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Civil Rights-Reverse Discrimination-Title VII and Section 1981

James L. Moeller

RECENT CASES

CIVIL RIGHTS—REVERSE DISCRIMINATION—TITLE VII AND SECTION 1981

McDonald v. Santa Fe Trail Transportation Co.[1]

Petitioners L.N. McDonald and Raymond L. Laird, white employees, were jointly and severally indicted with Charles Jackson, a black fellow-employee, for the misappropriation of sixty one-gallon containers of anti-freeze from their employer, Santa Fe Trail Transportation Co. (Santa Fe). Petitioners were discharged by Santa Fe six days later, but Jackson was retained. Grievances alleging racial discrimination by Santa Fe were promptly filed by petitioners with Local 988 of the International Brotherhood of Teamsters (Local 988). When these grievance proceedings failed to satisfy petitioners, they filed complaints with the Equal Employment Opportunity Commission (EEOC). Petitioners alleged that Santa Fe had violated Title VII of the Civil Rights Act of 1964[2] by discriminating against them on the basis of their race by discharging them, and that Local 988 had likewise violated Title VII by failing to properly represent petitioner McDonald's interests in the grievance proceedings. The EEOC proceedings proved to be equally unavailing for petitioners, who consequently initiated a civil action against Santa Fe and Local 988 in district court,[3] alleging violations of Title VII and Section 1981 of the Civil Rights Act of 1870.[4] The district court held

1. — U.S. —, 96 S. Ct. 2574 (1976).

2. 42 U.S.C. § 2000e-2 (1970) is the relevant provision, and states in part:

> (a) *Employer practices.* It should be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or to otherwise 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.
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> . . . .
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> (b) *Labor organization practices.* It shall be an unlawful employment practice for a labor organization . . . to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

3. 42 U.S.C. § 2000e-5(f)(1) (Supp. V 1975) gives an individual aggrieved under Title VII the right to commence a civil action against one who has discriminated against him, provided certain prerequisite conditions are met. For an excellent discussion of the procedures involved, *see* Kaemmerer, *Jurisdictional Prerequisites to Private Actions Under Title VII of the Civil Rights Act of 1964*, 41 MO. L. REV. 215 (1976).

4. 42 U.S.C. § 1981 (1970). The statute 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

that "the dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged Negro employee does not raise a claim upon which Title VII relief may be granted."[5] The court of appeals affirmed the lower court's dismissal per curiam,[6] and the United States Supreme Court granted certiorari.[7] In reversing the lower courts, the Supreme Court held that "Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they Negroes and Jackson white."[8] The Court relied on language in its previous decision in *Griggs v. Duke Power Co.*,[9] where it had considered the legality under Title VII of the use of employment tests which had the effect of racially discriminating against black job applicants. In interpreting Title VII in that case, the Court had stated that "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."[10] The Court followed *Griggs* in another respect by giving great weight to the administrative interpretations given to Title VII by the EEOC.[11] In the past, the EEOC had consistently interpreted Title VII as affording protection to whites.[12] This consistent administrative interpretation, combined with ample legislative history indicating identical Congressional intent,[13] furnished the *McDonald* Court with compelling support for its decision.

The *McDonald* decision is significant in that it authoritatively settles the question of whether whites, aggrieved because of racial discrimination in employment situations, may state claims under Title VII.[14] That such a

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.

5. 96 S. Ct. at 2577.

6. McDonald v. Santa Fe Trail Transportation Co., 513 F.2d 90 (5th Cir. 1975).

7. 423 U.S. 923 (1975).

8. 96 S. Ct. at 2578.

9. 401 U.S. 424 (1971).

10. *Id.* at 431.

11. 96 S. Ct. at 2578.

12. *See, e.g.*, EEOC Decision No. 75-268, 10 FEP Cases 1502, CCH EEOC DEC. ¶ 6452 (1975); EEOC Decision No. 74-106, 10 FEP Cases 701, CCH EEOC DEC. ¶ 6427 (1974); EEOC Decision No. 74-95, 8 FEP Cases 701, CCH EEOC DEC. ¶ 6432 (1974); EEOC Decision No. 74-33, 7 FEP Cases 1326, CCH EEOC DEC. ¶ 6406 (1973); EEOC Decision No. 71-969, 3 FEP Cases 269, CCH EEOC DEC. ¶ 6193 (1970).

13. *See* 110 CONG. REC. 6549 (1964) (remarks of Senator Humphrey); *Id.* at 7213 (interpretative memorandum of Senators Clark and Case); *Id.* at 8921 (remarks of Senator Williams).

