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## THE JURISDICTIONAL REACH OF TITLE VII\*

by

Michael B. Metzger\*\* and John F. Suhre\*\*\*

AN unheralded struggle is underway concerning the jurisdictional reach of title VII of the Civil Rights Act of 1964.<sup>1</sup> Both private plaintiffs and the Equal Employment Opportunity Commission (EEOC) are attempting to extend the protection afforded by the title VII proscription of employment discrimination<sup>2</sup> to situations other than those arising out of the traditional employer-employee context.<sup>3</sup> A recent EEOC decision,<sup>4</sup> for example, bases the Commission's jurisdiction upon whether a "deprivation of a protected right" has occurred rather than upon the existence of an employer-employee relationship between a respondent and a charging party.<sup>5</sup>

Attempts to expand title VII jurisdiction have met with mixed success in the courts. While some courts clearly have extended the reach of title VII beyond traditional employer-employee situations,<sup>6</sup> others have been un-

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\* The views expressed in this Article are the authors' alone. In no way do they represent an official statement of policy by the Equal Employment Opportunity Commission.

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1. 42 U.S.C. §§ 2000e to 2000e-17 (1976).

2. Title VII makes it unlawful "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." *Id.* § 2000e-2(a)(1).

3. The traditional common law test for distinguishing between employees and independent contractors is the "right of control" retained by the person for whom the work is being done, "not only as to the result accomplished by the work, but also as to the details and means by which that result is accomplished." *NLRB v. Phoenix Mut. Life Ins. Co.*, 167 F.2d 983, 986 (7th Cir.), *cert. denied*, 335 U.S. 845 (1948). Other factors used to determine whether an employer-employee relationship exists include: whether the person rendering service has a substantial investment in his tools or equipment; whether such person undertakes a substantial cost by performing the service or has an opportunity to profit depending upon his management or skill; whether such person works in the course of the recipient's business rather than in some ancillary capacity; and whether the parties have a permanent relationship. *Avis Rent A Car System, Inc. v. United States*, 503 F.2d 423 (2d Cir. 1974).

In addition to application to employees in the traditional sense, title VII has been applied to pensioners (*Hackett v. McGuire Bros.*, 445 F.2d 442 (3d Cir. 1971)), discharged employees (*Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969)), and applicants for employment (*Wilson v. Monsanto Co.*, 315 F. Supp. 977 (E.D. La. 1970)).

4. EEOC Decision No. 79-09 (Oct. 20, 1978), *discussed at* text accompanying notes 130-41 *infra*.

5. For a concise exposition of title VII procedures, see Note, *The Proliferation of Employment Discrimination Statutory Protections: An Overview*, 8 LOY. CHI. L.J. 934, 937-39 (1977).

6. See *Sibley Memorial Hosp. v. Wilson*, 488 F.2d 1338 (D.C. Cir. 1973), *discussed at*

willing to do so.<sup>7</sup> Title VII attacks aimed at allegedly discriminatory action by state licensing agencies have encountered especially strong judicial resistance.<sup>8</sup> This opposition has been strongest against attempts to apply title VII to professional licensing cases.<sup>9</sup>

The ultimate resolution of the jurisdictional scope of title VII is of obvious importance. A broad interpretation of title VII jurisdiction could extend the title's protections to areas of economic activity that heretofore have been practically immune to the title's scrutiny. In addition to affording protection in the licensing area previously mentioned, the adoption of a broader jurisdictional test could give protection to, among others, independent contractors,<sup>10</sup> franchisees,<sup>11</sup> franchisees' employees,<sup>12</sup> and employees seeking to pursue title VII claims against persons other than their immediate employers.<sup>13</sup>

This Article examines the arguments for and against a broad interpretation of title VII jurisdiction, delineates the nature of the jurisdictional test currently adopted by the EEOC, and illustrates the application of that test in various factual contexts.

## I. JUDICIAL DEVELOPMENTS TOWARD A JURISDICTIONAL TEST

In a manner reminiscent of the fabled blind men attempting to divine the physical attributes of an elephant by touching isolated parts of its anatomy, courts on both sides of the jurisdictional issue have focused primarily on the language of title VII as a justification for their disparate holdings. That this approach should be used is not surprising. Resort to legislative history, the traditional recourse for a court facing a statute susceptible to

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text accompanying notes 38 & 47 *infra*; Puntolillo v. New Hampshire Racing Comm'n, 375 F. Supp. 1089 (D.N.H. 1974), *discussed at* note 56 and text accompanying note 76 *infra*.

7. See *Smith v. Dutra Trucking Co.*, 410 F. Supp. 513 (N.D. Cal. 1976), *aff'd*, 580 F.2d 1054 (9th Cir. 1978), *discussed at* text accompanying notes 21-34 *infra*; *Mathis v. Standard Brands Chem. Indus., Inc.*, 10 Empl. Prac. Dec. (CCH) ¶ 10,306 (N.D. Ga. Feb. 20, 1975), *discussed at* notes 58-59 *infra*.

8. See *NOW v. Waterfront Comm'n*, 19 Empl. Prac. Dec. (CCH) ¶ 9253 (S.D.N.Y. Mar. 26, 1979), *discussed at* text accompanying notes 123-29 *infra*; *Lavender-Cabellero v. Department of Consumer Affairs*, 458 F. Supp. 213 (S.D.N.Y. 1978), *discussed at* text accompanying notes 112-22 *infra*. *But see* Puntolillo v. New Hampshire Racing Comm'n, 375 F. Supp. 1089 (D.N.H. 1974).

The 1972 amendments to title VII extended coverage to all state and local governments. 42 U.S.C. § 2000e(a) (1976) (amending 42 U.S.C. § 2000e(a) (1970)).

9. All such attempts to date have failed. See text accompanying notes 90-111 *infra* for discussion of professional licensing cases.

10. See cases cited in note 7 *supra*; *Sibley Memorial Hosp. v. Wilson*, 488 F.2d 1338 (D.C. Cir. 1973), *discussed at* text accompanying notes 38 & 47 *infra*.

11. Consider, for example, the case of a franchised dealer who alleges that his franchise was terminated on grounds proscribed by title VII.

12. This situation might arise when a former employee of a franchisee alleges that the franchisor caused his discharge for proscribed reasons.

13. See EEOC Decision No. 79-09 (Oct. 20, 1978), *discussed at* text accompanying notes 130-41 *infra*, wherein 12 female employees brought a title VII claim against the insurer providing an optional employee retirement program through their employer, based on the insurer's discriminatory payment of lower monthly pension benefits to females than to their male counterparts.

varying interpretations, is a difficult<sup>14</sup> and questionable<sup>15</sup> exercise in all but the most clear-cut situations. The legislative history of title VII<sup>16</sup> sheds little light on the issue at hand.<sup>17</sup> Thus, courts construing title VII frequently feel compelled to adhere to a narrow, highly literal interpretation of the statute.<sup>18</sup>

Courts that have narrowly construed the jurisdictional reach of title VII have focused on the use of the terms "employer" and "employee" in sections 701 and 703 of the Act<sup>19</sup> and have interpreted those terms in accordance with their common law meaning.<sup>20</sup> The most detailed exposition of this view is found in *Smith v. Dutra Trucking Co.*<sup>21</sup> The plaintiff in *Smith* was a woman who operated an independent trucking business with her husband. The Smiths had entered several subhauling agreements with Dutra Trucking Company, an overlying carrier.<sup>22</sup> After the plaintiff had

14. See E. LEVI, AN INTRODUCTION TO LEGAL REASONING 29 (1974): "[I]t is not easy to find the intent of the legislature." The author subsequently observes: "The difficulty is that what the legislature intended is ambiguous." *Id.* at 30.

15. For a general discussion of the identification between legal positivism and the idea of legislative intent, see Lehman, *How to Interpret a Difficult Statute*, 1979 WIS. L. REV. 489, 496-501. Professor Lehman notes: "It might well be that no solution [to a given problem of statutory interpretation] would attract a clear majority. Indeed, that may be the reason for the silence and ambiguity in the first place." *Id.* at 500. The author further observes that "the intent of the legislature is a phantom because the will of the legislature is a metaphor." *Id.*

16. See 2 U.S. CODE CONG. & AD. NEWS 2137-86 (1972); 2 U.S. CODE CONG. & AD. NEWS 2355-519 (1964). For a detailed discussion of the circumstances surrounding the passage of title VII, see Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431 (1966). For a view of the historical context of title VII, see Jones, *The Development of Modern Equal Employment Opportunity and Affirmative Action Law: A Brief Chronological Overview*, 20 HOW. L.J. 74 (1977).

17. "No party has set forth, nor has this court been able to find, any explicit language, in either the statute or the legislative history, to illuminate this issue." *Lavender-Cabellero v. Department of Consumer Affairs*, 458 F. Supp. 213, 214 (S.D.N.Y. 1978).

18. The Supreme Court stated: "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *United States v. American Trucking Ass'n*, 310 U.S. 534, 542 (1940).

19. Section 701(b) defines "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . ." 42 U.S.C. § 2000e(b) (1976). Section 701(f) states that "'employee' means an individual employed by an employer . . ." 42 U.S.C. § 2000e(f) (1976). Section 703(a) provides:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. §§ 2000e-2(a)(1) & (2) (1976).

20. See note 3 *supra*.

21. 410 F. Supp. 513 (N.D. Cal. 1976), *aff'd*, 580 F.2d 1054 (9th Cir. 1978).

22. The court explained:

To supply its customers with transportation service, Dutra makes use of both its own employees and independent owner-operators like plaintiff. The in-

hauled one load of asphalt pursuant to a subhauling contract with Dutra, her husband was told by Dutra's president that she would not be allowed to drive on any jobs for Dutra. Subsequently, Dutra withdrew an offer for another subhauling contract after being informed that the female plaintiff would be driving. Smith then filed a title VII suit<sup>23</sup> against Dutra, who moved for a summary judgment on the ground that no employment relationship had ever existed between plaintiff and defendant.<sup>24</sup> The court acknowledged that since Dutra was an "employer" within the meaning of the Act,<sup>25</sup> the resolution of the issue depended upon whether the plaintiff was considered Dutra's employee or an independent contractor.<sup>26</sup> While admitting that the Act's circuitous definition of "employee"<sup>27</sup> provided little assistance in resolving the issue thus cast<sup>28</sup> and that there was precedent supporting the proposition that the terms "employee" and "independent contractor" are "not to be construed in their common-law sense when used in federal social welfare legislation,"<sup>29</sup> the court concluded that including the plaintiff within the definition of "employee" would be an unwarranted broadening of title VII.<sup>30</sup>

The *Dutra* court based its conclusion upon prior judicial experience with the National Labor Relations Act (NLRA),<sup>31</sup> noting that the United States Supreme Court's decision in *NLRB v. Hearst Publications*,<sup>32</sup> giving a broad construction to the term "employee" as used in the NLRA, produced an adverse congressional response in the form of an amendment specifically excluding independent contractors from coverage.<sup>33</sup> The court

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dependent owner-operator works under a subhauling agreement with Dutra which recites that the subhauler is an independent contractor. Dutra collects a broker's fee of 5% as the overlying carrier.

