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THE SECOND CIRCUIT'S EMPLOYMENT DISCRIMINATION CASES: AN UNCERTAIN WELCOME

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INTRODUCTION

This Article will focus upon how the United States Court of Appeals for the Second Circuit has, over the past decade, addressed certain key issues in the area of employment discrimination.[1] Critical cases will be reviewed through the prism of the authors' belief that, consistent with congressional intent and public policy,[2] the federal courts of appeals should be wary of setting legal standards that act as barriers to employment discrimination litigants who seek relief in the federal courts.

The federal judiciary has only had responsibility for meaningful enforcement of antidiscrimination laws for the last quarter century, after the passage of the Civil Rights Act of 1964 (the "1964 law").[3] Some states, of course, had outlawed various types of dis-

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[1] The discussion in this Article will be largely limited to race, sex and national origin discrimination actions under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1988), and 42 U.S.C. § 1981 (1988), although decisions interpreting the Age Discrimination in Employment Act and the fair housing laws will be discussed where their holdings may be applicable to Title VII and § 1981 actions.

[2] *See, e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36, 59 (1974) (holding agreement to arbitrate cannot foreclose federal civil rights suit, based on strong public policy favoring bringing of civil rights suits in federal court).

[3] Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. §§ 1971, 1975a-1975d, 2000a to 2000d-4, 2000e to 2000h-6 (1988)). The Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981-1982), contained broad language prohibiting race discrimination, but "lay partially dormant for many years." Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437 (1968). In *Jones*, the Supreme Court held for the first time that 42 U.S.C. § 1982, which was derived from § 1 of the 1866 Act, barred all racial discrimination, public and private, in the sale or rental of property. *Id.* at 413. In Johnson v. Rail-

crimination long before passage of the 1964 law. For example, New York State has had a law prohibiting racial discrimination on the books since 1945, but it was rarely enforced before 1968.[4] Additionally, after the Supreme Court's decision in *Brown v. Board of Education*,[5] the southern federal judiciary had been presented with antidiscrimination litigation involving public entities, but few, if any, suits of this nature had been pursued in the north prior to passage of the 1964 law.

In that year, Congress reacted to years of upheaval during which African-Americans, with greater and greater insistence, demanded racial equality. Title VII of the 1964 law ("Title VII") prohibited discrimination based upon race, color, religion, and sex in the workplace.[6] On paper, this law seems to be designed to change the United States from an overtly discriminatory society to one in which important decisions affecting individual lives would be made on merit rather than on the basis of race, national origin, or sex.

This new law prohibiting discrimination, however, was intrinsically weak. For example, it did not criminalize any of the offending conduct. Moreover, under Title VII employers could not be held liable for punitive damages and for damage awards to compensate victims of discrimination for pain, suffering, and humiliation.[7] In short, while the language of this new law was written in broad strokes, the penalties for violations were circumscribed.[8] In

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way Express Agency, 421 U.S. 454, 459-60 (1975), and Runyon v. McCrary, 427 U.S. 160, 168-75 (1976), the Supreme Court held that § 1981, which was also derived from § 1 of the 1866 Act, applied to racial discrimination in the making and enforcement of private contracts for employment and public accommodations.

[4] *See* Ch. 118, § 1, [1945] N.Y. Laws (codified as amended at N.Y. EXEC. LAW § 290 (McKinney 1982)); *see also* Doe v. Roe, Inc., 143 Misc.2d 156, 158, 539 N.Y.S.2d 876, 877 (Sup. Ct. N.Y. County 1989) (noting "paucity of decisional law" on issue of whether New York Human Rights Law prohibits discrimination based on alcohol and drug abuse), *aff'd*, 160 A.D. 2d 255, 553 N.Y.S. 2d 364 (1st Dep't 1990); Rudow v. New York City Comm'n on Human Rights, 123 Misc.2d 709, 714, 474 N.Y.S.2d 1005, 1009 (Sup. Ct. N.Y. County 1984) ("[t]here has been a paucity of state judicial opinions on sexual harassment"); *cf.* Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978) (arguing "that we should treat . . . 'underenforced' constitutional norms as valid to their conceptual limits").

[5] 347 U.S. 483 (1954).

[6] 42 U.S.C. §§ 2000e to 2000e-17 (1988). The prohibition of sex discrimination was originally included in an attempt to defeat the bill. Price Waterhouse v. Hopkins, 490 U.S. 228, 244 n.9 (1989).

[7] Carrero v. New York City Hous. Auth., 890 F.2d 569, 581 (2d Cir. 1989).

[8] *Compare* 42 U.S.C. § 2000e-5(g) (1988) (enforcement provisions of Title VII include injunctions, appropriate affirmative action, equitable relief, and accrual of back pay) *with* 15 U.S.C. § 15 (1988) (treble damages under Clayton Act for violation of antitrust laws) *and* 18

addition, Title VII contains a very short statute of limitations[9] and sets forth complex administrative and procedural mechanisms that may act as pitfalls for the unwary *pro se* plaintiff. Moreover, even though Title VII set up a government agency, the Equal Employment Opportunity Commission ("EEOC"), which was given investigative powers, and authorized the Department of Justice to institute civil actions attacking pattern and practice violations, widespread enforcement was dependent upon the willingness of private individuals to obtain legal representation and challenge discriminatory conduct.[10]

It should go without saying that individual litigants and attorneys willing to represent them will only come forward in sufficient numbers to have a significant impact upon discriminatory practices if they receive a reasonable welcome from the courts that are given the responsibility of adjudicating their claims. Of course, the welcome (or unwelcome) mat that the federal judiciary lays out for civil rights plaintiffs is, to a huge extent, contingent upon crucial interpretations concerning the reach of the civil rights laws by the United States Supreme Court. However, the federal courts of appeals have much to say about the all-important ground rules of civil rights litigation, since they are called upon to interpret Supreme Court precedent and to decide fundamental questions in the absence of Supreme Court precedent.

This Article will address the way the Second Circuit has handled key issues in this area and the effects the Second Circuit's philosophy has had on civil rights plaintiffs and the development of civil rights law.

U.S.C. § 1964(c) (1988) (treble damages under Racketeer Influenced and Corrupt Organizations Act).

[9] *See* 42 U.S.C. § 2000e-5 (1988). Plaintiffs must file a Title VII claim within 90 days after an administrative determination by the Equal Employment Opportunity Commission ("EEOC"). *Id.* § 2000e-5(f)(1); Peete v. American Standard Graphic, 885 F.2d 331, 331 (6th Cir. 1989). They have 240 days to file a charge with the EEOC. Mohasco Corp. v. Silver, 447 U.S. 807, 815 n.16 (1980) ("complainant in a deferral State having a fair employment practices agency over one year old" must file charge within 240 days of alleged discriminatory employment practice to preserve Title VII rights).

[10] The law was changed in 1972 to allow the EEOC to bring civil actions on behalf of individuals. However, primary enforcement of the law was still left to individuals bringing civil actions in federal court. *See* Sheehan v. Purolator, Inc., 676 F.2d 877, 886 n.14 (2d Cir. 1981) (finding no basis for diminishing private right of action and noting EEOC "cannot possibly seek preliminary relief on behalf of all the complainants it believes deserving" because of "volume of its work"), *cert. denied*, 488 U.S. 891 (1988).

I. PROCEDURAL IMPEDIMENTS

The complex statutory scheme of Title VII has created difficult procedural issues since its inception, involving the various limitations periods imposed by the statute, the federal courts, and the agencies, the interplay between administrative and judicial remedies, and the relationship between state and federal civil rights laws. This Article will examine two discrete areas that have caused controversy in the last decade.

A. Timeliness

The mandatory administrative filing requirement under Title VII, coupled with the fact that a claimant has only ninety days after receipt of a "right to sue letter" to bring a federal action,[11] often acts as a stumbling block for the employment discrimination litigant, especially when the procedure, as is often the case, is begun by a claimant acting *pro se*.[12] During the 1970's, the courts of appeals, including the Second Circuit, grappled with the question of whether the requirement of timely filing charges with the EEOC was jurisdictional or analogous to a statute of limitations, which could be tolled in some circumstances. The Second Circuit, in some cases, held that failure to file timely EEOC charges was a jurisdictional bar to filing a federal action.[13] In other cases, the Second Circuit acknowledged that the time period was more akin to a statute of limitations and therefore could be tolled under some extremely limited circumstances.[14] The court, however, repeatedly declined to follow *Dart v. Shell Oil Co.*,[15] in which the Tenth Circuit had concluded that the EEOC filing period could be tolled where the claimant was not represented by counsel.

After the Supreme Court held in *Zipes v. Trans World Air-*

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[11] *See supra* note 9 (statute of limitations imposed by Title VII).

[12] These short time periods often do not afford individual prospective plaintiffs, especially those with limited resources, sufficient time to locate counsel. Many civil rights cases are thus begun and litigated to a conclusion by *pro se* plaintiffs.

[13] *See, e.g.*, Goss v. Revlon, Inc., 548 F.2d 405, 406 (2d Cir. 1976), *cert. denied*, 434 U.S. 968 (1977).

[14] *See, e.g.*, Keyse v. California Texas Oil Corp., 590 F.2d 45, 47 (2d Cir. 1978) (tolling improper because plaintiff was represented by counsel during 210-day period); Smith v. American President Lines, 571 F.2d 102, 108-09 (2d Cir. 1978)("in certain situations tolling of the Title VII time limits might be acceptable" but such instances are "very restricted"). The Fifth Circuit had come to a similar conclusion in Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924, 931 (5th Cir. 1975).