14. The Supreme Court noted that only district courts had confronted the issue. 96 S. Ct. at 2578, n.7. Some of these courts reached contradictory results. *See* notes 16-23 and accompanying text *infra*. One court of appeals has mentioned the issue, stating that Title VII "creates no rights or benefits in favor of non-minority persons or groups . . . . Indeed, . . . white workers have successfully sought relief for themselves under other statutes." Patterson v. Newspaper & Mail Deliverers' Union, 514 F.2d 767,773 (2d Cir. 1975).

question should have arisen in the first place is anamolous in view of the language of Title VII, the past decisions of the Supreme Court, the administrative interpretations of the EEOC, and the expansive reading given to other civil rights legislation by the courts.[15] Nevertheless, various courts have interpreted Title VII as not protecting whites. For example, in *Mele v. United States Department of Justice*,[16] a white plaintiff challenged the use of unvalidated[17] employment tests with dual scoring systems for blacks and whites as discriminating against him on the basis of his race.[18] The court concluded that while the use of unvalidated tests was in fact discriminatory per se, a white plaintiff could not challenge that discrimination under Title VII. A similar situation occurred in *Haber v. Klassen*,[19] where a white Postal Service employee alleged that a position which he sought, and for which he was qualified, was denied him solely because of his race. Relying upon dicta from *Griggs*[20] and *McDonnell-Douglas v. Green*,[21] the court in *Haber* concluded flatly that "[m]embers of the white race may not seek relief for racial discrimination under Title VII. . . ."[22] Other courts have expressed similar attitudes with respect to whites seeking relief under Title VII,[23] and have on occasion denied Title VII relief to white plaintiffs on other grounds even

15. *See* discussion of 42 U.S.C. § 1981 in Runyon v. McCrary, — U.S. —, 96 S. Ct. 2586, 2593-99 (1976).

16. 395 F. Supp. 592 (D.N.J. 1975), *appeal dismissed*, 532 F.2d 747 (3d Cir. 1976), *noted in* 14 DUQ. L. REV. 269 (1976).

17. A "validated" test is one for which empirical data has been obtained "demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." 29 C.F.R. § 1607.4(c) (1975).

18. The test in question *should* have been validated, according to the decree which mandated its use. United States v. United Ass'n of Journeymen, 364 F. Supp. 808, 831 (D.N.J. 1973). Since then, however, the use of *both* quotas *and* a validated test has been prohibited. EEOC v. Local 638, Sheet Metal Workers, 532 F.2d 821 (2d Cir. 1976). On the question of employment testing, *see* Wallace, *Validity of Standardized Employment Testing Under Title VII and the Equal Protection Clause*, 37 MO. L. REV. 693 (1972).

19. 10 FEP Cases 1446, 10 EPD ¶ 10,387 (N.D. Ohio 1975), *rev'd per curiam*, 540 F.2d 220 (6th Cir. 1976). (Court of appeals reversed on authority of *McDonald*).

20. In *Griggs*, the Court had stated that the objective of Congress in the enactment of Title VII was to "achieve equality of employment opportunities and remove barriers that . . . favor an identifiable group of white employees over other employees." 401 U.S. at 429-30. The *Haber* court concluded from this language that only minorities were protected by Title VII, evidently overlooking another passage in *Griggs* where the Supreme Court had declared that "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." *Id.* at 431.

21. 411 U.S. 792 (1973). In defining a prima facie case under Title VII, Justice Powell noted "[t]he complainant . . . must carry the initial burden . . . of establishing . . . (i) that he belongs to a *racial minority* . . . ." *Id.* at 802 (emphasis added).

22. 10 FEP Cases 1446, 1447; 10 EPD ¶ 10,387, p. 5649.

23. In *NOW v. Bank of California*, 6 FEP Cases 26, 5 EPD ¶ 8510 (N.D. Cal. 1973), the court stated of a white male plaintiff, "Phillips complains of discrimination not against himself but against another *and he does not come within the scope of protections under the act.*" *Id.* at 27, 5 EPD at 7331 (emphasis added).

when their protection by the statute had been acknowledged.[24] Such constructions and misapplications of Title VII are not only contrary to the intent of Congress, but are also potentially problematic to the extent that they might serve as precedential basis for further restriction of the availability of Title VII relief to whites or other groups.[25] In *McDonald* the Court carefully foreclosed these possibilities by clearly articulating the principle that whites are protected by Title VII.

The *McDonald* decision is significant in another major respect because it also held that whites may state a cause of action for racial discrimination under the Civil Rights Act of 1870.[26] This decision resolved an area of considerable conflict in the law because in the past some courts had been willing to extend section 1981 relief to whites[27] and others had not.[28] Courts in the latter category denied relief to white plaintiffs because the language in the statute granted to ". . . persons within the jurisdiction of the United States the . . . full and equal benefit of all laws . . . as is *enjoyed by white citizens.*"[29] These courts had determined that this language facially limited the application of section 1981 to non-whites, an argument that was offered by respondents in *McDonald.* The Court rejected that argument, declaring that the statutory language "as is enjoyed by white persons" was merely descriptive of the racial character of the rights protected.[30] An intensive examination of the legislative history of the statute ultimately led the Court to conclude that section 1981 was intended to protect both whites and non-whites.[31] But by deciding the section 1981 and Title VII issues presented by *McDonald,* the Court raised more inquiries than it resolved.

The *McDonald* decision naturally raises the question of the extent to which previous Title VII decisions may now be available to white plaintiffs who wish to assert Title VII claims. The Supreme Court offered some

24. *See* discussion of the concept of standing as applied by courts to white plaintiffs in notes 42 to 46 and accompanying text *infra.*

25. *See* Note, 14 DUQ. L. REV. 269, 275 (1976).

26. The Court had previously held that blacks could state a cause of action under § 1981 for racial discrimination in the private employment area. Johnson v. Railway Express Agency, 421 U.S. 454 (1975).

27. Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1972); Hollander v. Sears, Roebuck & Co., 392 F. Supp. 90 (D. Conn. 1975); WRMA Broadcasting v. Hawthorne, 365 F. Supp. 577 (M.D. Ala. 1973).