410 F. Supp. at 515.

23. Counsel for Smith argued that she was either a Dutra "employee" within the meaning of the Act, or that she was protected by title VII because Dutra controlled her access to employment. *Id.*

24. *Id.* at 514.

25. 42 U.S.C. § 2000e(f) (1976), *quoted in note 19 supra.*

26. 410 F. Supp. at 515. By casting the issue in these terms, the court made an *a priori* assumption that independent contractors are not covered by title VII, thereby lending an air of inevitability to its ultimate conclusion.

27. *See note 19 supra.*

28. 410 F. Supp. at 515.

29. *Id.* at 516. The court cited *Mednick v. Albert Enterprises, Inc.*, 508 F.2d 297, 299 (5th Cir. 1975), which in turn cited *Bartels v. Birmingham*, 332 U.S. 126 (1947); *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947); *United States v. Silk*, 331 U.S. 704 (1947); and *NLRB v. Hearst Publications*, 322 U.S. 111 (1944). The court noted that the *Bartels* Court had defined "employees" as "those who as a matter of economic reality are dependent upon the business to which they render service." *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947), *cited in* 410 F. Supp. at 516.

30. 410 F. Supp. at 516. The court even acknowledged that "conceivably it could be argued that plaintiff would be considered an 'employee' " under the *Bartels* test. *Id.*

31. 29 U.S.C. §§ 151-169 (1976).

32. 322 U.S. 111 (1944).

33. 410 F. Supp. at 516. Assuming, *arguendo*, that the judicial experience with the NLRA is relevant to questions of title VII interpretation, one might argue with equal justification that Congress knew the history of the NLRA and could have avoided statutory language with connotations broader than the traditional common law employer-employee relationship (*see discussion at text accompanying notes 35-56 infra*), or included specific

agreed with Smith that title VII should not be construed too narrowly, but concluded that nothing in the legislative history of the Act indicated a congressional intent to construe the term "employee" other than in accordance with common law agency principles.<sup>34</sup>

In contrast, the leading cases supporting an expanded interpretation of title VII have discovered in the language of the title a congressional intent to reach beyond traditional employer-employee relationships to protect employment opportunities.<sup>35</sup> Title VII expressly includes within its reach employment agencies<sup>36</sup> and labor organizations<sup>37</sup> as well as employers. Thus the court in *Sibley Memorial Hospital v. Wilson*,<sup>38</sup> considering a di-

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language excluding independent contractors and others similarly situated if it intended a similar result.

34. 410 F. Supp. at 516. Of course, as noted at notes 16-17 and accompanying text *supra*, the legislative history of title VII is equally devoid of any evidence indicating a specific congressional intent to follow the traditional common law definitions of "employer" and "employee."

35. *Sibley Memorial Hosp. v. Wilson*, 488 F.2d 1338 (D.C. Cir. 1973); *Hackett v. McGuire Bros.*, 445 F.2d 442 (3d Cir. 1971); *Puntolillo v. New Hampshire Racing Comm'n.* 375 F. Supp. 1089 (D.N.H. 1974). See also 42 U.S.C. §§ 2000e-2(a)(1) & (2) (1976), quoted in note 19 *supra*.

36. Section 701(c) provides: "The term 'employment agency' means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person." 42 U.S.C. § 2000e(c) (1976).

Section 703(b) provides:

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

*Id.* § 2000e-2(b).

37. Section 701(d) provides:

The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

*Id.* § 2000e(d).

Section 703(c) provides:

It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

*Id.* § 2000e-2(c).

38. 488 F.2d 1338 (D.C. Cir. 1973). The plaintiff in *Sibley* alleged that the defendant

rect employment relationship between a male private duty nurse claiming sex discrimination and the defendant hospital, observed:

We think it significant that the Act has addressed itself directly to the problems of interference with the direct employment relationship by labor unions and employment agencies—institutions which have not a remote but a highly visible nexus with the creation and continuance of direct employment relationships between third parties.<sup>39</sup>

Employment agencies, unlike employers hiring independent contractors, generally control only an applicant's access to employment opportunities and have no control over the terms and conditions of employment or the criteria for employability. The fact that Congress expressly extended the Act's coverage to these agencies that exert less control and to labor unions that exert more control over employment opportunities than an employer hiring an independent contractor may support the inclusion of independent contractors within the Act's loose "employee" definition. While this argument may be countered by citing the familiar maxim of statutory construction, *expressio unius, est exclusio alterius*,<sup>40</sup> the maxim itself is increasingly falling into disrepute.<sup>41</sup>

An argument can be made that the term "employer" as used in sections 701(b) and 703(a) of the Act<sup>42</sup> was merely intended to designate one class subject to the Act rather than to establish a relationship to which the Act's proscriptions apply.<sup>43</sup> This interpretation is bolstered by the fact that sub-

hospital had discriminated against him based on his sex by refusing to refer him to female patients who had requested a private nurse. Patients at Sibley Hospital could request a private duty nurse through the hospital, and the hospital referred requests to a central registry of private nurses. The court determined that the facts as alleged indicated the defendant hospital had blocked the plaintiff's access to patients. *Id.* at 1342.

39. *Id.* at 1342. See also *Hackett v. McGuire Bros.*, 445 F.2d 442, 445 (3d Cir. 1971); *Puntolillo v. New Hampshire Racing Comm'n*, 375 F. Supp. 1089, 1091 (D.N.H. 1974) ("Throughout the Act and the applicable federal regulations, an intent to deal with more than the conventional employer-employee situation is indicated. This intent is demonstrated by the specific prohibition against discrimination by employment agencies and labor organizations . . .").

40. Enumeration of specific items implies the exclusion of all others. *United States v. Robinson*, 359 F. Supp. 52, 58-59 (S.D. Fla. 1973). The *expressio unius* idea may explain the following language in *Lavender-Cabellero v. Department of Consumer Affairs*, 458 F. Supp. 213, 215 (S.D.N.Y. 1978): "Congress chose not to enact provisions which would have extended Title VII in the fashion requested by the plaintiff."

41. One author observed:

The rule that the expression of one thing is the exclusion of another is in direct contradiction to the habits of speech of most persons. To say that all men are mortal does not mean that all women are not, or that all other animals are not. There is no such implication, either in usage or in logic, unless there is a very particular emphasis on the word *men*. It is neither customary nor convenient to indicate such emphasis in statutes, and without this indication, the first comment on the rule is that it is not true.

*Radin, Statutory Interpretation*, 43 HARV. L. REV. 863, 873-74 (1930), reprinted in M. COHEN & E. COHEN, READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 511 (1951). See also *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 676 (D.C. Cir.), cert. denied, 415 U.S. 951 (1973).

42. 42 U.S.C. §§ 2000e(b) & -2(a)(1) & (2) (1976), quoted in note 19 *supra*.

43. As originally worded, § 701(b) applied to employers who had 25 or more employees. 42 U.S.C. § 2000e(b) (1970) (amended 1972). The Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103, amended this section by reducing the number

sequent sections of the Act do not restrict the Act's prohibitions to discriminatory acts against "employees" as defined by section 701(f),<sup>44</sup> nor do they place such a limitation on those having standing to sue for a violation of the Act. For example, section 703(a)(1) of the Act,<sup>45</sup> in contrast to the more specialized section 703(a)(2),<sup>46</sup> does not limit its prohibitions to discrimination against "employees" or "applicants for employment." Instead, it prohibits discrimination on the basis of the enumerated criteria against "any individual," a factor that has led to judicial conclusions that Congress intended the Act's proscriptions to extend beyond the traditional employer-employee relationship. As the court in *Sibley* observed:

The Act defines "employee" as "an individual employed by an employer," but nowhere are there words of limitation that restrict references in the Act to "any individual" as comprehending only an employee of an employer. Nor is there any good reason to confine the meaning of "any individual" to include only former employees and applicants for employment, in addition to present employees. These words should, therefore, be given their ordinary meaning so long as that meaning does not conflict with the manifest policy of the Act.<sup>47</sup>

Section 706(b) of the Act also militates in favor of a broad interpretation of title VII jurisdiction by granting standing to "person[s] claiming to be aggrieved" by violations of the Act rather than limiting standing to prospective, current, or former employees.<sup>48</sup> One court determined that, in using the "aggrieved person" language to confer standing, Congress demonstrated an intention to define standing as broadly as article III of the Constitution permits.<sup>49</sup> To establish standing, a plaintiff must meet a two-

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of employees required to 15. 42 U.S.C. § 2000e(b) (1976). This fact lends some credence to the view that a primary concern of this section is to exempt from the Act's scrutiny entities below a certain size.

44. 42 U.S.C. § 2000e(f) (1976), *quoted in note 19 supra*.

45. *Id.* § 2000e-2(a)(1).

46. *Id.* § 2000e-2(a)(2).

47. *Sibley Memorial Hosp. v. Wilson*, 488 F.2d 1338, 1341 (D.C. Cir. 1973). The court further observed:

Control over access to the job market may reside, depending upon the circumstances of the case, in a labor organization, an employment agency, or an employer as defined in Title VII; and it would appear that Congress has determined to prohibit each of these from exerting any power it may have to foreclose, on invidious grounds, access by any individual to employment opportunities otherwise available to him.

*Id.* See also *Puntolillo v. New Hampshire Racing Comm'n*, 375 F. Supp. 1089, 1091 (D.N.H. 1974), *discussed at note 56 infra*, wherein the court concluded:

Throughout the Act and the applicable federal regulations, an intent to deal with more than the conventional employer-employee situation is indicated. This intent is demonstrated by the specific prohibition against discrimination by employment agencies and labor organizations, and by the prohibition of discrimination against *individuals* (as opposed to employees who are defined as "individual[s] employed by an employer.")