[15] 539 F.2d 1256 (10th Cir. 1976), *aff'd by equally divided court*, 434 U.S. 99 (1977).

lines[16] that the EEOC filing period was not jurisdictional, the Second Circuit still tended to view narrowly the circumstances under which tolling was appropriate. The Second Circuit suggested in *Johnson v. Al Tech Specialties Steel Corp.*[17] that the statute of limitations might be tolled in a situation in which an EEOC official gave a potential claimant misinformation concerning the statute of limitations and the claimant signed an affidavit to that effect.[18] In *Miller v. International Telephone & Telegraph Corp.*,[19] the Second Circuit held that the claimant must have been "actively misled" or "prevented in some extraordinary way from exercising his rights."[20] The court defined "extraordinary" as a situation in which it would have been "impossible for a reasonably prudent person to learn that his [or her] discharge was discriminatory."[21]

There have been individual situations, however, in which fundamental fairness tipped so heavily in favor of the employee that the Second Circuit did hold that the statute of limitations was tolled. For example, in *Tolliver v. County of Sullivan*,[22] the court held that it would be unfair to bar the complaint of a *pro se* litigant because of a delay in filing by the *pro se* clerk of the court.[23]

The Second Circuit has also adopted a key procedural rule that makes it easier for employees to join pending employment discrimination suits. In *Snell v. Suffolk County*,[24] the court held that where one plaintiff has filed a timely EEOC charge, other plaintiffs may later join in the action, even if they did not file EEOC charges, as long as the later claims arose out of similarly discriminatory treatment in the same time frame.[25] The *Snell* ruling

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[16] 455 U.S. 385 (1982).

[17] 731 F.2d 143 (2d Cir. 1984).

[18] *Id.* at 146. The plaintiff in *Johnson* failed to prove that the EEOC advised him of the filing deadline. *Id.*

[19] 755 F.2d 20 (2d Cir.), *cert. denied*, 474 U.S. 851 (1985).

[20] *Id.* at 24.

[21] *Id.* By contrast, the Fifth Circuit held that the time period did not begin to run until the relevant facts "were apparent or should have been apparent to a person with a reasonably prudent regard for his rights similarly situated to the plaintiff." Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924, 931 (5th Cir. 1975).

[22] 841 F.2d 41 (2d Cir. 1988).

[23] *Id.* at 42.

[24] 782 F.2d 1094 (2d Cir. 1986).

[25] *Id.* at 1101. By reaching this conclusion, the Second Circuit followed the Eighth, Eleventh, and D.C. Circuits and a panel of the Fifth Circuit. *See* Ezell v. Mobile Housing Bd., 709 F.2d 1376, 1380-81 (11th Cir. 1983); Foster v. Gueory, 655 F.2d 1319, 1323-24 (D.C. Cir. 1981); Wheeler v. American Home Prods. Corp., 563 F.2d 1233, 1239 (5th Cir. 1977); Allen v. Amalgamated Transit Union, 554 F.2d 876, 882-83 (8th Cir.), *cert. denied*, 434 U.S.

(which results in no unfairness to the employer since the subsequent claims are related to the first claim) is an excellent example of judicial sensitivity to the special role of civil rights plaintiffs acting as private attorneys general. It also facilitates the bringing of class actions because it allows for the addition of named plaintiffs to serve in representative capacities.

B. *Preclusive Effect of Prior Judicial and Administrative Decisions*

The question of whether decisions of state courts, arbitrators, and state and federal agencies should preclude federal civil rights actions has long troubled the federal courts and civil rights plaintiffs.[26] It is clear from the legislative history of Title VII that the purpose of the requirement that an employee first file a federal or state administrative claim[27] before proceeding to federal court is to encourage conciliation of employment discrimination suits. At the same time, the administrative filing stage allows persons unrepresented by counsel to raise civil rights claims in an inexpensive and relatively informal administrative setting. Nothing in the legislative history of Title VII suggests that Congress intended negative decisions by the EEOC or state agencies to foreclose employees from bringing their claims to court.[28] Such a result would eviscerate the policy behind *Alexander v. Gardner-Denver Co.*:[29] that federal civil rights actions should be decided primarily by federal courts.[30] Moreover, it would result in preclusion of the claims of many unwary plaintiffs, especially those proceeding *pro se*, who file claims with administrative agencies without understanding the

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891 (1977). *But see* Hodge v. McLean Trucking Co., 607 F.2d 1118, 1121 (5th Cir. 1979); Inda v. United Airlines, 565 F.2d 554 (9th Cir. 1977), *cert. denied*, 435 U.S. 1007 (1978); Schulte v. New York, 533 F. Supp. 31, 34 (E.D.N.Y. 1981).

[26] *See, e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36, 59-60 (1974) (holding that agreement to arbitrate could not foreclose federal civil rights suit). *But see* Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647, 1650 (1991) (holding that a claim under Age Discrimination in Employment Act of 1967 "can be subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration application").

[27] 42 U.S.C. § 2000e-5(c) (1988).

[28] *See* University of Tenn. v. Elliot, 478 U.S. 788, 795-96 (1986) ("Congress intended to accord federal employees the same right to a trial *de novo* [following administrative proceedings] as is enjoyed by private sector employees"); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973) ("absence of a Commission finding of reasonable cause cannot bar suit under . . . Title VII").

[29] 415 U.S. 36 (1974).

[30] *Id.* at 59-60.

possible preclusive effect of the agency decisions.

When a negative determination of a civil rights claim by a state agency is affirmed by a state court, the question becomes more complicated. Under 28 U.S.C. § 1738, federal courts are required to give state court judgments "full faith and credit," so long as the plaintiff had an opportunity to "fully and fairly litigate" the issue in the prior state court action.[31]

The question of when an employment discrimination plaintiff has been given a full and fair opportunity to litigate a claim prior to filing a federal action was addressed by the Second Circuit in the early cases of *Mitchell v. National Broadcasting Co.*[32] and *Sinicropi v. Nassau County.*[33] In *Mitchell*, an employee brought an Article 78 proceeding appealing a negative decision of the New York State Division of Human Rights ("NYSDHR"). The Appellate Division of the New York State Supreme Court affirmed the agency's decision. The Second Circuit held that the former employee was barred on principles of res judicata from maintaining an action under 42 U.S.C. § 1981 against her former employer.[34] Two years later, in *Sinicropi*, the Second Circuit held that a Title VII action was barred where the plaintiff had unsuccessfully appealed a negative finding by the NYSDHR to the State Human Rights Appeal Board and then to the Appellate Division of the New York State Supreme Court (leave to appeal to the New York Court of Appeals was denied).[35]

The issue reached the United States Supreme Court in *Kremer v. Chemical Construction Corp.*[36] The Second Circuit decision in that case followed *Sinicropi* and gave preclusive effect to

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[31] Allen v. McCurry, 449 U.S. 90, 103-04 (1980). The Court held that "[t]here is . . . no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all." *Id.* at 104 (footnote omitted).

[32] 553 F.2d 265 (2d Cir. 1977).

[33] 601 F.2d 60 (2d Cir.), *cert. denied*, 444 U.S. 983 (1979).

[34] *Mitchell*, 553 F.2d at 277.

[35] Every other circuit that considered the issue, however, decided such cases in favor of plaintiffs, and refused to give preclusive effect to negative state agency and/or state court decisions. *See* Aleem v. General Felt Indus., 661 F.2d 135, 136-37 (9th Cir. 1981); Unger v. Consolidated Foods Corp., 657 F.2d 909 (7th Cir. 1981), *vacated*, 456 U.S. 1002 (1982), *cert. denied*, 460 U.S. 1102 (1983); Smouse v. General Elec. Co., 626 F.2d 333, 334-36 (3d Cir. 1980); Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079, 1082-85 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980).

[36] 456 U.S. 461 (1982).

an Appellate Division decision affirming a dismissal by the NYSDHR.[37] The United States Supreme Court affirmed.[38]

After *Kremer*, the Second Circuit continued to analyze a variety of state court and agency decisions to determine whether they should be given preclusive effect. For example, in *Bottini v. Sadore Management Corp.*,[39] the court refused to give preclusive effect to a New York Supreme Court decision upholding an arbitration award because, under state law, the supreme court's scope of review of an arbitrator's decision was very narrow, so the employee had not had a full and fair opportunity to litigate the issue in state court.[40] The *Bottini* court also refused to give preclusive effect to an unreviewed administrative decision of the NYSDHR, to the award of an arbitrator, and to a determination in a holdover proceeding in landlord-tenant court.[41] Similarly, in *Hill v. Coca Cola Bottling Co.*,[42] the court declined to give preclusive effect to a negative determination by an administrative law judge with regard to unemployment insurance, which was affirmed by the Unemployment Insurance Appeal Board and by the Appellate Division pursuant to an Article 78 proceeding.[43] The Second Circuit found that the administrative procedure and subsequent Article 78 appeal did not give the employee the full and fair opportunity to litigate required by *Kremer*.[44]

The United States Supreme Court clarified matters somewhat in *University of Tennessee v. Elliot*,[45] holding that it would be contrary to public policy to allow unreviewed administrative

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[37] *See* Kremer v. Chemical Constr. Corp., 623 F.2d 786, 788 (2d Cir. 1980), *aff'd*, 456 U.S. 461 (1982).

[38] Six years later, *Kremer* was unsuccessfully challenged on the ground that the Court had misread New York state law on claim and issue preclusion. *See* Kirkland v. City of Peekskill, 828 F.2d 104, 107-10 (2d Cir. 1987).

[39] 764 F.2d 116 (2d Cir. 1985).

[40] *Id.* at 120-21.

[41] *Id.* at 120-22.

[42] 786 F.2d 550 (2d Cir. 1986).

[43] *Id.* at 552-53. Leave to appeal to the New York Court of Appeals was denied. *Id.* at 552.

[44] The Second Circuit's unwillingness to apply harshly the *Kremer* result is illustrated by its decision in Evans v. Syracuse City School Dist., 704 F.2d 44, 46-47 (2d Cir. 1983). In *Evans*, the New York State Appellate Division, Fourth Department, dismissed plaintiff's appeal from a State Division of Human Rights Appeal Board decision in 1979. *Id.* at 46. The defendant waited until 1982 to move for summary judgment based on the res judicata defense. *Id.* The court held that the three-year delay was prejudicial to the plaintiff and refused to allow the defendant's motion. *Id.* at 47.

