 1982):
"practice must be shown to be necessary to safe and efficient job performance"

Richardson v. Quick-Trip Corp. 591 F. Supp. 1151, 1154-55 (S.D. Iowa, 1984):
"A discriminatory practice cannot be justified by routine business considerations; the employer must demonstrate that there is a compelling need... to maintain the practice." (emphasis in original)

Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971):
"[t]he applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact."

Rogers v. International Paper Co., 510 F.2d 1340, 1347 (8th Cir. 1975):
"The system in question must not only foster safety and efficiency, but must be essential to that goal.'" (emphasis in original)

Rowe v. Cleveland Pneumatic Co., 690 F.2d 88, 93 (6th Cir. 1982):
"The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business."

Shafer v. Commander Army and Air Force Exch. Serv., 667 F. Supp. 414, 422 (N.D. Tex. 1985):
"This doctrine is very narrow. A practice which is demonstrably discriminating in impact must not only foster safety and efficiency but must be essential to that goal." (emphasis in original)

Stevenson v. Int'l Paper Co., of Mobile Alabama, 352 F.Supp. 230, 249 (S.D. Ala. 1972):
"overriding legitimate, non-racial business necessity"

Thompson v. Boyle, 499 F.Supp. 1147, 1163 (D.D.C. 1979):
"irresistible necessity."

United States v. Chesapeake and Ohio Railway Co., 471 F.2d 582, 588 (4th Cir. 1972):
"The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business."

U.S. v. NL Industries, Inc., 479 F.2d 354, 365 (8th Cir. 1973):
"The system in question must not only foster safety and efficiency, but must be essential to that goal." (emphasis in original)

United States v. St. Louis, etc., R.R., 464 F.2d 301, 308 (8th Cir. 1972):
"The system in question must not only foster safety and efficiency, but must be essential to that goal" (emphasis in original)

Vuyanich v. Rep. Nat. Bank of Dallas 505 F.Supp.224, 264 (N.D. Tex. 1980):
"The typical formulation of the rule is that the practice must be one that is essential to the safe and efficient operation of the business."

Woods v. Safeway Stores, Inc., 420 F.Supp. 35,42 (1976):
"The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficient, compelling to override any racial impact, carry out the business purpose it's alleged to serve; and there must be available no acceptable or alternative policies or practices which would better accomplish the business purposes advanced, or accomplish it equally well with a lesser differential racial impact."

Chairman HAWKINS. Again, our apology. You may proceed, Mr. Brown.

STATEMENTS OF THE HONORABLE WILLIAM H. BROWN III, FORMER CHAIRMAN, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND JOHN J. CURTIN, PRESIDENT-ELECT, AMERICAN BAR ASSOCIATION

Mr. BROWN. Thank you very much, Mr. Chairman. I should say, just on a personal note, that I am always deeply pleased to appear before you. I certainly am indebted to you for the tremendous amount of support and help that you did give, not only to me but, more importantly, to my Commission and to the people of this country during the time that I had the pleasure of serving as the Chairman of the Equal Employment Opportunity Commission.

I must say, Mr. Chairman, that the graciousness of your remarks makes me feel that perhaps I should be more horizontal than vertical in addressing the group here today.

[Laughter.]

Mr. BROWN. But, as you have indicated, I am William H. Brown III. I presently am a partner in the Philadelphia law firm of Schnader, Harrison, Segal & Lewis, where I've been a partner since 1974.

Prior to that time, I served both as a Commissioner, from about 1968 until about April of 1969, on an interim appointment given to me by President Johnson on the Equal Employment Opportunity Commission. I was then confirmed by the Senate for a full term after being nominated by President Nixon, and served as Chairman of that Commission from 1969 until December of 1973.

I believe, Mr. Chairman and members of the committee, that my background perhaps gives me a special vantage point in discussing some of the very serious problems that this committee is facing.

First, in my early years of practice in Philadelphia in the 1950s and early 1960s, I represented primarily plaintiffs in civil rights cases, including employment discrimination cases. From that vantage point I could see and, indeed, I know first-hand the kind of frustrations and problems that beset so many minorities not only in the south, but indeed in my own City of Philadelphia.

I left that post to then view the problems of employment discrimination from the vantage point of the Equal Employment Opportunity Commission, where I served for some five and a half years and had the responsibility of chairing that Commission and presided over the transition from the point in time when the Commission was originally established without any employment powers until 1972 when employment enforcement powers were finally granted to the Commission.

Finally, I guess the third vantage point that I have and I approach these problems from is now having the responsibility of representing major corporations across the country and assisting them not so much from the standpoint of pure response to litigation, but I think of equal and perhaps to my own mind the greater importance of assisting them to make certain that their policies and practices are in keeping with both the intent of the law, as well as the purpose behind the law, making certain that their own employ-

ment practices are indeed in conformity with Title VII of the Civil Rights Act.

Having had that perspective, I believe that I am in a position to assist the committee in giving at least what are my own—and I guess I should emphasize my own perspectives. I am a member of the Board of Directors of the Lawyer's Committee for Civil Rights. I am a member of the Board of Directors of the Citizen's Commission for Civil Rights.

I should point out to the committee that I serve here this morning and the remarks which I will make and the responses to the questions are to be taken as my own personal opinions and should not be attributed to any of the organizations of which I'm a member.

Unfortunately I've not had the opportunity of discussing any of these issues at length with any of the individuals or civil rights organizations, nor have I had the opportunity of discussing it with any of the clients that I continue to represent.

Mr. Chairman, I think in looking at this piece of legislation I would have to take the committee back to the early 1970s.

As we all know, at that point in time we had no enforcement powers at all. We had the impression that many selection devises which were being utilized by corporations across the country in effect discriminated against individuals even though they were fair on their face and where the Commission felt very strongly about some of these issues, issues such as whether or not a high school diploma was required for some jobs, height requirements for some positions, and many, many others.

It was our feeling that indeed this was a violation of Title VII.

Mr. Chairman, I can still recall the kind of euphoria which went through that Commission on the day that the Griggs decision came down. I can tell you that it was almost like a party, because the position of the Commission, we felt, had been completely vindicated and we felt at that point in time, having had the Supreme Court's approval of our own thoughts and concerns would afford us the opportunity of bringing about equal employment for all of the citizens of this country.

Unfortunately, we still have significant remnants of discrimination and I think that perhaps some of our enthusiasm and some of our happiness, if you will, was rather short-lived as we continued to see the ongoing problems.

There is no question in my mind—and I will abide by the Chair's wishes in keeping my remarks brief, but there is no question in my mind that there is a substantial need for this corrective legislation. There's no doubt whatsoever that the effects of the *Wards Cove* decision completely, if not very, very substantially, undermines the effect of *Griggs*.

As I look at and remember reading the Workforce 200 Study which was prepared by the Hudson Institute, it tells us that in the year 2000 indeed the composition of the work force is going to change dramatically. The percentage of white males entering the work force for the first time at that point in time is going to be something around 15 or 20 percent. The overwhelming majority of the new entrants into the work force will be composed of minorities, new immigrants and women.

Indeed, if employers are going to be able to meet the challenge of a shrinking employment force, if employers are going to be able to compete for the kinds of employees that we're going to need to meet the increasingly technical aspects of our world, then it seems to me this legislation is critical because not only is it important that we swell the ranks of people coming into the work force at the lower echelon, but it seems to me of equal and even greater importance that reflection at the higher ranks in terms of minorities and women is critical.

Those employers who meet the test and who are model employers and who by their acts and their deeds and not merely by their words say to the future employees of this country that we are truly an equal opportunity employer will have the first shot and the best shot at getting the kinds of workers that we're going to be looking for in the next 10, 20 or 30 years.

I think, Mr. Chairman, that the need for this committee and the Congress to correct the effects of the *Wards Cove* decision is clearly apparent to me. I would suggest to you that there were many dire predictions which were made at the time the *Griggs* decision was issued.

My experience is and has been that employers have been willing and able to meet the *Griggs* decision without any problem. I can remember talking about the need for high school diplomas with clients of my own. I can remember asking some of the employers about some of the questions which were on their employment applications, questions as asinine as the color of your eyes and things of that nature.

The answer that I got almost invariably when I said, why are you asking these questions, what do you do with them, was—most of them said, we don't know, we've always asked the questions and we don't do anything with them.

I think, as I look back on that point in time, even though many employers were I would say almost afraid of what the impact of *Griggs* was going to be, they were able to meet the test of *Griggs*. They have changed their method of employing and promoting people to a very large extent, and that's not to say that we don't have a long way to go. But they were able to do that.

If there's anything that most of the employers who I now represent would like to see it, is a general stability, something that they can depend on. What worries them more than anything else, what causes them even greater fear than *Griggs* initially caused them was the inability to predict what the standard was going to be.

I think, Mr. Chairman, from that standpoint this legislation would correct it. We have to say to the employers of this country, we certainly have to say to the minorities and women of this country, we certainly have to say to all of the people of this country that we are going to have a standard which in fact mandates that equal employment opportunity is the law of the land and will be enforced.

I thank you, Mr. Chairman, and members of the committee, for allowing me this opportunity to appear before you. I shall be happy to answer any questions that you might have.

[The prepared statement of Hon. William H. Brown III follows:]

TESTIMONY OF WILLIAM H. BROWN III, FORMER CHAIRMAN OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

BEFORE THE HOUSE COMMITTEE ON EDUCATION AND LABOR AND THE COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS AT A JOINT COMMITTEE HEARING REGARDING H.R. 4000, THE CIVIL RIGHTS ACT OF 1990

FEBRUARY 27, 1990

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEES:

My name is William H. Brown III and I have been active in the field of civil rights for nearly 35 years with a significant portion of that time being spent in employment discrimination and related matters. During the late 50's and early 60's, I represented many individuals, who felt that their civil rights had been violated. The majority of these individuals were represented on a pro bono basis.

Given an interim appointment by President Lyndon B. Johnson, I served as a member of the Equal Employment Opportunity Commission from October of 1968 until May of 1969. President Richard M. Nixon submitted my name to the Senate for confirmation and after being confirmed, I was designated Chairman of the Commission, serving in that capacity from May of 1969 until December of 1973.

Since early 1974, I have been a law partner in the Philadelphia based law firm of Schnader, Harrison, Segal & Lewis representing primarily major corporations in employment discrimination and related matters. I represent these clients not only in litigation around the country but of even greater importance, I serve as a consultant to these corporations, advising them as to how best to comply with the equal employment laws in a way which will allow them to carry out their corporate obligations in the most responsible manner.

I am a member of the Citizens' Commission on Civil Rights, a bipartisan group of former officials who have served in the Federal Government in positions with responsibility for equal opportunity. This Commission was established in 1982, under the chairmanship of Arthur Fleming, to monitor the policies and practices of the Federal Government and to seek ways to accelerate progress in civil rights.

I also serve as a member of the Board of Directors and of the Executive Committee of the Lawyers' Committee for Civil Rights Under Law, as well as a member of the Board of Directors of the NAACP Legal Defense and Education Fund.

Today, I only speak for Bill Brown. Since I have had a very limited opportunity to discuss my views with the civil rights organizations of which I am a part and I have had no opportunity to discuss my views with any of the clients that I have the privilege of representing. By expressing only my own views will allow all interested parties to accept or reject any or all of my testimony here today.

My background and training has afforded me the unique opportunity to view the problems of employment discrimination from three distinct vantage points. During the 1950's and for a substantial portion of the 1960's, I represented plaintiffs in civil rights actions including employment discrimination cases as a young practicing attorney in Philadelphia. The

frustrations and anger felt by many of my clients at their inability to secure meaningful employment because of the color of their skin mirrored much of my own personal frustration I felt when being rejected for a job for which I was qualified merely because of my race.

A different opportunity I have had to view the problems of employment discrimination was occasioned by my appointment first as a member of the United States Equal Employment Opportunity Commission and then serving as its Chairman for nearly five years. The passage of the Civil Rights Act of 1964 and in particular Title VII of that legislation was viewed by many minorities and women as their ticket to employment opportunities heretofore denied them. I believe that during this century, no single piece of legislation has had a more profound effect upon our country than the Civil Rights Act of 1964. The most dramatic changes in our way of life, and particularly in the corporate way of life, have been brought about by Title VII. EEOC was charged with the responsibility of eliminating discrimination in employment if such discrimination was based on race, religion, sex or national origin.

My third vantage point, one which I have held since 1974 is related to my representation of major corporations in defending them against charges of discrimination and, more importantly, serving as a consultant to aid them in complying with the law.

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I am pleased to appear before you this afternoon to comment on House Bill 4000, cited as the "Civil Rights Act of 1990." While I will be pleased to answer any questions the Committee members might have concerning the entire bill, I prefer in my brief remarks to deal specifically with those sections of the Bill designed to remedy the effects of the Supreme Court's decision in the Wards Cove Packing Company v. Antonio case,[1] decided in June of last year. The effect of the Wards Cove decision is to so severely limit the affects of the Griggs v. Duke Power decision to make it almost a complete nullity.

In what has been viewed by many as one of the most important Supreme Court decisions this century, a unanimous court speaking through Mr. Chief Justice Burger held that employment practices which operate to exclude minorities (Blacks in this case) and which cannot be shown to be related to job performance, are prohibited. In both scope and depth, Griggs v. Duke Power has the same ring as did Brown v. Board of Education in 1954. For eighteen years since Griggs, nearly all of our Federal Courts, both trial and appellate, have recognized that acts or practices which might be fair in form but are discriminatory in their operation are in violation of Title VII.

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1 109 S.Ct. 2115 (1989), 104 L. Ed. 2d 733.

While there was an initial uproar from the business community, in a very short period of time most employers came to realize and accept that their employment practices must have a demonstrated job relevance whenever they operated as barriers to the hiring and promotion of minorities and women. The message which Griggs sent was clear. No longer could personnel departments or businesses follow the "business as usual" policy. At the time that Griggs was decided, a large majority of employers had never demonstrated the business necessity of their employment practices.

Furthermore, most of those practices as then presently constituted in our society did have an adverse impact on the job opportunities for minorities and women. This combination of adversity and irrelevance of hiring standards to work performance is precisely what the Supreme Court found unlawful under Title VII in deciding Griggs .

During my early tenure as Chairman of EEOC, the lack of enforcement powers for the Commission and the need to rely upon the limited staff of the Justice Department and those victims of discrimination, along with civil rights agencies and other interested individuals to institute lawsuits was our only hope of salvation. The Commission all along had taken the position that the use of general intelligence tests, high school diplomas, height and weight requirements which could not be

shown to be directly related to the position to be filled was a violation of Title VII. I can still clearly recall the elation which swept through the Commission when the Griggs decision was announced. Some of the language of the Griggs decision is so moving that it requires specific mention here. The Court stated that what was required by Congress was the removal of artificial, arbitrary, and unnecessary barriers to employment when those barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications.

At least the Burger Court felt that the objective of Congress in the enactment of Title VII was plain from the language of the statute. They stated that "it 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. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[2] The Court went on to say "the Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to

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2 401 U.S. at 429, 439.

excludes Negroes cannot be shown to be related to job performance, the practice is prohibited."

Intent under the Griggs test was to play no part in determining whether there was discrimination. The Court held:

> "We do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent; but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in head winds' for minority groups and are unrelated to measuring job capability."

It went on to say that the "... Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." (Emphasis that of the Court.) Clearly under the Griggs decision, the burden of showing business necessity was placed squarely on the shoulders of the employer who advanced such a defense. Many employers argued that the burden would be onerous and that it would cost too much to validate all employment practices that have an adverse effect on classes of individuals protected by Title VII. During the substantial period of time that has elapsed since the Griggs decision, most employers covered under Title VII have come to accept the burden

The significant advancements of minorities and women into jobs historically held by white males in a large measure is a direct result of the impact of the Griggs decision. During the past 18 years, the requirements imposed by the Federal Courts interpreting Griggs have dramatically changed the number of Blacks and women now in positions from which they have been traditionally barred. In addition, adherence to the equal employment opportunity laws has had a positive affect on most employers. Major corporations have had to rethink their personnel policies, not just in terms of how they affect Blacks, other minorities and women. In doing so, many found that they have improved the working environment of all employees.[3] A large percentage of employers have found that there had been improvements in their procedures and standards for hiring and in the use of discipline and employee performance reviews. Many employers have indicated that as they have been required to respond to affirmative action, their companies have been better able to identify relevant qualifications for various jobs and their ability to recruit and well-qualified candidates has improved significantly.

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3 See, Citizens' Commission on Civil Rights study, **Affirmative Actions Open the Doors of Job Opportunity - A Policy of Fairness and Compassion That Has Worked** (June 1984).

While Title VII has been neither a panacea nor a substitute for economic growth, education, job training and ambition, Title VII has made significant contributions to the ongoing effort to eliminate the inequality caused by a history of discrimination. Who can deny that the police and fire departments of the major cities of this country now that they have increased the number of minorities and women are much more sensitive organizations and are, indeed, more responsive to the legitimate concerns of the minority community? The changes in the racial profile and sexual profile of our workforce are dramatic. Can it be denied that in the past 25 years, significant changes have been made in the very fabric of our major corporations? Things that we now accept without question would have been unheard of throughout the country in the late 50's and early 60's.

It appears clear to me that if the Wards Cove decision stands uncorrected millions of American citizens will be left unprotected. More importantly the impact of the Wards Cove decision has created such a state of confusion among major employers who have come to accept, endorse and, indeed, benefit from the impact of the Griggs decision.

The greatest concern of most employers and corporations that I represent is the lack of clear direction or, more importantly, the lack of stability.

Until the Wards Cove decision last year, most employers accepted the burden of establishing a business justification defense when their employment practices, tests and other devices disproportionately excluded minorities and women from their jobs. Many corporations have already expended huge sums of money, examining and verifying the validity of their employment practices and how these practices might impact adversely on minorities and women. The Burger Court in Griggs clearly felt that both the burden and cost of establishing a business justification defense was one more appropriately borne by the employer.

I sincerely believe that the overwhelming majority of employers in this country are not unmindful of the dynamic changes in the workforce composition predicted in the Hudson Institute's Workforce 2000 study. Major employers will be in direct competition with each other as the availability of qualified employees shrinks while at the same time the composition of the workforce becomes increasingly minority and female. Those employers who have established themselves as equal opportunity employers will have a decided advantage in attracting and retaining the workers who will be available to them at the turn of the century.

While I have confined my written remarks to the Wards Cove decision and its implications, I shall be happy to respond

to any questions that the Committee might have regarding other aspects of the Bill.

Finally, Mr. Chairman, because my schedule has not permitted me to give the kind of careful attention to all aspects of this Bill that I would have preferred, I request an opportunity, if I deem it necessary to further augment my written comments at a later point in time.

Mr. Chairman, I am appreciative of the opportunity to express my views on this subject. I am happy to answer any question that you or any member of the Sub-Committee may have.

Chairman HAWKINS. In order that we do not disadvantage the other witness, Mr. Brown, if we proceed to the other witness before asking questions, with the understanding that you will be out in plenty of time, I think——

Mr. BROWN. I have no problem with that, Mr. Chairman. I'm willing to stay here and answer your questions first.

Chairman HAWKINS. Fine. We are very delighted to have Mr. John J. Curtin, Esquire, President-Elect of the American Bar Association. I believe, Mr. Curtin, just about a week ago you were in Los Angeles, the city that I like to refer to as the City of the Angeles. We are delighted to have you before us. We know you have a very busy schedule and we'll proceed to hear from you at this time.

Mr. CURTIN. Thank you, Mr. Chairman, and thank you on behalf of the American Bar Association for the opportunity to testify here this morning. The City of the Angeles was very hospitable to the American Bar Association and particularly to myself. I'm very grateful and perhaps I can use this opportunity to thank you on behalf of the City for your hospitality.

Chairman HAWKINS. I think it rained on you a little bit, didn't it?

Mr. CURTIN. Well, we're indoors a lot.

I'm here at the request of the President of the American Bar Association, L. Stanley Chauvin, Jr., to express the Association's strong support for legislation to restore the Nation's civil rights statutes to their pre-1989 status.

I'm proud to be on the same panel with Mr. Brown. I do not come from the same background and have not had the same advantages of having experience directly in these Title VII and related cases, but I speak on behalf of an Association which is broadly diverse. Some of the Members of the House, for example, had considerable expertise in this area but, in general, they represent a cross-section of American lawyers who are not necessarily expert in any particular area of law, but who approach this from the perspective of lawyers.

One of the Association's goals is to promote meaningful access to legal representation and the American system of justice for all persons regardless of their economic or social condition. We have a membership, as you may know, of over 350,000 lawyers, judges, law professors and law students.

To that end, the association has sought to serve the American ideal of equal justice under the law and we are proud to say we have a history of opposing discrimination on the basis of race, gender, national origin, disability and age.

We have adopted policies opposing discrimination in employment, in housing, in public accommodations, in credit, in education and in public funding, and we have urged these policies in these halls of Congress and we have argued our position as *amicus* in the Supreme Court of the United States.

In our own back yard—that is, within the profession—we have continued to fight discrimination in the legal profession on the theory that those who seek justice in the courts should have justice in their ranks.

We have a basic underpinning for this history of opposing discrimination. Namely, that determinations involving basic civil

rights should be made on the basis of fundamental fairness and equality, not on the basis of prejudice.

So, at the meeting to which you referred, Mr. Chairman, in Los Angeles on February 12th, the American Bar Association passed a resolution reaffirming that principle and applying it to the matters now before your committee.

Essentially that resolution provides that we support Federal legislation to restore Title VII of the Civil Rights Act of 1964 and 42 U.S.C. Sec. 1981 to the status that they had before the 1989 Supreme Court decisions, and the decisions that have been listed are the ones that you've heard so much about, *Patterson, Wards Cove, Price Waterhouse, Lorance*, and *Martin* v. *Wilks*.

This resolution was prompted by the concern, not of specialists, but of the entire House over a series of cases decided by the Supreme Court during the 1989 term which, in the view of the report given to the House, and, which, as the House has demonstrated by its vote, severely cut back the rights of minorities and women in the work place. In our view, these rulings reverse established precedent under the two most important laws that Congress has enacted to provide opportunities for racial, ethnic and religious minorities and women to secure jobs that were historically denied to them.

Collectively, in our view, these decisions signal a very significant retreat in the judicial construction of Federal anti-discrimination laws which have traditionally been very broad. You have heard considerable testimony, I know, on some of the effects on victims of unlawful discriminations, of the impact of these decisions.

I'm going to just briefly highlight them. Some of the most blatant and offensive examples of racial and ethnic discrimination are no longer, in our view, prohibited by any Federal anti-discrimination statute, in part, because of the limitations of Title VII to companies employing at least a certain number of employees.

Nearly a hundred pending claims were dismissed in just four months—four and a half months—following the decision in the *Patterson* case. Now I understand that number may be as high as 170.

As a result of the *Lorance* opinion, claims in certain types of discriminatory employment cases may now be dismissed as untimely—even where the complaint is filed immediately after the plaintiff is harmed, actually harmed.

The elimination of the placement of the burden of proof on the issue of business justification and the placement of that burden on the victims of discrimination under the *Wards Cove* opinion, in our view, has reduced significantly the opportunity of prevailing on a civil rights claim, even where the plaintiffs prove that an employment practice has had a severe adverse impact on hundreds or perhaps even thousands of minorities and women.

Employers who engage in intentional discrimination in the hiring, promotion or discharge of an employee can now prevail merely by establishing that an otherwise discriminatory motive or intent was accompanied by a legitimate business reason.

Finally, the finality of court-approved consent decrees in employment discrimination cases has been seriously undermined and numerous long-settled cases have been reopened.

The ABA, by its vote, expressed its view that prompt legislative action to correct the situation is necessary.

The question that was posed in the debate was, "do we want to make it harder for victims of discrimination to receive justice or not." The technicalities of this legislation aside—and there clearly are considerable technicalities—that was the bottom line for the members of the association. The cases that were decided the last term did not help those victims. This bill will. Therefore, we support it.

I would like, as the Chairman has suggested, to focus my comments on *Wards Cove*, but you will have our entire prepared statement in the record which deals with the other cases.

Let me focus a moment on *Wards Cove*. Nineteen years ago, as has been eloquently stated by Mr. Brown, the Court decided the *Griggs* case and in that case decided that Congress intended Title VII of the Civil Rights Act of 1964 to prohibit not only intentional discrimination in employment, but also those tests and devices that disproportionately exclude minorities and women from jobs unless the challenged practice is proven by the employer to be necessary to the operation of the business.

Mr. Brown I think has well stated it. *Griggs* has proven to be perhaps the single most important Title VII decision since 1964 and has resulted in reforming employment practices at all levels of private and public employment, and has resulted in lawyers advising their clients on actions that have significantly improved employment practices.

In our view, the Court's ruling in *Wards Cove* significantly restricts *Griggs*. In *Wards Cove*, the Court imposes what I view to be a new and onerous requirement on plaintiffs in adverse impact cases, the requirement of proving that the practice does not serve the employer's legitimate employment goals.

Thus, the burden of proving a business necessity for the employment practice is never assumed by the employer. It stays with the plaintiff although, as the dissent of Mr. Justice Stevens pointed out, it falls within the normal traditional affirmative defense.

So whether you call it shifting or attach Justice Stevens' analysis, the basic bottom line is that the plaintiff/victim has to prove something with respect to the employment practices of an employer which is most likely to be within the purview of the knowledge of that employer.

In addition, *Wards Cove* holds that even though it has been demonstrated that the combined result of several practices is to exclude a protected class of persons disproportionately, the plaintiff must demonstrate the effect and lack of business justification for each practice.

So, the information is more likely to be with the employer and the plaintiff is being asked to prove a negative, a task which because it is almost impossible is consistently rejected by our legal system in other areas of the law.

Wards Cove greatly diminishes the chance that plaintiffs will prevail in Title VII cases challenging practice which have a discriminatory impact on employment opportunities.

Griggs had as its fundamental premise that the employment practices which are fair in form, but discriminatory in operation,

would be deemed lawful only in circumstances where the employer was able to prove business necessity, which has been defined in various other cases as "essential to effective job performance" and is so defined in your bill.

Wards Cove turned that principle on its head. Moreover, it now requires plaintiffs to examine each component of the employer's hiring and promotion system in an attempt to show the precise discriminatory effect and the lack of business justification as to each part of the system. This will place substantially greater burdens of time and costs on Title VII plaintiffs even in successful cases.

So, as a result of that analysis, the American Bar Association urges the passage, Section 4 of the Civil Rights Act of 1990, to restore the *Griggs* standard to the burden of proof in disparate impact cases.

This amendment to the 1964 Civil Rights Act would require the employer to demonstrate the business necessity of a practice which has a disparate impact on the basis of race, color, religion, national origin or sex, and would remove the requirement that a complaining party demonstrate which specific practice or practices within a group of practices, or within an overall employment process, caused the disparate impact.

This standard, prior to last year's decision, provided a balanced approach in the lower courts of this country which did not appear to be that onerous to business and should be continued. So, we would support the provisions of H.R. 4000 in this regard.

In conclusion, Mr. Chairman and members of the committee, the view of the American Bar Association is that the civil rights decisions from the Supreme Court's 1988-1989 term have resulted in a sudden and substantial erosion of the legal protections Congress has afforded racial and religious minorities and women.

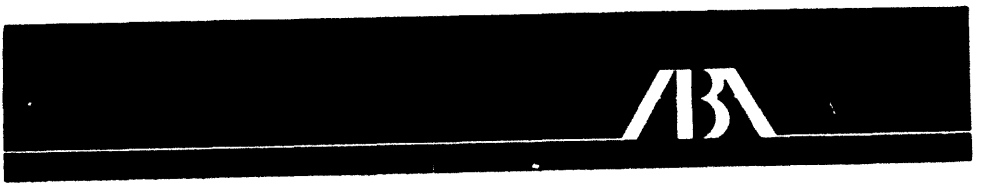
From start to finish, victims of employment discrimination will now find it much more difficult, time-consuming and expensive to prevail in cases brought under Title VII and under Section 1981. The net result is that many victims will choose not to file a complaint at all.

You are aware that we have reached a moment in world history where the rush of events leaves us breathless from day to day and from newspaper headline to newspaper headline. The progress in human rights achieved in the last six months would have been almost unimaginable six months earlier.

With such progress abroad in the world, the United States, traditionally the world's leader in civil rights, should not regress at home. The Civil Rights Act of 1990 preserves victories that were thought to have been won long ago. We urge the adoption of this legislation to reaffirm those victories and to shore up the foundation of civil rights in our country.

Thank you very much, Mr. Chairman.

[The prepared statement with attachments of John J. Curtin follows:]



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STATEMENT OF

JOHN J. CURTIN JR.

ON BEHALF OF
THE
AMERICAN BAR ASSOCIATION

CONCERNING

HR 4000 - THE CIVIL RIGHTS ACT OF 1990

BEFORE THE
EDUCATION AND LABOR COMMITTEE
AND COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE
ON CONSTITUTIONAL AND CIVIL RIGHTS
UNITED STATES HOUSE OF REPRESENTATIVES

FEBRUARY 27, 1990

Mr. Chairman and Members of the Committee:

Thank you on behalf of the American Bar Association for the opportunity to present this testimony. I am John J. Curtin, Jr, President-Elect of the Association, and I am here at the request of ABA President L. Stanley Chauvin, Jr., to express the Association's strong support legislation to restore the Nation's civil rights statutes to their pre-1989 status.

The American Bar Association, founded in 1878, is the nation's largest legal organization with a membership of over 350,000 lawyers, judges, law professors, and law students. One of the Association's goals is to promote meaningful access to legal representation and the American system of justice for all persons regardless of their economic or social condition. To this end, the Association has sought to serve the American ideal of equal justice under the law, and has a proud history of opposing discrimination on the basis of race, gender, national origin, disability and age. We have adopted policies opposing discrimination in employment, housing, public accommodations, credit, education and public funding. We have urged these policies in the halls of Congress, and we have argued our position, as an amicus, in the Supreme Court. In our own backyard -- that is within the profession -- we have continued to fight discrimination in the legal profession on the theory that those who seek justice in the courts should have justice in their ranks.

The underpinning of this history is a principle which the Association holds very dear: that determinations involving basic civil rights should be made on the basis of fundamental fairness and equality, not on the basis of prejudice. At our recently concluded midyear meeting in Los Angeles, the Association, on February 12, passed the following resolution reaffirming that principle and applying it to the matters now before your Committee:

> BE IT RESOLVED, that the American Bar Association supports federal legislation to restore Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §1981 to their status before the 1989 Supreme Court decisions in Patterson v. McLean Credit Union, Wards Cove Packing Co. v. Atonio, Price Waterhouse v. Hopkins, Lorance v. AT&T Technologies, Inc., and Martin v. Wilks.
>
> BE IT FURTHER RESOLVED, that the American Bar Association also supports federal legislation amending Title VII of the Civil Rights Act of 1964 to grant all protected classes the same rights to recover damages for employment discrimination which are enjoyed by victims of racial/ethnic discrimination under 42 U.S.C. §1981.

This resolution was prompted by concern over a series of cases decided by the Supreme Court during the 1988-89 Term which severely cut back the rights of minorities and women in the workplace. In our view, these rulings reversed established precedents under the two most important laws that Congress has enacted to provide opportunities for racial, ethnic and religious minorities and women to secure jobs that were historically denied to them -- Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §1981. Collectively, these decisions signaled a very significant retreat in the judicial construction of federal anti-discrimination laws.

The devastating impact of these rulings on victims of unlawful discrimination is already being felt.

- Some of the most blatant and offensive examples of racial and ethnic discrimination are no longer prohibited by any federal anti-discrimination statute.
- Nearly 100 pending claims were dismissed in just four and a half months following the Patterson decision.
- As a result of Lorance, claims in certain types of discriminatory employment cases now may be dismissed as untimely even where the complaint is filed immediately after the plaintiff is harmed.
- The the placement of the burden of proof regarding business necessity on the victims of discrimination under Wards Cove, rather than on the employer, has reduced significantly the opportunity of prevailing on a civil rights claim even where the plaintiffs prove that an employment practice has had a severe adverse impact on hundreds or even thousands of minorities or women.
- Employers who engage in intentional discrimination in the hiring, promotion or discharge of an employee can now prevail merely by establishing that an otherwise discriminatory motive was accompanied by a legitimate business reason.
- The finality of court-approved consent decrees in employment discrimination cases has been seriously undermined and numerous long-settled cases have been re-opened.

Mr. Chairman, the ABA, by its vote, expressed the view that prompt legislative action to correct this situation is necessary. The question H.R. 4000 poses to this Committee is, do we want to make it harder for victims of discrimination to receive justice? The technicalities of this legislation aside, that is the bottom line. Those cases last term did not help victims. This bill will.

For the balance of my testimony, I will discuss the five Supreme Court decisions and the two principal bills -- H.R. 4000 and H.R. 4081 -- which are before you.

Wards Cove Packing Co. v. Atonio 109 S. Ct. 2115 (1989)

Nineteen years ago, the Court decided in Griggs v. Duke Power Co., 401 U.S. 424 (1971), that Congress intended Title VII of the Civil Rights Act of 1964 to prohibit not only intentional discrimination in employment, but also those tests and devices that disproportionately exclude minorities and women from jobs, unless the challenged practice is proved by the employer to be necessary to the operation of the business. Griggs has proven to be perhaps the single most important Title VII decision since 1964 and has resulted in reforming employment practices at all levels of private and public employment.

The Court's ruling in Wards Cove Packing v. Atonio severely restricts the Griggs doctrine. In Wards Cove, the majority imposes a new and onerous requirement upon plaintiffs alleging the adverse impact of an employment practice upon large numbers

of minorities or women. After demonstrating that an employment practice disproportionately excludes women or minorities from employment, the plaintiff must now further show that the practice does not serve the employer's legitimate employment goals. Thus, the burden of proving a business necessity for the employment practice is never assumed by the employer. In addition, Wards Cove holds that even though it has been demonstrated that the combined result of several practices is to exclude a protected class of persons disproportionately, the plaintiff must also demonstrate the effect of and lack of business justification for each practice. The plaintiff is being asked to prove a negative -- a task which, because it is virtually impossible, our legal system has consistently refused to require of plaintiffs.

Wards Cove greatly diminishes the chance that plaintiffs will prevail in Title VII cases challenging practices which have a discriminatory impact on employment opportunities. Griggs had as its fundamental premise that employment practices which are "fair in form, but discriminatory in operation" would be deemed lawful only in circumstances where the employer was able to prove business necessity defined as essential to effective job performance. Wards Cove turned that principle on its head. Moreover, it now requires plaintiffs to examine each component of the employer's hiring or promotion system in an attempt to show the precise discriminatory effect and lack of business justification as to each part of the system. This will place substantially greater

burdens of time and cost on Title VII plaintiffs even in successful cases.

The American Bar Association urges the amendment in Section 4 of the Civil Rights Act of 1990 to restore the Griggs standard to the burden of proof in disparate impact cases. This amendment to the 1964 Civil Rights Act would require the employer to demonstrate the business necessity of a practice that has a disparate impact on the basis of race, color, religion, national origin or sex, and would remove the requirement that a complaining party demonstrate which specific practice or practices within a group of practices, or within an overall employment process, caused a disparate impact. This standard, prior to last year's decision provided a balanced approach which is not that onerous to business and should be continued. We support the provisions of H.R. 4000 in this regard.

Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989)

In this case, the Court decided a number of issues that arise in "mixed-motive" discrimination cases, where the plaintiff proves (usually by direct evidence) that race, color, religion, national origin or sex was a motivating factor in the challenged decision, but the employer asserts it would have made the same decision in the absence of the unlawful motive. In this type of case, the employer has deliberately acted for reasons prohibited by statute. Two of the issues decided in

Price Waterhouse were: (1) whether proof offered by the employer that it would have made the same decision absent its discriminatory motive (e.g., that it would not have hired the plaintiff anyway because of her lack of qualification) can serve to limit the relief in the case, or whether it should allow the employer to escape liability altogether; and (2) once a plaintiff proves that unlawful discrimination was a motivating factor in the decision, whether the employer has to show by "clear and convincing" evidence or merely a preponderance of the evidence that it would have reached the same decision for legitimate reasons.

The Court decided both issues favorably to employers, overruling a number of lower court decisions. It held that an employer can defeat liability completely by showing by a preponderance of the evidence that it would have made the same decision for lawful reasons, even where the plaintiff has proved that intentional discrimination was in fact one of the motivating factors for the decision. This means that even in cases involving blatantly discriminatory conduct, the employer receives no sanction at all, thus seriously undermining the statutory objectives of the fair employment laws.

Prior to Price Waterhouse, most lower courts had resolved this issue at the relief stage: if the employer proved convincingly that the plaintiff was not qualified for the job, then the remedy for the employer's discriminatory conduct was limited to declaratory and injunctive relief, costs and

attorneys' fees, and damages in §1981 cases. Such relief is necessary to deter employers from acting in an overtly discriminatory manner in the future, regardless of whether the ultimate decision not to hire or promote the plaintiff was defensible in that particular cases.

By holding that employers can escape liability altogether even where their conduct is clearly in violation of the statute, the Court has provided a way to sanction or excuse even the worst forms of discriminatory behavior, which are often involved in mixed-motive cases. The message Price Waterhouse sends is "There is nothing wrong with a little overt racism or sexism, as long as it was not the only thing on the employer's mind." Absolutely nothing in today's civil rights laws suggests that Congress, or the American people, agree with this message.

By specifying that an employer will be liable under the statute when the plaintiff demonstrates that race, color, religion, national origin or sex was a motivating factor for a decision, even though other factors also motivated the decision, H.R. 4000 restores an important principle in mixed-motive cases. A court could still decide not to order the employer to offer the plaintiff the job, promotion or other employment benefit if the employer demonstrates that because of legitimate factors the decision would have been the same. Other forms of relief, however, would be available even in that case. We urge the adoption of this amendment.

Martin v. Wilks, 109 S. Ct. 2180 (1989)

The plaintiffs here were white firefighters who brought reverse discrimination claims against the City of Birmingham, Alabama, when, for the first time in its history, the City promoted a black to the position of lieutenant in its fire department. The race-conscious promotion decisions challenged in Wilks were made pursuant to a consent decree in a separate case which black firefighters had filed years earlier against the City of Birmingham. During that prior litigation, the court had ruled in favor of the black firefighters after one trial and had completed a second trial when the City entered into the consent decree. The white firefighters did not timely intervene in either of those cases or to challenge the consent decree, but instead collaterally attacked the promotions in a separate lawsuit.

Prior to Wilks, virtually all of the federal courts of appeal followed the "impermissible collateral attack" rule that precludes persons who fail to intervene from subsequently bringing separate discrimination claims against parties to a consent decree for actions taken pursuant to the decree. The Court's five-member majority rejected this rule in Wilks, holding instead that the white firefighters could not be bound by the consent decree unless they had been joined as a party in the prior litigation.

After this ruling, it is possible that white employees could delay almost indefinitely the implementation of an affirmative

action plan which is necessary to remedy years of discrimination against blacks. Under Wilks, each white employee who is not joined as a party in the original suit can bring a reverse discrimination claim when the employer attempts to implement the decree. Wilks appears to apply to fully litigated relief orders as well as consent decrees. Moreover, a person can wait years after the order or decree has been entered to bring his challenge, even if he knew about the earlier action and had an opportunity to intervene in it.

Wilks jeopardizes many existing Title VII consent decrees and will clearly discourage future settlements in these cases by removing the benefit to the employer of being able to avoid further litigation by settling. H.R. 4000 would correct the effect of this decision by establishing standards for providing interested nonparties with notice and an opportunity to be heard when a litigated or consent order is proposed in an employment discrimination case, and then generally barring subsequent challenges by nonparties where these standards have been met. This amendment would thus provide a means of achieving finality in a case, without requiring the parties and the court to continually re-litigate the same challenges in separate actions, while at the same time protecting the due-process rights of interested nonparties.

Compensatory and Punitive Damages in Appropriate Title VII Cases

The ABA is pleased that H.R. 4000 also addresses several existing anomalies in Title VII. Title VII prohibits gender,

national origin and religious discrimination in addition to racial discrimination, but does not provide a damages remedy similar to that available under §1981 for intentional racial discrimination. As a result, Title VII leaves many victims of employment discrimination without remedies for their proven injuries and allows certain employers who discriminate to avoid any meaningful liability.

Title VII's remedial scheme is limited to injunctive and other equitable relief, with the latter consisting principally of reinstatement and back pay. Many plaintiffs who successfully prove they were discriminated against suffer injuries which are not compensable under Title VII; For example, victims of sex harassment often suffer extensive psychological and/or other emotional harm. In addition, meaningful remedies are often unavailable to other discrimination victims, including, for example, those who ultimately quit their jobs or for whom the amount of lost wages is too speculative to support a back-pay award.

In order to afford the same remedies to all protected classes, H.R. 4000 would amend Title VII to provide compensatory and punitive damages for intentional violations, except that punitive damages would not be available in cases against the government. Jury trials would be available in any action where damages are sought.

Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989)
Lorance v. AT&T Technologies, Inc., 109 S. Ct. 2261 (1989)

The American Bar Association is pleased that the Bush Administration joins in support of correcting the problems created by the rulings in Patterson and Lorance, and applauds the introduction of H.R. 4081 on behalf of the Administration by Congressman Goodling. Section 2 of that legislation addresses the holding in Patterson by providing that "§1981 protects against racial discrimination, not only in the formation and enforcement of a contract, but in the performance, breach and termination of a contract, and in the setting of its terms and conditions, as well." It overturns Lorance in Section 3 by clarifying that the time within which a Title VII charge must be filed begins to run from the date on which the employee becomes subject to the seniority system or the date on which the employee suffers injury, as well as from the date on which the seniority system is adopted.

Similarly, Section 12 of H.R. 4000, would restore the protections of §1981 by reaffirming Congress' intent that the right "to make and enforce contracts" includes "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." In an employment case, this would make §1981 applicable to racial and ethnic discrimination in hiring, promotions, harassment, demotions, discharges, retaliation and every other aspect of employment. By clarifying that all aspects of an employment contract are covered by §1981,

this amendment would also eliminate considerable confusion and conflict among the lower courts over the scope of this statute after Patterson.

To correct the problems created by the Lorance ruling, Section 7 of H.R. 4000 clarifies that the time within which a Title VII charge must be filed begins to run when the unlawful practice occurs or is applied to adversely affect the complaining party, whichever is later.

Conclusion

The civil rights decisions from the Supreme Court's 1988-89 Term have resulted in a sudden and substantial erosion of the legal protections Congress has afforded racial and religious minorities and women. From start to finish, victims of employment discrimination will now find it much more difficult, time consuming and expensive to prevail in cases brought under Title VII and Section 1981, and many victims will choose not to file a complaint at all.

We have reached a moment in world history where the rush of events leaves us breathless. The progress in human rights achieved in the last six months would have been almost unimaginable six months earlier. With such progress abroad in the world, the United States, the world's leader in civil rights, should not regress at home. The Civil Rights Act of 1990 preserves victories won long ago. We urge the adoption of this legislation to reaffirm those victories and to shore up the foundation of civil rights in our country.

3353A

AMERICAN BAR ASSOCIATION

RESOLUTION REGARDING TITLE VII AND §1981

ADOPTED FEBRUARY 1990

BE IT RESOLVED, that the American Bar Association supports federal legislation to restore Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §1981 to their status before the 1989 Supreme Court decisions in Paterson v. McLean Credit Union, Wards Cove Packing Co. v. Atonio, Price Waterhouse v. Hopkins, Lorance v. AT&T Technologies, Inc., and Martin v. Wilks.

BE IT FURTHER RESOLVED, that the American Bar Association also supports federal legislation amending Title VII of the Civil Rights Act of 1964 to grant all protected classes the same rights to recover damages for employment discrimination which are enjoyed by victims of racial/ethnic discrimination under 42 U.S.C. §1981.

COMMITTEE ON EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES
2181 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515

March 21, 1990

Mr. John J. Curtin, Jr.
c/o American Bar Association
Governmental Affairs Office
1800 M Street, N.W.
Washington, DC 20036

Dear Mr. Curtin:

Thank you for appearing before the Committee on February 27 to testify in regard to H.R. 4000, the Civil Rights Act of 1990. Your comments and prepared statement will constitute an important part of the hearing record.

I would, however, like to follow up on your testimony with a few questions.

First, you mentioned in your statement that you believe the definition of "business necessity" as set out in H.R. 4000, section 3(o) (page 3, lines 15-16), was taken directly from case law. In support of this statement, you mentioned the Supreme Court case of Dothard v. Rawlinson. I would appreciate your providing me with a list of cases, including relevant page cites, which you believe reflect the definition of "business necessity" found in H.R. 4000.

Second, I would also appreciate a brief description of the process by which the American Bar Association apparently endorsed H.R. 4000, or at least many of its provisions. I am particularly interested in learning what Committees within the American Bar Association the resolution was referred to for review.

Thank you for your cooperation in this matter. In order for your comments to be included in the hearing record, your written

response would need to be received before the record closes on April 3, 1990.

Should you have any questions, please do not hesitate to contact Randy Johnson, Labor Counsel, at (202) 225-3725.

Sincerely,

Steve Gunderson

STEVE GUNDERSON
Member of Congress

SG:rkj

AMERICAN BAR ASSOCIATION 750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000

April 3, 1990

The Honorable Steve Gunderson
Committee on Education and Labor
U.S. House of Representatives
2181 Rayburn House Office Building
Washington, D.C. 20515

Dear Representative Gunderson:

Thank you for the opportunity to provide additional information for the record of hearings on the Civil Rights Act of 1990 held jointly by your Committee and the Judiciary Subcommittee on Civil and Constitutional Rights.

You asked that we supply for the record a list of cases which reflect the definition of business necessity -- "essential to effective job performance" -- found in H.R. 4000.

The phrase, "essential to effective job performance," came from the Supreme Court case of Dothard v. Rawlinson, 433 U.S. 321, 331 (1977). Although the precise language formulation has varied, many lower courts subsequently adopted the same high standard or noted the heavy burden for proving business necessity in cases where an employment practice was shown to have significantly excluded minorities or women. The enclosed list contains citations to 43 cases which enunciate standards that are equivalent to the standard proposed in H.R. 4000.

Your letter also asks for a brief description of the process by which the Association adopted its policy supporting legislation to restore Title VII and §1981 to their status before the Supreme Court decisions last term which cut back the rights of women and minorities in the work place, and to extend the same remedies to victims of discrimination under Title VII that currently exist under §1981. In response to this question, I have enclosed a recent letter to the Chairman of your Committee which addressed this precise question.

Finally, you asked in particular to which ABA committees the policy recommendation was referred for review. The following Sections and Divisions of the American Bar Association received a copy of the proposed recommendations for review prior to the midyear meeting:

1. Section of Administrative Law and Regulatory Practice
2. Section of Antitrust Law
3. Section of Business Law
4. Section of Criminal Justice
5. Section of Family Law
6. Section of General Practice
7. Section of Individual Rights and Responsibilities
8. Section of International Law and Practice
9. Judicial Administration Division
10. Section of Labor and Employment Law
11. Section of Law Practice Management
12. Law Student Division
13. Section of Legal Education and Admissions to the Bar
14. Section of Litigation
15. Section of Natural Resources, Energy and Environmental Law
16. Section of Patent, Trademark and Copyright Law
17. Section of Public Contract Law
18. Section of Public Utility Law
19. Section of Real Property, Probate and Trust Law
20. Section of Science and Technology
21. Senior Lawyers Division
22. Section of Taxation
23. Section of Tort and Insurance Practice
24. Section of Urban, State and Local Government Law
25. Young Lawyers Division

I will be happy to respond to any additional questions regarding our policy position or my testimony before your Committee on February 27, 1990.

Sincerely,

John J. Curtin, Jr.

John J. Curtin, Jr.
President-Elect

JJC/DAC:mj
6585M

COURT ENUNCIATED STANDARDS OF PROOF FOR BUSINESS NECESSITY

CIRCUIT COURT CASES

Black Law Enforcement Ass'n v. City of Akron
824 F.2d 475, 480 (6th Cir. 1987):
Employer must show that the "procedure used measures important skills, abilities and knowledge that are necessary for the successful performance of the job."

Blake v. City of Los Angeles
595 F.2d 1367, 1376 (9th Cir. 1979):
"necessary to safe and efficient performance"

Craig v. Alabama State University
804 F.2d 682, 689 (11th Cir. 1986):
"The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business... ."

Crawford v. Western Electric Co., Inc.
745 F.2d 1373, 1385 (11th Cir. 1984):
"the test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business"

Davis v. Richmond Fredericksburg & Potomac Railroad Co.,
803 F.2d 1322, 1325 n.2 (4th Cir. 1986):
"a business necessity requires the challenged practice"

Donnell v. General Motors Corp.
576 F.2d 1292, 1299 (8th Cir. 1978):
"the burden has been described as 'heavy' and the requirement 'must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge.'"

EEOC v. Atlas Paper Box Co.
868 F.2d 1487, 1490 (6th Cir. 1989):
"procedure used [must] measur[e]...important skills, abilities and knowledge that are necessary for the successful performance of the job."

EEOC v. Local 14, International Union of Operating Engineers
553 F.2d 251, 256 (2nd Cir. 1977):
"compelling reason"

EEOC v. Rath Packing Co.
787 F.2d 318, 331-32 (8th Cir. 1986):
"the proper standard...is not whether it is justified by routine business considerations but whether there is a compelling need for...that practice" (emphasis in original)

Green v. Missouri Pacific Railroad Co.
523 F.2d 1290, 1298 (8th Cir. 1975):
"the system in question must not only foster safety and efficiency, but must be essential to that goal" (emphasis in original)

Hamer v. City of Atlanta
872 F.2d 1521, 1533 (11th Cir. 1989):
"The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business."

Hawkins v. Anheuser - Busch, Inc.
697 F.2d, 810, 815 (8th Cir. 1983):
"employer must demonstrate that there is a compelling need... to maintain that practice." (emphasis in original)

Head v. Tinken Roller Bearing Co.
486 F.2d 870, 879 (6th Cir. 1973):
"The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business."

Kirby v. Colony Furniture Co., Inc.
613 F.2d 696, 703 (8th Cir. 1980):
"the practice must be shown to be necessary to safe and efficient job performance"

James V. Stockhalm Valves & Fittings Co.
559 F.2d 310, 344 (5th Cir. 1977):
"The business necessity of a practice is not shown merely with evidence that it serves 'legitimate management functions... [The] system must not only directly foster safety and efficiency of a plant, but also be essential to those goals."

McLosh v. City of Grand Forks
628 F.2d. 1058, 1062 (8th Cir. 1980):
"the practice is necessary to safe and efficient job performance"

Muller v. United States Steel Corporation
509 F.2d 923, 928 (10th Cir. 1975)
"The employer may rebut a prima facie case of the employee by showing that the maintenance of safety and efficiency requires the practice which obtains."

Parsons v. Kaiser Aluminum
575 F.2d 1374, 1389 (5th Cir. 1978):
"A practice which is demonstrably discriminatory in impact must: 'not only foster safety and efficiency, but must be essential to that goal.'" (emphasis in original)

Peters v. Wayne State University
691 F.2d 235, 239, (6th Cir. 1982):
"necessarily and closely related to a business purpose"

Robinson v. Lorillard Corp.
444 F.2d 791, 798 (4th Cir. 1971):
"[t]he applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact."

Rowe v. Cleveland Pneumatic Co.
690 F.2d 88, 93 (6th Cir. 1982):
"The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business."

United States v. Chesapeake and Ohio Railway Co.
471 F.2d 582, 588 (4th Cir. 1972):
"The best test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business."

U.S. v. NL Industries, Inc.
479 F.2d 354, 365 (8th Cir. 1973):
"The system in question must not only foster safety and efficiency, but must be essential to that goal." (emphasis in original)

United States v. St. Louis, etc., R.R.
464 F.2d 301, 308 (8th Cir. 1972):
"The system in question must not only foster safety and efficiency, but must be essential to that goal." (emphasis in original)

DISTRICT COURT CASES

Chappelle v. E.I. Dupont
497 F.Supp. 1197, 1200 (E.D. Va. 1980):
"Whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business."

Easley v. Anheuser - Busch Inc.
572 F.Supp. 402, 414 (E.D. Mo. 1983):
"a compelling need to maintain that practice" (emphasis in original)

EEOC v. Local 798, United Assn. of Journeymen
646 F.Supp. 318, 326 (N.D. Ohio 1986):
"The practice must be essential, the purpose compelling."

Hayes v. Shelby Memorial Hospital
546 F.Supp. 259, 263 (N.D. Ala. 1982)
"[Defendant] must show that the practice is necessary to safe and efficient job performance."

Kincade v. Firestone
694 F.Supp. 368, 376 (M.D. Tenn, 1987):
"overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business"

Kohne v. IMCO Container Co.
480 F.Supp. 1015, 1035 (W.D. Va. 1979):
"Overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business."

Jordan v. Wilson
649 F.Supp. 1038, 1052 (M.D. Ala. 1986):
"...the test for business necessity is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business."

Louisville Black Police v. City of Louisville
511 F.Supp. 825, 834 (W.D. Ky., 1979):
"policies which are unrelated to legitimate business necessity"

Mineo v. Transportation Management of Tennessee
694 F.Supp. 417, 427 (M.D. Tenn., 1988):
"overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business"

Mosley v. Clarksville Memorial Hospital
574 F.Supp. 224, 232 (M.D. Tenn., 1983):
"mandated by business necessity."

Nance v. Union Carbide Corp., Consumer Product Division
397 F.Supp. 436, 455 (W.D. N.C. 1975):
"essential to overriding legitimate, non-sexual business purpose, such as safety and efficiency"

Neloms v. Southwestern Power
440 F.Supp. 1353, 1370 (W.D. La. 1977):
"To constitute a 'business necessity' and thus relieve the employer of liability for a practice that has a disparate impact on members of a particular race, the business practice must be essential to safety and efficiency."

Powell v. Georgia Pac. Corp.
535 F.Supp. 713, 719 (W.D. Ark. 1982):
"practice must be shown to be necessary to safe and efficient job performance"

Richardson v. Quick-Trip Corp.
591 F.Supp. 1151, 1154-55 (S.D. Iowa, 1984):
"A discriminatory practice cannot be justified by routine business considerations; the employer must demonstrate that there is a compelling need...to maintain the practice." (emphasis in original)

Shafer v. Commander Army and Air Force Exch. Serv.
667 F.Supp. 414, 422 (N.D. Tex. 1985):
"This doctrine is very narrow. A practice which is demonstrably discriminating in impact must not only foster safety and efficiency but must be essential to that goal." (emphasis in original)

Stevenson v. Int'l Paper Co., of Mobile Alabama
352 F.Supp. 230, 249 (S.D. Ala. 1972):
"overriding legitimate, non-racial business necessity"

Thompson v. Boyle
499 F.Supp. 1147, 1163 (D.D.C. 1979):
"...irresistible necessity."

Vuyanich v. Rep. Nat. Bank of Dallas
505 F.Supp. 224, 264 (N.D. Tex. 1980):
"The typical formulation of the rule is that the practice must be one that is essential to the safe and efficient operation of the business."

Woods v. Safeway Stores, Inc.
420 F.Supp. 35,42 (E.D. Va. 1976):
"The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficient, compelling to override any racial impact, carry out the business purpose it's alleged to serve; and there must be available no acceptable or alternative policies or practices which would better accomplish the business purposes advanced, or accomplish it equally well with a lesser differential racial impact."

Chairman HAWKINS. Thank you.

Mr. CURTIN. I will submit to the committee at the end of the hearing the recommendation that was adopted by the House in the House of Delegates of the American Bar Association, with the consent of the Chair, so that will be available to you in the record.

Chairman HAWKINS. Without objection, let us anticipate the document and have it printed in the journal following Mr. Curtin's testimony.

Mr. Edwards, I think you have a question or two.

Mr. EDWARDS. Thank you, Mr. Chairman, and I want to thank Mr. Curtin and congratulate the American Bar Association for the involvement of the ABA in civil rights. It's so very helpful, it's enormously helpful to us to have the scholarly and hard-hitting resolution such as has been prepared, and your splendid testimony is very helpful too, Mr. Curtin.

I have a question of Mr. Brown. Mr. Brown, you have represented employers. Have employers had a great deal of difficulty or has it been unduly expensive for them to comply with the holdings of *Griggs*?

Mr. BROWN. No, Mr. Chairman. My experience with the employers that I have represented—and I believe that they are typical of most employers across the country—initially, as I indicated, there was a great hue and cry which went up after the *Griggs* decision was announced. I think many people and many employers felt the worst was about to befall them.

As we moved along in the actual enforcement of Title VII and the interpretation by the courts of the *Griggs* decision, we found that we were able to meet the standards set forth in *Griggs*.

I think I should say here as clearly and as emphatically as I possibly can that *Griggs* in no way ever intended to or was ever active in promoting quotas. The effect of *Griggs* was to eliminate those selection procedures which had very little to do with the actual selection of individuals for employment positions, and it was that which was addressed by *Griggs*.

I think that most major employers, with very, very few exceptions, would come here and say to you that we have been able to meet the *Griggs* standard and it has not imposed an undue burden on us.

I would think, also, and my experience has been that, as we have looked at the effects of Title VII generally, many employers have indicated to me—and I believe there's even been testimony from time-to-time before various committees—that, as they have become more critical of their own employment practices, employers have learned how to address concerns affecting their entire work force.

Our findings have been that as a result of some of the things that we have seen, the work force generally has improved, the quality of the product has improved, employee morale has improved because employers, as they are looking at treating one group or two groups of people appropriately, also have found that in doing so, they have treated all of their employees fair, and that has had a very, very therapeutic fallout.

I remember very specifically Bob Lilly who at the time was the President of AT&T. Mr. Lilly and myself negotiated that pretty landmark decision and settlement between the Commission and

AT&T. In the comments that he and I had after the settlement was effectuated and had been in place, I remember his saying to me, "I'm surprised at the tremendous amount of benefit which we have found."

He wasn't talking about the loss of money, obviously, but the amount of benefit in terms of better employee relations, better quality of work product and a much more satisfied work force which came about because of that litigation.

Mr. EDWARDS. Thank you, Mr. Brown. That's a very valuable response to my question.

Mr. Chairman, I yield back the balance of my time.

Chairman HAWKINS. Thank you.

Mr. Gunderson, the Chair will remind the members that we're going to operate under the five-minute rule. This is not directed to you, Mr. Gunderson.

Mr. GUNDERSON. I was going to ask.

Chairman HAWKINS. You're usually within that limit. But it's for the benefit of all of the members.

Mr. GUNDERSON. Thank you, Mr. Chairman.

Mr. Brown, you indicated in your testimony on page 7, referring to *Griggs*, that it cannot be shown to be related to job performance. Would you find that language acceptable in terms of dealing with this whole issue of the burden on the employer for a "business necessity" if we would take the language from *Griggs* and carry it over into the legislation that comes out of this committee?

Mr. BROWN. Well, I think the bill itself, when you talk about the business necessity, I think that the definition which is contained in our bill—when I say our bill, I mean the bill that we're discussing here, of course—I think is an effective definition.

Mr. GUNDERSON. That isn't my question.

Mr. BROWN. I'm sorry.

Mr. GUNDERSON. My question is, is the language used by the court in *Griggs* acceptable to you?

Mr. BROWN. Yes. Yes. I found that the *Griggs* language was completely acceptable to us.

Mr. GUNDERSON. Mr. Curtin, do you agree with that?

Mr. CURTIN. Well, wasn't the language "the touchstone is business necessity?" I think that's it.

Mr. GUNDERSON. Let me read you the language. The language from the court ruling, directly from the top of page 7 of Mr. Brown's testimony, if you want to refer to it, "cannot be shown to be related to job performance." Related to job performance is the key from *Griggs*.

Is that acceptable to you?