28. Balc v. United Steelworkers, 6 FEP Cases 824, 6 EPD 8948 (W.D. Pa. 1973), *affirmed,* 503 F.2d 1398 (3rd Cir. 1974); Ripp v. Dobbs Houses, Inc., 366 F. Supp. 205 (N.D. Ala. 1973); Perkins v. Banster, 190 F. Supp. 98 (D. Md. 1960).

29. 42 USC § 1981 (1970) (emphasis added).

30. *See also* Hollander v. Sears, Roebuck & Co., 392 F. Supp. 90, 94 (D. Conn. 1975) (rights enjoyed by whites are used as a measuring stick under § 1981).

31. *But see* Runyan v. McCrary, — U.S. —, 96 S. Ct. 2586 (1976) (White, J., dissenting), where it was argued that due to codification errors in the United States Code, the majority's reliance upon the legislative history of section 1981 is misplaced. The statute, it was argued, was enacted pursuant to the fourteenth and not the thirteenth amendment; hence, the dissent asserted, private action may not be reached with section 1981.

guidance in resolving this issue by the manner in which it disposed of the discrimination claims presented in the *McDonald* case. After determining that white petitioners may state a claim under Title VII, the Court considered the merits of the petitioners' claims by principal reliance on the Court's prior Title VII decision in *McDonnell-Douglas.*[32] The respondent in *McDonnell-Douglas,* fired as part of a work force reduction in his employer's plant, had been refused subsequent re-employment when the employer later proceeded to fill positions for which respondent had been qualified. Respondent's application for re-employment was denied on the basis of his alleged prior participation in illegal and disruptive civil rights activities against his employer. Aware of the possibility that this otherwise sufficient justification was merely pretextual, the Supreme Court noted that the "[p]etitioner may justifiably refuse to hire one who has engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races."[33] Because the arguably pretextual use of criminal activity against the employer was present as an employment criterion in both *McDonnell-Douglas* and *McDonald,* the Court concluded the two cases were indistinguishable, and applied the *McDonnell-Douglas* rule to *McDonald.* Given this heavy reliance on a previous Title VII decision,[34] it is reasonable to argue that other Title VII decisions should be available to white plaintiffs seeking Title VII relief. Thus armed with complete Title VII protection, white plaintiffs might reasonably be expected to challenge several different types of employment discrimination.

One form of discrimination which a white plaintiff might challenge under *McDonald* and Title VII is the type which Title VII was most clearly intended to remedy: intentional or overt discrimination. This situation is illustrated by *Spiess v. C. Itoh & Co.,*[35] in which white plaintiffs alleging discrimination on the basis of race, color, and national origin, were held to state a cause of action under Title VII against their Japanese employer. However, intentional discrimination need not be present for a hiring practice to be actionable under Title VII. The Supreme Court has so held, stating that "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

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

33. *Id.* at 804.

34. In ruling on the petitioners' Title VII claim the *McDonald* Court need not have addressed the substantive discrimination issues in the case. Rather, after ruling that whites were protected by Title VII, the Court could have applied the "prima facie case" outlined in its *McDonnell-Douglas* decision and remanded on the basis that petitioners' case met that test. *See* McDonnell-Douglas v. Green, 411 U.S. 792, 802-3 (1973).

35. 408 F. Supp. 916 (S.D. Tex. 1976). It is interesting to note that this case was decided by the same court that decided *McDonald* at the trial level. The *Speiss* case was decided after the Supreme Court granted certiorari in *McDonald,* but before it decided it. While the bulk of the opinion interpreted plaintiff's section 1981 claim, the court sustained plaintiff's Title VII claim with minimal discussion.

capability."[36] Because of the *McDonald* ruling, whites invoking this principle should be able to challenge far more subtle forms of discriminatory action.

A second area in which white plaintiffs may assert Title VII claims involves facially non-discriminatory employment practices. Many such employment practices have the effect of illegally discriminating against minorities.[37] Under *McDonald* and *Griggs* an aggrieved white job applicant or employee asserting a Title VII claim should be able to challenge an employment practice that resulted in the same discrimination against whites.[38] For example, if a white employee was discharged because he was convicted of selling marijuana, he should have a cause of action under Title VII if the rule responsible for his discharge was not "job-related" under *Griggs* and operated in a discriminatory fashion by eliminating disproportionally greater percentages of whites than minorities from the employer's work force.[39] Also, it should be possible for whites to challenge the use of unvalidated employment tests as a hiring practice.[40] In addition, whites should be able to challenge recruitment procedures where, for example, an employer with a predominantly black work force relies primarily on word-of-mouth advertising of job vacancies to procure applicants.[41] But even assuming that Title VII under the *McDonald* decisions provides relief in these situations, there is no reason to conclude that Title VII will be used by whites only to oppose the expansion of opportunities for minorities.

A third area in which whites may assert Title VII claims is illustrated by the situation where a white plaintiff sues on behalf of minority group members, challenging discrimination against that group. While employment opportunity for minorities might thus be expanded, an overly restrictive concept of "standing" usually prevents the successful assertion of such

36. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). This principle, originally applicable to minorities, should be equally applicable to majority group members under *McDonald*.