[45] 478 U.S. 788 (1986).

agency decisions to preclude federal actions under Title VII.[46] However, the Court did allow agency determinations to be given preclusive effect in actions brought under 42 U.S.C. §§ 1981 and 1983.[47] This distinction was based on the public policy supporting the passage of Title VII and Title VII's unique procedural mechanisms.[48]

The Second Circuit made a disturbing move toward narrowing access to federal court in *Bray v. New York Life Insurance*.[49] In *Bray*, as in previous cases, the plaintiff had received an unfavorable finding from the NYSDHR.[50] However, the New York Supreme Court never reached the merits of her complaint, which was rejected as untimely.[51] Nonetheless, the Second Circuit held that Bray's Title VII action was precluded because, under New York law, dismissal of an action on statute of limitations grounds is considered a judgment on the merits.[52] The *Bray* court distinguished *Elliot* on the ground that *Elliot* involved a state agency determination which no one ever attempted to appeal to the state court.[53] However, the *Bray* court ignored the strong language in *Elliot* concerning the public policy of Title VII, relying instead solely on its interpretation of state law.[54]

The complexity of the law in this area complicates strategic decisions even for the experienced civil rights attorney. Unfortunately, many civil rights cases (including *Bray*[55] and *Sinicropi*) are

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[46] *Id.* at 795-96.

[47] *Id.* at 796-99.

[48] *Id.* at 795-99. The following year, the Second Circuit followed *Elliot* in DeCinto v. Westchester County Medical Center, 821 F.2d 111, 114-16 (2d Cir.), *cert. denied*, 484 U.S. 965 (1987).

[49] 851 F.2d 60 (2d Cir. 1988).

[50] *Id.* at 61.

[51] *Id.* at 61-62.

[52] *Id.* at 64.

[53] *Id.* at 63.

[54] *See id.* The court's most recent consideration of this issue was in Solimino v. Astoria Fed. Sav. & Loan Ass'n, 901 F.2d 1148, 1149-54 (2d Cir. 1990), *aff'd*, 111 S. Ct. 2166 (1991). In *Solimino*, a plaintiff alleging age discrimination received a no probable cause finding from the NYSDHR, which was affirmed by the State Human Rights Appeal Board. *Id.* at 1149. Plaintiff then attempted to bring a federal action under the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621-634 (1988 & Supp. 1991). *Id.* at 1150. The Second Circuit, analyzing *Elliot*, had to decide whether an ADEA action was more like an action brought under Title VII or an action brought under 42 U.S.C. § 1981 or § 1983. *Id.* The court reviewed the public policy behind ADEA, *id.* at 1150-54, and concluded that an ADEA action should not be precluded by an unreviewed state agency determination. *Id.* at 1154.

[55] Bray received court-appointed counsel while the state court application was pending.

begun by *pro se* plaintiffs who have no idea of the ramifications of their decisions to pursue claims in a particular administrative or judicial process.[56] Often, by the time the plaintiff retains counsel, the damage has been done. The trend toward granting preclusive effect to decisions not made on the merits or under unequal circumstances serves only to erode the once strong public policy favoring access to federal courts for the resolution of civil rights claims.

II. Class Actions

Persons suffering from discrimination in the workplace often wish to sue not only because they want their employers to stop discriminating against them personally and want to be compensated for what they have suffered as a result of the discrimination, but also because they seek to end discrimination in the workplace as a whole. Experienced civil rights lawyers will immediately analyze such cases as potential class actions. If the prospective plaintiff is part of a large enough group of similarly situated applicants or employees and outlines allegations that are not idiosyncratic, the class action approach may appear appropriate to the civil rights attorney.

The lawyer probes the prospective plaintiff to make sure he or she understands the following basic facts about employment discrimination class actions: they take much longer to resolve than individual cases; companies often offer more resistance to them than to individual suits; they often get more publicity than individual cases; and settlements are subjected to judicial scrutiny at fairness hearings at which other employees or applicants may complain that the proposed settlements are unprincipled or unfair. Often, such honesty convinces a prospective plaintiff not to become a class champion.

When a prospective plaintiff, after reflection, asks the civil rights lawyer to bring the case as a class action, the prospective plaintiff often does the public a great service. By putting into issue the overall policies or practices of an employer, that plaintiff tests the challenged practices in a way that could eliminate or validate

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Bray, 851 F.2d at 64.

[56] Holmes, *Workers Find It Tough Going Filing Lawsuits Over Job Bias*, N.Y. Times, July 24, 1991, at A1, col. 1 (discussing difficulty in finding lawyers to take employment discrimination cases).

them. Moreover, class action decisions or settlements affecting one company often affect the policies and practices of other companies in the same field, since corporate counsel look very carefully at both decisions and settlements in the field. From a public policy point of view, these results are often far better than those achieved by individual suits, which frequently end in settlements that are hidden from the public by confidentiality orders. These individual resolutions have almost no effect on institutional discrimination. Additionally, the process often leaves both sides dissatisfied: the employer professes to have been cheated and claims that it only settled to get rid of the disgruntled employee or applicant, at the least bother and expense; the plaintiff often feels undercompensated for what he or she claims to have suffered or lost, and the employer is free to do the same thing to somebody else of the plaintiff's race or sex.

Therefore, the rule 23 class action device[57] is particularly appropriate for resolving employment discrimination cases, which are often, by their very nature, class suits challenging pervasive discrimination or policies or practices that adversely impact on protected groups.[58] In the South, where the federal judiciary was repeatedly called upon to enforce Title VII, the Fifth Circuit in the 1970's and early 1980's instructed the district courts to certify "across-the-board" classes, including both applicants and employees claiming promotion discrimination on little more evidence than the allegations in a complaint.[59] This broad approach was supported by the United States Supreme Court's statement that the class certification decision should not entail a mini-hearing on the

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[57] FED. R. CIV. P. 23. Rule 23 provides in part:

(a)Prerequisites to a Class Action.

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of fact or law common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Id.

[58] *See, e.g.*, General Tel. Co. v. Falcon, 457 U.S. 147, 157 (1982) (recognizing "suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs") (quoting East Texas Motor Freight Sys. v. Rodriguez, 431 U.S. 395, 405 (1977)).

[59] *See* Payne v. Travenol Laboratories, Inc., 565 F.2d 895, 900 (5th Cir.), *cert. denied*, 439 U.S. 835 (1978); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1123-25 (5th Cir. 1969).

merits.[60] A liberal approach to class certification had also been articulated by the Second Circuit in *Woe v. Cuomo*,[61] in which the court noted that a class which is found to have been improperly certified can always be decertified.[62] By contrast, where class certification is wrongly denied, the error cannot be easily rectified because plaintiffs may be barred from obtaining the discovery necessary to challenge the denial on appeal.

However, in *General Telephone Co. v. Falcon*,[63] a particularly unfocused and weak case, the United States Supreme Court disapproved of the Fifth Circuit's across-the-board rule and instructed the federal judiciary that the rule 23 requirements of commonality, typicality, numerosity, and adequacy of representation could not be presumed.[64]

Falcon did not place a particularly difficult burden upon a plaintiff seeking to obtain class certification. Yet, as the Second Circuit noted, after *Falcon*, "courts have been generally strict in their application of the Rule 23(a) criteria."[65] This strictness varies from case to case and from circuit to circuit, offering little guidance to the potential class litigants. The Second Circuit has been no exception, having recently decided two cases that are difficult, if not impossible, to reconcile.

In the first case, *Rossini v. Ogilvy & Mather*,[66] the Second Circuit held that the district court abused its discretion by decertifying a class represented by one plaintiff as to promotion and training claims. The court also held the district court committed error in preventing another named plaintiff from representing the class on the ground that she was allegedly an officer of the company.[67] In reaching this decision, the court "recognized . . . that the primary thrust of *Falcon* was that the satisfaction of Rule 23(a) requirements may not be *presumed*."[68] The court noted that the named plaintiff did not ask the district court to make this presumption.[69] Instead, she sought to show that the defendant denied

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[60] *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78 (1974).
[61] 729 F.2d 96 (2d Cir.), *cert. denied*, 469 U.S. 936 (1984).
[62] *Id.* at 107.
[63] 457 U.S. 147 (1982).
[64] *Id.* at 157-59.
[65] Rossini v. Ogilvy & Mather, Inc., 798 F.2d 590, 597 (2d Cir. 1986).
[66] 798 F.2d 590 (2d Cir. 1986).
[67] *Id.* at 595, 599, 606.
[68] *Id.* at 597 (citations omitted).
[69] *Id.* at 598.

women opportunities to advance through the use of a subjective job evaluation system and that many of the decisions affecting employees' opportunities for advancement were made by the same, central group of people.[70] The court stated that the named plaintiff's "evidence, if believed, would indicate that [the defendant] discriminated 'in the same general fashion' " against the plaintiff and other class members and concluded that "no more was necessary" to satisfy the typicality requirement.[71] The court added that the named plaintiff's satisfaction of this requirement "goes a long way" toward satisfying the commonality requirement and also relied on the factual similarity between the individual claim and the class claim, even though the individual claim "also required proof of some facts that differed from those of the class claim[s]."[72] Finally, the court held that the district court had "overlooked the common thread" between the named plaintiff's transfer claim and the class claim of discrimination in promotion.[73] Emphasizing that "it was the same standardless subjective evaluation system that operated in both cases,"[74] the court held that common issues of law and fact predominated over those that separated the named plaintiff from the class.[75]

The *Rossini* court's reading of *Falcon* and its flexible interpretation of the necessary factual predicate for class certification contrast sharply with the analysis in *Sheehan v. Purolator, Inc.*[76] The named plaintiffs in *Sheehan* were two staff vice-presidents and a senior regional manager of the company who alleged sex discrimination in salaries and promotions as well as a hostile work environment.[77] The district court, stating it was relying on *Falcon*, denied class certification.[78] However, the district court made this determination based on a requirement not mentioned in *Falcon* (or in rule 23) "that the individual plaintiffs establish that there are aggrieved persons in the purported class, primarily through affidavits from employees alleging discriminatory treatment, or other evidence es-

