Upward Mobility
For the Minority Group Worker

The Central Meaning Of Affirmative Action and Title VII

On this eve of our Independence Day celebrations and the patriotic expression that accompanies them,* I think that it is particularly appropriate to speak of Title VII of the Civil Rights Act of 1964 and its relevance to the progress of racial minorities in this country. For it was just six years ago yesterday that President Lyndon Johnson, a Texan—whom many had mistakenly thought to be hostile to the cause of racial equality—signed into law a relatively comprehensive attack upon discrimination by unions and employers.

*Address before Labor Law Section July 2, 1970 in San Antonio during annual Texas Bar convention.

You may recall that that July 4 weekend was one not simply dedicated to celebration—but also to sober reflection and hope that men of goodwill and moderation would make real our patriotic creed of equality. But, for anyone willing to look back just a little more than 100 years, the task appeared formidable indeed. The Supreme Court of the United States—the same institution now properly associated with an uncompromising approach to desegregation of the public schools—had said in *Dred Scott v. Sanford*[1] that state legislation on the condition of the American Negro at the time of the Constitution had "impressed [upon him] such deep and enduring marks of inferiority and degradation" so as to disqualify any claim that he might make upon American citizenship.

Dred Scott was reversed, of course, not by the Court but by the Civil War and the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments. Its demise was hastened by the attacks of the Abolitionists and by President Abraham Lincoln who, as a candidate for the United States Senate shortly after the decision issued, declared it to be unacceptable. Said Lincoln of the struggle which was taking

(Continued on next page)

WILLIAM B. GOULD
Detroit, Mich.

(Continued from Page 871)

form shortly before the Civil War:

> **It is the eternal struggle between these two principles—right and wrong—throughout the world. They are the two principles that have stood face to face from the beginning of time; and will ever continue to struggle. The one is the common right of humanity, and the other the divine right of kings. It is the same principle in whatever shape it develops itself. It is the same spirit that says, "You toil and work and earn bread, and I'll eat it." No matter in what shape it comes, whether from the mouth of the king who seeks to bestride the people of his own nation and live by the fruit of their labor, or from one race of man as an apology for enslaving another race, it is the same tyrannical principle.**

We are not all that far from *Dred Scott*. The reports and studies document the continued exclusion of racial minorities and, ominously, the deeply felt racial animosities and polarization which have shamed us in the eyes of the world.[2] But what has become of Title VII and its promise during these past six years?

We are now at an intermediate stage in the litigation of Title VII matters. The Supreme Court has yet to deal with this area of the civil rights law. In part, this is because lower courts have been clogged with procedural issues of a wide variety during the past few years. Counsel defending against racial discrimination claims have been extremely imaginative in raising practically every possible defense. Whether, in so doing, they have served the community and the objectives of the statute as well as their clients' immediate interests is, of course, a highly debatable point. In my judgment, the bar —and I am not just talking about the State Bar of Texas or even the South— has not played a terribly constructive role in this regard.

Thus, six years after the passage of Title VII many of the important issues are still just coming to the circuit court level. The main thrust of my remarks is aimed at some of the more recent and important rulings at this level. As one who has been extremely critical of the excessive caution of some of the courts, I should like to emphasize the fact that I am, on the whole, encouraged by the recent trend of court opinions. I might note that in a remarkable number of instances a niggardly and ungenerous construction of civil rights legislation provided by the district courts has been reversed by the circuit courts. While recognizing the relatively limited role that law still plays in coping with the pervasiveness of racial discrimination in our country, I think that the pattern gives some cause for cheer. And it hardly goes without saying that the Fifth Circuit has begun to play a leading role in this area as it has in school segregation cases for the past 16 years.

In this regard, one needs to recall the words of Judge Tuttle last January in *Culpepper v. Reynolds Metals Co.*[3] when he stated the following:

> **Racial discrimination in employment is one of the most deplorable forms of discrimination known to our society, for it deals not with just an individual's sharing in the "outer benefits" of being an American citizen, but rather the ability to provide decently for one's family in a job or profession for which he qualifies and chooses. Title VII of the 1964 Civil Rights Act provides us with a clear mandate from Congress that no longer will the United States tolerate this form of discrimination. It is, therefore, the duty of the courts to make sure that the Act works, and the intent of Congress is not hampered by a combination of a strict con-**

WILLIAM B. GOULD

Mr. Gould has been a professor of law in Wayne State University Law School since August 1968. A labor arbitrator, he is a member of the National Academy of Arbitrators. He received his LL.B. degree from Cornell Law School in 1961, then was assistant general counsel for the United Automobile Workers, AFL-CIO in Detroit for a year. Mr. Gould later was an attorney with the National Labor Relations Board in Washington, D.C. for two years, and practiced law in New York City for three years.

State Bar Retrieval Card Code for this article (based on West Key Number © system):
Major Heading: Civil Rights (Punch 081)
Key Numbers (final digits have been omitted):
Punch 000
42 U.S.C. Sec. 2000e (Punch 2-42-200)
Year: 1970
Type: Other

Synopsis

1. 33 TBJ 871 (Nov. '70). Article by William B. Gould of Detroit, Mich., on Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq.

