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LABOR AND EMPLOYMENT

I. EMPLOYMENT DISCRIMINATION AND TITLE VII: APPROPRIATE CONCEPTUAL FRAMEWORKS FOR DIFFERENT CLAIMS

A. Fetal Vulnerability Plan: Disparate Treatment Absent Intent

In recent years there has been a proliferation of medical,[1] legal,[2] and other[3] literature about the harmful effects of chemical exposure on the unborn human fetus and on the general reproductive capacity of potential parents, male and female.[4] Employers who seek to protect fertile women or their fetuses from

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1. For a list of medical articles on the harmful effects of chemical exposure, see Furnish, *Prenatal Exposure to Fetally Toxic Work Environments: The Dilemma of the 1978 Pregnancy Amendment to Title VII of the Civil Rights Act of 1964*, 66 IOWA L. REV. 63, 119-29 (1980).

2. Comment, *Employment Rights of Women in the Toxic Workplace*, 65 CALIF. L. REV. 1113 (1977); Finneran, *Title VII and Restrictions on Employment of Fertile Women*, 31 LAB. L.J. 223 (1980); Furnish, *supra* note 1; Note, *Birth Defects Caused by Prenatal Exposure to Work Place Hazards: The Interface of Title VII with OSHA and Tort Law*, 12 U. MICH. J.L. REF. 237 (1979); Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals under Title VII*, 69 GEO. L.J. 641 (1981).

3. *Reproductive Hazards in the Workplace*, CHEMICAL & ENGINEERING NEWS, Feb. 11, 1980, at 28; *The Genetic Barrier—Job Benefit or Job Bias* (pts. 1-4), N.Y. Times, Feb. 3-6, 1980, at 1, col. 1, A1, col. 5, A1, col. 1, A1, col. 1; *Bitter Reaction—Issue of Fetal Damage Stirs Women Workers at Chemical Plants*, Wall Street J., Feb. 9, 1979, at 1, col. 1; *Chemical Concern—Worries are Growing Over Male Infertility Because of Job Hazards*, Wall Street J., Jan. 26, 1978 at 1, col. 6; *Early Warning—Protection for Unborn: Work Safety Issue Isn't as Simple as It Sounds*, Wall Street J., Aug. 2, 1977, at 1, col. 1.

4. Although either parent's exposure to chemicals can be harmful to the unborn child, the focus has been on women. The effect of direct exposure on an unknown fetus *in utero* accounts in part for the concern with the effects of chemical exposure on women. Lead, for example, is known to pass through the placental membrane. 43 Fed. Reg. 54,421 (1978)(medical findings accompanying OSHA lead standards codified in 29 C.F.R. § 1910.1025). In fact, "[n]umerous parties to the [federal rule-making] hearings raised the issue whether the fetus is the most sensitive organism requiring protection from exposure to lead." 43 Fed. Reg. 54,421. One such party was physician Kenneth Bridbord of the National Institute for Occupational Safety and Health, a congressionally created research organization. *See* 29 U.S.C. § 671(b)(1976). "Bridbord . . . argued that the immaturity of the blood brain barrier in the newborn raises additional concern about the presence of lead in fetal tissues." 43 Fed. Reg. 54,421-22.

chemical exposure in the work environment[5] may unintentionally violate Title VII of the Civil Rights Act of 1964.[6] In *Wright v. Olin Corporation*,[7] a case of first impression,[8] the Court of Appeals for the Fourth Circuit suggested an appropriate conceptual framework and a corresponding defense for this type of Title VII case. In addition, the court clarified the jurisdictional requirements of an enforcement action brought by the Equal Employment Opportunity Commission (EEOC).

Olin, a Virginia corporation, produces paper and other packaging materials at its Pisgah Forest plant in Transylvania County, North Carolina. The plant employs approximately 2600 people[9] in 265 job classifications.[10] Theresa Williams Wright was a step-two operator in the finishing department of the plant.[11] William Virgil Howell, a black, was a step-seven perforator operator.[12] Wright and Williams filed individual charges of sex and race discrimination with the EEOC's district office in Charlotte during 1976 and 1977, respectively.[13]

The EEOC began its action on September 25, 1978,[14] based on more than fifty charges of discrimination filed against Olin.[15]

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5. This effort by employers may stem from an attempt to comply with the Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (1976), and standards promulgated under the Act.

6. Civil Rights Act of 1964, §§ 701-718, 42 U.S.C. §§ 2000e-1 to -17 (1971).

7. 697 F.2d 1172 (4th Cir. 1982).

8. *Id.* at 1187 n.24.

9. Wright v. Olin Corp., 24 Fair Empl. Prac. Cas. (BNA) 1615, 1617 (W.D.N.C. 1980)(lower court opinion in Wright/Howell class action).

10. 697 F.2d at 1182.

11. 24 Fair Empl. Prac. Cas. (BNA) at 1618.

12. *Id.* at 1619.

13. *Id.* at 1617-18. Both amended their charges early in 1979 and received right to sue letters in May of that year. 24 Fair Empl. Prac. Cas. (BNA) at 1618. The Wright/Howell class action was finally authorized on May 16, 1980, over a year after the action was filed. *Id.* at 1617. The "right to sue" letter is a statutory prerequisite to any private suit brought under Title VII. 42 U.S.C. § 2000e-5(f)(1) (1976)(by implication). "Right to sue" letters are issued by the EEOC. The complaining party first files a charge with the Commission, and the Commission then makes its own investigation and "reasonable cause" determination. *Id.* at § 2000e-5(b). "Right to sue" letters are issued when the EEOC has completed its investigation and decides not to file an enforcement action, or upon request of the complaining party after 180 days have passed since the initial charge. *Id.* at § 2000e-5(f)(1); *see, e.g.*, Stebbins v. Continental Ins. Co., 442 F.2d 843 (D.C. Cir. 1971).

14. EEOC v. Olin Corporation, 24 Fair Empl. Prac. Cas. (BNA) 1646, 1650 (W.D.N.C. 1980)(lower court opinion in EEOC enforcement action).

15. 697 F.2d at 1176.

These discrimination charges, based on both race and sex, covered hiring, job classification, seniority, harassment, and discharges.[16] The EEOC also questioned the validity of Olin's fetal vulnerability plan under Title VII.[17]

After the EEOC action and the Wright/Howell class action were consolidated for trial, the case was bifurcated to allow separate consideration of damages and liability.[18] Chief Judge Woodrow Wilson Jones of the Western District of North Carolina, sitting without a jury,[19] overcame the jurisdictional objections of the defendants[20] and ruled in their favor on the merits.[21] The Fourth Circuit Court of Appeals vacated the district court's judgment for the employer on the fetal vulnerability issue and remanded the case for further proceedings.[22] In addition, the court set forth the conceptual framework and analysis applicable on remand.

Title VII prohibits employment discrimination based upon sex or race in both the public and private sector.[23] The EEOC has responsibility for this part of the Act,[24] and may bring civil actions against employers to enforce its provisions.[25] In addition, individual victims may bring actions for themselves or on behalf of a properly certified class.[26] The scope of an EEOC action is limited by the scope of the charges filed with the EEOC and by the scope of any reasonable investigation of those initial charges.[27] EEOC action is further limited by requirements that a reasonable cause determination be made and that employer-employee conciliation be attempted.[28] The level of investigation

16. 24 Fair Empl. Prac. Cas. at 1651.
17. *Id.* at 1658-59.
18. 24 Fair Empl. Prac. Cas. at 1616.
19. *Id.*
20. *Id.* at 1620 (first conclusion of law), 1650-51.
21. 697 F.2d at 1176.
22. *Id.* at 1187, 1192.
23. For statutory language, see *infra* notes 106 and 107.
24. Civil Rights Act of 1964, § 706, 42 U.S.C. § 2000e-5 (1981).
25. *Id.* at § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1)(1981).
26. These actions must satisfy the presuit review requirements of the EEOC, *see supra* note 13, and the class action requirements of Rule 23 of the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 23. For a general discussion of these requirements, see PLAYER, FEDERAL LAW OF EMPLOYMENT DISCRIMINATION IN A NUTSHELL 228-44 (2d ed. 1981).
27. 42 U.S.C. § 2000e-5(b)(1981).
28. 697 F.2d at 1176. *See also* EEOC v. Gen. Elec. Co., 532 F.2d 359, 366 (4th Cir.

and negotiation necessary to satisfy these two requirements at the trial level is not always clear, and it may be even more difficult for an appellate court evaluating jurisdiction to determine whether the requirements have been satisfied.[29] The court in *Wright* used notice as the determinative factor.[30]

Fair notice seems to be a useful and reasonable simplification of the investigation and conciliation requirement.[31] In *EEOC v. American National Bank*,[32] the court found the defendant's knowledge of race discrimination charges against one of its branch banks adequate to notify the defendant that the same type of charge might be alleged against the entire bank.[33] In *Wright*, the EEOC raised issues which were unrelated to charges filed by the individual victims. These issues were properly pleaded in the class action complaint, however, and the court determined they were properly presented on appeal.[34]

After reviewing its jurisdiction, the court of appeals affirmed the trial court's findings that: (1) the seniority system was bona fide;[35] (2) Olin did not discriminate in job assignments;[36] and (3) Olin promoted employees on a nondiscriminatory basis.[37] The court then proceeded to address the claim relating to Olin's fetal vulnerability plan.[38]

Olin's fetal vulnerability plan categorized jobs as either restricted, controlled, or unrestricted. These categories allegedly correspond to the level of risk to women and to the fetuses they may carry, based on the amount of exposure to toxic chemicals

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1976).