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[70] *Id.*
[71] *Id.*
[72] *Id.* at 598-99.
[73] *Id.* at 599.
[74] *Id.*
[75] *Id.*
[76] 839 F.2d 99 (2d Cir.), *cert. denied*, 488 U.S. 891 (1988).
[77] *Id.* at 100-01.
[78] *Id.*

tablishing the existence of an aggrieved class."[79] In *Sheehan*, the plaintiffs had in fact presented complaints of fifty-six employees of the defendant, but the district court rejected fifty-five of them for a variety of reasons.[80] Because the district court found only one affidavit to be acceptable, it concluded that plaintiffs had not proved the existence of an aggrieved class.[81] The district court also held that the "raw statistics" proffered by plaintiffs did not establish that there was an aggrieved class of female employees since the statistics did not offer relevant comparisons of similarly situated female and male employees, nor did they indicate that other female employees felt aggrieved.[82]

The district court went on to find that even if the plaintiffs had demonstrated the existence of an aggrieved class, the named plaintiffs were not appropriate representatives because they were high-level employees and the circumstances of their employment were "particularly unique."[83] The court specifically noted that "considerations that underlie a decision regarding a lateral transfer from an upper level staff position to an equivalent line position are 'hardly typical' of the considerations underlying a . . . transfer between lower level positions."[84]

The district court decision in *Sheehan* preceded *Rossini* and seems to conflict with it. As stated above, the *Sheehan* court imposed a requirement not mentioned in *Falcon* or rule 23: that plaintiffs prove by affidavits the existence of a class that "feel[s] aggrieved."[85] Moreover, it relies on relatively minor factual distinctions between employees, while the *Rossini* court stressed the "common thread" to be found, for example, between employees making promotion and transfer claims.[86] Nonetheless, the Second Circuit affirmed the district court denial of class certification in *Sheehan* "on the ground of lack of class-wide proof of an aggrieved

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[79] Sheehan v. Purolator, Inc., 103 F.R.D. 641, 648 (E.D.N.Y. 1984), *aff'd*, 839 F.2d 99 (2d Cir.), *cert. denied*, 488 U.S. 891 (1988).

[80] *Id.* at 649. For example, eight were brought by exempt employees, five resulted in formal complaints with governmental agencies, two were dismissed by these governmental agencies for lack of probable cause, and one of the affiants was a male. *Id.*

[81] *Id.*

[82] *Id.* at 656.

[83] *Id.* at 651-52.

[84] *Id.* at 654.

[85] *Sheehan*, 103 F.R.D. at 649.

[86] *See* Rossini v. Ogilvy & Mather, Inc., 798 F.2d 590, 599 (2d Cir. 1986).

class."[87] It also discussed the district court's new requirement that to successfully achieve class certification, a plaintiff must submit affidavits from employees who feel aggrieved.[88] The court held "that the [district] court was not clearly erroneous in concluding that only one such affidavit was relevant; and that submitting an affidavit from only one aggrieved employee, other than the named plaintiffs, was insufficient to establish a class of aggrieved individuals."[89] Additionally, the Second Circuit held that the district court was not clearly erroneous in requiring that statistical data presented by plaintiffs at the class action stage must control for various relevant nondiscriminatory factors such as education, prior job history, or job level.[90]

After *Sheehan*, civil rights lawyers representing plaintiffs know the defense will charge them with submitting "not enough" affidavits in support of class certification. In fact, the need to submit such affidavits defeats the class action concept. First, it places the burden on the plaintiff or the plaintiff's attorney to solicit such affidavits from current or former employees of the defendant. The attempt to communicate with current employees could lead to accusations of unethical conduct.[91] Second, very few employees, even if they feel aggrieved, will be brave enough to cooperate with somebody suing their boss because fear of retaliation is universal. Even former employees resist giving affidavits involving their prior employers: those who do not have new jobs are concerned about references, while those who are employed want to maintain their reputations as team players and are unwilling to embroil themselves in controversies with former employers.

Moreover, the requirement that affidavits from potential class members be submitted raises the issue of how many are enough—one from a corporation of 200 employees, 100 from a corporation of 10,000 employees? The numbers game simply does not

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[87] Sheehan v. Purolator, Inc., 839 F.2d 99, 102 (2d Cir.), *cert. denied*, 488 U.S. 891 (1988).

[88] *See id.* at 102-04.

[89] *Id.* at 103.

[90] *Id.* Moreover, the *Sheehan* court also agreed with the district court that even the existence of a transportation department manual containing discriminatory statements was insufficient to justify certifying a class since "there was evidence from which the fact-finder reasonably could conclude that they were not in effect at corporate headquarters." *Id.*

[91] *See* Niesig v. Team I, 76 N.Y.2d 363, 374-75, 558 N.E.2d 1030, 1035-36, 559 N.Y.S.2d 493, 498-99 (1990) (discussing ethical consequences of communicating with adversary's employees).

make sense, nor does the district court's rule in *Sheehan* that each affiant have filed an administrative complaint that resulted in a probable cause finding.[92] This standard is actually more onerous than that placed upon named plaintiffs because an individual can file a federal action without having received a probable cause finding from a federal or state agency.[93] Finally, and most importantly, if the plaintiff has submitted evidence of a common practice or policy that may violate the civil rights laws, why should five or fifty non-party affidavits be necessary to add to the showing? If a class certification motion is not to be treated as a trial on the merits,[94] such an overwhelmingly evidentiary showing should be entirely unnecessary. The need for this evidentiary showing also conflicts with the court's directive in *Woe* that class certification be liberally granted because an appropriate decertification motion can be made at a later time.[95] It also serves to wear out the plaintiff and his or her counsel, overburden the court with paperwork, engender endless argumentation concerning the meaning of that paper and make the class action device so unwieldy that plaintiffs, attorneys and courts will naturally tend to shy away from bringing and certifying these suits.

The existence of both the *Rossini* and *Sheehan* cases as Second Circuit precedent leaves civil rights plaintiffs in limbo. While *Rossini* creates a standard that can be met without the necessity of a mini-trial on the merits and after reasonably narrow class action discovery, the *Sheehan* decision makes plaintiffs' attorneys wary of seeking class certification before extensive discovery has taken place. Moreover, the individual proclivities of district court judges will appear to control whether or not a case can be certified as a class action. Those judges with a favorable view of class actions can apply one test, and those who wish to narrow the scope of cases before them can apply another.

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[92] *See* Sheehan v. Purolator, Inc., 103 F.R.D. 641, 649 (E.D.N.Y. 1984), *aff'd*, 839 F.2d 99 (2d Cir.), *cert. denied*, 488 U.S. 891 (1988).

[93] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973) (agency determination of lack of reasonable cause does not preclude suit against employer in federal court). It is not uncommon for agencies to dismiss meritorious complaints for lack of probable cause. As Justice Blackmun noted in his dissenting opinion in *Kremer*, "inadequate staffing of state agencies can lead to 'a tendency to dismiss too many complaints for alleged lack of probable cause.'" Kremer v. Chemical Constr. Corp., 456 U.S. 461, 507 (1982) (Blackmun, J., dissenting); *see also infra* note 207 and accompanying text.

[94] Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78 (1974).

[95] Woe v. Cuomo, 729 F.2d 96, 107 (2d Cir.), *cert. denied*, 469 U.S. 936 (1984).

The court's apparent move in *Sheehan* toward restricting the use of class actions is especially chilling because the decision of a district court judge in this area is nonreviewable prior to a final judgment on the merits.[96] A civil rights plaintiff and attorney therefore are faced with the prospect that a judge rigidly applying the *Sheehan* rationale may squelch the objective of the client prior to meaningful discovery and trial. The attorney and client are thus left with the option of continuing the case through limited discovery and a circumscribed trial in order to appeal after final judgment. Realistically, many plaintiffs placed in this position will accept an individual settlement package, complete with a confidentiality order. From the point of view of the civil rights plaintiff and attorney, this resolution may be a disaster. First, the plaintiff has failed to meet his or her objective of testing the challenged corporate practices. Additionally, plaintiff's attorneys representing clients who have limited resources often handle employment discrimination cases based upon the prospect of receiving reasonable attorneys' fees pursuant to statute.[97] When a district court denies class certification, the plaintiff's attorney may have lost hundreds of hours of time spent preparing the class certification motion, unless the work was also necessary in order to pursue the case on the merits.

Therefore, after *Sheehan*, a private civil rights attorney must view the bringing of a class action as extraordinarily risky business. As a result, policies and practices that are infected with or result in racism and sexism may be left intact to fester.

III. SECTION 1981

No recent United States Supreme Court case has done more damage to the enforcement of individual employment discrimination cases based upon race than *Patterson v. McLean Credit Union*.[98] In *Patterson*, the Court, after threatening to eliminate one of the Civil War statutes, 42 U.S.C. § 1981, as a means of protecting the right of minorities to contract for their services on the same basis as whites, contented itself with narrowly interpreting

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[96] *See* United Airlines v. McDonald, 432 U.S. 385, 396 (1977).

[97] *See* 42 U.S.C. § 2000e-5(k) (1988) (court has discretion to award reasonable attorney's fees to prevailing party).

[98] 491 U.S. 164 (1989).

the meaning of "making and enforcement of contracts."[99] Focusing on the narrow issues before it, the Court ruled that racial harassment on the job was not actionable under section 1981 since it did not involve the formation of a contract or its enforcement, but only the "terms" of the employment contract.[100] With regard to plaintiff's claim of racial discrimination in promotions, the Court held that such a claim would be actionable under section 1981 "[o]nly where the promotion rises to the level of an opportunity for a new and distinct relation between the employee and the employer."[101] The Court left unanswered the question of whether viable section 1981 claims exist for suits alleging terminations of employment contracts based on race discrimination.

Even absent section 1981, aggrieved persons would still have a cause of action for racial discrimination in employment under Title VII. Plaintiffs' claims, however, would certainly be worth significantly less if they were limited to Title VII. Under section 1981, plaintiffs are entitled to a jury, which may award compensatory damages for the pain, suffering, and humiliation of racial discrimination, as well as punitive damages.[102] By contrast, under Title VII, an individual plaintiff is limited to compensation only for economic loss in the form of wages and benefits.[103] *Patterson*'s restrictions on section 1981 actions inevitably will mean that many fewer employment discrimination cases based on race will be filed in the federal courts. Assume, for example, that a low-paid person is terminated on the basis of race and is out of work for a relatively short period of time thereafter. That person will have difficulty showing much economic loss under Title VII. As a result, such a

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[99] *Id.* at 180. The Court originally granted certiorari to decide whether plaintiff's racial harassment claim was actionable under § 1981 and whether the jury instruction on the § 1981 promotion claim was erroneous. However, after oral argument on these issues, the Court asked the parties to brief and argue the question of whether Runyon v. McCrary, 427 U.S. 160 (1976), should be overruled. *Patterson*, 491 U.S. at 171. *Runyon* had held that § 1981 prohibited racial discrimination in the making and enforcement of private contracts. *Runyon*, 427 U.S. at 172-73.