2. Discusses the recent appellate court decisions construing Title VII.

struction of the statute and the battle with semantics.[2 4]

A. *Jones v. Mayer and Jurisdictional Prerequisites*

The question of whether a charge with the Commission is a valid prerequisite to suing in the courts against racial discrimination has been made more significant by the Supreme Court's decision in *Jones v. Mayer*.[5] Even before *Jones*, both a statement made by Senator Humphrey during the legislative debate[6] to the effect that the individual could bypass EEOC, as well as increased frustration with inordinate delay and lack of success through conciliation, had highlighted the question of whether the Commission's involvement could be cut out altogether.

Jones, it is to be recalled, held that the Civil Rights Act of 1866 prohibited racial discrimination in housing—even though Congress, a few months earlier, had passed the Civil Rights Act of 1968 which was aimed at the same evils but much more limited in its coverage.[7] Since another portion of the Civil Rights Act of 1866, § 1981, prohibits racial discrimination where one attempts to "make and enforce contracts," the question arose as to whether the Civil Rights Act of 1866 prohibited racial discrimination in employment as well as housing. Specific references to the Southern practice of refusing to pay Negro laborers which were made in the Congressional debate—some of these passages contained in Mr. Justice Harlan's dissenting opinion in *Jones*[8]—made an affirmative answer the more likely one. But what of Title VII and its elaborate procedure prior to the filing of a lawsuit? Could it be said that the 1964 statute had impliedly repealed that passed by Congress in 1866?

For the most part, the federal district courts which were confronted with the problem held that *Jones* provided a jurisdictional base to attack racial discrimination independent of Title VII.[9] And, sadly enough, for the most part, very little discussion was given to the manifold problems that flow from such a conclusion. Most recently, the Seventh Circuit has ruled on this matter in *Waters v. Wisconsin Steel Works*[10] where Judge Swygert, speaking for the court, has answered this problem in a reasonably satisfactory manner.

In *Waters*, the court held that *Jones* provided federal jurisdiction to sue against racial discrimination even prior to Title VII and that Congress, by passing Title VII, did not repeal this right to sue. But the court added this proviso:

> **. . . in order to avoid irreconcilable conflict between the provision of § 1981 and Title VII, a plaintiff must exhaust his administrative remedies before EEOC unless he provides a reasonable excuse for his failure to do so.[11]**

The Seventh Circuit's reasoning was predicated upon its belief that had Congress been aware of the existence of a cause of action that under § 1981 of the Civil Rights Act of 1866 when it passed the 1964 statute, the absolute right to sue under that provision would have been modified in light of Congress's expressed preference for conciliation and an elaborate statutory scheme. Said the court:

> **By establishing the EEOC Congress provided an inexpensive and uncomplicated remedy for aggrieved parties, most of whom were poor and unsophisticated. Conciliation also was designed to allow a respondent to rectify or explain his action without the public condemnation resulting from a more formal proceeding. Furthermore, the absence of direct government coercion was thought to lessen the antagonism between parties and to encourage reasonable settlement. The need for voluntary compliance was stressed since more coercive remedies were likely to enflame respondents and encourage them to employ subtle forms of discrimination.[18 12]**

Of course, the alleged hopes and aspirations of the authors of Title VII have not been borne out in this regard inasmuch as the unions and employers, for the most part, have decided to litigate rather than to implement the statutory dictates. But *Waters* does seem to represent an effec-

(Continued on next page)

(Continued from Page 873)

tive accommodation between the principles of the respective statutes. Despite the threat of a filibuster and emergence of the Dirksen-Mansfield amendments in response thereto, I would think it highly questionable that Congress would have repealed the Civil Rights Act of 1866 in the midst of the racial turmoil that existed in this country even at that time. And the significance of the preservation of § 1981 and the applicability of *Jones* to the employment area cannot be understated. For the coverage of § 1981, unlike Title VII, is not limited to enterprises or unions with 25 or more employees. The statute of limitations presumably is to be determined with resort to state law rather than the ninety-day period which is mentioned in Title VII.[13] And some of the problems concerning past discrimination embodied into the present system which I shall mention in a few minutes may be overcome since *Jones* establishes the fact that racial discrimination in employment has been unlawful for more than 100 years in this country.

B. *Arbitration and Title VII*

But if *Jones* provides potential litigants with a tempting and attractive alternate forum to Title VII, the same cannot be said of the arbitration system—at least as of this date. Federal labor law encourages the voluntary and private resolution of industrial disputes through grievance and arbitration machinery. But the arbitration system which has evolved in this country has not yet been adapted sufficiently to deal with racial discrimination grievances. Without belaboring this problem which I have dealt with rather thoroughly elsewhere,[14] some of arbitration's deficiencies are: (1) the difficulty of obtaining an objective evaluation of the dispute if the arbitrator is chosen by the parties or party who is alleged to have discriminated; (2) the absence of black workers as well as black managers from positions of responsibility in labor and management; (3) the fact that the collective bargaining agreement—while sometimes containing a generalized anti-discrimination clause—often does not support the grievance which attacks discrimination; (4) the fact that most arbitrators regard themselves as limited to the contract and not law—and indeed a substantial number of them are unequipped to survey the latter.

