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Concurrence of Remedies for Labor Union Discrimination

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CONCURRENCE OF REMEDIES FOR LABOR UNION DISCRIMINATION

Employment discrimination by labor unions affects two groups in the labor force—applicants for unionized employment and employees represented by union bargaining agents. Applicants for employment may be victims of discrimination when a union operates a hiring hall that refuses to refer certain minority workers, or has a membership policy based on nepotism or majority approval. Discrimination against its own members may occur when a union refuses to process grievances of certain categories of employees, or when a union, bargaining for a labor contract with an employer, agrees to unequal classifications of employees concerning seniority, wages or conditions of employment. To combat these discriminations, three separate federal assurances of equal employment apply to labor organizations: Title VII of the Civil Rights Act of 1964,[1] the National Labor Relations Act,[2] and section 1981 of Title 42 of the United States Code.[3] This paper deals with the first two remedies and the problem of their concurrent application.[4]

Coverage Under Title VII

Title VII protects from discriminatory acts by labor organizations both union members[5] and applicants for membership.[6] Title VII expressly prohibits union activity which excludes or expels an individual from its membership,[7] limits, segregates, classifies, or refuses

1. 42 U.S.C. § 2000e, *as amended,* (Supp. II 1972).

2. 29 U.S.C. §§ 151-68 (1970).

3. 42 U.S.C. § 1981 (1970).

4. Section 1981 prohibits private racial discrimination in employment by companies and unions. Waters v. Wisconsin Steel Wks. of Int'l. Harv. Co., 427 F.2d 476 (7th Cir. 1970). The equal employment provisions of Title VII do not supersede the provisions of section 1981. Sanders v. Dobbs House, Inc., 431 F.2d 1097 (5th Cir. 1970). Section 1981 is not discussed in this comment since the discussion of section 1983 in this *Symposium*, 34 LA. L. REV. 540 (1974) is generally applicable to it. *See* Boudreaux v. Baton Rouge Mar. Cont. Co., 437 F.2d 1011 (5th Cir. 1971).

5. 42 U.S.C. 2000e 2(c)(1) (Supp. II 1972). International Union, which had chartered two segregated local unions, violated the Act by classifying its members as to race. United States v. International Longshoremen's Ass'n., 460 F.2d 497 (4th Cir.), *cert. denied,* 409 U.S. 1007 (1972).

6. *Id.* § 2000e 2(c)(2) (Supp. II 1972). The original text of the Act made no mention of applicants being covered. However, subsequent case law included protection for applicants. *See* Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971); United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969); Asbestos Workers Local 53 v. Volger, 407 F.2d 1047 (5th Cir. 1969). Later the 1972 amendments specifically extended coverage to applicants.

7. 42 U.S.C. § 2000e 2(c) (1).

to refer any member or applicant for membership in any way which would deprive or tend to deprive the individual of employment opportunities because of the individual's race, color, religion, sex or national origin.[8]

All labor organizations[9] engaged in an industry affecting commerce[10] are covered by Title VII. For purposes of the Act, a union is a labor organization if it is a representation committee in which employees participate for the purpose of dealing with employers concerning grievances, labor disputes, wages, hours and the terms and conditions of employment;[11] or if it is an employee representation committee subordinate to a national or international labor organization.[12] A labor organization is deemed to be engaged in an industry affecting commerce if it operates a hiring hall,[13] or has more than fifteen members and is certified[14] as the representative of employees under the provisions of the National Labor Relations Act. If not certified, a labor organization with fifteen or more members is covered if it is recognized by an employer in interstate commerce as the employee representative.[15] A local organization with fifteen or more members falls within the Act, although not recognized by the employer or certified, if it has some formal relationship with a national or international labor organization covered by Title VII.[16]

Rights and remedies against discriminating unions and employers are administered by the Equal Employment Opportunity Commission (EEOC).[17] Under the Act, a complainant must file his Title

8. *Id.* § 2000e 2(c)(2).

9. *Id.* § 2000e (d).

10. *Id.* § 2000e (e), (h): "The term 'industry affecting commerce' means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry 'affecting commerce' within the meaning of the Labor-Management Reporting and Disclosure Act of 1959." *See* 29 U.S.C. §§ 401-531 (1970).