37. Wallace v. Debron Corp., 494 F.2d 674 (8th Cir. 1974) (discharge for multiple garnishments); Boston Chapter, NAACP, Inc. v. Beecher, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975) (validation of two-Part employment test insufficient); Gregory v. Litton Systems, 36 F. Supp. 401 (C.D. Cal. 1970), *aff'd*, 472 F.2d 631 (9th Cir. 1972) (refusal to hire if more than minimum number of traffic arrests). On legality of garnishments rules, *see* Jeter, *Civil Rights—Title VII of Civil Rights Act of 1964—Dismissal from Employment of Minority-Groups Employee for Excessive Wage Garnishment*, 37 MO. L. REV. 705 (1972).

38. Affirmative action programs will not be considered here; *see* notes 47-71 and accompanying text *infra*.

39. EEOC Decision 75-269, CCH EEOC DEC. ¶ 6453 (1975).

40. Mele v. United States, Dept. of Justice, 395 F. Supp. 592 (D.N.J. 1975), *appeal dismissed*, 532 F.2d 747 (3d Cir. 1976). According to the court, all that prevented the plaintiff from stating a claim was his lack of protection by Title VII. Of course, *McDonald* has now altered that.

41. *See* Parkam v. Southwestern Bell Telephone, 433 F.2d 421 (8th Cir. 1970). In this case the company had no affirmative action programs and gained employees from word-of-mouth advertising. The work force was predominantly white, employing 51 blacks out of 2,736 total employees.

claims. In *Ripp v. Dobbs Houses*,[42] for example, a white plaintiff sought Title VII relief because his employer maintained a working environment that was hostile toward blacks and because he was allegedly discharged for association with the black employees. Lack of standing prevented the plaintiff from successfully asserting a Title VII claim. The court found that the plaintiff was not himself "aggrieved" since he alleged discrimination not against himself but against others. Such a limited interpretation of "aggrievement" for standing purposes conflicts not only with congressional intent,[43] but also with EEOC decisions which have granted standing to whites under similar circumstances.[44] It is also a more restrictive standard than has previously been applied to blacks granted standing under Title VII who were neither employed by nor directly discriminated against by the employers sued.[45] The standing requirement as applied to whites should be expanded to the limits applied by the EEOC and intended by Congress if the *McDonald* decision is to be fully implemented by whites under Title VII. Such action would be consistent with principles announced by the Court in *McDonald* and *Trafficante v. Metropolitan Life Insurance Co.*[46]

A fourth major area in which white plaintiffs should be able to assert Title VII claims under *McDonald* involves preferential hiring practices which are part of affirmative action programs.[47] Preferential remedies may

42. 366 F. Supp. 205 (N.D. Ala. 1973); N.O.W. v. Bank of California, 6 FEP Cases 26, 5 EPD ¶ 8510 (N.D. Cal. 1973) involved a white male plaintiff in a similar situation.

43. Hacket v. McGuire Bros., 445 F.2d 442, 446 (3d Cir. 1971) ("The use in Title VII of the language 'a person claiming to be aggrieved' shows a Congressional intention to define standing as broadly as is permitted by Article II of the Constitution"); Air Line Pilots v. Ozark Air Lines, 10 FEP Cases 462, 9 EPD · 10,069 at 7388 (N.D. Ill. 1975) ("[i]n using the language 'a person claiming to be aggrieved' Congress intended to extend standing as far as constitutionally permissible").

44. EEOC Decision 71-969, 3 FEP Cases 269 at 270, CCH EEOC Dec. ¶ 6193 at 4329 (1970) (Of white charging party alleging discrimination against third parties and maintenance of racially hostile work environment toward blacks, EEOC stated "[t]hat charging party was 'aggrieved' in fact and as a matter of law is well settled").

45. Byrd v. Local 24, I.B.E.W., 375 F. Supp. 545, 556-7 (D. Md. 1974) (Black plaintiffs were allowed to assert Title VII claims against subcontractors after admitting they had neither been employed by nor applied for employment with the employers being sued. The court reasoned that the employers relied exclusively on unions as hiring agents, and the unions discriminated). *See also* Carroll v. Knowlton Const. Co., 8 EPD ¶ 9526 (S.D. Oh. 1974) (facts and results similar to *Byrd*).

46. 409 U.S. 205 (1972). In *Trafficante*, the Court found that white plaintiffs had standing under the Civil Rights Act of 1968 to challenge their lessor's practice of racially discriminating against blacks. The injury alleged by the plaintiffs was loss of benefit of living in an integrated community, social and professional advantages lost because of inability to live with minorities, and embarrassment and stigmatization from living in a "white ghetto." Such arguments are equally applicable to an employment situation.

47. "Affirmative action" and "preferential remedies" are distinguishable concepts; the latter is subsumed by the former. "Affirmative action," in a general sense, includes a number of remedies for employment discrimina-

be administratively imposed,[48] voluntarily imposed,[49] or judicially mandated. They may arise under the Civil Rights Act of 1870,[50] the Civil Rights Act of 1871,[51] Executive Order 11246,[52] or under Title VII of the Civil Rights Act of 1964.[53] Title VII is the only provision of the four which purports to restrict the imposition of preferential remedies,[54] although in practice this restriction has been completely ineffective for this purpose.[55] Preferential remedies have been sustained by courts on the basis that these remedies are constitutionally permissible when imposed to eradicate the effects of past discrimination.[56] Some courts have declared they were

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tion, such as governmental agency prods to get employers to make good faith efforts to hire or promote more minorities or women. Only the last cited remedy, *i.e.*, preferential hirings and promotions, positively *requires* an employer to give *preference* to qualified minority persons or women (usually over white males) when hiring, promoting, or retaining employees in certain designated job positions.