48. 42 U.S.C. § 2000e-5(b) (1976). As the *Sibley* court observed: "It seems unlikely that Congress would confer standing to bring a suit under the Act upon persons without rights under the Act because they are not employees." 488 F.2d at 1341.

49. *Hackett v. McGuire Bros.*, 445 F.2d 442, 446 (3d Cir. 1971). The court of appeals in *Hackett* reversed a district court dismissal of a pensioner's title VII claim. The district court



pronged test: constitutional and statutory.<sup>50</sup> A plaintiff must demonstrate an "injury in fact" and an interest "arguably within the zone of interests to be protected or regulated by the statute."<sup>51</sup> The use of this test for standing has led some courts to conclude that Congress must have intended that title VII reach beyond conventional employer-employee relationships.<sup>52</sup>

Further support for a broad reading of title VII has been found in the perceived public policy behind the title,<sup>53</sup> the general principle that remedial legislation is to be broadly construed to effectuate its purposes,<sup>54</sup> and

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had held that he was not an "employee" within the meaning of title VII. The court of appeals observed:

In reaching the conclusion that Hackett, as a pensioner, lacked standing the district court relied upon the definition of "employee" in Section 701(f) of Title VII, 42 U.S.C. § 2000e(f), as "an individual employed by an employer." But that definition, in a general section of the Title devoted to definitions, does not speak to the issue of standing to invoke the remedies of the Act. The remedies section is § 706, 42 U.S.C. § 2000e-5. That section permits "a person claiming to be aggrieved" to file a charge with the Commission. . . . A person claiming to be aggrieved may never have been an employee of the defendant. . . . An aggrieved person obviously is any person aggrieved by any of the forbidden practices.

*Id.* at 445.

50. See *Gray v. Greyhound Lines, East*, 545 F.2d 169, 175 (D.C. Cir. 1976).

51. *Association of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970).

52. *Sibley Memorial Hosp. v. Wilson*, 488 F.2d 1338, 1341 (D.C. Cir. 1973). The court in *Sibley* observed:

The Act, in providing for the filing of complaints with EEOC and of eventual actions in the District Court, does not use the term "employee." The phrase is, rather, the "person aggrieved;" and that term can certainly be taken as comprehending individuals who do not stand in a direct employment relationship with an employer. The fact that the Act purports to provide remedies for a class broader than direct employees is a strong indication that the prescriptions contemplated by Section 703(a)(1) reach beyond the immediate employment relationship.

*Id. Contra*, *Mathis v. Standard Brands Chem. Indus., Inc.*, 10 Empl. Prac. Dec. (CCH) ¶ 10,306 (N.D. Ga. Feb. 20, 1975), *discussed at* note 58 *infra*.

53. One court emphasized: "More specifically, the Act is aimed at providing equal employment opportunities. Its purpose is to 'achieve equality of employment opportunities and remove barriers that have operated in the past' in a discriminatory fashion." *Puntolillo v. New Hampshire Racing Comm'n*, 375 F. Supp. 1089, 1092 (D.N.H. 1974) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971)). See also *Sibley Memorial Hosp. v. Wilson*, 488 F.2d 1338, 1341 (D.C. Cir. 1973) (quoting *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 386 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971)), in which the court stated: "In prohibiting discrimination in employment on the basis of sex, 'one of Congress' main goals was to provide equal access to the job market for both men and women.'" For a general statement on this point, see *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109 (1971). "Underlying Title VII is the public interest in eliminating employment discrimination in order to guarantee to minorities the economic status necessary to a free society and to insure maximum utilization of human potential." *Id.* at 1196.

54. Both the the Third Circuit and district court in *New Hampshire* support a broad construction. "The national public policy reflected both in Title VII of the Civil Rights Act of 1964 and in § 1981 may not be frustrated by the development of overly technical judicial doctrines of standing . . ." *Hackett v. McGuire Bros.*, 445 F.2d 442, 446-47 (3d Cir. 1971). "The courts have consistently recognized that 'Title VII of the Civil Rights Act of 1964 should not be construed narrowly.'" *Puntolillo v. New Hampshire Racing Comm'n*, 375 F. Supp. 1089, 1092 (D.N.H. 1974) (citations omitted).

See generally *Walling v. Rutherford Food Corp.*, 156 F.2d 513, 516-17 (10th Cir. 1947), a

the deference ordinarily afforded to administrative interpretations of a statute.<sup>55</sup> The case of *Puntolillo v. New Hampshire Racing Commission*,<sup>56</sup> for example, in which the plaintiff, a driver-trainer of horses, alleged discriminatory treatment based on his national origin, reinforces all three of these rationales. In light of the fact that neither *Sibley* nor *Puntolillo*, the leading cases arguing for an expanded view of title VII jurisdiction, has been expressly overruled, the issue at hand is perhaps more accurately viewed as how far title VII jurisdiction should extend beyond conventional employer-employee relationships rather than whether such an extension should be made.

#### A. Independent Contractors

The leading cases denying a title VII remedy to independent contractors, *Smith v. Dutra Trucking Co.*<sup>57</sup> and *Mathis v. Standard Brands Chemical Industries, Inc.*,<sup>58</sup> sought to distinguish *Sibley* and *Puntolillo*, and

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Fair Labor Standards Act (FLSA) case holding "boners" at a slaughterhouse were "employees" within the meaning of the FLSA, even though their contract provided that they were independent contractors. The traditional common law distinction between employees and independent contractors, the court observed,

is not necessarily decisive in a case of this kind, as the Act concerns itself with the correction of economic evils through remedies which were unknown at common law, and if it expressly or by fair implication brings within its ambit workers in the status of these boners, it is immaterial whether under the principles of the common law the relationship between Kaiser and the boners has been that of employer and independent contractor for other purposes.

*Id.* at 516. See also text accompanying note 29 *supra*; *United States v. Silk*, 331 U.S. 704 (1947).

55. See *Puntolillo v. New Hampshire Racing Comm'n*, 375 F. Supp. 1089 (D.N.H. 1974). "It should also be noted that, since the Equal Employment Opportunities [*sic*] Commission Determination reached the merits of plaintiff's complaint, the District Office must have thought that the relationship between plaintiff and defendants showed sufficient indicia of employment to bring plaintiff's claim within the Commission's jurisdiction." *Id.* at 1092. See also *Henderson v. Oregon*, 405 F. Supp. 1271, 1276 (D. Or. 1975); *Woodford v. Kinney Shoe Corp.*, 369 F. Supp. 911, 914 (N.D. Ga. 1973); *Williams v. New Orleans Steamship Ass'n*, 341 F. Supp. 613, 615 (E.D. La. 1972).

56. 375 F. Supp. 1089 (D.N.H. 1974). *Puntolillo* filed a title VII suit against the New Hampshire Racing Commission (NHRC) and the New Hampshire Trotting and Breeding Association (TBA). *Puntolillo* argued that the NHRC and the TBA had discriminated against him on the basis of his national origin by denying him the license and stall space necessary for him to gain employment with harness horse owners. The defendants moved to dismiss his complaint on the grounds that there was no employment relationship between plaintiff and themselves. The court, in an opinion strongly influenced by *Sibley*, ruled in favor of *Puntolillo*, noting that although the NHRC and the TBA were not his employers, they had "control over the ability of a driver-trainer to race, i. e., earning a living. . . that is coequal with that of the racehorse owners." *Id.* at 1090. The court concluded by saying:

Defendants here are certainly employers within the meaning of 42 U.S.C. § 2000e(b); and they certainly "control . . . access to [plaintiff's] job market." Plaintiff has alleged discriminatory actions which fall within the purview of 42 U.S.C. § 2000e-2(a), and I cannot say that these alleged actions fall completely without the scope of activities sought to be prohibited by Title VII.

*Id.* at 1092 (citing *Sibley*, 488 F.2d at 1341, 1342).

57. 410 F. Supp. 513 (N.D. Cal. 1976), *aff'd*, 580 F.2d 1054 (9th Cir. 1978).

58. 10 Empl. Prac. Dec. (CCH) ¶ 10,306 (N.D. Ga. Feb. 20, 1975). *Mathis* was a black worker who had performed industrial waste removal services for the defendant from April 1970 to February 1972, when the defendant awarded the contract for waste removal to another contractor. *Mathis* brought suit under title VII, alleging that he was denied the con-

thereby to limit their impact upon title VII's jurisdictional reach. Two main distinctions were drawn. First, both the *Smith* and *Mathis* courts emphasized that *Sibley* and *Puntolillo* dealt with interference with "employment" relationships and "employment" opportunities.<sup>59</sup> "Employment" was then defined in the traditional common law sense of the term, leading to the inevitable conclusion that independent contractors are not entitled to title VII protection because they are not "employees" in the traditional sense.<sup>60</sup> This treatment of *Sibley* and *Puntolillo* ignores the spirit of both cases,<sup>61</sup> the authority calling for a broad construction of remedial legislation,<sup>62</sup> and the fact that the plaintiffs in both cases could have been considered independent contractors.<sup>63</sup>

The *Smith* court also distinguished *Sibley* and *Puntolillo* on the ground

tract because of his race. The defendant moved for a summary judgment on the basis that *Mathis* was an independent contractor and not an employee. The EEOC submitted an amicus curiae brief arguing that title VII was applicable regardless of whether *Mathis* was an independent contractor or an employee because he was "a person claiming to be aggrieved" by a practice prohibited by the Act. The court rejected this argument, stating: "The law, then, is aimed at correcting discrimination in employment. Consequently, there must be some relationship with an employment situation." *Id.* at 5246. The court refused to grant the requested summary judgment, however, noting that an examination of the "economic realities" of the relationship between the parties was required to determine whether *Mathis* was an independent contractor or an employee. *Id.* at 5246-47.

59. The language of both decisions focuses on the existence of such a relationship or opportunity in *Sibley* and *Puntolillo*. "[B]oth *Sibley* and *Puntolillo* concern interference with the creation of direct employment relationships." *Smith v. Dutra Trucking Co.*, 410 F. Supp. at 518 (emphasis in original). The court in *Mathis* distinguished *Sibley* because "in that case there was an employment relationship between the patient and the nurse," and *Puntolillo* because "the court did not state that the plaintiff could sue where he had no connection with an employment scheme. . . . [D]river-trainers are employed by harness horse owners." 10 Empl. Prac. Dec. (CCH) ¶ 10,306, at 5247 n.2.