Mr. CURTIN. Well, I think you've said "is the key from *Griggs*." My understanding of the language in the holding of *Griggs*, and particularly of Chief Justice Burger's most important statement is that the touchstone is business necessity. I would concur with the Chief Justice that business necessity is the appropriate language.

I would define it as you have defined it in—or, as someone has defined it in the bill, which means "essential to effective job performance."

Mr. GUNDERSON. Well, that contradicts *Griggs* in terms of the touchstone of business necessity because *Griggs* says an employ-

ment practice which operates to exclude Negroes can be shown to be related to job performance. The practice is then prohibited.

Mr. CURTIN. I understood the language—I don't have the case in front of me—as manifestly related.

Mr. GUNDERSON. No, I'm reading the exact language because I think this is a very important point and I'm trying to figure out exactly where people are coming from.

Mr. BROWN. Mr. Congressman, I believe my statement which begins on page 6 at the bottom indicates that the touchstone is business necessity. If an employment practice which operates to excludes Negroes cannot be shown to be related to job performance, the practice is prohibited.

Then the *Griggs* court went on to talk about the intent under the *Griggs* test. They said that the intent was to play no part in determining whether or not there was discrimination. It held, "We do not suggest that either the district court or the court of appeals erred in examining the employer's intent," but went on to say, "but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as built-in headwinds for minority groups and are unrelated to measuring job capability."

It seems to me, Congressman, that that is pretty much the mirror of what's in this bill and I do not——

Mr. GUNDERSON. I don't think we're even dealing with the intent issue here. We're dealing with the definition of business necessity.

Mr. BROWN. I don't see the significant difference between the *Griggs* definition of business necessity——

Mr. GUNDERSON. And what?

Mr. BROWN. [continuing] and what's in this bill.

Mr. GUNDERSON. You don't?

Mr. BROWN. I do not.

Mr. GUNDERSON. Define essential. Define essential to effective job performance.

Mr. BROWN. I believe what has been said in the bill is "required by business necessity," and it means essential to effective job performance. I think if you look at the job and if, in fact, the job that you are looking at, has, let's say, a high school diploma requirement, and if in fact that job does not require a high school diploma as a part and parcel of that job, then *Griggs* said that high school diploma, to the extent it has a disparate impact on minorities, would be illegal under Title VII.

I would think the same result would apply under the proposed language in this case.

Mr. GUNDERSON. There's a big difference between "being related to job performance" and "essential to effective job performance." The concern that I have—and Mr. Curtin brought this forth in his testimony—that essential was a common use in the Supreme Court rulings, we simply can't find that in court rulings and I would ask you to provide for the committee evidence that quote the words essential to effective job performance is the exact definition or standard that has been used previously in the court cases because we can't find it.

Mr. CURTIN. You mean you can't find the specific language.

Mr. GUNDERSON. Yes.

Mr. CURTIN. But I think there's been testimony here and there's been a collection of about five Supreme Court cases which use language which is the equivalent of that. We'll be happy to provide that.

Mr. GUNDERSON. I think we'd like that because we simply don't find that in the court's directive. We simply just can't find it.

Mr. CURTIN. You mean you don't find a direct quote which uses that phraseology.

Mr. GUNDERSON. We don't find that as determining the standard that would be used in this area.

Mr. BROWN. Congressman, even in the *Wards Cove* decision, the decision itself on this particular point, at page 23 of the decision, the Justice Department brief states that it's necessary to safe and efficient job performance "essential to good job performance," and cites *Griggs* for that particular proposition.

Mr. GUNDERSON. Well, but this is the problem. See, we're playing a semantic game here when what we're going to define in the statute is going to be much more than a semantic game. That's why I brought you back to *Griggs*, because, frankly, the language in *Griggs* I think is acceptable to us. It says, "cannot be shown to be related to job performance."

Being related to job performance and being "essential to effective job performance," are very different standards. I mean, essential is a word that I don't think any of us in this room can prove. Can we determine something to be absolutely totally without exception essential? That's my problem.

Mr. BROWN. I think the difference, Mr. Congressman, between the two of us is that I did not see that neat a distinction between the phraseology.

Mr. GUNDERSON. Well, we differ on that.

Mr. BROWN. Yes, we do.

Mr. CURTIN. I think the language of *Dothard* contains the quote "essential to effective job performance."

Mr. GUNDERSON. Where?

Mr. CURTIN. *Dothard*. But we'll check that for you.

Chairman HAWKINS. Thank you. The gentleman's time has elapsed.

Mr. Murphy.

Mr. MURPHY. I have no questions, Mr. Chairman. I thank both Mr. Brown and Mr. Curtin for their testimony.

Chairman HAWKINS. Mr. Fawell.

Mr. FAWELL. Thank you, Mr. Chairman. Five minutes is not very long and I am a bit frustrated as I look at the questions which I have to try to clarify my own understanding of this bill.

I have before me, and I assume that both of you gentlemen have read, H.R. 4000 insofar as proof of unlawful employment practices in disparate impact cases are concerned. Is that correct?

Mr. BROWN. I have not read that case recently, Mr. Congressman.

Mr. FAWELL. I'm talking about the law, H.R. 4000.

Mr. BROWN. Are you talking about the Act itself?

Mr. FAWELL. Yes.

Mr. BROWN. Yes.

Mr. FAWELL. I'm talking about page 4(k). Proof of unlawful employment practices in disparate impact cases.

What we are doing, of course, is codifying case law and then changing it at the same time. What a number of us—at least on this side of the aisle—are concerned about and a number of—I happen to be a lawyer myself. I was unaware, as a member of the American Bar Association, of all these stances that have been taken, as I think many of us are.

But I am concerned about burden of proof in regard to the prima facia case under this wording of this bill. I am also concerned about the essential to business performance test and I would submit a careful reading of the various Supreme Court cases indicates that the courts have been all over the track on this.

Though one may not agree with what the court said in *Wards Cove*, clarification in regard to the burden that the employer had, or whether that was deemed, as in *Wards Cove*, just a simple obligation to proceed with the evidence, or whether you call it burden of proof I don't think matters much.

I can rest with the idea that the employer ought to have the burden of proof insofar as proving job relatedness, significant job relatedness and things of this sort. Cast it in the words of essential and you put an impossible burden, I believe, upon the employer.

But I don't think we're going to settle that in discussions between myself and each of you. But as I look at the wording, I can only zero in on small things here.

I ask myself, well, what is the plaintiff's burden in a disparate impact case, practically speaking? He has to prove what an unlawful employment practice is.

That is set forth in page 4. It says an unlawful employment praetice is established when—and then we go down to (b)—a complaining party demonstrates that a group of employment practices results in a disparate impact—that is, a causal relationship—of his allegations of a group of employment practices—and you look at the definition of group of employment practices and that even includes—on the preceding page—overall employment process. So he merely alleges that there is an overall employment processes which result in—one would think causal relationships—that is, causes an impact on the basis of race, let us say, or gender.

But then the next paragraph goes on to say, oh, by the way, the plaintiff does not have to demonstrate alleged specific practices nor does he have to prove specific practices actually result in—that is to say, he doesn't have to prove a causal relationship at all.

He merely has to show—or allege, basically, as I read this—that there is an employment process and that there is a disparate impact between the employees and those who have applied or those who are in the employment pool.

Now, Mr. Curtin, when you talk about proving a negative, here we have a shift of burden apparently. That's the lightest prima facia case I have ever, ever heard of. But now we have under this statute a shift of burden.

It seems to me then that the employer, as the respondent here, has to go one by one through the entire employment process and show that there is no causal relationship between the employment practices which have been in group alleged and the disparate

impact. One by one he must show the negative to help prove the plaintiff's case. He's got to go through the whole darned thing because, remember, under this statute the plaintiff doesn't have to prove the causal relationship.

That, to me, ends up with an allegation of quotas. That's all. That, to me, Mr. Curtin, as an attorney who believes in such things as some kind of a burden being placed upon the plaintiff, we've denuded the plaintiff completely of any obligations or burdens except to go through the statistics and be able to show, hey, there's a—there's a disparate impact. We've got "x" percentage of a certain minority group that is protected under this statute and they don't show up in the employment of this corporation.

There's no definition of what the heck employment practice means. Does it perhaps mean a wage plan and thus we have a potential of comparable worth being brought in here also? What is employment practice?

Remember, this disparate impact was created by the courts. Nobody yelled about that. I thought that the *Griggs* case was a good case too. I think any attorney who is fair as he looks at all the various Supreme Court cases in what is still young law, although I don't think it appears to the layman as such——

Chairman HAWKINS. The gentleman's time has expired.

Mr. FAWELL. I'm just beginning. I'd like to have an hour of cross-examination on this.

Chairman HAWKINS. Unfortunately, there are other members, Mr. Fawell.

Mr. FAWELL. Well, I know that. I know that. But that's why I have said, Mr. Chairman, boy, do we have to go slow on this. I don't think that people comprehend the damage that we can be doing here. And I speak as one of us.

I don't have any trouble of shifting the burden to the employer. But to say, for instance—and let me just conclude with this—that the courts are clear in regard to the definition of the burden to show whether it's something absolutely essential—I think you can find only one case, by the way that says that.

Then the courts, all the appellate courts, all of the decisions, are all over the barnyard in regard to what is actually meant by this. But you've picked the toughest of all and you've taken the burden of proof completely away from the plaintiff and you have established quotas.

I don't think anybody in Congress or anybody in the law profession wants it.

Chairman HAWKINS. We'll allow the witnesses an opportunity to comment on the statement made by Mr. Fawell.

Mr. CURTIN. Let me try to deal it. There are a number of points you made, but let me try to separate them out.

First, as I read the statute which you are proposing, at page 4, (k)(1)(B), it requires in order to establish an unlawful employment practice that a complaining party demonstrate that an employment practice results in a disparate impact in (A), and in (B) that a group of employment practices results in a disparate impact.

Now, demonstrates, as defined under definitions, is meets the burden of production and persuasion. So that it appears to me that a fair reading of your statute as you've proposed it is that the com-

plaining party does have the burden of proof of showing that an employment practice or a group of employment practices results in a disparate impact.

Mr. FAWELL. Excuse me. Would you look at subparagraph (i) though.

Chairman HAWKINS. We cannot. Mr. Fawell——

Mr. FAWELL. I just——

Chairman HAWKINS. I said we would allow the witness to respond to the question. But if we prolong it,——

Mr. FAWELL. Well, I just want to point out the proximate cause obligation is removed in the next paragraph.

Mr. CURTIN. Well, let me address that. The section that deals with the group of practices says, and the respondent fails to demonstrate that such practices are required by business necessity, except that if the complaining party demonstrates again that a group of employment practices results in a disparate impact, the party shall not be required to demonstrate which.

So, my view, again, of your statute is that in both instances you have not given on the one hand and taken away with the other.

On the general issue of the burden, the burden that is asked to be assumed by the employer, which I understand you agree to some extent should be assumed by the employer, is a burden of demonstrating necessity, business necessity. I can understand why you would say that because obviously the person most knowledgeable about the necessity for any particular requirement or any particular business practice is the person who sets it, the employer himself.

So, all you are doing is adopting, in my view, the normal rule in any litigation. He who asserts a proposition must prove it in general terms. Business necessity is an affirmative defense and under most general legal approaches to any kind of problem of that nature the burden is, as it should be, on he who asserts the affirmative defense.

So, the employer, if he's going to establish that there is some business necessity for whatever the test or whatever it may be that has resulted—casually connected—in a disparate impact, has that burden. So I don't have a problem.

Mr. FAWELL. Mr. Chairman, may I have one question that I might put to the—just to clarify that point.

Chairman HAWKINS. We will come back. Let the Chair say that——

Mr. FAWELL. It's a very important point.

Chairman HAWKINS. [continuing] I'm trying to be as fair as possible. The only way to do it is, as I indicated, a five-minute rule. Now, if the members are going to stay around here, I'll try to stay. But the other day there were two of us, Mr. Edwards and myself, who left here at 4:30.

Mr. FAWELL. And Mr. Fawell. I was with you to the end, Mr. Chairman.

Chairman HAWKINS. Okay. Then three.

Mr. FAWELL. Right.

Chairman HAWKINS. You and the others.

Mr. FAWELL. Mr. Chairman, the only point I wanted to bring out is that this makes it clear.

Chairman HAWKINS. Well, Mr. Fawell, I'm sorry, but your time has elapsed. Now, your statement was a very long statement.

The purpose of these hearings is to question the witnesses. You and I and——

Mr. FAWELL. Well, it's to ferret out the truth, Mr. Chairman, and we don't have time to be able to do it in five minutes.

Chairman HAWKINS. We will have time later today to discuss this and we will benefit from your legal talent. But——

Mr. FAWELL. Well, in five minutes no one in all of this Nation has the time to bring out very much. These people come like a tsetse fly, hit and go.

[Laughter.]

Mr. FAWELL. And we can't really question them.

Chairman HAWKINS. Well, the strategy is to try to bring it out in the first one or two minutes. Then you get that out and——

Mr. FAWELL. What I'm trying to bring out, Mr. Chairman, when we repeal five Supreme Court cases and then help the bar association with damages for attorneys to take over and have a complete change of the Civil Rights Act, we ought to have time to talk with the American Bar Association.

Chairman HAWKINS. Well, sometimes we disagree on the intent. I think Mr. Curtin has expressed the intent of the authors of this proposal, and that's what's before us.

Mr. FAWELL. I'd like to also know who in blazes wrote this bill also. That's the question.

Chairman HAWKINS. Well, a number of very distinguished——

Mr. FAWELL. Plaintiff's attorneys probably.

Chairman HAWKINS. [continuing] lawyers did write the bill and it's been in process for over a year. Those who were involved or wanted to be involved in the civil rights movement of the drafting of this bill had every opportunity to do so, Mr. Fawell.

Mr. FAWELL. Well, Mr. Chairman, I don't mean to be——

Chairman HAWKINS. There's no secrecy.

Mr. FAWELL. I don't mean to be difficult but I just don't think—it's being rushed through here and we don't have the time to ask questions and we don't get our witnesses until the end of the day and everybody's gone and the witnesses are——

Chairman HAWKINS. Well, there are other members who will say that they were foreclosed if we don't move on.

Mr. FAWELL. Well, I just think we ought to be able to have 15 minutes per person at least.

Chairman HAWKINS. Mr. Owens is recognized next, and then we'll alternate and try to take them in turn as best we can. If we have a second round, then, Mr. Fawell, you will have a second opportunity, provided, we don't take up all of the time with the first panel.

May I suggest to Mr. Brown, who had only 45 minutes to remain with us, your 45 minutes has gone by the wayside. Now, do you wish to——

Mr. BROWN. Well, Mr. Chairman, let me remain for a short while longer so that——

Chairman HAWKINS. Well, with the understanding that whenever you feel compelled to leave you will do so and——

Mr. BROWN. Certainly.

Chairman HAWKINS. [continuing] you are excused at that point.

Mr. BROWN. Thank you, Mr. Chairman.

Chairman HAWKINS. We'll try to move as fast as possible with deliberate speed.

Mr. BROWN. All deliberate speed.

[Laughter.]

Chairman HAWKINS. Mr. Owens.

Mr. OWENS. Mr. Chairman, if my colleague, Mr. Fawell, means he only wants 15 more minutes when he says we should go slow, I think you ought to give him the 15 minutes. But I hope go slow doesn't mean we're going to have to wait for months and years to deal with this very important remedy.

I'll just be brief. I want a clarification from Mr. Curtin on this. The position of bar association at this point is that they want legislation, but have they endorsed either H.R. 4000 or H.R. 4081 and what is your——

Mr. CURTIN. Well, the resolution will be before you. The recommendation of the bar is that we go back to the pre-1989 Supreme Court decisions. There is an additional recommendation not relevant to this.

As far as this bill is concerned, we endorse the substance of the provisions of this bill.

Mr. OWENS. You endorse the substance of it?

Mr. CURTIN. Yes.

Mr. OWENS. What do you think of the Administration bill? How do the two differ basically?

Mr. CURTIN. Well, I have the Administration bill in front of me. Let me focus on that a little bit, I guess. I just saw it, frankly, this morning.

But, as I understand it, the Administration bill focuses on the changes in Section 2 in those kinds of cases where there is—let's use an illustration—harassment after the employment function begins.

So the specter that has been raised is the specter that you could hire someone who is black and be prohibited from discriminating against him because they were black when you hired them, but five minutes after you hired them, you could proceed to harass them because they were black. So, the legislation that both the Administration and this bill are seeking to promote addresses that problem.

My view of the legislation proposed by the Administration is that it is possible that it may be restrictively interpreted. The language, as I read it on page 2, has the word performance, which I think is a broad word and is an appropriate word. But it says, "or in the setting of the terms or conditions thereof." That seems to talk in terms of the contract itself, the contract at the beginning.

Suppose you go along after a contract relation begins and you're five years down the road and there is a denial of benefits. Then it seems to me you want to be absolutely clear that if that denial is predicated on racial discrimination, that it should be covered by the statute.

I noticed that your language, or the bill—whoever drafted this bill—the language of the proposed bill used the phrase benefits. Where is that provision? On the Patterson section, Section 12. It

says there "all benefits, privileges, terms and conditions of the contractual relationship."

So, I assume that that's the sort of thing that can be worked out as to what is the appropriate language. But I assume also that you're trying to give the maximum protection, and, therefore, why should there be any ambiguity, why don't you use the language which is the broadest in this area?

The other provision on seniority systems troubles me a little bit because it appears to be limited to seniority systems. Now, it's true that the *Lorance* case which caused the problem was a seniority case, as I understand it. But, as I also understand it, there have been applications of the principle beyond the terms of seniority cases.

As I read the language of the Administration's bill, it focuses solely on seniority cases and, therefore, I would prefer the language which is in the proposed bill, H.R. 4000, because it talks about a broader expansion. It uses, on page 9 of the bill, by inserting after "occurred" the first time it appears "or has been applied to affect adversely the person aggrieved."

That modifies, as I understand it, discriminatory employment practices. So, it would cover all discriminatory employment practices, not just discriminatory employment practices which are tied to seniority restraints.

So, for those reasons, I would prefer the broader language of H.R. 4000 than that which I'm afraid may be viewed as a narrower interpretation in the Administration's bill. But since you're all working toward the same end, I assume that you can work out some language that would cover the broadest possible effort.

Mr. OWENS. Thank you. I think your testimony will be very helpful in achieving that compromise.

I have no further questions, Mr. Chairman.

Chairman HAWKINS. Mr. Henry.

Mr. HENRY. Thank you, Mr. Chairman. Mr. Curtin, I'm not an attorney, so please help me through this. So you can place me in the midst of this, I've not sponsored the Administration's bill because I think more is needed. I've got some real problems with the proposal.

In the resolution under which you're authorized to present the ABA's position to the committee you do not cite the *Independent Federation of Flight Attendants* v. *Zipes* case.

Second, however, in the remedies to establish the spirit of your testimony, you cite the other cases that are frequently being discussed here and then you add on further in the resolution, to grant all protective classes the same rights, etc. Of course, the point there is to open up the issue to see whether damages should be added to recovery and I understand that.

I guess my question is very explicit. Does the bar association support overturning *Zipes* and would the bar association expand other reforms relative to the assignment of attorney fees to various plaintiffs and parties as the Act calls for but which go beyond simply expanding protected classes in terms of giving them the same rights?

Mr. CURTIN. Well, the report that is the basis of the recommendation says that it is expected that the omnibus legislation, in

order to afford the same remedies to all protected classes, would amend Title VII to provide compensatory and punitive damages for intentional actions.

Mr. HENRY. I understand that. Now may I point to the section that I'm concerned about and raise my question because I think we have another issue here.

I'm asking for clarification. Let me set the background. Let's say hypothetically General Motors gets sued by the NAACP for its retirement, for the last-hired/first-fired, or whatever the issue is, and an agreement is made. Subsequently, the Hamtramic Polish Americans intervene subsequent to the agreement. Let's say the Hamtramic Brotherhood Society wins.

Who pays for their legal fees pre-*Zipes*, post-*Zipes* and under Section 9, subsection (3) of this bill?

Mr. CURTIN. You're talking about something entirely different.

Mr. HENRY. I'm just—page 11. In any action or proceeding——

Mr. CURTIN. Yes. If I'm correct, and help me out on this, you're talking about Section 9, which clarifies the attorney fees provisions.

Mr. HENRY. Yes.

Mr. CURTIN. Particularly the provision that deals with problems that may arise if subsequent to a decree or a judgment——

Mr. HENRY. Exactly.

Mr. CURTIN. [continuing] someone else comes in and then the person who has the favorable judgment has to fight about that judgment——

Mr. HENRY. Right.

Mr. CURTIN. [continuing] and someone who is responsible for the attorney's fees—in this bill, as I read it, it is the original defendant.

Mr. HENRY. Are assigned then to the employer?

Mr. CURTIN. Right. The recommendation of the House of Delegates and, therefore, the resolution as approved, as I understand it, takes no position on that issue.

Mr. HENRY. Okay. I just wanted to clarify that. I'm not taking a position. I want to make very clear that that is not part of the resolution, but we ought to make very clear it is a part of H.R. 4000.

Now, let me ask another issue here. As I understand it—in this hypothetical—you know, I'm speaking very stereotypically to make it clear—pre-*Zipes* if I am the Hamtramic Polish Brotherhood suing because I believe I lost something, and I succeed, then the NAACP would assume my fees?

Mr. CURTIN. No. I think the employer would.

Mr. HENRY. Okay.

Mr. CURTIN. But I'm not sure I'm clear with respect to your——

Mr. HENRY. Well, but in this case the union would be the losing party subsequent to the action of this later intervention.

Mr. CURTIN. Are you asking me how I interpret the protection——

Mr. HENRY. I'm talking about pre-*Zipes*. Then, what *Zipes* says is no unless there's—what? A frivolous nature? I'm having real trouble getting this and I can't get anyone to explain it to me. I told you, I'm not an attorney.

All I know is this gets reassigned always to the employer without a test as to whether it's frivolous and without a test as to whether or not the intervenor wins or loses on the merits.

Mr. CURTIN. Well, as I say, we have taken no position with respect to that provision and, therefore, I have made no effort to analyze how it would apply.

Mr. HENRY. Well, I find it very difficult to understand how you could give us instant analysis of the Administration bill which you had just not had time to see and come and cite H.R. 4000 and say, I'm sorry, I haven't had time to read the Act. In other words, there's a section of the Act you're prepared to say for the record that you're not conversant with.

Mr. CURTIN. No. All I'm saying is that as I understand this language, what it says is this language shifts to the defendant the attorney's fees if someone else comes in and attacks the judgement and if it loses.

Mr. HENRY. To the original defendant.

Mr. CURTIN. That's correct.

Mr. HENRY. So here I am. I am, let's say, General Motors, NAACP, or whatever, and we have reached an agreement which is binding through the order of the court. Two years later, three years later, a third party now seeks intervention and I, as General Motors, have to pay for their intervention win or lose?

Mr. CURTIN. Well, I would think the appropriate analysis and the reason for it—and I think even in some of the earlier cases—was that you try to focus on who caused the problem. If the original problem is caused by the original defendant and a judgment has been entered which so determines, then I suppose it is not manifestly unfair to make that defendant to pay for all subsequent costs of litigation.

But, as I say, on the policy question of whether or not that should be done, the American Bar Association has taken no position. Therefore, I'm not going to take a position as a spokesman for the American Bar Association.

Mr. HENRY. Do you think it is appropriate——

Chairman HAWKINS. Mr. Henry, your time——

Mr. HENRY. Okay.

Chairman HAWKINS. [continuing] has elapsed.

Mr. HENRY. Thank you, Mr. Chairman.

Mr. BROWN. Mr. Chairman, I believe that I must leave now. I apologize to you and the members of the committee but I do have to go over on the other side of the Congress now and take my lumps over there.

[Laughter.]

Chairman HAWKINS. Well, thank you, Mr. Brown. We wish you luck in——

Mr. CURTIN. I have to say I regret deeply that he's leaving.

[Laughter.]

Chairman HAWKINS. Well, we regretted his leaving a long time ago, when he left——

Mr. BROWN. I do appreciate the opportunity and I do want to thank you and the members of the committee for affording me the opportunity of being here this morning. I certainly appreciate your

allowing me to be called out of time so that I could meet my other obligation.

Thank you very much.

Chairman HAWKINS. Thank you, Mr. Brown. Best of luck in the cave of the winds.

[Laughter.]

Chairman HAWKINS. Mrs. Unsoeld.

Mrs. UNSOELD. [Shakes head.]

Chairman HAWKINS. Mr. Bartlett.

Mr. BARTLETT. Thank you, Mr. Chairman. I do have a series of questions.

First, I want to clarify the American Bar Association's position on damages and on reversing these five decisions. You said in your testimony that it was the ABA's position that these Supreme Court decisions should be reversed.

In your opinion, the section on page 10 which states punitive damages, compensatory damages and punitive damages, does that go further than reversing these Supreme Court cases?

Mr. CURTIN. Well, there's also a second portion of the resolution which says that the American Bar Association also supports Federal legislation amending Title VII of the Civil Rights Act of 1964 to grant all protective classes the same rights to recover damages for employment discrimination which are enjoyed by victims of racial ethnic discrimination under 42 U.S.C. 1981. That report—we are only talking about intentional.

Mr. BARTLETT. Mr. Curtin, let me ask this. As I understand this bill—and maybe I'm incorrect—this bill provides for punitive and compensatory damages under Title VII, which has never existed for anyone, as I recall, whether it's racial discrimination or sex discrimination. 1981, an older statute, did provide punitive and compensatory based on racial discrimination.

So you're urging that we provide punitive and compensatory for Title VII or am I incorrect?

Mr. CURTIN. Only for intentional violations. That's correct.

Mr. BARTLETT. Okay. The second—I want to see if I can——

Mr. CURTIN. Of course, punitive damages are not available for any case against the government.

Mr. BARTLETT. Well, I would have assumed that I'm sure Congress is exempt also, Mr. Curtin. I don't think that's necessarily right but that's the way it is.

Mr. CURTIN. Right.

Mr. BARTLETT. Do you think we should make Congress covered by Title VII?

Mr. CURTIN. I have no official position on that.

Mr. BARTLETT. Let me just make sure I understand. So you think that we should—and the ABA believes that we should extend punitive and compensatory damages to Title VII even though you believe that it's never been in Title VII? Or am I incorrect? Do you think it's been in Title VII in the past?

Mr. CURTIN. It has been in 1981 for racial minorities although it has not been in Title VII, and, yes, the position is that it should be extended to provide compensatory and punitive damages in Title VII.

Mr. BARTLETT. Okay. The second question is on the prevailing party and attorney's fees. I just want to try to clarify it. If you were in our seat, how would you draft the legislation with regard to prevailing parties?

Do you believe that in all cases the prevailing party should be—or, the court should be able to assess damages to the prevailing party or should it only be in the case if other relief is granted?

Mr. CURTIN. Well, the general answer to that is if the plaintiff prevails, then defendant should be assessed—damages should be assessed, which include attorney's fees. The test traditionally—and I think would apply here—should be if the defendant prevails, then the test is whether the complaint was frivolous.

Otherwise we will have gone back to the entire English system in which we shift to the prevailing party the entire responsibility for winning and losing; and this Congress and most state legislatures have refused to do that.

Mr. BARTLETT. So your testimony is consistent with what I understand current case law to be. That is, if the plaintiff prevails, well, then attorney's fees are paid by the defendant. If the defendant prevails, then no attorney's fees are paid.

Mr. CURTIN. Unless it's frivolous.

Mr. BARTLETT. Unless it's frivolous. But there's not a frivolous requirement on the other side.

Mr. CURTIN. Right.

Mr. BARTLETT. On prevailing party, who prevails, under the terms of this bill—who, in your judgment prevails, under the *Wards Cove* reversal if the complaining party demonstrates that an employment practice results in an disparate impact but the respondent does demonstrate that the practice is required by business necessity? In that case, who is the prevailing party?

Mr. CURTIN. If the respondent proves that it was required by a business necessity? It meets——

Mr. BARTLETT. I know that sounds incredulous to you, but sometimes that happens.

Mr. CURTIN. Well, it doesn't sound incredulous. I understand that businessmen have been prevailing on this.

Mr. BARTLETT. So, who is the prevailing party in that case, in your judgment?

Mr. CURTIN. Well, if the defense has been sustained by the defendant/employer, then he has prevailed.

Mr. BARTLETT. So then the defendant has prevailed in that case. No attorney's fees should be paid?

Mr. CURTIN. Well, as I say, I don't have any official position with respect to attorney's fees. So, whether or not——

Mr. BARTLETT. In your opinion it's fine.

Mr. CURTIN. Well, no, I'm not going to give my opinion as a personal matter. There is an obvious policy question as to whether or not attorney's fees should be awarded under these circumstances, and we have taken no position, so I will state no position.

Mr. BARTLETT. Do you think that this committee and this Congress in considering this legislation should look at the whole issue of attorney's fees and prevailing party and reexamine that issue and attempt to legislate or put in statute who should pay and

under what circumstances or do you think we should leave existing case law alone other than the changes made in here?

Mr. CURTIN. Well, I think that's a decision for the Congress to make itself. I think it's always appropriate to have the views of Congress on all matters when a particular statutory provision is being enacted, and that's certainly a related matter. You have the authority to do so and I think——

Mr. BARTLETT. Do you hear attorneys in the American Bar Association contend that there are unfair things that happen with regard to the current system of paying attorney's fees in the prevailing party, or do attorneys generally think that the system is okay the way it is?

Mr. CURTIN. I'm not sure I understand.

Mr. BARTLETT. What the attorneys in the American——

Mr. CURTIN. [continuing] the general English system versus the American system?

Mr. BARTLETT. In the current system do you hear other attorneys suggest that there are unfairnesses in the current system with regard to prevailing party and attorney's fees?

Mr. CURTIN. Well, I'm sure that there are a lot of different views on which way the statute should go. There have been some recent statutes in certain state jurisdictions—for example, Idaho has passed a statute which, in effect, in a commercial litigation permits the prevailing party to have their attorney fees paid. It's my understanding that Florida had a similar statute a couple of years ago and it was repealed.

The traditional common law view, which has been in effect here for many years, has worked reasonably well in practice. I can see that under certain circumstances, policy requirements may persuade a legislature to say that, if this individual or group is successful, that they should be entitled to attorney's fees as a way of demonstrating a distaste for the practice that is the subject of the legislation.

I think a Congress could well take the view that in racial and other kinds of discrimination cases that that is such a heinous practice that the prevailing party might be entitled to have attorney's fees as well.

Mr. BARTLETT. Mr. Chairman, I'm not trying to extend my time.

Chairman HAWKINS. Mr. Bartlett?

Mr. BARTLETT. But if I could ask a yes or no because I want to make sure I understand——

Chairman HAWKINS. Well, your time has long ago expired. May we go to Mr. James?

Mr. JAMES. I'll try to talk fast. Attorney's fees—what good does it do an employer to get a judgment for attorney's fees if he's the prevailing party if the employee is otherwise unemployable? If he gets a judgment and the employee is judgment-proof—how does the bar address that particular problem? They don't, right?

Mr. CURTIN. Well, if in fact you've got a judgment against someone who is judgement-proof, you've defined yourself into a situation where there's nothing much you can do about it.

Mr. JAMES. Of course. So almost all employees in that case, many of them, if they were not judgment-proof, they certainly would be

judgment proof against the thousands of dollars it would take for this type of case, would you not so surmise, in almost all cases?

Mr. CURTIN. Well, I'm not clear that I'm in a position to predict the financial state of every employee that might bring——

Mr. JAMES. I'm not asking you to do that.

Mr. CURTIN. [continuing] but in general I would think that most of the people who are discriminated against are poor and, therefore, it would be unlikely that they would have a lot of resources.

Mr. JAMES. I'm talking most people generally and statistically that are involved in litigation as opposed to an employer who is usually a business that has business assets. Statistically there would be much less chance of the employer prevailing as far as actually collecting large sums of attorney's fees against individuals, especially in a case like Florida that you mentioned—and I am a Florida attorney.

Mr. CURTIN. Do you remember that they did pass that?

Mr. JAMES. You mean the Medical Malpractice Act?

Mr. CURTIN. Yes.

Mr. JAMES. The reason—the very reason—the Medical Malpractice Act was amended was because the doctors thought they had a winner when they said, okay, prevailing party will get attorney's fees. By and large in a malpractice case the very problem occurs that it's not collectible, as you must know, against the plaintiff.

Mr. CURTIN. That's frequent.

Mr. JAMES. Quite frequently——

Mr. CURTIN. Quite frequent, yes.

Mr. JAMES. [continuing] if it's large. So, a doctor sued, lost. So the prevailing party got attorney's fees. So the plaintiff got several million dollars against the doctor in attorney's fees alone, or very large sums.

So then the medial medical association saw the lack of the wisdom of insisting it be in the statute because it worked against the deep pocket, it does not work against the person of the classification of people who do not have large sums of money whereby judgment could be collected. So that's why they changed it.

The plaintiff's attorneys at that point in time understood it was not the wisest thing. They have since then clarified the statute whereby—the frivolous part you're talking about, Florida has a statute on frivolous lawsuits. By and large it's almost never, never awarded except in the most egregious cases. So, frivolous lawsuits is no protection whatsoever in Florida. It may be in Federal law.

Let me ask you though, and it's more pertinent since we have such a limited time. It would appear to me in H.R. 4000 that you would extend Section 1981 for all Title VII actions which would be the American Disabilities Act, it would be any discrimination situation whereby there was an intentional act.

Now, where in the Act or the case law is intentional defined? More to the point, does intentional relate to criminal law—you do the act and have knowledge that you do the act, it's not required that you know the legal consequences—or is it defined somewhere within the case law or the statute meaning that you intended to discriminate rather than intended to do the act? Do you understand the distinction?

Mr. CURTIN. I'm not sure that I understand. The distinction you're making in terms of the general issue of intent, that is something that is traditionally defined by judges in charging juries on any intentional tort.

Mr. JAMES. You're quite correct and judges generally instruct you, both in civil and criminal law, that if you intended to do the act, regardless of your knowledge of the consequences, that's sufficient intent to find you culpable, whether it be civil or criminal.

Mr. CURTIN. The natural probable consequence of your act in civil——

Mr. JAMES. Yes.

Mr. CURTIN. [continuing] although it's my understanding that may be troublesome in a criminal context.

Mr. JAMES. Yes. But lack of knowledge of the law is no defense. In criminal actions, it's quite clear that if you did the act, it makes no difference that you understood the consequences were illegal.

Mr. CURTIN. That's true.

Mr. JAMES. Okay? So this is what bothers me about this scenario. When you say you can spring forth into Section 1981 because it was an intentional act, are you meaning intentional—is it defined as—and I don't know the answer to this—is intention to commit the act as it is generally in both criminal and civil law? That is, intentional to have this practice or does it require that you prove intention to have this practice and to discriminate?

Mr. CURTIN. Well, as I understand this, it makes no effort to change whatever the existing law is on that subject as it has been defined.

Mr. JAMES. What is the existing law in that area?

Mr. CURTIN. Well, my understanding generally, and I do not purport to be an expert in this field,——

Mr. JAMES. Yes.

Mr. CURTIN. [continuing] is that it is the general intent law.

Mr. JAMES. Okay. That's what I was afraid of. Okay. That being the case, what is this? You know, you could understand how the critics may refer to this as a lawyer's relief act in that all of the sudden you have 1991 that can—by the way, have you ever defended or been a plaintiff in that action?

Mr. CURTIN. No.

Mr. JAMES. Okay. In that action has the bar studied the statistics on what the size of the judgments are and the number of cases filed?

Mr. CURTIN. They may have but I don't know.

Mr. JAMES. Okay. Now that you expand the——

Mr. CURTIN. May I ask, what is this lawyer's relief act? I don't understand concept.

Mr. JAMES. You never heard that terminology?

Mr. CURTIN. I don't understand that concept as applied to this case.

Mr. JAMES. Okay. You don't? You don't?

Mr. CURTIN. Yes.

Mr. JAMES. Okay. I'll explain it to you—what the critics may mean by that. I'm not suggesting that it is. But what I'm saying is any time you set up a contingency fee scenario and expand the cause of action to include heretofore unanticipated claims with a

total shifting of burden of proof then you expand the potentiality of a multiplicity of lawsuits to invite plaintiff's attorneys who now could get contingency fee contracts for humiliation regardless of the out of pocket consequences, both under ADA and under this Act and on any discrimination action that heretofore went under Title VII.

Mr. CURTIN. Well, it sounds to me——

Mr. JAMES. So, that's what the critics would say. I'm not making that allegation.

Mr. CURTIN. Well, it sounds like the critics are engaged in a little bit more sophisticated form of lawyer bashing, which seems to be very prevalent these days.

If this Congress passes a statute which gives the right to people to bring a lawsuit, I would think that this Congress and all its representatives, including its lawyer representatives, would stand up for the fact that having created that right someone should be in a position to enforce it, and it isn't a lawyer's relief fund if that occurs.

Mr. JAMES. So you would say that would be incorrect.

Does the bar have any idea or have they studied statistically—and this is my last question, if I might finish——

Chairman HAWKINS. All right.

Mr. JAMES. [continuing] studied statistically the economic impact on business when you are in fact expanding these areas under Title VII and considering that ADA is being substantially modified? Do you have any idea what the economic impact may be in relationship to the increase of cases?

Mr. CURTIN. [continuing] do a statistical study about something that hasn't yet occurred.

Mr. JAMES. I see. So we don't know that. Thank you very much. I really appreciate your testimony. You've been extremely helpful. I understand the problems and the sophistication of them to some extent, but it's only the tip of the iceberg of the magnitude of the problems. But thank you so much for your testimony. I appreciate your candor and help.

Chairman HAWKINS. Mr. Smith is recognized.

Mr. SMITH. Thank you, Mr. Chairman. Sir, I should say at the outset, like at least Congressman Henry before—and I don't want to put words in his mouth—as I understand the burden of the major decisions found in *Wards Cove*—and I'm not an attorney—I am opposed to that decision and would like to see it remedied with legislation.

My concern, having listened to—and this is one of the few cases—it's not good news for you, but it may be good news for me that I go last and get to listen to everybody, and you just have to sit here through it all.

If I boil it down in non-lawyer terms, there are two areas above others that really concern some members of this committee and other Members of this Congress, frankly in both parties. One has to do with the—when we're talking about disparate impact, the words "related to" versus "essential to" job performance.

The other has to do with an apparent extension of damages to include in some regard, from Section 1981 to Title VII.

As I have listened to the testimony and the interrogations back and forth, what people haven't said but what I think is concerning some people is that if H.R. 4000 is passed into law as written, that the current language will be a de facto guarantee of employment quotas because, as the charge goes, businesses simply will not want to risk going to court because of the essential proof on the one side and the supposed radical extension of penalties for damages on the other.

Could you address that, those two concerns, give the bar association's response and give me some examples, some lay examples, of the reasoning why you believe that that is a founded or an unfounded set of concerns.

Mr. CURTIN. Well, let me try to focus on the quota issue. The basic thrust of the bar association's position, and I understand to be the basic intent of this bill, is to return to the status of *Griggs* and its progeny, which would include the Supreme Court case which used the language of "essential to effective job performance" shortly thereafter.

In 19 years after *Griggs*, there apparently was no demonstrated showing or even much argument that as a result of the impact of *Griggs* that quotas had to be imposed. Perhaps the most effective way of approaching it is what we're talking about is not, as I understand it, an intention that a businessman would have to demonstrate that his entire business will go down the tubes unless this particular test or standard is implied.

It focuses on effective job performance with respect to the job which the complaining party has not gotten or the class of people have not obtained.

So, what you're saying is what would a reasonable employee expect for a test or a standard? If you were an employer, what would you want for a test or a standard? It doesn't seem to me terribly far-fetched to suggest that if you've got a job, you would want a relationship to effective job performance.

If you have got a test which creates the kind of disparate impact that is the starting point causally, then it seems sensible to me to say that if I'm a businessman, I would want a test which demonstrated what was essential to job performance and that therefore I would, as an illustration, be willing to go to court to show that my job standards or tests were essential to effective job performance.

Now, it is true——

Mr. SMITH. Excuse me.

Mr. CURTIN. [continuing] that litigation does——

Mr. SMITH. Excuse me, sir. I just need to get—because I'm going to run out of time too and I'm trying to set a record by being done at the end of five minutes. It will be a first for me. You don't understand these particular set of historical precedence we're trying to set here.

[Laughter.]

Mr. SMITH. So, in a nutshell, because I want to get to the damages side of it, you're saying that the goal is to return to *Griggs*, that *Griggs* referenced or used the word "essential," that there's no evidence that——

Mr. CURTIN. No. That the later case did in some cases.

Mr. SMITH. Okay. You said *Griggs* and really other cases—and that there is basically no evidence over the 19-year history that quotas were encouraged or not and that the history of that those cases represent in the law and in case history is evidence of what the interpretation of this law would be.

Mr. CURTIN. Well, the history is that employers win some of those cases. In fact, quite a few of them.

As I say, I don't purport to be an expert in this field, but I do have partners who practice in this field, and they tell me that it's hard for a plaintiff to win such a case.

Mr. SMITH. So, could you go to the damages piece because—so the answer is yes?

Mr. CURTIN. Yes.

Mr. SMITH. I'm just a simple kid from the country and I'm trying to find out that -

Mr. CURTIN. Any time anybody says that I reach for my wallet immediately.

[Laughter.]

Mr. SMITH. How about the damages piece?

Mr. CURTIN. Well, what about it?

Mr. SMITH. You do not see that as a radical change from, as I've listened to it—and people here are concerned that it is such a dramatic departure in terms of the including of Title VII—maybe I'm getting it backwards—but that——

Mr. CURTIN. Well, it is a change. Don't misunderstand me. It is a change. What it does is it does for women what for years has been done for racial discrimination. I think this Congress has demonstrated time and time again that it does not want to discriminate as between women and racial discrimination.

Chairman HAWKINS. Your time has elapsed.

Mr. SMITH. Thank you.

Chairman HAWKINS. I think we've gone through the membership list. Again, thank you.

Mr. FAWELL. Mr. Chairman?

Chairman HAWKINS. Mr. Goodling.

Mr. GOODLING. I just want to make one comment. I don't want to bash the attorneys, but I wish you'd help us write legislation to give full employment to everybody else in this country——

[Laughter.]

Mr. GOODLING. [continuing] like you seem to do for those you represent.

Mr. FAWELL. Mr. Chairman?

Chairman HAWKINS. Mr. Fawell.

Mr. FAWELL. I wonder if I could have leave of the committee and if Mr. Curtin would agree, to propound questions in——

Chairman HAWKINS. No, Mr. Fawell. We have——

Mr. FAWELL. [continuing] questions in writing. In writing.

Chairman HAWKINS. In writing?

Mr. FAWELL. In writing. Yes.

Chairman HAWKINS. Mr. Fawell has requested that he submit a list of questions in writing to Mr. Curtin. Without objection, it is so ordered.

Thank you, Mr. Fawell.

Mr. FAWELL. Thank you, Mr. Chairman.

Chairman HAWKINS. Mr. Curtin, we've discussed attorney fees. If we had to pay you a fee this morning, this committee would be bankrupt by now, I suspect.

[Laughter.]

Mr. CURTIN. I'd be happy to represent you at any time.

Chairman HAWKINS. Thank you, Mr. Curtin. If I get into serious trouble, which is always somewhat possible, I'll certainly lean on an attorney of your caliber, I can assure you.

Mr. CURTIN. Thank you.

Chairman HAWKINS. Thank you very much for your appearance before the committee.

The next panel will consist of Mr. John E. Jacob, President and Chief Executive Officer of the National Urban League; Ms. Antonia Hernandez, Esquire, President and Counsel, Mexican-American Legal Defense and Education Fund; and Mr. Norman Dorsen, Esquire, Professor of Law and President of the American Civil Liberties Union, New York City, New York.

My understanding is that Mr. Dorsen has an 11:20 plane to catch——

[Laughter.]

Chairman HAWKINS. With permission, let us allow Mr. Dorsen to make his statement, and to the extent that questions may still fall within the time constraint, we'll direct those, then we'll call on the other two witnesses and question them.

Mr. Dorsen, you are recognized.

STATEMENTS OF JOHN E. JACOB, PRESIDENT AND CHIEF EXECUTIVE OFFICER, NATIONAL URBAN LEAGUE; ANTONIA HERNANDEZ, PRESIDENT AND COUNSEL, MEXICAN-AMERICAN LEGAL DEFENSE AND EDUCATION FUND; AND NORMAN DORSEN, PROFESSOR OF LAW AND PRESIDENT, AMERICAN CIVIL LIBERTIES UNION

Mr. DORSEN. Thank you very much, Mr. Chairman.

I can't start without saying how much we all appreciate your career in this issue. I know this is your last term. I hope this bill is passed and it's a capstone to a long period of working for human rights and civil rights. You should be very proud of yourself, Mr. Chairman.

Chairman HAWKINS. Well, thank you. Mr. Fawell is going to help me get it through real rapidly.

[Laughter.]

Mr. DORSEN. I'm glad you mentioned Mr. Fawell and Mr. Smith because I think they had some very good questions. If I were sitting up there on either side of the aisle, some of the questions and comments they made would have been the ones that would have occurred to me.

I deeply regret that I don't have the time to go into this in the detail that I had expected, but I have a class to teach at 2:05 in New York in the law school where I am a professor.

As you know, I am the President of the National American Civil Liberties Union. I should add that in 1964 and 1965 I drafted for the National Commission of Uniform Laws the first model antidis-

crimination act. In the mid-1970s, I was President of the Society of American Law Teachers.

The basic problem here, in my opinion, ladies and gentlemen, is that the Supreme Court fixed something that wasn't broken. The *Griggs* case, written by an extremely conservative and sophisticated Chief Justice of the United States set out rules that were working for 18 years. No rule ever propounded works perfectly. But the rule under *Griggs* worked very well.

As our written testimony will show when we submit it with your permission, many employers—many employers—won these cases. This is not a situation where people came in with frivolous cases and the Federal bench fell over backwards and allowed them to win.

Now, there are a number of aspects to the problem. The first one is that Justice White in writing for a five-member majority of the Court didn't recognize that there are some situations where you cannot pinpoint precisely the business practice that leads to the discrimination.

Sometimes an employer is working in a situation where there are a whole set of activities or practices, all of which together mixed up, aggregated, lead to the discrimination. What he said was separate the inseparable.

It is simply impossible, and there is no way in which any law is going to be passed that's going to do justice to racial minorities and to women who have long suffered in this country and in most countries, I might say, without recognizing that in some cases you can point to the single cause of the discrimination and in other cases you cannot.

All this bill does is recognize what I think is an absolutely clear fact and makes it essential that the courts face up to the fact that, on certain occasions, it is a group of practices rather than a single practice. So there is no reason to say that the practices must be disaggregated for the purposes of proving a case.

In terms of the standard—the question, again, that Mr. Smith and Mr. Fawell raised I thought very clearly and effectively—the bill does say "essential to effective job performance." That language is taken from the *Dothard* case which was decided in 1977, six years after *Griggs*.

Now, someone could say, gee, that's too high a standard. Of course, that's the thrust of the comments that have been made by the two members. But there's a premise—there's a premise that underlies this bill and that underlies that language. That is that discrimination is a very, very bad thing.

We're not dealing here with a marginal question, gray areas. We're talking about something that is harming people, that has harmed people for generations. The employer comes in and somebody proves in his case that there are ten men hired for every woman. The employer says, but it's part of the business. That's a legitimate question for the employer to raise. It is not unfair to impose a high standard of proof.

The problem with the comment that Mr. Gunderson made, who is no longer here, when he extracted certain language out of context from the *Griggs* case when he talked about "related to the business," is that that is such a flexible standard that can always

be proved. It would be impossible to win a discrimination case if all the employer has to do is show that the business practice was related to his business. It simply will not work.

At rock bottom here the question that is being measured by the action that Congress takes is the intensity with which Congress cares about discrimination. We suggest, recognizing the truth of what Mr. Gunderson said, that this is a high standard. It is a very high standard. Our position is, it should be a very high standard.

In terms of damages, the question was raised, again very properly, should new compensatory damages be applied in Title VII actions? The answer is yes. By definition we're talking about people who are being harmed, harmed in a way, I'd suggest, that perhaps some of us who are white males and who live rather privileged lives which I am the first to confess that I have lived. I've not been the victim of discrimination, to the best of my knowledge.

But there are millions, tens of millions of people who wake up every morning with a cloud overhanging their lives. It may be a small cloud. It may be a large cloud. Our position is if they prove—if they prove, pursuant to law, that discrimination occurred against them, they should get compensatory damages.

It's present in Section 1981, why shouldn't it be present in Title VII? Title VII was an attempt, finally, at long last, in 1964 to fulfill the promise of the 14th Amendment, a promise that was made in 1868 and has never been fulfilled in this country.

Now, I would be the last one to suggest that discrimination is always the product of a vicious and prejudiced mind. There are a lot of subtle discriminations. Many of us discriminate without recognizing it. The purpose of this law it to bring to the surface situations where discrimination has occurred in fact and then to put the burden on the defendant to show a good reason.

If the defendant can show a good reason, the defendant should win and the defendant should prevail, and the defendant should get attorney's fees. But in the absence of that, the plaintiff should win and people who have been harmed, harmed in a discernible way by intentional discrimination, should recover damages.

We do not think this is a very complicated matter. I'm perfectly prepared—I apologize once again, Mr. Chairman, that because of the change in schedule I won't have as much time. I'd be delighted at any time to discuss the technicalities of this matter.

The problem is that ultimately, at rock bottom, what we're talking about here is devising a workable system, which I assume that Members on both sides of the aisle are equally committed to, to do something at long last to fulfill the promise that the Equal Protection Clause of the Constitution sets out.

It is extremely regrettable that *Wards Cove* was decided. I should mention in terms of my background that I was a law clerk to Justice Harlan on the United States Supreme Court. My first job after that was working for Thomas E. Dewey. Before that I worked for the great Republican Counsel for the Army during the Army McCarthy hearings, Joseph Welch. I do not come to this from a position where I do not understand. I represented the Chase Bank. I represented a number of potential defendants under this law.

We're dealing here, to quote Richard Kluber, with a simple matter of justice. I recognize there are technical questions. I repeat again that Mr. Fawell and Mr. Smith and Mr. Gunderson raised legitimate questions—legitimate questions, and there are answers to those questions.

I apologize, Mr. Chairman, for not having more time to give those answers but I hope I've done some——

[The prepared statement of Norman Dorsen follows:]

STATEMENT

OF

NORMAN DORSEN

PRESIDENT

AMERICAN CIVIL LIBERTIES UNION

ON

H.R.4000

CIVIL RIGHTS ACT OF 1990

BEFORE

UNITED STATES HOUSE OF REPRESENTATIVES

COMMITTEE ON EDUCATION AND LABOR

FEBRUARY 27, 1990

Mr. Chairman and Members of the Committee:

I appreciate the opportunity to present the views of the American Civil Liberties Union (ACLU) concerning H.R. 4000, the Civil Rights Act of 1990. The ACLU is a nationwide, non-partisan organization of more than 275,000 members devoted solely to protecting the rights and liberties guaranteed by the Constitution.

By way of background, I am a lawyer admitted to practice in New York State, the District of Columbia, and other federal courts including the Supreme Court of the United States. Before entering the private practice of law, I served as law clerk to Chief Judge Calvert Magruder of the U.S. Court of Appeals for the First Circuit and for Justice John Marshall Harlan of the U.S. Supreme Court. Since 1962, I have been a member of the faculty of New York University Law School, where I am now Stokes Professor of Law. I have been a visiting professor and have lectured at many other law schools, including Harvard, Texas, Michigan, Georgetown, and the University of California at Berkeley. I was the President of the Society of American Law Teachers from 1973-75.

I am and have been since 1976 the president of the American Civil Liberties Union. I appear before you today in support of the Civil Rights Act of 1990.

Introduction

> "One wonders whether the majority still believes that [discrimination] is a problem in our society, or even remembers that it ever was."[1/]

In 1989, the Supreme Court dealt a series of crippling blows to the statutory framework of established civil rights laws and, in the process, sent the struggle for equality in the American workforce plummeting. The Court's decisions reversed time-honored judicial precedents under two of the most important laws that Congress has enacted to provide opportunities that were historically denied to racial and ethnic and religious minorities and women.

One of the statutes affected by a Court decision last term is the Civil Rights Act of 1866. Section 1981 of Chapter 42 of the U.S. Code[2/] has been robbed of much of its modern vitality as a result of the Supreme Court's decision in Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989). Congress enacted the Civil Rights Act of 1866 in response to post-Emancipation legal and extra-legal efforts to oppress "freedmen", and intended the legislation "give effect to th[e Thirteenth Amendment] and to secure to all persons within the United States practical

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[1/] Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989) (Blackmun, J., dissenting, joined by Brennan, J. and Marshall, J.).

[2/] 42 U.S.C. § 1981 was derived from § 1 of the 1866 Civil Rights Act, 14 Stat. 27, which was re-enacted with minor changes as § 16 of the Civil Rights Act of 1870, 16 Stat. 144. See Runyon v. McCrary, 427 U.S. 160, 168-70 and n.8 (1976); see also, Jones v. Alfred H. Mayer Co., 392 U.S. 409, 423 (1968).

freedom."[1/] The right to "make and enforce" contracts, which governs the employment relationship, is meaningless if that right is constricted through judicial interpretation to exclude the enjoyment of a workplace free of racial harassment.

The Civil Rights Act of 1990 corrects the Patterson holding by expressly defining the right "to make and enforce contracts" to include the making, performance, modification, and termination of contracts, including the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

By reaffirming the broad scope of Section 1981, Congress ensures that individuals have the same rights with respect to employment and other contracts regardless of race. An employer who is prohibited from discriminating against African Americans at the time of hiring should similarly be prohibited from harassing African American employees a week after they start working.

The other federal statute whose interpretation suffered a grievous blow was Title VII of the Civil Rights Act of 1964. Title VII and the Voting Rights Act of 1965 are the most significant and effective civil rights legislation enacted by Congress in this century. The importance of Title VII in promoting workplace equality for racial minorities and women derives largely from judicial interpretations which have made it

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[1/] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 431 (1968) (quoting Cong. Globe 39th Cong. 1st Sess. at 474) (Remarks of Senator Trumbull).

possible to remedy not only acts of intentional discrimination, but also the subtler and more arbitrary forms of decisionmaking which have had an adverse impact on women and minorities seeking employment.

Regrettably, Title VII has been impaired through the Court's restricted view of congressional intent and through a reversal of its own established precedents. For example, the Court overturned an 18-year-old landmark decision[4/] that has been used successfully to eliminate unnecessary barriers to equal employment opportunity. In Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989), the Court ruled 5-4 that an employer no longer bears the burden of demonstrating the business necessity of practices that tend to affect adversely the employment opportunities of individuals based on their race, color, religion, sex, or national origin; and that victims in such cases must isolate the precise factors that caused the discriminatory impact, even though it may be impossible to do so.

The The Civil Rights Act of 1990 corrects Wards Cove by prohibiting facially neutral employment practices that have a tendency to affect adversely the employment opportunities of individuals on the basis of race, sex, color, religion or national origin. It provides that upon a showing by the plaintiff of this effect, the burden of proof shifts to the

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[4/] Griggs v. Duke Power Co., 401 U.S. 424 (1971).

employer to prove business necessity if it is essential to effective job performance.

In Lorance v. AT&T Technologies Inc., 109 S. Ct. 2261 (1989), the Court required employees to anticipate future adverse applications of the seniority system in question no matter how speculative or unlikely the application might be and long before it had direct impact on its potential victims. To avoid the adverse consequence of the statute of limitations governing such actions, the employers were required to initiate suit on that basis. Short of such action by employees, the Court's decision insulates employers from liability for facially neutral seniority systems which have discriminatory effects that are not immediately felt.

Section 7 of H. R. 4000 would reverse the Lorance result, re-establishing that the statute of limitations period for challenging employment practices generally does not commence until the concrete effects of the injury are felt by the charging party. Accordingly, employees who must challenge employment practices within seniority systems can do so at a realistic point in time. Seniority systems adopted with an intent to discriminate may be challenged provided that they are challenged during the life of the collective bargaining agreement.

The Bush Administration has indicated its support for legislation to overturn the Court's decisions in Patterson and Lorance. However, the Administration's proposal falls far short.

Additional measures like those embodied in H.R. 4000 are necessary to achieve the national objective of a fair workplace.

The Civil Rights Act of 1990 is proof that this Congress recognizes the reality of discrimination in America's workplace. The legislation before us restores the scope and effectiveness of federal civil rights laws. It also addresses anomalies that are found in our existing fair employment laws.

The Civil Rights Act of 1990 is necessarily a broad remedy to many different ills in our present employment laws, or more pointedly, in the Supreme Court's interpretation of those laws. Each section of the bill is designed to create tangible, undeniably positive results in the struggle for equality in the workplace. It is for this reason that I submit this endorsement of the bill on behalf of the American Civil Liberties Union.

The Role of Congress in Protecting Civil Rights

Some opponents of H. R. 4000 have argued that it is improper for Congress to enact legislation that would effectively overrule various Supreme Court decisions. I believe that this argument lacks merit. It is entirely appropriate for Congress to correct erroneous readings of legislative intent by the Supreme Court. This is especially true in the civil rights area where Section 5 of the Fourteenth Amendment grants Congress express authority to adopt appropriate legislation to enforce the Amendment's provisions.

Obviously, the interplay between statutory and constitutional considerations is important. For example, a statute protecting minority interests might conflict with Fourteenth Amendment notions of equal protection, and the Court may act to bring the statute and the Amendment into harmony.[5/]

However, the Court's decisions at issue in H. R. 4000 do not involve interpretations of the Constitution. Instead the legislation involves little more than a congressional response to restrictive judicial interpretations of federal statutes that are wholly within the purview of Congress to enact. In the face of decisions which deprive the laws of their practical effectiveness, it is most appropriate for Congress to revisit the enforcement practices which provided for comprehensive coverage of the anti- discrimination laws.

Congress has corrected judicial misreading of the intent of civil rights laws on previous occasions. Most recently, Congress rejected the reasoning of Grove City v. Bell, 465 U. S. 55 (1984). In that case, the Court held that only the particular program within an institution receiving federal financial assistance had to comply with the civil rights laws. Other programs and the institution as a whole did not have to comply with the civil rights laws. The Congress passed the Civil Rights

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[5/]See, City of Richmond v. J. A. Croson Co., 109 S. Ct. 706 (1989). It should also be noted that the ACLU has joined several national civil rights organizations in the formation of the "Joint Project to Preserve Minority Business Opportunity" to explore the possibility of a separate legislative response to the Croson decision.

Restoration Act of 1987 (P. L. 100-259), overriding a veto, mandating institution-wide coverage.

Another important example of congressional leadership in the area of civil rights involved the decision in General Electric v. Gilbert, 429 U. S. 125 (1976) which held that an employer's health insurance policy which excluded pregnancy coverage did not constitute discrimination based on sex, although the EEOC had promulgated regulations to the contrary. Congress passed the Pregnancy Discrimination Act (P. L. 95-555) which said that discrimination on the basis of sex included discrimination because of pregnancy or childbirth. I note that in this instance all three branches of government had an opportunity to act on an important social question, with the congressional action being the final and decisive one.

Congress has also acted in the area of voting rights. In the case of City of Mobile v. Bolden, 466 U.S. 55 (1980), the Supreme Court held that an at large election scheme which had deprived black voters of representation did not violate the Voting Rights Act. Two years later, the Congress explicitly amended the Voting Rights Act to cover the City of Mobile v. Bolden fact pattern, by enacting the Voting Rights Act Amendments of 1982 (P. L. 97-205).