Edwards & Zaretsky, *Preferential Remedies for Employment Discrimination*, 74 MICH. L. REV. 1, 2 (1975).

48. Anderson v. San Francisco Unified School Dist., 357 F. Supp. 248 (N.D. Cal. 1972) (School board imposing de-selection plan in response to anticipated budget cut-back).

49. United States v. Wood, Wire, & Sheet Metal Lathers, Local 46, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973) (court-approved settlement agreement).

50. 42 U.S.C. § 1981 (1970).

51. 42 U.S.C. § 1983 (1970). *See, e.g.*, Bridgeport Guardians, Inc. v. Bridgeport Civil Service Comm'n, 482 F.2d 1333 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975) (quotas being imposed at patrolman rank in police department).

52. 42 U.S.C. § 2000e (1970). *See, e.g.*, Associated Gen. Contractors v. Alshuler, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974).

53. 42 U.S.C. § 2000e-2 (Supp. V, 1975). *See* note 2 *supra*.

54. 42 U.S.C. § 2000e-2(j) (1970) provides:

> Nothing contained in Title VII shall be interpreted to require . . . preferential treatment to any individual because of the race, color, religion, sex, or national origin of such individual . . . on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community . . . .

55. United States v. I.B.E.W., Local 38, 428 F.2d 144, 149 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970) ("We believe that section (2000e-2(j)) cannot be construed as a ban on affirmative relief against continuation of effects of past discrimination . . ."). *But see* Rios v. Enterprise Assn. Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974) (Hays, J., dissenting) arguing that this section [§ 2000e-2(j)] has been ignored by courts in the past. *See generally*, Larson, *Remedies for Racial Discrimination in State and Local Employment: A Survey and Analysis*, 5 COL. HUM. RTS. L. REV. 335, 377 (1973), in which it was argued there was in fact Congressional approval of preferential remedies by Congress' failure to adopt an amendment eliminating them. *Id.* at 377 n. 256.

56. EEOC v. Detroit Edison, 515 F.2d 301 (6th Cir. 1975); NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972). *See also* Bakke v. Regents of University of California, — Cal. 3d —, 553 P.2d 1152 (1976) (Court held preferential admissions policy unconstitutional, noting that there was no evidence that it was imposed to remedy past discrimination within the medical

required to order such remedies,[57] pointing to the oft-cited passage in *Louisiana v. United States*,[58] "a court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."[59]

Preferential remedies find support in various constitutional arguments, including the theses that the use of race as a basis for a majority group's discrimination *in favor* of a minority group is not a "suspect" racial classification,[60] and that such discrimination is "benign" and therefore not invidious or stigmatizing.[61] For these reasons, it is argued, the less rigid "rational basis" test should be applied to sustain the constitutionality of preferential remedies.[62] The ultimate constitutionality of preferential treatment could have been resolved by the Supreme Court in *DeFunis v. Odegaard*[63] had the Court reached the merits of that case. Because no ruling of the Supreme Court has sustained preferential treatment, the only authority for preferential remedies is that noted earlier which sustained such remedies when they were imposed to remedy the effects of past discrimination.

It should be possible under *McDonald* for whites to utilize Title VII to

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school). *But see* Alevy v. Downstate Medical Center, 39 N.Y.2d 326, 348 N.E.2d 537 (1976) (Court in similar situation sustained constitutionality of preferential admissions policy without any examination of whether it had been imposed to remedy past discrimination).

57. *See* Morrow v. Crisler, 491 F.2d 1053 (5th Cir.), *cert. denied*, 419 U.S. 895 (1974); Local 53, Heat, Frost & Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

58. 380 U.S. 145 (1965).

59. *Id.* at 154. *See, e.g.*, United States v. Local 169, Carpenters, 457 F.2d 210, 216 (7th Cir.), *cert. denied*, 409 U.S. 851 (1972).

60. Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 726-27 (1974). *But see* Greenawalt, *Judicial Scrutiny of "Benign" Racial Preferences in Law School Admissions*, 75 COL. L. REV. 559, 572-75 (1975).

61. Edwards & Zaretsky, *Preferential Remedies for Employment Discrimination*, 74 MICH. L. REV. 1, 14 (1975). *But see* DeFunis v. Odegaard, 416 U.S. 312, 343 (1974) (Douglas, J., dissenting) where the argument was that minorities were stigmatized by the thought that they "couldn't make it" without preferential treatment. *See also* DeFunis v. Odegaard, 82 Wash. 2d 11, 32, 507 P.2d 1169, 1182 (1973) where the court noted that "the minority admission policy is certainly not benign with respect to non-minority students who are displaced by it."

62. Edwards & Zaretsky, *supra* note 61, at 14. *Contra*, Bakke v. Regents of University of California, — Cal. 3d —, 553 P.2d 1152 (1976) (Court rejected arguments that rational basis test should be applied to such discrimination, and instead applied strict scrutiny); Alevy v. Downstate Medical Center, 39 N.Y.2d 326, 348 N.E.2d 537 (1976) (Court specifically rejected rational basis test and applied level of scrutiny higher than that required by rational basis test, but lower than that required by "suspect" classifications).