29. *See* 697 F.2d at 1177.

30. *Id.* (citing EEOC v. American Nat'l Bank, 652 F.2d 1176 (4th Cir. 1981), *cert. denied*, 459 U.S. 923 (1982)).

31. The danger in this approach, however, is that it may circumvent the legislative purpose of avoiding unnecessary litigation through voluntary compliance. *See* Stebbins v. Continental Ins. Co., 442 F.2d 843, 845 (D.C. Cir. 1971).

32. 652 F.2d at 1176.

33. This is particularly true since notice of the charge was forwarded by the local assistant vice president to the vice president at the main office in Portsmouth. 652 F.2d at 1186. Furthermore, the local bank was subject to unified supervision and control—including its hiring practices. *Id.*

34. 697 F.2d at 1179.

35. *Id.* at 1179-80.

36. *Id.* at 1180-81.

37. *Id.* at 1181.

38. *Id.* at 1182-92.

in the particular job classification. All "fertile"[39] women are precluded from employment in restricted jobs absent individual proof of infertility. Non-pregnant women may work in controlled jobs after making written acknowledgement of potential risk; pregnant women may work in controlled jobs if approved by Olin. Unrestricted jobs are open to all women.[40]

The court recognized the need to determine "the proper conceptual framework for analysis."[41] Title VII cases are usually analyzed by one of two general frameworks: disparate impact or disparate treatment. The disparate treatment framework applies to cases of discrimination in which the employer intentionally treats an employee or class of employees differently because of race, color, religion, sex, or national origin, or out of a desire for reprisal. Proof of discriminatory intent in these cases is critical.[42]

In cases of overt discrimination, the defendant employer acknowledges different treatment based on a protected classification and seeks to justify the classification as a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[43] This affirmative defense, provided for in Title VII, is known as the bfoq (bona fide occupational qualification) defense. The bfoq defense is narrowly drawn[44] and is strictly interpreted.[45] In cases of cov-

39. All women between the ages of 5 and 63 are presumed to be fertile. *Id.* at 1182.

40. *Id.* The scientific and medical evidence offered by Olin to justify its program was grossly inadequate in light of available information. *Id.*

41. *Id.* at 1183.

42. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977).

43. 42 U.S.C. § 2000e-2(e)(1981).

44. By its own statutory terms, the bfoq defense is limited to cases of discrimination based on sex, religion, or national origin only. *Id.* Thus, assuming it is reasonably necessary to the normal operation of their particular businesses, the Presbyterian Church may lawfully discriminate against the Buddhist monk who seeks to fill its pulpit, the Chinese restaurant may lawfully discriminate against the Japanese-born student who wants to be a cook; however, it seems the Hollywood studio may not limit itself to black actors when casting a film on nineteenth century American slavery. The classic example of bfoq application in the context of sexual discrimination is the sperm bank that, for obvious reasons, limits itself to male donors.

45. The Supreme Court case of Dothard v. Rawlinson, 433 U.S. 321 (1977), is one of the few cases in which the bfoq defense has been successfully applied. The Court in *Dothard* found that a female prison guard's "relative ability to maintain order in a male, maximum-security, unclassified penetentiary . . . could be directly reduced by her womanhood." 433 U.S. at 335. The Court found that the primary reason for this reduced

ert discrimination, the applicable Title VII proof formula, set forth in *McDonnell Douglas Corp. v. Green*,[46] seeks to "progressively sharpen the inquiry into the elusive factual question of intentional discrimination."[47]

Under *McDonnell Douglas*, the plaintiff must first establish a prima facie case of disparate treatment.[48] The defendant must then offer legitimate, nondiscriminatory reasons for his actions.[49] To prevail, the plaintiff must rebut the defendant's justifications by showing that they were a mere pretext for illegal discrimination.[50]

In contrast, the disparate impact framework applies to cases of employer discrimination which are based on a neutral policy or neutral factors. Although neutral discrimination is not prohibited by Title VII, plaintiffs in these cases either claim that the neutral policy is a mere pretext for illegal discrimination or that it has an unnecessary impact upon a protected class.[51] The standard defense to disparate impact claims is business necessity. Under this defense, the employer seeks to demonstrate that the neutral basis of discrimination is substantially related to job performance. The employer has the burden of proving this relationship once the Title VII claimant has shown a statistically significant disproportionate impact on a protected class.[52]

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ability was a high risk of sexual attack unique to female guards. *Id.* at 335-36. Dissenting Justices Brennan and Marshall were not convinced of any reduced ability. *Id.* at 345-46. The dissenting Justices also objected to the majority using the prison's overcrowded, unconstitutional, and otherwise *abnormal* conditions to enhance the perceived risk to female guards and simultaneously considering the prison within the statutorily required "normal operation of . . . business." *Id.* at 341-42. In the recent district court case of Griffin v. Mich. Dept. of Corrections, 30 Fair Empl. Prac. Cas. (BNA) 639 (E.D. Mich. 1982), the conditions and risks of the *Dothard* prison were distinguished and the defendants ordered immediately to remove the illegal and artificial barriers to the female plaintiff's promotion.

46. 411 U.S. 792 (1973).

47. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255 n.8 (1981).

48. 697 F.2d at 1183 (disparate treatment may be established "by proof of the program's existence and intended operation").

49. *Id.*

50. *Id.*

51. The classic example of this type of analysis is Griggs v. Duke Power Co., 401 U.S. 424 (1971). In *Griggs*, the Supreme Court held that the use in personnel actions of standardized test scores and high school graduation requirements, not substantially related to job performance, constitutes illegal discrimination when such requirements operate to disqualify blacks at a substantially higher rate than whites.

52. *See* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1328-30 (2d

In *Wright*, the court of appeals held the disparate impact framework and business necessity defense to be best suited to the fetal vulnerability issue.[53] The court properly dismissed the *McDonnell Douglas* disparate proof scheme,[54] because the pivotal issue in *Wright* was not intention but justification.[55] The court based its selection of the disparate impact framework/business necessity defense, instead of the overt discrimination framework/bfoq defense, on two factors.

First, the court noted that Olin had expressed its fetal vulnerability policy in gender-neutral terms.[56] The court then acknowledged the consistent judicial application of the disparate impact formula to policies which are superficially neutral but which result in discriminatory consequences when applied.[57] The court rejected the appellant's argument that the 1978 Pregnancy Amendment to Title VII[58] converted the neutral policy into an overtly discriminatory policy.[59] Unless Olin's policy is expressed in terms of "ability to conceive" rather than "pregnancy," the court's rejection may have been premature,[60] since the language of the Amendment is broad enough to include pregnancy, childbirth, and "related medical conditions."[61]

Second, the court noted that application of the overt discrimination framework would limit Olin to the narrow bfoq defense[62] and deprive the employer of an opportunity to present its legitimate justifications under the broader scope of business necessity.[63] This reason is considerably weakened, however, because the court acknowledged that the overt discriminator is limited to the bfoq defense by tradition rather than by doctrinal necessity.[64]

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ed. 1983).

53. 697 F.2d at 1185.

54. *See* text accompanying notes 48-50.

55. 697 F.2d at 1185 n.20.

56. *Id.* at 1186. The specific terms of the policy are not revealed, however, and the court admits that their neutrality might be subject to logical dispute. *Id.*

57. *Id.*

58. Title VII of the Civil Rights Act of 1964, Amendments of 1978, Pub. L. No. 95-555, § 1, 92 Stat. 2076 (codified as amending 42 U.S.C. § 2000e-2 (1976)).