In 1986, Congress overturned two Supreme Court decisions which limited the rights of the disabled contrary to congressional intent. In Atascadero State Hospital v. Scanlon, 473 U. S.734 (1985), the Court ruled that money damages could not

be awarded against a state agency which violated Section 504 of the Rehabilitation Act of 1973. The Congress amended that act to ensure that injured parties could recover from state agencies, see The Rehabilitation Act Amendments of 1986 (P. L. 99-506). Similarly, the Handicapped Children's Protection Act of 1986 (P. L.99-372) overturned the holding in Smith v. Robinson, 468 U.S.2 (1984) that the Education of the Handicapped Act had repealed by implication rights created by earlier statutes.

It is clear that Congress not only has the right, but that it has the responsibility to reverse the Supreme Court's decisions which misread congressional intent so fundamentally.

Discussion of Other Provisions of H.R. 4000

In addition to the Patterson, Lorance, and Wards Cove decisions, the Civil Rights Act of 1990 addresses other Supreme Court rulings which restrict or modify the reach of equal employment opportunity laws[6/]. For example, Price Waterhouse v. Hopkins, 109 S. Ct 1775 (1989), illustrates the Court's shift away from full protection against discrimination.

In Price Waterhouse a plurality of four justices adopted a new rule of causation in analyzing so-called "mixed motive" cases: once a plaintiff shows that discrimination is a motivating factor in an adverse employment decision, the employer

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[6/]See also, Martin v. Wilks, 109 S. Ct. 2180 (1989) and Independent Federation of Flight Attendants v. Zipes, 109 S. Ct. 2732 (1989).

can nonetheless escape liability by proving with preponderance of evidence that the same decisions would have been made notwithstanding the discriminatory factor. The effect of this ruling is to insulate previously unlawful action and to foster the implication that federal laws may, under some circumstances, tolerate intentional discrimination.

The Civil Rights Act of 1990 makes clear that actions for which discrimination is a motivating factor are violations of Title VII. However, this bill also provides that a court may not grant a remedy under Section 706(g) of Title VII that places an aggrieved individual in a better position regarding hiring, firing or promotion than he/she would have been absent the impermissible motivating factor. For example, H.R. 4000 wisely provides that if an employer would have fired the individual even without the improper motivating factor, a court may not order the reinstatement of the employee. This bill sends a necessary message to the courts that a "little bit" of discrimination is still wrong.

The Civil Rights Act of 1990 also amends the remedies provision of Title VII to provide for monetary damages in cases of intentional discrimination. However, this provision would exclude these remedies for violations based solely on proof of disparate impact. This section of the bill resolves an anomaly in fair employment law which permits these remedies for cases of racial discrimination, but denies them to women and others not

covered under Section 1981 of 42 U.S.C. The provision expressly provides for a jury trial where damages are sought.

Wards Cove v. Atonio

I will now turn my attention more specifically to the Court's decision in Wards Cove. This decision, which may be the most damaging of the Court's recent civil rights rulings, has been greatly misunderstood by some critics of H.R. 4000. As this Committee knows well, the Wards Cove decision has potentially far-reaching implications for the rights secured by Title VII. If left unchanged by subsequent act of Congress, the Wards Cove decision will seriously undermine the ability of any worker subjected to discriminatory employment practices to receive the remedy Congress intended.

The facts of the Wards Cove case are particularly compelling and worthy of a brief review by the Committee. The Wards Cove case began as a class action lawsuit filed in 1974 alleging employment practices that, individually and in combination, created a patently racially stratified work environment at three Alaska salmon canneries. Among the elements contributing to this discriminatory result were (1) a history of job segregation; (2) recruitment practices which targeted non-whites for lower-paying jobs, while applicants for better jobs were sought from a predominantly white labor force; (3) rehire preferences, word-of-mouth hiring, and nepotistic practices; (4) subjective hiring practices; (5) racial segregation in the provision of housing and

meals; and (6) common use of overt racial designations and characterizations.

The evidence presented to the trial court in Wards Cove revealed that non-whites were heavily concentrated in lower-paying cannery jobs, and whites predominated in the higher-paying positions. For example, at Bumble Bee Cannery, which was one of the companies whose employment practices were in dispute, more than 90% of all hires over a nine year period in seven of twelve of its departments were white[7]. The same kind of racial stratification was also evident at Red Salmon Cannery -- whites obtained more than 75% of the jobs in nine of twelve departments. Non-whites filled the majority of the laborer and cannery worker positions[8].

Even within apparently "integrated" departments, there was compelling evidence of racial job segregation. For example, at Bumble Bee, in the Fish House and Cannery departments, "butcher and slimer" jobs were filled exclusively by non-whites, and "filler feeder and retort" jobs were held almost exclusively by whites.

The evidence of racially discriminatory hiring patterns within the cannery industry should have come as no surprise. The industry had traditionally employed non-white laborers for the

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[7]Joint Excerpt of Record (hereinafter "ER") at 35.

[8]ER at 36.

hardest, least lucrative positions -- a pattern that persisted well past the enactment of Title VII.

The recruitment practices at issue in this case are particularly instructive. Non-whites were recruited specially for cannery work, although there is no apparent reason why the employers in question did not make the full range of employment opportunities available to all potential applicants. Undoubtedly, many of the native Alaskans and Filipino workers recruited for cannery work would have preferred other jobs, especially since the pay and working conditions were better. But the preferred jobs were not offered, and inquiries about the availability of other positions were met by a variety of evasive responses[9/] Overt discrimination was evident also in the housing and meals arrangements and in the race-typing of jobs and workers.

Many of the employment practices at issue in Wards Cove have changed little since the days when the cannery owners apparently openly embraced and espoused race-based practices[10/]. Originally shaped by intentionally discriminatory practices, the system challenged in Wards Cove incorporated elements of intentional

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[9/]For example, recruiters at Alaskan villages in the remote areas near the canneries were not authorized to accept applications for non-cannery work, Joint Appendix (hereafter "JA") at 163; and non-whites were actively discouraged from applying. JA 38-42; 52; 56-60; 63-67; 71-73;75-77; 85-86; 125-126.

[10/]See, Sue Liljeblad, "Filipino Alaska: A Heritage" (1980) (Alaska Historical Commission Studies in History No. 9).

discrimination along with identifiable neutral practices applied alike to whites and non-whites, which served to maintain the status quo.

The record in Wards Cove is replete with evidence that the challenged employment practices operated to freeze historical patterns of racial discrimination[11/]. This case recalls an earlier era of Title VII enforcement when race and sex typing in employment was rampant, often overt and institutionalized. Although the law has developed to address more sophisticated and subtle forms of discrimination, there is nothing subtle about this case.

As a preliminary matter, two important points must be made. First, it is a difficult and complicated matter to establish a prima facie case under disparate impact theory as elaborated in Griggs v. Duke Power Co., 401 U.S. 424 (1971). Nothing in H.R. 4000 would ease this difficulty. Second, the judicial rules and definitions established in Griggs, refined in Albermarle Paper Co. v Moody, 422 U.S. 405 (1985), and reaffirmed in Connecticut v. Teal, 457 U.S. 440 (1982), should have governed the disposition of Wards Cove, which would have compelled the conclusion that the employers at issue had failed to rebut the dramatic evidence of discrimination or to demonstrate that their practices were justifiable. Third, that principles of stare decisis should have precluded the result which is now the subject

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[11/]See Griggs v. Duke Power Co., 401 U.S. 424 (1971), Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975).

of today's hearing. In my view the Court should have affirmed its long-standing rule that practices "fair in form, but discriminatory in operation"[12/] are unlawful unless affirmatively justified by the employer as necessary to the successful operation of the business.

Justification for the "Business Necessity" Definition

The Wards Cove decision severely undermined the existence of the "disparate impact" theory as a method for challenging employment discrimination thereby effectively overruling its landmark decision in Griggs. Among other things, the decision weakened the Court's earlier definition of "business necessity." As a result of this relaxed standard, courts will now excuse employer practices that unnecessarily harm the employment opportunities of minorities and women. See, e.g., Evans v. Evanston, 881 F.2d 383 (7th Cir. 1989) (reversing a district court's holding that a fire department had not shown that a cut-off requirement for physical agility test that tended to exclude women candidates was necessary).

In fact, the Wards Cove majority weakened the definition of "business necessity," to the point of eliminating, despite its express terms, any necessity requirement. In that decision, the Supreme Court set forth what the employer must show: "the dispositive issue is whether a challenged practice serves, in a

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[12/] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

Court of Appeals had merely required that there "must be a genuine business purpose in establishing such requirements." Griggs v. Duke Power Co., 420 F.2d 1225, 1235 n.8 (4th Cir. 1970).

Most importantly, case law does not support the Wards Cove Court's assertion that a business necessity requirement would encourage employers to adopt quota systems. Neither the Wards Cove opinion nor the Watson decision, Watson v. Fort Worth Bank & Trust Co., 108 S. Ct. 2777 (1988), quoted in reliance by the Wards Cove Court, 109 S. Ct. at 2122, offers a single case involving quotas based on percentages of population and prohibited by Title VII. See 42 U.S.C. Sec. 2000(e)-2(j) (1982).

Moreover, employers have been able to defend successfully against disparate impact claims under the business necessity standard, where the challenged requirement was in fact shown to be required for successful job performance. See, e.g., Richardson v. Hotel Corp. of America, 332 F. Supp. 519 (E.D. La. 1971) (absence of property related criminal convictions necessary qualification for hotel bellhop), aff'd mem., 468 F.2d 951 (5th Cir. 1972). Gillespie v. State Dep't of Health & Social Services, 771 F.2d 1035 (7th Cir. 1985)(essay test for position of personnel specialist/manager was job-related despite disparate impact on minorities); Zahorik v. Cornell Univ., 729 F.2d 85, 96 (2d Cir. 1984)(selection criteria for tenured faculty, prior accomplishments and skills in scholarship and teaching upheld as job related despite any disparate impact on women); Boyd v. Ozark

significant way, the legitimate employment goals of the employer." 109 S. Ct. at 2125. The Court elaborated: while "a mere insubstantial justification" would not suffice, "there is no requirement that the challenged practice be "essential" or "indispensable" to the employer's business." Id. at 2126. A necessity requirement, the Court argued, would be almost impossible for most employers to meet, and would result in quota systems. Id.

Four members of the court vigorously disagreed. Justice Steven's dissent, with whom Justice Brennan, Marshall and Blackmun joined, emphasized the weighty burden on the employer. Id. at 2132. The dissent quoted from Dothard v. Rawlinson, 433 U.S. 321 (1977), and its formulation of business necessity, "essential to effective job performance," expressing astonishment that the Court would reject prior statutory construction. Id.

The Wards Cove Court's definition of business necessity negates the term on its face. The Court rejects the notion of necessity in repudiating the requirement for its synonyms: essential or indispensable. Instead it replaces business necessity with the broader concept of business justification.

The Wards Cove standard of "business justification" repudiates the reasoning of the Griggs decision and its recognition of the disparate impact theory. Griggs rejected the notion of mere business justification and imposed a tougher standard. In Griggs, the Court reversed the lower court's holding that a high school diploma need not be job related. The

Air Lines, Inc., 568 F.2d 50, 54 (8th Cir. 1977)(upholding 5' 5" minimum height requirement for position in airline pilot training class despite disparate impact on women); Coopersmith v. Roudebush, 517 F.2d 818 (D.C. Cir. 1975)(test requiring applicants for attorney positions to write sample legal opinion upheld despite any disparate impact on women); United States v. Buffalo, 457 F. Supp. 612 (W.D. N.Y. 1978)(high school diploma requirement upheld for police patrol officer position despite adverse impact on blacks); Smith v. St. Louis San Francisco Ry. Co., 397 F. Supp. 580, 586 (D.C. Ala. 1975)(general clerical test justified by business necessity despite any discriminatory impact on blacks); James v. Stockham Valves & Fittings Co., 394 F. Supp. 434 (D.C. Ala. 1975)(aptitude tests used by valve manufacturers found sufficiently related to successful job performance despite any disparate impact on black applicant).

Conclusion

Few Americans would wish a return to the nation as it existed prior to Brown v. Board of Education, 347 U.S. 483 (1954). Similarly, most Americans desire a society that is free of discrimination based on gender. In the last forty years, our nation has advanced in eliminating the scourges of prejudice. Indeed, these advances -- achieved through governmental action of the executive, legislation and judicial branches, as well steps taken by ordinary citizens -- are some of the most glorious accomplishments in American history.

Regrettably, at the start of the last decade of the 20th century, the Supreme Court is leading the retreat from these important and hard won victories. At a time when the doors of freedom are opening throughout the world, we must not allow a backward-looking Supreme Court to close the door on the possibility of a discrimination free workplace. Swift passage of the Civil Rights Act of 1990 is in keeping with the national consensus for equal opportunity regardless of race, gender or religious belief.

Chairman HAWKINS. Mr. Dorsen, I don't think you need to apologize. I will set the precedent by requesting of you answers that we may submit in writing to you so that you can at your leisure reply. I think that satisfies our request for your testimony this morning.

Mr. DORSEN. I'm very, very grateful to you. I am grateful to the Members on both sides of the aisle for permitting me to move in a little ahead of my colleagues here. I hope I can get to my class. I know my students will be disappointed when I arrive——

[Laughter.]

Mr. DORSEN. [continuing] but the dean might be happy. Well, I will respectfully leave now, if that's——

Chairman HAWKINS. Thank you. If that's the unanimous consent on it. Thank you again, very much. We'll move on. We appreciate your testimony.

The next witness is Mr. John E. Jacob, President and Chief Executive Officer of the National Urban League. Mr. Jacob, it is certainly an honor to have you present with us this morning.

Mr. JACOB. Thank you, Mr. Chairman.

Mr. Chairman, let me also join with Mr. Dorsen in expressing our appreciation to you for the many years of service that you have provided. My colleagues in the Urban League are deeply appreciative and we hope that we get to see you far more often, even after you leave the Congress than we have during this period.

Mr. Chairman, and distinguished members of this committee, I appreciate your invitation to the National Urban League to testify on H.R. 4000, the Civil Rights Act of 1990.

We urgently request this committee to support H.R. 4000, for the Congress to pass it and the President to sign it into law. I respectfully request the members of this committee to carefully read the written testimony submitted for the record, for it provides important information that cannot be shared in the limited time at my disposal.

In the recent address, just as Harry Blackmun said, and I quote, "These are indeed somber and sobering times for those interested in pressing and enhancing basic civil rights." Among other things, Justice Blackmun was referring to the Court's rulings that have substantially reduced the protections offered by Federal law against discrimination in the work place.

The Court's rulings send a terrible message to America, a message that says we are drilling loopholes into antidiscrimination laws and you don't have to worry about the consequences of violating the rights of minorities. H.R. 4000 will remedy that disastrous message.

Now, Mr. Chairman, since the introduction of H.R. 4000 I have been following news reports of its progress and I am disturbed by criticism of the bill that distorts its meaning. One of those criticisms holds that the bill is unnecessary because discrimination is vanishing from the work place. This is an absurd claim removed from the realities faced by millions of African-Americans and other minorities.

I refer the distinguished members of this committee to my written testimony, especially pages 8 through 17, which cite studies that prove widespread bias in hiring, training and promotion, as well as gross inequalities and earnings and unemployment rates.

Those studies control for nondiscriminatory factors and find that a considerable portion of the gap between minorities and white workers can only be accounted for by various forms of discrimination.

I should add that the gap between white and African-American unemployment rates is often greater among educated trained professionals than among blue-collar workers.

Another misleading critique of this bill is the suggestion that it is an affirmative action bill. To the contrary. There is absolutely nothing in this bill that would impose quotas or otherwise mandate affirmative action measures beyond those already in practice.

This bill simply prevents work force discrimination and assures effective antidiscrimination enforcement practices. It restores the status quo that existed before the Supreme Court's regressive rulings.

I'm also concerned that attempts will be made to dilute provisions of the bill that provide adequate relief to victims of discrimination. It seems to me that when the judicial system finds that someone is wrong, they should receive just compensation. In those cases where the courts find gross intentional violations of rights that warrant punitive damages, such punishment should be enforced.

Those means of redress are embedded in our justice system and commonly applied to other forms of victimization. To refuse to apply them to the bitter wrongs of discrimination would, in itself, be discriminatory, a way of saying that discrimination is a minor misdemeanor, like a parking ticket.

I also wish to point out that allowing compensatory damages introduces the important element of making antidiscrimination laws largely self-enforcing, just as product liability claims force manufacturers to make sure their products are safe.

Mr. Chairman, passage of H.R. 4000 is essential to securing equal employment opportunities for minorities who suffer gross disparities because of employment practices that continue to perpetuate their disadvantage, and passage of H.R. 4000 is essential to securing America's economic future.

In this decade, 85 percent of new work force entrants will be women and minorities, a third will be non-white. America's competitive position in this global economy will be severely damaged unless we do everything in our power to ensure that minorities have equal opportunities to play a productive economic role in our nation. Passage of H.R. 4000 is an essential part of that national effort.

I thank this committee for the opportunity to testify on behalf of passage of H.R. 4000, and I will be happy to respond to your questions.

[The prepared statement John E. Jacob follows:]

JOHN E. JACOB
PRESIDENT & CHIEF EXECUTIVE OFFICER
NATIONAL URBAN LEAGUE, INC.
TESTIMONY TO:
COMMITTEE ON EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, D.C.
FEBRUARY 27, 1990

The Civil Rights Act of 1990: or, Will Labor Market Discrimination Be Allowed in the Year 2000?

Mr. Chairman and Members of this distinguished Committee I want to thank you for your invitation today to address the passage of H.R. 4000, The Civil Rights Act of 1990.

The National Urban League (NUL) was founded in 1910 as a non-profit community service organization committed to securing full and equal opportunities for minority groups and the poor. There are currently 111 Urban League Affiliates (including the District of Columbia) located in 34 states. Over one million persons are served every year by the Urban League Movement through its comprehensive array of services, programs and projects that address such needs as education, adolescent pregnancy, health, housing, employment training and crime prevention.

The National Urban League and its affiliates have historically been in the forefront of organizations which have assisted African Americans in preparing for and securing employment. One of the basic missions of the Urban League Movement is to improve the income potential of African Americans through increased access to all segments of the job market.

Our affiliates provide on-going employment assistance to thousands of constituents each year who are seeking jobs.

A considerable proportion of this assistance is accomplished through the basic, United Way-supported services of the affiliates. We have formed partnerships with private industry, foundations, and the federal government in order to undertake specialized training and job placement programs.

During the past quarter century, our joint partnerships with the federal government have fully demonstrated the efficacy of working together. Under such federal legislation as the Manpower Development and Training Act (MDTA), the Comprehensive Employment and Training Act (CETA), the Older Americans Act, and the Job Training Partnership Act (JTPA), we have provided services to over three-quarters of a million persons. These services have included world of work orientation, on-the-job-training, work experience, basic skills training, occupational skills training, pre-apprenticeship outreach and training, as well as subsidized and unsubsidized employment. The League is very proud that we have placed approximately four hundred thousand of those persons in full-time, well-paying jobs.

Although we have accomplished much over these years, we are painfully aware that much still needs to be done if our goal of parity by the year 2000 is to be reached.

Therefore, on behalf of the Urban League Movement, I am here today to testify before this Committee for the sole

purpose of requesting overwhelming support for and immediate passage of HR. 4000-the most important civil rights legislation since the historic passage of the 1964 Civil Rights Act.

No one would have imagined in 1964 that some 26 years later the 101st Congress would find it necessary to amend the 1964 Civil Rights Act. Many of us thought that the 1964 Act, especially Title VII, would ensure perpetual protection from discrimination to all Americans in this nation's workforce. However, and indeed sadly, our judicial branch of government has seen the interpretation of this law differently. It is because of the U.S. Supreme Court's aggressive retreat on employment rights that I come before you to request that you exercise your broad Constitutional powers and reverse the devastating harm that the Court has placed on disadvantaged workers, particularly the African American worker. The Congress has the authority to restore and strengthen civil rights laws that ban discrimination in employment. Congress has exercised this authority before and I firmly believe that you will do so again by enacting H.R. 4000 into law.

I. H.R. 4000: An Overview

The National Urban League believes that the Supreme Court rulings in Patterson v. McLean Credit Union, Wards Cove Packing Co. v. Antonio, Martin v. Wilks, Price Waterhouse v.

Hopkins, and Lorace v. AT&T Technologies have abruptly and substantially reduced the protections offered by Federal Law against discrimination in the workplace. Many employers and all civil rights groups agree that because of those rulings, fewer discrimination claims will be brought and, of utmost concern, more will be lost.

The National Urban League believes that H.R. 4000, if enacted, will accomplish the following:

1) **Protect Americans Against Race Discrimination on the job and in Private Contracts.**

- The Civil Rights Act of 1990 will reaffirm the right to make and enforce contracts that extend the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship to all groups. Congress will ensure that Americans may not be harassed, fired or otherwise discriminated against in contracts because of their race.

2) **Restore the Burden of Proof in Discrimination Impact Cases.**

- The Civil Rights Act of 1990 restores the landmark Griggs ruling by providing that once a person proves that an employment practice has a disparate impact, the employer must justify the practice by showing that it is based on business necessity.

3) Facilitate Prompt and Orderly Challenges to Consent Decrees and Court Orders.

- The Civil Rights Act of 1990 guarantees notice to persons who might be adversely affected by a proposed court order, and provides a reasonable opportunity to challenge the court order.

4) Make Clear that Job Bias is Always Illegal.

- The Civil Rights Act of 1990 makes clear that any reliance on prejudice in making employment decisions is illegal, while making it clear that in considering the appropriate relief for such discrimination, a court shall not order the hiring, promotion or retention of a person not qualified for the position.

5) Grant Women and Religious and Ethnic Minorities the Right to Recover Damages for Internal Employment Discrimination Now Available to Racial Minorities.

- Under present Federal law, victims of sexual or religious harassment on the job usually have no effective remedy. The Civil Rights Act of 1990 would eliminate this loophole by amending Title VII to allow any victims of intentional discrimination the right to

recover compensatory damages, and, in egregious cases, punitive damages as well. The Act would make the remedies available under Title VII for all forms of illegal discrimination--including discrimination based on race, color, religion, sex, or national origin--consistent with the remedies now available under the Federal laws covering only racial discrimination.

As previously stated, one of the basic missions of the Urban League Movement is to improve the socio-economic status of African Americans through increased access to all segments of the job market. Over recent years, the League has sought to enhance economic growth in the larger economy by not only ensuring that African Americans are well trained, but also providing assurance that this training will provide personal and social benefits.

Accordingly, if H.R. 4000 does not become law, our goal of full employment for all African Americans will become virtually impossible to achieve.

Thus, the issue before this Committee today - that of the appropriate legislative remedies for labor market discrimination - implicitly embodies three queries:

1) As America rapidly approaches the twenty-first

century, does labor market discrimination continue to exist and, if so, what is its contemporary magnitude?

2) What are the direct and indirect mechanisms and processes through which labor market discrimination operates?

3) Do current judicial interpretations of anti-discrimination legislation constitute "leakages" in existent legislative initiatives which were designed to reduce the incidence of labor market discrimination?

Since the latter question has already been addressed in this testimony, I would like to focus, for a moment, upon the first two questions.

II. Labor Market Discrimination: Fact or Fiction?

Substantial differences continue to characterize the experiences of African Americans within the American labor market. African Americans have median incomes which are less than three-fifths the median incomes of White Americans. Our recent publication "The State of Black America 1990" indicates that, as recently as 1988, the median income of an African American family was $19,329 relative to $33,915 for a white family. [1] Even when the measure of labor market

disparity is restricted to earnings, a similar but slightly improved trend persists. The National Urban League's Research Department monitors the labor market status of African Americans through its Quarterly Economic Report. One such report indicates that in 1988, median weekly earnings for African American families with earnings were only 69% the level of their white counterparts.[2]

Such data are misleading, for not included in the calculations of the above statistics are the larger number of African American families who are unemployed and, therefore, without earnings. Our December 1989 Quarterly Report indicates that during the third quarter of 1989, African American unemployment rates remained at more than double the rate of White Americans.[3] Such data holds true across the country. In 1988, for example, only three states in the union had African American white unemployment ratios which fell below this level--Connecticut, Rhode Island, and West Virginia. [4]

Such labor market disparities are not restricted to earnings and employment. African Americans disproportionately hold what Urban League researcher Monica Jackson calls "Black-collar" jobs.[5] In 1987, African Americans were 10.1% of the workforce but only 6.2% of managerial and professional workers. However, African Americans were 15.2% of all operators, fabricators, and laborers.[6] Of even

greater concern, African Americans who did work, had a greater probability of existing in poverty than did their white counterparts. In 1987, for example, African American workers had poverty rates of 13.2% relative to 4.7% of working white Americans.[7]

Alternative hypotheses have been offered in explanation of these labor market asymmetries. Perhaps the most well-known argument is that African Americans collectively possess fewer of the skills, training, and education required for the highest levels of economic productivity. These deficiencies in "human capital" it is argued, are directly reflected in lower wages, inaccessibility to certain occupational categories and unemployment. The human capital explanations for existing racial economic inequalities are often supplemented by a psychosocial view which postulates that African Americans may also be deficient in those values and beliefs which are supportive of success in the highly competitive labor market which currently exists.

While human capital arguments are more prevalent, race inequalities in the workplace are sometimes explained from a less individualistic perspective. The labor market, it is argued, is comprised of many different and separate labor markets. Income, employment, etc. depend upon the nature of the labor market in which one is employed. Thus, teachers, who possess more human capital, may earn less than

electricians because the two occupations fall within different segments of the labor market. African Americans, the argument continues, tend to be more highly concentrated in less mechanized, less unionized, and lower profit industries. This "structural" explanation of race based inequalities implies that it is not only endogenous but also exogenous factors which contour the labor market experience of African Americans.[8]

In contrast to the human capital and/or the structural explanations of racial inequalities, there are those who argue that contemporary labor markets continue to be skewed and contoured by race based labor market discrimination. Managers, some persons assert, do not always choose from the available pool those persons who are capable of maximum performance. Rather, many managers continue to harbour, consciously and/or unconsciously, attitudes and beliefs which cloud their evaluation of the capabilities of African Americans. The assertion herein is that, while some portion of the labor market inequalities which exist by race can be explained by objective factors, there continues to exist labor market asymmetries which can best be explained by an acceptance of the discrimination hypothesis. Substantial evidence supports this assertion.

First, there exists statistical evidence supporting the hypothesis that discrimination by race continues to exist.

Numerous econometric studies support such an assertion. Cain (1986)[9] surveys a number of empirical studies regarding racial discrimination. While these studies may differ in terms of estimates of the magnitude of discrimination, they all provide evidence of a residual African American/white American earnings gap which cannot be "explained" by objective factors. Even more important for our purposes here today, additional research indicates that equal employment laws do reduce the level of unexplained variance between African Americans and whites. [10]

Nevertheless, problems have persisted. Even during the seventies when the abolition of labor market discrimination was a national priority, problems persisted. A somewhat dated study by Freeman (1973)[11] found that differences in education explained only about 8 percent of the economic differences between Blacks and whites during the period of the study. Gwartney and Long (1978) [12] also found a 21 percent differential between Blacks and whites in terms of wages during the seventies. This gap could not be accounted for by objective factors and the samples were matched across relevant variables.

Even more telling, this particular econometric study indicated that discrimination is a stronger factor with African Americans in the labor market than with any other ethnic group. Japanese Americans in the study, for example,

earned only 11 percent less than their white counterparts. Mexican Americans earned only 9 percent less. African Americans, however, earned 21 percent less.

Perhaps the strongest evidence of labor market discrimination relative to Black Americans can be observed in terms of the Black/white unemployment gap. The ratio of Black/white unemployment is greater today than at any other time for which data are available and this gap cannot be solely explained in terms of educational differences.

The National Urban League's report, The Black Unemployed: A Disagregation Analysis (1986) found some frightening trends for the year 1984. In that year, African Americans with 4 years or more education were unemployed at 2 1/2 times the rate of their white counterparts. In comparison, African Americans with 1-3 years of high school were unemployed at only 1 4/5 the rate of their white counterparts. As recently as 1975, however, the unemployment ratio for African Americans with 4 years of college or more relative to their white counterparts was only 1.3:1. In other words, over the last decade alone, the unemployment rate for the most educated African Americans has rapidly accelerated relative to both their white counterparts and relative to African Americans with less education. Similar trends continue to prevail.[13] Thus, one can conclude that within the population of African Americans, investment in

human capital diminishes the probability of unemployment. However, relative to their white cohorts, investment in human capital by African Americans correlates with a wider African American white unemployment gap.

Perhaps even more indicative of the assertion that labor market discrimination continues to exist is the fact that the African American/white unemployment gap is actually greater in the "higher" occupational categories. This same NUL study indicates that in the highest occupational categories -executive, administrative, and managerial - African Americans in 1984 were unemployed at 2.16 times the rate of whites. In the technical field of engineering, African Americans were unemployed at 3 times the rate of whites. In more general technical fields, the ratio was 2.5 to 1. In contrast, in the manufacturing industries which have experienced decline over recent years, African Americans were unemployed at a rate which was 1.56 times the rate of their white counterparts. Similarly, in construction, which was more affected by the recession of the early eighties than any other industry, African American workers were unemployed at only 1.5 times the rate of whites. In the white-collar occupation of sales, however, African Americans in 1984 had 3.5 times the unemployment rate of their white counterparts. Again, the pattern emerges, which was apparent relative to education - the gap between Black and white unemployment was actually higher in the primary rather than in the secondary

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labor markets. Some data indicate that even with less rigid interpretations of anti-discrimination legislation, labor market discrimination did persist. It also raises questions regarding such market imperfections in the future.

III. The Operation of Labor Market Discrimination: Mechanisms and Processes

If labor market discrimination does exist, a key question for legislators becomes:

1) What are the mechanisms and processes through which this phenomenon operates?
2) Will the proposed legislation address some of these mechanisms and processes?

The various training programs of the National Urban League are targeted towards the reduction of what has been called "pre-market" discrimination. Pre-market discrimination references those systemic factors which may reduce the access of African Americans to those skills and traits which are valued by contemporary labor markets. At the policy level, financial support for education, public job training programs, etc. are all designed to reduce pre-market discrimination. The proposed legislation, however, seeks to address not pre-market discrimination but market discrimination. That is, it seeks to enhance equality of opportunity for those persons who, having acquired skills and

training, seek to enter and/or actually enter the labor market.

First, discrimination may actually begin with the job search itself. For example, one EEOC case involved the Primrose Company. This company had adopted the policy of using bulletin board postings of vacancies as the primary method of employee recruitment. Such a strategy had the unintentional impact of discriminating against African Americans since few African Americans were employed by the firm. Thus, African Americans were unaware of the recruitment efforts. [14] Second, discrimination may continue into the hiring practices of managers. Centralized decision making by managers who embody racial bias may operate to create and sustain discriminatory behavior. A strong public policy stance in combination with sanctions against such behavior is critical. Before the recent Supreme Court interpretations of the law, many firms were moving towards decentralized human resource decision-making in order to reduce the potential for discrimination. Additionally, some companies (such as the P. Q. Corporation) were using anti-discriminatory practices by managers as a basis for performance appraisals.[15]

Thirdly, discrimination may emerge in intra-organizational interactions. African Americans may receive less on-the-job training. [16] Additionally, personal and

organizational discrimination may hamper promotion. White and Althauser (1984), for example, found such practices in a study of promotion practices at two banks.[17] Other workers may create intra-organizational conflict based upon their own prejudices. It is common knowledge that as recently as 1960, white workers sometimes boycotted companies which hired African Americans into jobs traditionally held by white Americans.[18]

Lastly, customers themselves may trigger discriminatory behavior on the part of managers. In 1982, for example, an African American female student was fired as a pharmacy trainee in Tifton, Ga. because of customers' prejudice.[19]

A number of other processes and mechanisms may also serve to sustain and perpetrate discriminatory behavior in the labor market. Thus, the described processes are illustrative rather than conclusive. Nevertheless, they serve to alert analysts and policymakers to the persistence of labor market discrimination.

IV. Conclusions

The year 2000 is only a decade away. The new century could be opportunity filled, or it may be characterized by a labor market in which the services of white males are bought and sold at a premium. Thus legislation is needed to reduce the probability of such an outcome. Thank you for this

opportunity to share with you the perspectives of the National Urban League. We remain available for any additional input or questions.

NOTES

1. See David Swinton, " The Economic Status of Black Americans During The 1980's: A Decade of Limited Progress" in Janet Dewart, editor, The State of Black America: 1990 (New York: National Urban League, Inc., 1990), pg. 25-52.

2. National Urban League, Research Department, Quarterly Economic Report on the Black Worker, Report No. 17, First Quarter 1988, June 1988, pg.6.

3. National Urban League, Research Department, Quarterly Economic Report on the African American Worker, Report No. 22, Third Quarter 1989, December 1989, pg. 2 and 7.

4. Ibid.

5. Monica Jackson, "Black-Collar Occupations, The Caste Line in the U.S. Occupational Structure," Discussion Paper, Draft, 1990.

6. U.S. Department of Commerce, Statistical Abstract of the United States 1989, No. 642, " Employed Civilians, By Occupation, Sex, and Race 1987," pg. 388.

7. U.S. Department of Labor, Bureau of Labor Statistics, A Profile of the Working Poor, Bulletin 2345, Pg. 8.

8. Michael J. Piore, Unemployment and Inflation: Institutionalist and Structuralist Views (White Plains, N.Y.: M.E. Sharpe, 1979); David Marshan, The End of Economic Man?Custom and Competition in Labor Markets (New York: St. Martin's Press, 1986).

9. Cain, Glen, "The Economic Analysis of Labor Market Discrimination: A Survey." In Orley Ashenfelter and Richard Layard, eds. Handbook of Labor Economics, Vol. 7. Amsterdam: North Holland, 1986: pp. 693-785.

10. See Leonard, Jonathan, S. "The Effectiveness of Equal Employment Law and Affirmative Action Regulation," in Ronald Ehrenberg, ed. Research in Labor Economics, 1986 pt.B, (Greenwich Conn. JAL Press, 1986); Westcott, Diane Nilsen "Blacks in the 1970's: Did They Scale The Job Ladder? " Monthly Labor Review 103 No. 6 (June 1982): pg. 29-38.

11. Richard B. Freeman, "Changes in the Labor Market for Black-Americans, 1948-72" Brookings Papers on Economic Activity (Washington D.C.: Brookings Institution, 1973).

12. See Gwartney and Long, Industrial and Labor Relations Review, April, 1978.

13. Tidwell, Billy, The Black Unemployed: A Disaggregation Analysis (Washington, D.C.: National Urban League Research Department, 1986).

14. See Davis, Keith and John Newstrom, Human Behavior At Work (N.Y.:McGraw Hill, 1989), pg. 460.

15. Jeanne C. Poole and E. Theodore Kautz, "An EEO/AA Program That Exceeds Quotas- It Targets Biases, "Personnel Journal, January 1987, pp. 103-105.

16. See Greg J. Duncan and Saul Hoffman "On-The-Job Training and Earning Differences by Race and Sex," Review of Economics and Statistics 61, No. 4, (November 1979), pg. 594-603.

17. Robert W.White and Robert P. Althauser, "ILM's, Promotions and Worker Skill: An Indexed Test of Skill ILM's" Social Science Research, 13 No. 4 (December 1984): 383-390.

18. See F. Ray Marshall, Labor in the South (Cambridge, Mass.: Harvard University Press, 1967).

19. See "Store Denies UGA Student Work Because She's Black," Atlanta Journal (August 13, 1987): 1, 13A.

Chairman HAWKINS. Well, thank you.

The next witness is Ms. Antonia Hernandez, Esquire, President and Counsel, Mexican-American Legal Defense Education Fund.

Ms. HERNANDEZ. Good morning, and thank you for giving me the opportunity to testify. As someone from Los Angeles, we will sorely miss you here in the Congress but really welcome to having you back home and hopefully seeing more of you.

Chairman HAWKINS. Thank you.

Ms. HERNANDEZ. I would like to start by saying that I'm very appreciative of being on this second panel because I had an opportunity to listen to some of the concerns and some of the questions raised. I'm going to give you a bit of a different perspective.

There are several themes that I see arising out of this legislation in concern or opposition to the legislation. One is that prior to 1989 and prior to the Supreme Court action that people of color, and specifically in my case, Hispanics, were fully covered and protected by Title VII and other civil rights legislation.

I would like to tell you that there was no perfect ideal time, that even under the protections prior to 1989 there was discrimination. Let me give you a sense of how that discrimination impacted and reflected upon the Hispanic community.

The overwhelming majority of Hispanic-Americans work for smaller employers and clearly close to 50 percent of those employers are employers of 15 or less. As you all know, Title VII limits coverage. To the Hispanic community not only do we have limited protection of Title VII but, as you know, in 1986 Congress passed the Simpson-Rodino Act which vastly limited and increased the discrimination against Hispanic-Americans.

Not only do we have discrimination against Hispanics based on national origin, but we also have discrimination based on alienage. The unfortunate circumstance of the employer sanctions that were passed is that the discrimination that is being documented is against United States citizen Hispanic-Americans.

So that going back to pre-1989 does not in itself mean that the discrimination for Hispanic-Americans will ease. Going back to 1989 basically means that there is a standard that the courts have applied that has brought some common sense and a certain sense of expectations of what society expected of the employer. People were used to what was expected of them. The drastic and rapid changes have changed all that.

A lot has been said about this being a lawyer's bill and I would like to give you some statistics. Although I do not have them all, I would be more than happy to provide some other statistics.

In fiscal year 1976 private counsel—total—private lawyers—filed 1,174 employment discrimination actions in Federal court—total. In 1987 only 48 cases had been filed. In fact this was a lawyer's relief bill, then I wonder what happened prior to 1989.

I am the head of MALDEF. We have offices in San Antonio, Los Angeles, San Francisco and Chicago, and an office here in Washington, DC. I will tell you that from personal experiences, even when we find compelling documentable cases of Title VII violation prior to 1989 you could not find a lawyer in private practice that could take this case, or any case.

Let me tell you why. They are complex. They are expensive. As someone who has tried Title VII cases many, many years ago, I can tell you that they're not easy cases to try.

I will also tell you that my assessment is not only shared by myself and other civil rights lawyers, but it's also shared by many Federal judges who, when individuals go and represent themselves pro bono and these judges are trying to find private civil rights lawyers or anyone to represent these cases, they cannot find them.

I will quote for you—and this is a quote—from Judge Thompson of Alabama, "Of the few attorneys most highly regarded as civil rights practitioners of the State of Alabama, at least three have redirected their energies towards other legal disciplines within the last few years. Their stated motivation was that the civil rights market did not adequately compensate them.

Unfortunately, the shift of these experienced practitioners was not offset by an influx of new attorneys willing to fill the void. Young attorneys, equally adept at making the same market comparison as other practitioners, have also shied away from the civil rights field in favor of other more lucrative and financially stable specialties.

There has been, as a result, almost a ten percent reduction in the number of civil rights attorneys within the state within the past few years. If this pattern continues unchecked, and the evidence before the court suggests that it will unless corrective measures are taken, the day will soon arrive when the state's civil rights bar will be little more than a memory. Unfortunately, the real victims of this trend will be the citizens of Alabama.

Without lawyers available to champion the cause of poor victims of discrimination, the progress that has been made during the past four decades towards eradicating discrimination from this state will be halted and the promise of equal treatment and equal opportunity for all will be an empty word."

The message that I bring to you is that under the best of circumstances in employment discrimination cases you are dealing with poor individuals of limited means. We in the Hispanic community have one organization that they can look to and that is MALDEF. Our ability to represent these individuals are limited.

I will tell you that we don't even touch upon the very few cases out there. They are expensive and I would be more than happy to provide documentation of the expense of the litigation. They are complex. They require statisticians, demographers and experts that are expensive to hire. Most poor plaintiffs or potential plaintiffs cannot afford it.

As to the issue of extending compensatory damages in Section 1981, it is not going to open the floodgate. We have had 1981 prior to *Patterson*. There has been no floodgate. Those remedies were there before. We are not giving anything that has not been tried before.

Under the best of circumstances, what one can hope for is to provide to women the opportunity to file under 1981. It makes no sense for a black woman to be able to file under 1981 and to have a white woman not be able to file under 1981.

What this piece of legislation does is partial restoration prior to the Supreme Court decision and some clarification of the law in

the respect that it brings compensatory and punitive damages into Title VII which had not existed.

I also must remind those members that Title VII covers only certain employers, it does not cover all employees, and under *Patterson* and the restrictions of *Patterson*, those restrictions have severely restricted the ability of some workers to have any remedy whatsoever.

Thank you.

[The prepared statement of Antonia Hernandez follows:]

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STATEMENT

On Behalf Of The

MEXICAN AMERICAN LEGAL DEFENSE
AND EDUCATIONAL FUND
("MALDEF")

By

ANTONIA HERNANDEZ
PRESIDENT AND GENERAL COUNSEL

Before The

COMMITTEE ON EDUCATION AND LABOR, And The
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

On The

CIVIL RIGHTS ACT OF 1990
H.R. 4000

101st CONGRESS
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Chairman Hawkins, Chairman Edwards, and other Members of the Committee and Subcommittee, I am Antonia Hernandez, President and General Counsel of the Mexican American Legal Defense and Educational Fund ("MALDEF"). Thank you for inviting me to testify on this most important legislation, H.R. 4000, known as the Civil Right Act of 1990. As you might expect, MALDEF fully endorses and urges swift enactment of this legislation.

In this prepared statement, I will address primarily two matters. First, I will comment on the general need for Congress once again to correct the Supreme Court's negative and incorrect interpretations of our nation's civil rights laws. Second, I will comment on several of the provisions of this legislation, with some emphasis on the particular need for these provisions to help to remedy the continuing discrimination against Hispanics.

1. Corrective Legislation in General

During the 1960s and early 1970s, Congress enacted and sometimes thereafter amended a series of landmark civil rights laws designed to remedy at least some of the pervasive discrimination being practiced against Hispanics, African Americans, women, and others. One of the first such laws was Title VII of the Civil Rights Act of 1964.[1] Other important laws

1. Pub. L. 88-352 (July 2, 1964), Title VII, 78 Stat. 253, 42 U.S.C. § 2000e et seq., as amended.

included the Voting Rights Act of 1965,[2] the Fair Housing Act of 1968,[3] and the Equal Employment Opportunity Act of 1972.[4]

Despite the breadth and expansive goals of many of these laws, Congress nevertheless has time and again had to revisit these laws and the underlying issue of ongoing discrimination. These revisitations have been necessary for two reasons: on occasion, to fill gaps in the laws or otherwise simply to make the laws stronger; and, more frequently, to correct the Supreme Court's wrong and sometimes even hostile misinterpretations of these laws. In neither instance has Congress failed to act.

As to the former category, for example, when Congress realized that ongoing discrimination in housing rentals and sales could not begin to be effectively remedied without the availability of open-ended damage awards, coupled with dual-track enforcement alternatives, Congress enacted the Fair Housing Amendments Act of 1988,[5] thereby altogether revising and strengthening the congressional ban on housing discrimination.

More often, however, congressional revisitation to our civil rights laws and to the issue of ongoing discrimination has

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2. Pub. L. 89-110 (Aug. 6, 1965), 79 Stat. 437, 42 U.S.C. § 1973 et seq., as amended.

3. Pub. L. 90-284 (April 11, 1968), Title VIII, 82 Stat. 81, 42 U.S.C. § 3601 et seq., as amended.

4. Pub. L. 92-261 (March 24, 1972), 86 Stat. 103, amending 42 U.S.C. § 2000e et seq.

5. Pub. L. 100-430 (Sept. 13, 1988), 102 Stat. 1619, amending 42 U.S.C. § 3601 et seq.

occurred -- indeed, has been required -- in response to narrow, restrictive, and even hostile rulings by the Supreme Court. For example, when the Supreme Court ruled in 1975 that the private law enforcement incentive of court-awarded attorneys fees generally could not be judicially implemented without express congressional authorization,[6] Congress immediately added a fee-shifting authorization to the then-pending Voting Rights Act Amendments of 1975,[7] and Congress also took the next necessary step of enacting the omnibus Civil Rights Attorney's Fees Awards Act of 1976.[8] When the Supreme Court ruled in 1976 that Title VII's ban on gender discrimination did not forbid discrimination against persons who were pregnant[9] -- obviously ignoring the fact that only women can become pregnant -- Congress responded by explicitly banning such gender discrimination through the Pregnancy Discrimination Act of 1978.[10] Similarly, when the Supreme Court in 1980 improperly ruled that voting rights could be denied or diluted only through intentional discrimination,[11]

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6. Alyeska Pipeline Service Co. v Wilderness Society, 421 U.S. 240 (1975).

7. Pub. L. 94-73 (Aug. 6, 1975), § 402, 89 Stat. 400, 404, adding 42 U.S.C. § 1973l(e).

8. Pub. L. 94-559 (Oct. 19, 1976), 90 Stat. 2641, 42 U.S.C. § 1988, as amended.

9. General Electric Co. v. Gilbert, 429 U.S. 125 (1976); see also Nashville Gas Co. v. Satty, 434 U.S. 136 (1977).

10. Pub. L. 95-555 (Oct. 31, 1978), 92 Stat. 2076, 42 U.S.C. § 2000e(k), as amended.

11. City of Mobile v. Bolden, 446 U.S. 55 (1980).

Congress was forced to revisit this issue by making its effects' test explicit in the Voting Rights Act Amendments of 1982.[12] Thereafter, when the Supreme Court in 1984 misconstrued Congress' intent by removing legislative and constitutional protections from handicapped children,[13] Congress had to restore those protections (and to add a few others) through the Handicapped Children's Protection Act of 1986.[14] And, when the Supreme Court in 1984 rendered altogether ineffective Congress' "simple justice"[15] ban on discrimination in federally assisted programs,[16] Congress had to revisit this issue by enacting the Civil Rights Restoration Act of 1988[17] to restore Congress' original intent to

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12. Pub. L. 97-205 (June 29, 1982), 96 Stat. 131, amending 42 U.S.C. § 1973 et seq.

13. Smith v. Robinson, 468 U.S. 992 (1984).

14. Pub. L. 99-372 (Aug. 5, 1986), 100 Stat. 796, 20 U.S.C. § 1415(e)(4)(B)-(G), as amended.

15. The theory behind the ban on discrimination in federally assisted programs, which initially gave life to Congress' enactment of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) et seq., was stated by President John F. Kennedy upon his announcement of the proposed legislation: "Simple justice requires that public funds to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination." 109 Cong. Rec. 11161 (June 19, 1963).

16. Grove City College v. Bell, 465 U.S. 555 (1984).

17. Pub. L. 100-259 (March 22, 1988), 102 Stat. 28, amending Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, et seq.; Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq.; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; and Section 309 of the Age Discrimination Act of 1975, 42 U.S.C. § 6107.

four separate civil rights statutes.[18]

Particularly in view of the foregoing litany of necessary revisitations by Congress, I can only assume that most Members of Congress are fairly fed up with spending the time and energy necessary to reinstate the many civil rights protections that have been repeatedly misconstrued and voided by a Supreme Court gone awry. Well, even if you are fed up with your having to fix what the Supreme Court keeps breaking, never has it been more important to do the fixing that needs to be done now.

As everyone in this hearing room is well aware, the Supreme Court within a period of only a few weeks last June, 1989, rendered more than half-a-dozen decisions altogether antithetical to Congress' duly-enacted protections against employment discrimination.[19] Although, as I've noted, the Court had

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18. See supra note 17.

19. These decisions, listed roughly in chronological order, include the following: Wards Cove Packing Co. v. Atonio, 490 U.S. ___, 109 S.Ct. 2115, 104 L.Ed.2d 733 (June 5, 1989) (reallocating burdens of proof, among other things, in Title VII disparate impact cases); Martin v. Wilks, 490 U.S. ___, 109 S.Ct. 2180, 104 L.Ed.2d 835 (June 12, 1989) (permitting "reverse discrimination" collateral attacks on consent decrees at any time); Lorance v. AT&T Technologies, Inc., 490 U.S. ___, 109 S.Ct. 2261, 104 L.Ed.2d 961 (June 12, 1989) (striking down EEOC charges as untimely under Title VII when filed shortly after the discrimination affected the female charging parties); Patterson v. McLean Credit Union, 491 U.S. ___, 109 S.Ct. 2363, 105 L.Ed.2d 132 (June 15, 1989) (eviscerating § 1981 by limiting it to intentional discrimination only in the formation of contracts); Jett v. Dallas Independent School District, 491 U.S. ___, 109 S.Ct. 2702, 105 L.Ed.2d 598 (June 22, 1989) (further eviscerating § 1981 in the public sector by subjecting it to the "policymaker" constraints governing § 1983 lawsuits); Independent Federation of Flight Attendants v. Zipes, 491 U.S. ___, 109 S.Ct. 2732, 105 L.Ed.2d 639 (June 22, 1989) (disallowing statutory attorneys fees to successful Title VII plaintiffs who had to

rendered at least a few similarly devastating decisions over the past fifteen years, never has the Supreme Court in this century rendered so many decisions hostile to civil rights within so short a time as it did last June.

It is time, I submit, to send a most definitive message to the Supreme Court. It is also time, for yet another reason, to send a message to the country.

Even if the Supreme Court had not ruled as it did last June, it nevertheless would still be appropriate for this Congress to shore up its legislative protections for Hispanics, African Americans, women, and other protected groups with regard to ongoing employment discrimination. Despite the gains that we Hispanics have been able to make in some sectors of the economy subsequent to the enactment of Title VII in 1964, rampant discrimination against Hispanics continues to be revealed in such places as the Federal Bureau of Investigation; [20] increased discrimination against Hispanics has followed Congress' enactment

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litigate for years against an intervening defendant's attack on their back pay and seniority remedies); Public Employees Retirement System of Ohio v. Betts, 492 U.S. ___, 109 S.Ct. 2854, 106 L.Ed.2d 134 (June 23, 1989) (insulating discriminatory benefit plans from age discrimination challenges under the ADEA); see also Price Waterhouse v. Hopkins, 490 U.S. ___, 109 S.Ct. 1775, 104 L.Ed.2d 268 (May 1, 1989) (affecting burdens of proof in Title VII mixed-motive disparate treatment cases).

20. Perez v. Federal Bureau of Investigation, 47 Fair Empl. Prac. Cases (BNA) 1782 (W.D. Tex. 1988) (classwide discrimination against Hispanics in violation of Title VII).

of the Immigration Reform and Control Act of 1986; [21] and most Hispanics continue to be concentrated in entry-level jobs in the most poorly paid sectors of agriculture and industry. [22]

At the same time, our awareness of the level of ethnic and racial violence, along with the seemingly condoned use of ethnic and racial epithets, has increased exponentially. Is the clock, in fact, being turned back? Is the message being received through the rulings last June that it's now okay to discriminate in employment against Hispanics and others?

Congress, in my view, responded admirably in totally

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21. Extensive documentation of this widespread discrimination has been provided in the following reports: California Fair Employment and Housing Commission, Report and Recommendations on the Impact and Effectiveness of the Employer Sanctions and Anti-Discrimination Provisions of the Immigration Reform and Control Act of 1986 (1990); U.S. Commission on Civil Rights, The Immigration Reform and Control Act: Assessing the Evaluation Process (1989); Association of the Bar of the City of New York, Methodology, Legal Definitions and Interpretations in Documenting the Employer Sanctions and Anti-Discrimination Provisions of IRCA (1989); City of New York Commission on Human Rights, Tarnishing the Golden Door (1989); Mexican American Legal Defense and Educational Fund, and American Civil Liberties Union, The Human Costs of Employer Sanctions (1989); Coalition for Humane Immigration Rights of Los Angeles, The Effects of Employer Sanctions on Workers (1989); Coalition for Immigrant and Refugee Rights and Services, Employment and Hiring Practices Under the Immigration Reform and Control Act of 1986: A Survey of San Francisco Businesses (1989); New York State Inter-Agency Task Force on Immigration Affairs, Workplace Discrimination Under the Immigration Reform and Control Act of 1986: A Study of Impact on New Yorkers (1988).

22. See generally National Council of La Raza, The Decade of the Hispanic: A Sobering Economic Retrospective (1989); D.E. Hayes-Bautista, W.O. Schink & J. Chapa, The Burden of Support: Young Latinos in an Aging Society (Stanford University Press, 1988); National Commission for Employment Policy, Hispanics and Jobs: Barriers to Progress (1982).

revising and strengthening our fair housing legislation, and in restoring the various civil rights protections periodically voided by the Supreme Court. The time has now come to restore and revise our fair employment legislation, while also sending a strong message both to the country and to the Supreme Court.

2. Specific Provisions of This Legislation

Although the several provisions in the Civil Rights Act of 1990 may appear to be too many or too broad to some critics, they in fact address in large part no more than what is necessary to rectify the wrongs done by the Supreme Court. Overall, they actually restore considerably less to our fair employment laws than what Congress added to our fair housing laws less than two years ago through enactment of the considerably stronger Fair Housing Amendments Act of 1988.

With regard to the bill before us -- the Civil Rights Act of 1990 -- it is not my intent to comment on all of its provisions. All of the provisions have been described in the Summary of the Civil Rights Act of 1990, which accompanied the introduction of H.R. 4000; and all of the provisions, I submit, are necessary to restoring original congressional intent to our civil rights laws.

Two sections of this bill do, however, deserve comment by me here. One such section pertains to the construction of civil rights laws in general. The other addresses the burdens of proof in Title VII disparate impact cases.

A. Construction of Civil Rights Laws

Although the primary purpose of the Civil Rights Act of 1990 is in large part to address and to nullify several of the specific decisions hostile to civil rights rendered by the Supreme Court, Section 11 of the bill quite properly is designed to correct the manner in which the Supreme Court has recently and too often chosen to construe congressional enactments protecting civil rights.

Baldly stated, the Supreme Court has now repeatedly construed civil rights laws both extremely narrowly and so as to restrict the rights and remedies available under other civil rights laws.[23] Section 11, which would add a new § 1107 to the Civil Rights Act of 1964, would nullify this unprecedented manner of judicial construction of civil rights legislation by providing as follows:

> (a) EFFECTUATION OF PURPOSE. -- All Federal laws protecting the civil rights of persons shall be broadly construed to effectuate the purpose of such laws to eliminate discrimination and provide effective remedies.
>
> (b) NONLIMITATION. -- Except as expressly provided, no Federal law protecting the civil rights of persons shall be construed to restrict or limit the rights, procedures, or remedies

23. See, e.g., the cases cited supra in note 19, and in notes 6, 9, 11, 13 & 16.

available under any other Federal law protecting such civil rights.[24]

The foregoing directives are not at all new, but instead are restorative of judicially fashioned principles of statutory construction enunciated and applied for many years by a Supreme Court more favorably disposed toward the protection of civil rights.

For example, with regard to the breadth of a statute's construction, the Supreme Court back in the 1960s and early 1970s repeatedly recognized that the "approach of this Court to ... civil rights statutes ... has been to accord [them] a sweep as broad as [their] language."[25]

Similarly, during the same time period, the Supreme Court consistently recognized that "courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to

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24. H.R. 4000, 101st Cong., 2d Sess. § 11 (1990).

25. Griffin v. Breckenridge, 403 U.S. 88, 97 (1971) (brackets by the Court) (ellipses added), quoting from United States v. Price, 383 U.S. 787, 801 (1966).

regard each as effective."[26]

Although the Court had invoked these principles in construing civil rights statutes in the past,[27] the Supreme Court more recently and particularly in June of last year turned these principles on their heads. For example, in Patterson v. McLean Credit Union,[28] where the Court construed the equal right "to make and enforce contracts" guaranteed by 42 U.S.C. § 1981,[29] Justice Kennedy in his 5-4 majority opinion initially construed that guarantee extremely narrowly so as to apply § 1981 "only to the formation of a contract," rather than more logically to apply the statutory guarantee to the terms and conditions of employment embodied within a contract.[30] Justice Kennedy thereafter sought

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26. Morton v. Mancari, 417 U.S. 535, 551 (1974) (per Blackman, J.). See also, e.g., Jones v. Alfred H. Mayer Co., 392 U.S. 409, 416, 417 n. 20 (1968), where the Court held that Congress' recent enactment of the Fair Housing Act of 1968 "had no effect upon" the similar rights protected by 42 U.S.C. § 1982, and where the Court further observed: "The Civil Rights Act of 1968 does not mention 42 U.S.C. § 1982, and we cannot assume that Congress intended to effect any change, either substantive or procedural, in the prior statute."

27. See supra notes 25 & 26. See also, e.g., Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 461 (1975) (where two statutes overlap, such as § 1981 and Title VII do here, the Court is not at liberty "to infer any positive preference for one over the other").

28. 491 U.S. ___, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989).

29. There has never been any disagreement about the fact that § 1981 was derived from two Reconstruction Era civil rights statutes: "the Civil Rights Act of 1866, as well as the Voting Rights Act of 1870." Saint Francis College v. Al-Khazraji, 481 U.S. 604, 612 (1987); Runyon v. McCrary, 427 U.S. 160, 168 n.8 (1976).

30. Patterson, 105 L.Ed.2d at 150.

to justify such a narrow statutory construction by -- of all things -- violating the second principle of statutory construction, which requires (or used to require) courts not to chose among congressional enactments but to give effect to all of them.[31] Specifically, in this § 1981 case, Justice Kennedy inexplicably looked to and reviewed the coverage of and procedures under Title VII, and then fashioned a new rule to deny congressional intent: "We should be reluctant, however, to read an earlier statute [here, § 1981] broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute [Title VII]."[32]

Such judicially-activist turning of basic principles of statutory construction on their heads is not the way our civil rights laws had previously been viewed, and it is not the way our civil rights laws should be viewed.

The carefully drafted provisions of Section 11 of this legislation simply restore to our civil rights laws the well formulated and proper canons of statutory construction. The provisions are fundamental to the effectiveness not just of this legislation but of our civil rights laws in general.

b. Disparate Impact Burdens of Proof

Not at all to forget the compelling importance of the other

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31. See supra notes 26 & 27.

32. Patterson, 105 L.Ed.2d at 153 (brackets added).

provisions of this legislation -- all are important, and all need to be enacted as a whole -- I am limiting my comments hereafter to only part of Section 4 of this legislation.[33] Section 4, of course, is the portion of this bill which restores to Title VII law the burden-of-proof standards which existed for eighteen years until the Supreme Court changed the law this past June in its 5-4 decision in Wards Cove Packing Co. v. Atonio.[34]

What Section 4 in large part is designed to accomplish is not just to restore the pre-existing burden-of-proof standards but also to restore those pre-existing standards as the only effective means of enforcing the congressional intent underlying Congress' enactment of Title VII of the Civil Rights Act of 1964, to wit: that "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation," [35] and accordingly that "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."[36] Defining the nature of the employer's affirmative burden of proving the job-related manifest relationship, Chief Justice Burger stated for the unanimous Supreme Court in Griggs v. Duke Company Co. that:

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33. H.R. 4000, 101st Cong., 2d Sess. § 4 (1990).

34. 490 U.S. ___, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989).

35. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (emphasis by the Court).

36. Id.

"The touchstone is business necessity."[37]

This affirmative burden-of-persuasion defense of proving business necessity was expressly approved by Congress during its enactment of the Equal Employment Opportunity Act of 1972.[38] It was also applied, not just in Griggs, but repeatedly thereafter by the Supreme Court.[39] For example, when protected groups showed statistically that height and weight requirements barred entry to many law enforcement positions, the Supreme Court in 1977 ruled that the challenged discriminatory height and weight requirements were unlawful under Title VII because the law enforcement defendants had not "rebutted the prima facie case of discrimination by showing that the height and weight requirements are ... essential to effective job performance."[40]

These burden-of-proof standards with their attendant definitions of business necessity were altogether eviscerated by the Supreme Court's decision last June in Wards Cove Packing Co. v. Atonio.[41] According to the Court's 5-4 majority decision, an employer's burden no longer is an affirmative-defense burden of

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37. Id. at 431.