63. 416 U.S. 312. Of course, a history of past discrimination by the University of Washington Law School was not even suggested in *DeFunis*—hence *DeFunis* had the effect of posing the preferential remedies question addressed here in a much broader context. A ruling favorable to the law school in *DeFunis* would have provided a justification much broader than the rationale noted earlier, *i.e.*, to remedy past discrimination.

challenge preferential remedies which are not imposed to remedy past discrimination.[64] More specifically, if a white plaintiff could show that a preferential remedy was *not* imposed to remedy the effects of past discrimination, then that remedy would discriminate illegally and should fall. This situation is illustrated in *Watkins v. United Steel Workers of America, Local 2369.*[65] There the black plaintiffs sought to invalidate their employer's "last-hired, first-fired" lay-off policy because it allegedly would have perpetuated the effects of past discrimination. The court of appeals reversed the district court's invalidation of the lay-off plan, holding that to invalidate the plan would create a preferential remedy in the form of "fictional seniority"[66] for newly-hired blacks who had not demonstrated that they had been subjected to unlawful job discrimination. The court determined that only one of the plaintiffs in the action had been of legal hiring age when the employer in the suit had ceased its discriminatory hiring practices, and that none of the plaintiffs had suffered discrimination either when hired or while working for the employer. Absent effects of past discrimination that would be perpetuated by the failure to grant the preferential remedy of "fictional seniority," it would seem that the court rightly refused to grant the requested remedy.

The court in *Anderson v. San Francisco Unified School District*[67] was faced with determining the legality of a proposed "de-selection" plan that would have had the effect of eliminating administrative positions within the school district because of budget restrictions. White administrators eligible for "de-selection" challenged the plan because black administrators, otherwise eligible, were exempted from the plan because of their minority group status. The court enjoined implementation of the plan, noting that racial

> . . . classifications have been allowed by the courts, but *only to correct* past discriminatory practices. In the instant case there has been no showing that the classifications and discriminations to be put into effect by the defendant school district are to be undertaken to correct past discrimination. No authority exists to uphold a practice which discriminates on racial or ethnic lines which is not being implemented to correct a prior discriminatory situation.[68]

Thus, it might reasonably be argued that whites could successfully challenge preferential remedies when imposed in the absence of a prior history of racial discrimination against minorities.

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64. The Supreme Court specifically excluded from consideration the validity of affirmative action programs in its decision in *McDonald.* 96 S. Ct. at 2578, n.8.

65. 516 F.2d 41 (5th Cir. 1975).

66. The Supreme Court's recent decision in *Franks v. Bowman Transp.*, — U.S. —, 96 S. Ct. 1251 (1976) is not contra; there fictional seniority was awarded to specific individuals who had been the victims of employment discrimination.

67. 357 F. Supp. 248 (N.D. Cal. 1972).

68. *Id.* at 250. *See also* Hiatt v. City of Berkely, 10 FEP Cases 251, 9 EPD ¶ 9969 (Cal. Super. 1975) (proposed affirmative action program discriminated against whites; implementation enjoined).

A second area in which whites could conceivably assert Title VII claims against preferential remedies is where such remedies—although imposed to correct prior discrimination—have a direct and substantial discriminatory impact on non-minorities. Although the successful assertion of such a claim would be more probable where the imposition of the preference had been voluntary and without a prior judicial determination of past discriminatory practices, such claims also might arguably be used to challenge judicially mandated preferences. *Carter v. Gallagher*[69] exemplified the latter situation. The district court had ordered the Minneapolis fire department to give absolute preference in certification as fire fighters to twenty black, American-Indian, or Spanish-surnamed American applicants. The court of appeals altered that remedy to provide for a hiring ratio instead of the absolute preference, noting that the absolute preference ordered by the trial court would operate as a present infringement on non-minority group persons. A similar result was reached in *Bridgeport Guardians v. Bridgeport Civil Service Commission*[70] where the district court had ordered that quotas be used to fill all vacancies occurring after specified dates in the various ranks within the Bridgeport police department. The court of appeals held that the imposition of quotas above the entry rank of patrolman constituted an abuse of discretion and was clearly erroneous, noting that the imposition of quotas would harshly discriminate against whites because of their color alone. Hence it appears that whites may, under Title VII, challenge preferential remedies which have direct and substantial effects on them, even if those remedies were otherwise validly imposed to remedy past discrimination.[71]

The arguments discussed above also may be utilized in actions brought under section 1981;[72] it is not unusual for relief to be sought simultaneously under both statutes.[73] However, this strategy is not always available because differences between the statutes may make the use of one either preferable or mandatory. For example, while Title VII applies only to employers of at

69. 452 F.2d 315 (8th Cir. 1971).

70. 482 F.2d 1333 (2d Cir. 1973).

71. *See* EEOC v. Local 638, Sheet Metal Workers, 532 F.2d 821 (2d Cir. 1976) (Court refused to allow implementation of district court order that would have removed white union administrator and replaced him with minority member); United States v. N.L. Ind., 479 F.2d 354 (8th Cir. 1973) (Court refused to use absolute hiring preferences and substituted ratios instead); Harper v. Kloster, 486 F.2d 1134 (4th Cir. 1973) (Court ruled lower court properly refused to impose absolute hiring preferences). *See also* Cooper, *Introduction: Equal Employment Law Today*, 5 COL. HUM. RTS. L. REV. 263, 271 (1973).

