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SPECIAL REPORT:

SUPREME COURT DECISIONS DO GRAVE DAMAGE TO EQUAL EMPLOYMENT OPPORTUNITY LAW

Editor's Note: Over the past twenty-five years since enactment of the Civil Rights Act of 1964, the Congress, in writing guarantees of fair employment, and the Supreme Court, in interpreting those guarantees, have shown an awareness of the importance and difficulty of their task.

They have recognized that employment practices that had long operated to exclude or limit the opportunities of minorities, women, disabled people or older workers were often deeply entrenched and that substantial change in those practices was required to translate paper guarantees into practical benefits. Accordingly, the Supreme Court and the lower federal courts incerpreted the laws not in a formalistic or constricted fashion but in a way that would give effect to their broad objective of bringing minorities and other intended beneficiaries into the economic mainstream.

In the key case in 1971, Griggs v. Duke Power Company, Chief Justice Warren Burger, speaking for a unanimous Court, invalidated employee screening devices that operated as "built-in headwinds" for minority groups and required employers to substitute practices which would include minorities and still serve business needs. Since that time employers have made significant changes in their hiring practices and as a result, minorities and women have made important gains in fields such as law enforcement, construction work, production and white collar jobs in large companies.

Now, suddenly, with new justices appointed by President Reagan, the Court has changed course drastically. In a series of decisions the Court has constructed "built-in headwinds" of its own, relaxing the duties of employers, making it far more difficult for minorities and women to prove violations of the civil rights laws and even opening the way for fair employment settlement agreements to be attacked long after they have gone into effect. While the decisions were couched in dry technical language, they have a real human impact. For example, the Court:

- o told a black woman employee that under an 1866 civil rights statute an employer could not refuse to hire her for

racial reasons but was free thereafter to harass her and even hound her from her job because of her race;

o told a group of minority employees that it was not enough to prove that an Alaska cannery hired whites for well-paid skilled jobs, minorities for low wage unskilled jobs, and segregated employees by race in dormitories and mess halls. To prevail, the employees had also to prove that the employer did not have legitimate business reasons for the challenged practices;

o told black firefighters in Birmingham that they could not be secure in their hard-won efforts to overcome past discrimination because their agreement could be challenged at any time by aggrieved white firefighters despite the fact that the agreement had already survived several court attacks by other white firefighters;

o told an elderly, ill, displaced homemaker in Ohio that the State of Ohio could discriminate against her on the basis of age in providing pension benefits unless she proved that the discrimination was also a subterfuge for discrimination in non-fringe benefits.

There is an air of unreality about the Court's opinions. In cases earlier in the 1980s involving affirmative action, the Court often struggled to balance the interests of white workers with settled interests or expectations against those of minorities seeking opportunities that had been denied them. But in the current cases there is no identification of the interests to be served in contructing new hurdles for minorities and women.

In earlier cases, the Court took into account, explicitly or implicitly, the larger purposes that Congress wished to serve in enacting fair employment laws. In these opinions the Court's majority seems oblivious to the consequences of its actions. It does not appear aware of the fact that by the year 2000, 85 of 100 new entrants into the workforce will be minorities and women and that many experts believe that the economic wellbeing of the nation depends on equipping these new entrants with skills and opportunity. Nor does the Court's majority seem aware or concerned about the disruption and racial tension that may result from reversing previous interpretations of the law and impairing the ability of parties to enter into binding settlement agreements.

Indeed, the opinions frequently seem to be chapters in an ideological crusade, with the majority reaching out to decide questions no one has raised. Some observers have likened the majority's performance to that of the group of Supreme Court Justices in the early 1930s who for a time thwarted federal and state efforts to deal with the harsh economic consequences of the depression.

In the wake of the June blizzard of civil rights decisions, it

seems inevitable that there will be a major legislative debate over efforts to reconstruct the fair employment laws. Much of the debate will be over matters that are technical and obscure to the great majority of citizens. If, however, the outcome is to be constructive it will be important for legislators and all others concerned to keep in mind what the Court's majority apparently forgot -- that the laws are designed to serve important national purposes and that their application has an indelible impact on human lives.

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I. INTRODUCTION

During the last month of its term the Supreme Court issued seven decisions related to employment discrimination that add up to a major shift from equal employment opportunity law established over the past twenty five years to protect the rights of minorities and women. The Court's decisions make it harder for women and minorities to prove discrimination, make it easier for those opposed to civil rights consent decrees to challenge them, narrow the coverage of civil rights statutes, and limit the award of attorney's fees.

In Wards Cove Packing Co. v. Atonio the Court in a 5-4 decision revised the standards governing proof of discrimination in Title VII disparate impact cases, standards the Court established eighteen years ago in Griggs v. Duke Power Co., 401 U.S. 424 (1971).

In Martin v. Wilks the Court ruled 5-4 that court-approved consent decrees are open to challenge by other persons affected by the decree for apparently an indefinite period of time.

In Lorance v. AT&T Technologies the Court ruled 5-3 that a challenge to a facially neutral seniority system must be timely filed when the system is first put in place and that persons who are adversely affected only later may not file a challenge at that time.

In Patterson v. McLean Credit Union the Court in a 5-4 decision limited the reach of an 1866 Civil Rights Law by ruling that the

law does not cover racial harassment on the job.

In Jett v. Dallas Independent School District the Court in a 5-4 decision further narrowed the reach of the 1866 law by holding that the statute could not be used to sue local governments for damages for acts of racial discrimination.

In Public Employees Retirement System of Ohio v. Betts the Court ruled 7-2 that all employee benefit plans are exempt from the Age Discrimination in Employment Act unless they are a subterfuge for discrimination in the nonfringe benefit aspects of employment.

In Independent Federation of Flight Attendants v. Zipes the Court held 6-2 that successful plaintiffs who sue under Title VII may not be awarded attorneys fees against persons who intervene in the suit unless the intervenors' action was "frivolous, unreasonable, or without foundation."

Representative Don Edwards (D-CA) said: "The Supreme Court is dealing blow after blow to 25 years of progress in civil rights law." Benjamin Hooks, Executive Director of the NAACP and Chair of the Leadership Conference on Civil Rights, said: "Night has fallen on the Court as far as civil rights are concerned. We are seeing the unraveling of gains we thought were secure." (New York Times, June 13, 1989.) Ralph G. Neas, Executive Director of the LCCR said: "This Supreme Court term has been a disaster for all those committed to equal employment opportunity. Sadly, the Supreme Court, the principal protector of individual rights and liberties for the past 35 years, has been abandoning that historic role."