60. "There are no facts before the Court to indicate that plaintiff was an employee, or sought to become an employee, of Mercer-Fraser Company, the third-party employer to whom Dutra allegedly blocked access." *Smith v. Dutra Trucking Co.*, 410 F. Supp. at 518. "Employment must be distinguished from the independent contractual associations of business entities for the latter are not covered by Title VII." *Mathis v. Standard Chem. Indus., Inc.*, 10 Empl. Prac. Dec. (CCH) ¶ 10,306, at 5246.

61. The *Sibley* court concluded:

To permit a covered employer to exploit circumstances peculiarly affording it the capability of discriminatorily interfering with an individual's employment opportunities with another employer, while it could not do so with respect to employment in its own service, would be to condone continued use of the very criteria for employment that Congress has prohibited.

A fair reading of the Act in the light of its stated purposes precludes such a result.

488 F.2d at 1341, quoted in *Puntolillo*, 375 F. Supp. at 1092.

62. See notes 29-32, 54 *supra* and accompanying text.

63. The *Smith* court recognized this factor, but chose to dispose of it in a conclusory fashion:

Curiously, in neither *Sibley* nor *Puntolillo* did the courts specifically find that access to employment relationships was denied. Arguably, a male nurse who works on a day-to-day basis or a driver-trainer who works for a horse owner is an independent contractor. Nevertheless the language of the opinions is confined to interference with employment opportunities. Moreover, it is clear that the opinions cannot be read as applying to the independent contractor context; otherwise Title VII would authorize a cause for discriminatorily blocking access to a type of relationship which is itself not covered by the Act.

410 F. Supp. at 518 n.11 (emphasis in original).

that the defendants in both of the latter cases exercised a greater "degree of control" over the plaintiffs' job market than Dutra Trucking had exercised in the case of Smith.<sup>64</sup> Thus the court concluded:

Here, however, plaintiff is not subject to defendant's authority. Plaintiff is not obligated to seek contracts through Dutra, nor can Dutra deny plaintiff access to any potential employer. It is true that because Dutra does not contract with plaintiff, she has fewer work opportunities, but Dutra's decision not to use plaintiff is not tantamount to blocking her access to employment.<sup>65</sup>

This distinction overlooks the fact that the plaintiff in *Sibley*, like Smith, was not barred from all "work opportunities," because the hospital, while denying the male nurse any assignment to female patients, regularly referred him to male patients. The likelihood that the plaintiff in *Sibley* could have sought additional work through another hospital did not dispose of the case in favor of the defendant. Finally, if one accepts the *Bar-tels v. Birmingham*<sup>66</sup> "economic realities" test as the determinant for "employment" in remedial legislation,<sup>67</sup> the "degree of control" distinction loses its force in cases where a significant portion of the plaintiff's income is derived from the kind of "work opportunities" allegedly being foreclosed to the plaintiff on a discriminatory basis.

Additional arguments support the extension of title VII protection to independent contractors. Viewing the issue from a social perspective, no apparent reason exists to excuse discrimination against independent contractors on the basis of proscribed criteria. The fact that a person adversely affecting an individual's employment opportunities is not that individual's employer according to the law of torts or contracts, or for the purposes of workmen's compensation or the social security laws, should not be dispositive. The adverse impact upon an unprotected individual's economic opportunities remains the same. Furthermore, the economic opportunities of minorities and females should not be limited to traditional employer-employee relationships. A narrow construction of title VII can only hinder the full economic integration of disadvantaged groups into the mainstream of American economic life<sup>68</sup> and inhibit the "maximum utili-

64. *Id.* at 518. The court noted that in *Sibley* the defendant hospital controlled the premises upon which services were rendered, including access to the patient for the purpose of securing employment. *Id.* In *Puntolillo*, the court observed, the defendant "had virtually complete control over plaintiff's access to employment [as a driver-trainer] through its licensing power." *Id.*

65. *Id.* But see EEOC Decision No. 79-33, discussed at note 144 *infra*, wherein the Commission stated:

Contrary to Respondent's assertion that Charging Party can work for someone else, a violation of Title VII does not require the discriminatory denial of all employment opportunities, but only the discriminatory denial of an employment opportunity. It is no defense that Charging Party may seek work with another employer.

EEOC Decision No. 79-33, slip op. at 2 (Jan. 16, 1979).

66. 332 U.S. 126 (1947).

67. See note 29 *supra*.

68. The most recent available evidence in STATISTICAL ABSTRACT OF THE UNITED STATES (1978) indicates that women and minorities have hardly begun to achieve propor-

zation of human potential."<sup>69</sup> A narrow interpretation could also encourage discrimination in some cases by inducing employers to use independent contractors rather than employees in some areas of their operations as a means of avoiding the impact of title VII.<sup>70</sup>

### B. *Employees of Franchisees and Employees Claiming Discrimination by Third Parties*

The case for extending title VII protection to employees of franchisees<sup>71</sup> and employees claiming discrimination by third parties in furnishing employment benefits<sup>72</sup> seems clearer. The *Sibley* and *Puntolillo* rationales plainly support their inclusion because in such cases defendants would be exercising significant control over the plaintiffs' "access to employment opportunities."<sup>73</sup> Additionally, *Smith* and *Mathis* do not prevent the extension of title VII to such plaintiffs, for although both cases insist on the presence of an "employment" relationship in the traditional sense, they do not necessarily require that relationship to exist between the plaintiff and defendant.<sup>74</sup>

### C. *Licensees*

The language of *Smith* or *Mathis* does not expressly bar the extension of title VII protection to licensing cases wherein applicants for licenses allege that they have been discriminatorily denied certification.<sup>75</sup> Licensing boards that deny an applicant a license are plainly controlling the applicant's access to employment in the traditional sense of the term. More-

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tional representation in some important areas of economic life. While blacks constituted 11.1% of the total population in 1970 (*Id.* Table No. 35, at 33), the percentage of business firms owned by blacks in 1972 constituted only 2.2% (*Id.*, derived from Table No. 921, at 564). Females constituted 51.3% of the total population in 1970 (*Id.*, derived from Table No. 28, at 28), but owned only 4.6% of business firms in 1972 (*Id.* Table No. 920, at 563).

69. See *Developments in the Law*, *supra* note 53, at 1196.

70. The foregoing arguments are equally applicable to cases of franchisor discrimination against franchisees. See note 11 *supra*. These individuals are likely to be even more economically dependent upon their franchisors than many independent contractors are on their employers. Franchisees are arguably also "individuals" within the meaning of § 703(a)(1) (see text accompanying notes 45-47 *supra*) who, if discriminated against in violation of that section, would be "aggrieved persons" with standing to sue under § 706(b) (see text accompanying notes 48-52 *supra*).

71. See note 12 *supra*.

72. See note 13 *supra*. *Henderson v. Oregon*, 405 F. Supp. 1271 (D. Or. 1975), and *Manhart v. City of Los Angeles*, 387 F. Supp. 980 (C.D. Cal. 1975), *aff'd*, 553 F.2d 58 (9th Cir. 1976), *vacated and remanded*, 435 U.S. 702, *modified*, 577 F.2d 98 (9th Cir. 1978), both held that title VII prohibits discriminatory furnishing of retirement benefits generally. See also EEOC Decision No. 79-09 (Oct. 20, 1978), *discussed at* text accompanying notes 130-41 *infra*.

73. See notes 47 & 56 *supra*.

74. See notes 59-60 *supra* and accompanying text (discussion of the distinctions drawn by the *Smith* and *Mathis* courts between the facts in *Sibley* and *Puntolillo* and the facts before them).

75. One would have to assume, however, that, despite the fact that the manner in which these courts distinguished *Sibley* and *Puntolillo* would not bar the Act's applicability in licensing cases, the fact that these courts were unwilling to extend title VII to the cases before them indicates a similar unwillingness to do so in licensing cases.

over, the holding in *Puntolillo* clearly supports the application of title VII to nonprofessional licensing cases, for the *Puntolillo* court's concern lay not so much with the nature of the complainant's occupation as with the power of a licensing board to determine, on the impermissible basis of national origin, whether an applicant would be able to earn a living.<sup>76</sup>

The EEOC has taken the position that title VII does afford protection to applicants for licensing, both nonprofessional<sup>77</sup> and professional.<sup>78</sup> In *Ciancio v. Family Life Insurance Co.*<sup>79</sup> the Commission held that a state insurance licensing agency had violated title VII by requiring a prospective insurance agent to pass an exam given only in English.<sup>80</sup> The agency challenged the Commission's jurisdiction on the basis that the agency had never been the plaintiff's employer or prospective employer.<sup>81</sup> The Commission held that this argument misconceived the letter and spirit of title VII.<sup>82</sup> Title VII, the Commission said, "speaks not of 'employees' but of 'person[s] aggrieved,'"<sup>83</sup> and the language of the title and its legislative history indicate a congressional intent to include more than the conventional employer-employee relationship as evidenced by the specific prohibition against discrimination by employment agencies and referral labor organizations.<sup>84</sup> The Commission further noted that "courts have held that no employer-employee relationship need exist, only control over access to the job market and denial of such access by reference to invidious criteria."<sup>85</sup> The Commission concluded that the agency was a "person" within the meaning of the title and that it had blocked the plaintiff's access to employment by refusing to license him. "The Act requires no more."<sup>86</sup>

In *EEOC v. Supreme Court*<sup>87</sup> the Commission unsuccessfully sought enforcement of administrative subpoenas against the Supreme Court of New Mexico, the Board of Bar Examiners, and the New Mexico Board of Bar Commissioners. The charging parties in the case were three unsuccessful candidates for admission to the New Mexico bar. The Commission, relying upon *Sibley* and *Puntolillo*, sought to overcome the respondents' challenge to its jurisdiction by arguing that the state supreme court was an employer under title VII and that title VII does not require a traditional

76. See note 56 *supra*. See also *Gill v. Monroe County Dep't of Social Servs.*, 79 F.R.D. 316 (W.D.N.Y. 1978), discussed at note 111 *infra*.

77. See *Ciancio v. Family Life Ins. Co.*, Decision No. 75-249, 2 EMPL. PRAC. GUIDE (CCH) ¶ 6457 (May 6, 1975).

78. See, e.g., *EEOC v. Supreme Court*, 17 Empl. Prac. Dec. (CCH) ¶ 8536 (D.N.M. July 21, 1977).

79. Decision No. 75-249, 2 EMPL. PRAC. GUIDE (CCH) ¶ 6457 (May 6, 1975).

80. The evidence indicated that Spanish surnamed American examinees had a significantly lower pass rate on the challenged examination than non-Spanish surnamed American examinees. *Id.* at 4208.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* (citing *Puntolillo*, 325 F. Supp. at 1091).