59. 697 F.2d at 1183-84 n.17.

60. *See* B. SCHLEI & P. GROSSMAN, *supra* note 52, at 402-03.

61. 42 U.S.C. § 2000e-2(k)(1981).

62. *See supra* notes 44-45 and accompanying text.

63. 697 F.2d at 1185-86 n.21.

64. *Id.*

After identifying the disparate impact/business necessity theory "as the appropriate one to apply in resolution of the fetal vulnerability issue,"[65] the court of appeals held "that the evidence of the existence and operation of the fetal vulnerability program established as a matter of law a prima facie case of Title VII violation."[66] The claimants urged the court to find, as a matter of law, that the relevant business necessity defense had not been established.[67] The court declined to do so, stating:

> Though the evidence deduced on trial would not suffice to support a finding of business necessity . . . we do not think it would be fair to resolve the case by our first instance application of the defense on the present record. . . . [W]e think the proper course is to remand for further proceedings confined solely to that issue. . . .[68]

The court then addressed the application of the business necessity defense "to the unique circumstances presented by this employment practice."[69]

A business necessity is any legitimate practice essential to the safe and efficient operation of the business.[70] The woman who is eight months pregnant may be an inefficient and unsafe bodyguard; the same is not necessarily true six to eight weeks after conception. Assuming efficiency is not affected, safety is the controlling factor. The safety of the female employee herself, however, is not a proper concern of the employer under Title VII. Title VII protects the woman's right to choose her own work environment, regardless of danger.[71]

The safety of others, coworkers and customers (*e.g.*, the person contracting for the services of the bodyguard), is a legitimate concern of the employer because the employer will be responsible for any harm to these third parties. The employer's duty toward unborn children is more similar to the duty toward these third party invitees and licensees than it is to the duty toward the autonomous first party worker. The court in *Wright* denied

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65. *Id.* at 1186.
66. *Id.* at 1187.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 1188.
71. 433 U.S. at 335.

the mother's right to make the same dangerous choice for her unborn child that she might make for herself.[72] This denial seems inconsistent with the court's acknowledgement of women's constitutionally recognized right to abort unborn children[73]—an issue the court understandably avoids.[74] As long as the employer knows a woman might have a child, the employer does have a legitimate concern with protecting the health of that child who is legitimately on business premises and exposed to workplace hazards. Employers may be particularly concerned by their potential liability to a child subsequently born with a deformity.[75]

The court in *Wright* held "that under appropriate circumstances an employer may, as a matter of business necessity, impose otherwise impermissible restrictions on employment opportunities that are reasonably required to protect the health of unborn children of women workers against hazards of the workplace."[76] The court then outlined how the defense may be established at trial.[77] The court in *Wright* placed a heavy burden on employers: the employer must prove by objective, scientific evidence that a significant risk exists which is substantially confined to women.[78] Although Olin failed to make such a showing at the original trial, evidence is available to support its position, and Olin should be able to meet this burden on remand. If Olin is successful, its prima facie establishment of the business necessity defense can only be rebutted by the plaintiff's demonstration of less intrusive alternatives.[79]

In *Wright*, the Fourth Circuit set a national precedent by establishing the framework appropriate in future fetal vulnerability cases. The court's analysis is thorough, well-organized, and should be helpful to attorneys faced with Title VII cases involving the issue of fetal vulnerability.

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72. 697 F.2d at 1189 n.25.

73. *See* Roe v. Wade, 410 U.S. 113 (1973).

74. 697 F.2d at 1189 n.25.

75. *See* Sloan, *Employers Tort Liability When a Female Employee is Exposed to Harmful Substances*, 3 EMPLOYEE REL. J. 506 (1978); Finneran, *supra* note 2, at 228-30.

76. 697 F.2d at 1189-90.

77. *Id.* at 1190.

78. *Id.* at 1190-91.

79. *Id.* at 1191.

B. *Title VII and the Sexually Offensive Work Environment: A Warranty of Workability*

In *Katz v. Dole*,[80] the Court of Appeals for the Fourth Circuit adopted the view[81] that sexual harassment, in itself, can constitute a form of discrimination forbidden by Title VII of the Civil Rights Act of 1964.[82] The Fourth Circuit thus followed the trend established by other courts in recognizing the work environment as part of the "terms, conditions, or privileges of employment"[83] regardless of any related deprivation of tangible job benefits.[84] The Fourth Circuit also suggested an appropriate modification of the Title VII plaintiff's standard prima facie case.[85]

Deborah Ann Katz was formerly a federal air traffic controller with the Federal Aviation Administration (FAA), a division of the Department of Transportation which reports to Secretary

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80. 709 F.2d 251 (4th Cir. 1983).

81. *Id.* at 256 (adopting the view of Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981)).

82. Civil Rights Act of 1964, §§ 701-718, 42 U.S.C. §§ 2000e-1 to -17 (1971).

83. *Id.* § 2000e-2(a)(1)(1976).

84. *See, e.g.*, Carroll v. Talman Fed. Sav. & Loan Ass'n, 604 F.2d 1028 (7th Cir. 1979)(Title VII is violated when female employees are required to wear uniforms while males are not), *cert. denied*, 445 U.S. 929 (1980); Firefighters Inst. for Racial Equality v. City of St. Louis, 549 F.2d 506 (8th Cir. 1977)(segregated employee eating clubs, condoned by employer, create a discriminatory work environment and violate Title VII), *cert. denied*, 434 U.S. 819 (1977); Waters v. Heublein, Inc., 547 F.2d 466 (9th Cir. 1976)(white employee has standing to sue employer who discriminates against blacks because of employee's statutory right to discrimination-free work environment), *cert. denied*, 433 U.S. 915 (1977); Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971)(employer's discrimination against Hispanic clients created a discriminatory environment for Hispanic employees), *cert. denied*, 406 U.S. 957 (1972); Brown v. City of Guthrie, 22 Fair Empl. Prac. Cas. (BNA) 1627 (W.D. Okla. 1980)(employer's failure to eliminate sexual harassment which led to plaintiff's resignation violates Title VII); United States v. City of Buffalo, 457 F. Supp. 612 (W.D.N.Y. 1978)(racial abuse and insults violate statutory right to work in an environment free of discrimination); Steadman v. Hundley, 421 F. Supp. 53 (N.D. Ill. 1976)(racial slurs may violate Title VII); Compston v. Borden, Inc., 424 F. Supp. 157 (S.D. Ohio 1976)(supervisor's religious slurs held to violate Title VII); Continental Can Co. v. Minnesota, 297 N.W.2d 241 (Minn. 1980) (sexually derogatory statements and sexual advances of coworkers led to plaintiff's resignation and constituted illegal discrimination); *but cf.* Halpert v. Wertheim & Co., 27 Fair Empl. Prac. Cas. (BNA) 21 (S.D.N.Y. 1980)(derogatory sexual language directed at plaintiff held not to violate Title VII because it was customary business practice to use such language); *see generally* Note, *Sexual Harassment in the Workplace: Title VII's Imperfect Relief*, 6 J. CORP. L. 625, 633-37 (1981).

85. 709 F.2d at 255-56. *See infra* note 119.

Elizabeth Dole.[86] Katz entered the federal air traffic controller training program in 1974 and was employed by the FAA as a fully trained air traffic controller from August 1980 to September 1981. Katz was assigned to the Washington Air Traffic Control Center in 1977. She worked with controller crew 1F until May 1981 when she was transferred to another crew at her own request. While she was working with crew 1F, her supervisor was John J. Sullivan.[87]

Katz commenced her discrimination suit on June 9, 1981, after a failure of the FAA's administrative remedies.[88] Katz alleged she had been subject to illegal sexual harassment and disparate personnel actions based on gender discrimination. Most of the alleged harassment consisted of verbal abuse by male coworkers and Sullivan. Additionally, Katz was subject to sexual advances by at least one coworker. Katz' complaints to Sullivan's superior and other FAA supervisory personnel were met with indifference or mere acknowledgement.[89] The court of appeals reversed the trial court, and held that "Katz was entitled to prevail on her claim of sexual harassment."[90] Katz also complained of disparate treatment on the job. The defendant, however, demonstrated legitimate, nondiscriminatory reasons for each action,[91] and the court of appeals affirmed the district court's judgment for the defendant on these claims.[92]

Courts, commentators, and federal agencies have divided sexual harassment into two categories:[93] "condition of work" and "*quid pro quo*."[94] "*Quid pro quo*" describes the form of harass-

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86. 49 U.S.C. § 1652 (1976)(FAA Administrator reports to Transportation Secretary).