11. *Id.* § 2000e (d) (1970).

12. *Id.*

13. *Id.* § 2000e (e)(1).

14. *Id.* § 2000e (e)(2)(B)(1). Certification is a process whereby the National Labor Relations Board or the National Mediation Board designates a labor organization as the exclusive bargaining agent for the workers in a particular craft. *See* NLRA, 29 U.S.C. § 159(c) (1970); Railway Labor Act, 45 U.S.C. § 152 Ninth (1970).

15. 42 U.S.C. § 2000e (e)(2)(B)(2) (Supp. II 1972).

16. *Id.* § 2000e (e)(2)(B)(3), (4), (5). The EEOC has decided that a union is covered under this section if it has only ten local members and it is controlled to a significant extent by an international union. EEOC Decision No. 7-3-336U, June 18, 1969; 1 F.E.P. Cases 909 (1969). *See also* EEOC Decision No. 7157, July 17, 1970; 3 F.E.P. Cases 94 (1972).

17. 42 U.S.C. § 2000e-4(a)—(i) (1970).

VII claim through the EEOC,[18] which is authorized to investigate charges of discrimination[19] and attempt to resolve the dispute through informal methods of conference, conciliation and persuasion.[20] The 1972 amendments to Title VII extended to the EEOC power to sue on behalf of the complainant if conciliation breaks down or provides a result unsatisfactory to the Commission.[21]

Procedures for exercising rights under Title VII are complicated and time consuming for the complainant. Claims must be filed through the EEOC within 180 days of the alleged violation.[22] But if a state or local fair employment agency exists, has enforcement powers, and can provide adequate civil remedies, the EEOC must defer to that agency.[23] If the state or local agency drops the claim, or fails to provide the complainant with relief, he must file a charge with the EEOC within 30 days.[24] The EEOC must then notify respondent of the charge within ten days. The EEOC then makes an investigation, a determination to prosecute the charge, and a finding of reasonable cause as promptly as possible and if practical within 120 days. If these are found in favor of the complainant, conciliation efforts are made by the EEOC. If conciliation fails after 30 days, the EEOC has enforcement powers to sue in federal district court on behalf of the complainant. If the EEOC makes findings against the complainant and drops the matter, the individual may file a private suit in district

18. Claimants must go through EEOC procedures before filing a private suit. Stebbins v. Nationwide Mut. Ins. Co., 382 F.2d 267 (4th Cir.), *cert. denied*, 390 U.S. 910 (1967); Mickel v. South Carolina State Emp. Serv., 377 F.2d 239 (4th Cir. 1967).

19. 42 U.S.C. § 2000e-5(b) (Supp. II 1972).

20. *Id.* The policy of informal conciliation is one of the strongest in the Act. *See* Dent v. St. Louis-San Fran. R.R. Co., 406 F.2d 399 (5th Cir. 1969); Johnson v. Seaboard Air Line R.R. Co., 405 F.2d 645 (4th Cir.), *cert. denied sub nom.*, Observer Trans. Co. v. Lee, 394 U.S. 918 (1968).

21. 42 U.S.C. 2000e (5)(f)(1) (Supp. II 1972). Before the 1972 amendments granting enforcement powers to the EEOC, there was a procedure whereby the government could sue on behalf of the complainant. The Attorney General of the United States could bring a civil action whenever he had reasonable cause to believe that an employer or union was engaged in a "pattern or practice" of resistance to equal employment rights. 42 U.S.C. 2000e-6(a) (1970). The new amendment provided that on March 24, 1972, the duties of the Attorney General regarding "pattern or practice" cases were to be transferred to the EEOC. 42 U.S.C. 2000e-6(c), (d), (e) (Supp. II 1972).

22. *Id.* § 2000e-5e (1970).

23. Grosslin v. Mountain States Tel. & Tel. Co., 400 U.S. 1004 (1971). The state or local fair employment agency must provide a meaningful and suitable remedy to the complainant.