Conservatives welcomed the decisions, viewing them as "necessary correctives to earlier liberal rulings." Former Reagan Justice Department attorney Bruce Fein stated:

> "For 34 years, since Brown v. Board of Education, the court's approach to civil rights laws bent the ordinary rules of [interpreting laws] so that almost invariably minorities would win. Now what has happened is for the first time [the court is saying] no longer are we going to give an advantage, a golf handicap...We are going to treat the civil rights laws like other laws, no special favors for anyone." (Wash. Post, June 17, 1989).

II. THE OPINIONS

A. Wards Cove Packing Company v. Atonio

In perhaps the most important of the seven decisions, the Court on June 5, 1989 in a 5-4 decision revised the standards to be applied in Title VII disparate impact employment discrimination cases. The old standards were established by the Court eighteen years ago in Griggs v. Duke Power Co., 401 U.S. 424 (1971), a unanimous decision written by then Chief-Justice Burger. In revising the standards, the Court has established barriers that

make it more difficult for a plaintiff to prove discrimination in disparate impact cases.

The Court ruled that the burden of proving discrimination remains with the plaintiff at all times. Thus, under Wards Cove the plaintiff must not only establish a prima facie case of discrimination, but after the employer makes an acceptable minimum showing of business necessity the plaintiff must also prove that the employment practices that have a disparate impact on the workforce are not justified by business necessity, i.e., don't accurately measure an applicant's or employee's ability to perform on the job.

The Court also ruled that the plaintiff's burden in establishing a prima facie case of discrimination goes beyond the need to show that there are statistical disparities in the racial makeup of the work force. Under the Wards Cove ruling plaintiffs "will have to demonstrate that the disparity they complain of is the result of one or more of the employment practices that they are attacking...specifically showing that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites."

1. Background

a. Disparate treatment vs. disparate impact

Civil rights law had developed two different legal standards for determining when illegal discrimination in employment has occurred. Constitutional guarantees of equal protection of the law, contained in the 5th and 14th amendments, are violated only by intentional, purposeful actions that harm persons because of their race, national origin, or sex. However, Title VII of the Civil Rights Act of 1964, and Executive Order 11246 on Affirmative Action also forbid actions, regardless of their intent, that have a discriminatory effect on protected classes and that cannot be justified as necessary to the conduct of the business.

Under both the intent and the effects standards, statistical data may be used in determining whether illegal discrimination has occurred, but such data serve different purposes. In intent cases, the question asked after discovering statistical disparities is whether there is evidence of intent. In effects cases, it is whether the practices that resulted in the disparities can be justified.

For a more thorough discussion, see Affirmative Action in the 1980's: Dismantling the Process of Discrimination, A Statement of the U.S. Commission on Civil Rights (1981) from which this section borrows heavily.

b. Griggs v. Duke Power Co.

In Griggs v. Duke Power Co. the Supreme Court interpreted Title

VII to invalidate general intelligence tests and other criteria for employment that disproportionately excluded minorities because these selection devices were not shown to be job related and dictated by "business necessity." Although the lower courts had found that the company's tests were not deliberately discriminatory, the Supreme Court concluded:

> "Good intent or the absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."

Not all employment selection mechanisms that have an "adverse impact" or "disparate effect" are unlawful, only those that cannot be shown to be job related and necessary to the conduct of the business. Griggs established that employers must show that practices which adversely affect the opportunities of minorities and women do, in fact, fairly measure or predict actual performance on the job.

The Griggs decision had a major impact on many businesses, as many employers reexamined their employment practices and eliminated those that had a discriminatory impact on women and minorities.

c. Watson v. Fort Worth Bank and Trust

Last year in Watson v. Fort Worth Bank and Trust the Court foreshadowed its ruling in the Wards case. In Watson, the Court addressed the question whether disparate impact analysis may be applied to cases in which subjective criteria rather than objective criteria are used to make employment decisions. In an 8-0 decision (Justice Kennedy not participating) the Court ruled "that subjective or discretionary employment practices may be analyzed under the disparate impact approach in appropriate cases." While agreeing on this point, the Justices split on the evidentiary requirements that should apply in these cases. A plurality of the Court, Justice O'Connor, joined by Chief Justice Rehnquist and Justices White and Scalia, stated: "today's extension of disparate impact analysis calls for a fresh and somewhat closer examination of the constraints that operate to keep that analysis within its proper bounds." The Court continued:

> "First, we note that the plaintiff's burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities in the employer's work force...The plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.
>
> "Once the employment practice at issue has been identified, causation must be proved; that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show

that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected class.

"A second constraint on the application of disparate impact theory lies in the nature of the 'business necessity' or 'job relatedness' defense. Although we have said that an employer has 'the burden of showing that any given requirement must have a manifest relationship to the employment in question,' Griggs, 401 U.S., at 432, such a formulation should not be interpreted as implying that the ultimate burden of proof can be shifted to the defendant."

2. The Wards Cove Facts

The Wards Cove case involved the employment practices of two companies that operated salmon canneries in remote areas of Alaska. There were two classifications of jobs at the canneries: unskilled jobs on the cannery line, and a variety of noncannery skilled and unskilled jobs. The unskilled jobs were filled primarily by nonwhites, Filipinos and Alaska Natives. The noncannery jobs were filled primarily with whites who were hired by the companies' offices in Washington and Oregon. The noncannery jobs paid more than the cannery jobs and the workers were segregated by job classifications in dormitories and eating halls.

In 1974 a group of nonwhite cannery workers filed suit under Title VII of the Civil Rights Act of 1964 alleging that some of the companies' hiring and promotion practices -- nepotism, rehire preference, lack of objective hiring criteria, separate hiring channels, and the practice of not promoting from within -- had denied them employment in the noncannery positions. They also complained about the segregated housing and dining facilities. Their claims "were advanced under both the disparate-treatment and disparate-impact theories of Title VII liability."

The District Court rejected all the disparate-treatment claims, and also the disparate-impact challenges involving the subjective hiring criteria used to fill noncannery positions "on the ground that those criteria were not subject to attack under a disparate-impact theory." The claims against the objective criteria "were rejected for lack of proof."

A panel of the Ninth Circuit Court of Appeals affirmed the District Court ruling. That decision was vacated when the Court of Appeals agreed to hear the case en banc. The question before the en banc court was "whether disparate-impact analysis could be applied to subjective hiring practices." The Court of Appeals ruled affirmatively. (A plurality of the Supreme Court subsequently took the same position in Watson as discussed above.)

The Court of Appeals also held that "once the plaintiff class has shown disparate-impact caused by specific identifiable employment

practices or criteria, the burden shifts to the employer...to prove the business necessity." The en banc court remanded the case to a panel for further proceedings. The panel "held that [the plaintiffs] had made out a prima facie case of disparate-impact in hiring for both skilled and unskilled noncannery positions." The panel then sent the case back to the district court with instructions that it was the employer's burden to prove that any disparate impact caused by its hiring and employment practices was justified by business necessity. The companies appealed to the Supreme Court and certiorari was granted in 1988.