87. 709 F.2d at 253.

88. The EEOC has developed guidelines for equal employment opportunity procedures, programs, and remedies in federal agencies. It also reviews each development and individual cases. *See* 29 C.F.R. § 1613 (1983).

89. 709 F.2d at 253-54.

90. *Id.* at 256, 257.

91. *See infra* note 130.

92. 709 F.2d at 256-57.

93. The two-category approach to sexual harassment is an oversimplification. A continuum would be a more accurate framework for analysis of sexual harassment cases and their outcomes. Because most cases can be placed in one of the two categories described in the main text, the analysis may be simplified without incorrect results. This discussion will generally follow the two-category approach as the cases do.

94. *See* Henson v. City of Dundee, 682 F.2d 897, 908 n.18 (11th Cir. 1982)(citing C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 32-47 (1979)); 29 C.F.R. §

ment in which an employer or supervisor makes participation in sexual activity an express or implied condition to continued employment or favorable treatment. The "condition of work" form of harassment consists of those situations when the workplace is "poisoned"[95] by discriminatory references, innuendo, and actions.

Title VII prohibits sex discrimination in employment.[96] Personnel actions based on an employee's participation in sexual activities ("*quid pro quo*" harassment) violate Title VII because they are in fact based upon gender.[97] The Fourth Circuit recognized this form of Title VII harassment action in *Garber v. Saxon Business Products, Inc.*[98] The *Katz* decision, however, is the first Fourth Circuit decision to deal with "condition of work" harassment and to explore sexual harassment actions in general.[99]

The general provision of Title VII, applicable to private employers, prohibits discrimination with respect to the "terms, conditions, or privileges of employment."[100] Recent opinions[101] have expanded the scope of this general provision and have brought "condition of work" harassment under the Title VII umbrella[102]

1604.11(a)(1983) (similar analysis in EEOC guidelines); *see also* B. SCHLEI & P. GROSSMAN, *supra* note 52, at 421-23.

95. The term "poisoned" was borrowed from Judge Wright's opinion in Bundy v. Jackson, 641 F.2d 934, 944 (D.C. Cir. 1981).

96. *See infra* notes 106 and 107.

97. The advances are in fact based on sex except in the rare instance when the harasser is bisexual and harasses both sexes with equal vigor. *See* 641 F.2d at 942 n.7 and accompanying text; Barnes v. Costle, 561 F.2d 983, 990 (D.C. Cir. 1977); Wright v. Methodist Youth Services, Inc., 511 F. Supp. 307, 309-10 (N.D. Ill. 1981)(example of how homosexual harassment is also based on sex); *see also* C. MACKINNON, *supra* note 94, at 200-01.

98. 552 F.2d 1032 (4th Cir. 1977). For discussions of *Garber* and other early sexual harassment cases, see Schupp, *Sexual Harassment Under Title VII: The Legal Status*, 32 LAB. L.J. 238, 238-47 (1981); Significant Development, *New EEOC Guidelines on Discrimination Because of Sex: Employer Liability for Sexual Harassment Under Title VII*, 61 B.U.L. REV. 535, 548 (1981)[hereinafter Significant Development]; Goodman, *Sexual Harassment: Some Observations on the Distance Travelled and the Distance Yet to Go*, 10 CAP. U.L. REV. 445, 459-60 (1981); Note, Williams v. Civiletti: *Expanding the Causes of Action in Sexual Harassment Claims*, 10 CAP. U.L. REV. 641, 642-44 (1981)[hereinafter Note].

99. The court noted that Katz' sexual harassment claim involved application of Title VII "in an area almost totally unexplored by our previous decisions." 709 F.2d at 257.

100. *See infra* note 107 for statutory language.

101. *See supra* note 84.

102. This expansion of Title VII protection was an evolutionary process. The inter-

by providing that a Title VII action for sexual harassment may exist even if no specific, tangible personnel action is related to the harassment.[103] These opinions recognize the intent of Title VII to protect the worker's right to a peaceful, productive, and discrimination-free work environment.[104] Title VII has become a warranty of workability.[105]

Although the statutory language which applies to federal employers prohibits only "personnel actions affecting employees" based on sex,[106] courts have expanded the scope of this prohibition to the full extent of the general Title VII provision applicable to private employers.[107] This expansion allows the federally-employed plaintiff to take advantage of the evolution

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mediate step in the evolution involved constructive termination cases, and the evolution of this warranty of workability paralleled that of the warranty of habitability in the landlord-tenant area of real property law.

The implied warranty of habitability evolved through two simple steps. First, courts began to allow tenants early termination of leases when the conditions of the leased premises were untenantable under the theory that tenants' rights to quiet enjoyment and peaceful possession were violated. This early termination of the leasehold estate is generally referred to as "constructive eviction." *See* Net Realty Holding Trust v. Nelson, 33 Conn. Sup. 22, 25, 358 A.2d 365, 366 (1976). Second, the courts began to imply a warranty of habitability to effect the public policy of protecting tenants' rights, to effect the legislative intent of the housing codes, and to protect the lessee/consumer from unfair bargains. *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970); Lemle v. Breeden, -51 Hawaii 426, 462 P.2d 470 (1969); *see generally* Abbot, *Housing Policy, Housing Codes and Tenant Remedies: An Integration*, 56 B.U.L. REV. 1 (1976). It is interesting to note that Judge Wright wrote the groundbreaking opinions in both *Bundy* and *Javins*.

103. The courts have frequently used the concept of constructive termination as a means to afford Title VII relief, particularly before the general recognition that Title VII protects the worker's rights to a discrimination-free work environment. *See* Significant Development, *supra* note 98, at 544-45. It should also be noted that the recognition of a warranty of workability like the warranty of habitability gives effect to an underlying legislative intent. *See infra* note 114.

104. *See* Judge Goldberg's opinion in Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). *See also infra* note 114.

105. "Warranty of Workability" is the author's term for Title VII protection. *See supra* notes 102 and 103.

106. The relevant language states: "All personnel actions affecting employees . . . in those units of the Government of the District of Columbia having positions in the competitive service . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a)(1976).

107. *See, e.g.*, 641 F.2d at 934. The general provision states: "It shall be an unlawful employment practice for an employer . . . 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 such individual's . . . sex. . . ." 42 U.S.C. § 2000e-2(a)(1976)(emphasis added).

of the warranty of workability under the general provision.

The success of sexual harassment actions brought by federal employees has depended on a two-step expansion of the scope of Title VII. In *Bundy v. Jackson*,[108] the first successful action of this type, the Court of Appeals for the District of Columbia Circuit followed these two steps in extending the scope of Title VII from the "*quid pro quo*" form of harassment, previously addressed in *Barnes v. Costle*[109] and *Garber*,[110] to the "condition of work" form of harassment.[111] First, the court interpreted the provisions of Title VII specifically dealing with federal employment[112] in terms of the general Title VII coverage of "terms, conditions, or privileges of employment."[113] Second, the court decided that sexual harassment which poisons the workplace is sexual discrimination with respect to the "terms, conditions, or privileges of employment."[114] The court of appeals in *Katz* followed this analysis.[115]

Perhaps the most significant aspect of the *Katz* decision is its analysis of the burden of proof. In contrast to the standard Title VII case, in sexual harassment cases, the factual question of intent is not at all elusive.[116] The discriminatory intent in

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108. 641 F.2d at 934.

109. 561 F.2d 983 (D.C. Cir. 1977).

110. 552 F.2d at 1032.

111. *See* 641 F.2d at 943-45.

112. *See supra* note 106.

113. 641 F.2d at 942.

114. *Id.* at 943-46. The court's determination in *Bundy* that "condition of work" sexual harassment is discrimination with respect to the "terms, conditions, or privileges of employment" was based in large part on Judge Goldberg's analysis in the Fifth Circuit case of Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). For a discussion of the court's reliance on *Rogers*, see Note, *supra* note 84, at 635. In that ethnic discrimination case, Judge Goldberg recognized the need to protect the employee's psychological well-being from "a working environment heavily charged with . . . discrimination." 454 F.2d at 238. Judge Goldberg noted the breadth with which Congress defined discrimination to allow effectuation of the underlying congressional purpose—to eliminate discrimination in all of its noxious forms. *Id.* This liberal reading of the statute has eliminated any need for Congress to amend the statute and specifically include the harassment form of discrimination.

115. 709 F.2d at 254.