72. Courts rely on Title VII principles to resolve issues under section 1981 in an effort to avoid substantive conflict between the statutes. Waters v. Wisconsin Steel Works of Int'l Harvester, 502 F.2d 1309 (7th Cir. 1974), *cert. denied* 96 S. Ct. 2214 (1976).

73. *See, e.g.*, Spiess v. C. Itoh & Co., 408 F. Supp. 916 (S.D. Tex. 1976); N.O.W. v. Bank of California, 6 FEP Cases 26, 5 EPD ¶ 8510 (N.D. Cal. 1973).

least fifteen employees,[74] section 1981 has no such limitation.[75] Also, while a person aggrieved under section 1981 may immediately sue for relief,[76] suit under Title VII must first be preceded by resort to administrative action with the EEOC.[77] Finally, availability of relief under the statutes may vary because of differing statutes of limitations. Section 1981 utilizes the applicable state statute of limitations.[78] Title VII contains its own limitations periods[79] which requires an initial complaint to be filed with the EEOC within 180 days of the alleged discriminatory act and permits suit to be filed within 90 days after the EEOC completes its activities with respect to the complaint.[80]

Where both statutes are equally available to a potential litigant, his selection may be influenced by the range of relief afforded by each. For example, punitive damages may be recovered under section 1981[81] but it is generally accepted that they are not available under Title VII.[82] On the other hand, attorney's fees are not recoverable under section 1981[83] whereas Title VII makes specific provision for their recovery.[84] Awards of back pay

74. 42 U.S.C. § 2000e(b) (Supp. V 1975).

75. 42 U.S.C. § 1981 (1970).

76. Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975). After the Supreme Court determined that section 1982 afforded a remedy against private discrimination, courts reasoned that the same was true of section 1981. But they frequently required exhaustion of state administrative remedies and Title VII remedies before suit was permitted under section 1981. *See generally* Larson, *The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment*, 7 HARV. CIV. LIB. CIV. RTS. L. REV. 56 (1972).

77. Olson v. Rembrandt Printing Co., 511 F.2d 1228 (8th Cir. 1975); Griffin v. Pacific Maritim Ass'n, 478 F.2d 1118 (9th Cir.), *cert. denied*, 414 U.S. 859 (1973). *See generally* Kaemmerer, *supra* note 3.

78. Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975). In *Johnson* the Court did not consider which Tennessee statute of limitations was applicable. Courts might differ and apply a statute of limitations applicable for torts, contract actions, or a state's general statute of limitations. *See* Larson, *supra* note 75, at 77.

79. 42 U.S.C.§ 2000e-5(f)(1) (Supp. V 1975).

80. *Id. See* Kaemmerer, *supra* note 3, for an excellent discussion of the circumstances which vary these limitation periods.

81. Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975) (dictum). Cook v. Advertiser Co., 323 F. Supp. 1212 (M.D. Ala. 1971), *affirmed*, 458 F.2d 1119 (5th Cir. 1972); Tramble v. Converters, Ink Co., 343 F. Supp. 1350 (E.D. Ill. 1972).

82. EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975); Van Hoomissen v. Xerox Corp., 368 F. Supp. 829 (N.D. Cal. 1973). *Contra*, Waters v. Hublein, Inc., 8 FEP Cases 908, 8 EPD ¶ 9522 (N.D. Cal. 1974); Dessenberg v. American Metal Forming Co., 6 FEP Cases 159, 6 EPD ¶ 8813 (N.D. Ohio 1973).

83. Runyan v. McCrary, — U.S. —, 96 S. Ct. 2586 (1976). Prior to *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975), attorney fees had been awarded under section 1981; after *Alyeska* the practice was discontinued by at least one court. Kirkland v. New York State Dept. of Correctional Servs., 520 F.2d 420 (2d Cir. 1975).

84. 42 U.S.C. § 2000e-5(k) (1970). Such awards may be significant. *See, e.g.*, Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971) (award of $150,000).

may be obtained under either statute, but the maximum length of time for which such an award may be made under Title VII is limited to two years.[85] Section 1981 contains no such limitation.[86] "Front pay"[87] is a remedy available under Title VII[88] and perhaps section 1981 as well.[89] Retroactive seniority rights have been awarded litigants under Title VII,[90] although their status under section 1981 is open to question.[91] Finally, compensatory damages for pain, suffering, and humiliation are available under section 1981,[92] while it is generally conceded they are not under Title VII.[93] In view of the differences between Title VII and section 1981, the choice of remedy for a potential plaintiff-white or black—will necessarily be a complex one.

The *McDonald* decision clearly establishes that whites are a class protected by Title VII and section 1981, thus opening the courts to white plaintiffs who wish to litigate employment discrimination claims. In so doing, the Court has not only provided a remedy to whites aggrieved by racial discrimination in employment,[94] but it has also exposed to possible

85. 42 U.S.C. § 2000e-5(g) (Supp. V 1975).