[100] 491 U.S. at 179.

[101] *Id.* at 185.

[102] *See id.* at 211-12 (Brennan, J., concurring in part and dissenting in part).

[103] *Id.* Plaintiff may sometimes obtain pain and suffering damages under state antidiscrimination laws. *See, e.g.*, N.Y. EXEC. LAW § 296 (McKinney 1982). For Example, the Second Circuit has held that in New York an Executive Law claim can be brought in federal court as a pendent state claim, where plaintiff has not previously filed a charge with the New York State Division of Human Rights or where the New York State Division of Human Rights has dismissed the charge for administrative convenience. *See* Promisel v. First Am. Artificial Flowers, Inc., 1991 WL 168373 (2d Cir. Sept. 4, 1991).

victim of racial discrimination will rarely file a complaint and the conduct of the employer will go unpunished and unchecked.

The circuit courts have struggled with the issue of whether *Patterson* forecloses termination claims under section 1981. By the time the Second Circuit received a case raising this issue, other circuits had considered the question. The Eighth Circuit had ruled in *Hicks v. Brown Group*[104] that *Patterson* does not foreclose a termination claim under section 1981.[105] The Fifth and Ninth Circuits, however, have ruled that *Patterson* does eliminate such claims.[106]

Faced with this conflict, the Second Circuit chose the more restrictive approach. It ruled in *Gonzalez v. Home Insurance Co.*[107] that run-of-the-mill termination claims under section 1981 should be dismissed in light of *Patterson*.[108] The court, however, did create an exception. It ruled that if a plaintiff could "in good faith" allege that an employer intended at the time it entered into the contract to dismiss the employee on the basis of race, the claim may not be foreclosed.[109]

Gonzalez was followed by *Patterson v. Intercoast Management of Hartford*,[110] in which another panel of the Second Circuit reached the same conclusion and refused to allow the plaintiff to replead based upon a claim that at the time of the formation of the contract, the employer refused to contract on racially neutral terms.[111] The court found such claims to be "dubious" under *Patterson* and ruled that highly specific proof of a racial nature would be necessary to establish such a claim.[112] Because such proof is notoriously difficult to obtain,[113] few plaintiffs will be able to challenge terminations on this basis.

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[104] 902 F.2d 630 (8th Cir. 1990).

[105] *Id.* at 635-48.

[106] *See* Courtney v. Canyon Television & Appliance Rental, Inc., 899 F.2d 845, 849 (9th Cir. 1990); Lavender v. V&B Transmissions & Auto Repair, 897 F.2d 805, 807-08 (5th Cir. 1990).

[107] 909 F.2d 716 (2d Cir. 1990).

[108] *Id.* at 722.

[109] *Id.*

[110] 918 F.2d 12 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1686 (1991).

[111] *Id.* at 14.

[112] *Id.* For example, in cases where there are written employment contracts, the contracts would have to contain different terms for white and non-white employees.

[113] *See, e.g.*, Robinson v. 12 Lofts Realty, 610 F.2d 1032, 1043 (2d Cir. 1979) (because evidence of overt racial motivation is hard to find, "courts must be alert to recognize means that are subtle and explanations that are synthetic").

In conclusion, the Second Circuit's restrictive reading of the scope of section 1981 poses an additional and significant barrier to the elimination of racial discrimination in employment.

IV. Use of Sanctions

From the outset, the 1983 amendments to rule 11 of the Federal Rules of Civil Procedure[114] had the potential for discouraging civil rights plaintiffs and their attorneys from prosecuting cases for two reasons. First, the history of the law in this area is the history of attempts, successful and unsuccessful, to extend, modify, or reverse existing law to provide greater protections for civil rights. To sanction the filing and prosecution of such cases, unless courts find that they are supported by "good faith argument[s],"[115] is to discourage attorneys from attempting to broaden legal protections for individuals. Second, employment discrimination litigation almost always involves litigation between two parties with vastly unequal resources. The imposition of sanctions against an individual whose job is already threatened or lost creates a much greater hardship than does the imposition of sanctions against a corporate party. The destructive use to which rule 11 and other sanctions provisions have been put in civil rights cases during the last seven years has been discussed extensively by commentators.[116]

The issue was recently raised in the Second Circuit in *Greenberg v. Hilton International Co.* ("*Greenberg I*").[117] In *Greenberg I*, the court addressed several issues concerning the appropriate-

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[114] Fed. R. Civ. P. 11. The 1983 amendments to rule 11 were adopted in response to growing concern over the rule's failure to deter attorneys from engaging in abusive practices and frivolous litigation. *See id.* advisory committee note, *reprinted in* 97 F.R.D. 198, 198. The amendments changed the existing rule in a number of significant ways, including: (1) extending applicability to all parties, not just attorneys; (2) requiring "reasonable inquiry" before filing any paper or motion to ascertain the facts and the law upon which the paper is based; (3) requiring that all motions made, or papers filed, be "well grounded in fact and . . . warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law"; (4) imposing sanctions on the signor, the represented party, or both if a pleading, motion, or other paper is signed in violation of the rule. *See* J. Moore & J. Lucas, Moore's Federal Practice § 11.01[3] (2d ed. 1984).

[115] Fed. R. Civ. P. 11.

[116] *See, e.g.*, Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. Pa. L. Rev. 2179, 2184-85 (1989) (procedural obstacles in rule 23 and substantive bias of rule 11 have crippling effect on civil rights actions); Grosberg, *Illusion and Reality in Regulating Lawyer Performance: Rethinking Rule 11*, 32 Vill. L. Rev. 575, 645 n.279 (1987) (statistics suggest rule 11 used against civil rights claimants in disparate proportions).

[117] 870 F.2d 926 (2d Cir. 1989) [hereinafter *Greenberg I*].

ness of rule 11 sanctions in the context of an employment discrimination case. First, the court considered the appropriateness of discovery sanctions where plaintiff's counsel told the district court she required certain documents to perform a professional statistical analysis, but after receiving the documents, did not submit them to an expert.[118] On defendant's motion for sanctions, plaintiff's counsel explained that her own rough statistical analysis revealed that the documents would not prove discrimination and that she therefore did not retain an expert to save money for her client, who was chronically ill and living on Social Security.[119] The Second Circuit panel initially reversed the district court's denial of the motion and sanctioned the attorney for misleading the district court about her intention to hire an expert.[120] However, on rehearing in *Greenberg v. Hilton International Co.* ("*Greenberg II*"),[121] the panel ordered the district court to examine counsel's document analysis to determine whether it was sufficiently professional to have fulfilled plaintiff's counsel's promise to the court.[122]

The *Greenberg I* court also discussed the question of how subsequent case law affects obligations under rule 11.[123] In *Greenberg I*, the plaintiff alleged constructive discharge in her complaint, which was filed in early 1984, and the claim survived a summary judgment motion.[124] In 1985, however, the Second Circuit upheld the dismissal of a constructive discharge claim in *Martin v. Citibank*,[125] a case with facts that the court described as more egregious than those in *Greenberg I*.[126]

Three years later, Greenberg's motion to dismiss her complaint because of poor health was granted by the district court.[127] At that point, the district court and the Second Circuit considered whether plaintiff or her attorney should be sanctioned for having failed to withdraw the constructive discharge claim after *Martin*

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[118] *Id.* at 937-39.

[119] *Id.* at 933.

[120] *Id.* at 938-39.

[121] 875 F.2d 39 (2d Cir. 1989) [hereinafter *Greenberg II*].

[122] *Id.* at 41-42. In *Greenberg II*, the court concluded that an award of attorneys' fees should not be made against Greenberg herself because of her financial condition and because there was no indication that she affirmatively participated in pursuing the discovery. *Id.* at 42.

[123] *See Greenberg I*, 870 F.2d at 936-37.

[124] *Id.* at 929-30.

[125] 762 F.2d 212 (2d Cir. 1985).

[126] *See Greenberg I*, 870 F.2d at 936-37.

[127] *Id.* at 932-33.

was decided.[128] The Second Circuit held that counsel may not be sanctioned under rule 11 for failing to withdraw a claim based on papers that have previously survived a motion for summary judgment as long as that ruling was not obtained by misleading the court, the adversary had not attempted to obtain withdrawal of that claim based on a change or clarification of existing law, and the claim had not been repeated in papers filed after the change or clarification of law.[129]

Greenberg had also raised a claim of promotion discrimination. With regard to that claim, the Second Circuit held:

> Because the threshold for a prima facie case [of employment discrimination] is low, sanctions may be applied only when a reasonably competent attorney would conclude that there is not an evidentiary basis sufficient to cross even that threshold. Otherwise, Rule 11 would chill not only the assertion of facially meritless claims, but also claims that are weak but potentially viable.[130]

The court also noted that, at the outset, plaintiff's counsel had reason to believe that her client's claim had a factual basis and was entitled to rely upon her client's statements, "particularly since much of the relevant information was within the control of the defendant."[131]

Significantly, the court on rehearing addressed the NAACP Legal Defense & Educational Fund's argument as amicus curiae that "the wide-spread use of Rule 11 in civil rights cases has discouraged private counsel from taking such cases."[132] The court explained that in its original opinion sanctioning plaintiff's counsel it did not intend to chill Title VII claims per se, but merely to sanction discovery misconduct.[133]

Despite this disclaimer, several facets of this case raise troubling issues for civil rights cases in particular. First, with regard to the question of discovery sanctions, the vastly different economic resources of the parties make it likely that a plaintiff's decisions concerning whether or not to hire an expert will be much more painful, difficult and subject to change than those of a defend-

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[128] *See id.* at 936-37.
[129] *Id.* at 937.
[130] *Id.* at 935.
[131] *Id.*
[132] *Greenberg II*, 875 F.2d at 42.
[133] *Id.*

ant.[134] Second, at the outset of an employment discrimination case, unlike many other cases, much of the relevant information is within the defendant's control.[135] Moreover, the increasing stringency of the burdens of proof in civil rights cases makes the necessary statistical analyses more and more time-consuming and expensive, requiring greatly increased amounts of data.[136] The extensive discovery needed to prove a Title VII case, coupled with defendant's resistance to such discovery, can drag out these cases for many years, which is what happened before *Greenberg I* came to trial. During the course of litigation, it is not uncommon for a plaintiff's financial situation to deteriorate.