116. The court in *Bundy* stated that sexual harassment is *always* intentional. 641 F.2d at 945. The *Katz* opinion watered down this declaration to "almost always." 709 F.2d at 255. *Katz* does, however, leave the presumption intact and shifts the focus of inquiry accordingly. *Id.* The analogous area of racial harassment provides further evidence of the shift of inquiry with a presumption of intent. For example, in Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87 (8th Cir. 1977), the court indicated

"*quid pro quo*" cases is clear from the nature of the harassment.[117] In "condition of work" cases, discriminatory intent is easily inferred from nontrivial harassment.[118] Thus, the focus of inquiry shifts from motivations and justifications to the existence and degree of the harassment, and the employer's liability for it.[119]

Although the factual element of intent may be easily established in most sexual harassment claims,[120] the same is not necessarily true of the employee's additional general disparate treatment claims. The court in *Bundy* decided that the employee's general disparate treatment claims should not be analyzed independently of sexual harassment claims, thus conferring a procedural advantage upon the plaintiff who adds a claim of disparate treatment to a basic sexual harassment case. Although not specifically authorized by the Supreme Court in *McDonnell Douglas*,[121] *Bundy* provides that when an employee who has proven sexual harassment makes out a prima facie case of some other form of sexual discrimination, the employer must re-

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that the plaintiff need only prove a certain level of persuasiveness in the harassment, and discriminatory intent would be implied. *See also* Steadman v. Hundley, 421 F. Supp. 53 (N.D. Ill. 1976).

117. *See* text accompanying notes 93-95.

118. *See, e.g.*, 421 F. Supp. at 53.

119. The court in *Katz* proposed a two-prong formula in sexual harassment cases which shifts the emphasis from intent to existence, significance, and liability:

> First, the plaintiff must make a *prima facie* showing that sexually harassing actions took place, and if this is done, the employer may rebut the showing either directly, by proving that the events did not take place, or indirectly, by showing that they were isolated or genuinely trivial. Second, the plaintiff must show that the employer knew or should have known of the harassment, and took no effectual action to correct the situation. This showing can also be rebutted by the employer directly, or by pointing to prompt remedial action reasonably calculated to end the harassment.

709 F.2d at 256. The court failed to specify the level of harassment required by the first prong, and thereby appears to have lowered the plaintiff's initial burden of production. Under this formula, a showing of even merely trivial harassment serves to shift the burden to the defendant. Other language in the case, however, indicates that it was Katz' unrebutted showing of nontrivial harassment that satisfied the requirements of her Title VII claim. *Id.* It is doubtful that the court intended to lower the plaintiff's burden of proof below that generally required to avoid summary judgment.

120. *See supra* note 116 and accompanying text.

121. The *McDonnell Douglas* opinion noted that the elements of the plaintiff's prima facie case would vary with different fact situations, but the Court made no mention of any variation in the basic formula or level of proof required for defendant's rebuttal. 411 U.S. at 802 n.13.

but this second claim by clear and convincing evidence of nondiscriminatory motive,[122] rather than by the standard preponderance of the evidence.[123] The stricter proof requirement of *Bundy* seems to be based upon either a strong presumption that a link exists between proven harassment and subsequent disparate treatment[124] or a policy of punishing an employer shown to have discriminated against or harassed an employee.[125]

The United States Supreme Court decision in *Texas Dept. of Community Affairs v. Burdine*,[126] decided less than three months after *Bundy*,[127] rejects any increase in the employer's burden of rebuttal.[128] Although *Burdine* involved simple sex discrimination and not sexual harassment, the Court's reasoning is equally applicable to *Katz*. First, the Court observed that the defendant's explanation must be clear and reasonably specific to rebut the plaintiff's prima facie case of discrimination; consequently, the plaintiff will have a full and fair opportunity to show pretext. Second, the defendant will naturally attempt to persuade the trier of fact of his innocence even without the formal burden of persuasion. Third, the Title VII plaintiff's access to EEOC files and liberal federal discovery rules should allow the plaintiff to demonstrate pretext easily if it exists.[129] The procedural advantage provided plaintiffs under *Bundy* may not

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122. 641 F.2d at 952.

123. *McDonnell Douglas* specified a preponderance of the evidence. 402 U.S. at 804.

124. Although the *Bundy* requirement of clear and convincing proof of nondiscrimination seems reasonable, Judge Wright failed to give it adequate justification. Judge Wright relied on language from the racial discrimination case of Day v. Mathews, 530 F.2d 1083 (D.C. Cir. 1976). In *Bundy*, he summarized, "We stressed in *Day* that since the employer's own proved discriminatory actions were largely responsible for the plaintiff's typical dilemma of having to prove the motive underlying the employer's past action, 'any resulting uncertainty [should] be resolved against the party whose action gave rise to the problem.' " *Bundy*, 641 F.2d at 952 (*quoting* Day v. Mathews, 530 F.2d 1083, 1086 (D.C. Cir. 1976)(footnote omitted and bracketed change by the court)). This simply rewords the presumption of a link between proven harassment and specific employer actions, and does not justify that presumption.

125. The divergence from the historical allocation seems to be based on a policy of punishment found in Day v. Mathews, 530 F.2d at 1082, and Baxter v. Savannah Sugar Refining Corp., 495 F.2d 437 (5th Cir. 1974), *cert. denied*, 419 U.S. 1033 (1974). The employer shown to have discriminated or harassed is punished by the requirement of a higher level of proof to rebut an employee's separate claim of disparate treatment.

126. 450 U.S. 248 (1981).

127. *Bundy* was decided January 12, 1981; *Burdine* was decided March 4, 1981.

128. 450 U.S. at 256-58.

129. *Id.* at 258.

have survived *Burdine*; it is not found in *Katz*.

The *Katz* decision impliedly rejects any presumption of a link because the court analyzed the disparate treatment and sexual harassment claims independently and found "no novel legal questions"[130] in the plaintiff's disparate treatment claims.

Although not found in *Katz* and disavowed in *Burdine*, the procedural advantage of *Bundy* may be justified in some cases. The purpose of the standard Title VII proof formula is to sharpen the focus of the inquiry on the elusive question of discriminatory intent.[131] The plaintiff who has proven illegal sexual harassment (a breach of the warranty of workability) has already shown some discriminatory intent. If there is an inherent nexus between the intent to harass and the intent to discriminate in subsequent disparate employee treatment, employers should be held absolutely liable for all claims of subsequent disparate treatment. This stern approach has been suggested by one author as the best means to deter harassment and to eliminate offensive and hostile work environments.[132] Although several courts have held employers strictly liable for unrebutted discrimination claims,[133] no court has held an employer absolutely liable based on an irrebuttable presumption of a discrimi-

130. 709 F.2d at 257. Indeed, the court in *Katz* found the actions justified by sound management policies and guidelines. Katz' claim of scheduling difficulties was overcome by the FAA's unrebutted, articulated reason for those difficulties—her ongoing training program. *Id.* at 256. Likewise, her transfer requests were denied based on a general policy against transfers (the legitimacy of which was not considered) and the absence of an open position. *Id.* The temporary denial of her request for "traumatic injury leave" was apparently due to confusion over new agency guidelines and not discrimination. *Id.* The employee's refusal to put through Katz' personal telephone call to a coworker, while the coworker was on the job, was also based on an agency policy, and the fact that Katz' supervisor passed the message along indicated that no discriminatory harm was intended. *Id.* at 256-57.

131. *See* text accompanying note 47.

132. Note, *supra* note 98, at 653-55. The author, however, fails to distinguish fully between strict liability, when the defendant bears the burden of rebutting the presumption of discrimination, and abolute liability, when the presumption of discrimination is irrebutable. The author indicates that the court in Williams v. Civiletti, 487 F. Supp. 1387 (D.D.C. 1980), holds the harassing employer absolutely liable without the usual "escape hatch defense provisions." Note, *supra* note 98, at 652 n.82 and accompanying text. *Williams v. Civiletti*, however, merely holds the employer strictly liable and requires disclosure by supervisors who intend to take detrimental personnel actions against the employee they have harassed. 487 F. Supp. at 1387.