85. *Id.* (citing *Puntolillo*, 325 F. Supp. at 1092, and *Sibley*, 488 F.2d at 1342).

86. *Id.* The Commission again cited *Sibley*, 488 F.2d at 1342.

87. 17 Empl. Prac. Dec. (CCH) ¶ 8536 (D.N.M. July 21, 1977).

employer-employee relationship.<sup>88</sup> This argument was rejected, however, as it has been in every judicially decided title VII licensing case since *Puntolillo*.<sup>89</sup>

The strongest judicial arguments against applying title VII to alleged discrimination in licensing occur in cases involving professional licensing. *Woodard v. Virginia Board of Bar Examiners*<sup>90</sup> is representative of those cases denying title VII jurisdiction in this context. The plaintiff in *Woodard*, a black male who failed to pass the Virginia bar examination, filed suit against the State Board of Bar Examiners under various civil rights statutes,<sup>91</sup> alleging that the Board was guilty of various racially discriminatory practices that operated to deprive black applicants of an equal opportunity to become practicing attorneys in Virginia.<sup>92</sup> The court granted the defendants' motion to dismiss the title VII portion of Woodard's claim, holding that "Title VII does not apply to the bar examination by its own terms."<sup>93</sup>

Woodard had argued that the Board's control over his access to the attorney job market was sufficient to bring his claim within the scope of title VII.<sup>94</sup> The court, citing *Sibley*, *Puntolillo*, and *Ciancio*, conceded that both judicial and administrative support existed to bolster this position.<sup>95</sup> The court also agreed with Woodard's characterization of the degree of control the Board exercised over his access to employment, stating: "Were the *Sibley* rationale otherwise applicable, there is little doubt but that the defendants exercise complete control over the plaintiffs' access to the attorney job market within the Commonwealth of Virginia."<sup>96</sup> The court noted, however, that several other courts had found title VII to be inapplicable to challenges to bar examinations<sup>97</sup> and had characterized title VII

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88. *Id.* at 6768.

89. See *Murry v. Supreme Court*, No. 72-2101 (9th Cir. Aug. 29, 1973); *Lavender-Cabellero v. Department of Consumer Affairs*, 458 F. Supp. 213 (S.D.N.Y. 1978); *Woodard v. Virginia Bd. of Bar Examiners*, 420 F. Supp. 211 (E.D. Va. 1976), *aff'd*, 598 F.2d 1345 (4th Cir. 1979).

90. 420 F. Supp. 211 (E.D. Va. 1976), *aff'd*, 598 F.2d 1345 (4th Cir. 1979).

91. Woodard brought suit under 42 U.S.C. §§ 1981, 1983, 1985, and 1988 in addition to title VII.

92. 420 F. Supp. at 212.

93. *Id.* The court cited *Richardson v. McFadden*, 540 F.2d 744, 747 (4th Cir. 1976), *aff'd on rehearing*, 563 F.2d 1130 (4th Cir. 1977). *Richardson* was, however, a due process and equal protection suit by four blacks who had failed the South Carolina bar exam. The plaintiffs apparently made no attempt to argue that title VII directly applied to their case. The court stated: "Appellants agree that Title VII does not apply to the bar exam by its own terms." 540 F.2d at 747. Instead, the plaintiffs in *Richardson* argued that title VII standards for judging job relatedness, rather than traditional fourteenth amendment tests, should be applied to the exam. The court disagreed, citing *Washington v. Davis*, 426 U.S. 229 (1976), wherein the United States Supreme Court held that where no discriminatory purpose on the part of the state is proved, application of the more rigorous title VII criteria is unwarranted. 540 F.2d at 747.

94. 420 F. Supp. at 212.

95. *Id.*

96. *Id.* at 213.

97. The court cited *Tyler v. Vickery*, 517 F.2d 1089 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1976); *Murry v. Supreme Court*, No. 72-2101 (9th Cir. Aug. 29, 1973); and *Lewis v. Hartsock*, No. 73-16 (S.D. Ohio Mar. 9, 1976). *Tyler* was a due process and equal protec-

test validation guidelines as inappropriate in the bar examination context because they had been developed in the context of traditional employment practices.<sup>98</sup>

The heart of *Woodard*, however, lies in the distinctions the court drew between the interests of an employer and those of the state as a licensing body:

The employer, whether public or private, has the limited interest in insuring that the individual hired is capable of performing the required tasks. Whatever the magnitude of this interest, [citations omitted], it falls short of that involved in professional licensing. The Supreme Court has recognized "that the States have a *compelling* interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions."<sup>99</sup>

This traditional federal solicitude for the states' strong interest in regulating the professions was also the primary basis for the court's decision in *EEOC v. Supreme Court*,<sup>100</sup> wherein the court characterized the act of admitting an applicant to the bar as "an exercise of judicial power"<sup>101</sup> and

tion suit by blacks who failed the Georgia bar exam. The plaintiffs argued unsuccessfully that the title VII test validation criteria should be applied to the exam. In a dictum the court stated: "Title VII does not apply by its terms, of course, because the Georgia Board of Bar Examiners is neither an 'employer,' an 'employment agency,' nor a 'labor organization' within the meaning of the statute." 517 F.2d at 1096. In *Murry* the appellants' title VII claims of racial discrimination in the administration and grading of the Arizona bar exam were dismissed as "frivolous" without further comment by the court. In *Lewis* a title VII suit was dismissed on the grounds that a board of bar examiners did not employ the jurisdictionally required 15 employees (42 U.S.C. § 2000e(b) (1976)). The *Woodard* court rejected this position, concluding that the board was "an agent of the state which unquestionably employs the requisite number of persons." 420 F. Supp. at 213 n.3.

98. 420 F. Supp. at 214. The court continued:

The employment tests utilized in an industrial setting are designed to measure an individual's ability to perform certain limited functions or operate particular machinery. The bar examination, however, serves a much broader purpose. A licensed attorney is presumed competent to handle any of a number of substantively divergent legal problems which may face his or her clients. Successful passage of the bar examination is intended to reflect a mastery of a wide range of substantive knowledge with which to approach such problems.

*Id.*

99. *Id.* (emphasis in original) (citing *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975)).

100. 17 Empl. Prac. Dec. (CCH) ¶ 8536 (D.N.M. July 21, 1977); see notes 87-89 *supra*. The court stated: "The doctrine of liberal construction of remedial legislation conflicts sharply with the restrictions to exercise of federal judicial power to consider challenges in the attorney licensing area outside of Title VII." *Id.* at 6769. The court further observed that "[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and, have historically been 'officers of the courts.'" *Id.* (quoting *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975)). In *Goldfarb*, however, the Court struck down bar association minimum fee schedules as violative of the Sherman Act. The public policy embodied in title VII is arguably at least as important as that embodied in antitrust laws.

101. 17 Empl. Prac. Dec. (CCH) ¶ 8536, at 6769 (D.N.M. July 21, 1977) (quoting *Doe v. Pringle*, 550 F.2d 596, 599 (10th Cir. 1976), wherein the court in turn quoted *In re Summers*, 325 U.S. 561, 565-66 (1945)). Significantly, however, the *Doe* court held that federal district courts have jurisdiction to hear "a constitutional challenge to the state's general rules and



concluded that "there is little support for a judicial construction of Title VII which would allow it to expand into an area where federal judicial power has been traditionally restricted."<sup>102</sup>

Professional licensing applicants, however, have a greater need for the increased protection afforded by title VII,<sup>103</sup> because they have even more at stake than ordinary applicants for employment. As the plaintiffs in *Tyler v. Vickery* pointed out: "The stakes are much higher than in an ordinary employment testing situation because failure results not in the loss of a specific job opportunity but in denial of the right to practice law in an entire state."<sup>104</sup> Moreover, to the extent that the further integration of minority applicants into the professions is hindered by professional examinations that have a disproportionate impact on minorities, the general purpose underlying title VII would seem to argue for its application in such cases.<sup>105</sup> As the United States Supreme Court admonished in *Griggs v. Duke Power Co.*:<sup>106</sup> "Under the Act [Title VII], practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."<sup>107</sup> Admittedly valid concerns for the integrity of federalism do not justify allowing a state to discriminate against an applicant for professional licensing in a manner in which the state clearly is prohibited from discriminating against its own employees.<sup>108</sup> Despite the merits of the foregoing arguments, however, one could probably realisti-

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regulations governing admission," but that only the United States Supreme Court may hear a claim seeking "review of a state court's adjudication of a particular application." 550 F.2d at 597. Allegations by title VII plaintiffs that a state discriminates against applicants for admission to the bar on the basis of race or sex would seem to be more analogous to the first kind of challenge than to the second.

102. 17 Empl. Prac. Dec. (CCH) at 6770.

103. Title VII standards for testing job-relatedness require that the challenged test be "shown, by professionally acceptable methods, to be 'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.'" *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975). The title VII validation process "involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed." *Washington v. Davis*, 426 U.S. 229, 247 (1976). The applicable constitutional standard also involves a "job-relatedness" aspect, but there the test is whether the subject examination "has a rational relationship to" an applicant's fitness to practice the profession in question. *Tyler v. Vickery*, 517 F.2d 1089, 1103 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1976). In two cases refusing to apply title VII standards, the courts have indicated that doing so would have necessitated invalidating the challenged exam. *See Richardson v. McFadden*, 540 F.2d 744, 746-47 (4th Cir. 1976), *aff'd on rehearing*, 563 F.2d 1130 (4th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *Tyler v. Vickery*, 517 F.2d 1089, 1096 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1976).

104. 517 F.2d 1089, 1096 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1976), *discussed at note 97 supra*. *See also* Judge Adam's dissent in *Tyler*, wherein he observed that "the examination here, although not administered by an 'employer' for the purpose of hiring, is for all practical purposes an employment test. The applicant who fails it may not, in any respect, be employed to practice law within the state." *Id.* at 1107.

105. *See note 53 supra*.

106. 401 U.S. 424 (1971).

107. *Id.* at 430.

108. *See note 61 supra*.

cally assume that the judicial reception afforded to previous attempts to apply title VII to professional licensing situations is indicative of the fate awaiting future attempts in this area.