38. See, e.g., the accompanying House and Senate Reports: H.R. Rep. No. 238, 92d Cong., 1st Sess. 8, 20-22, 24-25 (1971); S. Rep. No. 415, 92d Cong., 1st Sess. 5 & n.1, 13-15 (1971).

39. E.g., Connecticut v. Teal, 457 U.S. 440 (1982); Dothard v. Rawlinson, 433 U.S. 321 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

40. Dothard v. Rawlinson, 433 U.S. 321, 331 (1977) (ellipsis added).

41. 490 U.S. ___, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989).

persuasion, but instead is a mere burden of production, leaving the ultimate burden of proof (essentially of proving intentional discrimination) with the victim of discrimination.[42] Moreover, the employer's now-lesser-burden of merely production no longer is even one of proving business necessity but instead is one only of offering "evidence of a business justification for his [discriminatory] employment practice."[43]

What we're faced with here is not just major reallocations by the Supreme Court of most-important burdens of proof,[44] nor are we just faced with the reality that most victims of employment discrimination do not have the personnel or management

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42. Wards Cove, 104 L.Ed.2d at 752-53.

43. Wards Cove, 104 L.Ed.2d at 753 (brackets added).

44. As Justice Stevens explained in his dissenting opinion in Wards Cove, the Supreme Court majority not only reallocated the burdens of proof in Title VII disparate impact cases but also did so in a way as to make them different from the normal allocation of burdens of proof in civil cases in general:

> In the ordinary civil trial, the plaintiff bears the burden of persuading the trier of fact that the defendant has harmed her. The defendant may undercut plaintiff's efforts both by confronting plaintiff's evidence during her case in chief and by submitting countervailing evidence during its own case. But if the plaintiff proves the existence of the harmful act, the defendant can escape liability only by persuading the factfinder that the act was justified or excusable. Although the burdens of producing evidence regarding the existence of harm or excuse thus shift between the plaintiff and the defendant, the burden of proving either proposition remains throughout on the party asserting it.

104 L.Ed.2d at 759-60 (footnote and citations omitted).

expertise to rebut an employer's after-the-fact claim of some business justification for virtually any discriminatory employment practice. Instead, what we Hispanics and other minorities are now also confronted with is that, under the Supreme Court's reversal of prior standards, virtually any discrimination -- except only the most blatant: "no Hispanics need apply" -- may be permissible given any remote business justification therefor.

Let's get specific. Twenty-and-more years ago, riots in our ethnic and racial ghettos were not quelled but were made worse by seemingly occupying armies of law enforcement officers who, given our country's history of past discrimination, were predominantly white males.[45]

Only through private enforcement of Title VII, with Congress' directive to eliminate the discriminatory effects of employment practices, were law enforcement agencies encouraged if not forced to begin employing and even promoting law enforcement officers who were not white males.[46] Yet, entry into these positions by Hispanics, by Asian Americans, and by women were barred by height and weight requirements, which the Supreme Court finally in 1977 ruled could not be sustained under an employer's

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45. Kerner Commission, Report of the National Advisory Commission on Civil Disorders, 299-322 (Bantam Books, 1968).

46. See, e.g., United States v. Paradise, 480 U.S. 149, 154-67 (1977) (recounting the employment history of the Alabama Department of Public Safety).

burden of having to prove their business necessity.[47]

Now -- in 1990 -- as a result of Wards Cove, it is more than a remote possibility that any law enforcement agency could claim that extraordinary height for purposes of crowd control is a legitimate business justification for a reinstated height requirement for law enforcement personnel, and could thereby satisfy its minimal burden of production under Wards Cove, without such a discriminatory job requirement ever being able to be successfully challenged under Title VII by an Hispanic, Asian American, or female, regardless of their job abilities or proven military service.[48]

The burdens of proof and their definitions, previously established as necessary to fulfill Congress' intent to eliminate the consequences of discriminatory employment practices, would be restored through Section 4 of this legislation. Enactment is imperative.

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47. Dothard v. Rawlinson, 433 U.S. 321, 331-32 (1977). Despite the business justifications offered by law enforcement agencies to retain their discriminatory height and weight requirements -- better crowd control, lesser need to resort to force -- the lower federal courts routinely held that the justifications did not satisfy the affirmative defense of business necessity. See, e.g., Horace v. Pontiac, 624 F.2d 765, 766-69 (6th Cir. 1980); United States v. Virginia, 620 F.2d 1018, 1024 (4th Cir. 1980); Blake v. Los Angeles, 595 F.2d 1367, 1379 (9th Cir. 1979).

48. Stated otherwise, under the reallocated burdens of proof adopted by the majority in Wards Cove, the favorable court cases cited in note 47 supra very likely would be decided differently today, with the result that Hispanics, Asian Americans, and women could once again be easily excluded from law enforcement employment.

Conclusion

Having reviewed the entirety of H.R. 4000, the Civil Rights Act of 1990, I strongly encourage its speedy enactment.

Together we must send to our country, to the world, much less to our Supreme Court, this humanitarian message about our commitment to civil rights.

Chairman HAWKINS. Thank you, Ms. Hernandez.

Mr. Edwards.

Mr. EDWARDS. Thank you, Mr. Chairman. I appreciate the testimony of these two expert witnesses and I have just a couple of questions.

Mr. Jacob, I am acquainted, of course, with your work as head of the Urban League and the statistics that you have made available in the past to the subcommittee that I chair and to the American people generally.

Let me ask you this, Mr. Jacob. In the last decade are black Americans doing better or worse than anticipated?

Mr. JACOB. Well, certainly, Mr. Edwards, economically in every sector of the country black Americans are doing worse than we were doing in the 1970s. In fact, there are some sectors of the country where we are even doing worse than worse, if you look at the Midwest where conditions have been particularly difficult.

So, in spite of the fact that there has been some movement for that nine percent that represents what we might call the upper-class, that $50,000 and above family group, by and large African-Americans are doing very poorly.

Mr. EDWARDS. Unless these Supreme Court decisions are remedied, you feel that they'll do even worse in employment opportunities?

Mr. JACOB. I believe they will do worse. As a matter of fact, when I view the letters that I get every week about people who feel they're being discriminated against and really feel they have no recourse because they cannot find anyone who will handle their cases individually or who will even take them on as a class action because of the costs and the complications involved, that we will continue to see a deterioration.

Mr. EDWARDS. Ms. Hernandez, as you know, I represent San Jose where we have the largest number of Hispanics in Northern California, not in Southern California. Yours is the Big Apple insofar as Hispanics are in Los Angeles.

If I asked you the same question that I asked Mr. Jacob about how Hispanics have been doing in the last decade in employment and, of course, in education, how is it? Would you say better or worse?

Ms. HERNANDEZ. Well, the statistics and the evidence shows that there has been some progress. Overall, it has been worse.

If you look at education and the progress that Hispanic Americans have made in Education, there is an unfortunate downturn and for a community that is a poor community, education is the only means by which to make any progress in this society.

The same statistics apply to Hispanics, that Hispanic males—and I'm putting the best foot forward as far as employability—earn much less—Hispanic males who graduate from college earn less than white males that graduate from high school.

So that there is something in there that goes to the issue of discrimination and I think some of us within our society would like to think that the days of discrimination are over. Unfortunately, until we face the reality that discrimination still plays a very important factor in selection in our society, we will not address those concerns.

Mr. EDWARDS. Thank you, Ms. Hernandez. Mr. Chairman, I yield back the balance of my time.

Chairman HAWKINS. Thank you.

Mr. Fawell.

Mr. FAWELL. Thank you, Mr. Chairman.

Ms. Hernandez, you had indicated that the need for compensatory damages and punitive damages is necessary—I suppose—I don't mean to put words in your mouth—but as an incentive to perhaps have more of an emphasis on Title VII cases.

I'm citing from the testimony of Professor Jeremy Rabkin of Cornell University who testified before this committee last Tuesday. He was not able to fully testify but he left his written statements. He states that—and I'm quoting—"You have no doubt hear, for example, that the American Bar Association has urged legislation of this kind." He states, "I hope you will not be overly-swayed by this."

He then makes a bit of derogatory statement about the bar association being primarily a trade association and some lawyers have been doing quite extensive trade in employment discrimination cases.

He then cites a Federal court study committee recently noted in the National Law Journal of February 12th that the number of private discrimination claims filed under Title VII in the Federal district courts has increased by over 2,000 percent since 1970 and concludes—again quoting—"Race discrimination, or sex discrimination, for that matter, surely did not become more pervasive in the late 1980s than it was in 1970, let alone 20 times more pervasive. Instead the amount of litigation increased because plaintiff's bar has become more adept at turning employment disputes into successful lawsuits."

He then goes on and makes some statements that we ought to think long and hard about making such a major metamorphosis in Title VII cases and putting such a tremendous emphasis upon million dollar lawsuits as being what he—he didn't use the words sledgehammer approach, I guess those are my words—that in light of so many deeply plaguing problems, especially for the black population, and he cited a number of figures in that regard, that this bill does nothing to address those problems.

Then he goes on to say that it could have the reverse effect. A lot of employers would have a great deal of fears about having potential million lawsuits every time they turned around, whether that's a correct summation or not, and therefore would either, number one, seek safe harbor, that is to say, quotas, or use other ingenious methods that preclude some of the minorities most at risk, in our inner-cities, for instance, would find their troubles which are now terrible—I would be the first to agree, as one deeply knowledgeable on Chicago in the South Side there and all the problems that especially black youths face. So, he said, think long and hard about this.

Would you care to comment on that?

Ms. HERNANDEZ. Yes. In fact, I have read the testimony of Jeremy A. Rifkin, and I will tell you that I found it quite interesting that he would cite the problems of—you know, the drug abuse, the unemployment of youth, the deterioration of the family.

I agree with all that. I think all of us would agree with that. But that doesn't go to the heart of this issue, and I would ask you a question. I've been involved in civil rights since 1974, and as I said, once upon a time I did litigate. I am now just an administrator, but I did litigate. I have no heard of million-dollar suits in Title VII.

I will tell you, and I will give you some examples of what really happens in a very recent case. And it's not a case that MALDEF handled, and I want to pick something that we did not handle so that it cannot say it is ours.

The suit that was filed by the Hispanics within the FBI, it is a well-documented case, a case that was won by the plaintiffs, that was not appealed by the Department of Justice. It is very recent. I personally dealt with some of those plaintiffs, and they could not—we could not take their case. They could not find an attorney. They finally found an attorney. That law firm of three Hispanic attorneys in Texas dissolved because of the expense. They are still trying to collect attorneys' fees.

And I would be more than happy to submit to you the record of the amount of time spent, the expense taken to litigate the case, and the amount of attorneys' fees to give you a sense when you're dealing with a Title VII case.

Mr. FAWELL. I do agree with you. There certainly are million-dollar lawsuits now. But his point is that even with Title VII in its present status—and we have to remember, we're not only repealing five Supreme Court cases; we're making a major, deeply significant change in the whole concept of Title VII by indeed providing the potential of compensatory damages and mental suffering and all that and punitive damages for something called "callous indifference."

The potential—and I'm a lawyer, and I know that we lawyers do sometimes swarm to those kinds of cases, and then some of us think the cases are going to be much easier to try. So there is that kind of a concern.

But, Mr. Jacob, I'd like to have you—have you had the opportunity of reading Professor Rifkin's——

Mr. JACOB. I have not.

Mr. FAWELL. I would suggest that you do so, and I would like to have your reaction, because he cites the deep problems and the growing gap between black youth and white youth in the poor categories, poverty categories, and also with Hispanics in this tremendous area, and he closes—he says, you know, this bill is just doing nothing, and he closes with these strong words:

"Let me be blunt. This approach is not merely a disappointment, it is a scandal. The sponsors of this legislation are not even proposing to 'throw money' at the problems in the well-meaning, if naive, fashion of the Great Society programs. Instead, they propose to throw money at lawyers, who may be hanging around the remotest periphery of the problems or at lawyers who are simply hanging around a generation of inner city youth which is drowning in drugs and violence and despair. Does Congress really have no better idea than encouraging new lawsuits to intimidate employers?"

Could you react to that?

Mr. JACOB. First of all, let me say that I'm not an attorney, but I'd be very delighted to respond to your comments. And I would

agree with my colleague here, that no one would disagree with the fact that those are legitimate concerns, legitimate problems that ought to be addressed.

But I would separate those issues. Those are problems that ought to be addressed in and of themselves. They're substantial enough, and they have such a significant impact on this nation that they ought to be addressed for the viability of the Nation.

Beyond that, I would also say, though, that those of us who work in the civil rights community and are confronted with people every day who are discriminated against know that there has to be a way to remedy those conditions. We believe very strongly that the current situation does not allow that to happen. People have been moved beyond the point of where they even think that they can get a resolution to discrimination. They cannot afford it. Even if they could afford it, they do not think that they can win it, and, therefore, they have been put in a very desperate position.

And I would argue that what we are doing, in effect, is weakening our work force capability and ability by allowing or by enhancing or by sending messages that it is all right for employers to engage in these kinds of actions.

Mr. EDWARDS. The time of the gentleman has expired. The gentleman from Texas, Mr. Bartlett?

Mr. BARTLETT. Thank you, Mr. Chairman. Ms. Hernandez, first of all, I was unclear on why that law firm in Texas was not able to recover their attorneys' fees. Can you help me with that, that you cited with regard to——

Ms. HERNANDEZ. There are still—as you know, the way the process works in attorneys' fees, once the issue is settled, once there are no appeals, a submission is made to the court. The defendant at that time objects, or usually objects, and there is an effort to settle the matter as to the costs.

In most civil rights cases, plaintiffs' lawyers in Title VII cases have to submit to the court affidavits as far as the value of their hourly worth in order to recover, and there's usually a lot of disagreement as to the hours—and the value of the per hour rate that will be given to a civil rights lawyer.

It is a process that usually takes a lot of time. In many cases the judges will cut down the hours and allow the per hour rate, or in many instances they will disallow the per hour rate and give a lesser amount. They will disallow certain expenses that an individual has had, saying that they have too much paralegal time.

Mr. BARTLETT. So in this particular case——

Ms. HERNANDEZ. It's a long process.

Mr. BARTLETT. Because the amount has not been settled?

Ms. HERNANDEZ. The amount has not been settled, and this case, which is a very good example of a case, after many years of litigating and going to full litigation, I will tell you that the amount will not compensate for the amount of work——

Mr. BARTLETT. So I just want to make sure I understand it. So that's why the provision in the bill would provide for interest on penalties? Or does this bill do anything to resolve that?

Ms. HERNANDEZ. It provides a guidance to the courts as to how it should be done. Now, in the attorneys' fees, and what you're talking—there are certain things in this legislation. One of them is to

compensate for experts. That is very fundamental. If you cannot hire the experts, you're not going to be able to show——

Mr. BARTLETT. And has that been in law—or practice prior to these Supreme Court cases?

Ms. HERNANDEZ. That had usually been the practice. It has gradually been severely restricted. This piece of legislation would make it clear that expert cost would be recoverable.

Mr. BARTLETT. I understand. I just want to make sure that I had a clear idea of what this legislation does to correct that case, and what it does is, it makes it clear that expert fees are counted.

Ms. HERNANDEZ. It does something else, too. By Congress declaring that these types of cases that attorneys can recover fees, it will expedite the process. One of the reasons for providing interest in such cases is that even when it has been adjudicated that you're entitled to attorneys' fees, some defendants will drag it on for a very long time, and in most cases the type of attorneys handling these cases cannot carry such a large debt.

Mr. BARTLETT. Do you think that the law should provide for the prevailing party to recover attorneys' fees if the prevailing party is the defendant?

Ms. HERNANDEZ. Let me tell you what usually happens in these cases to give you a sense.

Mr. BARTLETT. I'd be happy for you to. I'm really not trying to trick you into an answer.

Ms. HERNANDEZ. No, no, no, no.

Mr. BARTLETT. I'm just curious on your position.

Ms. HERNANDEZ. Our position is, in most cases one would say yes, it's only fair. The reality of it is, you're dealing with very poor people. We have within MALDEF certain circumstances where the court has assessed costs to poor defendants. We, the organization, have paid the court costs because the individual cannot.

Mr. BARTLETT. So you do have some sympathy towards that, but you want to be careful.

Ms. HERNANDEZ. I have a certain sense of fairness as to the logic of the argument. The reality of it is, most plaintiffs that file these types of claims do not have money.

Mr. BARTLETT. Let me move on to another one because time is limited, and you all have been very helpful in your testimony.

Taking it away from the FBI, *MALDEF* v. *FBI* kind of large, celebrated lawsuit, and just taking it down into the day-to-day resolution of EEOC cases, in your judgment as a practicing attorney familiar with the EEOC—and Mr. Jacob, I'd also ask you if you have a comment on this—do you think that the current system of EEOC could be improved by some kind of alternative dispute resolution mechanism, a potential for binding arbitration or some other some kind of dispute resolution mechanism, or are you satisfied with the present system, but for the overturning of these cases?

I'm talking about the system now, not what the law is, but the system.

Ms. HERNANDEZ. As far as the system, EEOC has not been a system that has been very responsive as an institution to Hispanic-Americans, and we have had that problem with the system and the institution, the issue of bilingual services, of being receptive to that.

I'll give you an example as to where I think you're going. In California we have the Fair Employment and Housing Act, and in many instances, because that's a cleaner process, a clearer procedure in California, we will go through that agency rather than the EEOC.

Mr. BARTLETT. So you would send us to the California model as a place to look?

Ms. HERNANDEZ. We would send you, and, in fact, Mr. Hawkins was 30 years ago one of the people that, when he was in the California legislature, passed that, and I would be more than happy to send you documentation.

Mr. BARTLETT. Mr. Jacob, do you think that some kind of an alternative dispute resolution mechanism would be helpful or harmful in the EEOC law?

Mr. JACOB. My reaction, Mr. Bartlett, would be that I think that it could be constructed to be helpful, and I make that observation both from my position as an advocate for civil rights, but also as an employer who from time to time engaged in these kinds of actions.

I believe that there could be constructed a source that could be actually helpful and effective in addressing those kinds of concerns.

Mr. BARTLETT. Mr. Chairman, I might say that, with the help of these witnesses and others, during the course of these deliberations, I plan to work on some kind of a mechanism to see how far it gets in either committee or on the floor.

I think that regardless of what the committee--or the Congress decides on the overall questions of *Wards Cove* and dual motive and *Patterson* cases and such, I think that in addition to that, some kind of dispute resolution mechanism would be helpful.

I yield back to the chairman.

Mr. EDWARDS. I'm sure it will be respectfully accepted. The gentleman from Vermont, Mr. Smith.

Mr. SMITH. I have no questions, Mr. Chairman. Only to thank the two witnesses very much, and Mr. Dorsen, in his absence, for recognizing that in some cases the questions really are to try to understand what is at issue. Too often we literally, in many cases around here, pass legislation. We literally do not know what's on page 55 or what it will mean in two years, and then we find ourselves digging out of various holes we'd rather not be in.

We do see in these many issues cheerleading on both sides, where the assumption simply is that everybody knows exactly what's at stake. Some of us, by reasons that were mentioned by Mr. Dorsen and others, by professional proclivity or whatever, don't know what's at stake. That was certainly the thrust of my questions, and I've appreciated your testimony and his and the panelist very much. Thank you.

Mr. EDWARDS. Thank you very much. Both witnesses have been very helpful.

I'm pleased to welcome our colleague as the next witness, The Honorable Tom Campbell. Mr. Campbell comes from my area. He was a very distinguished professor of law of my alma mater, Stanford University. He's from the 12th District of California, Silicon Valley, and it's been my pleasure to work closely with him on some of the high tech problems of that great group of employers and employees.

Mr. Campbell, we welcome you. Without objection, your full statement will be made a part of the record, and you may proceed.

STATEMENT OF THE HONORABLE TOM CAMPBELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. CAMPBELL. Thank you, Mr. Chairman. It's a pleasure to appear before you. I have a background in this field, and I'd like to acquaint members of the committee with it very briefly. It's one of those few occasions when you'll actually give me a chance to talk on something I know something about, to be distinguished from the rest of my time in Congress, perhaps.

The field of statistical proof in discrimination cases was my Ph.D. dissertation. I studied starting in 1971 in the Graduate School of Economics at the University of Chicago and obtained a Ph.D. in this field. My dissertation was the first measurement of discrimination against women in the Federal Government by statistical analysis. It was accepted at the University of Chicago by a dissertation panel including George Stigler, Nobel Prize winner.

I then went on to publish two articles in the field, one in Volume 89 of Harvard Law Review and the other Volume 36 of Stanford Law Review, on statistical proof in employment cases and how burdens should be allocated.

I had the honor to clerk for Justice White on the Supreme Court, who is the author of *Wards Cove*, and I say that more by reason of disclaimer than anything else, in that in representing what I think the court said in *Wards Cove*, I do not borrow from any knowledge I might have from having clerked for Justice White.

That's the introduction. Here is the main point I'd like to impress upon the subcommittee and the full committee. *Wards Cove* needs to be reversed. *Wards Cove* allocated the burden of proof in Title VII cases incorrectly. Here's how a Title VII case should generally go in the statistical proof area.

Plaintiff comes forward with a prima facie showing of a statistical imbalance between those who are applying and those who are selected. The employer then comes forward and says, "Here's my business necessity, here's my business reason." And we can debate about that phrase, but that's the heart of it. The employer comes forward.

The employee then has a chance to come back and say, "That's really not a necessity because here's another system that would work as well for you, would get you that same object without the impact upon minorities or women, as the case may be."

That's how things have been in Title VII litigation. *Wards Cove* changed that profoundly. What *Wards Cove* said was, plaintiff now has to identify the precise practice that went wrong. And I'll get to that in a second. But, more importantly, plaintiff has to rebut the business necessity. That's to say, the employee has to start the case by saying, "Here's what went wrong, and here's why it's not a business necessity."

That expression tells you what's wrong with it. It's proving a negative. Here's why it's not a business necessity. The employee must show, even though the employee won't have access to the information or the business practices.

Now, Justice White for the Supreme Court says, "Don't worry. The employee has liberal discovery." I'm sorry, that's not adequate. Liberal discovery will not get you into the mind of the employer to determine what happened.

Second, liberal discovery won't get you to a prima facie case if you have a series of tests used to keep an employee from a particular job or benefit, each one of which is just this shy of being statistically significant.

So we'll give you an employment test; we'll check with your previous employer; we'll see if you did well during the probationary period. And each one of those cuts out blacks or Hispanics, let's say, or women at a 94 percent level of probability, not 95; and, hence, under normal standard rules of proof in Title VII cases, not enough to carry the burden.

That's why *Wards Cove* is wrong. What we ought to do, it seems to me, is go back to the correct allocation of burden of proof, which is something we all learned, or most of us learned in law school—some of us have benefitted from not having been to law school—which is, you don't ask anybody to prove a negative. You give the obligation to prove to the party best able to bear it.

So plaintiff comes forward and says, "Here's the statistical disparity." Employer comes forward and says, "Here's why it was a business necessity." And then employee comes back and says, "Here's why there's a better system that would work as well," if the employee can show that.

All right, those are the steps that ought to be done. Instead, *Wards Cove* changed that, and that's why I introduced, one week after the Supreme Court's opinion *Wards Cove*, H.R. 2598. It was, I'm proud to say, the first bill in this Congress to reverse *Wards Cove* introduced in the House of Representatives.

I wish to be brief to allow as much time for discussion, and so just let me quickly touch on two other topics in *Wards Cove*. What is business necessity? Very happy to debate that, and it's worthy of a lot of discussion.

You should know that the Supreme Court, when it originally used the phrase in *Griggs*, in the very next sentence said, "related to job performance." So business necessity sounds like a tough standard, but related to job performance sounds like a pretty easy standard.

And in *Wards Cove* the Supreme Court said, "serves in a significant way the legitimate employment goals of the employer," and then later, about a page later, says, "And so the burden of business necessity"—using the phrase "business necessity" again.

I would be so honored to help the committee in any way I could to draft what might be a good definition of "business necessity," but that is not my main point. My main point is, whatever that is, it should be the burden of the employer, not the burden of the employee, to come forward, as it is with every affirmative defense.

In conclusion, because this may be my last chance to speak to the entire bill, I did want to draw particularly the chairman's attention, my colleague from California for whom I have such high regard, to a couple of things I would have done differently, hopefully better.

If I could draw your attention to the bill, H.R. 4000, I'm troubled by the *Martin* v. *Wilks* provision, which is on page six of the committee draft, wherein a party who was not actually given notice and didn't have a reasonable opportunity to present objections is still estopped—and I'm quoting—"if the court determines that the interests of such person were adequately represented by another person who challenged such judgment or order prior to or after the entry of such judgment."

That troubles me. I don't know what it would take to be adequately represented, and I'd be a lot more comfortable if it was "had notice" or "had reasonable opportunity for notice," which is in the immediate prior section. I would very much invite your attention to that.

Second, page 9, in damages, the phrase "callous indifference" is new to me, new to me as an expert in the Title VII area, and I am troubled at what we are doing by allowing compensatory or punitive damages in the context of what is not defined, "callous indifference."

What troubles me most, Mr. Chairman and members of the committee, is, an employer with no malice at all might simply not have checked, and that might be termed indifference, and a court might hold that to be callous. I'd be careful about using a new term of art.

And my last suggestion is, on page 10, attorneys' fees, it strikes me as questionable to have all of the attorneys' fees in any challenge to a decree to be borne by the original defendant, who might have been willing to accommodate the challenge to the decree or accommodate it in some way or all that is being requested. It appears as though it's a life sentence.

Once you have signed a decree in a civil rights, whenever anybody challenges you, you're going to be the one socked for attorneys' fees, and that troubles me.

I'd far prefer a rule which allocates the fees in this sort of context against you if you were not the prevailing party as the original defendant, but not simply because you were the original defendant.

A last word on quotas. So much discussion, Mr. Chairman, has been around the subject: Will this bill create quotas? Here's how I look at it. There will be some employers who will make sure their numbers look good, and short of a 100 percent effective enforcement mechanism, there's no way to stop that.

But would you, because of that fear, knock out the use of statistics in Title VII, which is really what I believe *Wards Cove* in large part does. I would not. I would, rather, insist that when an employer does import a quota, realize that the statute protects whites as well as blacks, men as well as women, that a lawsuit will lie against such an employer, and we enforce the civil rights laws vigorously.

Because the alternative is, to me, to the say to the civil rights community, "Welcome to the court, but we put so many hurdles in front of you, you're not going to be able to succeed."

With this point, I conclude. Those of us who are troubled at the potential for expansion in H.R. 4000 or in my bill, H.R. 2598 or H.R. 3455, ought to realize that what keeps the peace and keeps us

progressing in civil rights is an understanding that if you're wrong, you've got a chance to take it to court. Cut that off, and the consequences could be devastating for our country.

Thank you, Mr. Chairman.

Mr. EDWARDS. Thank you, Mr. Campbell. We appreciate your coming here today, and we will look and examine your suggestions with keen interest. And certainly your prompt introduction of your bill was very helpful to us, and we appreciate it.

The gentlemen from Illinois, Mr. Fawell?

Mr. FAWELL. Thank you, Mr. Chairman. In my brief time I have to put some questions to you. My first one will be in regard to the essentiality test. You don't, I gather, agree with that, but, on the other hand, pure job-relatedness might seem to be too weak.

What wording would you suggest? And if you would comment on the essentiality test, why you are not in favor of the wording that is in the bill.

Mr. CAMPBELL. My colleague, what I would love to see is just the phrase "business necessity," which would then pick up the adjudicated meaning of the phrase "business necessity" over the last 19 years.

Mr. FAWELL. But aren't there all kinds of different definitions of "business necessity" in the various Supreme Court cases and appellate cases on the subject?

Mr. CAMPBELL. And they've been trending toward what I consider a very acceptable interpretation. Now, this is one commentator's interpretation.

Mr. FAWELL. Trending toward what?

Mr. CAMPBELL. Trending toward what I would probably call closely related to an important employment objective, not loosely and not a trivial objective. That's how I saw them.

Mr. FAWELL. Would you think that it might be proper to—if cases are trending that way, in your opinion, that we might be better off then to put that in as a definition of "business necessity" in a bill such as this?

Mr. CAMPBELL. We may, but my sense is that the phrase "business necessity" does that, and that there's a benefit for the——

Mr. FAWELL. It's a work of art, in other words, right now

Mr. CAMPBELL. It is a term of art, maybe not a work of art, but a term of art.

Mr. FAWELL. Yes

Mr. CAMPBELL. And it incorporates all of the case law.

Mr. FAWELL. Yes

Mr. CAMPBELL. I'd prefer just the phrase, "business necessity." Once in a while there is an occasion where you're happy to see the courts develop a series of cases that show expertise. That would be one of them, Mr. Fawell.

Mr. FAWELL. You would agree whenever we do repeal a Supreme Court, we have to be ultra careful, because case law, and, indeed, disparate impact was created by case law. It has grown, and as one author said, "The cases that came, *Griggs* and on, aren't as good as some people think, and *Wards Cove* ain't as bad as a lot of people think, too."

Would you agree with that kind of——

Mr. CAMPBELL. I would, but I'd like to draw your attention to a marvelous line in the Supreme Court's *Wards Cove* case. Just after they say that, from now on, the employee will have the burden of showing the absence of a business necessity, Justice White for the court says, "We acknowledge that some of our earlier decisions can be read as suggesting otherwise."

A Tom Campbell footnote: You're damn right, like 19 years of adjudication. End of Tom Campbell footnote, back to the text.

But to the extent that those cases speak of an employer's burden of proof with respect to legitimate business justification defense, they should have been understood to mean "an employer's production, but not persuasion burden."

So my point is, when you see the court pretty candidly telling you we're changing something, then Congress can be less hesitant, I should think, to change it back.

Mr. FAWELL. I happen to agree with your view, as I understand it, that the burden of proof insofar as business necessity ought to perhaps be with the employer, even though there are liberal discovery rules and things of that sort.

What about your view in reference to the other aspect of this bill which comes in, in the view of some, with a sledgehammer approach, to say from this point on, we're going to have compensatory and punitive damages with the definition of even "callous indifference" as part of punitive damages?

Do you think, as some do, that, hey, as a practical matter, this significant change of Title VII will do more harm than good? It hasn't worked perfectly, but it's been a fairly successful Title VII out there for 20 years, more than 20 years. What are your views in this very significant alteration of Title VII to go into compensatory and punitive damages? And, certainly, would you not agree with me, that many attorneys would be entering that field that are not there now

Mr. CAMPBELL. Yes, there will be attorneys entering the field and bringing cases. I agree, that's—if I didn't believe that, I couldn't teach economics. As the price goes up, the supply will increase.

But I think it's acceptable, Mr. Fawell. I think it's acceptable if we are punishing intentional discrimination and if the standard is correct. That's why, as I mentioned earlier, I'm troubled about "callous indifference." But if we're speaking about people as to whom you can prove a willful, intentional discrimination, my analogy is to antitrust, where you have willful conduct by business people for which you go to jail, and for which you pay treble damages.

And the reason we do that is because, where you can prove willfulness and the damage to the economy of that severity, the simple payment of back pay means you're ahead of the game unless 100 percent of the people you hurt sue you.

And that, to me, is inadequate. And my own sense—and this is something each of us has to decide for herself or himself—but my own sense is that a price fixer hurts the economy by and large less than an intentional discriminator.

Mr. FAWELL. I would like to talk to you about that more, but I don't have the time.

The other question is—I don't know if you have been here while I've been trying to get guidance in reference to this question of what in the world is a prima facie case.

Now, if I understand you correctly—and I've never felt that one should not be able to use statistics in order to be able to show the unlawful employment practices, or at least the prima facie showing of the same. Yet, as I read on page 4, when it states, for instance, that "an unlawful employment practice is established," and then it jumps down to b., "when a complaining party demonstrates or, that is, presents proofs"—"the burden of proof and persuasion that a group of employment practices results in a disparate impact," "results in" signals to me proximate cause, that you have that burden.

But, on the other hand—and I didn't get this opportunity to talk with the president of the bar association in reference to this point—in subparagraph i., under subparagraph b., it makes very clear that the party, the plaintiff doesn't have to worry about proving the specific practice at all as a part of his prima facie case. And if you're not going to prove the parts of a whole, I would assume you don't have to prove the whole.

And that was the point I was trying to bring out. It seems to me that it leaves the plaintiff with the right to simply come in with statistics and show that on the basis of statistics—and that's quite proper—that there is—that this suggests a prima facie case. Then he sits back and says—I'm not talking about proving a negative—he then says, well, now, the employer's going to have to come in and one by one prove that all of the various employment practices within the particular group are not actually causally related to proving a disparate impact.

Do you follow—I know it's a—maybe it's something I should forget about, but——

Mr. CAMPBELL. No, no.

Mr. FAWELL. [continuing] I worry about that as a plaintiff's attorney

Mr. CAMPBELL. You are right to worry.

Mr. FAWELL. Isn't that a very, very light prima facie case

Mr. CAMPBELL. Let me try a quick answer. Disparate impact still has to be shown, and you'll see that at the bottom of page 3. And thus we have another term of art.

If you load into the phrase "disparate impact" a lot of obligation, then that being the plaintiff's burden should satisfy the concern that you would have. The debate thus is: What does "disparate impact" mean? And the draftspersons of this bill were evidently intentional in not giving us a definition of "disparate impact."

Mr. FAWELL. Not even of employment practice, but that's another question, too

Mr. CAMPBELL. Although that's in the statute. That's in Title VII.

Mr. FAWELL. But my point is that—I'm only talking about prima facie proof here, not about ultimate proof. We have to ultimately get to a disparate impact, but to show a prima facie case, apparently all I have to do is throw statistics in? Is that correct?

Mr. CAMPBELL. Let me refer to an expertly crafted alternative, H.R. 2598 or 3455, where I use the phrase, "a prime facie violation

of this title shall be deemed to have been made out," and then I say, "by proof that the representation of the group receiving protection under this title of which plaintiff is a member is significantly less in the position or among those receiving the benefit at question than among the qualified applicants or likely qualified applicants for the position."

Mr. FAWELL. And you do that with statistics.

Mr. CAMPBELL. Yes. But there the focus should be on the word "qualified," because the comparison is only valid as between a feeder population that's qualified.

Mr. FAWELL. So you have the added burden of showing that those people out there in the pool are qualified.

Mr. CAMPBELL. Yes, and that's what I hope——

Mr. FAWELL. That's significantly different then from this bill, is it not?

Mr. CAMPBELL. Well, maybe not. That's what I hope the draftspersons of this bill meant by the phrase, "disparate impact." And I would have preferred that they either tried to write it down—and for all of my bad English, that's what I tried—or to come up with a different phase. "Disparate impact" is an attempt to pick that up from the case law.

Should be, "When the plaintiff has done all she or he can to show that she or he is qualified by the objective criteria that he or she can prove on the basis available to him or her."

That's what I would say. You shouldn't be allowed to have a prima facie case by doing what the cannery workers tried to do in *Wards Cove*. The case was correctly decided from the point of view of the outcome. Cannery workers and accountants are different people.

Mr. FAWELL. Mr. Chairman, I appreciate that you've been a bit lenient here. I do want to talk to you more on this point because a number of us are concerned that a prima facie case should not be just simply quotas, and if we go beyond that and show the need to show that, hey, those people out there are otherwise qualified, and things of this sort, then I think people such as myself feel much more comfortable.

I can't be comfortable with the essentiality test, but I would be comfortable with some of the wording I think that you have talked about.

Thank you, Mr. Chairman.

Mr. EDWARDS. We're going to examine that point very carefully as this appears to bother quite a number of people.

The gentleman from Vermont, Mr. Smith.

Mr. SMITH. I have no questions, but I simply wanted to thank my freshman colleague in the Republican Caucus for reminding me so articulately why I joined you on those two bills one week after *Wards Cove*, and to make the point, again, as we have said, as we worked on some amendments to H.R. 4000 along the lines that you have testified here today, that if we can get past the smoke and the charges and the countercharges and get down to the nub of the thing, where people of real knowledge, as I think all of our witnesses have had today, put specific proposals on the table, and as you have done, I think, in a beautiful form here, that, in fact, we can—we very likely can reach agreement.

And I appreciate your contribution here today, Tom.

Mr. CAMPBELL. I want to thank you for that, and just say for the record that Peter Smith was the first to come to my assistance in those bills, and our colleague from California, Merv Dymally was the next, and I'm proud to have both of their support and all the others since then.

Mr. EDWARDS. The gentleman from New Jersey, Mr. Payne.

Mr. PAYNE. Thank you very much. It's also good to see my freshman colleague from the State of California. I'm sorry that I got in here late. Unfortunately I have to dash out and come back again. But there is something I want to clarify about your definition because I think that a lot of where we go is going to be determined by the definition we use.

Is your definition of "business necessity" as it relates to important employment objectives, drawn from any Supreme Court case?

Mr. CAMPBELL. No, it is not. It is a phrase of my own, Mr. Payne, and I do want to say this, though. I am not using that in my legislation. I just want to use the phrase "business necessity" and then pick up the common law, not only where it is today, but where it's going.

I like the fact that the courts are dealing with this and developing a common law. But I was asked by our colleague from Illinois, "If you had to say where it is right now, what would it be?" And so that's from reading the Supreme Court cases and the circuit court cases on this issue.

Wards Cove told us it meant "significantly related to a legitimate employment goal." *Griggs* said, "related to job performance." And then in the next breath both cases used the phrase, "business necessity."

So I'm afraid now the phrase "business necessity," the way Webster would define it is no longer relevant, and what it means now is a signal. And I'd sure like the legislative history to show this, that we are picking up the case law over the course of the last 19 years since *Griggs*. And I was just giving you my—as a former law professor; actually still am—in teaching in this area, as where it is today.

Mr. EDWARDS. Thank you very much, Mr. Campbell. We appreciate your testimony.

Mr. CAMPBELL. Thank you, Mr. Chairman.

Mr. EDWARDS. The last three witnesses for today—and we apologize in advance for keeping them here so long—will constitute a panel.

Larry Lorber, Esquire, represents the National Association of Manufacturers and Society of Human Resource Professionals; Mr. N. Thompson Powers, Esquire, of the law firm of Steptoe & Johnson here in Washington, DC; and David Rose, Esquire, former Chief, Employment Litigation, of the United States Department of Justice. Mr. Rose is also from Washington.

Mr. Powers, you may testify first. We welcome you. Without objection, all of the statements of this panel of witnesses will be made a part of the record.

STATEMENTS OF DAVID ROSE, ESQUIRE, FORMER CHIEF, EMPLOYMENT LITIGATION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC; LARRY LORBER, ESQ., NATIONAL ASSOCIATION OF MANUFACTURERS AND SOCIETY OF HUMAN RESOURCE PROFESSIONALS, WASHINGTON, DC; N. THOMPSON POWERS, ESQUIRE, STEPTOE AND JOHNSON, WASHINGTON, DC

Mr. POWERS. Thank you very much, Mr. Chairman, and members of the committee. My name is Tom Powers. I have worked in the field of equal employment opportunity since 1962 when I began as special counsel for the President's Committee on Equal Employment Opportunity. I served in that position until I became the first executive director of EEOC in 1965.

After my return to private practice, I continued to work in this field. I was sent to Geneva by the Department of Labor to do a report on discrimination in vocational training in the United States and in 1967 and 1968 I was special counsel to the Inter Agency Committee on Mexican American Affairs.

Most of my practice has been in the field of equal employment opportunity representing employers. During that time, I have appeared before the Supreme Court twice, once in defense of the affirmative action plan of Kaiser Aluminum Steelworkers against Weber and the other time dealing with the application of Rule 23 to employment discrimination class actions.

I was an Adjunct Professor of Law at Georgetown from 1968 to 1980, teaching equal employment opportunity law and concepts. I am presently serving as editor-in-chief of the Supplement to the treatise on Employment Discrimination Law of Schlei and Grossman.

I appreciate the opportunity to appear here. I am appearing on my own. I am not representing any client and I would like to focus my remarks on the *Wards Cove* Decision which has been described as seeking to restore the disparate impact law to what it was before the *Wards Cove* decision.

I disagree with that characterization for two reasons. First, I don't think that *Wards Cove* represents as substantial a change in the law as has been portrayed. Second, I believe that the amendments proposed in H.R. 4000 would make it much more difficult for employers to justify employment practices that have a disparate impact, but which are adopted in good faith and without discriminatory intent, than was the case before the *Wards Cove* Decision.

I would like to focus initially on the three aspects of the *Wards Cove* decision, which H.R. 4000 seeks to change. First, the need for the plaintiff to identify the specific element or elements of the employer's practice that is causing the disparate impact; second, the burden of persuasion staying with the plaintiff at all times in disparate impact litigation; and third, the employer's ability to justify disparate impact by showing that the challenged practice significantly serves the employer's legitimate interest, even though the practice may not be indispensable or essential to those goals.

In my opinion, the most important of these three elements is the third, the question of what must the employer show to satisfy the requirement of business necessity.

It does seem to me that the *Wards Cove* decision is consistent with what the Supreme Court previously held, both in *Washington* v. *Davis* and *New York City Transit Authority* v. *Beazer*. In those cases, the court indicated that the employer could meet its burden of justifying disparate impact—first in *Davis* by showing a correlation, not with actual job performance, but rather with performance with a training program and in *Beazer*, by showing the program of not employing methadone users significantly served the employers' legitimate goals, although it was not essential or indispensable to them.

As to the second matter, whether the burden of persuasion stays with the plaintiff at all times, I would concede that as a defense practitioner, I certainly thought prior to *Watson* and *Wards Cove* that once disparate impact was established, that I had the burden of justifying the challenged practice.

It seems to me that most defense counsels will be less concerned with whether they have a burden of persuasion by a preponderance of the evidence, than what that burden is.

Finally, on the first element, the identification of the specific element or elements that are causing the disparity, I think it is appropriate to note that prior to *Watson* and *Wards Cove*, all of the cases in which the court applied disparate impact analysis were ones in which a specific identifiable practice was challenged.

I think also the fact that in this line of cases employers were unable to justify disparate impact by showing that there was no disparity in the total process, made it fair to require that plaintiffs establish or identify the specific practice they are challenging, where they can do that.

On the other hand, where employers do not keep records or don't make ratings or rejection decisions at various points in the selection process, then it seems to me that the plaintiff should be able to establish the prima facie case on a broader basis.

In my opinion, the most troublesome part of parts of H.R. 4000 are, first of all, that it seems to me that it calls for inflexible application of disparate impact analysis, wherever that is found in an employer's practices, whether it relates to selection, pay, benefits or whatever.

Also, it seems to me, the standard of justification is one that will make it difficult, if not impossible, in many cases for employers to justify selection standards that have a disparate impact, but that are adopted in good faith and serve legitimate employer needs.

The standard used in H.R. 4000 is essential to effective job performance. It seems to me that under that standard the justification that the court upheld, both in Washington against Davis and in *New York City Transit Authority* v. *Beazer*, would not be sufficient.

Second, it seems to me that if essential is given a strict construction, as it well might, then practices which correlate well with job performance and other significant goals of the employer, could be found inadequate because they are not 100 percent predictor.

In almost any validation study, there will be some false negatives and some false positives. My concern is that the word "essential" might well make it impossible for employers to justify their standards in those circumstances.

It seem to me also that the word "effective" may go significantly beyond what Title VII has previously been held to require of an employer. If "effectiveness" means only that a minimum level of performance—then judgments that have previously been made, and I think properly so, on the basis of relative qualification could be at issue.

It seems to me that so understood, H.R. 4000 is not a restoration to what the law was prior to *Wards Cove* and *Watson*, but a substantial tightening of the requirements of justification.

I note in my paper that I consider, and have since it was decided, *Griggs* to be a very questionable interpretation of what the Congress intended in 1964. I note in my paper two general counsel opinions of EEOC that were adopted in the early days, one of which when I was there.

More importantly, though, it seems to me important to recognize that *Griggs* proved to be a precedent that the court had difficulty applying in the various situations that came along. I have noted in my prepared testimony that in case after case, beginning with *McDonnell Douglas* in 1972—the court either distinguished *Griggs* and said it wasn't going to be applied in that case to an employer's refusal to rehire one who engaged in a civil rights demonstration.

There was a case involving an employer in the Texas border who refused to employ aliens. He was charged with acting in a way that had a disparate impact on Mexican-Americans, even though 96 percent of his workforce was Hispanic. In that case, also, the court held that *Griggs* would not be applied inflexibly.

The *Furnco* case was another case where a foreman hired people who had personal experience with him. The court held it was not appropriate to apply *Griggs* in that case.

In a more recent case, and one that I think is worthy of note, the court denied certiorari in a petition from the Ninth Circuit where the plaintiffs had argued that they could establish disparate impact in the employer's reliance on the market as the basis for pricing jobs. The contention was that reliance on the market had a disparate impact on women. The Ninth Circuit found *Griggs* inapplicable in that case. The Supreme Court denied certiorari.

I think it is interesting to note that in this whole range of cases where *Griggs* was distinguished or limited in its application, in only one of those cases, the one dealing with maternity benefits, did the Congress deem it appropriate to enact contradictory legislation and that was limited to prospective effect.

I would suggest that there are three things that are important for this committee to consider. First, that *Watson* and *Wards Cove*, while they do represent a redefinition of disparate impact, they represent a substantial extension of it to subjective practices. And its application, in subjective practices, needs to be considered very carefully.

Certainly such practices are suspect when these decisions are made by predominately white males and they have a disparate impact on minorities and women, but in some cases there is no alternative to subjectivity and it may be difficult to assemble proof that is consistent with a strict application of *Griggs* as it was initially applied to a test.

I think the court recognized that in *Wards Cove* and *Watson* and suggested that it was appropriate to move into this field on a case-by-case basis. I think that is appropriate.

Second, I would again urge the committee to recognize that we are not talking about a doctrine that is only applicable to selection practices. It is applicable to all employment practices, to pay practices to benefit practices. If those practices have to be justified because they have a disparity, then I think it is essential that there be a standard that can be utilized by employers and I do not believe that essentiality to job performance provides such a standard.

Finally, I would note that even if *Wards Cove* is left as it is, employers are still going to have great incentives to take race and sex into account in making their employment decisions. Many of us advised them to do so because if they don't they may well face the need to show the significant justification that is still required under *Wards Cove* or they may be in a situation where they can be found to intend the foreseeable consequences of actions that have a disparity.

I would simply note, in conclusion, that I recognize and share the frustration of others that we are as far as we are from our goal of equal employment opportunity. I think it is particularly unfortunate that we seem as unable and as unwilling as we are to do more to end discrimination in our schools and in our communities.

There is no question that there continues to be discrimination in employment and we need strong and effective laws to deal with that, but it also seems to me important that the Congress not unwisely straightjacket the court in applying a doctrine as powerful as disparate impact to the many situations to which it may be applied.

I would urge this committee, respectfully, to consider this matter carefully to avoid legislating in a way that has retroactive effect and to legislate sparingly, if at all, recognizing that courts may feel more inhibited in applying statutory provisions than they have heretofore felt in applying what, up to this point, has been a line of case law.

Thank you very much.

[The prepared statement of N. Thompson Powers follows:]

PREPARED TESTIMONY
OF
N. THOMPSON POWERS
ON
THE CIVIL RIGHTS ACT OF 1990
H. R. 4000
FEBRUARY 27, 1990

I have sought an opportunity to testify on the Civil Rights Act of 1990 because I believe that several provisions of this bill are unnecessary and will further complicate the development of sound and fair employment discrimination law.

My background in the field began in 1962 when I was appointed Special Counsel to the President's Committee on Equal Employment Opportunity. I held that position until 1965 when I became the first Executive Director of the Equal Employment Opportunity Commission in 1965.

After returning to private law practice in 1966, I was sent by the Department of Labor to the International Labor Organization in Geneva, Switzerland to prepare a paper on discrimination in vocational training in the United States. Between 1966 and 1968 I also served as Special Counsel to the Inter Agency Committee on Mexican American Affairs.

Since 1967 most of my law practice has involved counselling and representing employers in employment discrimination matters. This has included two appearances before the Supreme Court: One in defense of the affirmative action plan of Kaiser Aluminum in Steelworkers v. Weber[1/] and the other in arguing for full application of the requirements of Rule 23 to

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1/ 443 U.S. 193 (1979).

class actions alleging employment discrimination in General Telephone Company of the Southwest v. Falcon.[2/]

Between 1968 and 1980 I also served as an Adjunct Professor at Georgetown University Law Center teaching a course in equal employment opportunity law and concepts. I am presently Editor-In-Chief of the 1987-1989 Supplement to the treatise on Employment Discrimination Law by Schlei and Grossman.

WARDS' COVE PACKING CO., INC. V. ATONIO[3/]

I would like to focus my comments on Section 4 and related provisions of H.R. 4000 which purport to "restore" the burdens of proof in disparate impact cases to what they allegedly were before the Supreme Court's Ward's Cove decision.

I disagree with that characterization for two reasons: First, I do not believe Ward's Cove changed the law as much as is being claimed. Second, I believe the amendments proposed would make it much more difficult than it was before Ward's Cove for employers to justify selection and other employment practices that have a disparate impact but that were adopted in good faith and that are applied without discrimination.

There are three aspects of the Ward's Cove decision which H.R. 4000 seeks to change:

1. The plaintiff's need to identify the specific elements of the employer's practices that is causing the disparity.

2/ 457 U.S. 147 (1982).

3/ 109 S. Ct. 2115 (1989).

2. The burden of persuasion staying with the plaintiff at all times.

3. The defendant's ability to justify disparate impact by showing that the challenged practice "serves, in a significant way, ... [its] legitimate employment goals" even though the practice is not "essential" or "indispensable."

In my opinion, the third of these is the most important and is consistent with the court's earlier restatements of the business necessity/job relatedness defense in Washington v. Davis[4/] and New York City Transit Authority v. Beazer.[5/]

As for the second aspect, I think that most practitioners probably believed before Ward's Cove and its precursor Watson v. Fort Worth Bank & Trust Co.[6/], that once plaintiff's established a prima facie case of disparate impact, the burden of persuasion shifted to the defendant to justify that impact. I expect that most defense counsel will present evidence on that basis even after Ward's Cove. As a defense counsel, I am less concerned about whether I have to prove a justification by a preponderance of the evidence than what that justification must be.

In that connection, however, let me note that in her plurality opinion in Watson, Justice O'Connor stated that one of the significances of the burden of persuasion staying with the plaintiff at all times was that at the pretext stage of a disparate impact case, factors such as cost are relevant in

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4/ 426 U.S. at 229 (1976).

5/ 440 U.S. 560 (1979).

6/ 108 S.Ct. 2777 (1988).

determining whether alternative selection devices would be as effective as the challenged practice in serving the employer's legitimate business goals.7/ That is as it should be, in my opinion, and I do not believe that on this point the Watson, Ward's Cove decisions were clearly contrary to prior case law.

As for the plaintiff's need to identify the specific element or elements of a challenged practice that is causing the disparity, I have these comments: Prior to Watson and Ward's Cove the cases in which the Supreme Court applied disparate impact analysis to selection practices were all ones involving specific tests of other objective selection criteria. Since the Court has held that employers cannot justify disparate impact in one element of a selection process by the avoidance of such an impact in the total process,8/ it seems consistent with prior case law to require plaintiffs to show which aspects of a multi-step selection process is causing the disparity if that can be determined through discovery. If the defendant does not reject or rate persons at various steps in the selection process or keep records of such decisions, however, then plaintiffs cannot discover such proof and should be able to attack the disparity more broadly. I do not believe the majority in Ward's Cove foreclosed that possibility, but I would not oppose legislation to confirm that plaintiffs have that option.

7/ Id. at 2790.

8/ Connecticut v. Teal, 457 U.S. 440 (1982).

Let me now discuss one of the two principal ways in which I believe the proposed legislation would go far beyond the pre-Ward's Cove case law: The definition proposed for the business necessity defense that would be required to justify a disparate impact.9/ That definition is set forth in Section 3 and defines "business necessity" as "essential to job performance." This would appear to rule out the type of justifications the Supreme Court accepted in Washington v. Davis, (where test performance was shown to correlate with performance in a training program) and in New York City Transit Authority v. Beazer, (where a prohibition against employing any people who use methadone was found to "significantly serve" legitimate employment goals of safety and efficiency even though it was not required by them).

Furthermore, an "essential to job performance" standard probably cannot be satisfied by any validation evidence that has less than a perfect correlation. This would in effect limit justifiable criteria to those which represent significant components of the job, such as typing requirements for a secretary or bar admission for a lawyer, and would not be satisfied by proven predictors of good performance, such as test proficiency or past experience.

Perhaps validation data could still be used to justify decisions based on professionally developed ability tests under

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9/ The other way is the general requirement that disparities in all employment practices be justified. See discussion infra at pages 7-10.

Section 703(h), but even if that is true there would be no way to justify other selection criteria (except for seniority and possibly merit systems) that have a disparate impact and that are less than perfect predictors of job performance.

Such a result would not "restore" Title VII to what it was meant to be in 1964 but instead would create exactly the kind of situation the editors of the Harvard Law Review cautioned against in 1971 in a note on "Developments in the Law - Employment Discrimination and Title VII of the Civil Rights Act of 1962."[10] In that Note the editors stated:

> Congress in Title VII attempted to aid minority employment within the constraints of color blindness and non-interference with employer decisions that are based on legitimate business considerations . . . [C]ourts should be cautious lest they require such a high degree of proof from the employer that standards which very probably are valid must be abandoned because of the impracticability of demonstrating validity.[11]

I respectfully submit that Congress should observe that same caution.

Let me also say that I believe that the court's initial disparate impact decision in Griggs v. Duke Power Company,[12] was a very questionable interpretation of Title VII and its legislative history and created a precedent which the court has

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10/ 84 Harv. L. Rev. 1109 (1971).

11/ Id. at 1166.

12/ 401 U.S. 424 (1971).

had to distinguish or modify in a number of subsequent cases to avoid unjust results.

When I was Executive Director of the EEOC in 1965, my understanding was that under Title VII an employer could lawfully apply educational or test requirements as long as it applied them uniformly and acted in good faith. This understanding was confirmed in two early opinions of the General Counsel of the EEOC.13/

Others who have reviewed the legislative history have reached similar conclusions about what the 1964 Congress intended.14/

Griggs also proved to be a precedent whose application was as uncertain as its origin. The Supreme Court refused to extend disparate impact analyses to constitutional challenges to allegedly discriminatory tests, 15/ and it accepted justifications for disparate impact that did not show a correlation with actual job performance16/ or otherwise prove business necessity.17/

13/ G.C. Opin. 296-65, October 2, 1965, reprinted in CCH FEP Guide par. 17,251.0262; G.C. Opin. 451-65. Opin. Ltr. December 16, 1965, Reprinted in CCH FEP Guide par. 17,252.25.

14/ See, Wilson, A Second Look at Griggs v. Duke Power Company: Ruminations on Job Testing, Discrimination and the Role of the Federal Courts, 58 Va. L. Rev. 845 (1972); Gold, Griggs' Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform, 7 Ind. Rel. L. J. 429 (1985); Rutherglen, Disparate Impact Under Title VII: An Objective Theory of Discrimination, 73 Va. L. Rev. 1297 (1987).

15/ Washington v. Davis, supra.

16/ Ibid.

17/ New York City Transit Authority v. Beazer, supra.

Furthermore, the court refused to apply disparate impact analysis to:

- A refusal to rehire one who had engaged in an unlawful civil rights demonstration at the employer's gate.[18/]
- A policy against employing aliens.[19/]
- A preference for hiring those who have previously worked with the foreman.[20/]
- The exclusion of maternity coverage from sickness and disability benefits.[21/]

Finally, it recognized an exception for seniority systems that are not intentionally discriminatory,[22/] broadly interpreted the BFOQ exception to justify the all male composition of the correctional work force in a maximum security prison after strictly applying disparate impact analysis to height and weight requirements[23/] and denied certiorari in a case in which disparate impact analysis was not allowed to make a comparable

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18/ McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1978).

19/ Espinoza v. Farah Manufacturing Co., 414 U.S. 86 (1973).

20/ Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978).

21/ General Electric v. Gilbert, 429 U.S. 125 (1976).

22/ Teamsters v. U.S., 431 U.S. 324 (1977).

23/ Dothard v. Rawlinson, 433 U.S. 321 (1977).

worth challenge to an employer's pay system.[24/] Only one of these decisions - that involving maternity benefits - produced legislation to the contrary and that legislation had only prospective effect.

In my opinion that what the court recognized in all the cases I have cited from 1972 forward is that a single factor analysis - which is what disparate impact is - should not be inflexibly applied to all employment practices and that in some cases even when that analysis is applied, business necessity or a correlation with actual job performance should not be required to justify the disparity.

So understood, Ward's Cove and Watson before it, are not the repudiation of Congressional intent they have been portrayed to be, but rather are part of a continuing effort by the court to adapt the Griggs doctrine as different situations come before it.

It is important to recognize that Watson and Ward's Cove represent a substantial extension of Griggs to subjective decision making as well as a significant redefinition of plaintiff's burden of proof. Subjective decision making by predominately white supervisors is properly suspect when it has a disparate impact on minorities or women. The subjectivity may be unavoidable, however, and the justification required may need to be determined on a case-by-case basis considering, among other

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24/ Spaulding v. University of Washington, 740 F.2d 686, cert. denied, 469 U.S. 1036 (1984). Issues in certiorari petition set forth at 53 U.S.L.W. 3383.

things, what proof is feasible. Ward's Cove seems to me to signify the court's readiness to proceed on this basis, and I think that is appropriate.

In considering legislation concerning the disparate impact doctrine it also is important to recognize that unless limited by statutory provision or judicial discretion, this doctrine can be applied to any selection, employment, or benefit practice. This could revive comparable worth litigation in a context where employers might be unable to justify basing compensation on market values (because they could not show that it was "essential to job performance"). It would also threaten the lawfulness not only of drug abuse programs, such as that upheld in the Beazer case, but of any other practice that is shown to have an unintended disparate impact.

As I described earlier, beginning with the McDonnell Douglas case in 1972, the Court in a number of cases decided against applying disparate impact analysis in a number of situations and in only one of those situations - maternity benefits - was contrary legislation enacted and that was given only prospective effect. That kind of specific amendment seems much more suitable for dealing with complex employment and benefit practices than the comprehensive and excessive overhaul proposed in H.R. 4000.

Finally, let me point out that this legislation is not needed to insure that employers continue to consider the impact of their decisions on minorities and women. Especially where subjective judgments are being made by white males, employers are

well advised to recruit and select employees in a way that avoids or minimizes disparate impact. Unless this is done, they may not be able to show the substantial justification for their actions required by Ward's Cove and may be found to have intended the discriminatory effect their actions have produced.

The difference is one of degree but it is an important one. If the Supreme Court is allowed to continue to adapt the disparate impact doctrine as it has done up to now, employers will still be able to justify disparate impact where they have strong reasons for their actions. If the courts are required to apply the disparate impact provisions of H.R. 4000, however, then statistical disparity will create an almost irrebuttable presumption of unlawfulness.

In conclusion, let me say that I recognize and share the frustration many feel that we remain as far as we are from our goal of equal employment opportunity. It is particularly disappointing that we seem as unable or unwilling as we are to do more to end discrimination and disadvantage in our schools and communities. Discrimination in employment continues to occur and should be the subject of strong and effective laws that prohibit such conduct and promote equal opportunity for all Americans.

I believe, however, that the changes H.R. 4000 proposes to make would unwisely straightjacket the courts in disparate impact cases, and I respectfully urge this Committee to review this matter carefully, to avoid trying to effect pending cases or past conduct and to legislate sparingly, if at all, recognizing that the courts may feel they have less flexibility in applying

statutory provisions in unanticipated situations than they have in applying what to this point has been only a line of case law.