Yet, assuming that reform can be built into the arbitration process, utilization of private voluntary procedures is terribly important. This is especially so while the avenues of relief from the Equal Employment Opportunity Commission remain relatively clogged. But what is the effect of proceeding to arbitration for the minority group grievant? The first and most obvious difficulty is the question of the statute of limitations. Is the statute of limitations tolled while the grievant resorts to arbitration machinery? The Fifth Circuit in *Culpepper* has answered this question affirmatively and I believe correctly. To hold contrariwise would discourage the use of the private process since it could not be assumed to come to a conclusion within the ninety-day period.

But a more difficult problem is bound up in consideration of the legal doctrine known as "election of remedies." In *Edwards v. North American Rockwell Corp.*[15] the court was confronted with a claim for loss of straight-time for twenty-seven hours as a result of a suspension. Before the suit, settlement was made and the plaintiff cashed a check for the amount authorized by the parties. The court stated that since "the plaintiff has pursued a contractual remedy to its conclusion, [and] has accepted a settlement reached in that proceeding, . . . [she] must be considered to have made a binding election."[16] The court in *Washington v. General Corp.*[17], however, applied an election of remedies doctrine which in effect held that "at some point a choice must be made" between arbitration and Title VII so as to avoid multiple actions based upon the same claim and to promote the expeditious resolution of disputes.

The circuit courts are now speaking on this subject. In *Dewey v. Reynolds Metal Co.*[18] a divided court held that a grievance based upon an alleged religious discrimination case where the arbitrator was chosen by the union and employer was one in which the judgment by the arbitrator was properly "final." A contrary result, said the Sixth Circuit, would "sound the death knell to arbitration of labor disputes" inasmuch as the parties would not be inclined to use arbitration

where the grievants could get a "second bite of the apple."

Said Judge Combs in dissent, "the doctrine of election of remedies does not apply."[19] The dissenting opinion's source of authority was the Seventh Circuit's decision in *Bowe v. Colgate-Palmolive Co.*[20] In that case the Seventh Circuit held that the relationship between Title VII and arbitration is similar to that involved in the National Labor Relations Act. Said the court: "The analogy to labor disputes involving concurrent jurisdiction of the NLRB and the arbitration process is not merely compelling, we hold it conclusive."[21] Thus the court in *Bowe* noted that the arbitrator might consider himself bound to apply contract and not remedies which were available under a public law. As a matter of fact, the arbitrator in *Dewey* had such a belief and expressed himself to that effect.

The court in *Bowe* noted that arbitrators might well provide relief which, because of statutory technicalities, might not be available under public law. But, in light of the "public interest" involved in civil rights cases the court held that it possessed a "special responsibility" to determine the facts. At the same time, the court sensibly qualified its position to the extent that it would ". . . preclude duplicate relief which would result in an unjust enrichment or windfall to the plaintiff."[22]

In *Hutchings v. U.S. Industries*[23] the Fifth Circuit has come to much the same kind of conclusion. The district court had granted the company's motion for summary judgment on the ground that a charge of discrimination with the EEOC had not been filed within the ninety-day statute of limitations and because the plaintiff had made a "binding election of remedies by pursuing to final determination the processing of his grievances through the grievance-arbitration machinery. . . ." *Culpepper*, however, easily disposed of the first basis for summary judgment inasmuch as the Fifth Circuit had previously held that Title VII's statute of limitations was tolled while private remedies were pursued. And the reasoning of that decision was applicable to the question of election of remedies as well. Said the court:

> **In the arbitration proceeding, the arbitrator's**

(Continued on next page)

(Continued from Page 875)

> role is to determine the contract rights of the employees, and distinct from the rights afforded them by an act of legislation such as Title VII. The arbitration process is a private one essentially tailored to needs of contracting parties, who have agreed upon this method for the final method of disputes under their contract. . . .
>
> In view of the dissimalarities between the contract grievance-arbitration process and the judicial process under Title VII, it would be fallacious to assume that an employee utilizing the grievance-arbitration machinery under the contract and also the seeking a Title VII remedy in court is attempting to enforce a single right in two forums. . . .[24]

The Fifth Circuit therefore properly concluded that the federal courts, and not the arbitrator or EEOC, are the final authorities in questions of whether Title VII has been violated. Said the court:

> If the doctrine of election of remedies is applicable at all to Title VII cases, it applies only to the extent that the plaintiff is not entiled to duplicate relief in the private and public forums which result in an unjust enrichment and windfall to him. Bowe v. Colgate Palmolive Co. [citation omitted].[25]

I believe that *Bowe* and *Hutchings* represent the better approach taken to these questions. This is not to say that the courts ought to ignore arbitral awards. One the contrary, it seems to me that the awards ought to be introduced admissible into evidence, although not necessarily persuasive, let alone binding. If the parties wish to have the courts place greater reliance upon arbitration awards, I believe that their responsibility is to reform the process so that the minority group worker has a great stake in it. In part, this would necessitate third party intervention by the minority group worker with his counsel in the proceeding as well as participation in the selection of the impartial third party. It cannot be gainsaid that there are problems bound up with this kind of approach and that it represents a departure from much of of the conventional wisdom in industrial relations as well as the Fifth Circuit's opinion in *Acuff v. United Paperworkers,*[26] i.e., that the duty of fair representation is not offended where the third party is not notified of the arbitration or permitted to intervene in it.