3. The Opinion

In Wards Cove, the Supreme Court plurality of Watson, joined by Justice Kennedy, applied to all criteria the standards suggested in Watson for subjective criteria.

The Court stated:

> "...The plaintiff bears the burden of disproving an employer's assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration...We acknowledge that some of our earlier decisions can be read as suggesting otherwise...But to the extent that those cases speak of an employer's 'burden of proof' with respect to a legitimate business justification defense...they should have been understood to mean an employer's production--but not persuasion--burden."

Thus, under the standards outlined in Wards Cove, the burden of proof remains with the plaintiff at all times.

The Court's opinion does provide an avenue, albeit difficult, by which a plaintiff may still be able to prevail even if an employer has established a business justification defense. That is, the plaintiff must establish that "other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate [hiring] interests."

> "If respondents, having established a prima facie case, come forward with alternatives to petitioners' hiring practices that reduce the racially-disparate impact of practices currently being used, and petitioners refuse to adopt these alternatives, such a refusal would belie a claim by petitioners that their incumbent practices are being employed for nondiscriminatory reasons."

The Court states that the alternative practices must be equally effective and that considerations of cost or other burdens are legitimate indicators of effectiveness.

4. The Dissent

Justice Stevens, joined by Justices Brennan, Marshall and

Blackmun, characterized the majority opinion as the "latest sojourn into judicial activism."

The dissent states:

> "The Court announces that our frequent statements that the employer shoulders the burden of proof respecting business necessity 'should have been understood to mean an employer's production--but not persuasion--burden.'...Our opinions always have emphasized that in a disparate impact case the employer's burden is weighty. 'The touchstone,' the Court said in Griggs, 'is business necessity.'...I am thus astonished to read that the 'touchsotne of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice...[T]here is no requirement that the challenged practice be...essential...This casual--almost summary--rejection of the statutory construction that developed in the wake of Griggs is most disturbing. I have always believed that the Griggs opinion correctly reflected the intent of the Congress that enacted Title VII. Even if I were not so persuaded, I could not join a rejection of a consistent interpretation of a federal statute."

Justice Blackmun in a separate dissent, joined by the other three dissenting Justices, states: "One wonders whether the majority still believes that race discrimination--or, more accurately, race discrimination against nonwhites--is a problem in our society, or even remembers that it ever was."

B. Martin v. Wilks

On June 12, 1989 in another 5-4 decision the Court ruled that persons who were not parties to a court approved consent decree are free to challenge the provisions of the consent decree at a later date. In so doing the Court has made it easier for white males to challenge consent decrees worked out between employers and women and minorities to address job discrimination.

To avoid any future challenges employers and employees seeking to resolve claims of discrimination through consent decrees must now seek to make all employees likely to be affected by the decree parties to the case by suing them. (The same would appear to be necessary to ensure finality to a decree in a case litigated to decision.) It also appears that the decision would allow persons hired after the consent decrees were in place to challenge them.

The decision has the likely effect of making employers reluctant to enter into such decrees since they will be open to challenge and the possibility of liability to the challengers by anyone not a party to the litigation for apparently an indefinite period of time. Employers may also seek to limit the reach of affirmative action plans in an attempt to avoid challenges of reverse discrimination.

Civil rights activists said the ruling was a major setback that

could undermine many affirmative action plans currently in place. It had long been thought that such consent decrees were immune from further legal challenges.

Barry Goldstein speaking for the NAACP Legal Defense Fund said that the decision will result in "suits without end. It's been very effective in civil rights cases for the union and the city and blacks to say, 'Let's stop pointing fingers and come up with a practical solution.' That incentive has been largely undercut and will force litigation to the final end." (New York Times, 6/13/89.)

1. The Facts

As outlined in the dissenting opinion, the facts in the case are as follows:

In 1974 and 1975, two groups of private parties, one group represented by the Lawyers Committee, and the U.S. Government brought three separate Title VII actions against the City of Birmingham, the Personnel Board of Jefferson County and various officials alleging discrimination in hiring and promotions in several areas including the fire department.

In 1976 after a full trial the District Court found that the defendants had violated Title VII and ruled that tests used to screen applicants for the police and fire department were biased.

In 1979 a second trial was convened to address the promotional practices. Prior to the decision, the parties negotiated two consent decrees: one with the city defendants and one with the Board. The U.S. Government was party to both consent decrees. The District Court provisionally approved both decrees, which included goals for the hiring and promoting of blacks and women and directed the parties to provide notice to all interested persons informing them of the provisions of the consent decrees and of their right to file objections.

Two months later the court held a fairness hearing at which a group of black employees said the decree was inadequate and a group of white firefighters represented in part by the Birmingham Firefighters Association opposed any race-conscious relief. Fairness hearings are provided for in the Federal Rules of Civil Procedure where individual plaintiffs seek to settle a case brought on behalf of a class of aggrieved persons. The settlement is published in the newspapers and affected persons are invited to submit their views to the court on whether the settlement is fair and adequate.

In August 1981 the District Court overruled both sets of objections and entered the decrees. Based on its understanding of the wrong committed, the court concluded that the remedy embodied in the consent decrees was reasonably commensurate with the nature and extent of the discrimination shown in the case record. The court denied other specific objections and denied the

firefighters' motion to intervene as untimely. The firefighters appealed.

Several months after the entry of the consent decrees, the Board certified to the city that five black firefighters and eight white firefighters were eligible to fill six vacancies for the position of lieutenant.

A group of white firefighters filed suit against the city and Board challenging the policy of certifying candidates and making promotions on the basis of race under the assumed protection of consent settlements.

An evidentiary hearing was held and the District Court found that the attack on the consent decrees was without merit, and that four of the black officers were qualified for promotion in accordance with the terms of the decrees. The motion was denied and for the first time in the history of the city the fire department had a black lieutenant.

The white firefighters appealed and this appeal was consolidated with their earlier appeal from denial of their motion to intervene in the initial case as untimely. The Court of Appeals upheld the district court on both orders.

While that appeal was pending the Wilks respondents, another group of white firefighters, filed a separate complaint alleging that the city had violated their Title VII rights but not challenging the validity of the consent decrees.

The District Court consolidated the case along with four other reverse discrimination cases. Over the course of the litigation the Court allowed other parties to intervene including the U.S. Government which reversed its position and sided with the white firefighters.

In December 1985 the court conducted a 5-day trial on issues of promotion in the city's fire and engineering departments. The district court judge entered a partial final judgment dismissing portions of the plaintiffs' complaints. The judge ruled that "a valid consent decree appropriately limited can be the basis for a defense against a charge of discrimination even in the situation in which it is clear that the defendant to the litigation did act in a racially conscious manner."