Mr. EDWARDS. Thank you very much, Mr. Powers. The next member of the panel to testify is Larry Lorber, Esquire. Mr. Lorber, we welcome you.

Mr. LORBER. Thank you, Mr. Chairman. My name is Lawrence Lorber. I am a partner in a law firm of Kelley, Drye and Warren, where I practice employment and administrative law.

Prior to my entering private law practice, I held several positions in the United States Department of Labor including that of director of the Office of Federal Contract Compliance Programs during the Ford Administration.

I am pleased today to be testifying on behalf of the National Association of Manufacturers, NAM, and the Society for Human Resource Management, SHRM.

NAM represents more than 13,500 member companies, which employ more than 85 percent of all workers in manufacturing. NAM members include the very largest manufacturing companies to more than 9,000 smaller manufacturers, which employ less than 500 employees each.

SHRM, formerly the American Society for Personnel Administration, is the world's largest association for human resource professionals with over 44,000 members who work for employers who employ over 53 million American workers.

Both NAM and SHRM come to these hearings with a long record of productive involvement in the development of equal employment policy. In the 1960s NAM was in the forefront of establishing many of the policies and programs leading to the establishment of our national commitment to equal employment opportunity.

Plans For Progress, the forerunner of our affirmative action programs was developed and sponsored by NAM. NAM's involvement continues to the present day. In the 1980s, NAM took the lead in forging the employer consensus supporting the continuation of affirmative action.

SHRM's involvement is no less impressive. Beginning in the 1960s and 1970s, when it took the lead in educating and training the human resource professionals to understand and implement affirmative action and equal employment in the workplace, through 1986 when it filed an Amicus brief in the Johnson case, which I was privileged to write, and when provided the professional justification relied upon by Justice Brennan in upholding affirmative action—we would like to offer copies of that brief for the record. We ask that it be made part of the record and attached to our testimony.

The subject of today's hearing relate to sections of the Civil Rights Act of 1990 which purport to overturn or expand upon various Supreme Court decisions. While it may afford certain administrative convenience to parch this bill in this way, it would be remiss if I did not indicate the concerns felt by employers that the decisions of last term's court are being used as the vehicle to rush through dramatic changes in the entire scope and philosophy of our equal employment policies.

While the various advocacy groups worked with the majority staff for several months in crafting this legislation, the employers who are to be most impacted have had less than a month to analyze and respond. Certainly, the organizations on whose behalf I

am testifying, have shown by their long efforts in furthering equal employment, that they are necessary and worthy partners in the fashioning of the law.

We find it disheartening that at the very time when a consensus is formed, that our employment problems of this decade will revolve around the need to find trained or trainable employees to achieve the productivity that our economy needs, that Congress would consider legislation which would build a legal wall as impenetrable as the Berlin Wall around our employers and create enormous incentives to hamstring the workplace in protracted litigation serving the interests of neither the individuals whom the law would protect nor the law whom the law would regulate.

With respect to Section 4 of the bill, and I would like to address both Sections 3 and 4 of the bill, the sections which purport to overturn the *Wards Cove* decision—the employment community has several major problems with it and would like to point out, to the attention of this committee, faults which we believe would doom this bill and if enacted would doom the workforce to a drastic diminution of merit and a drastic diminution of the increase in the skills of our workplace.

Proposed new definition "n" in the bill includes the term "group of employment practices" within the scope of Title VII. This definition, as applied to both disparate treatment and adverse impact cases, would place the entire range of an employer's employment practices under question without providing the employer with any specificity as to which practice is questionable.

The legal inquiry would be changed from an examination of a single suspect practice into an open-ended inquisition of an employer if its total workforce did not reflect some idealized numerical balance suggested by a plaintiff.

This new definition rejects long accepted Title VII jurisprudence. In *Connecticut* v. *Teal*, Justice Brennan analyzed the various adverse impact cases since *Griggs* and made clear that Title VII never required the focus to be placed on the overall number of minority of female applicants hired or promoted.

In *Transit Authority* v. *Beazer*, the Supreme Court focused on a single identified employment practice. To permit a lawsuit to be based on a "group of employment practices"—perhaps all practices used by a particular employer and to have that lawsuit triggered because the "overall employment practice" results in a workforce that is numerically deficient, is a profound change in the standard for reviewing personnel practices.

It will put pressure on employers to assure that their overall employment practices result in a workforce measured by arbitrary numerical standards and not productivity or ability.

I would add, as well, that this definition is apparently being put into the bill to deal with the rather unique facts of the *Wards Cove* case where the plaintiffs opted not to attempt to show any causation, but merely offered evidence showing that the plaintiff, Mr. Atonio, he was Filipino, he wished to be a carpenter and not a cannery worker and he somehow did not become a carpenter.

The plaintiff did not offer any evidence as to any specific factor in the employer's personnel practices, which resulted in him not achieving the job he desired. It was on this basis, and on this

record, that the Supreme Court dealt with the issue and made the determination, quite properly, that simply aggregating a bunch of unconnected employment practices does not serve the interests of Title VII and is inappropriate to determine whether adverse impact occurred.

Proposed new definition "o" would find business necessity justifying a selection criterion only if that criterion were proven to be "essential to effective job performance." This new definition is a drastic change from the definitions first set forth in *Griggs* v. *Duke Power Company*, which has become well settled law during the succeeding 19 years and to which employers have readily acceded and have adapted their employment practices.

In *Griggs*, the Supreme Court first enunciated the theory of adverse impact, and imposed on employers the requirement of showing that a challenged practice was justified by business necessity. The Court said that the standard of business necessity meant "job relatedness," meaning a selection criterion having a manifest relationship to the employment in question.

The Court, in *Griggs*, reemphasized congressional intent to allow employers to set their employment standards as high as they wished as long as the business necessity test was met. The various Supreme Court and appellate court rulings subsequent to *Griggs* have made it clear that business necessity requires a showing that the challenged practice be predictive of job performance, correlate to important elements of work behavior, or more generally relate to the specific job functions in question.

The proposed new definition of business necessity would overturn these long-standing precedents and impose an impossible burden on employers.

Understanding that the legal review of employment practices does not even begin until there is proof of numerical imbalance defined as adverse impact under the proposed legislation, employers would have to show that the suspect practice, or the overall employment process, as discussed in definition "n," are not only necessary, but are essential.

The judgment as to what is essential would not be made by the employer alone, but by a judge, or indeed, if a plaintiff alleged that a practice were put in to intentionally discriminate, by a jury, and then in the context of a numerical deficiency rather than actual business needs.

The promise of Congress in 1964, as enunciated and stated in *Griggs*, that employers could establish their own employment standards so long as the standards were consistent with the employer's own business requirements and equal employment principles will be consigned to a footnote describing discarded policy.

The law has suggested that it would require instead that employers accept bare minimum qualifications or performance levels, since they would be the only standards which could possibly meet the essential test.

Proposed definition "n," as I discussed, would abolish the requirement that a plaintiff identify the cause of a statistical disparity. Proposed subsection 703(k) would overturn those parts of the Court's holdings in Watson and *Wards Cove* related to burdens of proof.

The Civil Rights Act of 1990 would permit a plaintiff's cause of action to be based solely on the statistical bottom line. That is, a plaintiff need not identify one specific employment practice causing adverse impact, but could complain generally about a group of practices or point to the overall employment process to establish the numerical threshold.

The employer would then have the burden of showing that some or all of its practices, depending upon the scope of the complaint, were not causally related to the numerical deficiency. The employer would then be obliged to prove that each of these practices was essential to its business.

Thus, an employer using a variety of employment practices would have to first parse all of its practices, identify which caused the numerical "discrimination" and then prove that the suspect practice was essential to its business.

Proving that some objective selection criterion, such as a college degree, is essential to success on a job is difficult enough. But, in the context of subjective criteria this task becomes impossible.

Completely unrecognized in the bill or in the accompanying congressional analysis is the fact that *Watson* and *Wards Cove* dealt with non-standardized subjective practices not heretofore dealt with under the impact analysis.

The proposed legislation is built on the faulty premise that every employment practice, including interviews, supervisory ratings and the like, can be reviewed with scientific precision. Unlike the accepted methodology for establishing the job relatedness of objective pass-fail instruments, or practices such as standardized tests or height and weight standards, where, indeed, even there business necessity was not converted into the legal sine qua non which this legislation would mandate, the prospect of proving that it is essential to job performance for a candidate to appear bright or motivated during the interview would be completely unmanageable, as would the burden when reviewing the multistage hiring process for management trainees, first line supervisors, public law enforcement positions or such other positions.

The very complexity of the employer's burden when dealing aggregated, subjective employment practices would require decision-making aimed at numerical balance, rather than business judgment, in order to avoid the crushing costs which would be required to even attempt to defend challenged criteria.

I would note that were, for example, this bill to be applied to the Congress, it would be obviously impossible, as I read this bill, for one congressional office to determine that its staff members, who would work in the District of Columbia, are better served if they came from Iowa or Indiana or whatever the location of the home of the congressman, which criteria, I understand, are, from time to time, observed by the Congress.

Were the standard to be essentiality, I would suggest that it would be impossible to prove that. In looking at the demographics of the college educated employees or potential employees in this area, the congressional hiring practices would necessarily fail.

In *Watson* and *Wards Cove* the Supreme Court attempted to craft a rational balance allowing long accepted Title VII obligations, and

heretofore unquestioned general litigation burdens to coexist with viable productive employment systems.

Proposed subsection 703(k) and the new definitions would overturn this balance, leaving employers essentially defenseless to challenges of subjective practices based on adverse impact analysis and requiring employers to lower standards to the bare minimum necessary to put warm bodies into the jobs so as to avoid the burden, the impossible burden, of showing that any one particular standard or one particular criterion was essential to the economic viability of that workplace.

Thank you.

[The prepared statement of Larry Lorber follows:]

National Association
of Manufacturers

H.R. 4000

CIVIL RIGHTS ACT OF 1990

TESTIMONY ON BEHALF OF

NATIONAL ASSOCIATION OF MANUFACTURERS

AND

SOCIETY FOR HUMAN RESOURCE MANAGEMENT

BEFORE THE

COMMITTEE ON EDUCATION AND LABOR

AND THE

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS

UNITED STATES HOUSE OF REPRESENTATIVES

TUESDAY, FEBRUARY 27, 1990

Lawrence Z. Lorber
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Mr. Chairman, members of the Committee, my name is Lawrence Lorber. I am a partner in the law firm of Kelley Drye & Warren. I am submitting this testimony on behalf of the National Association of Manufacturers ("NAM") and the Society for Human Resource Management ("SHRM") (formerly the American Society for Personnel Administration).

The National Association of Manufacturers is a voluntary business association of more than 13,500 member companies and subsidiaries, large and small, located in every state. Members range in size from the very large to the more than 9,000 smaller manufacturing firms, each with fewer than 500 employees. NAM member companies employ 85 percent of all workers in manufacturing and produce more than 80 percent of the nation's manufactured goods. NAM is affiliated with an additional 158,000 businesses through its Associations Council and the National Industrial Council.

The Society for Human Resource Management is the world's largest association for human resource professionals with over 44,200 members representing employers who employ over 53 million individuals. As the leading professional association for human resource managers, SHRM has a vital interest in legislation impacting on almost every aspect of the human resource function.

Both SHRM and NAM have a long background in promoting fair employment practices. NAM's involvement in this area goes back to the 1960s when it was instrumental in promoting Plans for

Progress, the forerunner of our affirmative action policies. And its efforts continued through the 1980s when NAM took the lead in establishing the consensus which preserved the policy of affirmative action as a viable component of our nation's employment structure. SHRM's efforts in this area are as equally long-standing. SHRM played a vital role in training the human resources profession to understand and implement the concepts of equal employment opportunity in the workplace when the laws were first passed. In the 1980s SHRM's activities included the preparation and filing of an Amicus Curiae brief before the Supreme Court in the landmark affirmative action case of Johnson v. Santa Clara County, California, arguing that affirmative action was a necessary part of our employment system. SHRM's brief, which I prepared, was cited by Justice Brennan as providing the professional justification for affirmative action. Thus, these two leading organizations bring a long and involved background to the current debate over our equal employment policies.

The Civil Rights Act of 1990 represents a massive restructuring and rewriting of our equal employment laws. Presented as a response to certain Supreme Court decisions of last term, the draft legislation in fact rejects the concept of conciliation and rapid settlement of complaints, which the Congress used as its guidepost in 1964 when Title VII was enacted, and assumes that the only resolution of discrimination complaints is in protracted litigation in a federal court system which is

already overburdened. We find this thrust particularly ill-conceived at a time when there is almost universal recognition that the problem our economy faces in the 1990s is not too few jobs but too few trained or trainable employees. A congressional commitment of scarce federal resources to increased federal court litigation seems particularly ill-advised when our country faces such pressing employment problems. In the recent annual economic report issued by the President, the employment concerns of America were identified as the necessity to find skilled workers for the available jobs. The President's Report, which follows upon the Workforce 2000 study issued by the Department of Labor and the many private studies focusing on the employee shortage we are facing identifies the trained labor shortage as a grave problem of national proportions.

Our country has long since outgrown the pernicious "luxury" of discriminatory exclusion. In the increasingly tight labor markets of the 1990s, employers inclined to indulge in discriminatory hiring will pay a high price for it -- they will be unable to meet their own need for workers. The protected groups -- minorities and women -- will comprise the overwhelming percentage of new entrants to the workforce. Employers who are unwilling to hire them for reasons of bias will find themselves increasingly unable to find qualified workers. Therefore, it is ironic that at a time when business necessity dictates open, nondiscriminatory employment practices, Congress is seeking to

place greater rigidities on the labor market. We think this would be counterproductive to expanded workforce opportunities. This legislation, however, ignores these pressing problems and focuses single-mindedly on narrow and technical litigation concerns of interest primarily to lawyers.

The Civil Rights Act of 1990 does not profess to create jobs or provide skills. It does, however, promise to vastly increase contentious litigation. Beginning with the several new definitions to Title VII, the legislation places employers in a position where they have no reasonable opportunity to offer non-discriminatory explanations to challenged employment practices. Put into this position, employers will have little choice other than to assure numerical balance in their workforce.

Definitions

Proposed new definition "n" includes the term "group of employment practices" within the scope of Title VII. This definition, as applied to both disparate treatment and adverse impact cases, would place the entire range of an employer's employment practices under question without providing an employer with any specificity as to which practice is questionable. The legal inquiry would be changed from an examination of a single suspect practice into an open-ended inquisition of an employer if its total workforce did not reflect some idealized numerical balance suggested by a plaintiff. This new definition rejects long accepted Title VII jurisprudence. In Connecticut v. Teal,

Justice Brennan analyzed the various adverse impact cases since Griggs and made clear that Title VII never required the focus to be placed on the overall number of minority or female applicants hired or promoted.

In Transit Authority v. Beazer, the Supreme Court focused on a single identified employment practice. To permit a lawsuit to be based on a "group of employment practices" -- perhaps all practices used by a particular employer and to have that lawsuit triggered because the "overall employment practice" results in a workforce that is numerically deficient -- is a profound change in the standard for reviewing personnel practices. It will put pressure on employers to assure that their overall employment practices result in a workforce measured by arbitrary numerical standards, and not productivity or ability.

Proposed new definition "o" would find "business necessity" justifying a selection criterion only if that criterion were proven to be "essential to effective job performance." This new definition is a drastic change from the definitions first set forth in Griggs v. Duke Power Company which has become well settled law during the succeeding nineteen years.

In Griggs the Supreme Court first enunciated the theory of adverse impact, and imposed on employers the requirement of showing that a challenged practice was justified by "business necessity". The Court said that the standard of business necessity meant "job relatedness", meaning a selection criterion

"having a manifest relationship to the employment in question." The Court in Griggs reemphasized congressional intent to allow employers to set their employment standards as high as they wished as long as the business necessity test was met. The various Supreme Court and appellate court rulings subsequent to Griggs have made it clear that "business necessity" requires a showing that the challenged practice is predictive of job performance, correlates to important elements of work behavior, or more generally relates to the specific job functions in question. The proposed new definition of business necessity, would overturn these long-standing precedents and impose an impossible burden on employers.

Understanding that the legal review of employment practices does not even begin until there is proof of a numerical imbalance defined as adverse impact under the proposed legislation, employers would have to show that the suspect practice, or the "overall employment process" (see new definition "n") are not only necessary but are "essential". The judgment as to what is "essential" would not be made by the employer but by a judge or possibly a jury, and then in the context of a numerical deficiency rather than actual business needs. The promise of the Congress in 1964, as enunciated in Griggs, that employers could establish their own employment standards so long as the standards were consistent with the employer's own business requirements and equal employment principles will thus be consigned to a footnote

describing discarded policy. Rather, the law would require employers to accept bare minimum qualifications or performance levels since they would be the only standards which could possibly meet the "essential" test.

Section 4

Proposed definition "n" discussed above, would abolish the requirement that a plaintiff identify the cause of a statistical disparity. Proposed subsection 703(k) would also overturn those parts of the Court's holdings in Watson and Wards Cove related to burdens of proof.

The Civil Rights Act of 1990 would permit a plaintiff's cause of action to be based solely on the statistical "bottom line". That is, a plaintiff need not identify one specific employment practice causing an adverse impact, but could complain generally about a group of practices or point to the overall "employment process" to establish the numerical threshold necessary for a showing of adverse impact. An employer would then have the burden of showing that some or all of its practices -- depending upon the scope of the complaint -- are not causally related to the numerical deficiency. The employer would then be obliged to prove that each of these practices is "essential" to its business. Thus, an employer using a variety of employment practices would have to first parse all of its practices, identify which caused the numerical "discrimination" and then prove that the suspect practice was "essential" to its business.

Proving that some objective selection criterion -- such as a college degree -- is "essential" to success on a job is difficult enough. But in the context of subjective criteria the task becomes impossible. Completely unrecognized in the bill or the accompanying congressional analysis is the fact that the Watson and Wards Cove cases dealt with non-standardized subjective practices not heretofore dealt with under the impact analysis. The proposed legislation is built on the faulty premise that every employment practice, including interviews, supervisory ratings and the like, can be reviewed with scientific precision. Unlike the accepted methodology for establishing the job relatedness of objective "pass-fail" instruments or practices such as standardized tests or height-weight standards, where business necessity has never been converted into the legal sine qua non which this legislation would mandate, the prospect of proving that it is "essential" to job performance for a candidate to appear "bright"or "motivated" during an interview would be completely unmanageable, as would be the burden when reviewing the multistage hiring process for management trainees, first line supervisors, public law enforcement positions or other such positions. The very complexity of the employer's burden when dealing with aggregated, subjective employment practices would require decisionmaking aimed at numerical balance, rather than business judgment, in order to avoid the crushing costs which would be required to even attempt to defend challenged criteria.

In Watson and Wards Cove, the Supreme Court attempted to craft a rational balance allowing long-accepted Title VII obligations, and heretofore unquestioned general litigation burdens to coexist with viable productive employment systems. Proposed subsection 703(k) and the new "definitions" would overturn this balance, while leaving employers essentially defenseless to challenges of subjective practices based on adverse impact analysis.

Section 5

Proposed Section 5 of the draft legislation would "deal" with the Price Waterhouse case by amending Title VII to find a violation whenever a discriminating factor was shown to have been a "motivating factor" in any personnel action regardless of the presence or importance of other factors supporting the action. Section 5 is here characterized as "dealing" with Price Waterhouse since at the time of the decision it was greeted as a major advance by civil rights advocates and was said to represent the first time the Supreme Court had recognized the well-established concept of mixed motives in the Title VII context. The drafters of section 5 clearly intend to expand upon Price Waterhouse by finding liability where a discriminatory consideration is a motivating factor as opposed to the motivating factor or even a substantial motivating factor. Indeed the mere presence in the mind of the decisionmaker or in the employer's records of any questionable consideration or inartfully phrased concern about an

individual would, by the terms of the proposed amendment, doom the employment decision. The legislation would preclude an employer's ability to rebut or refute the inference of discrimination by proving that the factor was irrelevant because of the predominant weight of legitimate factors.

One obvious result of this section, were it to become law, would be to require legal review of personnel appraisals, supervisory ratings and similar personnel tools while in draft stage in order to scrub or delete any phrase or reference which could be pointed to as a "motivating factor" and which would thereby subject an employer to absolute liability. Employers would almost have to establish legal "thought police" to measure each consideration of a supervisor against the ever-changing legal standards of intentional discrimination in order to insulate the employment process.

The argument by the proponents of Section 5 that Price Waterhouse authorizes "a little bit of discrimination" is specious. The Supreme Court crafted an appropriate burden shift by requiring employers to do more than merely articulate an explanation for the "taint." Employers were given a difficult burden of proof to avoid liability. The draft legislation "cures" Price Waterhouse by abolishing any opportunity for defense. Strangely, the draft legislation seeks to amend § 706(g) by including the Price Waterhouse "defense" in that section. The intent of this placement is unclear. Clearer drafting would have

new § 703(1) add at its end "except that a respondent will not commit an unlawful employment practice where it establishes that it would have taken the same action notwithstanding the consideration of the prohibited factor."

Section 6

In Martin v. Wilks, a five justice majority of the Supreme Court held that where allegedly race conscious promotion decisions were being made as a result of the operation of a prior consent decree, white individuals who were not party to the proceedings which resulted in the entry of the decree could bring suit alleging that the denial of promotions to them was due to impermissible considerations of race. The four dissenters argued that obedience to the dictates of a lawfully entered consent decree should not expose an employer to collateral attack and potential liability. The Supreme Court was grappling with the competing and equally compelling concepts of affording every individual his or her own day in court with the need to bring finality to litigation.

Proposed section 6 would establish that a person could not challenge the operation of a decree if the person were a party to the proceedings, had notice that the proposed judgment might affect his interests and was given reasonable opportunity to object, or if a court determines that the objections being raised were raised by other persons during the pendency of the consideration of the decree.

Section 6 would leave the adequacy of notice to interested parties as the only grounds available to attack the lawful operation of a decree after it is entered. Apparently it would bring finality to issues even if the underlying decree incorporated race conscious features and was of substantial duration. While employers share the belief that judicial oversight of employment policies not be open-ended and intrusive, we believe that these concerns ought to be tempered somewhat in view of the appropriately strict standards for relief currently followed by the courts in reviewing or imposing race conscious policies. The standards enunciated by the Supreme Court in Johnson v. Santa Clara County and Local 28 Sheetmetal Workers v. EEOC ought to allay concern that affirmative relief will unfairly hinder the expectations of nonparty individuals or that a court will usurp the employer's human resources function.

We do believe that rather than rushing to simply "repeal" Martin v. Wilks, the Congress ought to take sufficient time to study the issues and consider such possibilities as statutory time limits for an employment consent decree or specifying the scope of the fairness hearing so that adequate notice is in fact provided to all interested or potentially interested or impacted individuals.

Section 7

In Lorance v. AT&T Technologies, the Supreme Court held that a challenge to a seniority system allegedly adopted for a

discriminatory purpose must be raised at the time the seniority system is adopted (within Title VII's limitation period) rather than at the time the system has its discriminatory impact. The Court reiterated its view that there was no viability to the "continuing violation" theory of discrimination in this context. The dissenters argued that Congress never intended absolute immunity for tainted seniority systems and that the decision would foster anticipatory litigation.

While the holding in Lorance is relatively straightforward and deserving of careful consideration, the legislative response incorporated in section 7 is wholly out of proportion to the holding in Lorance and affects significant expansion of Title VII.

Section 7(a)(1) expands the statute of limitations of Title VII from 180 days to two years. There was no "adverse" Supreme Court ruling which triggered this section. There seems to be no rationale for this fourfold expansion of the statute of limitations, nor does there appear to have been consideration of other, parallel changes sure to follow, such as the extension of EEOC's record retention rules to two years and other administrative changes. The legislation is also silent as to the impact of this change on cases filed with deferral agencies. The silence with respect to the status of deferral states apparently will allow simultaneous processing of charges and could create redundant legal actions in different forums. This result would be

a direct contradiction of Title VII's fundamental purpose to foster conciliation and settlement of cases.

The drafters have apparently given no thought to the ramifications of this proposal on actual employment processes. It is difficult to imagine the benefit in allowing a grievance to fester for at least two years before triggering the investigative and adjudicative processes of Title VII. In that long interim, personnel will have changed, managers shifted, perhaps even ownership changed, yet the employer will have to reconstruct dated events in order to respond. Productive employment will be subject to forgotten land mines of forgotten actions when a charge is filed two or more years after the triggering occurrence.

Section 7(a)(2) reinstates the continuing violation theory by starting the running of the statute of limitations only after a questioned practice has adversely affected the aggrieved party. Thus, the proposed legislation has the effect of overturning United Airlines v. Evans decided in 1977, not 1987. It is simply inappropriate policy to encourage potential plaintiffs to sit on their rights for an extended period. There seems to be no cogent reason for this other than to increase employer exposure.

Section 8

This section would amend Title VII to provide for compensatory and punitive damages where intentional discrimination is shown and, consistent with the principle that such damages fall

under the definition of "legal" rather than equitable relief, a jury trial would be provided.

As much as any section of the proposed legislation, this section would change the entire structure of our equal employment laws. The issue of a jury trial and extraordinary relief for discrimination was considered by the drafters of the original Title VII and rejected for a number of sound policy reasons. Those reasons have not changed.

It was the considered view that discrimination issues should be settled quickly, that the employee achieve make whole relief promptly and that the process avoid interminable delay in crowded federal courts. Further, there was concern that juries might be loath to find for minority or female plaintiffs.

Since 1964, Title VII has been interpreted and enforced in a relatively efficient manner, enabling individuals to achieve relief. To the extent there has been criticism, it was that the EEOC was inefficient in conciliating cases and that backlogs were permitted to expand.

Section 8 would not respond to these concerns but would create new problems of vastly increased magnitude. Were this section enacted, any hope of conciliation and settlement through the EEOC would vanish. We would witness instead a national employment law lottery where attorneys would hold out to individuals the promise of six or seven figure judgments, with the accompanying six or seven figure legal fee. The purpose and

function of the EEOC would be effectively terminated, and the courts would be inundated with new employment suits.

Nor is this a spectral parade of horrors raised by employers with untold hidden liability. Rather, it reflects the experience in those states with expanding doctrines of wrongful discharge and expanding liability judgments. Employers would be ill-advised to undertake thoughtful self-analysis and corrective action for fear of unleashing a torrent of two-year old "intentional discrimination" litigation with million dollar liability claims. Short of resurrecting the plaintiff's bar, no cogent explanation has been given for this section.

We would also note that the Senate debated this issue when it recently passed the Americans With Disabilities Act ("ADA"). Following long negotiations between the White house and Senate, during which organizations such as SHRM and NAM and the disability community provided input, the Senate rejected the inclusion of compensatory and punitive damages and jury trials for the disabled as inappropriate in the employment title of the ADA. The Senate and the Civil Rights community were correct then. We do not believe that those negotiations were undertaken in other than complete good faith, yet we see a policy reversal in a matter of months. Section 8 has no place in this legislation.

Section 11

This section would require all federal civil rights laws to be "broadly construed," effectively providing that the actual

statute serve only as the starting point for judicial review rather than providing textual limits on such review. This seems to be a needless invitation to judicial activism and could readily cause confusion. If the "broad construction" were viewed by some to be limiting rather than expanding, we would inevitably have to respond to yet another round of congressional restoration. The Congress should not invite such activism and thereby subject the law to transient determinations of the meaning of "broad construction".

Section 11(b) appears to abolish, in the context of civil rights, the doctrine that subsequent legislation that is more specific or narrow in design operates to limit prior legislation that is more expansive. If this is the intent, section 11(b) ought to be thoroughly debated. We see absolutely no reason to legislatively fossilize every piece of civil rights legislation and simply add layer upon layer of additional statutory language. Civil rights and equal employment is not such a fragile concept so as to require this type of legislative shield. As the organizations I am representing today showed in the debate over affirmative action, exposure to such debate, whether in the executive branch or the legislative branch, or before the public, will not shrivel the reach of our equal employment policies. There is no place for Section 11 in the proposed legislation.

Section 12 -

Section 12 of the proposed legislation would overturn the Patterson decision. The Administration similarly has introduced legislation to accomplish this purpose. Rather than legislatively "correct" an admittedly strained judicial interpretation, the Congress ought to meet its responsibility by thoroughly examining the ramifications and underlying rationale of the Supreme Court's action.

The Patterson case involved alleged racial harassment. Title VII makes racial harassment illegal. The Supreme Court did not endorse racial harassment. It noted that the remedial provisions of Title VII could have been available to the plaintiff. Rather, the Court questioned, perhaps awkwardly, the efficacy of having multiple statutory forums available to remedy discriminatory activities and attempted by its decision to channel such matters through the congressionally-created scheme of Title VII. The underlying question which the Supreme Court attempted to resolve was whether it made sound policy to have such multiple forums. The Congress ought to take the time to examine whether it makes any sense to have such anomalous situations as litigations in which both Title VII and § 1981 are at issue and in which the same facts are tried partly before a judge and partly before a jury, either at the same time or on alternate days, in which different procedural rules and statutes of limitations would apply and different remedies would be available. We believe that the

Congress ought to examine whether plaintiffs ought to be required to choose an exclusive forum, and whether equal employment litigation ought not be encumbered with parallel federal, state and common law counts. We would urge that considered legislative attention be devoted to examining and addressing the underlying causes of the Supreme Court's decision rather than rushing to "reverse" the attempt of the Supreme Court to bring reason to an unnecessarily confused and cumbersome situation.

Conclusion

Contrary to the representations of its sponsors, the Civil Rights Act of 1990 far exceeds its professed aim of "simply" reversing certain Supreme Court decisions. Rather, the draft legislation will effect a sea-change in the treatment of equal employment complaints, converting every charge into a federal court action; making the administrative process of mediation and conciliation an unused and forgotten option and building up a backlog of cases calling on scarce federal court resources.

The draft legislation also reverses the long-settled concept underlying Title VII when it was passed and incorporated in the Griggs decision, of letting an employer set its standards as high as it wishes. The legislation would present American industry with the choice of boiling its legitimate employment criteria down to the very few essential elements which would result in a minimally competent workforce or facing lengthy and expensive litigation leading to extraordinary relief in which the

statutory deck is stacked overwhelmingly against it. The only other option left to employers is the distasteful one of insuring numerical balance.

Finally, the draft legislation ignores the current procedural and statutory impediments to rapid and equitable resolution of employment complaints. Rather than examining the continued viability of multiple forums and multiple statutory basis for employment litigation the legislation merely perpetuates the current unwieldy and inefficient system.

The issues raised by the Civil Rights Act of 1990 deserve careful and thoughtful analysis. The apparent rush to pass a bill with a minimum of debate and consideration is an unseemly and inappropriate way of treating civil rights. We urge that this committee reflect upon the issues raised in this testimony and join with America's employers in addressing the pressing issues we all face in the 1990s and beyond.

Mr. EDWARDS. Thank you very much, Mr. Lorber.

The last member of the panel to testify is David Rose, Esquire, Former Chief, Employment Litigation, United States Department of Justice.

Mr. Rose, we welcome you, and without objection your full statement will be made a part of the record.

Mr. ROSE. Thank you, Mr. Chairman. It is my pleasure to be here today. The issues presented by the proposed legislation are of great importance to me. I spent more than 20 years of my career at the Department of Justice in the Civil Rights Division. I spent most of that time doing equal employment opportunity law.

I am presently in private practice and I do have some cases for plaintiffs in equal opportunity cases, but I am not representing any client here. I am speaking for myself, which has the advantage of allowing me to state my views without influence by any possible clients and the disadvantage of not being able to escape questions that I don't want to answer.

I strongly endorse the purpose and major features of the bill, and I believe that adoption of legislation by the Congress is essential to restore the benefits of the equal employment opportunity laws in this country.

I am going to devote the bulk of my remarks to the problems raised by *Wards Cove* and Sections 3 and 4 of the bill because, in my view, that decision was the most intentionally and probably actually the most devastating to the rights in employment opportunities of blacks, Hispanics, American Indians and women.

I should add that I agree with Congressman Hawkins, who is not here at the moment, that legislation incorporating Executive Order 11246 into statutory form would be extremely salutary and I would hope that the two committees, or the Labor Committee at least, would look favorably upon that at some point.

I think it is essential that Congress restore the law in discriminatory impact to what it was under *Griggs* before the decision in *Wards Cove*. The decision in *Wards Cove* threatens to reinstate some of those traditional barriers to equal employment opportunity, which are artificial and arbitrary, and unrelated to measuring job performance.

Indeed, because of the way things work, the decision might well offer an incentive for some new artificial and unnecessary barriers with devastating impact.

One of the most pervasive and least understood facts in the field of equal employment opportunity law is the enormous disparity between whites, on the one hand, and blacks, and Hispanics, and native Americans on the other, and scores of standardized tests of ability, aptitude and intelligence. I use those with quotes.

In most of those tests, the normal difference is one full standard deviation. This is illustrated by some statistics, which I quote on pages 3 and 4 of my testimony. This was put out by an industrial psychologist who is of the view that these tests of so-called "G" factor, intelligence—are the best selection procedure that you can use for employment.

Under her analysis, 23 percent of the white population, but only 3.3 percent of the black population would be intelligent enough to be a physician. Thirty-five percent of the whites would be intelli-

gent enough to be secondary school teachers or real estate agents, but only 3.3 percent of the blacks. Similarly 28 percent of blacks, but 75 percent of whites would be intelligent enough to be police officers, fire fighters or electricians.

If such tests were used to select among applicants, the black applicant would have 1/28 of the chance of being selected as a doctor or an engineer; less than 1/10 of the chance of being selected as a real estate agent; and less than 2/5 or forty percent the chance of being selected as a police officer, fire fighter or electrician.

Thus, if blacks constituted 12 percent of the applicants for a particular job, and I use the 12 percent because that is the population of blacks in the country, they would constitute only one percent of the people hired for a real estate agent or a teacher.

Yet, these tests of intelligence in one form or another are extremely widely used in employment practices and have been since World War I. There are similar differences between men and women in tests on physical performance. They have an equally devastating impact.

Recent studies of the Graduate Record Exam show major, major differences between men and women on things like music, French, history and political science—more than 3/4 of the standard deviation on political science, as well as the so-called hard subjects of math, chemistry and physics.

Thus, although these ability tests which have features which are very much like the I.Q. tests are widely used—because they are so widely used, they are the perfect reason or excuse for an employer who wishes to upgrade his workforce, or to insure that it has a high quality, to use them to disproportionately screen out blacks and Hispanics, and if he wishes to do so, women.

Many employers would do that inadvertently, without knowing about it, because they do not know the devastating impact that these kinds of traditional tests have.

There has been much progress since the 19 years since *Griggs*. One of the major areas of progress was new kinds of assessment techniques, untraditional tests which have much, much less impact, which are still not as widely used as the more traditional ones. The screening of the performance tests—because *Griggs* requires that you show that the particular test is tied to performance on the particular job.

Let me say add that through six years of effort and much pain, there is something called the Uniform Guidelines on Employee Selection Procedures that was adopted by the Federal Government in 1978. It is still in force as the regulations of most of the Federal agencies, and the guidelines of the EEOC. Those guidelines provide substantial guidance on how one shows that a test is job related.

The Supreme Court, in the *Albemarle* case, stated that you have to show that it is job related by the standards of the profession, by the standards of the industrial psychology profession. I think it terribly, terribly important that the new legislation make it clear that that is still the law. That is what the Supreme Court said in the *Albemarle* case. It is not at all clear that that is any longer the case in light of *Wards Cove*.

I quote Judge Posner from the Seventh Circuit, who succinctly, page 11, stated the two major problems with *Wards Cove*. There are

three, as everybody has identified today. The first major problem is it shifts to the plaintiff the burden of persuasion for showing that the test is not job related, that the test does not measure successful job performance.

A burden of proof is terribly important in litigation. I have spend most of my 33 years since law school in litigation. It is terribly important to let the judge know what he or she ought to decide if things are in balance. The burden should be on the employer. It is the employer who selects the particular practice that is being used. It is the employer who has the records. It is the employer who decides whether he spends $5,000 on a cheap and dirty validity study or $50,000 on a good validity study. It is, therefore, essential to give that employer the burden of proof and to make sure that the standard is an adequate one.

As Judge Posner stated, and I quote him from the top of page 11—and that is a recent court decision, *Allen* v. *Seidman*. "*Wards Cove* also" severely—he doesn't use the word severely, and I now quote, "dilutes the necessity in the business necessity defense."

It becomes no longer of that matter of business necessity, but a matter of significantly serving legitimate employment goals. We don't know what it takes to have proof that shows how one serves legitimate employment goals.

Mr. Fried, Solicitor General Fried, testified the other day that business necessity was like the "necessary and proper clause" in the Constitution. If it is reasonable, then you can do it. That should not be the standard for a test which has an exclusionary effect. That should not be a standard for even a subjective practice which has a severely disproportionate effect.

The employer should be obliged to show that either the test is valid, and by using the term "valid" or some functional equivalent, which the Supreme Court did by saying "job related"—job related incorporates the whole notion of test validity, and there are standards, and the standards and the guidelines have been accepted as being interpretive of those in the standards of the American psychological profession.

If you can show validity, then you have served a legitimate goal. You have shown job relatedness. So, there is a standard. We shouldn't throw away 19 years of learning. We shouldn't throw away 50 years of learning in the field of industrial psychology.

The standard ought to be either that you have shown that the selection procedure is valid, meeting the standards of the profession, or required by business necessity.

I have two suggestions. One of them I make as a suggestion, and the other I make as a proposal for further study, not a long study, because I certainly agree with the committee or the drafters of the bill that it is important to move quickly on this. I would add to Section 3, "n," the words "be used in the selection of persons for a job, or group of jobs."

I would do so for the following reason. If the employer uses a number of practices for selection for a particular job, then the employer has created that ball of wax. The employee may or may not know which of the particular elements in the ball of wax are causing the adverse impact. If the employer does know, the Uniform Guidelines require that that be set forth in the employer's records,

so there is no burden on the employer in showing validity for any of those that do have an adverse impact. There is a burden, but it is a legitimate burden.

Second, I think the authors of the bill and the authors of the language intended this bill to apply to selections procedures, not to pay practices, such as Mr. Powers was talking about, not to comparable worth. This was not a back door attempt, if it was—I don't believe it was. If it was, I wouldn't support it—to get comparable worth back into Title VII through the back door.

I think that it was the understanding with regard to Section 3 "n," that you are talking about a selection process or group of procedures when they are tied together by the employer and used for a particular job or group of jobs. I would add that language.

Second, on the definition of business necessity, I think that there is a wealth of experience and expertise at this table, and I refer particularly to my two colleagues, both of whom who have served—had distinguished careers in the government, and both of whom represent employers. I think an improvement probably can be made in the definition of business necessity.

I would think it very important to have as part of the element of that definition, the concept that if you meet the standards of the psychological profession or meet the standards of the Uniform Guidelines, you have satisfied your use of a particular employment selection procedure.

I think the other element is to recognize that there may be some practices which, because they are subjective in nature, cannot be validated. There may be some subjective practices that it would not be practical—some objective practices that it would not be practical to validate, but if they are manifestly related to job performance or if they are required by business necessity, then it seems to me the court would have accepted them before *Wards Cove* and that the bill ought to make it clear either in the text of in legislative history that it would do so now.

I would say that if there is an effort to get the leaders of the industries such as the gentlemen who are here, and the leadership conference and the staff together, if anybody thought it helpful, I would be glad to participate in an effort to have a better definition of business necessity.

I don't think that is the key point. By the way, I was very impressed with Congressman Campbell's testimony, and I agreed with almost everything that he said. I don't agree that you can't any longer use the words "business necessity" because the court in *Wards Cove* poured new wine into that old bottle, and in my judgment, the definition of *Wards Cove* is unacceptably weak.

It does not impose the kind of burden that an employer should have to justify a practice which has this statistically significant discriminatory effect. I think business necessity before *Wards Cove* may, but because of *Wards Cove*, I would think that you can't just use those words.

I think you need to do something better. I think the definition ought to have the concept normally of meeting the standards of the psychological profession and if it was impractical or impossible to meet those standards, I would think that you could then come back

to the term "business necessity" as defined in the cases before *Wards Cove* or something of that kind.

I have not stated everything in the testimony, but I think I have given you the gist of it. Let me say one thing in response to Mr. Powers, who is an friend and somebody who I sometimes agree with a great deal, and I agree with some of what he said today.

Griggs may or may not have been correct in 1971. *Griggs* was adopted by this Congress in 1972 and endorsed and blessed and extended to the Federal Government and to state and local governments, and if there has ever been an adoption of a Supreme Court decision, and it was unanimous by the way, it happened in this case and we shouldn't turn our backs on *Griggs*.

It has worked for 19 years. We ought to make it work now. I hear, although severe criticism from both Mr. Lorber and Mr. Powers, much in their testimony that suggests that it's not so much restoring, it's the language and particularly the language of the definition sections that give them problems, rather than the concept of restoring *Griggs*—I would say restoring *Griggs*, the concept of keeping a relatively stringent burden of proof, such as meeting the standards of profession and business necessity, and placing the burden on the employer that gives them the least problem.

So, I think that the bill should go forward. Perhaps there can be some work done on the definitions. It's essential to get this done and to give some hope to those blacks, women, and Hispanics who are not so far out of society that they can't work, but who are working, who are productive, and who should have the same opportunities for employment and promotion that those of us who do not have those characteristics have.

So, I think the bill is essential. I think you have done yeoman work. I thank you for it. I support the concepts, and I urge you particularly to pass legislation which restores the *Griggs* doctrine and to do so as quickly as possible.

I also support most of the rest of the bill, but my expertise is in the field of testing, and I have given you the gist of my comments.

[The prepared statement of David Rose follows:]

TESTIMONY OF DAVID L. ROSE
BEFORE THE HOUSE COMMITTEE ON
EDUCATION AND LABOR AND THE
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS

CONCERNING H.R. 4000, THE CIVIL RIGHTS ACT OF 1990

FEBRUARY 27, 1990

My name is David L. Rose. 1/

Mr. Chairman, and members of both committees. I wish to thank you for the opportunity to present my views on the Civil Rights Act of 1990. The issues presented by that Act are of great importance to me, since I spent more than twenty years of my career with the Department of Justice in the Civil Rights Division, mostly in equal employment opportunity law enforcement.

1/ Attorney at Law, 1121 12th Street, N.W., Washington, DC 20005-4632. Mr. Rose joined the Department of Justice in 1956 under the Attorney General's Honor Law Program, and served for 10 and 1/2 years in the Civil Division. He became Special Assistant to the Attorney General for Title VI of the Civil Rights Act of 1964 in April, 1967. He became Chief of the Employment Section of the Civil Rights Division in October, 1969, and served in that capacity until he left the Department in December, 1987. As such, subject to the direction of the Assistant Attorney General for Civil Rights, he directed the litigation program of the Department in the enforcement of Title VII and Executive Order 11246, and he participated personally in a number of major decisions, including Griggs v. Duke Power Co., 401 U.S. 424; Albemarle Paper Co. v. Moody, 422 U.S 405; and Teamsters v. United States, 431 U.S. 324. From 1972 through 1980, Mr. Rose served as the staff representative of the Department of Justice on, and chairman of, the interagency staff committee which developed the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. 1607, which were adopted by the Departments of Justice, Labor, and Treasury, and the Civil Service Commission the Equal Employment Opportunity Commission, and the Questions and Answers which interpreted them. See n. 14, below.

I represent plaintiffs in some equal employment opportunity cases now in my private practice, but I am not representing any client here, but am offering you my views, based upon my experience.

I strongly endorse the purpose and major features of H.R. 4000, and believe that the adoption of such legislation by the Congress is essential to restore the benefits of equal employment opportunities laws upon the residents of this country. While other provisions are important and useful, I will direct the bulk of my prepared remarks to the problems raised by the decision of the Court in Ward's Cove Packing Co. v. Atonio 2/, and to Sections 3 and 4 of the H.R. 4000 which address that decision, because in my view that is potentially the most devastating decision of all to the rights and opportunities of blacks, hispanics, american indians and women.

Before I do so, let me express my personal view, particularly to you Mr. Chairman, that legislation incorporating Executive Order 11246 into statutory form would have an important and salutary impact on equal employment opportunity law enforcement. I would love to see something like that pass the Congress this year. 3/

Let me get back to the Bill before these committees, and tell you why I believe it essential that the Congress restore the law on discriminatory impact to what it was under Griggs, and

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2/ 109 S.Ct. 2115 (June 5, 1989).

3/ See H.R. 4903, 100th Cong., 2d Session, 134 Cong. Rec. H4714 (daily ed. June 27, 1988).

the cases interpreting and implementing it, before the decision in Ward's Cove. In Griggs, the Court ruled that in Title VII Congress sought to prohibit the "artificial, arbitrary and unnecessary barriers" which are discriminatory in effect and are "unrelated to measuring job performance." 4/ The decision in Ward's Cove threatens to reinstate some of those traditional barriers to equal employment opportunity, and to encourage or permit employers, whether intentionally or through inadvertence, to institute some new artificial and unnecessary barriers to equal opportunities, with devastating effect upon minorities and women.

One of the most pervasive and least understood facts in the field of equal employment opportunity is the enormous disparity between whites on the one hand, and blacks and hispanics, native americans on the other, in scores on standardized tests of "ability", "aptitude," or "intelligence." For most standardized tests of "aptitude", "intelligence", or "cognitive ability", the mean score for blacks is one full standard deviation below whites. 5/ This gap is illustrated by reference to a recent article by an industrial psychologist who argues that tests of intelligence, the "g" factor, are the best predictor for job

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4/ 401 U.S. 424, 432.

5/ See, 1 Ability Testing: Uses, Consequences, and Controversies 71-73 (A.Wigdor & W. Garner eds. 1982)[hereafter "Ability Testing"]; National Research Council, Interim Report: Within Group Scores on the General Aptitude Test Battery 40 (A. Wigdor & J. Hartigan eds. 1988). See also, L. Cronbach, "Essentials of Psychological Testing (4th Ed. 1984).

success. 6/ Based upon a one standard deviation difference, and the psychologist's assessment of job needs, only 1.1% of the black population is "intelligent" enough to be a physician or engineer, as compared to 23% of the white population; only 3.3% of the blacks, but 35.2% of the whites, are intelligent enough to be secondary school teachers or real estate agents; and only 28.4% of the blacks, but 74.5% of the whites, are intelligent enough to be police officers, firefighters, or electricians. 7/

The problem exists because of the view, which is widespread in the industrial psychology profession, that such tests really do measure or predict intelligence and job performance. If such tests were used to select among applicants, a black applicant would have only one-twenty-third, or 4%, the chance of being selected as a doctor or engineer as a white applicant; less than one-tenth (9.3%) the chance of being selected as a real estate agent or teacher; and less than two-fifths (38.1%) the chance of being selected for a police officer, firefighter or electrician. To illustrate the discriminatory impact further, if selections were made for teacher or real estate agent by such tests, and blacks constituted 12% of the applicants, they would constitute only 1.1% of the persons selected.

6/ Gottgredson, Societal Consequences of the g Factor in Employment, 29 J. Vocational Behavior, 379 (1986). For a fuller discussion, see Rose, "Where Do We Stand on Equal Employment Opportunity Law Enforcement", 42 Vanderbilt Law Review 1121,1176-1179 (May, 1989).

7/ Gottfredson, supra, n. 3, at 400-401.

A wide disparity also exits between the scores on such "intelligence" examinations between whites and hispanics, and whites and American Indians--usually on the order of 1/2 half a standard deviation. 8/ While that difference is not as great, it nevertheless greatly reduces the chances of hispanic and native american success in obtaining employment.

The difference between men and women is equally dramatic with tests of physical performance or use of height and weight standards. Thus, in Dothard v. Rawlinson 9/, the combined effect of two seemingly innocuous requirements for corrections officer (minimum requirements of 5'2" in height, and 120 pounds in weight) was to exclude 40% of the female population, but only approximately 1 % of the males. The experience of the Employment Section was that physical performance tests of speed, strength and endurance typically showed a full standard deviation difference between the scores of men and women. Thus a physical performance test for police officer, for example, if sustained by the courts, would tend to restore the job of police officer to the virtually all male domain it was before the adoption of Title VII and its extension to state and local governments. Yet all the experience we have shows that women do an excellent job in law enforcement work, notwithstanding their lower performance on tests of physical performance, and that their presence in

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8/ 1 Ability Testing, supra n. 3, at 73.

9/ 433 U.S. 321.

substantial numbers on police forces has greatly aided law enforcement.

The difference between men and women on standardized multiple choice tests is less dramatic than that between blacks and whites, but is nevertheless highly significant. You may not be surprised to know that on the quantitative portion of the Graduate Record Examination, the difference between men and women was two-thirds (67%) of a standard deviation, that is women score .67 of a sd lower than men. There are similar differences on the "mathematical" portion of the scholastic aptitude test. On the graduate record examination, there was no significant difference between the male/female scores on the verbal aptitude test. The surprise, at least to me, was that on the subject matter standardized tests, there are major differences between men and women not only in physics, chemistry and mathematics, but also in history (.57 sd), music (.56), french (.48 sd) and political science (.76 sd). 10/

While the tests used by employers to select employees for hire or promotion are not precisely the same as the tests referred to above, most of them have the same kinds of adverse impact on grounds of race and national origin, and some of them have the same impact on grounds of sex. Because the "ability" tests are so widely used and commonly accepted, they provide a

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10/ "Gender Differences on Standardized Examinations Used for Selecting Applicants to Graduate and Professional Schools", a paper presented by Linda E. Brody, Johns Hopkins University, at the American Educational Research Association in Washington, D.C. on Friday, 24 April 1987.

perfect "reason" or excuse, for an employer who wishes to continue the "high quality" of his workforce, or to "upgrade" his workforce to use devices that disproportionately screen out blacks and hispanics, and if he wishes, women, from all or certain kinds of jobs. As noted above, in many situations the test is close to being surrogate for exclusion on grounds of race, sex or national origin. For that reason, the employer using such tests should be obliged to show that they are in fact predictive of successful job performance, or correlated with important elements of job performance.

At least until the decision in Ward's Cove, that was the law. Title VII and Executive Order 11246 prohibited the use of tests and other selection procedures for hiring or promotion that have an adverse impact on the employment opportunities of blacks, hispanics or women, unless the selection procedures have been shown to be predictive of successful performance of the job, or otherwise required for the safe and efficient operation of the employer's enterprise. That safeguard, which was announced by Chief Justice Burger for a unanimous Supreme Court in Griggs, and ratified and extended by the Congress when it adopted the Equal Employment Opportunity Act of 1972 amending Title VII, is threatened by the decision in Ward's Cove.

It is because the use of employment practices which have a discriminatory impact was and is so widespread, and because proving discriminatory intent is so difficult when a widely used device is adopted by a particular employer, that most scholars

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have agreed that Griggs was the most important judicial decision interpreting Title VII, and the Congressional adoption and extension of its principles to federal, state and local governments in 1972, was one of the most important legislative decisions, concerning federal equal employment opportunity law. 11/ The most important Supreme Court cases applying Griggs are Albemarle Paper Co., Dothard v. Rawlinson, and Connecticut v. Teal, and Watson v. Ft. Worth Bank & Trust Co. 12/ Griggs was of course followed by the appellate courts hundreds of times and by the trial courts even more. 13/

Much progress was made in the almost 19 years since the decision in Griggs. Many employer conducted the kind of self-examination of traditional selection procedures contemplated by Griggs, and rid themselves of the practices which were discriminatory and not related to successful job performance. Not only were employers obliged to examine their selection practices in light of their discriminatory impact, but also in light of their validity, that is, whether they actually did lead to successful job performance. That whole process resulted in

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11/ See Chambers & Goldstein, "Title VII at Twenty: The Continuing Challenge", 1 Labor Law. 235, (1985); Blumrosen, "The Legacy of Griggs: Social Progress and Subjective Judgments", 63 Chi-Kent L. Rev. 1, 11 (1987).

12/ See notes 1, , and above for citations to Griggs, Albemarle, and Dothard. Connecticut v. Teal is found at 457 U.S. 440 (1982); and Watson at 107 S.Ct. 2777 (1988).

13/ Professor Blumrosen found Griggs cited by federal courts of appeals from 31 to 68 times a year from 1972 through 1985, for a total of 618 times, in addition to 49 decisions of the Supreme Court during the same time. 63 Chi-Kent L. Rev. at 11, n. 53.

improved selection procedures, -- use of tests and other practices which better predicted successful job performance. I believe that most industrial psychologists will tell you that there have been more improvements in the field of industrial psychology since Griggs than there had been for many, many years before that. They certainly have told me that many times, in private as well as in public.

Among the most important developments are less traditional tests, which can be and usually are objectively scored, based upon biographical data, which have greater evidence of validity and greater predictive power than the tradition "IQ" or "g" factor tests, but much less discriminatory impact. Other improvements include assessment centers, where a job is simulated through "out basket" or other procedures.

Although it took many years, the government did in 1978 adopt "Uniform Guidelines on Employee Selection Procedures." 14/ The American Psychological Association found a high degree of consistency between the Guidelines and the standards of the psychological profession. 15/ The Guidelines provide substantial guidance on how an employer can obtain and administer tests and other selection procedures which meet the standards of Title VII

14/ 29 CFR 1607 et seq. The Guidelines were adopted in 1978 by the Departments of Justice, Labor and Treasury, and by the Equal Employment Opportunity Commission and the Civil Service Commission (now the Office of Personnel Management). See, 43 Fed. Reg. 38290 et seq. They have not been substantively amended since that time. See also, Questions and Answers, 44 Fed. Reg. 11.996, 45 Fed. Reg. 29,530.

15/ See 45 Fed. Reg. 29,530 (May 2, 1980).

and the standards of the profession; and they provide standards by which the federal agencies and the courts can assess the validation studies of the industrial psychologists.

The decision in Ward's Cove is not free from ambiguity, and legitimate differences in interpretation. Thus we cannot predict with certainty how crippling the decision will prove to be. Indeed, its ambiguity is one of the problems, because the decision unsettled many issues which had long been considered settled by the appellate courts and the practitioners. Two things are however reasonably clear. First, while the Supreme Court stated in Griggs, and repeated many times thereafter, that "The Congress placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question" 16/, the Court in Ward's Cove ruled that the burden was one of production, and was not one of persuasion. Thus, after all the evidence is in, the finder of fact (always a judge in the adverse impact cases even under H.R. 4000) must rule for the defendant if he or she finds that the evidence of job relatedness does not show whether or not the particular test or other selection practice is valid, even if the test is shown to have a discriminatory effect.

That is clearly a change in the law as it was understood and applied in the appellate and district courts. As Judge Posner of the Seventh Circuit, a distinguished judge and hardly a left winger, recently ruled, 17/

16/ Griggs, supra, 431 U.S. at 430.

17/ Allen v. Seidman, 881 F.2d 375, 377 (7th Cir. 1989).

> Before Ward's Cove it was generally believed that if the plaintiff in a Title VII case showed * * * that a criterion or practice * * * was disproportionately excluding members of a group protected by the statute, * * * the burden shifted to the employer to persuade the judge * * * that the criterion was necessary to the effective operation of the employer's business * * * Ward's Cove returns the burden of persuasion to the employee, while leaving the burden of production on the employer. and also dilutes the "necessity" in the business necessity defense * * *

The legislation now before this Committee, particularly Section 4, properly places the burden of persuasion on the employer and thus restores Title VII to understanding adopted in Griggs and followed by the Supreme Court and lower courts since that time. The employer should have the burden. It is, after all, the employer which chooses to use a particular test or other selection procedure or criterion. The employer can and should make that choice on the basis of what is good for his business enterprise. If the selection procedure or criterion has a discriminatory effect, the employer should insist that the test is in fact valid, that is that it is going to result in efficiency or safety in job performance. Under the present regulations interpreting Title VII, the employer is obliged to maintain data showing whether the procedures used in the employment process have a discriminatory impact, and how much. 18/ If the employer selects a test or other procedure which has a discriminatory impact, he or she should be prepared

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18/ Uniform Guidelines on Employee Selection Procedures, 29 CFR 1607.4(A), cited and relief upon by the Court in Ward's Cove, 109 S.Ct. 2115, 2125 (1989).

to defend it and demonstrate that it is valid. 19/ That is what Section 4 of H.R. 4000 does, and correctly so.

Secondly, as Judge Posner noted, the language of the majority opinion in Ward's Cove sharply dilutes the standard of what kind of evidence and proof sufficient to justify a test or other selection procedure which has a discriminatory effect. Chief Justice Burger, speaking for a unanimous Supreme Court in Griggs, ruled that the key term was "business necessity", and used almost interchangeably that term with the phrases "related to job performance", related to "measuring job capability", and "manifestly related to job performance." 20/

19/ 29 CFR 1607, Section 4.

20/ Griggs, 401 U.S. at 430-432:

> The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in practice. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. * * *
>
> We do not suggest either the District Court or the Court of Appeals erred in examining the employer's intent; but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds for minority groups and are unrelated to measuring job capability. * * *
>
> But Congress directed the thrust of the Act to the consequences of employment practices, not simply motivation. More than that, the Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.

Following Griggs, the Supreme Court, in the Albemarle Paper case, gave further definition to the Griggs standard by describing the burden placed upon the employer to justify a test which is discriminatory in effect:21/

> The message of these Guidelines is the same as that of Griggs--that discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be "predictive or significantly related with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated."

In short, the Court held that only those tests which are shown by professionally acceptable methods to be valid may be used by an employer, if the tests have a discriminatory effect.

In Dothard v. Rawlinson, the Court used a third formulation of the business necessity test in striking down the minimum height and weight standards which had a discriminatory effect on women in correction officer positions. There had been no validity study conducted to justify the height and weight standards in that case, and a ready alternative to those standards, namely physical performance tests, was available to further the interests that the employer advanced. In that case the Court ruled: 22/

> Thus for both private and public employers, "The touchstone is business necessity" Griggs, 401 U.S. at 431; a discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge.

21/ 422 U.S. at 431.

22/ 433 U.S. at 331-332, fn. 4.

Although the majority opinion of the Court retains the words "business necessity defense",[23/] it uses them in a novel way, and pours new and different meaning into them. The business necessity defense is described as the "legitimate business justification" defense. No longer is the issue described as whether the practice is necessary to safe and efficient job performance, or whether the test or other standard is valid or "manifestly related to job performance", but rather that [24/]

> the dispositive issue is whether the challenged practice serves in a significant way, the legitimate employment goals of the employer. * * * The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice. A mere insubstantial justification in this regard will not suffice, because such a low standard of proof would permit discrimination to be practices through the use of spurious, seemingly neutral employment practices. At the same time there is no requirement that the practice be deemed "essential" or "indispensable" to the employer's business to pass muster: this degree of scrutiny would be almost impossible for most employers to meet, and would result in a host of evils we have identified above.

Unless the Congress acts, the courts and counsel will be obliged to wrestle with what the Court meant by legitimate employment goals, or "a mere insubstantial justification," whether "necessary to the safe and efficient job performance" is still the standard even for minimum height and weight requirements, and whether an employer must even introduce evidence that a test is predictive of successful job performance

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23/ See, Ward's Cove, Opinion IIIB(2), 109 S.Ct. at 2126.

24/ 109 S.Ct. at 2125-2126.

to justify the use of a test which has a discriminatory impact; and whether the test validator must follow the standards of the profession in showing that a test is valid. The very holdings of Dothard and Albemarle are now open for further debate and litigation. More importantly, the advances made by and under Griggs, both in bringing down arbitrary barriers to equal employment opportunity, and in improving the selection processes of employers so as to improve the job performance and efficiency of employees, are threatened.