Even if the principles enunciated in *Woodard* and *EEOC v. Supreme Court* are valid in the context of professional licensing, the rationale of those cases should not be extended to nonprofessional licensing situations. In such cases there exists neither the compelling state interest previously noted<sup>109</sup> nor the strong body of precedent restricting the extension of federal power into a highly sensitive area of state action.<sup>110</sup> Additionally, the rationale of *Puntolillo* provides clear judicial support for the application of title VII to such licensing cases.<sup>111</sup> Nonetheless, two recent lower court decisions have denied title VII jurisdiction in nonprofessional licensing contexts.

In *Lavender-Cabellero v. Department of Consumer Affairs*<sup>112</sup> the court granted the New York City Department of Consumer Affairs' motion to dismiss a title VII claim alleging that the department had unlawfully discriminated in its licensing of process servers. The court noted that neither the language of the Act nor its legislative history specifically addressed the issue of whether protection should be extended to a city agency that has statutory authority to issue licenses,<sup>113</sup> even though the 1972 amendments to the Act<sup>114</sup> had "explicitly extended Title VII to state and local governments who [are] employers within the meaning of the Act."<sup>115</sup> It characterized the plaintiff's claim as calling for "sweeping court legislation"<sup>116</sup> and concluded that if it could be demonstrated that such action was necessary to prevent discrimination, such demonstration "should properly be made in the halls of Congress, not the courtroom."<sup>117</sup>

The *Lavender-Cabellero* court distinguished *Sibley* because the defendant hospital in *Sibley* was not a state or city licensing agency performing a separate public, as opposed to private, function apart from employment

109. See text accompanying note 99 *supra*.

110. See notes 101-02 *supra* and accompanying text.

111. See notes 56 & 61 *supra*. See also *Gill v. Monroe County Dep't of Social Servs.*, 79 F.R.D. 316 (W.D.N.Y. 1978), a suit alleging discrimination on the basis of sex, race, and national origin by a county social services department and a state civil service commission and state social services department. The county defendants argued that the state defendants had exclusive control over employment decisions involving allegedly discriminatory civil service exams and job qualifications. The state defendants moved to dismiss on the grounds that they were neither "employers" nor "employment agencies" within the meaning of title VII. The court, citing *Sibley* and *Puntolillo*, disagreed, stating:

If in fact the county defendants are acting solely as agents of the state defendants, then the state defendants are employers within the meaning of Title VII.

Even if the state defendants do not directly employ the plaintiffs, they are within the reach of Title VII if they control access to the plaintiffs' job market.

*Id.* at 334.

112. 458 F. Supp. 213 (S.D.N.Y. 1978).

113. See note 17 *supra*.

114. 42 U.S.C. § 2000e(a) (1976) (amending 42 U.S.C. § 2000e(a) (1970)).

115. 458 F. Supp. at 214.

116. *Id.* at 215.

117. *Id.*

itself.<sup>118</sup> The court also distinguished *Puntolillo* on the highly dubious grounds that the plaintiff-defendant relationship was primarily one of employment. The court emphasized that the defendant racing commission, in addition to granting licenses for harness horse racing, also operated a raceway and had jurisdiction over all facets of harness racing.<sup>119</sup> *Puntolillo* was thus characterized as a case involving a state agency performing essentially private functions,<sup>120</sup> while the licensing of process servers was likened to "the regulatory function delineated by the line of cases holding that governmental bodies are not employers within the meaning of Title VII when exercising their licensing function with respect to bar examinations."<sup>121</sup> Admitting that a process server's license was not a professional license, the court nonetheless concluded that the city had a compelling interest in the service of process within its jurisdiction.<sup>122</sup>

In *NOW v. Waterfront Commission*<sup>123</sup> the court granted a motion to dismiss a sex discrimination suit by the National Organization for Women against the defendant Waterfront Commission<sup>124</sup> on the grounds that the Commission was neither an "employer" nor an "employment agency" within the meaning of title VII.<sup>125</sup> The court rested its decision on the lack of legislative history indicating "that Congress, in removing the exemption for state government 'employers', intended to benefit anyone other than those actually employed or seeking to be employed by state governments or their subdivisions."<sup>126</sup> The court characterized *Puntolillo* and *Gill v. Monroe County Department of Social Services*<sup>127</sup> as resting upon a misapplication of *Sibley*,<sup>128</sup> which it distinguished as unrelated to state police power.<sup>129</sup> Thus the judicial fate awaiting future attempts to extend title

118. *Id.*

119. *Id.* Clearly, however, any "employment" relationship existing in *Puntolillo* was between the plaintiff driver-trainer and individual racehorse owners. See note 56 *supra*. The relationship between driver-trainers and horse owners could, in fact, have been an independent contractor relationship. See note 63 *supra* and accompanying text.

120. 458 F. Supp. at 215.

121. *Id.* (citing *Woodard v. Virginia Bd. of Bar Examiners*, 420 F. Supp. 211 (E.D. Va. 1976), *aff'd*, 598 F.2d 1345 (4th Cir. 1979), and *Tyler v. Vickery*, 517 F.2d 1089 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1976)).

122. *Id.* The court alluded to problems with "sewer service" of process to justify this compelling interest on the city's part. Because minorities are generally conceived as the primary victims of "sewer service" (in part because of the alleged unwillingness of process servers to enter some parts of the community), one would think that the public interest would better be served by a large number of minority process servers.

123. 19 Empl. Prac. Dec. (CCH) ¶ 9253 (S.D.N.Y. Mar. 26, 1979).

124. The plaintiffs alleged that the Commission had accepted applications for cargo checker jobs only from the ranks of registered longshoremen, a predominantly male group.

125. The court explained: "In its licensing role, the Commission neither pays the wages nor engages the services of persons it registers. Nor does it undertake to obtain workers for employers or jobs for workers. It is, therefore, neither an 'employer' nor an 'employment agency' with respect to persons desiring registration." 19 Empl. Prac. Dec. (CCH) at 7506.

126. *Id.* "We cannot believe that a Congress that had before it such a meticulous enumeration of the categories of entities covered by the Act would have left to speculation and conjecture any desire to subject to federal regulation city and state licensing activities of which it was obviously aware." *Id.* at 7507.

127. 79 F.R.D. 316 (W.D.N.Y. 1978); see note 111 *supra*.

128. 19 Empl. Prac. Dec. (CCH) at 7506.

129. *Id.*

VII protection to applications for nonprofessional licenses is, at best, uncertain.

## II. THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S JURISDICTIONAL TEST

Despite the fact that attempts to broaden title VII jurisdiction have met with mixed success in the courts, the EEOC has adopted a broad jurisdictional test based, in part, on *Sibley* and *Puntolillo*. In a 1978 decision the EEOC delineated its jurisdictional test.<sup>130</sup> The action involved twelve female employees who charged that their employer had discriminated against them by offering an optional retirement program through an insurer that paid lower monthly pension benefits to females than to males on the basis of sex-segregated actuarial tables projecting a longer life expectancy for females. Further, the complainants charged that the employer failed to inform its female employees of the unequal benefit feature at the time when they were required to make an irrevocable decision concerning enrollment in the pension plan. The complainants also charged that the insurer had violated title VII by discriminating against women in its unequal distribution of pension benefits.<sup>131</sup>

The respondent insurer argued that its actions were not within the purview of title VII because it did not employ the complainants, and therefore the EEOC had no jurisdiction over it in its capacity as an insurer providing and distributing retirement benefits through contracts with the employees. The Commission rejected this contention, noting the statutory language supporting a broad view of the Act's reach,<sup>132</sup> and concluded that "the fact that the women claiming to be aggrieved were not Respondent-Insurer's employees does not bar the Commission's jurisdiction over the charge against [Respondent-Insurer]. The operative factor is Respondent-Insurer's ability to deny them an employment benefit."<sup>133</sup>

The Commission then listed four criteria for jurisdiction, claiming authority over a charge against a respondent:

1. when the respondent is an employer within the meaning of Section 701(b);

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130. EEOC Decision No. 79-09 (Oct. 20, 1978) has not been generally reported. Current EEOC policy forbids disclosure of the names of the parties involved in such cases.

131. *Id.* slip op. at 1.

132. The Commission found:

That the use of the term "employer" in Sec. 703(a) does not establish a relationship to which the proscriptions of that section apply is indicated by the wording of Sec. 703(a)(1) and 703(a)(2). Section 703(a)(1), in contrast to Section 703(a)(2), does not limit its prohibitions to discrimination against "employees" or "applicants for employment", but prohibits discrimination against *any individual* on the basis of any of the enumerated criteria.

*Id.* at 3 (emphasis in original); see note 19 *supra* for the relevant statutory language.

133. EEOC Decision No. 79-09, slip op. at 3. The Commission further observed that its jurisdiction over the subject matter of a charge "focuses on whether the Respondent acted in a manner or made a decision which allegedly deprived the Charging Party of a right protected by Section 703 or Section 704 of the Act." *Id.*

2. when the respondent is responsible for the act or decision complained of;
3. when the act or decision adversely affects the charging party; and
4. when that adverse effect is alleged to be a deprivation of a right protected by Section 703 or Section 704 of the Act.<sup>134</sup>

The Commission then observed, in response to the first requirement, that there was no dispute that the insurer was an employer within the meaning of section 701(b).<sup>135</sup> The second part of the jurisdictional test, the Commission concluded, was satisfied by the fact that the insurer had irrevocable control over the money contributed to the fund.<sup>136</sup> The third part of the test was deemed met because the complainants' monthly payments upon retirement would be less than those of similarly situated males.<sup>137</sup> Finally, the Commission observed that title VII protects pension rights<sup>138</sup> and that the complainants had alleged the insurer's actions to be a deprivation of rights protected by section 703 of the Act.<sup>139</sup> The Commission then noted the existence of precedent for the proposition that the use of such sex-segregated tables to determine employment benefits violates title VII<sup>140</sup> and, after analyzing the discriminatory effect of the insurer's policy, concluded that there were reasonable grounds to believe that it had violated the Act.<sup>141</sup>

One noteworthy aspect of the Commission's four-step jurisdictional test is that it focuses upon the alleged discriminatory act, rather than upon the particular relationship between the parties.<sup>142</sup> To be sure, step one re-

134. *Id.*

135. *Id.*

136. *Id.* In this connection the Commission subsequently observed:

The member institutions of Respondent-Insurer cannot withdraw the funds once they are placed with Respondent-Insurer, nor can they tell Respondent-Insurer how these funds are to be distributed. Neither the employer nor the employees have any control over those resources; those funds already contributed to the [Respondent-Insurer] may not be withdrawn. The act of distributing the funds in the manner in which they are distributed is solely within the discretion of Respondent-Insurer.