133. *See* Henson v. City of Dundee, 682 F.2d 897, 910 (11th Cir. 1982); Barnes v. Costle, 561 F.2d 983, 993 (D.C. Cir. 1977); 487 F. Supp. at 1387.

natory nexus.[134]

The existence of such a nexus may vary with the form or degree of harassment. "*Quid pro quo*" harassment is always presumptively linked to an intent to discriminate in subsequent employee treatment; the link is explicitly laid out or clearly implied in advance to the employee by the employer or supervisor. This clear or explicit link defines "*quid pro quo*" harassment.[135] "Condition of work" harassment, on the other hand, is not presumptively related to subsequent adverse employee treatment; there is no clearly expressed link.[136]

The existence of a discriminatory nexus in "*quid pro quo*" cases justifies the procedural advantage found in *Bundy*,[137] but the *Katz* approach will impose liability on the same guilty employers without altering the traditional allocation of burdens.[138] There is no discriminatory nexus in "condition of work" cases, and it would be unfair to impute to the innocent employer the discriminatory intent of its relatively autonomous workers.[139] Under these circumstances, disparate treatment claims should definitely be analyzed separately, as were the claims in *Katz*.[140]

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134. This is notwithstanding the interpretation of *Williams v. Civiletti* discussed *supra* note 132.

135. *See* text accompanying notes 93-95.

136. *Id.*

137. *See* text accompanying notes 122-23.

138. The difference in the rebuttal burdens placed upon defendants under *Bundy* and *Katz* may have more philosophical than practical significance. The innocent defendant, whose actions are truly justified, should be able to meet either level of proof. For example, the proof offered by the defendant in the *Katz* case, *see supra* note 130, would seem sufficient to meet either level of proof. The guilty defendant might be able to rebut the plaintiff's prima facie case by a preponderance of the evidence; once the plaintiff shows that the rebuttal is mere pretext, however, the defendant must meet the higher standard of clear and convincing proof. Historically, the ultimate burden (persuasion) has remained on the plaintiff. *See* 450 U.S. at 253. The defendant's increased burden of rebuttal appears to shift the ultimate burden of persuasion to the defendant. *Burdine* holds that the ultimate burden should remain on the plaintiff and that only the burden of production should shift back and forth.

139. This refusal to presume intent is particularly reasonable when supervisory personnel are not involved and workers enjoy a great deal of freedom on the job. Any unfairness of imputing intent disappears, however, when the employer is on notice of harassment and does little or nothing to eliminate it. *See* Note, *New EEOC Guidelines on Discrimination Because of Sex: Employer Liability for Sexual Harassment Under Title VII*, 61 B.U.L. REV. 535, 545-46 (1981). For a discussion of employer liability in general under the EEOC guidelines and numerous liability theories, see generally *id.*

140. The court in *Katz* analyzed the disparate treatment claims independently of the harassment claim.

The plaintiff who suceeds in a sexual harassment claim may seek injunctive relief, nominal damages, and attorney's fees;[141] this potential liability alone should warn an employer to improve the work environment. Employers guilty of "*quid pro quo*" harassment or gross or habitual "condition of work" harassment could be subject to absolute liability or a higher burden of rebuttal under a strict, *Bundy* approach. Such an approach, however, would unnecessarily and perhaps unfairly shift the burden to the defendant. As an alternative in these cases of serious harassment, a new statutory tort might be created under Title VII or punitive damages might be allowed. The increased likelihood of significant liability might increase the responsiveness of employers to harassment problems.

The *Katz* decision gives clear Fourth Circuit recognition to Title VII actions of harassed employees. Sexual harassment is an area of new impression in the Fourth Circuit, and the decision appropriately recognizes the *Bundy* expansion of Title VII without any unnecessary or unfair alteration of traditional burdens. The court's two-step analysis[142] sets forth the essential elements of the plaintiff's case and makes clear the defendant's obligations in rebuttal. Although *Katz* is a sexual harassment case, the sound analysis provided by the court could apply to all claims of discriminatory work environments.

II. WILDCAT STRIKES AND LOCAL UNION LIABILITY

In determining the liability of a labor union for an illegal work stoppage in an action under section 301 of the Labor Man-

141. Title VII generally limits plaintiffs to equitable relief: reinstatement, awards of back pay, and declaratory or injunctive relief. 42 U.S.C. § 2000e-5(g) (1976). Rewards for mental suffering and emotional distress are not allowed under Title VII. *See* 641 F.2d 934, 946 n.12 (D.C. Cir. 1981); Shah v. Mt. Zion Hosp. & Medical Center, 642 F.2d 268, 272 (9th Cir. 1981); Garner v. Giarrusso, 571 F.2d 1330, 1339 (5th Cir. 1978). The courts may, however, award nominal damages and attorney's fees. 42 U.S.C. § 2000e-5(k)(1976); *see, e.g.*, Joshi v. Florida State Univ., 646 F.2d 981, 991 n.33 (5th Cir. 1981), *cert. denied*, 456 U.S. 972 (1982). Because of the limited nature of Title VII relief, some real or substantive damages must be recovered under disparate treatment claims or state tort actions such as invasion of privacy or assault and battery. For a discussion of these alternatives, see Note, Kyriazi v. Western Electric Co.: *Damages for Sexual Harassment—Title VII and State Tort Law*, 10 CAP. U.L. REV. 657 (1981).

142. *See supra* note 119.

agement Relations Act (LMRA),[143] courts have recognized two theories of liability: "mass action"[144] and agency. The Fourth Circuit case of *Consolidation Coal Co. v. Local 1702, UMWA*,[145] illustrates both theories of union liability.

Consolidation Coal Company employed approximately 400 workers, all members of Local 1702, at its Blacksville No. 2 Mine in Mongolia County, West Virginia. The coal company and Local 1702 were parties to the National Bituminous Coal Wage Agreement of 1978. This agreement provided that the integrity of the contract would be maintained, but did not contain an express no-strike clause.[146]

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143. 29 U.S.C. § 185 (1976). The LMRA (Taft-Hartley Act), § 301, states, in part:

> (a) Suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States. . . .
>
> (b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter . . . shall be bound by the acts of its agents. . . .
>
> . . .
>
> (e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

29 U.S.C. § 185 (1976).

144. The "mass action" theory was first articulated by Judge Goldsborough in United States v. International Union, UMWA, 77 F. Supp. 563 (D.D.C. 1948). In *International Union* over 350,000 union members throughout the country walked off the job in unison. Judge Goldsborough, presented with evidence of prior communications between the international and local unions, concluded that someone had necessarily directed the strike. Of particular concern was the fact that union officials might covertly organize a strike, but be immune from liability. "Mass action" theory has been employed in numerous cases since its inception. *See, e.g.*, United States Steel Corp. v. UMWA, 598 F.2d 363 (5th Cir. 1979); Carbon Fuel Co. v. Locals 6572, 7626 and 2236, UMWA, 582 F.2d 1346 (4th Cir. 1978), *aff'd on other grounds*, 444 U.S. 212 (1979); Eazor Express Inc. v. International Bhd. of Teamsters, 520 F.2d 951 (3d Cir. 1975); Vulcan Materials Co. v. United Steelworkers of Am., 430 F.2d 446 (5th Cir. 1970); Consolidation Coal Co. v. Local 1261, UMWA, 500 F. Supp. 72 (D. Utah 1980); Airco Speer Carbon-Graphite v. Local 502, Int'l Union of Electrical, Radio and Machine Workers of Am., 494 F. Supp. 872 (W.D. Pa. 1980); United States v. International Union, UMWA, 77 F. Supp. 563 (D.D.C. 1948). For a historical review of the "mass action" doctrine, see generally Fishman and Brown, *Union Responsibility for Wildcat Strikes*, 21 WAYNE L. REV. 1017, 1025-29 (1975).

145. 709 F.2d 882 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 487 (1983)(No. 83-510).

146. Consolidation Coal Co. v. Local 1702, UMWA, 110 L.R.R.M. (BNA) 2907, 2908-09 (N.D.W. Va. 1982); *see also* Brief of Appellant at 2-3. The appellant's brief notes that integrity clauses similar to that found in the National Bituminous Coal Wage Agreement of 1978 "have been given the same effect as an explicit 'no-strike' clause." *Id.* at n.8 (citing Gateway Coal Co. v. UMWA, 414 U.S. 368 (1974)).