C. *The Past Discrimination Problem*

One of the thorny issues in the substantive law area is the question of the extent to which the remnants of past discrimination as they are embodied into the present employment system can be lawfully retained therein. Although the framers of the statute were generally of the view that Title VII was to be prospective rather than retroactive, they had little notion of the specifics. This is particularly so with regard to the seniority question which involves the extent to which white workers who have accumulated seniority credits in segregated portions of an establishment, may use those credits for competitive status purposes against minority workers who have been discriminated against in transfer or hiring —and who were not permitted to accumulate the credits for the purpose of promotion and transfer. Does Title VII require a remedy which awards the discriminatee credits accumulated in these segregated districts which he would have obtained in the white district but for the discrimination practiced against him?

In *Whitfield v. United Steelworkers,*[27] a duty of fair representation case which preceded the enactment of Title VII, the Fifth Circuit upheld a plan which purported to eliminate segregated lines of progression in a steel mill. Negro workers were required to take the bottom job in the white line as they moved over as well as a new test which had not been given to white encumbents. But the court said that neither the qualification test nor the bottom job entry requirement violated the law. This is a "product of the past" said Judge Wisdom and the court left the seniority arrangement undisturbed.

But Title VII has already begun to erode the foundations of *Whitfield.* In

Quarles v. Philip Morris, Inc.[28] the court said that, for Title VII purposes, a seniority system could not be *bona fide* which had its "genesies" in past discrimination even though that discrimination was prior to the effective date of the statute. Said the court in *Quarles:* "Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the Act."[29]

Last summer the Fifth Circuit followed much the same line in *Local 181 United Papermakers v. United States*[30] where Judge Wisdom, speaking for a unanimous court, agreed with the *Quarles* conclusion about past discrimination. Said Judge Wisdom:

> **The translation of racial status to job seniority status cannot obscure the hard, cold fact that Negroes at Crown's mills will lose promotions which, but for their race, they would surely have won. Every time a Negro worker hired under the old segregated system bids against a white worker in a job slot, the old racial classification reasserts itself, and the Negro suffers anew for his employer's previous bias.**[31]

Accordingly, the court held that a "rightful place" theory which would not bump incumbent white workers out of their present positions but which would award future job vacancies to Negroes with greater employment seniority was the approach to the problem which "accords with the purpose and history of the legislation."[32] Where Judge Wisdom's opinion seems anxious to preserve his prior effort in *Whitfield* (inasmuch as he distinguishes that case as one involving business necessity and, more accurately, one which did not involve promotion from job to job once the discriminatory transfer had been abolished) Judge Tuttle's opinion in *United States v. Hayes International Corporation*[33] takes on *Whitfield* more directly for Title VII purposes and states squarely that the decision is "not controlling" in this area as well as "inconsistent with the words of the statute,

(Continued on next page)

(Continued from Page 877)

its purposes and thrust of recent cases in the circuit."[34]

It should be noted that in *Local 189* the court stated that "when an employer and the union have discriminated in the past and when its present policy is to renew or exaggerate discriminatory effects, these policies must yield, unless *there is an overriding legitimate non-racial business purpose.*"[35]

Some of the cases arising under the National Labor Relations Act, of course, have held that even where there is a valid business purpose behind an employer's policy, it must nevertheless be regarded as unlawful if it is at the same time discriminatory.[36] Exactly what Judge Wisdom's "overriding legitimate, non-racial business purpose" will mean in the future is unclear at this time. The relitigation of *Whitfield* itself under Title VII is now pending before the Fifth Circuit.[37] It is possible that in such a case, or in other cases arising in either industrial union or craft union seniority schemes, the courts will be confronted with minority group workers who have been precluded from opportunities and who do not possess immediately marketable skills, but nevertheless possess qualifications in the sense of capacity to learn. Presumably, more than a longer trial period will be required for such workers as a remedy. Some kind of training may be necessitated.

Whether the steel industry or other industrial union cases will present these kinds of problems is unknown at the present. However, it is quite possible that this sort of issue will arise where suits are brought against craft union seniority on behalf of minority workers who have had some kind of "related work experience" in the industry or in perhaps a related industry. It is conceivable that, for instance, black or Spanish speaking workers who have been mechanics in shipyards may be able to move to better paying jobs in the crafts—but perhaps only with some kind of remedial program in the interim. Does Title VII impose a remedy for such an excluded worker once discrimination has been found and where the defendant craft union has a discriminatory reputation in the minority community? Or is the fact that he is "unqualified" in the *Local 189* sense of the word, i.e., lacking presently existing skills, preclude such a remedy and result in the much feared "preferential treatment" which is prohibited by the statute.