The court's analysis of the constructive discharge claim also raises difficult issues. If defendant had moved for summary judgment again after the *Martin* decision, would plaintiff's counsel have been ethically prohibited from opposing the motion? The *Martin* case did not involve a new rule of constructive discharge law, merely the application of that law to a different set of facts. Since all these cases are highly fact-specific, reasonable attorneys and judges can differ as to whether the facts in one case are more or less egregious than those in another. In the absence of definitive Supreme Court standards with respect to constructive discharge, plaintiffs should not be sanctioned for pressing such claims in a variety of factual contexts.

Finally, neither *Greenberg I* nor *Greenberg II* discusses the special role courts have assigned to plaintiffs in civil rights actions as private attorneys general, enforcing statutes not only for individual benefit, but for the greater good.[137] Therefore, despite the

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[134] *See* West V. Univ. Hosps. v. Casey, 111 S. Ct. 1138, 1148 (1991) (expert witness fees not recoverable by prevailing party).

[135] *See, e.g., Greenberg I*, 870 F.2d at 935 (noting that relevant information was within control of defendants).

[136] *See, e.g.*, Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 650-55 (1989) (plaintiffs' statistical analysis flawed for failing to consider differences in qualifications between two pools of workers); Sheehan v. Purolator, Inc., 839 F.2d 99, 103-04 (2d Cir.) (upholding district court ruling that plaintiff's statistical evidence was flawed for failing to take into account relevant nondiscriminatory factors), *cert. denied*, 488 U.S. 891 (1988).

[137] *See, e.g.*, Newman v. Piggie Park Enters., 390 U.S. 400, 402 (1968) (plaintiff seeking injunction under Civil Rights Act of 1964 "does so not for himself alone but also as a 'private attorney general' vindicating a [congressional] policy"); Red Bull Assocs. v. Best W. Int'l, Inc., 862 F.2d 963, 966 (2d Cir. 1988) (as "private attorneys general," plaintiffs carry out important civil rights objectives). The term "private attorney general" first was used by the Second Circuit in Associated Indus. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943), to describe any private individual who would "vindicate the public interest." *Id.* at 695.

court's assurances to the contrary, the *Greenberg* decisions may, in fact, have a chilling effect on litigation of employment discrimination cases by plaintiffs of limited means.

V. Problems of Proof

Employment discrimination cases have long been classified for purposes of analysis into two types: disparate treatment and disparate impact. The broad contours of the former type of case have long been established by the United States Supreme Court.[138] Essentially, two issues have been left to the lower courts: how much evidence is necessary to show that an allegedly nondiscriminatory reason was, in fact, a pretext for discrimination; and what standard of causation should be applied.

Concerning the first issue, it is undisputed that pretext can be very difficult to prove. The Second Circuit in particular has long been sensitive to the difficulties plaintiffs face in proving that a decision was improperly motivated. Thus, in *Robinson v. 12 Lofts Realty, Inc.*,[139] a case involving alleged discrimination against a black prospective buyer of a cooperative apartment,[140] the court emphasized:

> In its deliberations, the [district] court must remember that "clever men may easily conceal their motivations." "As overtly bigoted behavior has become more unfashionable, evidence of intent has become harder to find. But this does not mean that racial discrimination has disappeared." It means that when a discriminatory effect is present, the courts must be alert to recognize

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[138] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-56 (1981) (describing plaintiff's burden in establishing case of disparate treatment and defendant's burden on rebuttal); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973) (four circumstances plaintiff must show to establish a prima facie case of racial discrimination).

[139] 610 F.2d 1032 (2d Cir. 1979).

[140] *Id.* at 1033. Case law involving Title VIII, the Fair Housing Act, has long been held to be analogous to case law interpreting Title VII and vice versa. *See, e.g.*, NAACP v. Town of Huntington, 844 F.2d 926, 935 (2d Cir.) (noting "parallel between Title VII and Title VIII" as part of coordinated anti-discriminatory plan of Congress), *aff'd*, 488 U.S. 15 (1988); Smith v. Town of Clarkton, 682 F.2d 1055, 1065 (5th Cir. 1982) ("anti-discrimination objectives of Title VIII are parallel to goals of Title VII"); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 146-48 (3d Cir. 1977) (comparing Titles VII and VIII to decide Title VIII case), *cert. denied*, 435 U.S. 908 (1978). The United States Supreme Court has held that both Title VII and Title VIII should be broadly construed to promote the congressional purpose of eliminating discrimination. *See* Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211-12 (1972) (Title VIII must be construed expansively to promote integrated housing); Griggs v. Duke Power Co., 401 U.S. 424, 429-36 (1971) (broad application of Title VII necessary to achieve congressional objective of ensuring equal employment opportunities).

means that are subtle and explanations that are synthetic.[141]

Sweeney v. Research Foundation of the State University of New York[142] appears to stray somewhat from the stringent standard set forth in *Robinson*. In *Sweeney*, an employment discrimination case involving sex discrimination, the Second Circuit did note that the evidence produced by the defendant should be "objective and competent. Subjective evaluations are not adequate by themselves because they may mask prohibited prejudice."[143] However, the district court did not critically scrutinize the "objective reasons" proffered by the defendant and concluded that the defendant's "exercise of traditional management prerogatives constituted a legitimate and non-discriminatory basis for [the] defendant's actions."[144] The Second Circuit reviewed the evidence and held that the district court's conclusion was not clearly erroneous.[145]

More recent Second Circuit cases have continued to instruct lower courts to scrutinize carefully defendants' proffered reasons, as well as the circumstances surrounding challenged termination decisions. Thus, in *Ramseur v. Chase Manhattan Bank*,[146] the court stated that "[i]n assessing the inferences to be drawn from the circumstances of the termination, the court must be alert to the fact that '[e]mployers are rarely so cooperative as to include a notation in the personnel file' that the firing is for a reason expressly forbidden by law."[147] More recently, in *Sumner v. United States Postal Service*,[148] the Second Circuit held that a supervisor's remark that plaintiff had a "war-like attitude" lent credence to the claim of discriminatory animus, seen in the context of the supervisor's hostility toward the plaintiff and the plaintiff's history of charging racism.[149] The Second Circuit, therefore, reversed the decision of the district judge dismissing Sumner's complaint after trial.[150] Similarly, in *Rosen v. Thornburgh*,[151] the Second Circuit

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[141] *Robinson*, 610 F.2d at 1043 (citations omitted).

[142] 711 F.2d 1179 (2d Cir. 1983).

[143] *Id.* at 1185 (citations omitted).

[144] *Id.* at 1186.

[145] *Id.*

[146] 865 F.2d 460 (2d Cir. 1989).

[147] *Id.* at 464-65 (quoting Thornbrough v. Columbus & Greenville R.R., 760 F.2d 633, 638 (5th Cir. 1985)).

[148] 899 F.2d 203 (2d Cir. 1990).

[149] *Id.* at 210-11.

[150] *Id.* at 211. A similarly searching analysis by the Second Circuit of an employer's

recognized

> that employment discrimination is often accomplished by discreet manipulations and hidden under a veil of self-declared innocence. An employer who discriminates is unlikely to leave a "smoking gun," such as a notation in an employee's personnel file, attesting to a discriminatory intent. A victim of discrimination is therefore seldom able to prove his or her claim by direct evidence and is usually constrained to rely on the cumulative weight of circumstantial evidence.[152]

So-called pattern and practice cases, group disparate treatment cases in which statistics are used to make out a prima facie case, should be distinguished from the common individual disparate treatment cases described above. The Second Circuit, following the lead of the United States Supreme Court in *International Brotherhood of Teamsters v. United States*,[153] has placed a much heavier burden on plaintiffs in that situation, scrutinizing carefully the statistical evidence presented. For example, in *J. Ste. Marie v. Eastern Railroad*,[154] the plaintiffs' expert had shown that women were overrepresented in clerical positions and underrepresented in technical and managerial positions.[155] However, the court held that the data were flawed because they did not analyze whether women in clerical positions (such as secretaries and typists) were qualified for, or interested in, the higher level jobs.[156]

Another controversial issue in disparate treatment litigation that raged throughout the 1980's was causation: must an individual

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stated reasons for the challenged action revealed pretext in Ibrahim v. New York State Dep't of Health, 904 F.2d 161, 168 (2d Cir. 1990) ("Department's proffered reasons were patently pretextual"). In Schmitz v. St. Regis Paper Co., 811 F.2d 131 (2d Cir. 1987), the Second Circuit affirmed a district court decision finding pretext based on explanations by defendant that changed over time. *Id.* at 133.

[151] 928 F.2d 528 (2d Cir. 1991).

[152] *Id.* at 533 (citations omitted).

[153] 431 U.S. 324 (1977).

[154] 650 F.2d 395 (2d Cir. 1981).

[155] *Id.* at 400.