On appeal the Eleventh Circuit reversed and held that because the white firefighters who challenged the decrees were not parties to the decrees, "their independent claims of unlawful discrimination are not precluded." The Supreme Court granted certiorari and affirmed.

2. The Opinion

The opinion written by Chief Justice Rehnquist for himself and Justices White, O'Connor, Scalia and Kennedy, states that the

Federal Rules of Civil Procedure provide that "a party seeking a judgment binding on another cannot obligate that person to intervene; he must be joined."

> "Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree. The parties to a lawsuit presumably know better than anyone else the nature and scope of relief sought in the action, and at whose expense such relief might be granted. It makes sense, therefore, to place on them a burden of bringing in additional parties where such a step is indicated, rather than placing on potential additional parties a duty to intervene when they acquire knowledge of the lawsuit."

The opinion continues:

> "Petitioners contend that a different result should be reached because the need to join affected parties will be burdensome and ultimately discouraging to civil rights litigation. Potential adverse claimants may be numerous and difficult to identify; if they are not joined, the possibility for inconsistent judgments exists. Judicial resources will be needlessly consumed in relitigation of the same question."

* * * * * *

> "The difficulties petitioners foresee in identifying those who could be adversely affected by a decree granting broad remedial relief are undoubtedly present, but they arise from the nature of the relief sought and not because of any choice between mandatory intervention and joinder."

3. The Dissent

Justice Stevens, with whom Justices Brennan, Marshall and Blackmun joined, wrote:

> "As a matter of law there is a vast difference between persons who are actual parties to litigation and persons who merely have the kind of interest that may as a practical matter be impaired by the outcome of the case. Persons in the first category have a right to participate in a trial and to appeal from an adverse judgment; depending on whether they win or lose, their legal rights may be enhanced or impaired. Persons in the latter category have a right to intervene in the action in a timely fashion, or they may be joined as parties against their will. But if they remain on the sidelines, they may be harmed as a practical matter even though their legal rights are unaffected. One of the disadvantages of sideline-sitting is that the bystander has no right to appeal from a judgment no matter how harmful it may be."

Justice Stevens added:

> "This litigation was brought to change a pattern of hiring and promotion practices that had discriminated against black citizens in Birmingham for decades. The white respondents in this case are not responsible for that history of discrimination, but they are nevertheless beneficiaries of the discriminatory practices that the litigation was designed to correct. Any remedy that seeks to create employment conditions that would have obtained if there had been no violations of law will necessarily have an adverse impact on whites, who must now share their job and promotion opportunities with blacks. Just as white employees in the past were innocent beneficiaries of illegal discriminatory practices, so it is inevitable that some of the same white employees will be innocent victims who must share some of the burdens resulting from the redress of the past wrongs."

C. Lorance v. AT&T Technologies

On the same day that the Court ruled in Martin v. Wilks that court-approved consent decrees remain open indefinitely to challenge by persons not parties to the litigation, it ruled (5-3, Justice O'Connor not participating) in Lorance v. AT&T Technologies that women who challenged a seniority system as discriminatory had filed their Title VII claim too late. The complaint was filed by the plaintiffs shortly after they were demoted under the system. The Court ruled that under Title VII they were required to file the suit within 300 days of the seniority system's adoption. As Justice Marshall wrote in dissent: "Employees must now anticipate, and initiate suit to prevent, future adverse applications of a seniority system, no matter how speculative or unlikely these applications may be."

1. The Facts

The female plaintiffs had worked at AT&T Technologies, an electronics products company, as hourly workers since the early 1970's. Until 1979 there was a plantwide seniority system in place that determined seniority for all hourly employees solely on the basis of years of employment. Workers promoted to the higher paid, skilled tester positions maintained their plantwide seniority. In 1979 a collective bargaining agreement between the company and the union changed the seniority system to provide that a tester's seniority was determined by years employed as a tester. Employees promoted to tester positions could "regain full plantwide seniority after spending 5 years as a tester and completing a prescribed training program."

The plaintiffs were promoted to tester in 1978 and 1980. In 1982 they were selected for demotion during an economic slowdown at the plant. The plaintiffs would not have been demoted under the old plantwide system because of their years of employment at the plant. In April 1983 they filed charges with the EEOC claiming

that the seniority system was implemented with the intent to discriminate on the basis of sex. In September 1983 the EEOC issued right to sue letters and the plaintiffs filed suit in the District Court for the Northern District of Illinois. As stated in the Supreme Court opinion:

> "[The] complaint alleged that among hourly wage earners the tester positions had traditionally been held almost exclusively by men, and nontester positions principally by women, but that in the 1970s' an increasing number of women took the steps necessary to qualify for tester positions and exercised their seniority rights to become testers. [The plaintiffs] claimed that the 1979 alteration of the rules governing tester seniority was the product of a 'conspiracy to change the seniority rules, in order to protect incumbent male testers and to discourage women from promoting into the traditionally-male tester jobs,' and that 'the purpose and the effect of this manipulation of seniority rules has been to protect male testers from the effects of the female testers' greater plant seniority, and to discourage women from entering the traditionally-male tester jobs.'"

In August, the District Court granted the company's motion for summary judgment "on the ground that petitioners had not filed their complaints with the EEOC within the applicable limitations period." A divided panel of the Court of Appeals for the Seventh Circuit affirmed, concluding that the claims were not filed on time: "the relevant discriminatory act that triggers the period of limitations occurs at the time an employee becomes subject to a facially-neutral but discriminatory seniority system that the employee knows, or reasonably should know, is discriminatory." The Supreme Court granted review in 1988 and has now affirmed the Appellate Court decision.

2. The Opinion

Justice Scalia wrote the opinion in which Chief Justice Rehnquist and Justices White, Stevens, and Kennedy joined. Justice Stevens filed a brief concurring opinion.

The Court makes a distinction between facially discriminatory seniority systems, i.e, one that treats similarly situated employees differently, for example assigning men twice the seniority that women receive for the same amount of time served, and facially neutral systems, i.e, one that awards seniority to men and women equally but may have been adopted with the intent to discriminate. In the former case, the Court reasons that the system can be challenged at any time because by definition discrimination occurs each time it is applied. In the latter case, the Court states that discrimination occurs only at the time of adoption of the system and thus is subject to challenge only then.

Under Title VII, a charge of discrimination must be filed with EEOC within 180 days of the alleged discrimination, or within 300

days if the complaint was initially filed with a State or local agency. Thus a challenge to a facially discriminatory seniority system could be made within the time limitations each time the system was applied to an employee. But, as a result of Lorance, a challenge to a facially neutral system must be made within the prescribed time after the system is first put in place regardless of its later impact on employees.