24. Jefferson v. Peerless Pumps Hydro., 456 F.2d 1359 (9th Cir. 1972). A single filing is allowed where EEOC receives the claim and forwards it without delay to a state agency. The EEOC is not considered to have usurped state or local agency jurisdictions.

court within 30 days after he receives a right to sue notice. EEOC's deadline for filing a suit after unsuccessful conciliation efforts is 180 days; if EEOC fails to timely commence suit, the individual may do so but only within ninety days.[25]

The courts have attempted to relax some procedural standards in favor of the complainant. A complainant may sue after filing a claim if EEOC unduly delays in processing the claim,[26] or even if EEOC makes its initial findings against the complainant.[27] The Fifth Circuit Court of Appeals has held that an EEOC failure to timely notify the respondent of the charge cannot be prejudicial to the plaintiff[28] and further that EEOC's failure to commence conciliation proceedings could not bar plaintiff's institution of a civil suit against his collective bargaining agent.[29]

Protections Under the National Labor Relations Act

Unions which act as exclusive bargaining agents are required to represent employees fairly and without invidious discrimination. This duty of fair representation was enunciated by the United States Supreme Court in *Steele v. Louisville & Nashville Railway Co.*,[30] where a labor union was acting as the exclusive representative of all employees, but bargained with the employer to systematically exclude blacks from promotion and eventually from employment in the company. The Supreme Court reasoned that since the union was acting under authority of the Railway Labor Act as the exclusive bargaining representative of all employees in the craft regardless of their union or non-union status, it could not treat employees unequally. The duty of fair representation was also extended to the National Labor Relations Act (NLRA),[31] which prohibits unfair labor practices[32] through the activities of the National Labor Relations

25. 42 U.S.C. 2000e-5(b), (c), (d), (e), (f) (Supp. II 1972).

26. Quarles v. Phillip Morris, Inc., 271 F. Supp. 842 (E.D. Va. 1967). Plaintiffs' right to bring suit cannot be prejudiced because EEOC caseload and lack of trained employees makes it unable to timely meet procedural requirements.

27. Feteke v. U.S. Steel Corp., 424 F.2d 331 (3d Cir. 1970); Beverly v. Lone Star Lead Const. Co., 437 F.2d 1136 (5th Cir. 1971). The EEOC's finding of no reasonable cause to believe discrimination has occurred cannot bar the institution of a private suit.

28. Cromecraft v. EEOC, 465 F.2d 745 (5th Cir. 1972).

29. Dent v. St. Louis-San Fran. R.R., 406 F.2d 399 (5th Cir. 1969).

30. 323 U.S. 192 (1944).

31. Syres v. Local 23, Oil Workers, 350 U.S. 892 (1955); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Wallace Corp. v. NLRB, 323 U.S. 248 (1944).

32. 29 U.S.C. § 158 (1970). An unfair labor practice is the term used to denote any activity by the employer or union specifically prohibited by the NLRA.

Board (NLRB).[33]

In 1953 the NLRB also decided that a union's breach of the duty of fair representation violated the NLRA.[34] Later, in *Miranda Fuel Co.*,[35] the Board held that a union's interference with an employee's right to be free from seniority discrimination in matters affecting his employment constituted an unfair labor practice. In addition, an employer who participates in the arbitrary union conduct violates the Act and commits an unfair labor practice also.[36] The NLRB has extended fair representation protection to applicants for membership[37] and for referral through a union hiring hall.[38] Union members alleging sex discrimination have recently received coverage under the duty of fair representation.[39]

Under the "pre-emption doctrine,"[40] the NLRB has exclusive jurisdiction to hear unfair labor practice cases. Thus, classification of a breach of the duty of fair representation as an unfair labor prac-

33. *Id.* § 153 (1970).

34. Hughes Tool Co., 104 N.L.R.B. 318 (1953). In *Hughes Tool Co.*, the Board found that a breach of the duty of fair representation violated the NLRA and ordered the immediate revocation of the certification of the local unless the practice of discriminatory application of grievance procedures ceased.

35. Miranda Fuel Co., 140 N.L.R.B. 181 (1962). The doctrine that a breach of the duty of fair representation constitutes an unfair labor practice has been affirmed by the Fifth Circuit. Local Union 12, United Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967).