Let me discuss drafting and definitions. I would urge the committee to make one change in definition, and to consider another. First, I would add to the definition of "group of employment practices" (Sec. 3 (n)) the words "used in the selection of persons for a job of group of jobs" so as to make it clear that a group of employment practices is tied together only when the employer has tied them together for purposes of selection for a job or group of jobs. While the courts would be likely to reach the same result anyhow, there is no need for ambiguity, and no need to provide ammunition to those who see an intent to impose quotas under every bed and in every nook and cranny.

On the definition of business necessity, I agree that a definition of the standard is badly needed, if only to avoid the argument that necessity is the equivalent of reasonableness which I believe I heard former Solicitor General Fried make the other day. As I have already indicated, the standard used in Ward's

Cove, "whether the challenged practice serves in a significant way, the legitimate goals of the employer" is so vague as to be virtually useless. It is not tied either to the standards of a profession, as are the terms "job related" or "valid", both of which are intended to incorporate the standards of the psychological profession, or to any other discernable standard.

Similarly, the words "serve the employer's legitimate interest in 'efficient and trustworthy workmanship'" while taken from Albemarle, were used in that case to describe the employee's burden once the employer had shown "business necessity" or "manifest relationship to the job." It was never intended to be a substitute for the requirement that an employer show validity or job relatedness, and should not be used in that way.

I have noted that the Supreme Court has used the terms job related, manifestly job related, business necessity, and necessary to the safe and efficient job performance almost interchangeably, albeit in different contexts. Those terms can and do have different meanings. While I believe that the present definition of "required by business necessity" is a legitimate one, supported by Dothard, I do not believe that it is the only one that captures the essence of Griggs. There might be a better way to draft the definition. Thus, a study meeting the standards of the psychological profession, as set forth in the Uniform Guidelines should suffice. Compliance with the standards of the Uniform Guidelines (not a part of the Guidelines or the "spirit of the Guidelines") should be a defense to the use of a

test or other objective selection procedure, and presumably would be Albemarle and Griggs. Most objective employment practices should be subject to such scrutiny and to evidence which meets professional standards. However, there may be a few practices that do not lend themselves to formal validation studies. If so, the employer should be able to justify them only under a stringent standard like "manifestly related to successful job performance" or "necessary for the safe or efficient performance of the job."

If the Committee would like technical assistance, I would suggest to you that you have a wealth of talent in this room at this time. Mr. Powers and Mr. Lorber have great experience and expertise both in the government and as representatives of industry. I would suggest that they, perhaps with some colleagues, explore with committee staff and one or more representatives of the Leadership Conference, the possibility of agreeing on some improvement to the business necessity definition in H.R. 4000. I would be happy to participate if anyone thought it helpful.

If the Congress does not act to adopt Sections 3 and 4 of H.R. 4000, or some functional equivalent, the language and holding of the Court in Ward's Cove threaten to encourage the use of tests and other procedures which have a discriminatory impact and but in fact are not valid. Facial validity, that is, have the appearance of being job related, without proof of validity, may become the acceptable standard. Such tests and

other selection procedures and requirements, should they become widespread, would confirm the prejudices of those who believe that differences in race, national origin and sex are in fact related to successful job performance, and would result in a substantial resegregation of the work force. I urge you to adopt H.R. 4000, or some substantial equivalent which would restore the holding and spirit of Griggs.

I will be glad to respond to any questions.

Mr. EDWARDS. Thank you very much, Mr. Rose. We appreciate your offer to be of help in negotiations also. When my subcommittee authored the Fair Housing bill just a year or so ago, we had a lot of assistance from the National Association of Realtors and the National Association of Home Builders, all of whom were a part of the process and that is the way it should be.

Mr. Fawell.

Mr. FAWELL. Thank you, Mr. Chairman. I agree. I think the testimony each of you have offered has been very helpful to me. It appears to me, though, that the three of you—I'll start with what I think you all agree with, be positive.

I think I hear all of you as saying that the essentiality test, as set forth in this bill, you would all question and I think it is a very important part of the bill. Is that a fair summation?

Mr. POWERS. It is for me.

Mr. FAWELL. I know it is for Mr. Lorber.

Mr. ROSE. I think it is for my two colleagues. I would say I could certainly live with it, but I think we can do better, and I think the committee can do better, and I think probably you ought to do better because while you can fix a lot of it through legislative history, I think it is better off if the real definition is in the language of the bill.

Mr. FAWELL. Do you have——

Mr. LORBER. Congressman Fawell, just one point. I have to say I found it somewhat amusing to see that put in the bill. I'm unaware that the *Wards Cove* case changed anything.

Justice White restated the law. He restated the law in *Beazer*; he restated the law in *Griggs*, possibly as a throwaway that a practice does not have to be shown to be essential to pass legal mustard. What's happened is that that has been elevated to what's happened in the bill to when nothing in the decision dealt with that. Nothing in the decision changed the law. *Griggs* did not require essentiality.

The other one point I would make with respect to this and it is something that seems to have been lost in this, were Willie Griggs to file his lawsuit today, he, in my view, and I believe many attorneys, he would prevail in a lawsuit against the Duke Power Company.

The *Wards Cove* case did not take away Willie Griggs' rights to a job, did not allow the company to unilaterally and arbitrarily establish a high school diploma as a criteria. That has been lost in the rhetoric of what has been overturned and not overturned.

Mr. ROSE. May I just comment on that last comment, because I wish I could agree with Mr. Lorber, and I would certainly argue if there is no change in legislation that that is true. I have to tell you that I cannot tell from—and I have studied it a lot—I cannot tell from the *Wards Cove* decision whether an employer using a test is any longer obliged to meet the standards of the psychological profession and the uniformed guidelines.

The case law that has been coming down, and I have not read it all, but the case law that has been coming down seems to indicate quite clearly that at least some of the lower courts are answering that question "no," that you don't have to show validity, meeting the standards of the profession, meeting the standards of the uniformed guidelines.

If there were anything in *Wards Cove* that stated what Mr. Lorber just stated, I would feel a lot less urgent about the need for this bill, but there isn't, and I think the door is open wide, and talk about fees—Full Employment for Lawyers Act, let me tell you that interpretations of *Wards Cove* would create a industry at least for several years.

I think that one of the things that you need to do, that you ought to do, pardon me, is to address that and try to get some definition into the bill. We don't know where we stand and I have had a couple of judges tell me that flat out, and I have searched *Wards Cove* for some reassurance that you do need to have a validity study to justify a test, and I couldn't find it.

Mr. POWERS. I just would like to note that Dave may be the first plaintiff's counsel I have heard suggest that the court didn't spell out far enough what its views were in the *Wards Cove*. The fact is, much of what is being objected to was dicta, and it seems to be important for the court not to set forth all of the applications of this doctrine in any case, but to deal with it on a case by case basis, and it seems to me that is what the court continues to be ready to do.

I think that significantly serving legitimate employment goals, whether they be of safety, efficiency, productivity isn't appropriate standard and it is not just Justice White's standard, that's language used by Justice Stevens in the majority opinion in the Beazer case.

Mr. FAWELL. Yes. I would intend to agree with that point, too I am a bit surprised, Mr. Rose, that you have questioned that a plaintiff's attorney cannot certainly come in and take a part in an employment test, and I would think that that would be an obvious step in most cases where any employment test are there, you are going to get good expert testimony and find out, is that something I can take a part or not.

Are you saying that *Wards Cove* could be construed to mean that a plaintiff's attorney cannot as part of his prima facie case put that evidence in?

Mr. ROSE. No. I don't suggest that you couldn't challenge the test. What I am suggesting is the standard that the employer puts forth is no longer a clear standard.

There's nothing in *Wards Cove* that says that you have—in fact, there is language in *Wards Cove* that says you do not have to have a validity study for many practices, and it doesn't define which ones.

I agree with Tom Powers that the basic holdings here were essentially decked. I was so convinced of that that when I wrote my article that was published in June a few days before the decision, I assumed that they weren't going to reach either the burden of persuasion or the definition of business necessity. I was wrong, obviously.

Mr. FAWELL. Let me get—I've got two more questions. I'm not going to have the time perhaps. I think, Mr. Rose, your comment in regard to employment practices and to discover what in the world are we talking about.

Whenever Congress starts codifying, and we take the words, "employment practices," Mr. Powers, you indicated that that could include all kinds of plans, and I suppose any type of an employee

benefit plan can be deemed to be employment practices and, indeed, wage plans can be and thus we could have an issue in regard to an employable sales to have comparative—worse, analyst who don't adopt it, indeed, are producing a disparate impact in regard to an employment plan.

It would seem to me, Mr. Chairman, that that is something that we just can't let go here. We have got to decide, are we talking about employment plans which deal with hiring and dismissal and basic operation of the work place, or are we getting into other decisions. Indeed, a plant closing could be deemed to be an employment plan, I suppose.

We could have all kinds of—Pandora's box could be open, so I would suggest that in the Judiciary and in the Education and Labor Committee, we have got to give some kind of guidance, I think, to the courts as to what in the world are we talking about here.

Would you agree?

Mr. LORBER. I couldn't agree more. I think that it's not really imagining things that could not be brought. There are prior cases. It's not just compensation and pay practices. It's also not just test and educational criteria. Decision to move to the suburbs is one that may well have a disparate impact.

Use of a drug abuse program may well have a disparate impact. I think there's a real question——

Mr. FAWELL. Stock option plans. You could go the full gamut, I suppose. If I could take one more question—I know I am over my five-minute period, but none of you addressed the question that we're doing—the words "monkeying around with five Supreme court cases"—that's not the right nomenclature, I am sure, but we certainly are repealing five Supreme court cases which I have mentioned many times as a tremendous never before undertaking of Congress.

That is tough enough as it is, but we also are, I think we all would agree, making significant alteration of Title VII by turning it into what some had said are, and I think it is true, the potential of multi-million dollar lawsuits.

No longer are we going to have just back pay, and having equitable powers of injunction, and one having the right to get his job back. Now, we're altering it significantly. What are your respective views? Do you think that that is wise for Congress to do so, and/or is it wise in regard to this specific area? Looking at these five Supreme court cases, is it wise for us to make that kind of a leap also in this bill?

Mr. LORBER. Congressman, the employer's certainly—I think that type of a decision is absolutely unwise and is based on no equitable or logical reasoning. Employers, those whom I'm representing today, are not afraid of multi-million or even six-figure lawsuit or judgments.

That may happen occasionally. It will happen after protracted litigation. If that happens, employers could live with it. What employers are deeply concerned about is the fact that what this bill does in its totality would change the scope of Title VII from a bill encouraging conciliation and rapid resolution of issues so that employees could get back to work. They spend their time on the job

and not in the court, and, instead, we are going to be putting into the Federal court system thousands, tens of thousands of new cases because a plaintiff's lawyer is certainly not going to settle for reinstatement in their job, and perhaps six months back pay because that plaintiff's lawyer is not going to get any money out of it.

The plaintiff will get a job, but the lawyer won't get any money out of it. So, I think that is in terms of what this bill does of essentially gutting and eviscerating any purpose for the EEOC because there is no reason to conciliate a case.

No lawyer is going to agree to punitive damages. No lawyer is going to agree frankly to compensatory damages without a hearing. So, I think to take all of that and to put all of these practices further before a jury, I would just beg the indulgence in an example I gave in the Senate just a while go which pertains to selection.

You could posit a situation where an individual scored slightly higher on a selection test was rated better by a reviewing panel, yet was not chosen for promotion because the employer wanted someone else who was a different race or sex, and where the employer's records indicated clearly that management wanted the choice to be made on the grounds of race or sex.

This bill, Title V of the bill, the jury section, part of the bill, compensatory and punitive damages, would clearly state that since race or sex was a motivating factor, Title VII would prohibit such consideration and, therefore, the employer would lose.

The case I'm talking about was Johnson v. Santa Clara County Transportation Department, and were this bill to become law, Paul Johnson, the white male plaintiff, would have prevailed in a court, would have prevailed before a jury; Diane Joyce, the female would not have gotten the job, and the Santa Clara County Transportation Department would remain 100 percent male.

I don't think that's the result that this Congress should endorse and putting in compensatory damages, putting in punitive damages, putting in jury trials, raising the whole spectra, as I call it, a national employment lottery so that somebody could get the six numbers and achieve their seven million dollars and go home while thousands and hundreds of thousands of people sit and wait at the courthouse door when the speedy justice provisions take place, and the drug trials take precedence and the lengthy class action, anti-trust cases tie up the courts, and all of that while somebody's waiting to get before a Federal judge to say, "Should I become a first-line supervisor?"

I think that's an inappropriate and unfortunate route that this Congress would take if this bill were passed.

Mr. ROSE. Let me just say, Mr. Congressman, I'm not sure of the wisdom of coupling that feature with the other features of the bill. There is a strong element of unfairness in the present law and, that is, that purposeful discrimination is actionable under 1981 if the discrimination is on ground of race or national origin and it is not for grounds of sex discrimination.

The areas of discrimination where the problem lies are in sexual harassment and racial harassment, and lesser extent, national origin harassment, where the injury—where's there no relationship whatsoever between the injury that the employee or applicant suffers and the back pay.

There may not even be loss of back pay; they may sometimes. Those are the cases that there ought to be some provision for some kind of damage or something other than back pay in my judgment. I think that's important.

I have given you my order of priorities. My order of priority is the most important thing you can do is to change *Wards Cove* and to do it right away. Most of the other cases, I agree, ought to be—the results ought to be changed to the other four.

In terms of my order of priorities, and I have been working under Title VII since 1967, my view is that decision—and the greatest need is for change in that decision. I would think that it is terribly important to change all of them, and I would not put the damages issue on the same order of priority.

Although I do support, I think that a notion of that kind where you can get damages for purposeful discrimination, particularly where there's been harassment or something other than the loss of a job is important.

I agree with Mr. Lorber that it doesn't make a lot of sense to require that those things be filed with Equal Employment Opportunity Commission. That's not really what the Commission was set up for, and it may be that you ought to be able to go right to court with those.

I think that's a separate matter though from *Wards Cove* and these other decisions.

Mr. POWERS. I would agree with Dave Rose that I think if one looks under Title VII there is not an adequate remedy for harassment, whether it is race harassment or sex harassment. I do believe though that extending compensatory and punitive damages under Title VII and providing jury trials would seriously conflict with what I understand to be the purpose of that statute to encourage conciliation and prompt remedying.

I think part of the problem here is that after Title VII was passed, at a time when we all thought there was no existing Federal remedy, suddenly the courts gave new life to 1981. I don't think that it's appropriate to have remedies for race discrimination that are not applicable to sex discrimination and religious discrimination.

It seems to me that it may be time to rationalize the employment discrimination laws, and I would include the Age Discrimination Act which does have a provision for liquidated damages and willful discrimination, but it seems to me compensatory and punitive damages is the wrong way to go.

Mr. FAWELL. Well, I thank you very much. Your testimony has been helpful. I, too, had the dilemma of looking at 1981 and realizing that we are giving compensatory and punitive damages insofar as racial discrimination is concerned and then you look at Title VII, that is not the case, and yet, as an attorney and one who has practiced law for more than 25 years, I will without any question in my mind tell you there will be an "explosion" of lawsuits and an awful lot of money will go to lawyers.

They will get their one-third cut, no matter what, and maybe more on contingent fees. If that kind of money is going to be raised, it ought to be, for instance, put back in the intercity or things like that, maybe a good amendment that would restrict legal

fees to something much more reasonable and take a portion of those obviously exorbitant recoveries that are going to occur and use them back in the intercities to really help young at-risk people who never will get employment with legislation like this. Perhaps that might be a good idea.

Thank you, Mr. Chairman, for your indulgence.

Mr. EDWARDS. Thank you, Mr. Fawell. I just have one question. Mr. Rose, during your nearly 20 years as the chief employment officer in your job for the Federal Government, what definition of business necessity did you use most often?

Mr. ROSE. The Uniform Guidelines were adopted in 1978. We used those after that, Your Honor. The Uniform Guidelines, say essentially showing job relatedness by the standards of the profession, and then we used the catch-all phrase when there was some good reason not to have a study, otherwise justified by business necessity.

So, I agree with Congressman Campbell that business necessity is sufficient to pick up the relatively few kinds of practices where you can only do things subjectively, but unfortunately, the courts changed that.

I think the standards of the Guidelines were basically accepted; *Griggs* was accepted by industry, as Mr. Lorber stated; the Uniform Guidelines were essentially accepted by industry in 1978 and 1980 and they are still in place.

I think if you satisfied the Guidelines, you've probably done the job, but if you wanted to do it a little bit more explicitly, I think there is some further work that could be done, but I don't think we can any longer just say "business necessity" without something that disclaims the new wine that's been poured into that bottle in the *Wards Cove* case because I don't think the *Wards Cove*——

Mr. EDWARDS. What do the Uniform Guidelines say? Do they define business necessity?

Mr. ROSE. They do not, Your Honor, because most of them are for the kinds of—the bulk of what they are trying to do was to say, "What do you need to do to validate a test or objective standard?"

So we do need some further definition, I believe.

Mr. EDWARDS. Do you think, Mr. Rose, under this bill that a plaintiff could make a prima facie case just by showing an overall racial imbalance?

Mr. ROSE. No. As I understand the bill, you'd have to show that there was a disparity in selection for a particular job or groups of jobs. I don't think the bottom line, so-called bottom line, disparities would be sufficient certainly if the employer kept the kinds of records that he is now obliged to do under Title VII.

Mr. EDWARDS. Well, thank you very much. You've been very helpful and we're——

Mr. FAWELL. Mr. Chairman, could I just ask one question? The point that I tried to bring out to Mr. Curtin, who was testifying this morning, on page four when it refers to the proof necessary to establish an unlawful employment practice as being established, it does refer to the complaining party demonstrating, and that is to say, proving that a group of employment practices result in because of relationship causes, a disparate impact on basis of race or color, et cetera.

Then, however, under subsection "I," it makes it very clear, though, that the plaintiff does not have to prove, "shall not be required to prove which specific practice or practices within the group."

In other words, he doesn't have to prove the parts of the whole. Theoretically, he must prove the whole. That would say to me that basically, the courts are going to say, "Well, Congress has made it clear he doesn't have to prove a cause of relationship between the suspected employment practice and the disparate impact."

Therefore, he can rest with his statistical evidence, and, therefore, he can rest with his quotas. Now, nevertheless, I would say that with the shifting of burdens, if the employer doesn't have to show it's absolutely essential, which under this bill it says it should be liberally construed to bring about the effect of eliminating discrimination, I think you'd get the strict construction of essential.

I could still have hope. As it is worded right now, it seems to me a prima facie case can be done based on subsection "I" with merely statistics.

Mr. ROSE. I think the prima facie case can be, but the—two things. The employer is required by the regulations, the EEOC, to maintain evidence as to what impact the selection procedures the employer is using has on his employment.

If he does—I use the word "he"—if the employer does that, then this is not a problem, because then you can see the people who apply and you can see what happens to the applications by race, sex, and national origin.

Two kinds of problems are addressed by this bill. One is, and the law already is, that if the employer does not maintain that kind of record, and there's no other kind of record available, the Supreme Court said in *Teamsters* that you can look at the relevant labor market and see if there's a significant disparity between the relevant labor market for a particular job and the employer's work force in that job or group of jobs.

So, I don't think you would normally use the overall statistics. I agree that if the employer hasn't done what he should be doing, which is to maintain the records, then you may be obliged to, but that is what the law is now under *Teamsters* and the other cases and there is nothing in this bill that shifts that, except for *Wards Cove* which talks about a causal of relationship.

Normally, if the records are there—and you can get them—proving the cause of relationship is not nearly as important as who has the burden or the definition of business justification.

Mr. FAWELL. I would be interested in the reaction of the other two gentlemen also, but it does seem to me, though, to say that a prima facie case, as long as you can show the racial imbalance, you don't have to prove the cause of relation.

You don't have to prove and there could be all——

Mr. ROSE. The court has said that——

Mr. FAWELL. I mean, this is what the bill says.

Mr. ROSE. Yes, I know. The court has set it in cases of purposeful discrimination. The *Teamster* case, which was a case that came out of our section, was a case of purposeful discrimination. The *Hazelwood* case was a case of purposeful discrimination, and what they said in each of those was, if you have a disparity between the rele-

vant labor market, and that includes qualified, between the relevant labor market and the employer's work force and its gross disparity, then you can draw an inference of purposeful discrimination.

Now, what *Wards Cove* did was to change that with respect to adverse impact or discriminatory impact, discrimination, and because the employer is the one who makes the decisions, the employer can tie all those things together and make it one ball of wax so that the employer doesn't even know which of the various practices has the impact because frequently they combine things and leave it to the final selection decision before you know and then you never know why.

Mr. FAWELL. Mr. Lorber or Mr. Powers?

Mr. LORBER. I don't necessarily agree. First of all, *Wards Cove* and *Watson*—we are really talking about two Supreme Court cases—that was subjective practices.

The cases Mr. Rose pointed out in *Hazelwood*, the question was, Who should be a school teacher in St. Louis? One job. In *Teamsters*, who should be holding over-the-road truck driver? One job. In *Wards Cove*, we had so-called at-issue jobs which were every job that the canneries employed other than the people who actually butchered the fish, and an individual wanted one of those jobs. He didn't specify what job he wanted, and this legislation in its definition talks about the total employment process.

It seems to me that one could logically take a congressional action overturning a decision in which an individual wanted any other job but the job he had, and said he couldn't get any other job because of his national origin—he was Filipino—looked to a decision overturning that legislation, looked to the definition talking about total employment process and say that that Congress obviously intended an employer to be judged totally on its total employment process regardless of the job and regardless of the qualifications of an individual for any specific job because his qualifications differ even amongst skilled jobs, and in numbers of people available differ even amongst skilled jobs.

So, I don't think it is fair to say that in a context of what we are talking about of what the Congress is doing in reference to the case it is overturning, that we could simply blithely say this does not require quotas.

If you look to the facts of *Wards Cove*, if we're overturning that, we are going to say that a minority has the right to any job, any skilled job regardless of which one it is because the total totality of the employers practices do not result or result in an employment process which doesn't measure up.

I think that you have to look at the specifics of what the Congress is dealing with and say that. The other point again, it has to be understood we are talking about subjective practices. I don't believe any of the employers I represent would willingly want to have an industrial psychologist standing beside every supervisor when that supervisor is filling out a performance appraisal to make sure that the conditions that the appraisal is being out comports with some psychologist's notion of fairness. The lighting is acceptable, the supervisor is not tired, and all of these things that the industrial psychologist talk about.

The APA, the psychologist have a role, a very valid role in test validation. We're talking about every other employment practice, almost every practice other than test, and once we get into that, I think reference to the standards of the profession would create an enormous burden for employers that employers simply would be unable to meet.

Mr. EDWARDS. I believe we have to wrap up the hearing this morning. Mr. Fawell, if you have any other questions, I'm sure the gentlemen, the witnesses would be happy to respond in writing. Would that be agreeable with the witnesses.

Mr. POWERS. Yes.

Mr. ROSE. Yes, sir.

Mr. EDWARDS. Well, thank you very much. You've been very patient; you have been very helpful, and that winds it up for today.

[Whereupon, at 1:45 p.m., the joint committee was adjourned.]

[Additional material submitted for the record follows.]

JAMES K. COOK
CHARLES A. WERNER
CHRISTOPHER T. HEXTER
MARILYN S. TEITELBAUM
JAMES I. SINGER
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ARTHUR H. NISSENBAUM
Of Counsel

April 20, 1990

Congressman Augustus F. Hawkins
2371 Rayburn House Office Building
U. S. House of Representatives
Washington D.C. 20515

Dear Congressman Hawkins:

We are writing in reference to R. Lawrence Ashe's letter to you dated April 2, 1990 regarding the Kennedy-Hawkins bill. We feel compelled to respond. Although Mr. Ashe states that his position in opposition to the Kennedy-Hawkins bill is a personal one, his letter appears on ABA stationery and refers to his position as Management Co-Chair of this Committee. We are the Union Co-Chair, Lisa Van Amburg, and the Public Co-Chair, Barry Goldstein.

It is inaccurate to say that the matter of the Kennedy-Hawkins bill has not been addressed by the EEO Committee. At our recent Mid-Winter meeting in Pebble Beach, California, March 14 through 17, a subcommittee consisting of ourselves, Mr. Ashe's designates, Paul Grossman and Mark Dichter, and others discussed whether our committee should take a position on the Kennedy-Hawkins bill after the ABA House of Delegates had already voted to support it. In view of the ABA House of Delegate's vote, the subcommittee felt it would be inappropriate to take any position.

We do not believe, as Mr. Ashe's letter suggests, that the issue of the Kennedy-Hawkins bill was "rushed through" the ABA House of Delegates. It is our understanding that the ABA rules and regulations were followed including the distribution of the proposed endorsement of the Kennedy-Hawkins bill to the Chairman of Labor and Employment Section of the ABA prior to the consideraton and vote on the endorsement.

It is certainly correct, as Mr. Ashe states, that the views of the members of the Committee on Equal Employment Opportunity are varied. Without full discussion and formal action, we feel it

is inappropriate for the Co-Chairs to speak "personally" on offical ABA stationery regarding their views on the legislation. Therefore, we decline to do so.

Of course, a Co-Chair may present his or her personal opinion without any connections to the Committee. In fact, the Public Co-Chair, Barry Goldstein, testified on March 1, 1990, before the Senate Labor and Human Resources Committee in support of the bill. During the testimony he did not even mention his position as Co-Chair. Coincidentally, he testified on a panel that included Mr. Chauvin, the President of the American Bar Association. In a manner consistent with the position taken by the ABA, Mr. Chauvin testified forcefully in support of the bill.

We would like for the record to show, however, that the EEO Committee leadership made a conscious decision not to comment on the legislation which the ABA House of Delegates had already supported. Moreover, the Union and the Public Co-Chairs did not know about and do not approve of the sending of the letter by Mr. Ashe.

Lastly, we would add, since Mr. Ashe has given his personal opinion about the views of members of the Committee, that, in our view, many members support the bill in whole or in part. It is not surprising that those members who represent companies, like Mr. Ashe, are less likely to support the bill than those members, like us, who represent employees and unions.

Thank you for including this letter in the record.

Sincerely yours,

Lisa S. Van Amburg, Esq.
Union Co-Chair

Barry Goldstein, Esq.
Public Co-Chair
Law Offices of
Saperstein, Seligman & Mayeda
505 Fourteenth Street, Ste 1150
Oakland, CA 94612

EEO Committee
Section on Labor and Employment
American Bar Association

LSV:alb

cc: R. Lawrence Ashe, Jr. -- Management Co-Chair
L. Stanley Chauvin, Jr. -- President
John J. Curtin, Jr. -- President-Elect
ABA

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WRITER'S DIRECT DIAL NUMBER
404/527-8201

April 24, 1990

Congressman Augustus F. Hawkins
2371 Rayburn House Office Building
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Hawkins:

I wrote to you concerning the "Kennedy-Hawkins bill" on April 2, 1990, while I was in a three-week jury trial in federal court in Bridgeport, Connecticut. Due to the deadline for closing the record in Congress, the letter in final form was signed for me in my absence by an Atlanta colleague acting with my permission. However, contrary to my intent and express instructions (of which the colleague was unaware), the letter was inappropriately transmitted to you on ABA stationery rather than that of my law firm or my personal stationery. I am quite embarrassed and chagrinned by this error. I assume full responsibility for it and apologize profusely for the mistake. Please correct the record to reflect the fact that the letter should not be deemed to have been written on ABA stationery. As I stressed in the content of the letter, the views expressed in it are solely personal to me and not that of any other individual or organization, especially the ABA or any of its sections or committees.

I profoundly regret any confusion or embarrassment that the referenced error may have caused to others, particularly those in leadership positions in the ABA.

For the record, while the large majority of my practice involves representation of employers, I do represent plaintiffs in civil rights matters on a regular basis and have always done so. Nothing in this letter should be regarded as a change in the solely personal views which I expressed to you on April 2, 1990.

Please call if you have any questions.

Sincerely yours,

R. Lawrence Ashe, Jr.

RLA:tmf
04-23-32.ltr

cc: L. Stanley Chauvin, Jr., Esq.
John L. Curtin, Jr., Esq.
Herbert L. Segal, Esq.
Robert K. McCalla, Esq.
Lisa S. VanAmburg, Esq.
Barry L. Goldstein, Esq.
Ms. Susan Valentine

AMERICAN BAR ASSOCIATION Section of Labor and Employment Law

R. Lawrence Ashe, Jr.
42nd Floor
Georgia-Pacific Center
133 Peachtree Street, N.E.
Atlanta, Georgia 30303

April 2, 1990

Congressman William F. Goodling
2263 Rayburn House Office Building
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Goodling:

The Equal Employment Opportunity ("EEO") Committee of the ABA's Labor and Employment Law Section has been in existence since the early 1970's. It is the ABA Committee with primary responsibility for liaison with the EEOC, the Civil Rights Divisions of the Justice Department and the U.S. Labor Department's OFCCP. It is and has been the ABA Committee with original jurisdiction over Title VII of the Civil Rights Act of 1964, as well as all other employment discrimination legislation. The Committee is thoroughly tripartite, with representatives of Management, Labor and the Plaintiffs' bar. It has over 600 members from across the country, a majority of whom represent employers of all sizes.

At no time has the Civil Rights Act of 1990 (the "Kennedy-Hawkins Bill") been brought before the EEO Committee by the ABA. I was shocked to learn that the ABA had purported to take a position at its Mid-Winter meeting on this important legislation without review or comment by this Committee. It is my personal belief that many of this Committee's members are opposed to the Kennedy-Hawkins Bill in its present form and without major modifications. Further, I am confident that this fact was well-known to those who rushed through the highly controversial ABA resolution and thus avoided notice, opportunity to comment and a vote to this Committee.

In summary, it is my opinion that the ABA's purported endorsement of the Kennedy-Hawkins Bill does not represent the majority view of the EEO Committee, which I believe is the most logical and appropriate ABA Committee to have considered it. Its members are available for comment, testimony or other technical assistance. Their views are varied.

Please contact me if you have any questions. The views expressed above are my own. They do not reflect a position of the ABA or the EEO Committee.

My biographical data is enclosed.

I would appreciate your inclusion of this letter in the hearing record concerning the Civil Rights Act of 1990.

With best wishes, I am

Respectfully yours,

R. Lawrence Ashe, Jr.

RLA:tmf
Enclosure
03-24-03.ltr

cc: Lisa S. VanAmburg, Esq., Union Co-Chair
Barry L. Goldstein, Esq., Public Co-Chair

March 27, 1990

Honorable Edward M. Kennedy
Chairman
Committee on Labor and Human Resources
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Honorable Augustus F. Hawkins
Chairman
Committee on Education and Labor
2181 Rayburn House Ofc. Bldg.
Washington, DC 20515

Dear Mr. Chairman:

This paper is written to deal with a single section problem in the Civil Rights Act of 1990, now before your Committee. Specifically, we are recommending most strongly that a change be made in the 1990 Section 3(o) language which now defines "business necessity" in a fashion which requires proof that selection procedures with adverse impact are essential to job performance, rather than related to it or to the content of the job. The paper does not endorse or reject any other part of the Act or the Griggs opinion which it references. It deals only with that which is of legitimate professional concern; i.e., ensuring that business necessity is defined in a professionally acceptable and feasible manner. Despite whatever assurances to the contrary you may have received, we must advise you that the present Section 3(o) definition does not meet that requirement.

With its unanimous 1971 Griggs V. Duke Power Company opinion, the Supreme Court added a legal requirement in civil rights terms to the more all-encompassing urgings of the psychological profession that selection and promotion procedures should be demonstrably job-related. The specific language used by the Griggs Court that--"If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited"--was clearly consistent with professional standards for showing job-relatedness (See also Griggs Footnote 9). Further, leaving nothing to possible interpretive abuse, the Griggs court also endorsed the then-existing EEOC guidelines and added the following admonition which was consistent with the legislative history and purpose of the 1964 Civil Rights Act and, most importantly, with professional standards and practice:

> "Nothing in the Act precludes the use of testing or measurement procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are a reasonable measure of job performance (emphasis added). Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant."

In the years which have followed, the Griggs language, with a frequency far exceeding that of any other opinion, has become the cornerstone of civil rights case law involving selection and promotion disputes. As described in Mr. David Rose's testimony before the House Labor and Education Committee on February 27, there were 618 Griggs citations by appellate courts and 49 by the Supreme Court during the 1972 through 1985 period. It also must be noted that the 1978 federal Uniform Guidelines on Employee Selection Procedures were designed to be consistent with the Griggs standards and the Guidelines in turn, with some technical exceptions, have been found by the psychological profession to be acceptable in terms of the profession's published Standards, as well as its practice. In short, the Griggs requirements have been clear, workable, and professionally consistent, while at the same time permitting the improvement of workforce quality and the recognition of individual merit, so long as the procedures used to do so could be shown to be job-related in ways consistent with law and professional standards.

It is in light of this long-standing professional and legal background that we have prepared this paper. Without meaning to endorse or object to any other portions of the Civil Rights Act of 1990, we wish to convey a deep professional concern, indeed belief, that Section 3(o) of that Act, despite being represented as restoring Griggs requirements, in fact eviscerates them in terms of what constitutes adequate job-relatedness proof, if such proof ultimately is required. The language of Section 3(o) "The term 'required for business necessity' means essential to effective job performance" is nowhere to be found in Griggs. Additionally, any claim that the word "essential" is consistent with Griggs is simply not supportable, particularly with reference to subsequent cases which interpreted it. It also must be understood that while the behavioral measurement science has acceptable and clear standards for the showing of job-relatedness as required by Griggs, it has none for showing essentiality. That being the case, one must ask what will be deemed "essential", and without scientific anchors, by whom and how? Will a one or two percent reduction in turnover or improvement in workforce quality be "enough" or will it have to be 10 or 20? Will "essential" have a different meaning if adverse impact is greater or if international competition is greater? How can the professional practitioner assure the organization which has conducted the time-consuming and expensive research necessary to show job-relatedness for its procedures that the showing also will meet an "essential" standard, whatever that may be by whomever defines it?

To summarize, the law, coupled with the Griggs opinion and the federal Uniform Guidelines, has given employers the right to hire and promote on the basis of relative qualifications, so long as any offending procedures in impact terms could be shown to be job-related using professionally acceptable procedures. If it is truly desired that Griggs be restored, then one must ask why Griggs language is not being used to do so. The purported restoration language certainly does not restore Griggs; it instead replaces it by creating a technically infeasible, subjective standard which the psychological profession and employers cannot meet or even define in advance. By thus depriving employers of the means by which they can define job-related systems designed to hire and promote on the basis of relative qualifications, it creates a litigation avoidance incentive to replace systems which recognize the value of relative merit with those which do not. It therefore demeans merit and encourages the hiring of the minimally qualified so as to avoid expensive and can't win inquiry. We do completely agree that the Griggs

language on what constitutes adequate proof of job-relatedness, if such is required, should be restored, but if it is truly desired to restore it in a fashion which will not mislead or confuse, then we would suggest that the following be the means by which it is done.

Section 3

(o) The term "required for business necessity" means (1) shown to be predictive of or significantly correlated with important elements of work behavior comprising or relevant to the job or job family for which the procedures are in use, or (2) representative of the content of one or more important components of the job. Nothing in this Act is intended or designed to prohibit or restrict the hiring or promotion of persons on the basis of relative qualifications. It is intended, however, to require that practices which operate to exclude any individual on the basis of race, religion, nationality or sex must be shown to be job-related as described above.

Finally, you should know that all of those who have added their signature to and approved this position paper, its discussion and its recommendation have achieved the rank of Fellow in the American Psychological Association. Additionally, 15 of the signers have served as President of the Association's Division 14, now known as the Society for Industrial and Organizational Psychology.

Thank you

Lewis E. Albright
Oregon

Anne Anastasi
New York

Scarvia B. Anderson
Georgia

Brent Baxter
North Carolina

Douglas W. Bray
New Jersey

William C. Byham
Pennsylvania

Joel T. Campbell
New Jersey

Wayne F. Cascio
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Kenneth E. Clark
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Orlo L. Crissey
Michigan

James L. Farr
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John C. Flanagan
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Edwin A. Fleishman
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Albert S. Glickman
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Arthur C. MacKinney
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Ross Stagner
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George C. Thornton
Colorado

J. E. Uhlaner
California

Congress of the United States
Washington, DC 20515

March 6, 1990

Chairman Evan J. Kemp, Jr.
Equal Employment Opportunity Commission
1801 L Street, N.W.
Washington, D.C. 20507

Dear Chairman Kemp:

As you know, the Committee on Education and Labor and the Committee on the Judiciary, Subcommittee on Civil and Constitutional Rights, are conducting hearings on H.R. 4000: The Civil Rights Act of 1990. The bill responds to the decisions of the Supreme Court in *Wards Cove Packing Co. v. Atonio*; *Martin v. Wilks*; *Price Waterhouse v. Hopkins*; *Patterson v. Mclean Credit Union* and *Lorance v. AT&T*. The bill also responds to the long-standing need to strengthen civil rights remedies, provide reimbursement for expert witness fees, provide interest on back pay awards in federal employee discrimination claims, and extend the period for filing discrimination charges.

On behalf of the Committees we request copies of the following documents:

(1) all inter and intra-office memoranda, reports, assessments, opinions, policy guidance, statements, letters concerning the above cited decisions of the Supreme Court and issues addressed by other sections of the proposed bill;

(2) all briefs and memoranda of law filed in district and appellate courts concerning the application of the above-cited decisions of the Supreme Court;

(3) a list of all charges alleging discrimination pursuant to or arising from a court order, consent decrees, or voluntary affirmative action plan, together with the date the

charge was filed, the basis of the alleged discrimination (race, gender), the status of charge and whether the Commission's handling of the charge has been affected by the Supreme Court decision in *Martin v. Wilks*;

(4) drafts, proposed or revised instructional material or manuals initiated in response to the above-cited decisions;

(5) speeches by Commissioners or staff at a policy-making level concerning the above-cited cases and issues addressed by other sections of the proposed bill.

This request should be construed broadly to include cases involving private litigants, the Commission, and the Department of Justice and drafts as well as final work product.

Should you have any questions or need additional information, please do not hesitate to contact Reggie Govan (225-3388) or Stuart Ishimaru (226-7680).

Thank you in advance for your prompt attention to these matters.

Sincerely,

Augustus F. Hawkins
Chair, Education & Labor Committee

Don Edwards
Chair, Subcommittee on Civil & Constitutional Rights, Committee on the Judiciary

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

June 1, 1990

The Honorable Augustus F. Hawkins
Chairman
Committee on Education and Labor
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

You have asked that the Commission release three privileged documents for the Committee's publication as part of the Committee Report record on the Civil Rights Act of 1990. If this letter is made part of that same record and the condition stated in the next paragraph is met, the Commission waives its privileges concerning each of these three documents.

The first document requested is a memo prepared by the Office of Legal Counsel analyzing H.R. 4000. You have not requested publication of a contemporaneous analysis of the bill prepared by the Office of General Counsel. Because these memos were the views of advisors to the Commission rather than official views of the Commission, and because the publication of only one of these documents will distort the record, the Commission waives its privileges only if both memoranda are published together in the Committee's record.

The second document is an Office of General Counsel analysis of the Supreme Court's 1989 employment discrimination opinions prepared shortly after the end of the Court's term. This analysis is not official Commission policy, but rather the early views of General Counsel Shanor concerning possible ramifications of the cases upon the Commission's litigation. For your information, I am also enclosing a copy of an article coauthored by Mr. Shanor and Mr. Marcosson several months later at 6 The Labor Lawyer 145 (1990), which refines and reorganizes Mr. Shanor's analysis of these cases.

The third document is a memorandum from the St. Louis Regional Attorney responding to the General Counsel's inquiry to each of 23 regional attorneys for their analyses of all Commission cases arguably affected by the Wards Cove and Betts decisions. This memorandum concerns only two cases from a docket of over 700 Commission cases then active, and both cases have been resolved since the memorandum was written. Since the Commission does not believe any harm to the Commission's litigation can come from its publication at this time, the Commission waives its privileges concerning this memorandum.

The Commission waives no privilege concerning the confidentiality of any document other than those specifically discussed in this letter.

Sincerely,

James C. Lafferty
Acting Director of Communications
and Legislative Affairs

Attachment

PR

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

CONFIDENTIAL ATTORNEY-CLIENT
COMMUNICATION

TO : Evan J. Kemp, Jr.
Chairman

R. Gaull Silberman
Vice Chairman

Joy Cherian
Commissioner

Tony E. Gallegos
Commissioner

FROM : Richard D. Komer
Legal Counsel

SUBJECT : Office of Legal Counsel Comments on the Civil Rights Act of 1990 (H.R. 4000)

This office has reviewed the above-referenced bill and offers the following summary and analysis. Because of the time constraints under which this analysis was prepared, the comments below represent our initial impressions of and thoughts on the background and impact of the bill. We would be happy to provide any additional assistance we can should you have comments or further questions about specific provisions.

SECTIONS 1-3: SHORT TITLE; FINDINGS AND PURPOSES; DEFINITIONS

A) Sections 1 and 2 of the bill simply set forth the title of the act and a statement of findings and purposes. They are self-explanatory.

B) Section 3 amends § 701 of Title VII to include a few new definitions. Those too are generally self-explanatory but, where significant, will be discussed in the context of the more substantive sections in which the terms arise.

SECTION 4: RESTORING THE BURDEN OF PROOF IN DISPARATE IMPACT CASES

Summary

A) This section amends Section 703 of Title VII, 42 U.S.C. § 2000e-2, by adding a new subsection (k), which provides that:

1) Title VII is violated when plaintiff "demonstrates" [1] that an employment practice or group [2] of practices results in a disparate impact and the respondent fails to demonstrate that the practice is required by "business necessity" (i.e., is "essential to effective job performance").

2) When a group of practices is challenged, the plaintiff does not have to demonstrate which specific practice results in the disparate impact.

3) If respondent demonstrates that one of the group of employment practices does not contribute to the disparate impact, respondent does not have to demonstrate the business necessity of that particular practice.

4) Business necessity may only be used as a defense against a claim under this subsection.

B) Purpose is to overrule parts of the decision in Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989), which held that:

1) Appropriate statistical comparison to make out a prima facie case of disparate impact is between racial make-up of work force in at-issue jobs and make-up of qualified labor pool for those jobs, citing Hazelwood School District v. United States, 433 U.S. 299 (1977).

2) Prima facie case includes showing by plaintiff of a causal connection between each challenged employment practice and the disparity complained of

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[1] "Demonstrates" is defined in Section 3 as "meets the burdens of production and persuasion."

[2] "Group of employment practices" means "a combination of employment practices or an overall employment process." (Section 3.)

(plaintiff cannot simply rely on a "bottom-line" disparity of a hiring process).

3) Employer bears no burden of proof: only bears burden of producing evidence that challenged practice serves a legitimate employment goal in a significant way.

4) Even if practice serves a legitimate goal, plaintiff can prevail by demonstrating availability of alternative practices that serve the employer's goal equally effectively in light of costs and other considerations.

Comments

A) Bill leaves intact holding concerning appropriate comparators and statistical proof. Law as articulated in Hazelwood and progeny can be relied upon with or without the legislation.

B) Bill abolishes requirement that plaintiff demonstrate causal connection between each challenged employment practice and the perceived disparity. Sufficient for plaintiff to show that group of practices results in the disparity.

1) Amendment is consistent with position taken by EEOC and a number of federal courts in the years following Griggs. See, e.g., Griffin v. Carlin, 755 F.2d 1516, 36 EPD ¶ 35,132 (11th Cir. 1985) (relying on Gilbert v. City of Little Rock, 722 F.2d 1390 (8th Cir. 1983), court held adverse impact analysis applicable to multi-component selection process, including its subjective elements); Segar v. Smith, 738 F.2d 1249, 1271, 3 EPD ¶ 34,488 (D.C. Cir. 1984) (employer in best position to know how its practices affect employees, thus employer should have to identify those practices with adverse effect; Title VII's objective of removing barriers to employment is ill-served by requiring plaintiffs to "pinpoint at the outset the employment practices that cause an observed disparity...."). [3] Position takes into

[3] See also Gilbert v. City of Little Rock, 722 F.2d 1390, 1396, 32 EPD ¶ 33,954 (8th Cir. 1983) (court reversed lower court's finding of no adverse impact in any of subparts of promotional process, stating that analysis had been incorrect because it had not focused on interrelationship of component parts of promotional procedure); Kirkland v. New York State Dept. of Correctional

(continued...)

consideration interaction of separate component elements causing adverse impact in total selection process. Further, requirements and standards are well known to potential plaintiffs, employers, lower courts, and the Commission.

-- Position stated above not universally followed by courts prior to Wards Cove's imposition of causal connection requirement, however. See, e.g., Pouncy v. Prudential Insurance Co., 668 F.2d 795, 28 EPD ¶ 32,451 (5th Cir. 1982); Pope v. City of Hickory, N.C., 679 F.2d 20, 22, 29 EPD ¶ 32,752 (4th Cir. 1982) (discriminatory discipline and discharge case citing Pouncy for proposition that adverse impact model not appropriate for across-the-board attack on employment practice; model applies only where employer "has instituted a specific procedure" that is connected to "class based imbalance in the workforce"). [4] Further, Supreme Court's earlier cases all involved single selection practices or devices.

-- It could be argued that it is reasonable to require plaintiff to identify particular selection practice having adverse impact before shifting burden to employer.

2) Wards Cove requirement regarding proof of causal connection may be interpreted by lower courts so that it is extremely difficult, even with a strong statistical showing, for plaintiffs to prove impact.

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[3](...continued)
Services, 520 F.2d 420, 10 EPD ¶ 10,357 (2d Cir. 1975) (court considered discriminatory impact of promotional exam as a whole where promotions were based on cumulative results of five-part test).

Additionally, in his dissent in Connecticut v. Teal, 457 U.S. 440 (1982), Justice Powell, joined by Justices O'Connor and Rehnquist, commented that "our disparate impact cases consistently have considered whether the result of an employer's total selection process had an adverse impact on the protected group." 457 U.S. at 458, 29 EPD ¶ 32,820 (1982) (emphasis in original).

[4] See also American Federation of State, County and Municipal Employees v. State of Washington, 770 F.2d 1401, 37 EPD ¶ 35,459 (9th Cir. 1985) (adverse impact analysis confined to cases that challenge specific, clearly delineated employment practice applied at single point in job selection process).

See, e.g., EEOC v. Joint Apprenticeship Committee, No. 89-6165 (2d Cir. Jan. 31, 1990). Whether this will in fact be a problem is, to date, unclear, but the bill would eliminate the uncertainty.

3) Bill would remove logical corollary to Connecticut v. Teal, 457 U.S. 440 (1982), which Court created in Wards Cove.

-- Teal: employer cannot defend against a showing of disparate impact by showing there is no disparity in its "bottom-line" hiring.

-- Wards Cove: plaintiff cannot prove disparate impact by showing only that a disparity in "bottom-line" hiring exists.

As such, bill would permit plaintiffs to use a "bottom-line" approach not available to defending employers.

-- If plaintiffs can make out a prima facie case by showing "bottom-line" impact, there is some concern that employers may attempt to achieve numerical balance to avoid impact challenges (for example, juggling test results by lowering cut-off scores for minority groups or using ranges of scores instead of serial ranking). See, e.g., San Francisco Police Officers' Ass'n v. San Francisco, 812 F.2d 1125, 42 EPD ¶ 36,872 (9th Cir. 1987) (after-the-fact modification of police department promotion test that proved to have adverse impact on minorities and women by changing weight of test components violated both Title VII and city's own affirmative action plan; however, court noted possible contra decision by Second Circuit in Kirkland v. New York State Dept. of Corrections, 711 F.2d 1117, 1133-34, 32 EPD ¶ 33,666 (2d Cir. 1983), cert. denied, 465 U.S. 1005, 33 EPD ¶ 34,070 (1984)). It is not apparent, however, whether there would be sufficient incentive for employers to attempt to clear "bottom line" in order to shift burden of identifying specific component with adverse impact to plaintiffs. Even if there were, this may not be a significant concern since, under Teal, the "bottom line" is not a defense.

C) Bill requires employer to bear burden of proving that a practice or group of practices that results in a disparity is required by business necessity to escape a

finding of discrimination and defines business necessity far more narrowly than did the Court.

1) Placing burden on respondent reinstates well developed body of law. Once a practice is shown to discriminate, employer is in best position to justify the practice.

2) Bill's definition of business necessity may pose an almost insurmountable burden on employers. Many selection practices may not be absolutely "essential" to performing the job but may go so far toward increasing efficiency that it would be unreasonable not to allow an employer to use them. This office favors the formulation used by the government in its brief in Watson v. Fort Worth Bank and Trust: that the respondent must prove that a selection practice which has disparate impact has a "manifest relationship to successful job performance or to the safe and efficient operation of its business."

3) The phrase "business necessity" is used in the proposed Americans with Disabilities Act (ADA). See Sections 102(b)(7), 102(c)(4)(a), and 103(a) of the Senate-passed version (S. 933) and the House-proposed version (H.R. 2273). Presumably, courts will look to Title VII law to interpret this defense, and thus any changes brought about by the Civil Rights Act will affect interpretation of the ADA.

D) Bill makes no mention of the final stage of proof, that is, proving the availability of less discriminatory alternative practices. Therefore, intent is probably to rely on existing law permitting a plaintiff to prevail even after a showing of business necessity if there is a less discriminatory alterative practice. However, the bill leaves intact the statements in Wards Cove that the less discriminatory alternative must be "equally effective" in achieving the employer's legitimate goals and that costs and other burdens are relevant in making the determination.

E) Bill makes clear that the business necessity defense may only be relied upon to defend against disparate impact claims. Thus, business necessity cannot be used, as it was in the recent case of United Auto Workers v. Johnson Controls, Inc., 51 EPD ¶ 39,359 (7th Cir. 1989), to defend against claims of disparate treatment. This is consistent with the view adopted by the Commission in

its Policy Guidance on Johnson Controls, N-915.047 (1/24/90).

SECTION 5: CLARIFYING PROHIBITION AGAINST IMPERMISSIBLE CONSIDERATION OF RACE, COLOR, RELIGION, SEX OR NATIONAL ORIGIN IN EMPLOYMENT PRACTICES

Summary

A) Section 5 amends Section 703 of Title VII by:

-- providing that discrimination need not be the sole motivating factor for an employment decision; if complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, a violation is established regardless of whether there were other motives for the decision.

B) Section 5 amends Section 706(g) of Title VII by:

-- providing that an employer will not be obligated to hire, reinstate, or promote an individual or to pay back pay if it establishes that it would have taken the same action in the absence of any discrimination.

Comments

A) Bill counteracts portion of Supreme Court's holding in Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989). In Hopkins, a plurality of the Court held that, if a plaintiff proves that discrimination was a motivating factor for an employment action, burden shifts to the employer to prove that a legitimate motive would have caused it to make the same decision anyway. If the employer meets this burden, it avoids a finding of liability. Justices O'Connor and White agreed with this holding, thus forming a majority, with the exception that they would require a showing that discrimination was a "substantial" factor in order for the burden to shift.

B) New bill rejects Hopkins approach by providing that, if the complaining party demonstrates that discrimination was a motivating factor for an employment decision, liability is established. If the employer can prove that it would have taken the same action in the absence of discrimination, it can avoid an order of reinstatement and back pay, but it would still be subject to such remedies as an injunction, attorneys' fees, and, under

the new bill, compensatory and punitive damages. Holding an employer liable whenever a discriminatory motive plays any role in an employment decision is consistent with the Commission's policy pre-Hopkins. See Commission Decision Nos. 70-025, 72-0591, 72-0606, CCH EEOC Decisions (1973) ¶ ¶ 6158, 6314, 6310, respectively; Commission Decision Nos. 75-007 and 75-091, CCH EEOC Decisions (1983) ¶ ¶ 6436, 6528. See also § 612.3 of the Discharge and Discipline Section of the EEOC Compliance Manual at 612-2 and -3.

C) Provision applies to those cases described as "mixed motive." Those usually involve direct evidence of discrimination, although particularly compelling circumstantial evidence may suffice.[5] We do not understand the drafters of this bill to be attempting to alter the McDonnell Douglas/Burdine allocations of proof applicable to the vast majority of Title VII cases which are proved inferentially. However, a statement in the legislative history to that effect may be advisable to avoid any suggestion that the reference to a motivating factor was intended to alter the Burdine approach.[6]

D) It appears that by using the phrase "motivating factor," instead of "substantial motivating factor," the authors of the bill are rejecting the standard that Justices O'Connor and White thought was appropriate. However, either phrase is subject to interpretation, and courts

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[5] In her Hopkins concurrence, Justice O'Connor stated that "mixed motive" cases can arise only where there is direct evidence. The plurality, however, did not adopt that approach. Lower courts have split on the issue. See Jones v. Gerwens, 874 F.2d 1534, 1539 n.8, 50 EPD ¶ 39,089 (11th Cir. 1989); Gagne v. Northwestern National Insurance Co., 881 F.2d 309, 315, 51 EPD ¶ 39,208 (6th Cir. 1989); Grant v. Hazelett Strip Casting Corp., 880 F.2d 1564, 1568 (2d Cir. 1989) (all three cases (Jones, Gagne, and Grant) cite Justice O'Connor's view that direct evidence is required for Hopkins "mixed motive" scheme to apply). But see Nichols v. Acme Markets, Inc., ___ F. Supp. ___, 51 EPD ¶ 39,368 (E.D. Pa. 1989) (applied Hopkins "mixed motive" framework to circumstantial case).

[6] See Nichols v. Acme Markets, Inc., ____F. Supp. ____, 51 EPD ¶ 39,368 (E.D. Pa. 1989).

are likely to differ on how or whether either standard is met on particular facts.

E) The bill would authorize an award of compensatory and punitive damages whenever an employer is shown to have acted with a discriminatory motive, regardless of whether the employer could show that it would have taken the same action in the absence of discrimination. To the extent that the employer demonstrates that the plaintiff in a "mixed motive" case would have been subjected to the same treatment even absent discrimination, it seems unlikely that a court would award significant compensatory or punitive damages in most cases.

1) Permitting plaintiffs in such cases to prevail on a finding of liability will, however, permit them to collect attorneys' fees under Section 706(k) of Title VII regardless of the lack of personal relief.

2) Additionally, punitive damages may be appropriate in those cases in which the employer's conduct has been particularly egregious, even where the individual plaintiff has not been a victim of that conduct. Awarding such damages in these circumstances is consistent with the notion of using "private attorneys general" as an enforcement tool.

SECTION 6: FACILITATING PROMPT RESOLUTION OF CHALLENGES TO LITIGATED OR CONSENT JUDGMENTS

Summary

Section 6 amends Section 703 of Title VII by adding subsection (m), which provides that:

A) An employment practice implemented pursuant to a litigated or consent judgment or order resolving a claim of employment discrimination under the U.S. Constitution or federal civil rights laws may not be challenged:

1) by a person who had notice of the proposed judgment or order and a reasonable opportunity to present objections to such judgment or order, or

2) by a person whose interests were adequately represented by another challenger, as determined by the court, or

3) if the court that entered the judgment or order determines that reasonable efforts were made to provide notice to interested persons.

-- The determination under 3) above shall be made prior to the entry of the judgment or order, except that the determination can be made at any reasonable time if the order or judgment predates this legislation.

B) The provision is not intended to affect the standards for intervention under Rule 24 of the Federal Rules of Civil Procedure; or apply to the rights of parties or class members represented in the original litigation; or prevent challenges based on fraud, collusion, transparent invalidity, or lack of subject matter jurisdiction.

C) Any challenge not precluded by subsection (m) must be brought in the same court that entered the challenged order or decree and, if possible, before the same judge.

Comments

A) Bill is intended to overrule Martin v. Wilks, 109 S. Ct. 2180 (1989), and restore the pre-Martin status quo.

1) Prior to Martin, the majority of the circuit courts endorsed the doctrine of "impermissible collateral attack," namely, if a party failed to timely intervene in the initial proceedings, that party's subsequent challenge to actions taken under the consent decree ordered by the initial court would be barred as an impermissible collateral attack. See Martin, 109 S. Ct. at 2185.

2) In Martin, the Supreme Court explicitly rejected the doctrine of "impermissible collateral attack," holding that individuals who were neither parties nor privies to a judgment or decree are not precluded from subsequently asserting their independent claims of unlawful discrimination based upon actions taken pursuant to the decree. "Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree." Id. at 2186. While the particular facts of Martin involved affirmative action and a consent decree, the Court's holding is essentially procedural and could be broadly applied to other contexts. Because

the decision invites challenges to consent decrees, it is likely to make voluntary settlements more difficult to achieve.

3) There is uniform agreement that Martin invalidated the statement in the Commission's Guidelines on Affirmative Action that "actions taken pursuant to the direction of a Court Order cannot give rise to liability under Title VII." 29 C.F.R. § 1608.8. Thus, after Martin, the Commission can no longer automatically issue a no cause determination where the challenged action was taken pursuant to a court order. Reversal of Martin by the proposed legislation would permit the charge processing procedures outlined in the Guidelines on Affirmative Action to remain in their present form.

B) Bill may face challenge on due process grounds.

1) While the Martin decision was premised on the lack of any basis in the Federal Rules for a system of mandatory intervention, the holding also had due process underpinnings. See Martin, 109 S. Ct. at 2184 n.2. An attempt to reverse Martin, and legislatively enact the collateral attack rule, would likely face constitutional challenge on due process grounds. In providing for notice, the bill generally addresses those concerns. However, subparagraph (1)(C) of the bill, which would preclude challenge to a litigated or consent judgment or order, even absent notice, if the court determines "that reasonable efforts were made to provide notice to interested persons," may be vulnerable to due process attack.

2) To avoid due process concerns, it might be preferable to allow third parties to challenge decrees but to provide a statutory defense to an employer who has acted pursuant to a court order, a consent judgment, a conciliation or other settlement agreement in which a government agency was a party. Such a provision could be modeled on the good faith reliance provisions of § 713(b) of Title VII or on § 10 of the Portal-to-Portal Act, which has been incorporated by § 7(e)(1) of the ADEA.

C) Requirement that challenges be brought in the same court that entered the original decree or judgment, and preferably before the same judge, makes good sense. It would help to minimize some of the concerns about courts

second guessing other courts, as well as maximizing the efficient use of judicial resources.

D) The Martin decision and, thus, its legislative reversal will affect litigation and Commission processes.

1) Section 6 of the proposed legislation represents an attempt to fairly treat the interests of third parties whose rights may be affected by an affirmative action plan or any other type of decree, while at the same time recognizing the importance of finality of judgments and orders.

-- Martin makes it difficult to achieve finality in litigation. It is difficult to fully assess the decision's impact at this time, but it could theoretically lead to the relitigation of many long-standing consent decrees or litigated judgments. For example, a significant number of "reverse discrimination" lawsuits have evidently been filed in the wake of Martin, attempting to reopen long-standing decrees and judgments entered into after years of litigation. See Lawyers' Committee Analysis of the Impact of Supreme Court Decision in Martin v. Wilks, reprinted in Daily Labor Report, 2-13-90. Since Martin, this office has received at least nine calls from field offices concerning charges challenging existing court orders or agreements, or other settlements or approved affirmative action plans. One involved a "reverse discrimination" charge challenging a Commission-approved conciliation agreement with General Motors, which, among other things, provides for educational assistance for the children of minority employees.

-- On the other hand, it seems likely that such challenges will often fail, because courts are likely to give great deference to the decisions of other judges. Once it becomes clear that such challenges will fail, they will probably cease.

2) If not reversed, Martin will require revision of our procedural regulations and their assurance that "actions taken pursuant to a Court Order cannot give rise to liability under Title VII." This office, in consultation with others, has been attempting to determine what options are available. The issues and problems have proved to be quite complex.