The Court states that in so holding it is in part respecting the special treatment accorded to seniority systems under Title VII.

> "This 'special treatment' strikes a balance between the interests of those protected against discrimination by Title VII and those who work--perhaps for many years--in reliance upon the validity of a facially lawful seniority system. There is no doubt, of course, that a facially discriminatory seniority system (one that treats similarly situated employees differently) can be challenged at any time, and that even a facially neutral system, if it is adopted with unlawful discriminatory motive, can be challenged within the prescribed period after adoption. But allowing a facially neutral system to be challenged, and entitlements under it to be altered, many years after its adoption would disrupt those valid reliance interests that sec. 703(h) [Title VII] was meant to protect. In the context of the present case, a female tester could defeat the settled (and worked-for) expectations of her co-workers whenever she is demoted or not promoted under the new system, be that in 1983, 1993, 2003, or beyond. Indeed, a given plaintiff could in theory sue successively for not being promoted, for being demoted, for being laid off, and for being awarded a sufficiently favorable pension, so long as these acts--even if nondiscriminatory in themselves--could be attributed to the 1979 change in seniority. Our past cases, to which we adhere today, have declined to follow an approach that has such disruptive implications."

3. The Dissent

Justice Marshall, with whom Justices Brennan and Blackmun joined, wrote:

> "The majority holds today that, when it is alleged that an employer and a union have negotiated and adopted a new seniority system with the intention of discriminating against women in violation of Title VII...the [time] limitations period...begins to run immediately upon the adoption of that system...This is so even if the employee who subsequently challenges that system could not reasonably have expected to be demoted or otherwise concretely harmed by the new system at the time of its adoption. This severe interpretation...will come as a surprise to Congress, whose goals in enacting Title VII surely never included conferring absolute immunity on discriminatorily adopted seniority systems that survive their first 300 days. Because the harsh

reality of today's decision, requiring employees to sue anticipatorily or forever hold their peace, is so glaringly at odds with the purposes of Title VII, and because it is compelled neither by the text of the statute nor our precedents interpreting it, I respectfully dissent."

D. Patterson v. McLean Credit Union

On June 15, 1989 the Supreme Court unanimously declined to overturn its interpretation of an 1866 civil rights law (sec. 1981 of the U.S. Code, Title 42) in Runyon v. McCrary, 427 U.S. 160 (1976), but ruled 5-4 that the 1866 law does not cover racial harassment, Patterson v. McLean Credit Union. In so doing the Court stated that the 1866 law prohibits racial discrimination in the hiring actions of a private employer and may cover some promotion actions, but does not prohibit discriminatory treatment of employees.

Julius Chambers, Director-Counsel of the NAACP Legal Defense Fund, who argued the case before the Supreme Court for the black plaintiff, said the Court's ruling upholding Runyon "represents a victory in a battle that never should have been fought," and the Court's decision in Patterson "has the practical effect of denying to those who suffer the emotional pain and indignity of on-the-job racial harassment any effective remedy" (New York Times, 6/16/89).

1. Background

On April 25, 1988 the Supreme Court on its own (no party having raised the issue) in a 5-4 decision ordered reargument in the Patterson case, and instructed the parties in the case to submit briefs and to argue whether the Court's interpretation of the Civil Rights Act of 1866 in Runyon should be reconsidered. In Runyon the Court had held that the law prohibits racial discrimination by private schools. In effect the Court was reconsidering whether blacks had the right, pursuant to the 1866 law, to sue private persons or organizations for acts of racial discrimination. The 1866 law was designed to secure the rights of minority citizens to make and enforce contracts and to acquire property.

The new questions before the Court in Patterson were whether the 1866 law "encompass[ed] a claim of racial discrimination in the terms and conditions of employment, including a claim that petitioner was harassed because of her race, and whether to prevail on her claim of racial discrimination in promotion she had to prove that she was more qualified than the white person who received the promotion. Ms. Patterson had alleged that throughout her employment she had been "subjected to abusive and demeaning terms and conditions of employment" including having to dust and sweep the office and being told that "blacks are known to work slower than whites by nature." She also alleged that she was denied promotional opportunities as the "company did not post vacant positions, and [she] did not learn of promotional

opportunities until after the selection had been made."

For a more thorough discussion of the 1866 Civil Rights Law, and the Runyon and Patterson cases, see the CIVIL RIGHTS MONITOR, June 1988 and October 1988.

2. The Opinion

On the question of reconsidering Runyon, the opinion, written by Justice Kennedy, discusses the doctrine of stare decisis (to stand by things decided) and the exceptions to the doctrine (decision has been undermined by subsequent changes or development in the law, inherent confusion created by an unworkable decision, inconsistent with the sense of justice or with the social welfare) and concludes that none of the exceptions is applicable to this case. The decision also notes that the burden of persuasion when "advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction," in contrast to a constitutional interpretation, because Congress is always free to change the interpretation of a statute.

> "The arguments about whether Runyon was decided correctly in light of the language and history of the statute were examined and discussed with great care in our decision. It was recognized at the time that a strong case could be made for the view that the statute does not reach private conduct..., but that view did not prevail. Some members of this Court believe that Runyon was decided incorrectly, and others consider it correct on its own footing, but the question before us is whether it ought now to be overturned. We conclude after reargument that Runyon should not be overruled, and we now reaffirm that sec. 1981 prohibits racial discrimination in the making and enforcement of private contracts."

On the question of whether the 1866 law covered racial harassment, the Court (Justice Kennedy, joined by Chief Justice Rehnquist and Justices White, O'Connor and Scalia) stated:

> "By its plain terms, the relevant provision in sec. 1981 protects two rights: 'the same right...to make...contracts' and 'the same right...to...enforce contracts.' The first of these protections extends only to the formation of a contract, but not to problems that may arise later from the conditions of continuing employment...[It does not extend to] breach of the terms of the contract or imposition of discriminatory working conditions... The second of these guarantees,...embraces protection of a legal process, and of a right of access to legal process, that will address and resolve contract-law claims without regard to race...The right to enforce contracts does not, however, extend beyond conduct by an employer which impairs an employee's ability to enforce through legal process his or her established contract rights."

* * * * * *

> "Applying these principles to the case before us, we agree with the Court of Appeals that petitioner's racial harassment claim is not actionable under sec. 1981....With the exception perhaps of her claim that respondent refused to promote her to a position as an accountant...none of the conduct which petitioner alleges as part of the racial harassment against her involves either a refusal to make a contract with her or the impairment of her ability to enforce her established contract rights."

On the question whether a promotion claim is actionable under Title VII the Court states: "only where the promotion rises to the level of an opportunity for a new and distinct relation between the employee and the employer is such a claim actionable under sec. 1981."