36. Miranda Fuel Co., 140 N.L.R.B. 181 (1962). The Court of Appeals in the District of Columbia has recently held that an employer acting alone could commit an unfair labor practice by treating employees unequally. The court found that the employer who sponsored separate and unequal fringe benefits for Anglo, Mexican-American and black workers violated the employees' rights to be free from coercion in their concerted union activities. United Packinghouse, Food, and Allied Workers v. NLRB, 416 F.2d 1126 (D.C. Cir. 1969). The NLRB criticized this decision in *Jubilee Manufacturing Co.*, 82 L.R.R.M. 1482 (1973), stating that every employer's act of discrimination was not a per se violation of the NLRA. But the Board was careful to point out that where employer discrimination directly affects the primary function of the NLRA to foster collective bargaining agreements, protect employee rights to act concertedly and conduct union elections, a violation of the NLRA may be found.

37. Hughes Tool Co., 147 N.L.R.B. 1573 (1964).

38. Houston Maritime Assn., Inc., 168 N.L.R.B. 615 (1967).

39. Petersen v. Ruth Pack. Co., 461 F.2d 312 (8th Cir. 1972). In *Petersen*, the court found that the union breached its duty of fair representation by refusing to represent two women in their complaint seeking reclassification of certain male job categories. Both the union and the employer breached a requirement in their collective bargaining agreement by refusing to consider the individual qualifications of an employee requesting a transfer to a job in a different classification.

40. San Diego Trade Council v. Garmon, 359 U.S. 236, 245 (1959). When an activity is subject to or arguably subject to section 7 or section 8 of the NLRA, the state as well as the federal courts must defer to the exclusive competence of the NLRB.

tice raised the question as to whether the courts, who had initially created the doctrine, retained jurisdiction over fair representation cases. In *Vaca v. Sipes,*[41] the Supreme Court made it clear that the courts could hear fair representation suits concurrently with the NLRB. The courts have the power to grant equitable relief, award damages and back pay, and to compel arbitration.[42]

Although members alleging unfair representation are free to seek remedies through the courts or through the NLRB, both routes require, as a prerequisite to complaint or suit, the exhaustion of internal union grievance procedures.[43] But the duty of the union to process an employee's grievance is not absolute. Both the courts and the NLRB allow the union a range of discretion in refusing to process complaints which it feels are unreasonable or lack merit.[44] Once the complainant has exhausted his internal union remedies, the NLRB and the courts generally defer to the arbitrator's decision. In *Spielberg Manufacturing Co.*[45] the Board stated it would defer to an arbitrator's award if the proceedings were fair and regular, the parties had agreed to be bound by the decision, and the decision was not repugnant to the policies of the NLRA. Subsequently, the Board extended the deferral doctrine so that it would overturn an arbitrator's award only if it were shown that the arbitration proceedings were tainted with fraud, collusion, or procedural irregularities.[46] Similarly,

41. 386 U.S. 171 (1967). In *Sipes,* the union refused to arbitrate through the final step an employee's complaint that he had been wrongfully discharged. The Missouri supreme court held that the union had violated the duty of fair representation. The United States Supreme Court reversed, holding that the union had acted reasonably in deciding not to proceed in the arbitration because of the weight of evidence against the complainant. The Court added, however, that courts still retained jurisdiction over fair representation cases in spite of the pre-emption doctrine. The Court reasoned that Congress had not intended this judicially created right to come under the exclusive jurisdiction of the Board. Also, the instant case was a section 301 suit which is under the court's jurisdiction, but the Court did not limit its ability to hear fair representation cases to section 301 situations.

42. The Board has the power to order persons to cease and desist unfair labor practices and to order reinstatement of employees with or without backpay. 29 U.S.C. 160 (c) (1970).

43. Bsharah v. Eltra Corp., 394 F.2d 502 (6th Cir. 1968); Stringfield v. Rubber Workers, Local 101, 285 F.2d 764 (6th Cir. 1960); Imbrunnone v. Chrysler Corp., 336 F. Supp. 1223 (E.D. Mich. 1971); General Teamsters, Local 890, 193 N.L.R.B. 1048 (1971). An exception to this general rule may occur if the suit is against a union which the court feels is hostile to the complainant. *See also* Brady v. Trans World Air., Inc., 401 F.2d 87 (3d Cir. 1968), *cert. denied,* 393 U.S. 1048 (1969).