[156] *Id.* The court stated that the burden that is shifted to the defendant once a plaintiff establishes a prima facie case is not a burden of persuasion, but rather a burden of production requiring the defendant to articulate a nondiscriminatory reason for rejecting the minority employee. *See id.* at 399 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)). In a pattern and practice disparate treatment case, as in an individual disparate treatment case, the burden of persuasion remains on the plaintiff throughout the action. *See id.*; *see also* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) (in an individual disparate treatment case burden of persuasion remains on plaintiff throughout action).

prove that discrimination was a "but for" cause of the protested decision, simply a cause of the decision, or something in between?[157] The plurality opinion in *Price Waterhouse v. Hopkins*[158] sets forth the view that an employee should not be required to show that sex, for example, was a "but for" cause of the challenged decision.[159] Instead, Justice Brennan suggested that where an employee proved that sex was a motivating factor in the employment decision, the burden should shift to the employer to show by a preponderance of the evidence that it would have made the same decision even if it had not considered sex as a factor.[160] Justice O'Connor's concurring opinion in *Price Waterhouse*, however, stressed that the "mixed motive" formulation should only apply where a plaintiff presented *direct* evidence of discrimination, and required plaintiff to show under this formulation that the improper motive was a "substantial" factor.[161] This analysis excludes the majority of disparate treatment cases, which are supported only by circumstantial evidence, from those, like *Price Waterhouse*, in which the plaintiff actually has direct evidence of discrimination.

In the wake of *Price Waterhouse*, the courts of appeals, including the Second Circuit, have blurred the distinction between Justice O'Connor's concurring opinion and the plurality opinion.[162] Thus, in *Grant v. Hazelett Strip-Casting Corp.*,[163] the Second Circuit held:

> Once the plaintiff establishes by direct evidence that an illegitimate factor played a motivating *or* substantial role in an employment decision, the burden falls to the defendant to prove by a preponderance of the evidence that it would have made the same decision even if it had not taken the illegitimate factor into account.[164]

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[157] *Compare* Bellissimo v. Westinghouse Elec. Corp., 764 F.2d 175, 179 (3d Cir. 1985), *cert. denied*, 475 U.S. 1035 (1986) ("but for" cause) *with* Berl v. Westchester County, 849 F.2d 712, 714-15 (2d Cir. 1988) ("substantial part").

[158] 490 U.S. 228 (1989).

[159] *See id.* at 239-42.

[160] *Id.* at 244-45.

[161] *Id.* at 276-79 (O'Connor, J., concurring).

[162] The plurality opinion was written by Justice Brennan, who was joined by Justices Marshall, Blackmun, and Stevens. *Id.* at 228-58. Justice White and Justice O'Connor each filed a concurring opinion. *Id.* at 258-79. Justice Kennedy filed a dissenting opinion in which Chief Justice Rehnquist and Justice Scalia joined. *Id.* at 279-95.

[163] 880 F.2d 1564 (2d Cir. 1989).

[164] *Id.* at 1568 (emphasis added) (citing plurality opinion and Justice O'Connor's con-

In *Barbano v. Madison County*,[165] the Second Circuit elaborated on the need to present "direct" evidence. In that case, the court held that "the key inquiry on this aspect of the case is whether the evidence is direct, that is, whether it shows that the impermissible criterion *played some part* in the decision-making process."[166]

These interpretations of *Price Waterhouse*, however, leave open the question of the causation requirement in cases where the only evidence of discrimination is circumstantial. A recent Second Circuit case under the Age Discrimination in Employment Act of 1967[167] held that the impermissible factor must be "a factor that made a difference" in making the decision.[168] After *Price Waterhouse*, this standard appears to be a reasonable compromise between a "but for" cause standard and the more lenient standards that apply where there is direct evidence of discrimination.

The sensitivity of the federal courts towards the difficulties in proving discriminatory treatment cases contrasts with their attitudes toward discriminatory impact cases. The Second Circuit has been no exception. For example, in *Zahorik v. Cornell University*,[169] the court, following *Pouncy v. Prudential Insurance Co.*,[170] required that plaintiffs prove that "clear and convincing" evidence of a "substantially discriminatory effect" exists before an impact standard can be applied.[171] The court cited three cases in support of this requirement: *International Brotherhood of Teamsters*, *Griggs v. Duke Power Co.*,[172] and *Grant v. Bethlehem Steel Corp.*[173] However, none of these cases set forth the requirement that disparate impact be proved by "clear and convincing evidence" rather than by the usual "preponderance of the evidence." While the requirement that disparate impact be proved by "clear and convincing evidence" has not been widely adopted, courts have continued to increase the burden of proof required of plaintiffs to prove a disparate impact case.

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curring opinion in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)).

[165] 922 F.2d 139 (2d Cir. 1990).

[166] *Id.* at 145 (emphasis added).

[167] 29 U.S.C. §§ 621-34 (1988 & Supp. 1991).

[168] Paolillo v. Dresser Indus., 884 F.2d 707, 707 (2d Cir.), *modifying* 865 F.2d 37 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1169 (1990).

[169] 729 F.2d 85 (2d Cir. 1984).

[170] 668 F.2d 795 (5th Cir. 1982).

[171] *Zahorik*, 729 F.2d at 96.

[172] 401 U.S. 424, 430 n.6 (1971).

[173] 635 F.2d 1007, 1010 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1988).

For example, in 1988, in *Watson v. Fort Worth Bank & Trust Co.*,[174] the United States Supreme Court held that the disparate impact analysis may, in principle, be applied to subjective as well as objective employment practices.[175] However, the Court then modified the evidentiary standards for disparate impact cases. The Court held that to prove a prima facie case, the plaintiffs must identify the specific employment practice challenged and "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 group*."[176] The Court held that the statistical disparities presented by plaintiff "must be sufficiently substantial that they raise such an inference of causation."[177]

The following year in *Wards Cove Packing Co. v. Atonio*,[178] the United States Supreme Court again made it significantly harder to prove a case of disparate impact. Under *Wards Cove*, plaintiffs must 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."[179] The *Wards Cove* Court also significantly changed the law by holding that in a disparate impact case the burden of persuasion remains with the plaintiff at all times,[180] so it is now the plaintiff, not the defendant, who carries the burden of proving there is no legitimate business justification for defendant's action. If the plaintiff cannot persuade the trier of fact on the question of the business necessity defense, he or she must "persuade the factfinder that 'other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate [hiring] interest[s].' "[181] By placing heavier burdens on plaintiffs in establishing a prima facie case and disproving the business justification defense, *Wards Cove* made it much more difficult for plaintiffs to prevail.

The Second Circuit has interpreted *Wards Cove* strictly. In

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[174] 487 U.S. 977 (1988).
[175] *Id.* at 999-1000.
[176] *Id.* at 994 (emphasis added).
[177] *Id.* at 995.
[178] 490 U.S. 642 (1989).
[179] *Id.* at 657.
[180] *See id.* at 660 ("persuasion burden . . . must remain with plaintiff").
[181] *Id.* (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975)).

EEOC v. Joint Apprenticeship Committee ("*JAC*"),[182] the court considered a case factually very similar to *Griggs*, the case in which the disparate impact standard was first enunciated.[183] The Joint Apprenticeship Committee ("JAC") administered an apprentice training program that had a high school diploma requirement.[184] The EEOC alleged that the diploma requirement discriminated against blacks.[185] In support of their motion for partial summary judgment, the EEOC presented statistics showing that blacks constituted 18.3% of the pertinent pool of potential applicants, but only 12.2% of the actual applicant pool.[186] The EEOC also proved that 89.2% of whites between the ages of nineteen and twenty-two had high school diplomas, whereas only 68.3% of blacks in the same age group had high school diplomas and that a higher percentage of black applicants than white applicants lacked diplomas.[187] Therefore, the EEOC argued that the use of the high school diploma criterion had an adverse impact on blacks.[188] In addition, the EEOC presented statistics demonstrating the disparity in JAC's evaluation of black and white applicants: a much higher percentage of white applicants than black applicants was found acceptable.[189]

The district court granted the EEOC's motion for partial summary judgment.[190] On appeal, however, the Second Circuit vacated the district court's order.[191] The court quoted the *Wards Cove* language stating that plaintiffs must demonstrate "that the disparity they complain of is the result of one or more of the employment practices that they are attacking here, specifically showing that each challenged practice has a significantly disparate impact on

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[182] 895 F.2d 86 (2d Cir. 1990).

[183] *See Griggs*, 401 U.S. at 432 ("Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation") (emphasis in original). The *Wards Cove* Court did not specifically overrule *Griggs*.

[184] *Joint Apprenticeship Comm.*, 895 F.2d at 87. The program also required that applicants be no more than 22 years of age if they had not served in the armed forces and no more than 26 years of age if they were veterans. *Id.* The EEOC challenged this latter requirement on the ground of sex discrimination. *Id.*

[185] *Id.*

[186] *Id.* at 87-88.

[187] *Id.* at 88.

[188] *Id.*

[189] *Id.*

[190] *Id.* at 89.

[191] *Id.* at 91.

employment opportunities for whites and nonwhites."[192] In *JAC*, the EEOC seems to have met this burden by showing that the particular employment practice—the high school diploma requirement—adversely impacted minorities because fewer minorities than whites had high school diplomas.[193] This was precisely the case in *Griggs*.[194] However, the Second Circuit, not even citing *Griggs*, held that "in order to make out a prima facie case of disparate impact under Title VII, the plaintiff must establish that the challenged employment practice caused the statistical disparity."[195] The Second Circuit criticized the district court for not requiring the plaintiffs to meet the standard and required that the district court further consider the matter in light of the principles set forth in *Wards Cove*.[196]

While the Second Circuit specifically expressed "no view as to the sufficiency of EEOC's statistics to establish the requisite disparities, or as to whether summary judgment is appropriate with respect to the issue of causation,"[197] it also gave no guidance to the district court about the meaning of the "causation" requirement, or how plaintiffs can meet this burden. For example, it is unclear whether the court meant to subject plaintiffs to the onerous requirement of proving that each rejected black applicant was rejected *because* of the lack of a high school diploma. This would only be possible where the potential employer had kept scrupulously detailed records, all of which were made available to plaintiffs. On the other hand, the district court may find on remand that the high school diploma statistics presented by the EEOC were sufficient to meet the causation requirement.[198]

It may be that courts are now fundamentally uncomfortable with the idea that an employment practice may be racially discriminatory without proof that the employer intended it to be so. Yet, the use by employers of facially neutral requirements such as high school diplomas obviously can have a devastating impact on

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[192] *Id.* at 90 (quoting *Wards Cove*, 490 U.S. at 657).

[193] *See id.* at 88.