The Court goes on to rule that "the District Court erred when it instructed the jury that petitioner had to prove that she was better qualified than the white employee who allegedly received the promotion." The Court reasoned that there are other ways the petitioner "might seek to prove intentional discrimination on the part of the respondent" such as "presenting evidence of respondent's past treatment of petitioner, including the instances of racial harassment which she alleges and respondent's failure to train her for an accounting position."

3. The Dissent

Justice Brennan, joined by Justices Marshall and Blackmun and Stevens in part, wrote in the dissent:

> "Though the Court today reaffirms sec. 1981's applicability to private conduct, it simultaneously gives this landmark civil rights statute a needlessly cramped interpretation... When it comes to deciding whether a civil rights statute should be construed to further our Nation's commitment to the eradication of racial discrimination, the Court adopts a formalistic method of interpretation antithetical to Congress' vision of a society in which contractual opportunities are equal. I dissent from the Court's holding that sec. 1981 does not encompass Patterson's racial harassment claim."

* * * * * *

> "The question in a case in which an employee makes a sec. 1981 claim alleging racial harassment should be whether the acts constituting harassment were sufficiently severe or pervasive as effectively to belie any claim that the contract was entered into in a racially neutral manner. Where a black employee demonstrates that she has worked in conditions substantially different from those enjoyed by

similarly situated white employees, and can show the necessary racial animus, a jury may infer that the black employee has not been afforded the same right to make an employment contract as white employees. Obviously, as respondent conceded at oral argument, if an employer offers a black and a white applicant for employment the same written contract, but then tells the black employee that her working conditions will be much worse than those of the white hired for the same job because 'there's a lot of harassment going on in this work place and you have to agree to that,' it would have to be concluded that the white and blacks had not enjoyed an equal right to make a contract. I see no relevant distinction between that case and one in which the employer's different contractual expectations are unspoken, but become clear during the course of employment as the black employee is subjected to substantially harsher conditions than her white co-workers. In neither case can it be said that whites and blacks have had the same right to make an employment contract. The Court's failure to consider such examples, and to explain the abundance of legislative history that confounds its claim that sec. 1981 unambiguously decrees the result it favors, underscore just how untenable is the Court's position."

E. Jett v. Dallas Independent School District

On June 22, 1989 the Supreme Court continued to narrow the coverage of the 1866 law by ruling that the statute could not be used to sue local governments for damages for acts of racial discrimination. In its 5-4 decision the Court reasoned that Congress did not intend the 1866 law (sec. 1981) to provide for such suits because a law enacted five years later in 1871 (sec. 1983) expressly authorizes discrimination damage suits against state and local jurisdictions.

However, the scope of the 1871 law was defined in narrow terms eleven years ago when the Court held in Monell v. New York City Dept. of Social Services, 436 U.S. 658, that under the 1871 statute a local government could be held liable for the discriminatory actions of its employees only if it could be shown that "the employees had been delegated policymaking authority or were acting pursuant to a settled custom that represented the official policy of the jurisdiction." (Monell established that local governments may be sued under Section 1983, reversing an earlier Supreme Court decision which had prevented such suits.) Since many jurisdictions now have official policies prohibiting discrimination, this is an onerous burden.

Prior to the Supreme Court's ruling in Jett, almost all lower courts had interpreted the 1866 law as allowing damage suits against local governments, and, in contrast to Section 1983 suits, had found governments liable for the discriminatory actions of their employees under a legal theory known as respondeat superior or vicarious liability, regardless of a jurisdiction's official policy of nondiscrimination.

This decision in combination with the Patterson decision has "virtually wiped the statute off the books as it applies to employment discrimination." (Charles Stephen Ralston, NAACP Legal Defense memorandum, June 27, 1989) In 1977 the Court held that the 1866 law did not apply to employment discrimination by the Federal Government. The 1866 law had been a powerful tool against employment discrimination because, unlike Title VII it permits trial by jury, provides for the award of punitive and compensatory damages, has a longer statute of limitations, and covers employers of fewer than 15 workers.

1. The Facts

Norman Jett, a white male, filed suit under secs. 1981 and 1983 in the District Court for the Northern District of Texas against the Dallas Independent School District and his former principal and superintendent alleging in part that his removal from the athletic director and head coaching positions at South Oak High School was motivated by the fact that he was white, and that the principal and superintendent, and through them the DISD, were responsible for the racially discriminatory diminution in his employment status." He also alleged due process and First Amendment violations.

The jury found for Jett on all counts and awarded him monetary damages. The case was appealed and the Court of Appeals for the Fifth Circuit reversed in part and remanded. On the issue of liability for racial discrimination, the Appellate Court ruled "that local governmental bodies cannot be held liable under a theory of respondeat superior guaranteed by sec. 1981..." The Supreme Court granted certiorari and has now remanded the case to the Court of Appeals "for it to determine where final policymaking authority as to employee transfers lay in light of the principles [outlined in the decision]."

2. The Opinion

The question which the Court had agreed to review was whether under the 1866 law a municipality may be held liable for its employees' violations of the law under a theory of respondeat superior. The opinion, written by Justice O'Connor and joined by Chief Justice Rehnquist and Justices White, Kennedy, and Scalia in part, answered that question in the negative but also addressed the question whether the 1866 law provides an independent federal cause of action for damages against local government entities. The Court discussed the legislative history of the 1866 and 1871 laws in great detail and concluded that the "guarantees contained in...the 1866 Act...were to be enforced against state actors through the express remedy for damages contained in the 1871 law."

"We think the history of the 1866 Act and the 1871 Act

recounted above indicates that Congress intended that the explicit remedial provisions of sec. 1983 be controlling in the context of damages actions brought against state actors alleging violation of the rights declared in sec. 1981. That we have read sec. 1 of the 1866 Act to reach private action and have implied a damages remedy to effectuate the declaration of rights contained in that provision does not authorize us to do so in the context of the 'state action' portion of sec. 1981, where Congress has established its own remedial scheme."

In another June 1989 decision the Court by the same 5-4 majority, ruled that "neither a State nor its officials acting in their official capacities are 'persons' under Section 1983."

3. The Dissent

Justice Brennan, with whom Justices Marshall, Blackmun and Stevens join, stated in dissent:

> "To anyone familiar with this and last Terms' debate over whether Runyon...should be overruled...today's decision can be nothing short of astonishing. After being led to believe that the hard question under...sec. 1981...was whether the statute created a cause of action relating to private conduct, today we are told that the hard question is, in fact, whether it creates such an action on the basis of governmental conduct. Strange indeed, simultaneously to question whether sec. 1981 creates a cause of action on the basis of private conduct...and whether it creates one for governmental conduct...and hence to raise the possibility that this landmark civil-rights statute affords no civil redress at all."