In this connection, it is perhaps useful to examine the craft union cases. Here, the circuit courts seem to be getting into the habit of reversing their brethren at the district court level. In *United States v. Sheet Metal Workers International Association*,[38] the court held that the Civil Rights Act "permits the use of evidence of statistical probability to infer the existence of a pattern or practice of discrimination."[39] The court noted that neither local involved in that proceeding had admitted any Negro members until subsequent to the effectiveness of the statute, and that even then membership was deterred since ". . . a qualified Negro electrician, who had been employed in the trade for five years doing work similar to that of white electricians would, under Local 1's referral plan, be placed in the lowest priority group."[40] Moreover, even though the locals were not shown to have refused membership or work referrals to Negroes subsequent to the effective date of the statute, the court based discrimination upon the absence of black members, the building trade policy of organizing only white contractors with white employees, as well as their refusal to work with non-unionists who happened in many instances to be black.

The court attempted to remedy past discrimination by slotting Negroes into the preferred groups of the referral system who had the "requisite union experience in the construction industry" as well as those with "reasonably comparable experience" into the lower groups. Moreover, the Eighth Circuit panel—of which Mr. Justice Blackmun was a member—ordered an objective journeymen examination which would permit review by another party as well as a procedure for handling applications under the court's supervision. And finally, the court decreed that a public information program was to be instituted with regard to membership, referral, and apprenticeship opportunities.[41]

On June 19 of this year—the same day as the Fifth Circuit's *Hutchings* decision —the Sixth Circuit relied upon *Sheet*

(Continued on Page 881)

Legal Forms for Sale

The forms prepared by the Legal Forms Committee of the State Bar of Texas are sold for use by lawyers only and may be purchased from the State Bar or organized Bar Associations only on the representation that they will not be resold.

No. of Copies		Unit Price	Price Per 50 Copies
_____	Earnest Money Contract	10¢	$4.00
_____	Warranty Deed - Short Form	10¢	4.00
_____	Warranty Deed - Long Form	20¢	7.50
_____	Warranty Deed with Vendor's Lien	20¢	7.50
_____	Real Estate Lien Note	10¢	4.00
_____	Deed of Trust	20¢	7.50
_____	Deed of Trust to Secure Assumption	20¢	7.50
_____	Builder's & Mechanic's Lien Contract	20¢	7.50
_____	Builder's & Mechanic's Lien Note	10¢	4.00
_____	Builder's & Mechanic's Lien Contract (With Power of Sale)	20¢	7.50
_____	Builder's & Mechanic's Lien (With Power of Sale) Note	10¢	4.00
_____	Transfer of Lien	10¢	4.00
_____	Release of Lien	10¢	4.00
_____	Partial Release of Lien	10¢	4.00
_____	Extension of Real Estate Note & Lien	10¢	4.00
_____	Collateral Transfer of Note (Security Agreement)	20¢	7.50
_____	Promissory Note (Unsecured)	10¢	4.00
_____	Bill of Sale	10¢	4.00
_____	Security Agreement (Consumer Goods, Equipment & Farm Products)	20¢	7.50
_____	Note (Secured by Security Agreement)	10¢	4.00
_____	Financing Statement (UCC-1)*	5¢	2.50
_____	Financing Statement Change (UCC-3)*	5¢	2.50
_____	Request for Information or Copies (UCC-11)*	5¢	2.50

*No Discounts on UCC Forms

TOTAL GROSS PRICE $_____
ADD 4¼% SALES TAX _____
ADD POSTAGE & HANDLING 1.00
NET AMOUNT DUE - enclose $_____
check for net amount payable to STATE BAR OF TEXAS

Legal Forms Dept.
State Bar of Texas
Box 12487, Capitol Station
Austin, Texas 78711

Enclosed is my check for $_____. Please send me the Legal Forms I have checked above.

Please print clearly; this is your mailing label.

Name _____

Address _____

City _____ Zip _____

(Continued from Page 878)

Metal Workers to reach a similar conclusion in *United States v. IBEW, Local No. 38.*[42] In *Local No. 38 IBEW,* discrimination had ceased two years *after* the effective date of Title VII and thus the case presented less difficulties in arriving at a finding of discrimination than in *Sheet Metal Workers.* Thus, Judge Edwards, speaking for a unanimous bench, stressed the fact that a court order would assist the union's new leadership with whom the district court had been impressed—in implementing compliance, and specifically upheld the Attorney General's contention that past discrimination in craft entry and referral was perpetuated in the present system and that relief was necessary to cure such discrimination as carried over. Thus, the Sixth Circuit vacated and remanded to the lower court for further proceedings consistent with the opinion. Moreover, said Judge Edwards about the anti-preferential treatment provision of Title VII:

> **We believe this section prohibits interpreting the statute to require "preferential treatment" solely because of an imbalance in racial employment existing at the effective date of the Act. But we also believe that its prohibition must be read in conjunction with the fundamental purposes of the statute . . . and in conjunction with the section providing for affirmative relief. . . .**[43]