*Id.* at 4.

137. *Id.* at 5.

138. *Id.* at 4 (citing *Rosen v. Public Serv. Elec. & Gas Co.*, 477 F.2d 90 (3d Cir. 1973)).

139. EEOC Dec. No. 79-09, slip op. at 5. For the applicable statutory language, see note 19 *supra*.

140. EEOC Dec. No. 79-09, slip op. at 5 (citing *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978), which held that requiring female employees to make larger pension contributions than their male counterparts violated § 703(a)(1) of title VII).

141. EEOC Dec. No. 79-09, slip op. at 8.

142. *See, e.g.*, EEOC Decision No. 79-32 (Jan. 16, 1979), wherein the charging party alleged that the respondent failed to hire her as a sales representative because of her sex. The respondent argued that title VII did not apply to its actions because the position the charging party sought was that of an independent contractor, not that of an employee. After examining the degree of control the respondent exercised over its sales representatives, the Commission stated:

While the Respondent has control over the method and manner in which the work is accomplished and should be considered a common law employer, we consider it more appropriate to determine the Commission's jurisdiction over the charge by the character of the Respondent's act which is alleged to have denied the Charging Party an employment opportunity.

*Id.* slip op. at 4.

quires that the respondent be an "employer" as defined in section 701(b) of the Act before personal jurisdiction attaches.<sup>143</sup> This requirement, however, is treated solely as defining a class subject to the Act rather than as a prerequisite form of relationship between a charging party and a respondent.<sup>144</sup> By focusing on the discriminatory act involved, the Commission has manifested a firm commitment to the expanded scope of title VII sanctioned by *Sibley* and *Puntolillo*.

An aspect of step one likely to raise questions of application relates to the statute's requirement that "employers" have fifteen employees. Some entities that would otherwise be subject to the Act will clearly be excluded on this basis. A related question concerns when a respondent lacking the required number of employees may be treated as an "agent" of another entity that does meet the statutory criterion, and thus be subject to the Act on that basis.<sup>145</sup> An example is a state licensing board employing fewer than the required number of employees. The weight of authority indicates that the board may be treated as the agent of the state, and thus be subject to personal jurisdiction under step one.<sup>146</sup>

A related theory that, for jurisdictional purposes, may facilitate the aggregation of the employees of two or more nominally separate entities is the "integrated enterprise" theory. This concept is derived from National Labor Relations Board jurisdiction cases.<sup>147</sup> The factors that are generally

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143. 42 U.S.C. § 2000e(b) (1976), *quoted in note 19 supra*.

144. *See, e.g.*, EEOC Decision No. 79-33 (Jan. 16, 1979), wherein the charging party alleged that the respondent had denied him permission to sell insurance on its behalf because of his national origin. The respondent argued that title VII did not apply because the charging party was an independent contractor. The Commission disagreed, stating: "The use of the word 'employer' in Sec. 703(a) does not establish a relationship to which those unlawful employment practices are limited, rather it only declares a class of persons (those who employ fifteen or more employees) to which the prohibitions apply." *Id.* at 2.

145. Section 701(b) includes within its "employer" definition "any agent of such a person." 42 U.S.C. § 2000e(b) (1976).

146. In *Woodard v. Virginia Bd. of Bar Examiners*, 420 F. Supp. 211, 213 n.3 (E.D. Va. 1976), the court concluded that the Virginia Board of Bar Examiners was "an agent of the state which unquestionably employs the requisite number of persons." *See also* EEOC v. Supreme Court, 17 Empl. Prac. Dec. (CCH) ¶ 8536, at 6768 (D.N.M. July 21, 1977), wherein the court stated: "The Supreme Court of New Mexico is a person and an employer within the meaning of 42 U.S.C. § 2000e. The Board of Bar Examiners is an agent of the Supreme Court and is, therefore, considered to be an employer to the extent that the Supreme Court is an employer." *But see* *Lewis v. Hartsock*, No. 73-16 (S.D. Ohio Mar. 9, 1976).

The possibility also exists that under an agency theory board members may be held personally liable in their individual capacities for discriminatory board actions. *See* *Hanshaw v. Delaware Technical & Community College*, 405 F. Supp. 292 (D. Del. 1975), a race and sex discrimination suit against a college, its board of trustees in their individual and official capacities, and its president and two "campus directors" in their individual and official capacities. Therein the court observed that "it is not necessary for the members of the Board to be a 'person having fifteen or more employees,' if the Board members can be considered agents of an institution which is such a person." *Id.* at 295. Without holding that the board members were agents, the court denied their motion for summary judgment, noting: "As a matter of law, the Board members may be inferred to be agents." *Id.* at 296. *See also* *Padilla v. Stringer*, 395 F. Supp. 495 (D.N.M. 1974).

147. *See, e.g.*, *Sakrete of N. Cal., Inc. v. NLRB*, 332 F.2d 902 (9th Cir. 1964), involving a California licensee of an Ohio corporation (*Sakrete, Inc.*) that unsuccessfully argued that it was not subject to NLRB jurisdiction because its activities were wholly intrastate in nature. The court, noting that the same persons owned the stock of both corporations and were also

considered relevant in determining whether application of this theory is appropriate are: an interrelation of the operations of the companies; centralized control of labor relations; common management of the related entities; and common ownership or financial control.<sup>148</sup> The EEOC has adopted the integrated enterprise theory,<sup>149</sup> and it has enjoyed judicial application in some title VII cases.<sup>150</sup> The most important factors supporting the existence of an integrated enterprise appear to be those indicating a high degree of operational integration. Common ownership standing alone clearly is insufficient.<sup>151</sup>

A more troublesome question that may arise about step one's application concerns who appropriately may be considered an employee for the purpose of calculating the jurisdictionally required number of employees. A situation with factual circumstances similar to those of the overlying carrier in *Smith v. Dutra Trucking Co.*<sup>152</sup> serves as an example. The overlying carrier could have fewer than fifteen employees in the common law sense of the term, but regularly enter subhauling contracts with several subhaulers like Smith. The issue would be whether the Commission could include all aggrieved persons similarly situated to a charging party in a respondent's employee total, although such aggrieved persons are not employees in the common law sense.<sup>153</sup> While this situation has yet to arise, the Commission would likely include all such aggrieved persons, because that approach would be consistent with its broad view of title VII jurisdiction.<sup>154</sup>

More difficult problems of application can arise, however, when one at-

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officers and directors of both, concluded: "[T]he facts show that the operations of petitioner and Sakrete are closely integrated, that their labor relations policies are almost identical and are centrally controlled, that the management of both resides virtually in one man, and that both are commonly owned and financially controlled." *Id.* at 906. Thus the court upheld the NLRB's finding that the two corporations could be considered as "a single employer" for jurisdictional purposes.

148. *Id.* at 905 n.4.

149. *See, e.g.*, EEOC Decision No. 71-1537, [1973] EEOC Dec. (CCH) ¶ 6235 (Mar. 3, 1971).

150. *See, e.g.*, *Williams v. New Orleans Steamship Ass'n*, 341 F. Supp. 613, 616 (E.D. La. 1972), wherein the court treated an association of steamship companies, 12 of which lacked the required number of employees, as a single employer for title VII purposes due to the fact that the association controlled employment on the waterfront, established policies and practices applicable to all member companies, and operated a central hiring hall.

151. *See, e.g.*, *Hassell v. Harmon Foods, Inc.*, 336 F. Supp. 432 (W.D. Tenn. 1971), wherein an employee of a wholly owned subsidiary that lacked the requisite number of employees argued that the parent corporation should be considered his employer for title VII purposes. The court disagreed, observing that "[t]he control exercised by the parent by virtue of its stock holding is exercised in the usual way by the election of the subsidiary's board and officers. The affairs of the two are generally handled separately." *Id.* at 433.

152. 410 F. Supp. 513 (N.D. Cal. 1976), *aff'd*, 580 F.2d 1054 (9th Cir. 1978); *see notes 21-30 supra* and accompanying text.

153. This problem could arise in different factual contexts, such as a real estate broker employing sales agents who may not meet all the traditional common law employee criteria, or a very small manufacturing firm using sales representatives. *See also notes 142 & 144 supra*.

154. This approach would also discourage employers from fragmenting control over employees in an attempt to avoid title VII jurisdiction. *See text accompanying note 70 supra*.

tempts to apply step two of the Commission's jurisdictional test to determine who bears responsibility for the alleged discriminatory act. The application of step two is fairly straightforward when the respondent is the charging party's employer in the common law sense and the act complained of, such as a refusal to hire or a discharge, is solely that of the respondent. Even in independent contractor and licensing cases, the act of the respondent clearly deprives the charging party of an employment opportunity.<sup>155</sup> In some situations, however, more than one respondent may be responsible for an alleged discriminatory act. Two or more respondents may act in concert to deprive a charging party of a protected right. The agency and integrated enterprise theories discussed previously<sup>156</sup> as methods for aggregating the employees of related entities for jurisdictional purposes may also be applied for purposes of affixing responsibility for discriminatory acts. Thus in *Hairston v. McLean Trucking Co.*<sup>157</sup> McLean was held responsible for the discriminatory behavior of Modern Automotive Services, Inc. (MAS), a wholly owned subsidiary. The court examined the degree of control McLean exerted over MAS's operations,<sup>158</sup> and concluded that "McLean and MAS are operated in many respects, as a single unit."<sup>159</sup> Similarly, in *United States v. Local 638, Enterprise Association of Steam*,<sup>160</sup> a race discrimination suit against a steamfitter's union and a trade association that engaged in collective bargaining on behalf of its members, the trade association was held to be a proper party to the suit because "as a trade association for purposes of unified collective bargaining, [the association] performs the functions of an agent for its member contractors."<sup>161</sup>

More complex problems of affixing liability arise in instances where a charging party's employer has delegated some aspect of the employment function to a third party, such as an insurer providing health or pension benefits or a testing firm screening applicants for employment or testing

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155. See note 56 *supra* and text accompanying notes 66-67 *supra*.