The dissent goes on to say that in granting certiorari the Court was not asked to review the question whether one could bring a suit for damages on the basis of governmental action under sec. 1981. That issue, the dissent states, was raised only in the school district's brief to the Court on the merits of the case. Thus Jett addressed that issue only in his reply brief on the merits. The dissenting opinion states:

> "It is not only unfair to decide the case on this basis; it is unwise. The question is important; to resolve it on the basis of largely one-sided briefing, without the benefit of the views of the courts below, is rash. It is also unnecessary. The Court appears to decide today (though its precise holding is less than pellucid) that liability for violations by the government of sec. 1981 may not be predicated on a theory of respondeat superior. The answer to that question would dispose of Jett's contentions. In choosing to decide, as well, whether sec. 1983 furnishes the exclusive remedy for violations of sec. 1981 by the government, the Court makes many mistakes that might have been avoided by a less impetuous course."

F. Public Employees Retirement System of Ohio v. Betts

On June 23, 1989 the Court in a 7-2 decision ruled that a section of the Age Discrimination in Employment Act (ADEA) that provides an exemption for employee benefit plans, in effect exempts all benefit plans unless they are shown to be a subterfuge for discrimination in the nonfringe-benefit aspects of the employment. Further, the Court ruled that a benefit plan adopted prior to the enactment of ADEA cannot be a subterfuge for discrimination and thus is exempt from the provisions of the Act.

1. Background

The Title VII employee benefit exemption provides that under the ADEA it is not unlawful for an employer:

> "to observe the terms of...any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of [the ADEA] except that no such employee benefit plan shall excuse the failure to hire any individual, and no such...employee benefit plan shall require or permit the involuntary retirement of any individual...because of the age of such individual."

The Department of Labor and its successor as the relevant administrative agency, the Equal Employment Opportunity Commission, had interpreted the exemption as applying only to employee benefit plans providing reduced employee benefits for older employees that are justified by the increased cost of providing those benefits to such employees. Thus, if the employer could demonstrate that the cost of providing equal benefits is greater for older workers than for younger workers, then the employer could comply with the ADEA by spending equal amounts for the benefits per employee regardless of the level of benefits provided younger vs. older employees (equal benefit or equal cost rule). And, the courts had upheld the administrative interpretation of Title VII's employee benefit exemption.

1. The Facts

The Ohio public employee retirement system, established in 1933, provided two forms of retirement payments. Payments were available for age and years of service under several formulas, and disability payments were available for persons totally disabled who had been employed at least five years and who were under the age of 60.

Jane Betts, who was hired in 1978 as a speech pathologist, developed medical problems that required transfer to a less demanding job in 1984. By May of 1985 she was no longer able to perform in any capacity and was given the option of retiring or being placed on unpaid medical leave. She chose to retire and

because she was 61 she was not eligible to retire on disability.

In 1976 the formula for computing disability payments only had been changed to provide that "payments in no case would be less than 30 percent of the retiree's final average salary." Previously the formulas for the two classes of retirement had been the same. Betts' retirement payments were approximately $200 less than she would have received had she been eligible to retire on disability.

Betts filed an age discrimination charge with the Equal Employment Opportunity Commission and subsequently sued in U.S. District Court for the Southern District of Ohio. The U.S. District Court found that the "retirement scheme was discriminatory on its face, in that it denied disability retirement benefits to certain employees on account of their age." As the majority opinion states:

> "Relying on interpretive regulations promulgated by the EEOC, the District Court held that employee benefit plans qualify for the...[exemption] only if any age-related reductions in employee benefits are justified by the increased cost of providing those benefits to older employees. Because the PERS plan provided for a reduction in available benefits at age 60, a reduction not shown to be justified by considerations of increased cost, the court concluded that PERS' plan was not entitled to claim the protection of the...exemption."

A divided panel of the Court of Appeals for the Sixth Circuit affirmed. The Supreme Court reversed.

2. The Opinion

The Supreme Court opinion written by Justice Kennedy and joined by Chief Justice Rehnquist and Justices White, Blackmun, Stevens, O'Connor and Scalia rules that the Ohio retirement system "is entitled to the protection of the [Title VII] exemption unless its plan is 'a subterfuge to evade the purposes of the Act.'" The opinion further states that "the requirement that employers show a cost-based justification for age-related reductions in benefits appears nowhere in the statute itself," and that "no deference is due to agency interpretations at odds with the plain language of the statute itself."

The Court reasons that "the statute's use of the phrase 'any employee benefit plan'" creates a broad scope for the statutory exemption that "cannot reasonably be limited to benefit plans in which all age-based reductions in benefits are justified by age-related cost considerations. Accordingly, the interpretive... requirement is contrary to the plain language of the statute, and is invalid."

Employers may now provide "different benefits" regardless of the lack of an economic justification unless the employee can prove

that the employer intended to use a benefit plan to discriminate in the non-fringe aspects of the employment.

3. The Dissent

Justice Marshall, with whom Justice Brennan joined, dissented:

> "The majority today immunizes virtually all employee benefit programs from liability under the Age Discrimination in Employment Act of 1967...Henceforth, liability will not attach under the ADEA even if an employer is unable to put forth any justification for denying older workers the benefits younger ones receive, and indeed, even if his only reason for discriminating against older workers in benefits is his abject hostility to, or his unfounded stereotypes of them. In reaching this surprising result, the majority casts aside the estimable wisdom of all five Courts of Appeals to consider the ADEA's applicability to benefit programs, of the two federal agencies which have administered the Act, and of the Solicitor General as amicus curiae, all of whom have concluded that it contravenes the text and history of the Act to immunize discrimination against older workers in benefit plans which is not justified by any business purpose. Agreeing with these authorities, and finding the majority's 'plain language' interpretation impossibly tortured and antithetical to the ADEA's goal of eradicating baseless discrimination against older workers, I dissent."

G. Independent Federation of Flight Attendants v. Zipes

On June 22, 1989 in a 6-2 opinion the Court held that plaintiffs who sue under Title VII may not be awarded attorney's fees against persons who intervene in the suit prior to settlement unless "the intervenors' action was frivolous, unreasonable, or without foundation." The Court's ruling, as Justice Marshall writes in dissent, may result in fewer victims of discrimination filing suits because of lack of resources to defend against potential intervenors.

1. Background

Title VII provides that: "In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the...[EEOC] or the United States, a reasonable attorney's fee as part of the costs, and the...[EEOC] and the United States shall be liable for costs the same as a private person."

The law as it has developed in regard to the attorney's fees provision has been that "a prevailing plaintiff should 'ordinarily recover an attorney's fee unless special circumstances would render such an award unjust'" (Newman v. Piggie Park Enterprises, Inc. 390 U.S.400 (1968). The Court in Newman reasoned that "this constraint on district court discretion [was] necessary to carry out Congress' intention that

individuals injured by racial discrimination act as 'private attorney[s] general,' vindicating a policy that Congress considered of the highest priority."