In one important respect, both *Sheet Metal Workers* as well as *IBEW Workers Local No. 38,* to a lesser extent, break new ground beyond the industrial union seniority decisions in *Quarles, Local 189,* and *Hayes International.* The distinction between the craft union and industrial union cases is squarely faced and dealt with in the Eighth Circuit in *Sheet Metal Workers:*

> **We recognize that each of the cases cited [mostly industrial union seniority cases] to support our position can be distinguished on the ground that in each case, a number of known members of the minority group have been discriminated against after the passage of the Civil Rights Act. Here, we do not have such evidence, but we do not believe that it is necessary. The record does show that qualified Negro tradesmen have been and continue to be residents of the area. It further shows that they were acutely aware of the Local's policies toward minority groups. It is also clear that they knew that even if they were permitted to use the referral system and become members of the union, they would have to work for at least a year before they could move into a priority group which would assure them reasonably full employment. In light of this knowledge, it is unreasonable to expect that any Negro tradesman working for a Negro contractor or a nonconstruction white employer would seek to use the referral systems or to join either Local.**[44]

But if integration into better paying jobs is an effective remedy for the minority group worker, it is not at all clear that the same holds true with regard to the elimination of segregated locals. It is unlawful under Title VII to segregate on the basis of race in unions and thus, segregated locals and lily white locals have been mandated out of existence. Here again, however, it is the *basis* for merger rather than the merger itself which is critical. Hopefully, *Hicks v. Crown Zellerbach Corp.*[45] will smooth the way toward an equitable solution of this problem.

In *Hicks,* the court attempted to insure Negro participation and leadership of the merged local by ordering a two-year transition plan. The court held that within one month prior to the merger of the locals, the previously all-black local was to select from its membership a general Vice-president, a Trustee, plus ten other persons who were to serve as stewards in the Executive Board for a period of two years. The court ordered that the general vice-president and trustee be invited to attend and participate in any meeting of the full Executive Board, and that both officers participate on the negotiating committee, and that should any of the black offices become vacant during the transition period, they were to be chosen by a "separate caucus of former members of Local 624."

I have two observations to make about *Hicks.* The first is that *Hicks* represents a willingness by the judiciary to take into account racial considerations, where necessary, as the Supreme Court has done in other fields of civil rights activities—so as to effectuate a decree which assures compliance with civil rights mandates.[46] Secondly, the fact that black trade unionists fear deprivation of both offices and assets—and thus a worsening of their power position in the industrial community—is simply a reflection of the widely felt frustration with the slow pace of

(Continued on next page)

(Continued from Page 881)

integration in all sectors of American life. All of this, of course, can only fan the flames of black separatist rhetoric and, I believe, produce a situation which is disadvantageous to all races and ethnic groups in this country. I would suggest, therefore, that the quest for racial peace in our nation cannot be divorced from the willingness of the judiciary to move in step with Judge Tuttle's view of Title VII as expressed in *Culpepper. Local 189* and *Quarles* are rather elemental beginnings in this regard. Much more is needed if the courts are to make Title VII work.

In the industrial union seniority context, this may mean in some situations a bit more of a remedy for the "qualified" discriminatee than a generous trial period during which he acquires the skills for job opportunities. The scope of relief, of course, depends upon the breadth that can be read into the "affirmative action" remedial provisions in Title VII. I have argued that the "affirmative action" provisions are compatible with and perhaps require a training remedy in certain industrial union discrimination cases. Thus, I have been critical of the effort by Judge Butzner in *Quarles* to preserve *Whitfield,* pleased with Judge Tuttle's comment in *Hayes* that *Whitfield* has no applicability to Title VII cases, and am a bit confused —but cautiously optimistic—about Judge Wisdom's use of "overriding business purpose" as a defense to discrimination. I would hope and assume that the court will not find that private parties have an overriding business purpose in failing to institute some kind of training remedy more generous than the liberalized trial period.

In the craft union context, it is possible that some of the discriminatees—particularly those who are contemplated in the Eighth Circuit's *Sheet Metal Workers* opinion as having done "related work" may need some remedial relief to be made whole and to take advantage of future job opportunities. I would think that the same conclusions that I have drawn about the industrial union cases would be applicable here—with the proviso that the further one dips down closer to the hard core unemployed with virtually no related experience, the expansiveness and difficulties involved in relief increase accordingly—and so does a court's ability to find discrimination as to the particular group. The courts must establish some kind of cut-off point. While a burdensome remedy may impel unions and employers to take a greater interest in minority education, they obviously cannot assume total responsibility for educational deficiencies in our society.

One other facet of this problem is the Nixon Administration's "Philadelphia Plan" and the litigation that it has spawned. In *Contractor's Association v. Shultz,*[47] a federal district court has approved the imposition of "goals" upon contractors who do business with the government under the Executive Order and has held that such a plan does not offend the anti-quota or "preferential treatment" provisions of Title VII. This holding, it seems to me, makes good sense not only because Congress, when passing Title VII, contemplated the existence of other routes for relief against discrimination, but, moreover because relief must necessarily be racially conscious.