-- It has been argued that to comply with the spirit of Martin, the Commission must fully investigate each and every "reverse discrimination" charge challenging actions taken pursuant to an AAP approved by a court, the Commission, or other agency with relevant authority, to determine whether the AAP conforms to applicable legal standards. While it will vary from case to case, the investigation and reconsideration of such questions would often be very complex and resource-intensive, particularly in a case where the court remedy or court-ordered consent decree was implemented after years of litigation.

-- Martin investigations would put the Commission in the very awkward position of, in effect, reviewing or second guessing a federal court's order. There is an inherent awkwardness with an administrative agency's declaring that a court order is right or wrong. There are also obvious constraints on the Commission's ability to resolve such a charge at the administrative level, given a conflicting court order. One option may be to administratively close the charge and issue a notice of RTS, allowing the party to go to court. This seems consistent with the separation of powers doctrine and addresses the problem of dealing with a conflicting court order. This is the approach favored by this office.

-- Another option may be to limit the scope of such investigations, pursuant to the Commission's prosecutorial discretion, to a determination of whether there has been a change in law or circumstances subsequent to the date the AAP was implemented, such that the AAP no longer conforms with applicable legal standards. However, this option is not without problems. For example, would we find cause where a change seems warranted but the employer is still acting in accord with a court approved decree?

-- The point is that questions about the proper approach have yet to be settled. Procedural complications spawned by the Martin decision will affect the Commission's processing of charges challenging actions taken pursuant to an approved AAP. While we believe, as noted

above, that few of these Martin challenges are likely to ultimately succeed, assuming that the challenged AAP conformed to applicable legal standards at the time it was initially approved or ordered, the possibility that the Commission, and, for that matter, the judicial system, could be overwhelmed by the processing or relitigation of these cases cannot be totally disregarded. Reversal of the Martin decision would help to avoid these potential problems.

3) The bill does not eliminate challenges to relief awarded under non-court approved settlement or conciliation agreements or affirmative action plans approved by government agencies. For instance, it does not provide for the Commission to notify third parties who may be affected, prior to entering a settlement or conciliation agreement. It probably cannot so provide because of Title VII's confidentiality provisions.

SECTION 7: STATUTE OF LIMITATIONS; APPLICATIONS TO CHALLENGES TO SENIORITY SYSTEMS

Summary

A) Subsection (a) amends § 706(e) of Title VII to extend the current statute of limitations for charge filing from 180 days (or 300 days in a deferral state) to 2 years.

1) With regard to deferral jurisdictions, provides only that the Commission shall file a copy of the charge with the state or local agency.

2) Subsection (a)(2) changes the time from which the statute begins to run from when the discriminatory act "occurred" to when the act "occurred or has been applied to adversely affect the person aggrieved, whichever is later."

B) Subsection (b) amends Section 703(h) to provide that when a seniority system or practice is included in a collective bargaining agreement with the intent to discriminate, it is an unlawful employment practice to apply "such system or practice during the period that such collective bargaining agreement is in effect."

Comments

A) Purpose of §§ 7(a)(2) and (b) is to reverse holding in Lorance v. AT&T Technologies, 109 S. Ct. 2261 (1989), that when a facially neutral seniority system is non-discriminatorily applied, any adverse effects on an individual do not constitute a current Title VII violation. The Court held that if the provision was included with intent to discriminate, the statutory time period begins to run at the time the provision is adopted. Lorance requires plaintiffs to anticipate possible future harm and to file suit shortly after a possibly discriminatory collective bargaining agreement is adopted, even though they may never be adversely affected by it.

1) Lorance would be reversed so that a discriminatory policy could be challenged any time that it is applied, i.e., any time an individual is injured by it, rather than only at the time of its adoption, even when it is part of a seniority system embodied in a collective bargaining agreement.

2) Although the legislative history does not mention Ricks v. Delaware State College, 449 U.S. 250, 24 EPD ¶ 31,393 (1980), it is arguable that § 7(a)(2) would change the holding in Ricks because a plaintiff's date of termination, as opposed to his/her notice of a "terminal contract" indicating termination at a late date, may be regarded as the date upon which a discriminatory act "has been applied to adversely affect the person aggrieved." We recommend that Congress clarify its intent on this issue.

3) Under the amendment, an employee would not have to anticipate, at the time of the adoption of a seniority system, any possible adverse effect that it might have on him/her in the future, but could challenge it when the provision was applied in a way which actually injured him/her.

B) The reversal of Lorance in §§ 7(a)(2) and 7(b) seems advisable since the decision encourages anticipatory and unnecessary litigation.

-- Unclear why § 7(b) pertains only to those seniority systems contained in collective bargaining agreements.

C) The language in § 7(b), stating that the application of an intentionally discriminatory provision in a

collective bargaining agreement "during the period that such collective bargaining agreement is in effect shall be an unlawful employment practice" (emphasis added), is somewhat puzzling. Bargaining agreements tend to be renewed every two or three years. Did drafters intend to say that the application of a provision adopted with discriminatory intent is NOT unlawful if there was no specific intent to discriminate at the time of renewal?

D) Provision in § 7(a)(1), changing the statute of limitations, is not necessary to reverse Lorance, and reasons for including it are unclear.

1) It may have been intended to eliminate the different statutes of limitation in deferral and non-deferral jurisdictions. This end is not entirely achieved since § 706(c) of Title VII continues to provide that a charge must be initially instituted in a deferral state 60 days before EEOC filing. However, to delete the § 706(c) provision would be virtually to eliminate the role of state and local FEP agencies.

2) Later charge filing and its attendant delay may make investigations more difficult. If symmetry between deferral and non-deferral jurisdictions is desired, extending the statute to one year, not two, should be considered. One year would not significantly impede investigations, since the current limitations period in most jurisdictions is 300 days.

3) Record retention regulations would have to be revised to account for the longer period.

SECTION 8: PROVIDING FOR DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION

Summary

Section 8 amends Section 706(g) of Title VII to:

-- provide for compensatory and punitive damages for intentional violations of Title VII, and

-- allow for jury trials where compensatory or punitive damages are sought.

Comments

A) Bill expands Title VII remedies to include compensatory and punitive damages.

1) Those remedies are not currently available under Title VII. [7] Thus, those who suffer losses beyond back pay cannot currently be made whole. [8] Additionally, even a respondent who engages in egregious discrimination cannot be penalized. This is particularly significant where the discrimination consists of egregious harassment for which the claimant suffers no financial loss. The bill's damages provisions would remedy these deficiencies.

2) Many other civil rights statutes afford some form of relief beyond bare back pay.

-- Compensatory and punitive damages may generally be awarded under Sections 1981 and 1983, 42 U.S.C. §§ 1981, 1983. To the extent that plaintiffs can state a claim under these sections, they are encouraged to proceed under them and to bypass Title VII's administrative scheme which is designed to avoid litigation. Thus, providing similar relief, as well as jury trials, under Title VII increases incentives to use the Title VII procedures.

-- Actual and punitive damages are authorized as relief for violations of the fair housing

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[7] See, e.g., Conrad v. Department of the Interior, EEOC Office of Review and Appeals Decision No. 05880821 (Dec. 28, 1988) and cases cited therein at pp. 6-8.

[8] Courts have, for example, refused to award compensation under Title VII for out-of-pocket expenditures for relocations necessitated by discrimination, see, e.g., Mitchell v. Seaboard System Railroad, 883 F.2d 451, 452-53 (6th Cir. 1989); for medical expenses arising from the mental and physical illnesses caused by discrimination, see, e.g., Moll v. Parkside Livonia Credit Union, 525 F. Supp. 786, 791-93 (E.D. Mich. 1981); or for emotional distress, see, e.g., Easley v. Anheuser-Busch, Inc., 758 F.2d 251, 263 (8th Cir. 1985); see also Conrad v. Department of the Interior, EEOC Office of Review and Appeals Decision No. 05880821 (Dec. 28, 1988) (noting unavailability of compensation for medical and moving expenses, damages to credit rating, and emotional distress resulting from discrimination).

laws. See 42 U.S.C.A. § 3613(c) (1989 pocket part).

-- Although compensatory and punitive damages are not generally available under the Age Discrimination in Employment Act (ADEA) and the Equal Pay Act (EPA),[9] both statutes provide for liquidated damages in some circumstances. Although the liquidated damages available under these statutes are not the same as the compensatory and punitive damages contemplated under the bill, they provide a mechanism for courts, in some cases,[10] to award plaintiffs more than back pay.[11]

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[9] See Five-Year Cumulative Supplement to Schlei & Grossman's Employment Discrimination Law 212-13, 544 (2d ed. 1989) (citing majority rule that neither punitive damages nor damages for pain and suffering are available under ADEA); Eglit, Age Discrimination [1989 Binder] Sections 18.19, 18.21 at 18-81, 18-93 (citing cases for proposition that no compensatory damages of any sort are available under the ADEA); 29 U.S.C. § 216(b) (statute permits recovery of unpaid wages or overtime compensation, plus liquidated damages, for violation of the EPA).

[10] Liquidated damages are not awarded in all cases under the ADEA or the EPA. Under the ADEA, for instance, liquidated damages are authorized only in cases of "willful violations" of the statute. See, e.g., Trans World Airlines v. Thurston, 469 U.S. 111, 125 (1985); cf. Marshall v. Brunner, 668 F.2d 748, 753 (3d Cir. 1982) (liquidated damages available for violations of the EPA are mandatory unless the employer demonstrates that it acted in good faith and had reasonable grounds for believing that its actions did not violate the statute). In contrast, the compensatory damages contemplated in the bill would presumably be available in all cases in which a plaintiff suffered a compensable loss beyond back pay.

[11] We note that, while prejudgment interest may be awarded in private sector actions under Title VII, see, e.g., Loeffler v. Frank, 108 S. Ct. 1965, 1970-71 (1988), courts have generally interpreted the EPA's liquidated damages provisions to be in the nature of compensatory damages which are a substitute for prejudgment interest. See, e.g., Hodgson v. Miller Brewing Co., 457 F.2d 221, 229 (7th Cir. 1972) (refusing to authorize prejudgment interest when maximum amount of liquidated damages awarded under EPA); Doty v. Elias, 733 F.2d 720, 726 (10th Cir. 1984) (same for minimum wage claim under Fair Labor Standards Act). A number of circuits have issued similar rulings under the ADEA. See, e.g., EEOC v. O'Grady, 857 F.2d 383, 391 n.13 (7th Cir. 1988)

(continued...)

-- The proposed Americans with Disabilities Act (ADA) provides that the procedures and remedies of Title VII shall apply. Hence, absent some amendment to the ADA, the new Title VII remedies will affect ADA claimants as well.

3) The limitations on relief under existing Title VII law cannot be completely filled by other statutes.

-- Section 1981, 42 U.S.C. § 1981, has been held not to apply to discrimination on the basis of sex [12] and, under Patterson, to apply only to contract formation.

-- Section 1983, 42 U.S.C. § 1983, by its terms applies only to actions taken under color of state law.

-- Pursuant to Brown v. General Services Admin., 425 U.S. 820 (1976), Title VII provides the exclusive judicial remedy for federal employment discrimination claims (though see D and E below re scope of remedies against federal government).

B) The new damages provisions, as well as the new right to jury trial, apply only to cases of disparate treatment and not to cases of disparate impact.

1) Since disparate impact cases do not involve intentional discrimination, it is appropriate to exclude award of punitive damages in those cases.

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[11](...continued)
(court could not "award both prejudgment interest and liquidated damages in an ADEA action"); but see Lindsey v. American Cast Iron Pipe Co., 810 F.2d 1094, 1102 (11th Cir. 1987) (holding both forms of relief available under ADEA in light of Supreme Court's Thurston decision). To the extent that liquidated damages substitute for prejudgment interest, they cannot be said to provide more relief than is available under Title VII. Nonetheless, in many cases, liquidated damages, which are granted in an "equal amount" to back pay, 29 U.S.C. § 216(b), will presumably offer more compensation than prejudgment interest.

[12] See, e.g., St. Louis v. Alverno College, 744 F.2d 1314, 1317 (7th Cir. 1984); Flowers v. TRW Inc., 680 F. Supp. 279, 281 (N.D. Ohio 1987); Sanders v. A. J. Canfield Co., 635 F. Supp. 85, 87 (N.D. Ill. 1986).

2) Once disparate impact plaintiffs have established that they are victims of unlawful discrimination, however, it is difficult to see why they should not be entitled to the same "make whole" relief available to victims of intentional discrimination, as long as they can prove that they have suffered losses for which compensatory damages would be appropriate.

3) With regard to application of jury trial right, seems debatable whether juries are well suited to decide pure impact cases in which no employer misconduct is alleged.

C) Bill's standard for award of punitive damages -- that employer acted "with malice or with reckless or callous indifference to the Federally protected rights of others" -- seems consistent with existing analogous standards.

1) Standard set forth in Section 908 of the Restatement (Second) of Torts defines punitive damages as those awarded for "conduct that is outrageous because of the defendant's evil motive or his reckless indifference to the rights of others."

2) Standard accepted by the Supreme Court to assess whether employer acted "willfully" and thus whether liquidated damages should be awarded under the ADEA is whether "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 128 (1985) (citation omitted).

3) Might be worthwhile to clarify ways in which punitive damages standard in the bill requires a showing beyond the showing of intentional discrimination necessary to make out a disparate treatment case.[13]

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[13] Courts interpreting the Supreme Court's Thurston decision have apparently wrestled with the appropriate application of the Thurston "willfulness" standard to cases alleging intentional discrimination under the ADEA. See, e.g., Lindsey v. American Cast Iron Pipe Co., 810 F.2d 1094, 1099-1100 (11th Cir. 1987) (citing but rejecting Third Circuit decision requiring a showing of "outrageous conduct" to justify liquidated damages in a disparate treatment case).

D) Bill appears to provide that compensatory but not punitive damages are available against government agencies.

1) The provisions of Section 717(d) of Title VII currently make applicable to the federal government the remedial provisions of Section 706(g) (to which Section 8 of the bill would be an amendment).

2) The bill at § 8(B) explicitly excludes the government from punitive damages, but contains no similar exclusion for compensatory damages.[14]

E) Bill also provides a right to jury trial when a plaintiff seeks compensatory or punitive damages.

1) May be worthwhile to clarify whether jury trials are intended to be available to federal sector employees. If Congress intends to make compensatory damages available against the federal government, as seems likely, the bill's language that "any party may demand a trial by jury" "if compensatory or punitive damages are sought" seems to indicate intent to extend the jury trial right to federal sector plaintiffs. However, the Supreme Court has construed statutes as granting rights to jury trial against federal agencies only where Congress has "affirmatively and unambiguously" granted that right. See Lehman v. Nakshian, 453 U.S. 156, 160-68 (1981) (denying ADEA plaintiff right to jury trial against federal agency). A more explicit statement of Congressional intent with regard to jury trials in federal sector cases might thus be required to satisfy the Lehman standard.

2) As a policy matter, are the delays and extra expense occasioned by jury trials balanced by the more favorable forum that they will presumably offer to discrimination plaintiffs?

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[14] Based on the general proposition that the "conditions on which the government consents to be sued must be strictly observed and exceptions thereto are not to be implied," Smith v. Office of Personnel Management, 778 F.2d 258, 261 (5th Cir. 1985) (denying compensatory damages in ADEA suit against the federal government), cert. denied, 476 U.S. 1105 (1986), it might be clearer for Congress to state explicitly that compensatory damages are intended to be available against government agencies.

F) Bill's effects on the Commission would be as follows:

1) Bill would enhance remedies that could be applied in the conciliation process and -- to the extent applicable -- in the Commission's orders in federal sector cases.

2) Bill would require adjustments to the investigative process to include investigation of facts that might lead to awards of compensatory or punitive relief.

SECTION 9: CLARIFYING ATTORNEYS' FEES PROVISION

Summary

Section 9 would amend Section 706(k) of Title VII by making three changes:

A) providing for the payment of expert witness fees to a prevailing party as part of the award of attorneys' fees and costs;

B) precluding a court from entering a consent order or judgment unless the parties certify that a waiver of all or substantially all attorneys' fees was not required during settlement discussions; and

C) providing for the payment of attorneys' fees to the prevailing plaintiff in the original court action against the original defendant where anyone has challenged the judgment or order entered in the original action.

Comments

A) Bill provides for payment of expert fees.

1) Prior to the Supreme Court's decision in Crawford Fitting Co. v. J. T. Gibbons, Inc., 107 S. Ct. 2494 (1987), courts awarded expert witness fees to prevailing parties as part of costs. See, e.g., Thornberry v. Delta Airlines, 676 F.2d 1240 (9th Cir. 1982), vacated, 461 U.S. 952 (1983). In Crawford Fitting, the Court held that costs that could be awarded to a prevailing party were limited to the $30.00 per day limit of 28 U.S.C. §§ 1821 and 1920, absent a contract or specific statutory authority. Nothing in Title VII authorizes an award of expert witness fees and, as a result, courts have not awarded expert witness fees in Title VII cases in excess of $30.00 per day.

2) Bill will provide for courts to order payment of reasonable expert witness fees under the same standards now governing payment of attorneys' fees (presumptive entitlement for prevailing plaintiffs and Christiansburg standard for prevailing defendants). Expert fees can be quite high, so providing for their recovery should serve as an incentive to attorneys to incur those expenses when necessary in litigation, and serve as a deterrent to bringing frivolous litigation. [15]

3) Bill does not provide for payment of expert fees to the Commission. Because the Commission does incur costs for experts, however, might be appropriate to amend bill to provide for direct reimbursement of those costs to the Commission.

B) Bill restricts waiver of attorneys' fees.

1) In settling Title VII claims, there are three types of significant relief typically available to a plaintiff, i.e., placement or promotion in a job, back pay, and attorneys' fees. As part of the give-and-take in negotiations, defendants often seek to limit the amount of attorneys' fees to be paid, either by specifically negotiating a fee amount or by negotiating a lump sum (back pay and attorneys' fees) amount.

2) Plaintiffs' attorneys have traditionally resisted such negotiations, often claiming that negotiating was unethical because it placed the interests of the attorney in conflict with the interests of the client. The Supreme Court, in Evans v. Jeff D., 475 U.S. 717 (1986), held that the parties could negotiate over the issue of attorneys' fees as part of settlement discussions in the case. The Court found that a party could waive his/her entitlement to fees as part of settlement.

3) The proposed legislation would overturn the Supreme Court's decision, and probably is intended to require parties, as suggested by the court in Prandini v. National Tea Co., 557 F.2d 1015 (3d Cir. 1977), to first settle the make-whole relief before

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[15] As is true with all these proposed changes, this change only applies to Title VII cases, and not ADEA cases. The use of experts in ADEA cases, especially where maximum age limits are used in public safety cases, can be as extensive as in Title VII cases.

negotiations on attorneys' fees would commence. The legislation could be criticized as hampering settlements of charges and lawsuits. Employers are often unwilling to settle the relief portion of a charge or lawsuit while leaving themselves open to an unknown liability for attorneys' fees. They prefer, instead, to arrive at a lump sum figure and let the plaintiff and the attorney divide it as they see fit.

C) Bill provides for fees for defending court order.

1) Where a party intervened or brought an action challenging a consent decree or other order and the original prevailing plaintiff was successful in defending the original decree or order, courts had awarded fees against the objecting party. In a case decided this past term, the Supreme Court held that the original plaintiff could not recover fees from the intervenors. Independent Federation of Flight Attendants v. Zipes, 109 S. Ct. 2132 (1989).

2) Bill provides for the original prevailing party to recover attorneys' fees from the original non-prevailing party in this situation. This seems problematic.

-- Suggests that original defendant may be liable for attorneys' fees even if it also seeks to defend the original decree or order in a subsequent proceeding. This creates a significant disincentive to settlement, since employers will be uncertain at time of settlement about amount of fees for which they will ultimately be liable.

-- Not clear whether party challenging the decree or order is also intended to be liable for attorneys' fees.

SECTION 10: PROVIDING FOR INTEREST, AND EXTENDING THE STATUTE OF LIMITATIONS, IN ACTIONS AGAINST THE FEDERAL GOVERNMENT

Summary

Section 10 amends Section 717 of Title VII in two respects:

A) to extend the period to file suit after a final decision of an agency or the Commission from 30 to 90 days; and

B) to expressly provide for the payment of interest on back pay awards.

Comments

A) Bill extends limitations period from 30 to 90 days.

1) Extension of the limitations period does not seem significant or controversial. Federal sector employees are simply provided the same time to file suit as private sector employees. The change will mean that some lawsuits that are now untimely filed will be timely, but the number of untimely cases, in our experience, has not been that great.

2) Changing the Title VII limitations periods, though, highlights the absence of a limitations period in Section 15 of the ADEA. It would be desirable that there be express limitations period in both, and that they be consistent.

3) The change to 90 days in Section 717 will also make that provision inconsistent with the judicial review provisions of the Civil Service Reform Act, 5 U.S.C. § 7703(b)(2). The Civil Service Reform Act states that all cases of discrimination subject to 5 U.S.C § 7702 ("mixed cases"), "[n]otwithstanding any other provision of law," must be filed within 30 days of receiving a final decision. The result of Section 7703(b)(2) would appear to be that mixed cases would have a 30-day limitations period while non-mixed cases would have a 90-day period.

B) With regard to the interest provision, the Commission believes that it has the authority to award interest on back pay awards and that the 1987 amendments to the Back Pay Act, 5 U.S.C. § 5596, waived sovereign immunity. In a memorandum dated September 18, 1989, however, the Assistant Attorney General for Legal Counsel issued a memorandum finding that the United States had not waived sovereign immunity for the payment of interest. In light of that memorandum, the bill's explicit waiver of sovereign immunity is appropriate. Because of the Commission's remedies policy and ORA decisions, it does not seem practical to oppose this provision.

SECTION 11: CONSTRUCTION

Summary

Section 11 of the bill:

A) Amends Title XI of Civil Rights Act of 1964, 42 U.S.C. § 2000h et seq., by adding new Section 1107 on rules of construction for civil rights laws.

B) Contains two provisions:

1) First states that all federal civil rights laws shall be broadly construed to effectuate purpose of eliminating discrimination and providing effective remedies ("effectuation of purpose" provision).

2) Second provides that no federal civil rights law shall be construed to limit rights, procedures, or remedies available under any other federal civil rights law ("nonlimitation" provision).

Comments

A) Principle of broad construction is consistent with long-standing EEOC policy, relied upon and cited in numerous policy documents.

1) Principle of broadly construing remedial legislation is also in accord with and expressed consistently throughout established lower court case law (see, e.g., EEOC v. First Catholic Slovak Ladies Association, 694 F.2d 1068, 1070 (6th Cir.), cert. denied, 464 U.S. 819 (1983)).

2) However, while not repudiating this principle, the Supreme Court in recent years has arguably narrowly construed the terms of Title VII and other civil rights statutes in various decisions, the outcomes of which might have been different had the proposed amendment been in effect.

B) "Nonlimitation" provision may overturn case law holding that Title VII provides exclusive judicial remedy for claims of discrimination in federal sector employment (see Brown v. General Services Administration, 425 U.S. 820 (1976) and line of cases relying on Brown), resulting in possibility, for example, of federal employee's filing racial discrimination action under 42 U.S.C. § 1981 (as expanded by proposed amendment in Section 12 of this bill).

1) "Nonlimitation" provision may also overturn Supreme Court decision that a violation of Title VII cannot be the basis for a cause of action under Section 1985(3). Great American Federal Savings & Loan Association v. Novotny, 442 U.S. 366 (1979).

2) Additionally, "nonlimitation" provision may preclude courts from construing Section 1981 in a manner that imposes on that statute exemptions and limitations expressly provided under Title VII. For example, while some courts have held that Title VII exemption of bona fide private membership clubs (BFPMC) is inapplicable to actions under Section 1981 (see, e.g., Konicki v. Piedmont Driving Club, 44 EPD ¶ 37,434 (N.D. Ga. 1987); Baptiste v. Cavendish Club, Inc., 670 F. Supp. 108 (S.D.N.Y. 1987); and Guesby v. Kennedy, 580 F. Supp. 1280 (D. Kan. 1984)), other courts have held that an employer that is within Title VII's BFPMC exemption may not be sued under Section 1981 (see, e.g., Hudson v. Charlotte Country Club, Inc., 535 F. Supp. 313 (W.D.N.C. 1982), and Kemerer v. Davis, 520 F. Supp. 256 (E.D. Mich. 1981)).

3) Possible consequences noted in the three comments immediately above would nave no direct impact on EEOC since they concern potential expansion of statutes not enforced and administered by EEOC.

C) "Nonlimitation" provision may also have the effect of overturning recent decision in Gilmer v. Interstate/Johnson Lane Corp., No. 88-1796 (4th Cir. Feb. 6, 1990), reported in BNA Daily Labor Report D-1 (2/14/90). In Gilmer, court held that an agreement between an individual employee and his employer compelling arbitration of all claims arising out of employment is enforceable under the Federal Arbitration Act, 9 U.S.C. § 1 et seq. (1982), even when the claim against the employer arises under the ADEA. In so holding, court found no Congressional intent to preclude waiver of judicial forum in ADEA's text, legislative history, or underlying purposes.

1) Fourth Circuit's decision in Gilmer is in conflict with Third Circuit's decision in Nicholson v. CPC Int'l, Inc., 877 F.2d 221 (3d Cir. 1989).

2) Gilmer court declined to follow, as inapposite, three Supreme Court decisions denying preclusive effect to arbitration provisions in the context of rights created under civil rights statutes: Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)

(Title VII); Barrentine v. Arkansas Best-Freight Systems, 450 U.S. 728 (1981) (FLSA); and McDonald v. City of West Branch, 466 U.S. 284 (1984) (Section 1983).

3) Although the amendment in Section 11 of the bill may overrule Gilmer, a more explicit statement of Congressional intent is desirable if that result reflects what Congress intends.

SECTION 12: RESTORING PROHIBITION AGAINST ALL RACIAL DISCRIMINATION IN THE MAKING AND ENFORCEMENT OF CONTRACTS

Summary

A) Section 12 amends Section 1977 of Revised Statutes of United States (42 U.S.C. § 1981) by adding a new subsection defining the right to "make and enforce contracts."

B) New definition includes the "making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship."

Comments

A) The intent of the amendment is:

1) to overturn Supreme Court decision in Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989), by amending 42 U.S.C. § 1981 to expressly provide for coverage of all aspects of contract relationship, not just the initial formation of contract;

2) to restore scope of Section 1981 with respect to employment discrimination claims under case law prior to Patterson.

B) In Patterson, the Court initially considered whether to overrule its decision in Runyon v. McCrary (1976), which held that Section 1981 applies to private conduct (and not solely to state action).

1) The Court ultimately upheld Runyon, relying on the judicial doctrine of stare decisis.

2) The Court then held that Section 1981 coverage does not extend to racial harassment in employment,

finding that the statute does not prohibit discrimination in all aspects of contract relations but only in the making and enforcing of contracts.

3) In so holding, the Court narrowly construed the right to "make and enforce contracts":

-- interpreting scope of "making" contracts as covering only the initial formation of a contract and not covering employer's post-contract-formation conduct, including breach of terms of contract and imposition of discriminatory working conditions;

-- interpreting right to "enforce" contract as extending only to the legal process and prohibiting conduct that impedes access to courts or obstructs nonjudicial avenues of resolving contract disputes.

4) The Court held that harassment is not actionable under Section 1981 since it is post-contract-formation conduct relating to the terms and conditions of employment and involves neither the initial formation of a contract nor its enforcement through the legal process.

5) The Court also held that a promotion claim is actionable under Section 1981 only where promotion rises to the level of an opportunity to enter into new contract with employer.

C) With respect to the effects of Patterson, the decision:

1) precludes cause of action under Section 1981 for post-contract-formation conduct by employer, including harassment and other discriminatory terms and conditions of employment;

2) limits availability of Section 1981 cause of action for denial of promotion to only those situations where promotion equates to new contract;

3) strongly suggests, based on Court's interpretation of scope of statute, that discharge claims may no longer be actionable under Section 1981 since they involve termination, not formation, of contract;

4) may indirectly affect EEOC by increasing number of Title VII charges filed on issues now precluded under Section 1981.

SECTION 15: APPLICATION OF AMENDMENTS AND TRANSITION RULES

Summary

A) Section 15(a) provides generally that the amendments made by Sections 4 (Wards Cove), 5 (Hopkins), 6 (Martin v. Wilks), 7(a)(2)-(4) (Lorance) and 12 (Patterson) of the bill will apply to "all proceedings pending on or commenced after" the date of the Supreme Court decisions that each of those sections is intended to address.

-- Section 15(a)(4) provides that Sections 7(a)(1), 7(b), 8, 9, 10, and 11 of the bill will apply "to all proceedings pending on or commenced after the date of enactment" of the bill.

B) Section 15(b) contains two transition rules:

1) providing that orders entered between effective dates set forth in Section 15(a) and date of enactment of the bill may be vacated if they are inconsistent with amendments made by Sections 4, 5, 7(a)(2)-(4) or 12 and the request is made within one year of enactment;

2) providing that orders entered between effective date of Section 6 and date of enactment of the bill may be vacated if they are inconsistent with the provisions of Section 6 and the request is made within 6 months of enactment.

-- for period of one year following enactment, latter section also gives same intervention rights as existed on date Martin v. Wilks was decided to parties whose challenges to court orders are rejected or vacated pursuant to Section 6.

C) Section 15(c) tolls statute of limitations for period from effective dates set forth in Section 15(a) to date of enactment of bill on showing that a claim was not filed because of the decisions in Wards Cove, Hopkins, Lorance, or Patterson.

Comments

A) Three provisions of Section 15 all appear to be attempts to advance same basic goal: to ensure that no plaintiffs or potential plaintiffs will be prejudiced by Supreme Court decisions bill reverses.

D) As to impact on EEOC, Section 12 of the bill:

1) has no direct effect since it amends 42 U.S.C. § 1981 (not Title VII) and EEOC does not enforce Section 1981 claims;

2) may have indirect effect of reducing number of Title VII cases potentially increased in aftermath of Patterson decision.

SECTION 13: LAWFUL COURT-ORDERED REMEDIES, AFFIRMATIVE ACTION AND CONCILIATION AGREEMENTS NOT AFFECTED

Summary

Section 13 of the Civil Rights Act of 1990 states that "[n]othing in the amendments made by this Act shall be construed to affect court-ordered remedies, affirmative action or conciliation agreements that are otherwise in accordance with the law."

Comments

While the language of Section 13 is somewhat unclear, OLC interprets the reference to affirmative action to mean that nothing in the Act is intended to affect the substantive standards governing affirmative action. As noted above in the discussion of Section 6, the holding in Martin v. Wilks was procedural in nature and did not change the applicable legal standards governing affirmative action.

SECTION 14: SEVERABILITY

Summary

Section 14 of the bill provides that, if any provision of or amendment made by the Act or any application of the Act to any person or circumstances is held to be invalid, the remainder of the Act shall not be affected.

Comment

Section 14 incorporates the standard severability provision. As such, it is uncontroversial.

-- Bill thus makes identified sections retroactive for cases pending but not yet decided (Section 15(a)); allows parties to make requests to vacate orders issued between the dates of the relevant Supreme Court decisions and the date of enactment of the bill (Section 15(b)); and tolls statute of limitations so that prospective plaintiffs may in some circumstances bring cases for which the statute of limitations would have expired in the period between the Supreme Court decision and enactment of the bill (Section 15(c)).

B) Treatment of effective dates for statutes of limitations provisions seems overly complex:

1) Bill appears to provide that elimination of the 300-day filing period (Section 7(a)(4)) will be retroactive to date of Lorance even though Lorance did not address this issue and even though substitution of new 2-year statute of limitations (Section 7(a)(1)) will apply, under the bill, only to proceedings pending on or commenced after enactment.

-- As a result, could be argued that charges filed after the date of Lorance that were filed more than 180 days but less than 300 days after the date of the discrimination and that are no longer pending at the date of enactment were not timely filed. Hard to believe that a charge that was timely filed can retroactively become untimely. but provision seems confusing.

2) Might therefore be preferable to adopt same effective date for all statutes of limitations provisions.

C) Also unclear what period of time will remain for causes of action revived only because of the tolling provisions of Section 15(c). Will a plaintiff whose cause of action is so revived be able to take advantage of the 2-year statute of limitations that will be applicable on the date of enactment of the bill, or will he/she have to subtract from that 2-year period the amount of time that had run on his/her claim prior to the statutory tolling?

D) Our assumption is that the various substantive provisions of the bill will all be applicable to actions which are revived only because of the tolling provisions of Section 15(c), but this may be worth clarifying. Is it clear, for example, that a plaintiff who brings an action that would have been time-barred but for the tolling provisions is entitled to compensatory and punitive damages?

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of
General Counsel

February 23, 1990

MEMORANDUM

CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION

TO: CLARENCE THOMAS
Chairman

R. GAULL SILBERMAN
Vice-Chairman

EVAN J. KEMP, JR.
Commissioner

JOY CHERIAN
Commissioner

FROM: CHARLES A. SHANOR CAS
General Counsel

SUBJECT: Analysis of H.R. 4000, "The Civil Rights Act of 1990"

Because of the likelihood that the Commissioner will be asked to comment upon this legislative proposal, the following section-by-section analysis of the 1990 Civil Rights Act is provided to summarize its provisions, describe the expressed or apparent purposes of the provisions, and identify some potential concerns with the meaning and application of these provisions. These are the tentative and preliminary observations of the Office of General Counsel and the views expressed are subject to modification in the upcoming months as further research and analysis requires. This memorandum, at several points, refers to confidential Commission or Office of General Counsel positions and thus should not be circulated outside the Commission.

I. Section 2 -- Purpose of the Act

A. Summary

The proponents of H.R. 4000 state that the purpose of the Act is to restore civil rights protections that were "dramatically limited" by Supreme Court decisions during the 1988 term (Sec. 2(b)(1)), and to strengthen the protections and remedies of the Federal civil rights laws by providing "more

effective deterrence and adequate compensation for victims of discrimination" (Sec. 2(b)(2)).

B. Purpose

The drafters explicitly state their view that recent Supreme Court decisions have reduced the scope and effectiveness of civil rights protections and that the present federal remedies are inadequate to deter discrimination or to compensate its victims.

C. Comment

In response to decisions of the last Supreme Court term, the Act modifies the holdings of, inter alia, Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989) (see sections 3 and 4); Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989) (see section 5); Martin v. Wilks, 109 S. Ct. 2180 (1989) (see section 6); Lorance v. AT&T Technologies, Inc., 109 S. Ct. 2261 (1989) (see section 7); and Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989) (see Section 12). Additionally, the Act modifies the holdings of other cases such as Delaware State College v. Ricks, 449 U.S. 250 (1980) (see section 7); United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977) (see section 7); Crawford Fitting Co. v. J.T. Gibbons, Inc., 107 S. Ct. 2494 (1987) (see section 9); Marek v. Chesney, 473 U.S. 1 (1985) (see section 9); Evans v. Jeff D., 475 U.S. 717 (1986) (see section 9); and Independent Federation of Flight Attendants v. Zipes, 109 S. Ct. 2732 (1989) (see section 9). The Act also provides increased damages for victims of discrimination and jury trials in some Title VII actions (see section 8), alters attorneys' fees provisions (see section 9), and provides for interest on monetary awards to federal employees (see section 10).

II. Sections 3 and 4 -- Disparate Impact Cases

A. Summary

The Act amends section 703, 42 U.S.C. § 2000e-2, by adding a new subsection (k), which provides that an unlawful employment practice is established when a complaining party demonstrates that an employment practice results in a disparate impact and the respondent fails to demonstrate that the practice is required by business necessity, or when a complaining party demonstrates that a group of practices results in a disparate impact and the respondent fails to demonstrate that such practices are required by business necessity. When a group of practices is challenged for disparate impact, the complaining party does not have to demonstrate which specific practice results in such impact and if the respondent demonstrates that one practice in a group does not contribute to the impact, it does not have to demonstrate the business necessity of that particular practice.

In the definitions in section 3 the Act provides that "business necessity" means "essential to job performance"; "demonstrates" means "meets the burdens of production and persuasion"; and "group of employment practices" means "a combination of employment practices or an overall employment process."

B. Purpose

These sections are intended to "overrule" several of the holdings of Wards Cove, 109 S. Ct. 2115. The Supreme Court held that: (1) a statistical prima facie case of disparate impact requires a showing of a disparity between the racial make-up of the work force holding at-issue jobs and the make-up of the qualified labor pool or applicant flow; (2) a plaintiff must show a causal connection between a specific employment practice and a significant disparity and cannot simply rely on a bottom-line disparity; (3) an employer has the burden of producing evidence that the challenged practice serves a legitimate employment goal in a significant way, but the burden of persuasion is on the plaintiff; and (4) a plaintiff may prevail by persuading the factfinder that other means would serve the employer's legitimate hiring interests equally effectively in light of cost and other burdens.

The proposed legislation permits challenges to a "group of employment practices" and abolishes the requirement that each practice must be causally related to a statistically significant disparity. It places the burden of demonstrating business necessity on the employer and defines business necessity in much more demanding terms than the Supreme Court did.

C. Comments on the proposed legislation

1. The Act says nothing about the prima facie statistical showing or the relevant labor market comparison in disparate impact cases. Presumably, the bill implicitly preserves these aspects of the decisional law, as developed in Hazelwood School District v. United States, 433 U.S. 299, 308-12 (1977), and reaffirmed in Wards Cove, 109 S. Ct. at 2121-24. The EEOC's views on these issues are in accordance with the Supreme Court's opinion, and EEOC's evaluation of cases has long been premised on these underpinnings. (See Wards Cove Memorandum to the Solicitor General, August 26, 1988). The bill would be improved technically if "disparate impact" were defined or if the legislative history made it clear that the intent was to preserve decisional law on that point. See, e.g., 118 Cong. Rec. 7166, 7564 (1972) (section-by-section analyses of the 1972 amendments submitted to both houses of Congress expressly stated that in areas not addressed by the amendments, existing case law was intended to continue to govern).

2. The Act places on the respondent the burden of demonstrating the business necessity of its practice(s). This reflects the prevailing view of the courts prior to Wards Cove. As the United States and the Commission stated in the amicus brief filed in Watson v. Fort Worth Bank & Trust, after the plaintiff has proved that a selection process has caused a disparate impact, "the defendant must make the more rigorous initial showing that the selection device producing the statistical disparity has a 'manifest relationship' to successful job performance or to the safe and efficient operation of its business." (Brief at 17). But see Brief of United States in Wards Cove at 26 ("We agree with the plurality in Watson . . . that . . . [l]eaving the burden of persuasion on the plaintiff [in the disparate impact context] is consistent with the general rule . . . that a plaintiff at all times bears the burden of persuading the trier of fact on the basic causation element of a violation."). The shift in burdens in the proposed legislation is less important to EEOC than to the private bar, due to EEOC's pre-litigation investigation processes. Nevertheless, it is not inappropriate that the business whose practice(s) have a disparate impact bear the burden of persuasion as well as production. While this would mean the defendant's burden would be greater in a disparate impact case than in an indirect evidence disparate treatment case (McDonnell Douglas), the burden would be less than in a direct evidence disparate treatment case (Price Waterhouse). This is appropriate because the plaintiff's showing of a prima facie case of disparate impact is much more substantial than in individual disparate treatment cases under McDonnell Douglas, and because the information concerning the reasons for the practice(s) is in the employer's hands.

3. The proposed definition of business necessity as "essential to effective job performance" is unduly restrictive and goes beyond pre-Wards Cove law. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971) ("[t]he touchstone is business necessity" which requires demonstration of the "manifest relationship" between the challenged practice and job performance); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425-26 (1975) (employer must demonstrate the "job relatedness" of a practice with adverse impact). Although the Supreme Court's formulation in Wards Cove, 109 S. Ct. at 2125-26 -- that a practice is justified if it "serves, in a significant way, the legitimate employment goals of the employer" -- could be interpreted as a rather undemanding standard, the new statutory language creates an almost insurmountable burden for respondents. The stringency of the defense may encourage employers whose practices are related to legitimate business purposes but who cannot meet the onerous defense burden to eliminate impact by engaging in racial, sexual and ethnic balancing of their workforces to eliminate impact. See Wards Cove, 109 S. Ct. at 2122; Watson v. Fort Worth Bank & Trust Co., 108 S. Ct. 2777, 2788 & n.2 (1988)(plurality opinion). When the challenged

practice is a job criterion used to select employees based on a prediction of their performance, the standard the Government articulated in the Watson brief was that there must be "a manifest relationship to successful job performance or to the safe and efficient operation of the business." Prior to Wards Cove, this showing was made when the employer demonstrated that its tests were valid indicators of job performance, e.g., Guardians Ass'n of the New York City Police Dep't v. Civil Serv. Comm'n, 630 F.2d 79, 95 (2d Cir. 1980)(police force examination), cert. denied, 452 U.S. 940 (1981); that its practice significantly served a legitimate goal of job safety, Beazer v. New York City Transit Auth., 440 U.S. 568, 587 (1979)(no methadone users); or that its practice plausibly improved the work environment and promoted efficiency, Yuhas v. Libbey-Owens-Ford Co., 562 F.2d 496, 499-500 (7th Cir. 1977)(no spouse rule), cert. denied, 435 U.S. 934 (1978). When the challenged practice is not a performance based criterion, see, e.g., Schlei and Grossman, Employment Discrimination Law, Chp. 5 (2d ed. 1983)(discussing nonscored objective criteria such as specific educational, experience, performance or licensing requirements, arrests, convictions, garnishments, and other financial criteria), its defense should require proof of the benefit to the business of the practice under a test that it is substantially necessary to the efficient operation of the business. See, e.g., Wallace v. Debron Corp., 494 F.2d 674, 677 (8th Cir. 1974)(garnishment policy); Schlei and Grossman, Employment Discrimination Law at 187, 1329.

4. Subsection (2) of Section 4 limits the application of the business necessity defense to disparate impact claims. This may reflect the drafters' view that the Seventh Circuit improperly permitted this defense in a challenge to a fetal protection policy. See United Auto Workers v. Johnson Controls, Inc., 886 F.2d 871 (7th Cir. 1989). If that is the purpose and effect of subsection (2), it would accord with EEOC's Policy Guidance on Johnson Controls, 1/24/90, which adopted the view that only a BFOQ defense is applicable to a challenge to a fetal protection policy.

5. The definition of a "group of practices" as "a combination of practices or an overall employment process" does not provide sufficiently precise guidance for such challenges. The United States, in its brief in Wards Cove, asserted that "if factors combine to produce a single ultimate selection decision and it is not possible to challenge each one, that decision may be challenged (and defended) as a whole." (Brief at 22). See also EEOC regulation, 29 CFR § 1607.16 Q (a selection procedure is any measure or combination of measures). The proposed definition does not seem to recognize any distinction between independent and interdependent selection procedures, nor to limit challenges to groups of practices that are interdependent, as for example, questions on a test or test scores combined with

evaluations of interview performance. Where hiring practices are independent, as for example, seeking job applicants through both college recruitment and newspaper advertising, complaining parties should be required to demonstrate the statistically significant impact of each hiring practice separately.

6. The proposed legislation provides that an unlawful employment practice is established when a practice or "group of practices" results in a disparate impact on a protected group. This modifies the causation element established by Wards Cove, 109 S. Ct. at 2124, by eliminating the requirement that each specific employment practice must be causally connected to the disparate impact under attack. This standard is appropriate when interdependent practices are challenged for their cumulative impact. Any further limitation of causation standards in disparate impact cases might encourage employers to focus excessively on the racial, sexual and ethnic balances of their workforces rather than on job-related criteria and processes.

7. Because the Act omits any mention of the final stage of proof in a disparate impact case, the intent is apparently to rely on the case law establishing that a complaining party may prevail even after a respondent demonstrates business necessity of its practices if the plaintiff provides an alternative with less impact. This case law includes the pro-employer gloss of Wards Cove that any proposed alternative must be shown to be "equally effective" in furthering the employer's interests, considering "factors such as the cost or other burdens," and that courts analyzing alternatives should "proceed with care" because they are "generally less competent than employers to restructure business practices." 109 S. Ct. at 2127. The question of how this gloss will be applied is not addressed by the legislation, but the search for an alternative would be a less important inquiry in light of the increased burdens placed on employers at the rebuttal stage in a disparate impact case.

8. While the bill is premised in part on the view that Wards Cove "cut back dramatically" on disparate impact claims, (H.R. 4000, sec. 2(a)(1)), it is far from clear that the Supreme Court's decision will have the far reaching negative effect on the litigation of disparate impact claims that is foreseen by the drafters of the proposed legislation. In recent months, the Office of General Counsel has recommended proceeding in most disparate impact cases in the belief that EEOC can meet the standards of Wards Cove. Although the Second Circuit recently reversed the district court's grant of partial summary judgment for the Commission in EEOC v. Joint Apprenticeship Committee, holding that the district court had not properly analyzed the question of whether statistical disparities were caused by the challenged criteria, this case was litigated prior to the Wards Cove decision. It remains to be seen whether the district court, upon remand, will consider the Commission's proof sufficient in

light of Wards Cove. Recently the Office of General Counsel has decided against appealing two cases investigated and litigated under pre-Wards Cove standards, because of the Commission's failure to identify specific practices causing disparate impact (EEOC v. Federal Reserve Bank of St. Louis (W.D. Tenn.)), and because of the Commission's failure to meet its burden of proving that a policy with less adverse impact could meet the employer's legitimate business goals (EEOC v. Carolina Freight Co. (S.D. Fla.)). Nevertheless, the standards of Wards Cove should not be difficult to meet when charges are investigated in light of those standards.

9. Because the future application of Wards Cove is uncertain, the congressional effort to resolve some of these questions might be helpful to the EEOC and to respondents by clarifying obligations and creating a more stable legal regime. Many facially neutral practices with adverse impact on women and minorities have been eliminated from the employment scene since the Supreme Court first endorsed impact analysis in Griggs v. Duke Power Co., 401 U.S. 424 (1971). See, e.g., Helfand and Pemberton, The Continuing Vitality of Title VII Disparate Impact Analysis, 36 Mercer L. Rev. 939, 942 (1985)(the Griggs definition "has done much to restructure institutional systems for employee selection and promotion so as to further widely-accepted ideals of efficiency and reward for merit"). A resurgence of the use of "built-in headwinds" to minorities and women which are not justified by business necessity would be deplorable, and thus, the drafters' desire to maintain the vitality of disparate impact is understandable. However, to serve its purpose as a tool for identification of neutral practices that operate to impede minority advancement, disparate impact analysis must be carefully tailored to provide a reasonable test of business necessity and to assure a causal nexus between a challenged group of interdependent practices and disparate impact on a protected group.

III. Section 5 -- Mixed Motive Cases

A. Summary

The Act amends section 703, 42 U.S.C. § 2000e-2, by adding a new subsection (l) to say that an unlawful employment practice is established when a party demonstrates "that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though such practice was also motivated by other factors." The Act also amends section 706(g), § 2000e-5(g), by adding a clause saying that remedies of backpay or reinstatement are not required when there has been a 703(l) violation if "respondent establishes that it would have taken the same action in the absence of any discrimination."

B. Purpose

In response to the Supreme Court's decision in Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989), this section is apparently intended to clarify the causation standard in a "mixed motive" case and to alter the Court's decision that an employer's proof that he would have made the same decision absent the impermissible factor defeats liability, id. at 1787-88 & n.10. The various opinions in Price Waterhouse differed over whether Title VII imposes a "but for" causation requirement. The plurality held that "once a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role." Id. Although the plurality denied that this constituted a showing of "but for" causation, at least four other justices insisted that "but for" is the appropriate standard, id. at 1797 (O'Connor, J., concurring); id. at 1807 (Kennedy, J., dissenting, joined by Rehnquist, C.J. and Scalia, J.), and Justice Kennedy asserted that the plurality's theory of liability "essentially incorporates the but-for standard." Id. at 1806. The proposed legislation states that a violation is shown when an impermissible factor is a "motivating factor." While this codifies one aspect of the plurality's approach, the proposed legislation departs from the Court's analysis in stating that reliance on an impermissible factor constitutes a violation for which the remedy may be limited if the respondent can show it would have taken the same action in the absence of any discrimination.

C. Comments on the proposed legislation

1. The proposed legislation provides that if the respondent proves it would have made the same decision in the absence of discrimination, such proof serves only to limit equitable relief, and not to avoid a finding of liability. This provision codifies the approach of the Eighth and Ninth Circuits, Bibbs v. Block, 778 F.2d 1318, 1320-1324 (8th Cir. 1985)(en banc); Fadhl v. City and County of San Francisco, 741 F.2d 1163, 1165-1166 (9th Cir. 1984). This was also the approach urged in Price Waterhouse by Hopkins, 109 S. Ct. at 1784 & n.2, and by the United States (Brief at 21-24). Although the Commission did not join the amicus brief filed by the Government, the Commission too had determined that where it is shown that discrimination is "a" factor in an employment decision, the burden should shift to the defendant only to avoid retroactive relief, but not to extinguish liability. (Price Waterhouse Amicus Recommendation, March 23, 1988, at 9 & n.12).

2. The effect of the amendment to section 706(g) is to give respondents the opportunity to avoid only the remedies of backpay and reinstatement. Presumably, if liability is established

through proof that an impermissible factor was a motivating factor in an employment decision, the respondent could be liable for compensatory and punitive damages as provided in the proposed section 8. It is unclear how the proposed amendment would affect attorneys' fee considerations.

3. The proposed legislation does not identify the level of proof necessary for the respondent's defense. The legislation thus implicitly approves the Supreme Court's adoption of the preponderance standard. Price Waterhouse, 109 S. Ct. at 1792.

4. The proposed legislation also does not identify the type of evidence necessary for a complaining party to meet its burden, a question treated differently in the various opinions. Cf., e.g., 109 S. Ct. at 1784-1789 (plurality opinion)(Title VII requires a shifting of the burden to the employer once the plaintiff establishes a prima facie case that an illegitimate consideration entered into the employment decision); 109 S. Ct. at 1795 (White, J. concurring)(the plaintiff's "burden was to show that the unlawful motive was a substantial factor in the adverse employment action"); 109 S. Ct. at 1801 (O'Connor, J., concurring)(burden shifts to the employer "where there is direct evidence that it has placed substantial reliance on factors whose consideration is forbidden by Title VII"). By requiring that the complaining party demonstrate that an impermissible factor was "a motivating factor," the proposed legislation may not adequately address situations in which there are numerous decision makers and only one was influenced by an impermissible factor.

IV. Section 6 -- Challenges to Prior Decrees

A. Summary

The Act adds a new subsection (m) to section 703, 42 U.S.C. § 2000e-2, to provide that an employment practice implementing a litigated or consent judgment or order resolving a claim of employment discrimination under the United States Constitution or Federal civil rights laws cannot be challenged by a person who had notice and opportunity to present objections to the judgment or order, or by a person whose interests were adequately represented by another person who challenged the judgment or order, or if the court determines that "reasonable efforts were made to provide notice to interested persons." Second, the proposed legislation says this provision does not alter standards for Rule 24 intervention; apply to rights of parties or class members; or prevent challenges to judgments or orders based on claims of collusion, fraud, invalidity, or lack of subject matter jurisdiction. Third, the proposed legislation provides that actions not precluded by this section have to be brought in the court that entered the original order or judgment, and, if possible, before the same judge.

B. Purpose

This section is intended to "overrule" Martin v. Wilks, 109 S. Ct. 2180 (1989), in which the Supreme Court held that a person could not be precluded from filing a separate lawsuit challenging a consent decree unless that person was made a party to the consent decree action, even if that person had an opportunity to be heard by the court prior to the entry of the decree.

C. Comments on proposed legislation

1. The Office of General Counsel previously recommended joining the Department of Justice on briefs arguing for the result the Supreme Court reached in Martin, but the Commission did not adopt those recommendations. (Amicus Recommendations Martin v. Wilks, August 4, 1988; Marino v. Ortiz, 1987). Those memoranda outlined the primary objection to the "collateral attack" doctrine--that it puts the burden on interested parties to intervene in litigation to which they are strangers. In rejecting the collateral attack doctrine, the Supreme Court analyzed this issue in terms of the absence in the Federal Rules of a basis for a system of mandatory intervention. The proposed legislation would codify the "collateral attack" doctrine, putting the burden on interested parties to intervene if they have "notice from any source of the proposed judgment or order." Although the proposed legislation creates a statutory exception to Rule 24, it states that there is no intent to "alter the standards for intervention under rule 24." The Office of General Counsel continues to adhere to its view that an exception to Rule 24 in the employment discrimination area is neither necessary nor desirable.

2. The proposed legislation amends Title VII but precludes challenges to litigated or consent judgments or orders brought under the Constitution or federal civil rights laws. If the drafters intend to apply the same procedures to challenges brought under section 1981 it may be necessary to amend that statute as well.

3. There are due process concerns underlying the Supreme Court decision. Martin, 109 S. Ct. at 2184 & n.2 (exceptions to the general rule that a lawsuit cannot conclude the rights of strangers to proceedings must be "consistent with due process"). The proposed legislation attempts to address these concerns by providing that prior judgments or orders may not be challenged by interested persons who had notice and a reasonable opportunity to present objections, or by those whose interests were represented by another person who challenged the judgment or order, or if the court determines that reasonable efforts were made to provide notice. It is unclear whether the legislation would satisfy due process considerations. See, e.g., Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (a fundamental

requirement of due process is notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"). Although the sufficiency of notice is a factual inquiry, the legislation appears to foreclose such an inquiry by providing for preclusion of challenges by notice "from any source," which could be general notice far removed from later developments which adversely affect nonparties to the litigation.

4. It is doubtful that this portion of the proposed legislation will have much impact on EEOC's litigation or on private sector suits. There appear to have been few charges filed post-Martin. (The Office of Program Operations is currently conducting a statistical study of Martin charges filed with the Commission since the Supreme Court's decision.) The handful of lawsuits filed -- nineteen identified by the Lawyers Committee -- is limited almost exclusively to firefighter claims in the public sector. (Lawyers Committee Analysis of the Impact of Supreme Court Decision in Martin v. Wilks, Daily Labor Report, 2/13/90). While the Lawyers Committee contends that the Martin decision will open up endless litigation, discourage new settlements, overburden the courts and destroy the concept of finality in employment discrimination litigation, there is little evidence that such dire consequences will eventuate because of Martin. None of the lawsuits filed since Martin has overturned a previously entered decree, but if older decrees do not meet current legal standards for affirmative action or are no longer necessary to remedy discrimination, the decrees should be reexamined. (See Department of Justice Memo on the Impact of Martin v. Wilks, February 16, 1990). A more extensive analysis of the limited reach of Martin may be found in Shanor and Marcosson, Battleground for a Divided Court: Employment Discrimination in the Supreme Court, 1988-89, 6 The Labor Lawyer 137, 157-160 (1990)(forthcoming).

5. Efficiency and judicial economy concerns support the bill's provision that any challenges to prior decrees be brought in the same court and if possible before the judge that entered the original judgment or order.

6. The draft legislation does not address agreements that result from the EEOC conciliation process rather than from judicially approved consent decrees and orders. This would undermine EEOC conciliation efforts: respondents would not agree to prospective relief as part of the conciliation process but would insist on judicial resolutions. Adding conciliation processes under section 6, however, would create other problems: EEOC could not provide notice to interested nonparties during conciliation processes because of the confidentiality provisions of Title VII.

V. Section 7 -- Seniority Systems and Statute of Limitations

A. Summary

The Act amends section 706(e), 42 U.S.C. § 2000e-5(e), to change the charge filing period from 180 days to two years, to run the time for filing a charge from the date the unlawful employment practice occurred "or has been applied to affect adversely the person aggrieved, whichever is later," and to delete the provision for a 300 day charge filing period in deferral states. It also amends section 703(h), 42 U.S.C. § 2000e-2, to say that when a seniority system was initially included in a collective bargaining agreement with an intent to discriminate, the application of the system during the period the bargaining agreement is in effect is an unlawful employment practice.

B. Purpose

These sections are intended both to extend the general limitations period for filing Title VII charges and to "overrule" Lorance v. AT&T Technologies, Inc., 109 S. Ct. 2261 (1989), which held that Title VII claims are untimely unless charges are filed with the EEOC within 300 days of the allegedly discriminatory change in the facially neutral seniority system which later caused the plaintiffs' demotions. The language providing that the filing period begins to run with the application of an unlawful practice also appears to "overrule" Delaware State College v. Ricks, 449 U.S. 250 (1980), which held that the discriminatory denial of tenure triggered the charge filing period rather than the resulting termination of employment one year later, and may implicate United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977), which held that a challenge to a seniority system cannot be predicated on a past illegal act that affects the present calculation of seniority credit.

C. Comments on the proposed legislation

1. The Commission would likely experience some difficulties in investigating charges filed two years after the alleged unlawful acts. Moreover, extending the period to two years could fuel respondents' arguments that they have been prejudiced by investigatory delay. A one year charge filing period would be more reasonable and would simplify the charging party's burden of calculating the time for filing.

2. It is not entirely clear what the drafters intend to accomplish by deleting the provision that in deferral states charges must be filed within 300 days after the unlawful practice or within thirty days after notice of termination of the state proceedings. If the intent is to make the charge filing period the same in deferral and nondeferral states, the proposed

legislation does not accomplish that goal because section 706(c) still requires that no charge may be filed with the EEOC "before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated." Thus, extending the EEOC charge filing period to one or two years will not alter the fact that in a deferral state charging parties must file with the state or local agency at least sixty days before the end of the one or two year period after the unlawful act. See Mohasco Corp. v. Silver, 447 U.S. 807 (1980). Although worksharing agreements between the Commission and state and local agencies solve some of the timeliness problems associated with the sixty day deferral period by providing for the waiver of the state's period of exclusive jurisdiction for certain categories of charges and for simultaneous filing with the Commission upon receipt, EEOC v. Commercial Office Products Co., 108 S. Ct. 1666 (1989), questions regarding charge-filing in deferral states continue to complicate litigation and threaten loss of federal rights. For example, litigation continues on whether state or local agencies may prospectively waive initial processing in their worksharing agreements or whether they must execute separate waivers on each charge received. See, e.g., Green v. Los Angeles County Superintendent of Schools, 883 F.2d 1472 (9th Cir. 1989).

3. As EEOC argued in Lorance, the charge filing period should begin to run with the application of an unlawful practice in the context of a seniority or benefit plan because the discriminatory reasons for adoption of such a system may become apparent only when it is applied to affect the employment status of covered employees. To limit challenges to the period immediately following adoption of a seniority system would foster possibly unnecessary litigation and would preclude challenges by any employees hired more than 180 or 300 days after the adoption of the system. This problem is addressed in the "Civil Rights Restoration Act of 1990" proposed by the Administration.

4. The language of subsection (a)(2) arguably establishes a better rule for all adverse employment decisions because charging parties can be more certain that illegal discrimination has occurred when decisions are actually applied to them. (See United States' and EEOC's Amicus Brief in Delaware v. Ricks at 19-20). However, it might encourage employers to shorten the time between notice and adverse actions, to the detriment of the employee. The rule of this subsection may be overbroad if applied to situations where notice is firm and final as well as to those where there is unclear or contingent notice.

5. The language change proposed by subsection (a)(4) makes the final sentence of section 706(e) somewhat confusing and contradictory: it says that when proceedings are initially instituted with a State or local agency, a copy of the charge shall be filed by the Commission with the State or local agency.

6. Subsection (b), creating a new rule for challenges to seniority systems, restricts its application to seniority systems and practices that are part of a collective bargaining agreement. This restriction is not contained in the original language of section 703(h) or in the Administration-sponsored "Civil Rights Restoration Act of 1990." Presumably challenges to seniority systems that are not embodied in a collective bargaining agreement would be subject to the restrictions in Lorance. There is no apparent reason for distinguishing between intentionally discriminatory seniority practices embodied in bargaining agreements and those that are unilaterally adopted by an employer or are agreed to informally.