86. An award of back pay has been held to be an equitable remedy, and as such subject to refusal or limitation by the equitable defense of laches. Franks v. Bowman Transp. Co., 495 F.2d 398, *reh'g denied*, 515 F.2d 1082 (4th Cir. 1975), *rev'd on other grounds*, — U.S. —, 96 S. Ct. 1251 (1976). It has also been held that liability for back pay under section 1981 is subject to the applicable statute of limitations. *See* note 78, *supra*. Patterson v. American Tobacco Co., — F.2d —, 11 EPD ¶ 10,728 (4th Cir. 1976).

87. "Front pay simply is an affirmative order designed to compensate the plaintiff for economic losses that have not occurred as of the date of the court decree, but that may occur as the plaintiff works toward his or her rightful place." Note, *Front Pay—Prophylactic Relief Under Title VII of the Civil Rights Act of 1964*, 29 VAND. L. REV. 211 (1976). "Rightful place" has reference to the theory of the same name which courts use to try to put plaintiffs in as good a position as they would have occupied absent racial discrimination.

88. Patterson v. American Tobacco Co., — F.2d —, 11 EPD ¶ 10,728 (4th Cir. 1976); United States v. United States Steel Cop., 371 F. Supp. 1045 (N.D. Ala. 1973), *modified on other grounds*, 520 F.2d 1043 (5th Cir. 1975); White v. Carolina Paperboard Co., 10 EPD ¶ 10,470 (W.D. N.C. 1975).

89. *Patterson v. American Tobacco Co.*, — F.2d —, 11 EPD ¶ 10,728 (4th Cir. 1976), awarded back pay which was, in effect, front pay. Arguably, then, front pay is available under section 1981. Courts can be expected to analogize from Title VII to section 1981 when fashioning relief under the latter act. *Id.* at 7019.

90. Franks v. Bowman Transp. Co., — U.S. —, 96 S. Ct. 1251 (1976).

91. Although no authority on this issue has been found, argument by analogy from Title VII would be possible. *See* notes 72 & 89, *supra*.

92. Runyon v. McCrary, 515 F.2d 1082 (4th Cir. 1975), *aff'd on other grounds*, — U.S. —, 96 S. Ct. 2586 (1976).

93. Jiron v. Sperry Rand Corp., 10 FEP Cases 730 (D. Utah 1975); Water v. Hublein, Inc., 8 FEP Cases 908, 8 EPD ¶ 9522 (N.D. Cal. 1974); Howard v. Lockheed-Georgia Co., 372 F. Supp. 854 (N.D. Ga. 1974). *Contra*, Humphrey v. Southwestern Portland Cement Co., 369 F. Supp. 832 (W.D. Tex. 1973), *rev'd on other grounds*, 488 F.2d 691 (5th Cir. 1974). *See generally* Comment, *Implying Punitive Damages in Employment Discrimination Cases*, 9 HARV. CIV. LIB. CIV. RTS. L. REV. 325 (1974).

94. White plaintiffs, at least in some jurisdictions, were already afforded remedies under the Civil Rights Act of 1866. *See, e.g.*, Carter v. Gallagher, 452 F.2d

challenge the preferential remedies afforded minorities under affirmative action programs.[95] The extent to which these remedies will be challenged successfully is dependent upon the Court's resolution of several important issues. For example, when are the effects of past discrimination eradicated by preferential remedies, thus permitting successful challenge of preferential remedies that have served their purpose? Just what is the scope of past discrimination for the purpose of determining whether a given preferential remedy has been properly invoked to remedy the purported effects of such discrimination?[96] And when are the effects on third parties of an otherwise properly imposed preferential remedy so substantial and direct as to invalidate the remedy? These are only some of the questions that await ultimate resolution by the Supreme Court in this dynamic area of the law.*

JAMES L. MOELLER

315, 327 (8th Cir.), *cert. denied* 406 U.S. 950 (1972). The latter part of the *McDonald* decision, dealing with the 1866 Act, resolved any conflicts that might exist in previous decisions by extending the protection of that act to whites.

95. Such programs were not immune from challenge before; many were challenged by whites who were threatened by them under FED. R. CIV. P. 24 which permits intervention. *See, e.g.*, Patterson v. Newspaper & Mail Deliverers' Union, 514 F.2d 767 (2d Cir. 1975). However, this remedy was not uniformly available to all potential plaintiffs, since some plaintiffs became "aggrieved" at a time when intervention might properly be refused as untimely. An independent action then became necessary. *See, e.g.*, Harper v. Kloster, 486 F.2d 1134 (4th Cir. 1973).

96. This issue is illustrated by the dissent in Bakke v. Regents of University of California, 132 Cal. Rptr. 680, 553 P.2d 1152, 1172 (Tobriner, J., dissenting). Here it was argued that the preferential admission program invalidated by the majority was instituted to remedy "the continuing effect of past discrimination in this country." *Id.* at 1180. Such a broad interpretation of "the effects of past discrimination" would have the effect of upholding virtually *any* preferential practice. Courts normally look for the effects of past discrimination only within the institution in which the remedy under scrutiny has been imposed. *See, e.g.*, cases cited in note 56, *supra.*

* Since this note was delivered to our printer, the Board of Regents of the University of California have petitioned the United States Supreme Court for a writ of certiorari *sub nom.* Regents of the University of California v. Bakke, No. 76-81, 45 U.S.L.W. 3437 (Dec. 14, 1976).