One other aspect of this problem is this: even assuming that the percentage of black apprentices and journeymen increases substantially during the next few years—and to date despite Project Outreach and other voluntary efforts, the progress has been extremely miniscule—such programs can be thwarted by the small size of apprenticeship and journeymen and classes which the union will admit. Theoretically, the National Labor Relations Act prohibits union control over the work place while tolerating some of the practices which make this control possible, i.e., the hiring or referral system.[48] The Fifth Circuit held, in *Local 53 v. Vogler*[49] that where discriminatory exclusion of minorities had been practiced in the past and where the size of the work force was artificially depressed, an appropriate remedy was an increase in the number of skilled workers going through the union referral system.

The reason is obvious: an artificial scarcity of labor can make it exceedingly difficult to ease any kind of racial imbalance within the foreseeable future. Of course, the economic purpose of such procedures, like industrial union and craft union practices, is non-racially motivated. But the effect of such practices, coupled with past exclusions, is to make racial

equality a distant dream. Thus, despite the most valid of economic purposes for the size of the class, i.e., to drive up wages and keep down unemployment in times of economic scarcity, it will probably be necessary—and I believe compatible with the "affirmative action" provisions of Title VII—to involve the judiciary in what has previously been the uncontested domain of craft unions, i.e., the number of skilled workers in the area.

These then are but some of the arenas into which the judiciary has ventured—and hopefully will venture—in the spirit of Judge Tuttle's admonition to see that Title VII works. Just as the Supreme Court has defined the "central meaning" of the First Amendment to be robust and wide open speech,[50] so also, I believe, the central meaning of Title VII is affirmative action which places minority group workers into better paying jobs at leadership positions previously denied.[51] But I say to you that it is the business of the lawyers as well as the judges to see to it that that statute works. *Title VII must work: that is the central meaning of civil rights legislation in employment.* Without the kind of commitment advocated by Judge Tuttle, all the slogans, flags, and parades tomorrow are complete and utter sham. For if this country and its Declaration of Independence and Civil War mean anything at all, they mean equality for all its people.

Surely Mr. Justice Potter Stewart had this in mind when he had the following to say about the Reconstruction period in *Jones v. Mayer:*

> **Negro citizens North and South, who saw in the Thirteenth Amendment a promise of freedom—freedom to "go and come at pleasure" and to "buy and sell when they please"—would be left with "a mere paper guarantee" if Congress were powerless to assure that a dollar in the hands of a Negro would purchase the same things as a dollar in the hands of a white man. At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.[52]**

Acting in a manner which redeems that promise, we do honor to this country this Independence Day, 1970.

---

1. 60 U.S. (19 How.) 393 (1857).
2. See, for instance, National Advisory Commission on Civil Disorders (1968); U.S. Commission on Civil Rights, Jobs and Civil Rights (prepared for the Commission by the Brookings Institute) (1969); Equal Employment Opportunity Report No. 1 (1969); on unions with hiring rolls and referral systems see most recently the nationwide figures for 1967 and 1968 on minority group participation in releases of Equal Employment Opportunity Commission on September 28, 1969 and May 19, 1970. See also M. Sovern, Legal Restraints on Racial Discrimination in Employment (1966).
3. 2 FEP Cases 377 (5th Cir. 1970).
4. Id. at 378.
5. 392 U.S. 409 (1968).
6. 110 Cong.Rec. 14188 (1964).
7. Civil Rights Act of 1968, § 804.
8. *Jones v. Mayer supra* at 462. The majority opinion contains similar references. The Court also stated that *Hodges v. United States* 203 U.S. 1 (1906), where it had been indicated that Congress lacked constitutional authority to deal with employment discrimination involved in that case, was overruled. Id. at 442, n. 78.
9. See *Dobbins v. Local 212, IBEW* 292 Supp. 413 (S.D.Ohio 1968); *Washington v. Baugh Construction Co.* 2 FEP Cases 271 (W.D.Wash. 1969).
10. 2 FEP Cases 574 (7th Cir. 1970). See also *Sanders v. Dobbs Houses, Inc.*, 2 FEP Cases 942 (5th Cir. 1970).
11. Id. at 582.
12. Id. at 581-2. Cf. *Fekete v. U. S. Steel Corp.* 2 FEP Cases 540 (3rd Cir. 1970) *Johnson v. Seaboard Air Line R. Co.* 405 F.2d 645 (4th Cir.

(Continued on next page)

CIVIL RIGHTS

(Continued from Page 883)

1968) cert. den. 394 U.S. 918 (1969); Dent. *St. Louis-San Francisco Railway Company* 406 F.2d 399 (5th Cir. 1969); *Miller v. International Paper Company* 408 F.2d 283 (5th Cir. 1969); *Jenkins v. United Gas Corp.* 400 F.2d 28 (5th Cir. 1968); *Oatis v. Crown Zellerbach Corp.* 398 F.2d 496 (5th Cir. 1968).

13. See generally Comment, Racial Discrimination in Employment Under the Civil Rights Act of 1866, 36 U. of Chi.L.Rev. 615 (1969).

14. See Gould, Labor Arbitration of Grievances Involving Racial Discrimination 118 U.Pa.L.Rev. 40 (1969). See also *Glover v. St. Louis-S.F.R.Co.* 393 U.S. 324 (1969); *Czosek v. O'Mara*, 38 U.S. L.W. 4151 (1970).