Further, the Court held in Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) that "even though the term 'prevailing party' does not distinguish between plaintiffs and defendants, the principle of Newman would not be applied to a prevailing defendant." The Title VII defendant, the Court reasoned is not "the chosen instrument of Congress" and the losing plaintiff is not "a violator of federal law." Finally, the law has been that a prevailing defendant may receive attorney's fees if the plaintiff's case was brought in bad faith "but only upon a finding that the plaintiff's action was frivolous, unreasonable or without foundation."

2. The Facts

In 1970, a group of female flight attendants of TWA, represented by their union, filed suit against the airline in federal court alleging that the airline's policy of terminating flight attendants who became mothers but not those who became fathers was a violation of Title VII's prohibition against sex discrimination. TWA responded to the suit by abandoning the policy and entered into a settlement. The district court approved the agreement but class members who were dissatisfied appealed the District Court's decision. The Court of Appeals reversed the District Court's ruling.

On remand the District Court found for the female flight attendants on the merits and the "Court of Appeals affirmed the District Court's determination that TWA's policy violated Title VII." After continued litigation on matters not relevant here, the parties reached an agreement "in which TWA agreed to establish a $3 million fund to benefit all class members and to credit class members with full company and union 'competitive' seniority from the date of termination." The Independent Federation of Flight Attendants, which had become the replacement bargaining representative of the flight attendants, sought to intervene in the suit on behalf of incumbent flight attendants not affected by the challenged policy and attendants hired after this action began. The District Court allowed the intervention but rejected the intervenor's objections, and approved the settlement in all respects. The Court of Appeals affirmed and in 1982 the Supreme Court agreed, concluding that "reinstatement of all respondents with full competitive seniority was a remedy authorized by Title VII and appropriate in the circumstances of the case."

The original plaintiffs then petitioned the court for attorney's fees against the intervenor. "The District Court held that unsuccessful Title VII union intervenors are, like unsuccessful Title VII defendants, consistently held responsible for attorney's fees." A divided panel of the court of appeals affirmed.

The question before the Court in Zipes was under what circumstances the attorney's fees provision of Title VII permits a court to award attorney's fees against intervenors who have not been found to have violated the Civil Rights Act or any other federal law.

3. The Opinion

The opinion, written by Justice Scalia and joined by Chief Justice Rehnquist and Justices White, O'Connor and Kennedy, stated:

> "[w]e conclude that district courts should...award Title VII attorney's fees against losing intervenors only where the intervenors' action was frivolous, unreasonable, or without foundation. It is of course true that the central purpose of sec. 706(k) is to vindicate the national policy against wrongful discrimination by encouraging victims to make the wrongdoers pay at law -- assuring that the incentive to such suits will not be reduced by the prospect of attorney's fees that consume the recovery...Assessing fees against blameless intervenors, however, is not essential to that purpose. In every lawsuit in which there is a prevailing Title VII plaintiff there will also be a losing defendant who has committed a legal wrong. That defendant will, under Newman, be liable for all of the fees expended by the plaintiff in litigating the claim against him, and that liability alone creates a substantial added incentive for victims of Title VII violations to sue...Respondents argue that this incentive will be reduced by the potential presence of intervenors whose claims the plaintiff must litigate without prospect of fee compensation. It is not clear to us that that consequence will follow. Our decision in Martin v. Wilks...establishes that a party affected by the decree in a Title VII case need not intervene but may attack collaterally--in which suit the original Title VII plaintiff defending the decree would have no basis for claiming attorney's fees. Thus, even if we held that fees could routinely be recovered against losing intervenors, Title VII plaintiffs would still face the prospect of litigation without compensation for attorney's fees before the fruits of their victory can be secure.
>
> "But even if the inability generally to recover fees against intervenors did create some marginal disincentive against Title VII suits, we would still have to weigh that against other considerations...Foremost among these is the fact that, in contrast to losing Title VII defendants who are held presumptively liable for attorney's fees, losing intervenors like petitioner have not been found to have violated anyone's civil rights...Awarding attorney's fees against such an intervenor would further neither the general policy that wrongdoers make whole those whom they have injured nor Title VII's aim of deterring employers from

engaging in discriminatory practices.

Justice Blackmun, although concurring in the judgment, observes that the Court's attorney's fees rule ignores the difference between a plaintiff and an intervenor. The result, he states is "to place the additional cost of litigating third-party rights on the prevailing Title VII plaintiff, whom Congress has assumed lacks the resources to bear them." Justice Blackmun says that the plaintiff's attorney's fees should be paid by the defendant "as the cost to the plaintiff of vindication of his or her own rights, would not have existed but for the conduct of the Title VII defendant."

> "I see nothing in the language of the statute or in our precedents to foreclose a prevailing plaintiff from turning to the Title VII defendant for reimbursement of all the costs of obtaining a remedy, including the costs of assuring that third-party interests are dealt with fairly...[L]iability for fees should shift from the defendant to the intervenor if the intervenor's position was 'frivolous, unreasonable, or without foundation.'"

4. The Dissent

Justice Marshall with whom Justice Brennan joined wrote that the opinion "ignores Congress' explicit conferral of discretion on the district courts, and instead establishes an absolute rule that, in all circumstances, a court must treat an intervenor like a plaintiff for fee liability purposes."

The dissent states:

> "The Civil Rights Act of 1964 embodies a national commitment to eradicate discrimination. Congress intended not only 'to make the wrongdoers pay at law'...but more broadly to make victims of discrimination whole...Given the scarcity of public resources available for enforcement, individuals injured by discrimination serve as 'the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.' Congress recognized that victims of discrimination often lack the resources to retain paid counsel, and are frequently unable to attract lawyers on a contingency basis because many victims seek injunctive relief rather than pecuniary damages...It therefore enacted sec. 706(k) to ensure that victims of discrimination could obtain lawyers to bring suits necessary to vindicate their rights, and to provide victorious plaintiffs with fully compensatory attorney's fees...Nothing in the legislative history indicated that Congress intended to limit the types of losing parties against whom attorney's fees could be awarded. Indeed, given Congress's broad remedial goals, the majority errs in casually presuming that such limits exist."

Finally, Justice Marshall says that the majority ignores the likely consequence of its decision:

"In the future, defendants can rely on intervenors to raise many of their defenses, thereby minimizing the fee exposure of defendants and forcing prevailing plaintiffs to litigate many, if not most, of their claims against parties from whom they have no chance of recovering fees. Without the hope of obtaining compensation for the expenditures caused by intervenors, many victims of discrimination will be forced to forego remedial litigation for lack of financial resources. As a result, injuries will go unredressed and the national policy against discrimination will go unredeemed."

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