7. Intentionally discriminatory seniority systems should not be subject to challenge only "during the period that such collective bargaining agreement is in effect." Collective bargaining agreements commonly have two or three year terms but then are renegotiated with many of the provisions being readopted without change. In such a case the system should be subject to challenge whenever it is applied to the charging party, even if it is beyond the period that the original bargaining agreement is in effect. (See comments of the Department of Justice at February 20, 1990 Hearing on Civil Rights Act of 1990).

VI. Section 8 -- Damages

A. Summary

The Act amends section 706(g), 42 U.S.C. § 2000e-5(g), by adding provisions for compensatory and punitive damages and for the right to demand a trial by jury when compensatory or punitive damages are sought.

B. Purpose

These provisions reflect the drafters' desire to strengthen existing remedies for victims of discrimination.

C. Comments on proposed legislation

1. In the absence of empirical data we are unable to speculate about the potential effects of the availability of compensatory and punitive damages in encouraging or discouraging respondents to settle claims with offers of backpay and/or reinstatement. (See Equal Employment Advisory Council January 30, 1990 Letter to William K. Slate, Director, Federal Court Study Committee, re Tentative Recommendations of the Federal Courts Study Committee at 4-6). However, strengthening monetary remedies available to victims of discrimination would further the prophylactic purposes of the statute at least in cases where there is no wage loss, such as where sexual or racial harassment occurs without discharge, promotion denial or the like.

2. The addition of jury trials in cases where such damages are available would appear to be constitutionally mandated by the

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Seventh Amendment because cases involving such damages would be actions at law. See, e.g., Tull v. United States, 107 S. Ct. 1831, 1835 (1987); Curtis v. Loether, 415 U.S. 189, 194 (1974) (right to a jury trial in a statutory cause of action depends upon whether a statute "creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law"). Jury trials increase the probabilities of success for plaintiffs, as demonstrated by the fact that nearly two-thirds of all ADEA cases submitted to juries result in plaintiffs' verdicts. Jury trials also increase the expense and delays inherent in federal court litigation. (See Equal Employment Advisory Council's Comments on Federal Courts Study Committee's Tentative Recommendations at 4-6).

3. Because the Americans With Disabilities Act incorporates the remedies provisions of Title VII, compensatory and punitive damages would be available under the ADA as well.

VII. Section 9 -- Attorneys' Fees

A. Summary

The Act amends section 706(k), 42 U.S.C. § 2000e-5(k), by providing for recovery of expert fees and other litigation expenses as part of an attorney fee award and by adding new sections providing that waiver of attorneys' fees may not be compelled as a condition of settlement and that in an action challenging a judgment or order granting relief under Title VII, a prevailing party may recover a reasonable attorney's fee and costs from the party against whom relief was granted in the original action.

B. Purpose

These provisions reflect the drafters' desire to make employment discrimination litigation more attractive to private plaintiffs' counsel.

C. Comments on proposed legislation

1. The new section (1), by making expert fees a part of a reasonable attorney's fee, restricts Crawford Fitting Co. v. J.T. Gibbons, Inc., 107 S. Ct. 2494 (1987), in which the Supreme Court held that a court taxing witness fees to a losing party could not exceed the $30-per-day limit of 28 U.S.C. § 1821. While the Seventh Circuit recently held that the $30-per-day limit does not apply in Title VII cases, this section would provide nationwide certainty on this important question. Friedrich v. City of Chicago, 888 F.2d 511 (7th Cir. 1989).

2. Section (1) also limits the possible application of Marek v. Chesney, 473 U.S. 1 (1985), to Title VII actions. In Marek the Court held that under 42 U.S.C. § 1988, because attorney's fees are awarded "as part of the costs," when a Rule 68 offer of judgment is made and rejected, if the final judgment

obtained is not more favorable, the plaintiff must pay attorney's fees incurred after the making of the offer. The amendment thus expressly provides that attorney's fees are separate from costs.

3. EEOC should be able to recover expert fees as part of the cost of litigation, a result precluded by the current language of the draft bill. This is the effect of the amendment because the proposed language includes expert fees as a part of a "reasonable attorney's fee" and the Commission is limited to recovering costs which is now a separate item.

4. As amended, section 706(k) exempts the United States and the Commission from having to pay attorney's fees, expert fees and other litigation fees because these items are no longer enumerated as "part of the costs" for which the Commission and the United States shall be liable.

5. The new section (2) overrules the Supreme Court's decision in Evans v. Jeff D., 475 U.S. 717 (1986), which held that the right to attorney's fees under 42 U.S.C. § 1988 may be waived as part of a settlement process. It is unclear why the language in this section concerns "all or substantially all attorneys' fees." Because section 706(k) calls for a "reasonable attorneys' fee" it appears that the task of the bill should be to ensure that such a fee is provided while giving defendants who negotiate settlements some certainty as to the amount of bottom-line monetary liability they will incur. Guaranteeing the non-waiver of only "all or substantially all" attorneys' fees does not meet this dual concern.

6. The new section (3) codifies the concurring view of Justice Blackmun in Independent Federation of Flight Attendants v. Zipes, 109 S. Ct. 2732, 2739-40 (1989), that nothing should foreclose "a prevailing plaintiff from turning to the Title VII defendant for reimbursement of all the costs of obtaining a remedy, including the costs of assuring that third-party interests are dealt with fairly."

VIII. Section 10 -- Federal Employees

A. Summary

The Act amends section 717, 42 U.S.C. § 2000e-16, by changing the suit filing period from thirty to ninety days and by providing that public employees are entitled to interest on awards to compensate for delay in payment.

B. Purpose

These provisions reflect the drafters' desire to improve the position, both procedurally and remedially, of public employees who are victims of discrimination.

C. Comments on proposed legislation

1. The proposed ninety day filing period would provide the same suit filing time for public employees as that provided to private employees under section 706(f)(1). The filing period for ADEA claims under our current proposed regulation is thirty days. 54 Fed. Reg. 45747, 45749-50 (1989). Under the Civil Service Reform Act, there is also a thirty day limitations period governing "mixed cases." 5 U.S.C. § 7703(b)(2); 29 C.F.R. § 1613.421.

2. In EEOC's view, the 1987 amendment to the Back Pay Act, 5 U.S.C. § 5596, already waived the Government's immunity from recovery of interest by federal employees. (See 29 C.F.R. Part 1613, Appendix A, ¶ 4; Hall v. Lyng, EEOC No. 05880912 (Dec. 29, 1988)). However the Department of Justice takes the view that Title VII is the exclusive remedy for federal employees and that the Back Pay Act does not extend to claims brought under Title VII. The Office of Legal Counsel has drafted a request that the Attorney General issue an opinion holding that, in amending the Back Pay Act, Congress waived sovereign immunity from the award of interest in discrimination complaints. It is clear that loss of interest on back pay is a real economic loss to victims of discrimination; conversely, a disentitlement to such interest encourages procrastination in the payment of awards by the United States.

IX. Section 11 -- Construction

A. Summary

The Act amends Title XI, 42 U.S.C. § 2000h, by adding a rule that federal laws protecting civil rights "shall be broadly construed" and a rule that no Federal law restricts or limits rights, procedures, or remedies available under any other Federal law.

B. Purpose

Section 1107(a) presumably reflects a desire of the drafters to change the approach taken by the Supreme Court in interpreting the Civil Rights Act of 1964. Section 1107(b) may be an attempt to "override" other Federal law when the Civil Rights Act applies.

C. Comments

1. While "broad construction" of civil rights laws sounds innocuous, it is unclear (1) whether this provision is an invitation to revisit previously settled questions of Title VII jurisprudence, which "narrowly construed" the Civil Rights Act and (2) what is meant by "broad construction," especially in situations where rights for one group may conflict with rights of another group.

2. The nonlimitation provision may overrule Brown v. GSA, 425 U.S. 820 (1976), which held that Title VII is the exclusive remedy for federal employees with claims of discrimination. It may also be an attempt to foreclose any argument that the Federal Arbitration Act applies to Title VII claims. See Gilmer v. Interstate/Johnson Lane Corp., No. 88-1796, (4th Cir. DLR 2/14/90) (suggesting that the rule of Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), -- that prior arbitration cannot preclude federal court action under Title VII -- is limited to cases involving a collectively bargained agreement to arbitrate).

3. The nonlimitation language of section 1107(b) is restricted to Federal law. It might therefore be inferred that Federal law may limit rights or remedies available under state law. This was probably not intended by the drafters.

X. Section 12 -- Section 1981 Claims

A. Summary

The Act amends 42 U.S.C. § 1981 by explaining that to "make and enforce contracts" includes "the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship."

B. Purpose

This section "overrules" Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989), which held that section 1981 only protects the formation of a contract and not problems that may arise from the conditions of continuing employment.

C. Comments

1. Although the Commission has no role in enforcing section 1981, EEOC recommended to the Solicitor General that section 1981 be construed to reach racial harassment. Upon rehearing in Patterson, EEOC urged (1) that Runyon v. McCrary, 427 U.S. 160 (1976), not be overruled and (2) that EEOC's work was supported, not supplanted, by the existence of section 1981. (Patterson Memorandum to Solicitor General, June 6, 1988).

2. If the remedies enumerated in section 8 of the Civil Rights Act of 1990 are added to Title VII, so that plaintiffs are entitled to seek punitive damages and to demand jury trials, the sole uses of section 1981 in employment discrimination cases would be (1) to provide plaintiffs alleging employment discrimination a means to bypass EEOC processing and, (2) to give plaintiffs a longer limitations period in states having limitations periods exceeding two years, and (3) to permit suits on race discrimination claims (but not sex, national origin or religion claims) against employers having fewer than 15 employees.

XI. Sections 13, 14, 15

A. Section 13 says that the amendments in the Civil Rights Act of 1990 shall not be construed "to affect court-ordered remedies, affirmative action, or conciliation agreements that are otherwise in accordance with the law." It is not entirely clear why the drafters included this statement, but it is consistent with news releases and statements by the proponents of the bill that it does not mandate quotas or change the law of affirmative action. As noted in the comments on Sections 4 and 6 above, the bill would change incentives for racial balancing to avoid disparate impact liability and would preclude challenges to consent decrees containing quotas other than through intervention procedures.

B. Section 14 contains a standard severability provision.

C. Section 15 provides the transition rules and effective dates of the various amendments, which are keyed, where relevant, to the dates of the Supreme Court decisions being modified and otherwise become effective with the date of enactment of the Act. The retroactivity arguments raised by the Department of Justice in response to the Betts legislation would clearly apply to this legislation also. The Department of Justice Letter to Hon. Edward M. Kennedy suggested that application of legislation to actions that were pending on a certain date may run afoul of the vested rights doctrine where the cases have proceeded to final judgment.

File

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Confidential + Multiple

July 19, 1989

MEMORANDUM

TO : CLARENCE A. THOMAS
Chairman

R. GAULL SILBERMAN
Vice-Chairman

TONY GALLEGOS
Commissioner

EVAN J. KEMP, JR.
Commissioner

JOY CHERIAN
Commissioner

III - Impact
XII . A. 1
Disparate Impact

FROM : CHARLES A. SHANOR CAS/DRV
General Counsel

SUBJECT : Memorandum on Supreme Court Decisions From the 1988-89 Term Having Significant Impact on the EEOC Litigation Enforcement Efforts.

The attached memorandum is a briefing paper on the impact of recent Supreme Court decisions on EEOC litigation. The Office of Program Operations is conducting an independent analysis on how these decisions might impact on other aspects of EEOC's law enforcement program. We have tried to limit our discussion of investigative and operational matters to those areas likely to impact on litigation efforts.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of
General Counsel

CONFIDENTIAL:
Lawyer-Client Communication

MEMORANDUM

TO: CLARENCE A. THOMAS
Chairman

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Commissioner

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Commissioner

JOY CHERIAN
Commissioner

FROM: CHARLES A. SHANOR CAS/DRL
General Counsel

RE: Supreme Court Decisions From the 1988-89 Term Having Significant Impact on EEOC Litigation Efforts.

The purpose of this memorandum is to explain the most important civil rights cases of the 1988-89 Supreme Court term, and to analyze the probable effects on the EEOC's litigation efforts. The major cases this memorandum will discuss are:

1. Wards Cove Packing Co. v. Atonio, 57 U.S.L.W. 4583 (U.S. June 5, 1989)
2. Martin v. Wilks, 57 U.S.L.W. 4616 (U.S. June 12, 1989)
3. Lorance v. AT&T Technologies, 57 U.S.L.W. 4654 (U.S. June 12, 1989)
4. Public Employees Retirement System v. Betts, 57 U.S.L.W. 4931 (U.S. June 23, 1989).
5. Price Waterhouse v. Hopkins, 57 U.S.L.W. 4469 (U.S. May 1, 1989)[1]

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[1] There were several other decisions likely to affect employment discrimination enforcement efforts. Among these were Patterson v. McLean Credit Union, 57 U.S.L.W. 4705 (U.S. June 15, 1989) (declining to overrule Runyon v. McCrary, 427 U.S. 160 (1976), but limiting scope of § 1981 to claims of discrimination in formation of contracts, thus precluding claims based on racial harassment or discriminatory discharge); Jett v. Dallas Independent School District, 57 U.S.L.W. 4858 (U.S. June 22, 1989) (§ 1981 does

Before analyzing each case in detail, it may be useful to summarize the likely ramifications. Each of these, of course, involves some level of speculation, and assumes that other factors remain constant.

1. We can expect some growth in our class complaint investigations due to Wards Cove, which makes large, class-action disparate impact cases more difficult to prove. We therefore expect that fewer such private actions will be brought, and that the burden will shift to the Commission. This impact may, however, be marginal: 27.4% of our Title VII suits are class suits, and only 46 private employment class actions were filed in FY 1988, down from over 1100 in 1977.

2. We can expect Title VII disparate impact cases to be more difficult to win. First, in cases where a plaintiff alleges that several factors collectively have a disparate impact, Wards Cove seems to hold that the plaintiff must show that each individual factor produces a statistically significant disparate impact. Second, the standard for measuring whether a practice with a disparate impact is justified has been altered, and possibly eased. The Court said that a practice must merely "serve[], in a significant way, the employment goals of the employer." This standard differs from the more stringent definitions of business necessity used by federal courts in the past. Third, while the employer has the burden of producing evidence of its business justification, the burden of persuasion remains with the plaintiff. Finally, the Court said that when the practice is found to be justified, and the plaintiff suggests less discriminatory alternatives, they must be "equally effective." We discuss the potential effects of these holdings in more detail below.

3. After Martin, we can expect more white males to challenge

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not provide an independent cause of action for damages against local government entities that is broader than remedy available for violations under § 1983, thus precluding recovery under § 1981 under a theory of respondeat superior); Independent Federation of Flight Attendants v. Zipes, 57 U.S.L.W. 4872 (U.S. June 22, 1989) (intervenors in Title VII actions are liable for fees only on same basis as are plaintiffs); Blanchard v. Bergeron, 57 U.S.L.W. 4191 (U.S. Feb. 21, 1989) (plaintiff's "reasonable attorneys' fee" is not limited by amount provided for in contingent fee arrangement between plaintiff and his attorney); Missouri v. Jenkins, 57 U.S.L.W. 4735 (U.S. June 19, 1989) (paralegal services could be billed at market rate if such separate billing was the prevailing custom in relevant legal market; Eleventh Amendment does not bar a fee against a state that includes enhancement to compensate for delay in payment).

race-conscious and gender-conscious employment plans adopted under court order or pursuant to a consent decree. Such charges will have to be handled differently than the way they are currently handled under Commission regulations, which call for a no-cause determination where a charge challenges practices based upon a court order.

4. Also, because Martin leaves settlements with race-conscious remedies vulnerable to subsequent challenge, conciliation may turn in the direction of monetary settlements. When race-conscious practices are employed, there will be greater incentive for the parties to carefully and narrowly tailor the plan so that it conforms to Weber and Johnson.

5. As to pending cases, Lorance will have minimal impact on our litigation. At this point we have discovered only one Commission suit that will be affected; the docket is being evaluated for others. However, since virtually all Supreme Court cases that have involved seniority systems were not brought within 180 or 300 days of the system's adoption, they would have been untimely under Lorance. While we assume that many future challenges to seniority systems will be time-barred, there will often be strong arguments that a defendant has waived the statute of limitations defense, or that notions of estoppel or tolling will preserve a suit (or previously entered decree) otherwise vulnerable after Lorance.

6. In light of Betts, we are examining our ADEA docket and considering dismissal of "benefit plan" claims. Some isolated cases may survive when a case falls within the Court's definition of "subterfuge" under § 4(f)(2). It appears that 28 current district court and four appeals court cases are directly implicated. While some specific claims may survive Betts, it is clear that we must be able to prove some intent to discriminate on the basis of age in some aspect of the employment relationship not involving fringe-benefits (e.g., hiring, wages, discharge).

7. As to claims that are no longer viable under Patterson's reading of § 1981, Title VII becomes the exclusive avenue for relief. Only hiring claims (18% of EEOC's Title VII cases) and some promotion claims (5.8%) will be unaffected. Many actions have been brought under § 1981 because Title VII was unavailable (e.g., untimely charges). As to these cases, the narrowing of § 1981 will not affect our Title VII docket, but it will mean that discriminatees who fail to comply with Title VII's charge filing requirements, and who are not covered under the more restrictive

reading of § 1981, will have no cause of action under federal law.[2]

8. In light of Price Waterhouse, we can expect to benefit from burden-shifting to the defendant in mixed-motive cases, where the plaintiff proves that an unlawful motive was a substantial factor in an adverse employment action. The greatest impact of the decision will be in cases of collegial decision-making.

9. We fear that there may be an overall "chilling effect" on those who would bring charges of discrimination. Victims of discrimination may be more reluctant to take legal action because of perceived judicial hostility.

Each of the cases will be discussed in detail in separate sections.

SECTION I: Wards Cove Packing Co. v. Atonio

The Supreme Court's 5-4 decision in this case contained five rulings on Title VII law having potential impact on the Commission's litigation:

1. Statistical evidence should compare the employer's decisions with the relevant labor market. 57 U.S.L.W. at 4585-87.

2. Each employment practice challenged must be shown to have a significant adverse impact. 57 U.S.L.W. at 4587.

3. A practice shown to have a disparate impact may be justified by a showing that it "serves, in a significant way, the legitimate employment goals of the employer." 57 U.S.L.W. at 4588.

4. When an employer's practice has been shown to have a disparate impact, the employer has the burden of producing evidence of its business justification, but the burden of persuasion remains with the plaintiff. 57 U.S.L.W. at 4588.

5. If the practice is found to be justified, plain-

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[2] There may also be an increase in DOJ recommendations because of Jett. The lack of an independent § 1981 remedy means that such suits must proceed under § 1983, which is a less attractive alternative to Title VII than a respondeat superior action under § 1981 would have been. More claims against state and local governments may now be brought under Title VII than under the cause of action created by § 1983 to remedy violations of § 1981.

tiff's proof of less discriminatory alternatives must be "equally effective" considering "costs and other burdens." 57 U.S.L.W. at 4588.

1. Labor Market: The court's ruling on the appropriate focus of statistical proof should present no problems for our litigation. Since Hazelwood School District v. United States, 433 U.S. 299, 308-12 (1977), the Court has required statistical evidence to compare the employer's actual selections with an appropriate measure of labor market availability. Here, the district court found that when petitioners' hiring was compared with the appropriate labor market there was no disparity. The court also found that the large number of minorities in the cannery jobs resulted from a skewed labor market for these jobs -- i.e., hiring of Alaska Natives from villages in close proximity to the canneries and the hiring hall contract with Local 37, I.L.W.U., which is predominantly Filipino. Accordingly, representation in the cannery jobs was found not to be a reasonable proxy for the labor market for the upper level jobs.

Determination of the appropriate labor market is ultimately a question of fact. While the Court found that statistics comparing representation in high- and low-level jobs were irrelevant here, such statistics may be probative in other cases. See Johnson v. Uncle Ben's Inc., 628 F.2d 419, 425-26 (5th Cir. 1980), vacated on other grounds, 451 U.S. 902 (1981), decision reinstated, 657 F.2d 750 (5th Cir. 1981)(internal availability appropriate for promotions). To be probative, they would need to be a reasonable proxy for labor market availability; such internal comparisons are not inherently probative of discrimination.

The Supreme Court's resolution of this issue thus comes as no surprise, and because the Commission's statistics have invariably been based on what we believe was the relevant labor-market, this component of the decision should cause no problems for the Commission.

2. Causation: The Court appeared to rule that, where multiple factors combine to produce a disparate effect, the plaintiff must prove that each practice by itself has a statistically significant impact or no causation has been proved.[3]

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[3] Plaintiffs "have to demonstrate that the disparity they complain of is the result of one or more of the employment practices that they are attacking . . ., specifically showing that each challenged practice has a significantly disparate impact on employment opportunities . . . ." 57 U.S.L.W. at 4587 (emphasis added).

This ruling has two fundamental problems.[4] First, it allows a divide-and-conquer defense[5] which would absolve selection processes with significant impact as long as the individual components are not separately significant. This makes outcomes turn on statistical artifact.[6] Second, it allows defendants to assure that their selection practices are immune to Title VII attack even if the overall process has a disparate impact. Since the data necessary to show the effect of the components is within their control, employers can avoid the reach of impact analysis by not retaining the requisite information.

The decision as to what constitutes a "discrete component" -- such that the plaintiff would have to isolate and show the statistically significant disparate impact of that practice -- can be taken to extremes. Individual questions on a test can be analyzed for adverse impact, but it is doubtful that the Supreme Court intended to require such extreme precision. Presumably, a plaintiff can still attack the disparate impact of a test without having to show which questions produce the impact and that each of those questions produces a statistically significant impact. On the other hand, there is no obvious difference between a test with three subparts and a hiring decision based on three factors. Yet,

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[4] While the United States supported Petitioners on the question of burden of proof, it realized that plaintiffs should be allowed to challenge multi-component selection practices. Brief for the United States at 22 (if "multiple factors . . . . combine to produce a single ultimate selection decision and it is not possible to challenge each one, that decision may be challenged (and defended) as a whole").

[5] See Capaci and EEOC v. Katz & Besthoff, Inc., 711 F.2d 647, 654 and n.4 (5th Cir. 1983). Statistical evidence showed an enormous and statistically significant disparity adverse to women in the selection of managers at defendant's drugstores. The defendant argued that the hiring in each year and for each locality should be analyzed separately; such fragmented analysis reduced or eliminated the statistical significance. However, the court of appeals termed this a "'divide and conquer' technique", and stated, "this was an unfair and obvious attempt to disaggregate the data to the point where it was difficult to demonstrate statistical significance." Ibid.

[6] If a significant "bottom line" impact results from several components, it must be caused by some or all of the individual components. However, it is easily possible that the effect is cumulative, and the effect of each component -- while adverse -- is not individually large enough to be statistically significant. When this is the case, the outcome under the Wards Cove causation rule will depend principally on sample size, a statistical artifact.

in a case like Wards Cove, where various factors are alleged to contribute to a bottom-line disparate impact in hiring, the Court clearly has required plaintiffs to identify which factors produce the disparate impact, and show that the impact of each of those factors is itself significant. Exactly where the Court will draw the line is not clear. There is, therefore, room for us to argue that there are circumstances where a cumulative disparate impact arising from multiple factors will suffice. The strength of this argument will depend upon the interrelationship between the factors and how each informs the employment decision at issue.

Depending on how strictly the Wards Cove causation requirement is read, the decision could overturn sub silentio several circuit court decisions and cause significant problems.[7] The Second Circuit in Kirkland v. New York State Dept. of Correctional Services, 520 F.2d 420, 425 (2d Cir. 1975), considered a challenge to the department's promotion process. Promotions were determined by a combined score on a five-part test, and the state argued that the results of each part individually did not show an adverse impact. However, the court rejected this fragmented approach:

> Since passing grades and promotion were dependent upon the cumulative results of the five sub-parts, we . . . see little relevance in this proof on the issue of whether or not the examination as a whole had an unconstitutional discriminatory impact.

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[7] The court's causation ruling is also at odds with two treatises on employment discrimination law. In a section entitled "Cumulative Effects", Baldus and Cole write:

> The clearest justification for bracketing more than a single decision point is when the plaintiff's claim goes to the combined effects of several stages in the defendant's selection process. . . . What counts is the effect of the entire system.

Baldus and Cole, Statistical Proof of Discrimination §4.121, p. 111 (1980). Similarly, Larson and Larson state:

> ...the more typical situation is one in which the employer's selection procedure is a mix of objective procedures, such as tests or seniority, and subjective evaluations. Here a showing of gross workforce imbalances alone may well provide a prima facie showing of the invalidity of the overall selection procedure.

Larson and Larson, Employment Discrimination §50.84(a), p. 10-142.4.

In Gilbert v. City of Little Rock, 722 F.2d 1390 (8th Cir. 1983), the Eighth Circuit reversed a district court finding of no disparate impact because it failed to look at cumulative effects. The case involved promotions in the Little Rock Police Department and the district court had found "there is no adverse impact in any of the subparts of the promotional process." 544 F. Supp. 1231, 1247. The court of appeals reversed, stating that "the district court's analysis was incorrect because it did not focus on the interrelationship of the component parts of the promotional procedure." 722 F.2d at 1396. The district court had analyzed passing rates of blacks and whites on the subparts which were roughly equal, but failed to consider the "bottom line." When the scores on the subpart were combined and candidates ranked by total score, there was a substantial adverse impact. Id. at 1397-98.[8]

Of particular concern to the Commission, Wards Cove contradicts the Uniform Guidelines on Employee Selection Procedures (UGESP), 29 C.F.R. § 1607, which support application of impact analysis to "[a]ny measure, [or] combination of measures." 29 C.F.R. § 1607.16Q. The Guidelines direct that analysis should start with a determination whether the "total selection process"

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[8] See also Griffin v. Carlin, 755 F.2d 1516 (11th Cir. 1985) (impact analysis could be used to challenge a multi-component selection process); Fisher v. Proctor & Gamble, 613 F.2d 527, 536-37 (5th Cir. 1980) (impact analysis applied to "total selection process" which included application forms, supervisor ratings, tests, and interviews); Davis v. City of Dallas, 483 F.Supp. 54, 56 (N.D.Tex. 1979), reconsideration denied, 487 F.Supp. 389, 395-97 (N.D.Tex. 1980)(same).

The Fifth Circuit ruling in Carroll v. Sears, Roebuck & Co., 708 F.2d 183 (5th Cir. 1983), illustrates how unfair the Court's new rule is. The court of appeals rejected a disparate impact attack on Sears' employment tests, despite evidence that they "were not job related and that blacks on average scored much lower than whites." Because the tests had no passing score and were only one factor in the employment decisions, plaintiffs could not isolate their effects and the court ruled no prima facie case had been established. "The flaw in the plaintiffs' proof was its failure to establish the required causal connection between the challenged employment practice (testing) and discrimination in the work force." 708 F.2d at 189. Plaintiffs had argued that a disparity between 56.5 percent black applicants and 45.3 percent black hires resulted from a combination of test scores and subjective judgments.

has an adverse impact.[9] 29 C.F.R. § 1607.4C.

The majority relies on the recordkeeping provisions of UGESP to suggest that the new causality ruling will not be unduly burdensome to plaintiffs because the guidelines require employers to keep records of their selection practices. 57 U.S.L.W. at 4587-88, quoting Sections 4A and 4C of UGESP, 29 C.F.R. §§ 1607.4A, 1607.4C (1988). However, in Wards Cove itself, the employers' records were insufficient to allow plaintiff to carry this causality burden. Thus, as a result of the majority's ruling, an employer's violation of the recordkeeping regulation could enable it to avoid liability. Such a causation ruling would have the effect of "shield[ing] from liability an employer whose selection process is so poorly defined that no specific criterion can be identified with any certainty, let alone be connected to the disparate effect." Watson v. Fort Worth Bank & Trust, 108 S. Ct. 2777, 2797 n.10 (Blackmun, J., concurring in part and concurring in the judgment).

To the extent recordkeeping regulations can help, the Commission's recent proposed amendments to 29 C.F.R. Part 1602 would appear to make a contribution. 54 Fed.Reg. 6551 (Feb. 13, 1989). The proposed rules would eliminate the exemption for seasonal work (which applied to the canning operation in Wards Cove) and would incorporate by reference the recordkeeping provisions of UGESP (Sections 4 and 15A, 29 C.F.R. §§ 1607.4, 1607.15A) into Part 1602. This incorporation is significant because the Uniform Guidelines are only interpretative and do not have the force of law.[10]

The Commission should also consider applying an "adverse inference" rule to failures to comply with UGESP recordkeeping. UGESP Section 4D, 29 C.F.R. § 1607.4D ("Federal enforcement agencies may draw an inference of adverse impact of the selection process from the failure of the user to maintain [the required] data . . . ."); see also Investigative Compliance Policy, FEP (BNA) 401:2625 (July 14, 1986). Such a policy could facilitate the

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[9] The total selection process means:

> The combined effect of all selection procedures leading to the final employment decision such as hiring or promoting.

29 C.F.R., Answer to Question 14.

[10] In addition, the Commission has proposed to the co-signatories that changes be made to UGESP in response to Connecticut v. Teal, 457 U.S. 440 (1982), which would require component-by-component analysis of impact. See Commission Vote of June 12, 1984, authorizing coordination with co-signatory agencies.

administrative processing of disparate impact cases, and we can attempt to convince courts to adopt such a rule as well. However, neither the amendments to our regulations nor the use of adverse inference help in cases where the challenged practices are not each significant but in combination produce an impact.

3. Business Justification: The majority's standard for assessing the employer's asserted justification may be more a change in tone and emphasis. The language used by the majority certainly implies a lower level of scrutiny. In contrast to Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971), where the "touchstone" was "business necessity", and to Dothard v. Rawlinson, 433 U.S. 321, 331 (1977), where practices with an adverse effect had to be "essential to effective job performance," the "touchstone" is now a "reasoned review of the employer's justification" and "there is no requirement that the challenged practice be 'essential' or 'indispensable' . . . ." 57 U.S.L.W. at 4588.

Yet, in actual application, it is not clear that the standard has changed. The operative rule is "whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer." Id. An argument can be made that the standard was, and is, whether the practice is job-related. Despite being called the "business necessity" test, no court has required proof that a challenged practice is essential to the survival of the business; the question has always been whether the practice selects employees who will perform the job in question better. Validity under UGESP means establishing a correlation between the selection practice and job performance; there is nothing in the guidelines suggesting the practice has to be essential.

4. Burden of Proof: The change of the employer's justification burden from one of persuasion to one of production is the clearest departure from past precedent.[11] Obviously, placing on the plaintiff the burden of disproving the employer's proffered justification will not make our litigation efforts any easier.

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[11] The amicus brief filed jointly by the United States and Commission in Watson v. Fort Worth Bank & Trust stated that when the plaintiff has proved that the defendant's selection process has caused a disparate impact,

> the defendant must make the more rigorous initial showing that the selection device producing the statistical disparity has a "manifest relationship" to successful job performance or to the safe and efficient operation of its business.

Watson Brief at 17. The brief concluded, this is "the principal difference between disparate treatment and disparate impact analysis." Id.

Yet, whether this change will be significant will depend largely on how it is interpreted. It is possible to argue that the only change is to move the risk of non-persuasion from the employer to the plaintiff. If this interpretation were to prevail, the new rule would change the outcome only in the presumably small number of cases where the proof is in equipoise.

Thus, we anticipate arguing that the employer has the burden to produce validation evidence which complies with the Uniform Guidelines, and that failure to meet UGESP requirements would cause the employer's defense to fail. As the Supreme Court stated in Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 255 (1981), to meet its burden of production, the employer has to present evidence sufficient to create an issue of fact; "[t]he explanation provided must be legally sufficient to justify a judgment for defendant."

If the risk of non-persuasion argument is not successful, plaintiffs might be faced with the nearly impossible burden of proving a negative. For example, to defeat motions for summary judgment, plaintiffs might have to submit validation studies showing the invalidity of the challenged practice. If large corporations find validation expensive, shifting these costs to plaintiffs will virtually eliminate disparate impact cases. Employment class actions are already on the endangered species list, having declined from 1174 filings in 1977 to 46 in 1988. Annual Reports, Administrative Office of the U.S. Courts.

5. Less Discriminatory Alternatives: Like the ruling on the substantive standard for business justification, the ruling on proof of less discriminatory alternatives preserves much of the prior standard, but adds a pro-employer gloss. It is still open to plaintiffs to rebut the employer's business justification defense with proof that "other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate [hiring] interest[s]." 57 U.S.L.W. at 4588, quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1974). However, the majority writes that such alternatives must be "equally effective" in furthering these interests considering "factors such as the costs or other burdens"; and courts are cautioned to "proceed with care" because they are "generally less competent than employers to restructure business practices." Id.

Whether the new language will make a practical difference depends on how "equal" the practices have to be and how strictly the cost considerations are viewed. For example, if an adjustment eliminates adverse impact, but reduces validity by a small amount, is that an acceptable alternative? A similar question would be posed if modest increases in costs were necessary to eliminate impact. It is not clear how such trade-offs will be treated by the courts.

SECTION II: Martin v. Wilks

The impact on our litigation efforts of the Supreme Court's decision in Martin v. Wilks, 57 U.S.L.W. 4616 (U.S. June 12, 1989), is unclear. Martin allowed Title VII suits challenging actions taken pursuant to a court order providing for race- or sex-conscious employment decisions, whether the court order is a consent decree entered after a settlement or a remedy entered after a finding of a Title VII violation. The key fact is whether the plaintiff bringing the subsequent action was a party to the initial litigation.[12] If he or she was not, the later suit is not foreclosed by the earlier litigation, regardless of how it was resolved.

The most obvious effect of Martin is to invalidate the Commission's regulation providing that "actions taken pursuant to the direction of a Court Order cannot give rise to liability under Title VII." 29 C.F.R. § 1608.8. In Martin itself, for example, the plaintiffs were white firefighters challenging Birmingham's promotion practices, which were adopted under a consent decree between the city and black firefighters settling a prior Title VII action. The Court held that their claim should be resolved on its merits. After Martin, the Commission can no longer issue a no-cause determination simply because investigation determines that an employment decision was based upon a court-ordered affirmative action plan.[13]

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[12] Just as a non-party is not bound by the court order, neither is a non-settling party bound where the involved order is a consent decree. As the Court noted in Martin, parties who wish to settle cannot negotiate away the claims of others who oppose the settlement. 57 U.S.L.W. at 4619 ("'A court's approval of a consent decree between some of the parties . . . cannot dispose of the valid claims of nonconsenting intervenors.'")(quoting Firefighters v. Cleveland, 478 U.S. 501, 529 (1986)).

[13] .One alternative would be to administratively close charges that challenge employment practices implemented pursuant to a court order, on the ground that our investigators should not second-guess the decision of the district court that entered the order. Implicit (or explicit in the district court's entry of the order) is a finding that the race-conscious elements of the order meet the Supreme Court's standards for such relief; it is questionable whether the Commission should base reasonable cause findings on the conclusion that the district court that entered the order was wrong, and that the race conscious relief violates Title VII. On the other hand, changes in the law since entry of the decree, or circumstances involving its implementation, might alter the validity of the district court's conclusion and render the practice under the decree a Title VII violation. If so, failure to investigate on a case-by-case basis whether there is cause could

What is less clear is what standard will be applied to determine whether the practices under a court order violate Title VII. The Court said only that a suit such as that brought in Martin can go forward; it did not say that the consent decree (or other court order) is irrelevant to that suit. Nor did it alter the substantive standards for "reverse discrimination" suits challenging affirmative action plans, whether adopted under a consent decree or otherwise. See Steelworkers v. Weber, 443 U.S. 193, 208 (1979); Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 627 (1987); Local 28 of Sheet Metal Workers v. EEOC, 106 S. Ct. 3019, 3050 (1986); United States v. Paradise, 107 S. Ct. 1053, 1067 (1987). Under these cases, the plan agreed to by the parties would not violate Title VII if it is narrowly tailored, does not involve rigid quotas, and does not unnecessarily infringe upon the rights and expectations of other employees. See 29 C.F.R. 1608.4(c)(2) (plan should "be tailored to solve the problems identified [by the employer] . . . and to ensure that employment systems operate fairly in the future, while avoiding unnecessary restrictions on opportunities for the workforce as a whole" and "should be maintained only so long as is necessary to achieve these objectives"); Weber, 443 U.S. at 208 (voluntarily adopted affirmative action plan does not violate Title VII where it (1) imposes no "absolute bar to the advancement of white employees," (2) is a "temporary measure," and (3) is designed to "eliminate a manifest racial imbalance"); Johnson, 480 U.S. at 627 (reaffirming Weber standard for judging voluntary affirmative action plans); at 649 (O'Connor, J., concurring) (accepting race-conscious remedies if "the employer . . . had a firm basis for believing that remedial action was required").[14]

In most cases, subsequent Title VII actions, limited to challenging the scope of the initial decree, will have little

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be seen as an abdication of our statutory responsibility fully to investigate all Title VII charges. Martin makes clear that the Supreme Court believes such charges must be resolved on their merits. A decision on precisely how the Commission should treat Martin-like challenges to court orders is beyond the scope of this memorandum; for the time being, it is sufficient to conclude that they should not automatically give rise to no-cause findings pursuant to 29 C.F.R. § 1608.8.

[14] In addition to this affirmative action shelter, an employer might persuasively argue that, where the challenged employment decision was required by a court order in an earlier Title VII action, the plaintiff in the second action cannot relitigate the liability issue from the first suit, but can prevail only on a showing that the remedial order was improper. An exception would have to be recognized in cases where the plaintiff in the later case alleged that the first action was collusive.

chance of succeeding. Any consent decree would have to have been approved by the district court, which presumably will have measured any race-conscious provisions against the Weber standard and the EEOC Guidelines, to insure that they are sufficiently narrowly tailored. In other words, any challenge should fail if entry of the decree itself was initially handled properly. The same is true of a court-ordered remedy; a race-conscious remedy, prior to being entered, should already have been determined not to violate the Title VII rights of those who would bring a subsequent suit, even if they were not before the court.

One question which remains is what weight the first court's conclusion that the remedy/consent decree is lawful has in the subsequent court's assessment of the race-conscious employment practice. Chief Justice Rehnquist's opinion for the Court indicated that the fact of the court order is "not a defense" to the challenge. 57 U.S.L.W. at 4618 n.6. This forecloses any argument that the first court's determination is res judicata on the second court. Nevertheless, the initial judgment may have stare decisis effect: the second court should depart from the first's judgment only if such a departure is justified by a change in the law, or some new facts or circumstances not made known in the earlier proceeding.

Despite the fact that few subsequent challenges should have merit, defendants may be less likely to agree to settlements involving affirmative relief, knowing they may well have to defend the settlement -- entirely valid under Title VII -- in still further rounds of litigation. Moreover, in an attempt to preclude such challenges, employers may seek to join third parties likely to be affected under Rule 19, Fed. R. Civ. P.[15] The presence of individuals likely to be adversely affected by affirmative relief would make a comprehensive settlement far more difficult to reach, and might force cases to trial that would otherwise settle by consent decree. Of course, their involvement may spark a more exacting inquiry into the necessity and appropriate breadth of any affirmative action, perhaps ensuring that the Supreme Court's standards for race-conscious relief are met from the beginning.

Indeed, in cases where the Commission may seek affirmative relief, it would be prudent to employ Rule 19 to ensure that all interests are represented, and that all will be bound by whatever

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[15] Judges may insist that Rule 19 be used to join affected parties before they will impose affirmative action remedies.

outcome is reached.[16] The alternative is the prospect that any settlement we reach, or any relief we obtain, will be vulnerable to future challenge.

Finally, where a challenge to a court-ordered practice is successful, the employer will be faced with inconsistent obligations. Cf. W.R. Grace and Co. v. Local Union 759, 461 U.S. 757, 767-771 (1983) (where employer faces conflicting legal obligations arising from its prior discrimination, it must bear the cost of necessarily failing to comply with one of its obligations). In Martin, for example, if the white firefighters succeed in establishing that the promotion policy created by the consent decree violates Title VII, the district court might enter an injunction ordering Birmingham to make promotions on a race-blind basis. Alternatively, the court might alter the policy so that it set different goals than were set originally. Where the Commission was the original plaintiff in a case where a later challenge succeeds in establishing a Title VII violation in the remedy or settlement, the defendant would be almost certain to join the Commission (if the Commission is not itself named as a defendant) so that any equitable adjustment that is made will bind all affected parties, including the Commission. We should anticipate having to defend affirmative action plans against challenges that will arise in response to Martin.[17]

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[16] Even joinder will not foreclose all later challenges to a decree, since it is impossible to join all potentially affected parties, such as future employees. One possible (but still partial) solution is a defendants' class action, whereby at least some potential challengers could be represented, and thereby bound. There is no way to predict whether the Court would allow such persons to be bound by an order where they were not individually parties but were members of a represented defendant class. This raises questions about adequacy of notice, the proper procedures for handling defendant class actions, and the adequacy and availability of the representatives (e.g., whether unions can represent affected employees), all of which are beyond the scope of this memorandum.

[17] There would appear to be little potential in attempting to use the Supreme Court's decision in Lorance, to argue that Martin-style challenges must be brought within 180 or 300 days of the entry of the court order. The Court in Lorance recognized a specific exception for seniority systems that are facially discriminatory, saying, "There is no doubt, of course, that a facially discriminatory seniority system . . . can be challenged at any time . . . ." 57 U.S.L.W. at 4657. Since race-conscious remedies are, by definition, not race-neutral, this would appear to make Lorance useless for this purpose, even when race-conscious relief is implemented in the form of seniority system adjustments.

SECTION III: Lorance v. AT&T Technologies

The Supreme Court's decision in Lorance that a Title VII challenge to the operation of a facially neutral seniority system must be brought within 300 days of the system's adoption will have a profound impact on the ability of individuals to challenge discriminatory seniority systems under Title VII and the ADEA.[18] Indeed, in our brief in Lorance, we pointed out that most of the Supreme Court's prior seniority system cases would have been untimely under the Lorance rule. In our view, the decision's impact will be confined to challenges to seniority systems, since the Court's rationale is based on the provision in § 703(h) that protects bona fide seniority systems from Title VII challenge. Indeed, the Court acknowledged that plaintiffs can ordinarily challenge the disparate impact of a neutral rule when it is applied, and emphasized that this case differed because seniority systems "'are afforded special treatment under Title VII' . . . by reason of § 703(h)." 57 U.S.L.W. at 4655 (citation omitted).

The Court concluded that plaintiffs must prove, as an element of their claim, actual intent to discriminate in the adoption or maintenance of a seniority system, and may not rely on the discriminatory consequences of such a system. Id. at 4656. Accordingly, the Court held that the plaintiffs' claim in Lorance depended upon proof of the intentionally discriminatory adoption of the system and, since that occurred outside the limitations period, their challenge was time-barred. Id. The same would not generally be true of disparate impact challenges to other neutral employment rules not covered by § 703(h).[19]

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[18] Although the Court did not specifically discuss the ADEA, its analysis would apply equally to cases involving the exception for bona fide seniority systems contained in § 4(f)(2) of the ADEA. In explaining why it took this case, the Court, without further explanation, stated that the circuit court's decision conflicted with the Second Circuit's decision in Cook v. Pan American World Airways, 771 F.2d 635 (2d Cir. 1986), an ADEA case.

[19] Arguably, the statute of limitations as to facially neutral employee benefit plans covered by § 4(f)(2) of the ADEA also starts to run from the time of their adoption, since the Court in Betts held that a showing that such a plan was a subterfuge to evade the purposes of the statute is part of the plaintiff's burden in establishing an ADEA violation. However, application of the Lorance rule should have less overall impact in the ADEA context since most of the plans we have challenged have been facially discriminatory and, therefore, not covered by the rule.

Additionally, Lorance does not bar challenges to decisions made pursuant to facially discriminatory seniority systems, long after their adoption. The Court observed that a system that, on its face, treats similarly situated employees differently can be challenged any time it is applied because each application constitutes present discrimination. 57 U.S.L.W. at 4657 n.5. We are not aware of any such systems, or any such challenges.

Nor does the decision prevent reliance on continuing violation theory where at least one present act of discrimination occurs within the limitations period. Although the Court rejected reliance on that theory in this case, it did so because the demotions themselves were not unlawful unless plaintiffs could establish a fact that occurred more than 300 days before their charges were filed, namely that AT&T's seniority rule was adopted with a discriminatory purpose. As long as a present act which is itself unlawful under Title VII occurs within 300 days of the filing of a charge, nothing in Lorance prevents the use of acts occurring earlier than 300 days as background evidence to establish the unlawful nature of the present act, since such a claim would not be "wholly dependent on discriminatory conduct occurring well outside the period of limitations." Id. at 4657.

At present, we are aware of one pending Commission suit which will be affected by Lorance. Trial Services and Systemic Litigation Services are reviewing their dockets to determine whether there might be others. We will carefully review all Title VII actions challenging seniority provisions adopted more than 300 days (or 180 days where applicable) before a charge was filed to determine whether there might be a basis for arguing for waiver, estoppel, or tolling. The Supreme Court has made clear that Title VII's charge-filing limitations periods are "subject to waiver, estoppel, and equitable modification." Zipes v. TWA, 455 U.S. 385, 393 (1982).

There is a good chance of success in arguing that the statute of limitations defense has been waived in cases where a defendant has not raised the defense until after trial, judgment, or settlement. The courts have held that the defense is waived when it is not raised earlier. See Zipes, 455 U.S. at 389 (delay in pleading statute of limitations defense until after initial settlement); Liberles v. County of Cook, 709 F.2d 1122, 1125 (7th Cir. 1983) (after judgment); Jackson v. Seaboard Coastline, 678 F.2d 992, 1010-11 (11th Cir. 1982) (after trial). In addition, where an employer or union affirmatively misled employees and they reasonably relied on the defendants' conduct in delaying filing charges, the doctrine of equitable estoppel may foreclose assertion of a statute of limitations defense. See Bomba v. W.L. Belvidere, Inc., 579 F.2d 1067, 1071 (7th Cir. 1978) (to invoke equitable estoppel, plaintiff must have reasonably relied on defendant's conduct or representations in forbearing suit); see generally 2 A. Larson & L. Larson, Employment Discrimination § 48.13(d)(1) (1987).

Pending cases where the charge was filed more than 300 days after the challenged seniority system's adoption should also be carefully examined to determine whether there is any basis for equitable tolling of the statute of limitations. Courts have held that the charge-filing limitations period is tolled until the charging party knew or had reason to know of the discrimination. See Mull v. Arco Durethene Plastics, Inc., 784 F.2d 284, 291 (7th Cir. 1986) (ADEA limitations period tolled until facts that would support charge of discrimination were or should have been apparent to reasonably prudent person); Wolfolk v. Rivera, 729 F.2d 1114, 1117 (7th Cir. 1984) (same for Title VII); Reeb v. Economic Opportunity of Atlanta, 516 F.2d 924 (5th Cir. 1975) (Title VII). See also EEOC Compl. Man. § 605.7(d). Courts have applied tolling under these circumstances where the employer neither actively misled the plaintiff nor induced the plaintiff to forego his rights. See Burnett v. New York Central Railroad Co., 380 U.S. 424, 429 (1965) (holding, under Railway Labor Act, that statute of limitations was tolled until employees knew sufficient facts to realize law had been violated, and citing cases holding that tolling applied despite lack of employer misconduct). This approach might save some charges that would otherwise be untimely, particularly charges by individuals who were not employees at the time the seniority system was adopted.[20]

In light of the decision in Lorance, defendants may also seek modification under Fed.R.Civ.P. 60(b)(5) of consent decrees entered in cases challenging the lawfulness of seniority systems. Changes in governing case law may justify modifications of a consent decree previously entered where it is no longer equitable that the decree should have prospective application. System Federation No. 91 v. Wright, 364 U.S. 642, 650 n.6 (1961); Swann v. Board of Education, 402 U.S. 1 (1971). The courts are not all in agreement on the standard (see U.S. v. Georgia Power Co., 634 F.2d 929, 933 (5th Cir. 1981) (citing inconsistent and conflicting decisions), vacated on other grounds, 456 U.S. 952 (1982), previous opinion reaff'd, 695 F.2d 890 (5th Cir. 1983)), but they are generally reluctant to alter a decree that was reasonable when entered. See Larson at § 56.42. Most courts will modify a consent decree only where there is a significant decisional change in the law such that continued enforcement of decree would result in extreme hardship to the defendant. Dawson v. Pastrick, 600 F.2d 70, 76 (7th Cir. 1979).

We will argue that Lorance does not justify modification of

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[20] However, some courts have held that there must be some misleading conduct by the employer before tolling will be permitted. See, e.g., Earnhardt v. Commonwealth of Puerto Rico, 691 F.2d 69 (1st Cir. 1982). See also cases cited in B. Schlei & P. Grossman, Employment Discrimination Law at 1056-58 (2d ed. 1983), & at 237 (Supp. 1983-85).

prior consent decrees covering seniority systems. It does not in any way change the substantive standard for determining whether a seniority provision is lawful, but only affects the limitations period for challenging such a system. Since, as we discussed above, a defendant's failure to raise a statute of limitations defense constitutes a waiver of the defense, the employer should not be permitted to reopen a consent decree on that basis. Furthermore, where the parties have been operating under a modified seniority system pursuant to a consent decree, the policy considerations favoring stability in seniority systems militate against further modifications.

We will also explore the possibility of arguing that the Lorance decision should not be applied retroactively, at least in the three circuits where the courts of appeals had previously held that seniority systems could be challenged under Title VII or the ADEA whenever they were applied. See Cook, supra; Patterson v. American Tobacco Co., 634 F.2d 744, 751 (4th Cir. 1980), vacated on other grounds, 456 U.S. 63 (1982); and Morelock v. NCR Corp., 586 F.2d 1096, 1103 (6th Cir. 1978). Based on past experience, however, we are doubtful that such an argument would succeed. The presumption that Supreme Court decisions apply retroactively can be overcome only by a showing that the decision represents a sharp break with precedent and that the equities weigh decisively in favor of applying the decision only prospectively. Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). Here, the equities weighing in favor of permitting charges which were timely under the law of the circuit when filed must be balanced against the strong policy interest the Lorance Court attached to repose in the area of seniority systems.

SECTION IV: Public Employees Retirement System v. Betts

The Office of General Counsel has, to this point, identified four cases on appeal and 28 cases in the district courts which are adversely affected by the Betts decision. Each of these cases raises, either in whole or in part, claims involving "employee benefit plans" which may ultimately be dismissed in light of Betts.

The Commission's regulations, and lower court decisions, had interpreted § 4(f)(2) of the ADEA to provide that benefit plans that were prima facie unlawful under § 4(a)(1) were not exempt unless the employer showed that the age discrimination in the plan was justified by age-related costs. The Supreme Court rejected the cost-justification interpretation of "subterfuge to evade the purposes of the act" under § 4(f)(2), and held that the section "exempt[s] employee benefit plans from the coverage of the A[DEA] except to the extent plans are used as a subterfuge for age discrimination in other aspects of the employment relation." 57 U.S.L.W. at 4937. In other words, there must be an "actual intent to discriminate in those aspects of the employment relationship

protected by the provisions of the ADEA" (id.), i.e., "hiring and firing, wages and salaries, and other nonfringe-benefit terms and conditions of employment." Id. at 4936.[21]

The impact of Betts appears to be relatively straightforward: the EEOC, and any other ADEA plaintiff, is effectively precluded from litigating any case where the alleged discrimination is limited to fringe benefit issues, unless there is proof that the employee benefit plan was intended to serve the purpose of discriminating in some other, nonfringe-benefit aspect of the employment relation.[22]

Benefits claims are still viable in constructive discharge cases. The Court specifically addressed purposeful manipulation of benefits plans in order to discriminate based on age, noting that it constitutes a "subterfuge" even under the Betts analysis. 57 U.S.L.W. at 4937. Where such manipulation is designed to induce retirement, it would give rise to a § 4(f)(2) claim, since the denial of benefits would be intended to evade the purposes of the act, which do not allow benefit plans to require mandatory retirement. Thus, Betts should not allow employers to use the denial of benefits to older workers to force them to quit or retire.

The Commission's regulations on the interpretation of § 4(f)(2) were directly and explicitly rejected by the Court. 57 U.S.L.W. at 4934 ("[N]o deference is due to agency interpretations at odds with the plain language of the statute itself."). Thus, 29 C.F.R. § 1625.10(d), which provided that a plan "is not a 'subterfuge' within the meaning of section 4(f)(2), provided that the lower level of benefits is justified by age-related cost considerations," is invalid under Betts.

It is important to keep in mind that, by saying that a fringe

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[21] Moreover, the Court ruled that "the employee bears the burden of proving that the discriminatory plan provision actually was intended to serve the purpose of discriminating in some nonfringe-benefit aspect of the employment relation." Id. Thus, the Court rejected the characterization of § 4(f)(2) as providing an affirmative defense, instead treating it as part of the plaintiff's burden in making out a prima facie case.

[22] There are clear signals from Congress that an effort will be made to amend the ADEA to overrule Betts, and perhaps do so retroactively. Whether such an amendment would save cases that have already been dismissed at the time it is enacted is a difficult question. Utilization of Rule 60 of the Federal Rules of Civil Procedure to amend a judgment is a possibility, but fuller evaluation of the ramifications of a retroactive overruling of Betts is beyond the scope of this memorandum.

benefit plan is a subterfuge only if it is implemented with the intent to discriminate in another aspect of the employment relationship, the Court did not limit what aspects of the relationship were involved, except that they had to be "nonfringe-benefit terms and conditions of employment." 57 U.S.L.W. at 4936. Betts itself involved only an alleged violation of § 4(a)(1), but there is no reason to believe the Court meant to read §§ 4(a)(2) and 4(a)(3) out of the statute; thus, a benefit plan implemented with the intent to "limit, segregate, or classify . . . employees in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual's age," would also constitute a subterfuge. This may provide a productive argument in cases involving lay-offs and/or recall rights, where the plan offered to the employees may have a substantial effect on future employment opportunities.[23] Nevertheless, since the plan would have to "deprive or tend to deprive" the employee of "employment opportunities," it would still have to be tied to nonfringe-benefit aspects of employment, and cost-justification of the plan would still not be the touchstone of a violation.

SECTION V: Price Waterhouse v. Hopkins

In this case, a majority of the Court agreed that, where a plaintiff shows that an unlawful motive was a substantial factor in an adverse employment action, the burden shifts to the defendant to demonstrate by a preponderance of the evidence that it would have reached the same decision absent the forbidden factor. Alone among the major decisions discussed here, Price Waterhouse will have a favorable effect on our efforts. However, its force will be felt only in those cases where an adverse employment action results from "mixed motives."

The import of the Price Waterhouse decision is that, where both legitimate and illegitimate factors have informed an employment action, the plaintiff is relieved of the burden of proving that "any one factor was the definitive cause . . . ." 57 U.S.L.W. at 4482 (O'Connor, J., concurring). In Justice O'Connor's view, requiring plaintiff to bear such a burden might have been

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[23] In such a case, we would argue, on the appropriate facts, that the "purpose" the plan was a "subterfuge to evade" was not the purpose involved in Betts (i.e., ending "arbitrary age discrimination in employment"). Rather, we would tie the plan to the purpose of promoting "employment of older persons based on their ability rather than age." This purpose was not involved in Betts because the plaintiff was permanently disabled and seeking a disability retirement; she had no interest in present or future employment opportunities.

"tantamount to declaring Title VII inapplicable to such actions." Id. [24] The Commission should expect to benefit from the burden-shifting rule in cases involving collegial decisionmaking, e.g., partnership and tenure decisions. The mixed motive paradigm appears to apply primarily in the context of professional jobs and in situations where women and minorities are seeking to penetrate what has been termed the "glass ceiling" of the highest levels of employment.

1. Although the Price Waterhouse decision is a favorable one, we caution against any reflexive attempts by investigators or litigators to analyze cases from the start as "mixed motive" ones. Since the plaintiff has the burden of persuasion to show that an improper motive was a substantial factor in the challenged decision, the development of evidence should always be directed toward that goal. The mixed motive paradigm is an analytical tool for judges -- not an invitation to a relaxed standard of investigation and pre-trial case development.

2. The Court did not clearly delineate the nature of the evidence needed to shift the burden to the defendant. While a majority of the Court agreed that illegal motive must be a "substantial factor" in the employment decision, the meaning of "substantial" remains uncertain. Furthermore, while Justice O'Connor would require "direct" evidence that an illegal criterion was a substantial factor (57 U.S.L.W. at 4481), the precise meaning of that term is unclear.

However, the Court's application of its holding to the facts of Price Waterhouse does reveal that proof of sex stereotyping by the employer's decisionmakers constitutes direct evidence sufficient to shift the burden. This certainly differs from the traditional "smoking gun" notion of direct evidence. On the other hand, the Court also made clear that certain evidence, without more, could not shift the burden of persuasion, viz., statements by non-decisionmakers, stray remarks (discrimination in the air), and expert testimony regarding stereotyping. 57 U.S.L.W. at 4476; 57 U.S.L.W. at 4483 (O'Connor, J., concurring).

The Court's application of its holding here does suggest that "direct" evidence means evidence proffered to prove the truth of the matter asserted (the employer's discriminatory intent), rather than simply evidence which attacks the credibility of the employer's "legitimate" explanation (here, Hopkins' poor

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[24] This sensitivity to the difficulty of proving subtle discrimination in disparate treatment cases stands in stark contrast to the Court's approach in Ward's Cove (plaintiff required to "specifically show[] that each challenged practice has a significantly disparate impact on employment opportunities . . . ."). 57 U.S.L.W. at 4587.

"interpersonal skills"). In other words, affirmative proof of discrimination -- as opposed to proof of discrimination by a process of elimination -- may be required to shift the burden.

3. The Court also left undecided the question of what type of evidence the employer must introduce to carry its burden.[25] While the plurality would require "some objective evidence" that the same employment decision would have been made for a legitimate reason (57 U.S.L.W. at 4474), Justice White required only credible testimony to this effect (57 U.S.L.W. at 4478 (White, J., concurring)). Absent a majority view on this issue, we should assume that the employer can avoid liability only by proferring accurate documents delineating the plaintiff's performance problems. Should Justice White's view prevail, the employer could carry its burden by presenting the testimony of its decisionmakers.

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[25] The Court's holding regarding the quantum of defendant's proof, viz., that it must be by a preponderance, rather than clear and convincing, will have no discernible effect on our efforts.

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June 27, 1989

MEMORANDUM

TO: Phillip B. Sklover
Associate General Counsel

FROM: James R. Neely, Jr. J.R.N., Jr.
Regional Attorney

SUBJECT: Effect of Recent Supreme Court Decisions

In complying with the General Counsel's instructions, I have canvassed the staff to determine the impact of recent Supreme Court cases on our inventory.

Aldi, Inc. which is currently in headquarters for approval of the consent decree is the only case likely to be affected by the recent decisions, particularly Wards Cove. You and I have discussed this case extensively. When it was presented by this office, you and the General Counsel had reservations about the case and thought that the business necessity defense had legitimacy.

Now Wards Cove seems to have reduced the defense in an impact case from business necessity to business justification and has also revised the burdens of proof. As a result, this case has lost significant strength as a litigation vehicle.

With respect to the Betts case, I submit the fo. owing:

EEOC v. Cargill, Inc., 81-4193, is the only case affected by the Betts decision. However, it is not active in the St. Louis District Office. The case involved our challenge to the Defendant's long term disability plan. It was lost on summary judgment in 1984 and was appealed to the Tenth Circuit. The Tenth Circuit affirmed the district court on appeal in August 1988. I believe the Appellate Division sought rehearing en banc or a stay pending the Supreme Court decision on Betts but I am not certain.

Both the district court opinion and the appellate court opinion are probably in line with the Betts case.

I am certain that the Appellate Division will provide further information on this case.