15. 291 F.Supp. 199 (C.D.Cal. 1968). But see *Rosenfeld v. Southern Pac. Co.* 293 F.Supp. 1219, 1225 (C.D.Cal. 1968).

16. Id. at 209.

17. 282 F.Supp. 517 (C.D.Cal. 1968).

18. 2 FEP Cases 687 (6th Cir. 1970).

19. Id. at 693.

20. 416 F.2d 711 (7th Cir. 1969).

21. Id. at 714.

22. Id at 715.

23. 2 FEP Cases 725 (5th Cir. 1970). Cf. *Newman v. Avco Corp.* 2 FEP Cases 517 (M.D.Tenn. 1970).

24. Id. at 732.

25. Id. at 733.

26. 404 F.2d 169 (5th Cir. 1968) cert. denied 294 U.S. 987 (1969).

27. 263 F.2d 546 (5th Cir.) cert. denied 360 U.S. 962 (1959).

28. 279 F.Supp. 505 (E.D.Va. 1968). See generally Gould, Seniority and the Black Worker: Reflections of Quarles and Its Implications, 47 Texas L.Rev. 1039 (1969); Cooper and Sobel, Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and to Promotions 82 Harv. L.Rev. 1598 (1969).

29. 279 F.Supp. at 516.

30. 416 F.2d 980 (5th Cir. 1969) cert. denied 397 U.S. 919 (1969).

31. Id. at 988.

32. Id.

33. 415 F.2d 1038 (5th Cir. 1969).

34. Id. at 1042, n. 6. For some of the more recent seniority decisions other than those discussed below, see *Irvin v. Mohawk Rubber Co.* 2 FEP Cases 349 (E.D.Ark. 1970); *Robinson v. P. Lorillard Co.* 2 FEP Cases 465 (M.D.N.C. 1970); *U.S. v. Bethlehem Steel Corp.* 2 FEP Cases 545 (W.D. N.Y. 1970); *U.S. v. Jacksonville Terminal Company* 2 FEP Cases 611 (M.D.Fla. 1970); *Williams v. American Saint Gobain Corp.* 2 FEP Cases 331 (E.D.Okla. 1969) Cf. *NLRB v. George E. Light Boat Storage, Inc.* 373 F.2d 763 (5th Cir. 1967). Compare *NLRB v. Houston Maritime Association, Inc.* 74 LRRM 2200 (5th Cir. 1970) with *Local Union, No. 269, IBEW v. NLRB* 357 F.2d 51 (3rd Cir. 1966).

35. *Local 189 United Papermakers v. United States supra* at 989.

36. *NLRB v. Erie Resistor Corp.* 373 U.S. 221 (1963).

37. *Taylor v. Armco Steel Corp.* 2 FEP Cases 820 (5th Cir. 1970). Of course, as a practical matter, this entire question is closely related to the extent to which employers may screen out job applicants through tests which are not necessarily related to work performance, but which may disproportionately exclude minority group workers. See *Griggs v. Duke Power Co.* 420 F.2d 1225 (4th Cir. 1970) (Sobeloff, J. dissenting).

38. 416 F.2d 123 (8th Cir. 1969) See generally Comment, Title VII of the Civil Rights Act of 1964 and Minority Group Entry Into the Building Trades 37 U. of Chi.L.Rev. 328 (1970).

39. Id. at 127, n. 7.

40. Id. 128, n. 8.

41. Id. at 138-139. See also in this regard *U. S. v. Plumbers & Pipefitters, Local 73*, 61 CCH Lab Cos. § 9329 (S.D.Ind. 1969).

42. 2 FEP Cases 716 (6th Cir. 1970).

43. Id. at 719.

44. *U.S. v. Sheet Metal Workers International Association supra* at 132. See also *Gaston County v. U. S.* 395 U. S. 285 (1969).

45. 2 FEP Cases 433 (E.D.La. 1970) Cf. *Chicago Federation of Musicians, Local 10 v. American Federation of Musicians* 57 LRRM 2227 (N.D. Ill. 1964). See also *Allen v. State Board of Elections* 393 U.S. 544 (1969).

46. See e.g., *U. S. v. Montgomery Board of Education* 395 U. S. 225 (1969).

47. 2 FEP Cases 472 (E.D.Penna., 1970).

48. See, e.g., *Local 357, Teamsters v. NLRB* 365 U.S. 667 (1961).

49. 407 F.2d 1047 (5th Cir. 1969). See also 2 FEP Cases 491 (E.D.La. 1970).

50. *New York Times v. Sullivan* 376 U.S. 254 (1964).

51. Cf. Gould, Black Power in the Unions: The Impact Upon Collective Bargaining Relationships 79 Yale L.J. 46 (1969).

52. *Jones v. Mayer supra* at 443. ■

The American Bar Association has again expressed opposition to a proposed reorganization plan that would decentralize control of the legal services program of the Office of Economic Opportunity. President Edward L. Wright said the proposed decentralization would be a "regression" which "would be unwise, unwarranted and unacceptable to the legal profession."