On January 30, 1981, all members, including officers and committeemen, of Local 1702 joined in an isolated wildcat strike over an arbitrable issue.[147] There was no picketing. The district court issued a temporary restraining order later that day directing the union to return to work. Although the union officials undertook some actions to return the members to work, they did not perform certain significant procedures, such as media publication of return-to-work orders.[148] On the fifth day of the strike the district court held the union, and its officers, committeemen, and members, in civil contempt and assessed fines.[149] The strike ended shortly thereafter.[150]

Consolidation Coal Company brought an action for damages against the local union under section 301 of the LMRA.[151] The district court held that the "mass action" theory was no longer a viable theory of union liability after the Supreme Court's decision in *Carbon Fuel Co. v. UMWA*.[152] As stated in *Carbon Fuel*, "[t]he legislative history is clear that Congress limited the re-

147. 709 F.2d at 883. The provocation for the work stoppage was the suspension of a union member who had allegedly attempted to steal company property. The district court found that this issue was absolutely subject to arbitration under the parties' collective bargaining agreement. *Id.*

148. *Id.* at 884. Officers and committeemen went to the bathhouse at the beginning of their shifts and encouraged the miners to return to work; they failed, however, to lead the men into the mines. A union meeting was held on the third day of the strike, but no motion to return to work was offered. Union officials did not arrange for media publicity directing the members to return to work, nor did they threaten any members with disciplinary action. Finally, no officers or committeemen worked their shifts during the strike. *Id.*

149. *Id.* at 883. The district court later reduced the fines against the officers and committeemen, and completely remitted the fines assessed against individual members. The Court of Appeals in Consolidation Coal Co. v. Local 1702, 683 F.2d 827 (4th Cir. 1982), affirmed the lower court's decision regarding the fines. 709 F.2d at 883-84 n.2.

150. *Id.* at 883-84.

151. *See supra* note 143.

152. 444 U.S. 212 (1979). In *Carbon Fuel*, local labor unions engaged in a series of unauthorized strikes in violation of their collective bargaining agreement. The regional union's efforts to return the miners to work were unsuccessful. The employer brought an action for damages under § 301 of the Labor Management Relations Act, 1947, and judgments were given against the local, district, and international unions. The Court of Appeals, 582 F.2d 1346 (4th Cir. 1978), affirmed the judgment against the locals, but vacated the judgments against the district and international unions, holding that those unions had no duty to use all reasonable means to prevent or terminate wildcat strikes, and that, in the absence of evidence showing that the unions instigated, supported, ratified, or encouraged the strikes, neither the district or international could be liable for damages. The Supreme Court, 444 U.S. 212, reviewing only the Fourth Circuit's decision in favor of the district and international unions, affirmed.

sponsibility of unions for strikes in breach of contract to cases when the union may be found responsible according to the common law rule of agency."[153] Although the district court acknowledged that *Carbon Fuel* "did not involve a judgment against a local union but only judgments against an international and district union,"[154] it nevertheless held that the agency theory is the exclusive basis of imposing liability against unions at any level of union hierarchy. The court further found that the evidence was insufficient to establish union liability under common law agency principles.[155] Consolidation Coal Company appealed from the district court's order.[156]

The Fourth Circuit Court of Appeals reversed the district court and held that the "mass action" doctrine remains a viable method of imposing liability for wildcat strikes.[157] After stressing that the holding of *Carbon Fuel* was limited to the liability of an international or district union, the court in *Consolidation Coal* insisted upon the compatibility of that holding with the "mass action" theory, which is confined to the local union level.[158] The court in *Consolidation Coal* also held that the union was liable under agency principles. The court indicated that the union officials' "foreseeably ineffective" actions to halt the strike created an inference of union approval or encouragement. As a result, the union officials were deemed to have tacitly ratified the strike.[159] The decision is significant since it is the first court of appeals decision to fully consider "mass action" after the Supreme Court's decision in *Carbon Fuel*.[160]

Under "mass action" theory, a local union may be held liable when its members engage in a concerted strike even if it is not formally authorized by the union.[161] The premise is that

153. 444 U.S. at 216.

154. 709 F.2d at 884. In *Consolidation Coal*, judgment was sought against the local union only. *Id.*

155. *Id.* at 884-85.

156. 709 F.2d at 884.

157. *Id.* at 885.

158. *Id.* at 884-85. *See also supra* note 152.

159. 709 F.2d at 886.

160. In North River Energy Corp. v. Local 1926, UMWA, 664 F.2d 1184 (11th Cir. 1981), the court assumed, without discussion, that mass action theory still applied to local unions.

161. 709 F.2d at 885. *See also* United States v. International Union, 77 F. Supp. 563, 566-67 (D.D.C. 1948).

large groups of people do not act collectively without leadership. Thus, the mass action of the rank and file is regarded as union action. Under agency theory, the union may be held responsible if it can be shown that the union's agents at any level (*i.e.*, generally, the union officials), acting within the scope of their apparent authority, participated in, ratified, instigated, encouraged, condoned, or in some way directed the unauthorized strike. The difference between the two theories is in the focus and level of proof required. The former theory can be established by the simple proof of concerted action by the rank and file; the latter requires a more subtle analysis of union agents and their activities.

In *Carbon Fuel*, the Supreme Court articulated a rule of union liability which did not explictly differentiate between local, district, or international unions.[162] After the decision, uncertainty arose about whether the "mass action" theory, as a basis of liability distinct from agency doctrines, was still viable in the wake of *Carbon Fuel*.[163] A broad interpretation of the Supreme Court's language is consistent with the statutory language[164] and legislative history[165] of section 301, neither of which distinguish between levels of unions.

The purpose of section 301, as explained by its sponsor, Senator Taft, was to give both the employer and the union the right to bring an action in federal court to enforce the terms of a collective bargaining agreement[166] and to make the party responsible for violating the contract liable for damages resulting from the violation.[167] Section 301(b) provides that, "Any labor organization . . . shall be bound by the acts of its agents."[168] Although the legislative history of section 301(b) nowhere expressly defines "agent," it was apparently not the legislative in-

162. *See supra* notes 152-54 and accompanying text.

163. *See* Airco Speer Carbon-Graphite v. Local 502, Int'l Union of Electrical, Radio and Machine Workers of Am., 494 F. Supp. 782 (W.D. Pa. 1980). The court concluded that after *Carbon Fuel*, liability could not be imposed under the "mass action" theory. However, the union in *Airco* was held liable under common law rules of agency of illegal acts performed by union officials acting within the scope of their authority.

164. *See supra* note 143.

165. *See, e.g.*, Legislative History of the Labor Management Relations Act of 1947, at 23 [hereinafter cited as Legis. Hist. LMRA].

166. *Id.* at 1074.

167. *Id.* at 1146.

168. 29 U.S.C. § 185(b)(1976).

tent to consider every employee an agent of the union[169] under section 301(b), but rather to restrict the term to union officials.

Section 301(e) reflects the application of common law agency tests to the activities of union officials and notes, "[I]n determining whether any person is acting as an 'agent' . . . the question of whether the specific acts were actually performed or were actually authorized or subsequently ratified shall not be controlling."[170] Senator Taft explained[171] that section 301(e) substituted the common law rules of agency[172] for the more stringent standard of *United Brotherhood of Carpenters v. United States*.[173] Although comments from Senator Ball seem to suggest a lower standard of union liability in cases of violence and picketing,[174] it is clear from most of the legislative history that union responsibility is to be proven only by directing the common law agency test at the activities of the union officials.

Although "mass action" theory may seem clearly distinguishable from the agency principles intended to be applied in these situations by the drafters of LMRA, the lines between them sometimes blur. Consequently, courts have struggled with the concepts[175] and have not always maintained nice analytical

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169. Legis. Hist. LMRA at 1204.

170. 29 U.S.C. § 185(e)(1976).

171. 93 CONG. REC. 4022, 6858 (1947).

172. *See* 93 CONG. REC. 6859 (1947)(remarks of Sen. Taft):

> [U]nion business agents or stewards, acting in their capacity of union officers, may make their union guilty of an unfair labor practice when they engage in conduct made an unfair labor practice in the bill, even though no formal authorization has been taken by the union to authorize or approve such conduct.

93 CONG. REC. 6859 (1947).

173. 330 U.S. 395 (1947). This standard, which required clear proof that the union actually participated in, gave prior authorization to, or ratified such illegal acts, was based on the Norris La Guardia Act § 6, 29 U.S.C. § 106 (1976).

174. The only suggestions in the legislative history of the Taft-Hartley Act that unions could be held responsible on somewhat less strict proof came from Senator Ball: "I think that when there are mass picket lines, which usually produce acts of violence, which are organized in front of the entrance of a plant, it is virtually always the union leaders who organize them," Legis. Hist. LMRA at 1020. Although the parallel between Senator Ball's statement and the underlying premise of the "mass action" theory is obvious, it would be unrealistic to assert that Senator Ball's statement provides historical support for the application of the "mass action" theory in a setting in which the only illegal activity was an isolated illegal stoppage because Senator Ball's view was not referenced in subsequent debates, later reports consistently referred to the ordinary rules of agency, and Senator Ball's statement was by its own terms confined to instances of picketing and violence, neither of which occurred in *Consolidation Coal*.