[194] *See Griggs*, 401 U.S. at 427 (defendant company required high school diploma for assignment to any department but labor and for any transfer out of labor).

[195] *Joint Apprenticeship Comm.*, 895 F.2d at 90.

[196] *Id.* at 91.

[197] *Id.*

[198] *Cf.* Lowe v. Commack Union Free School Dist., 886 F.2d 1364, 1370-71 (2d Cir. 1989) (disparate impact case must focus on specific procedure, not hiring process as a whole), *cert. denied*, 110 S. Ct. 1470 (1990).

minority hiring. Moreover, it is equally obvious that a high school diploma, for example, is not needed for many jobs. If non-job related criteria are left in place in a society in which minorities and women have fewer credentials than white men, these disadvantaged groups will continue to be excluded from many forms of employment. Any serious judicial effort to create greater workplace equality must therefore include clear and workable standards for disparate impact claims as well as for disparate treatment claims.

VI. Preliminary Injunctions

Fear is never far from the minds of employees who claim their employers have discriminated against them and wish to challenge the offensive conduct. Civil rights attorneys counseling such persons inevitably discuss the practical meaning of Title VII's prohibitions against retaliation. Put simply, prospective plaintiffs want to know whether their lawyers can keep them on the job if they are retaliated against after filing charges or if they may find themselves on the street without any immediate, effective remedy. Some prospective plaintiffs who have been discharged for what they claim to be discriminatory reasons in violation of Title VII also want to know whether they can be restored to work prior to going through the entire administrative process and prosecuting federal court actions to conclusion.

The Second Circuit ruled at a fairly early stage of interpreting Title VII that an employee who was fired from a position for allegedly discriminatory reasons could not obtain preliminary relief. The theory of the court was that the employee could not show irreparable harm.[199] While this reasoning was harsh in that the alleged victim of discrimination would have to find other employment, the court held that a defendant employer would not be required to reinstate such an employee before a court found that the employee's discharge was discriminatory.

Plaintiffs who allege they have been discharged in retaliation for their opposition to discrimination present far greater equitable claims for immediate reinstatement. The Second Circuit explained

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[199] *See* Caulfield v. Board of Educ., 583 F.2d 605, 610 (2d Cir. 1978) (teachers seeking to enjoin school board's ethnicity survey denied injunction for failure to show possible irreparable injury or probable success on merits); Faro v. New York Univ., 502 F.2d 1229, 1231-32 (2d Cir. 1974) (plaintiff seeking preliminary injunction against "demotion" denied relief for failure to show irreparable harm or likelihood of success on merits).

in a 1982 opinion:

> [W]e think it plain that for the court to renounce its incidental equity jurisdiction to stay such employer retaliation pending the EEOC's consideration would frustrate Congress's purposes. Unimpeded retaliation during the now-lengthy (180-day) conciliation period is likely to diminish the EEOC's ability to achieve conciliation. It is likely to have a chilling effect on the complainant's fellow employees who might otherwise desire to assert their equal rights, or to protest the employer's discriminatory acts, or to cooperate with the investigation of a discrimination charge. And in many cases the effect on the complainant of several months without work or working in humiliating or otherwise intolerable circumstances will constitute harm that cannot adequately be remedied by a later award of damages.[200]

The Second Circuit, however, immediately began to retreat from this position. The very next year, the court ruled that it would not "accept the EEOC's suggestion that there is irreparable injury sufficient to warrant a preliminary injunction in every retaliation case."[201] Instead, the court directed the district court to judge the possibility of weakened civil rights enforcement as one factor to be weighed in determining whether irreparable injury exists.[202] Moreover, the court held that the district court judge on remand could consider claims that hostility existed between the plaintiff and her former colleagues as a factor militating against preliminary relief.[203] Suggestively, the Second Circuit also noted that there was precedent to award monetary damages rather than reinstatement in a retaliatory discharge case even after a ruling on the merits.[204]

The Second Circuit's last ruling in this line of cases was *Stewart v. Immigration & Naturalization Service*,[205] in which the court acknowledged that its earlier cases recognized the potential chilling effect of a retaliatory discharge "as an example of an extraordinary circumstance which might constitute irreparable harm."[206] However, the court held that proof that the discharge was degrading

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[200] *Sheehan*, 676 F.2d at 885-886 (footnote omitted).

[201] Holt v. Continental Group, 708 F.2d 87, 91 (2d Cir. 1983), *cert. denied*, 465 U.S. 1030 (1984).

[202] *Id.*

[203] *Id.*

[204] *Id.* (citing EEOC v. Kallir, Philips, Ross, Inc., 420 F. Supp. 919, 926-27 (S.D.N.Y. 1976), *aff'd mem.*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977)).

[205] 762 F.2d 193 (2d Cir. 1985).

[206] *Id.* at 200.

and humiliating and that it damaged the reputation of the victim of retaliation and prevented the victim from adequately providing for his or her family was insufficient to constitute irreparable harm.[207] Clearly, the Second Circuit was sending a warning: plaintiffs alleging retaliatory discharge should not expect preliminary injunctions ordering them reinstated unless they are able to provide proof of extraordinary damage. After *Stewart*, employment discrimination lawyers are on notice to advise their clients that in all likelihood the judicial system will not protect them from retaliatory discharge.

CONCLUSION

Given the almost complete lack of government enforcement in the civil rights arena,[208] society relies upon individual plaintiffs, who are often in financially straitened circumstances, to bring high-risk cases to the attention of the federal judiciary. As described above, these plaintiffs and their lawyers operate at a tremendous disadvantage. In most cases, they find themselves opposed by large corporations with seemingly limitless resources or by publicly funded counsel unworried about their day-to-day costs and fees. By contrast, plaintiffs' lawyers in many cases must advance their own expenses over years of complex litigation. In addition, they will receive their fees only if their clients prevail, and these fees will be determined by district courts exercising great discretion.[209]

Moreover, civil rights plaintiffs commonly operate in factually uncharted territory. Rarely is there a case in this area of the law

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[207] *Id.* By contrast, the Fifth and Eleventh Circuits presume irreparable harm in Title VII retaliation cases. *See, e.g.*, Baker v. Buckeye Cellulose Corp., 856 F.2d 167, 169 (11th Cir. 1988) ("courts are to presume irreparable harm in Title VII cases"); Middleton-Keirn v. Stone, 655 F.2d 609, 612 (5th Cir. 1981) (for purposes of preliminary injunction in Title VII cases, "irreparable injury is presumed").

[208] *See Kremer*, 456 U.S. at 507 n.22 (Blackmun, J., dissenting) (describing problems associated with administrative agency enforcement). The General Accounting Office reported that in six EEOC field offices and five state agencies, 40 to 80% of the cases closed "were not fully investigated"; "critical evidence was not verified" in these cases; and "relevant witnesses were not interviewed in at least 20 percent" of the cases in seven of the 11 offices investigated. Hoopes, *Working Late: The Case of the Myopic Watchdog*, MOD. MATURITY (1989).

[209] *See, e.g.*, Jones v. Amalgamated Warbasse Houses, Inc., 721 F.2d 881, 884 (2d Cir. 1983) ("[i]t must be emphasized that a district court has broad discretion to determine the amount of a fee award"); *see also* Holmes, *supra* note 56 (discussing difficulty in finding lawyers to take employment discrimination cases).

where the facts are undisputed and the only issues are legal. The factual record must be painstakingly built from a vast array of documentary evidence. Discovery battles are frequently lengthy and hard-fought. The data collected more likely than not must then be submitted to experts for time-consuming analysis. Plaintiffs and their lawyers who cannot afford this expensive and drawn-out process have no choice but to withdraw their claims.[210]

Despite these overwhelming difficulties, access to the federal court for employment discrimination plaintiffs is extremely important. In difficult economic times, employers are unwilling or unable to devote resources to ensuring that their policies are nondiscriminatory.[211] Employees who complain about discrimination often are accused of making trouble for American companies at a time when such companies need to devote their full resources to making themselves competitive, not to curing social ills for which they feel they are not responsible.

In the face of overwhelming odds, civil rights plaintiffs and their lawyers must rely on the federal courts to offer them the opportunity to vindicate the important congressional policy against discriminatory employment practices.[212] Certainly, Second Circuit rulings, such as *Ramseur*, which require the district courts to evaluate discrimination claims in depth and with sensitivity toward the difficult problems of proof faced by plaintiffs, serve to level the playing field. They make clear that a plaintiff should be given a fair chance of overcoming a defendant's denial of discrimination.

On the other hand, appellate decisions that uphold unduly restrictive lower court class action decisions, rigidly interpret limitations, or virtually foreclose the possibility of obtaining preliminary injunctions, deter plaintiffs and their attorneys from bringing potentially significant and necessary civil rights actions.[213]

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[210] *See, e.g., Greenberg I*, 870 F.2d at 932 (plaintiff moved to dismiss discrimination complaint three years after suit was brought); *see also supra* notes 116-36 and accompanying text (discussing *Greenberg* decisions and their ramifications for civil rights plaintiffs).

[211] During the course of their practice, the authors have encountered a considerable number of persons who were formerly employed as equal employment opportunity specialists in corporate human resource departments. These persons report that in difficult economic times, the position of equal employment opportunity specialist is among the first to be eliminated.

[212] *See Alexander*, 415 U.S. at 59-60 (federal policy against discriminatory employment best served by allowing plaintiffs to pursue Title VII action in federal courts).

[213] *See Sheehan*, 839 F.2d at 106 (affirming denial of Title VII claim but "declin[ing] to say that the judge's findings were clearly erroneous" because "[h]e was there" and "[w]e were not"); *Stewart*, 762 F.2d at 200 (taking restrictive view of what constitutes irreparable

No one doubts that extensive discrimination still exists within American society. The recent restrictive Supreme Court case law raises the question whether individual civil rights plaintiffs acting as private attorneys general[214] will be able to engage in enough successful federal litigation to have some impact on the problem. As this Article illustrates, the Second Circuit also plays an important role in determining whether cases that might have significant societal impact get past the courthouse door.

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harm).

[214] *See supra* notes 24-25, 136 and accompanying text (private attorneys general).