44. Vaca v. Sipes, 386 U.S. 171 (1967); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Chrysler Corp., 193 N.L.R.B. 898 (1971); General Box, 189 N.L.R.B. 269 (1971).

45. 112 N.L.R.B. 1080 (1955).

46. International Harv. Co., 138 N.L.R.B. 923 (1962).

the courts have a policy of deferral to the arbitration proceedings and its award.[47]

Although it is the later legislative mandate, the enactment of Title VII did not preempt existing remedies under the NLRA.[48] Thus union members are furnished alternative means to remedy discrimination by their labor representatives; under the duty of fair representation through the courts and the NLRB, and under Title VII through the EEOC. In pursuing fair representation remedies both the courts and the NLRB require that an employee complaint be first processed through internal union procedures.[49] However, an employee need not pursue his contractual grievance remedy as a prerequisite to bringing a suit under Title VII.[50] The problem of whether to defer to an arbitrator's decision once the employee has voluntarily submitted his claim to his union's grievance-arbitration machinery has been a source of conflict among the circuits.[51] The Supreme Court recently resolved this conflict in *Alexander v. Gardner Denver Co.*[52] The Court held that an employee's prior submission of a grievance under a nondiscrimination clause in the union contract does not affect his statutory right to a trial de novo under Title VII. The Court reasoned that Congress gave federal courts the ultimate power to secure compliance with Title VII and therefore a prior arbitration decision could not

47. United Steelworkers v. Enterprise Wheel & Car Co., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960). In the *Steelworkers* trilogy the court stated that the arbitrator's decision must be enforced by the courts even if the arbitrator's interpretation of the contract is different from the courts' or is ambiguous.

48. United Packinghouse, Food, and Allied Workers v. NLRB, 416 F.2d 1126 (D.C. Cir. 1969); Rubber Workers, Local 12 v. NLRB, 368 F.2d 12 (5th Cir. 1966).

49. *See* note 40 *supra.*

50. Caldwell v. National Brew. Co., 443 F.2d 1044 (5th Cir. 1971); Bowe v. Colgate Palmolive Co., 416 F.2d 711 (7th Cir. 1969); King v. Georgia Power Co., 295 F. Supp. 943 (N.D. Ga. 1968).

51. The Tenth Circuit position was that an adverse arbitration award is binding on the employee as well as the employer, and the employee is estopped from subjecting the employer to a second action under Title VII. Alexander v. Gardner Denver, 466 F.2d 1209 (10th Cir. 1972). The Seventh Circuit rule was that an employee could proceed concurrently with both arbitration and Title VII claims, but he must ultimately make an election as to one remedy so as to preclude duplicate relief. Bowe v. Colgate Palmolive Co., 416 F.2d 711 (7th Cir. 1969). The position in the Fifth Circuit was that courts should defer to an arbitrator's decision only if the employee's contractual rights in the collective bargaining agreement are identical to Title VII protections, the arbitrator's decision covered the issues presented in the Title VII claim, and those issues were actually decided with adequate evidence in an impartial proceeding free of procedural infirmities. Rios v. Reynolds Metal Co., 467 F.2d 54 (5th Cir. 1972).

52. 42 U.S.L.W. 4214 (Feb. 19, 1974).

divest the federal courts of jurisdiction. Regarding the national policy favoring deferral to arbitration decisions in labor disputes, the Court found that a Title VII action was not to be considered a review of the arbitrator's decision, but rather a statutory right independent of the arbitration process. The Court also pointed to the differences between a Title VII action and an arbitration proceeding as further evidence that Congress intended Title VII as an independent remedy. Congress designates the federal courts as the ultimate authority in determining an employee's Title VII rights; an arbitrator's scope of review in determining an employee's rights is limited to interpretation of the collective bargaining agreement. Thus the court found that an employee may elect to pursue his Title VII remedy even after submitting his claim to arbitration.

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