175. Illustrative of this fusion is Judge Maris' comment that, "Courts upholding lia-

distinctions between agency and "mass action" theories.[176] In fact, one court has recognized that the legal theories underlying "mass action" and agency are essentially the same.[177]

If so, then the application of "mass action" theory may be consistent with section 301. "Mass action" theory can be seen as an evidentiary tool to apply accepted agency principles. Under this theory, the union could be defined as the rank and file;[178] wildcat strikes by the rank and file, therefore, are actions of the union principal. In *Consolidation Coal*, the court concluded that since "every member, including all officers and committeemen, engaged in the illegal strike, the union [made] itself a part of the illegality."[179]

If, on the other hand, the "mass action" and agency theories are distinct, a segregated analysis must follow. Under agency principles, a union is liable when "it makes itself a party to a strike."[180] Although the legislative history might indicate union liability based upon mere participation by union officials,[181] several courts have not so held.[182]

Using a pure agency analysis, the court in *Consolidation Coal* found the union liable based upon the union officials' tacit ratification of the strike. Under agency principles, union officials

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bility . . . upon the mass action theory . . . have stressed the failure of the unions involved to take steps, other than written and oral exhortation, speedily to terminate illegal strikes as an indication of passive acquiescence in the strike." 520 F.2d at 964. This comment indicates that courts applying "mass action" have simultaneously looked for elements of tacit ratification under an agency standard.

176. *See, e.g.*, North River Energy Corp. v. Local 1926, UMWA, 664 F.2d 1184 (11th Cir. 1981); United States Steel Corp. v. UMWA, 598 F.2d 363 (5th Cir. 1979); Consolidation Coal Co. v. Local 1261, UMWA, 500 F. Supp. 72 (D. Utah 1980).

177. Consolidation Coal Co. v. Local 1261, UMWA, 500 F. Supp. at 75.

178. *See, e.g.*, New Power Wire and Elec. Corp. v. NLRB, 340 F.2d 71 (2d Cir. 1965)(the Second Circuit criticized the NLRB position that in order to establish the liability of a union for violation of § 8b(1)(A), it is not sufficient that the rank and file engaged in coercive conduct, but that participation of union officials must be shown; the court suggested this was a "narrow conception of who constitute[s] the union," *id.* at 72).

179. 709 F.2d at 886.

180. United States Steel Corp. v. UMWA, 598 F.2d at 365; Carbon Fuel Co. v. Locals 6572, 7626 and 2236, UMWA, 582 F.2d 1346, 1351 (4th Cir. 1978); United States Steel Corp. v. UMWA, 519 F.2d 1249, 1255 (5th Cir. 1975); Consolidation Coal Co. v. Local 1261, UMWA, 500 F. Supp. at 75.

181. *See supra* note 172.

182. North River Energy Corp. v. Local 1926, UMWA, 664 F.2d at 1192. The "mass action" doctrine could not be employed in situations in which only the rank and file and not the officials engaged in the strike. Such alienation between the officials and the union members would be proof that the parties were not "functioning as a union."

may ratify the acts of the rank and file by inaction which manifests consent.[183] Although liability under ratification can be avoided by a credible demonstration of union disapproval,[184] the court reviewed the union officials' efforts, considered their effectiveness, and found them too passive for such an avoidance.

The court relied heavily on *United States Steel Corp. v. UMWA*[185] in finding the union's actions[186] "foreseeably ineffective."[187] *United States Steel* is clearly distinguishable, however, since it involved a prolonged series of unauthorized strikes.[188] "[A] series of unauthorized strikes puts the union on notice, creates or supports an inference of union ratification of strike activity, and raises the level of effort required to exculpate the union from liability."[189] It follows that the *Consolidation Coal* union officials' attempts to terminate an isolated walkout of which they had no advance notice might be correspondingly less vigorous than if they had had notice.[190] Thus, the court's conclusion that the union officials' actions were "foreseeably ineffective" may be inconsistent with the reasoning of *United States Steel*, which implied that actions could only be considered foreseeably ineffective when there was a prior history of ineffectiveness.

In *Consolidation Coal*, the Fourth Circuit found that the following facts demonstrated union ratification: (1) union officials failed to return to work themselves; (2) union officials failed to publicize return-to-work directives in the media; and (3) union officials failed to threaten disciplinary actions against

183. "A principal manifests his consent by doing nothing after learning of an unauthorized act, when the failure to take action is evidence of a willingness to become a party to the action." W.A. SEAVEY, HANDBOOK OF THE LAW OF AGENCY, § 37. *See also* RESTATEMENT (SECOND) OF AGENCY § 94 (1957).

184. *See* Eazon Express Inc. v. Int'l Bhd. of Teamsters, 520 F.2d 951, 963-64 (3d Cir. 1975).

185. 598 F.2d 363 (5th Cir. 1979).

186. *See supra* note 148.

187. 709 F.2d at 886 (citing 598 F.2d at 366).

188. In *United States Steel*, the mine had been the site of an average of one wildcat strike each month during 1977, and almost one every two months during the previous five years. 598 F.2d at 365-66.

189. 598 F.2d at 366.

190. For example, a Utah court declined to find a union liable and noted that the factual distinction involving the series of unauthorized strikes was "pivotal in holding the union liable" in *United States Steel*. Consolidation Coal Co. v. Local 1261, UMWA, 500 F. Supp. at 75.

striking members.[191] Not all courts consider all of these factors; some courts have refused to consider the failure of union officials to return to work as evidence of ratification because striking members may threaten and intimidate union officials.[192] Another court has refused to consider a failure to discipline strikers as evidence of ratification.[193] The imposition of sanctions, a time-consuming process,[194] may be impractical during a short-term isolated walkout. Thus, the failure of Local 1702 to publicize return-to-work orders was probably its most damaging omission. No court has yet found ratification when a union engaged in media publication of return-to-work orders.

Other courts suggest that in each case the question involved should be examined in light of the underlying labor agreement.[195] If a collective bargaining agreement contains a mere promise to maintain the integrity of the contract, it is unlikely that the parties to the contract agreed to assume the same potential liability as would be imposed by an express no-strike clause.[196] Insofar as the *Consolidation Coal* opinion failed to make reference to the terms of the agreement, the court's approach may have been too limited.

In *Consolidation Coal* the Fourth Circuit affirmed its belief that *Carbon Fuel* should be limited to cases against an international or district union. This affirmation confirms that "mass action" theory is available for use against local unions. The Supreme Court's recent denial of certiorari[197] lends weight to the

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191. 709 F.2d at 886.

192. Consolidation Coal Co. v. Local 1261, UMWA, 500 F. Supp. at 75.

193. United Steelworkers of Am. v. Lorain, 616 F.2d 919, 923 (6th Cir. 1980), *cert. denied*, 451 U.S. 983 (1981).

194. *See* 29 U.S.C. §§ 411(5), 529 (member must be given written specific charges, reasonable time to prepare defenses, and a full and fair hearing).

195. It has been recognized in the decisions that the facts must be examined in the light of each situation and that there is no litmus test which can be applied. Formal Union action is not necessary. Each case stands on its particular facts to be examined in the light of the underlying labor agreement.

12th and L. Ltd. Partnership v. Local 99-99A, Operating Engineers, 396 F. Supp. 1174, 1176 (D.D.C. 1975), *quoted in* United States Steel Corp. v. Local 8982 UMWA, 519 F.2d 1249, 1256 (5th Cir. 1975).

196. *See* United States Steel Corp. v. UMWA, 519 F.2d 1249 (5th Cir. 1975)(parties intend heavier burden of proof in absence of express no-strike clause); *see also* Cox, *Some Aspects of the Labor Management Relations Act, 1947, Part II*, 61 HARV. L. REV. 274, 306-07 (1948); *but see* Gateway Coal Co. v. UMWA, 414 U.S. 368 (1974).

197. 104 S. Ct. 487 (1983).

Fourth Circuit's revival of "mass action" theory, but fails to clarify the intertwined roles of agency principles and "mass action" theory in determining local union liability. Thus, "mass action" theory seems to remain somewhat inconsistent with the language and legislative history of section 301 of the LMRA.

The Fourth Circuit prescribes that union officials, attempting to avoid liability under ratification for illegal work stoppages, should pursue vigorous methods, especially media publication of return-to-work orders, to persuade the union membership to end their strike. The court insists upon a highly credible demonstration of union disavowal of the strike, and will likely find less active measures insincere and staged by the union to avoid liability.

J. René Josey