156. See notes 145-51 *supra* and accompanying text.

157. 520 F.2d 226 (4th Cir. 1975).

158. The court observed: "They have common officers and directors; MAS services McLean vehicles principally; McLean keeps personnel records for both companies; and McLean screens and tests applicants for employment for both companies at a single office staffed with McLean's employees." *Id.* at 229-30.

159. *Id.* at 229.

160. 360 F. Supp. 979 (S.D.N.Y. 1973), *modified*, 501 F.2d 622 (2d Cir. 1974).

161. 360 F. Supp. at 995. The court also observed that they enjoyed equal representation with the union in the operation of the challenged apprenticeship program and concluded that "MCA has greater influence over and responsibility for employment practices applying to the industry as a whole than any single employer." *Id.* See also *Woodford v. Kinney Shoe Corp.*, 369 F. Supp. 911, 916 (N.D. Ga. 1973), a suit alleging violation of the Age Discrimination in Employment Act, wherein the court acknowledged that a parent corporation could be liable for the discriminatory employment practices of its subsidiary if "the parent corporation so controls the subsidiary that the subsidiary is merely the agent or instrumentality of the parent." For examples of cases in which no agency relationship was found, see *Batiste v. Furnco Constr. Corp.*, 350 F. Supp. 10 (N.D. Ill. 1972), *rev'd on other grounds*, 503 F.2d 447 (7th Cir. 1974), *cert. denied*, 420 U.S. 928 (1975), and *Butler v. Local 4, Laborers' Int'l Union*, 308 F. Supp. 528 (N.D. Ill. 1969).



employees seeking certain job classifications.<sup>162</sup> If the delegate discriminatorily distributes the benefits in question or administers an invalid test, the employer remains liable for its selection of a delegate that acts in a discriminatory manner and for delegating the employment function to such a delegate.<sup>163</sup> The more difficult problem is to determine under what circumstances the delegate is also liable. This issue may appropriately be resolved by an inquiry into the degree of control the delegate exercises over the subject employment function. If the employer delegates the subject function and allows the delegate to determine the method of achieving the desired result, the delegate who chooses a discriminatory method will be liable if its decision is controlling, as in the case of an insurer discriminatorily distributing pension benefits. Likewise, the delegate will be liable if the employer relies on the delegate's determination when considering employees, as in the case of the employer who makes hiring or promotion decisions solely on the basis of discriminatory test results. In the latter instance, if the employer did not rely on the invalid test results but instead made an independent judgment, the delegate would not be liable.<sup>164</sup> Some cases will generate close factual questions concerning the impact of the delegate's actions on the charging party. The employer may consider all applicants regardless of test results or may consider such results as only one factor in its decision making. In view of the extant authority for the proposition that decisions that are even partially based on discriminatory criteria are illegal,<sup>165</sup> however, step two of the test should be satisfied unless the facts indicate that the employer made the decision without any consideration of the invalid test results. If, on the other hand, the employer dictates the delegate's discriminatory methods, a delegate performing such a ministerial function under the employer's control should not be

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162. For example, an employer might require that all employees seeking supervisory positions be tested.

163. In EEOC Decision No. 79-09 (Oct. 20, 1978), *discussed at* text accompanying notes 130-41 *supra*, the EEOC held that the respondent-employer as well as the respondent-insurer had violated title VII.

164. This situation, however, is likely to be rare, because one might reasonably infer some degree of employer reliance from the fact that the employer pays for the delegate's services.

165. *See, e.g.*, *King v. Laborers Int'l Union Local 818*, 443 F.2d 273, 278-79 (6th Cir. 1971), wherein the court stated:

Thus, if one is unlawfully discriminated against in violation of Title VII, an employer need not reinstate him or grant back pay if it can be shown that the employer also had a lawful non-discriminatory motivation for his actions which when considered by itself would have caused the same result as his discriminatory purpose. But where it can be shown that discrimination on the basis of race, color, religion, sex or national origin was, in part, a causal factor in a discharge or refusal to hire the aggrieved party, the aggrieved party is statutorily entitled to damages of lost compensation.

*See also* EEOC Decision No. 74-93, 2 EMPL. PRAC. GUIDE (CCH) ¶ 6426 (Mar. 7, 1974). *Compare* *Rogers v. EEOC*, 13 Empl. Prac. Dec. (CCH) ¶ 11,549 (D.C. Cir. Feb. 15, 1977) and *Day v. Matthews*, 530 F.2d 1083 (D.C. Cir. 1976) (plaintiffs in both cases seeking back pay awards for denial of promotions for allegedly discriminatory reasons could not recover because evidence indicated they would not have been promoted in the absence of discrimination) *with* *Gillin v. Federal Paper Bd. Co.*, 479 F.2d 97 (2d Cir. 1973) (employer who used sex as a factor in job qualification was guilty of discrimination).

responsible for the discriminatory act.<sup>166</sup> The same result may occur in cases where the employer's delegate does not have irrevocable control over employment-generated resources.<sup>167</sup> For example, an insurer that provides health insurance benefits ordinarily only provides current coverage based on periodic payments, and the employer has the right to prospectively alter the coverage or benefit level. In such a case, the insurer should not be liable for discrimination in benefit provisions.

In contrast to the problems that could arise in the application of step two, step three of the Commission's test requiring an adverse effect should be fairly simple to apply in most cases. Once a court establishes that a respondent is an employer for purposes of the Act and is responsible for the act or decision complained of under step two, the presence or absence of an adverse effect upon the charging party should be readily ascertainable. In situations involving traditional employment relationships, the adverse effect will most often be rather obvious: the plaintiff will have been denied employment or promotion, discharged, or given an unjustifiably reduced level of employment benefits. In licensing cases the adverse impact will be equally apparent.<sup>168</sup> In independent contractor cases the Commission has taken the position that whenever a complainant has been discriminatorily deprived of an employment opportunity, a basis for title VII jurisdiction exists.<sup>169</sup>

According to step four, the Commission must determine that the adverse effect determined in step three involves a deprivation of a protected right resulting from a practice proscribed by title VII. Numerous nondiscriminatory acts by an employer may adversely affect an employee's employment rights without violating title VII.<sup>170</sup> The major area of disagreement

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166. The case of a doctor who routinely examines all of an employer's job applicants and is directed to measure their height, weight, blood pressure, and pulse rate and report such data to the employer is such an example. If the employer uses the data thus obtained to implement unjustifiable height and weight standards for various job classifications (which standards may ultimately have the effect of discriminating against females and a disproportionate number of males of certain racial origins), the doctor in question will not be in violation of title VII. More common examples would include employers who direct insurers to pay employment benefits on a discriminatory basis, or direct screening firms to use invalid testing devices. For an interesting reversal of this factual situation in which the common law employer of plaintiffs alleging discrimination in testing and job qualifications maintains that the use of such devices is mandated by two state agencies, see *Gill v. Monroe County Dep't of Social Servs.*, 79 F.R.D. 316 (W.D.N.Y. 1978), *discussed at* note 111 *supra*.

167. EEOC decisions imposing liability on insurers emphasize the fact that the respondent-insurer had irrevocable control over the subject resources. *See, e.g.*, EEOC Decision No. 79-09 (Oct. 20, 1978), *discussed at* note 136 *supra* and accompanying text. *See also* EEOC Decision No. 74-118, 2 EMPL. PRAC. GUIDE (CCH) ¶ 6431, at 4152 (Apr. 26, 1974), holding that a municipal agency paying lower monthly pension benefits to female municipal employees "has such a direct involvement in, and control over, the retirement system to which Respondent City belongs and which affects Charging Party, that it falls within the proscriptions of section 703(a)(1) of the Act notwithstanding that [it] is not Charging Party's employer."

168. *See* text accompanying notes 103-04 *supra*.

169. *See* note 65 *supra*. *But see* *Smith v. Dutra Trucking Co.*, 410 F. Supp. 513 (N.D. Cal. 1976), *aff'd*, 580 F.2d 1054 (9th Cir. 1978).

170. An employee may have been denied promotion as a result of failing an examination required by the employer of all candidates for promotion, but the test may not have ad-

concerning the application of step four is certain to be the scope of the rights included in the title's protection of "employment opportunities"<sup>171</sup> and the "terms, conditions, or privileges of employment."<sup>172</sup> Standing requirements dictate that complainants show their interests to be "within the zone of interests" protected by the statute.<sup>173</sup> As discussed earlier, the Commission has expressly adopted an expanded view of the scope of title VII based on *Sibley's* and *Puntolillo's* focus upon a defendant's ability to deny the complainant an "employment opportunity" rather than the existence of a common law employer-employee relationship.<sup>174</sup> The Commission has taken the position that title VII protects the rights of applicants before state licensing bodies, both professional<sup>175</sup> and nonprofessional,<sup>176</sup> and it will likely continue to assert jurisdiction in such cases unless it is barred from so doing by an ultimate judicial resolution of the issue to the contrary.

The Commission also appears to be firmly committed to the idea that title VII protects the rights of independent contractors as well as common law employees.<sup>177</sup> This position has produced a judicial statement of concern that under the Commission's broad view of the title's scope "all contractual relationships between businessmen would logically be subject to the Act's coverage."<sup>178</sup> The Commission, in an amicus curiae memorandum submitted to the *Mathis*<sup>179</sup> court, stated its contrary view that "the protections afforded by Title VII against racial discrimination accrue [only] to an individual who provides an employer, *on a continuing basis*, with services or labor which are regularly necessary for the employer to carry on its business."<sup>180</sup> The Commission noted that *Mathis's* industrial waste removal services were "an integral and on-going essential part of the operation of the defendant employer's business. If this work were not performed by a nonemployee who contracted to perform it, it would of necessity have to be performed by defendant's own employees."<sup>181</sup> The Commission concluded by expressing the concern that failure to extend the title's protection to *Mathis* and others similarly situated would encourage employers to avoid the title by increasing the percentage of their

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versely affected the employee's class, or it may have been valid under title VII testing criteria.

171. See 42 U.S.C. § 2000e-2(a)(2) (1976), quoted in note 19 *supra*.

172. See *id.* § 2000e-2(a)(1), quoted in note 19 *supra*.

173. See note 51 *supra* and accompanying text. See also notes 48-52 *supra* and accompanying text and note 58 *supra*.

174. See note 65 *supra* and text accompanying notes 130-34 *supra*.

175. See text accompanying notes 87-89 *supra*.

176. See text accompanying notes 79-86 *supra*.

177. See notes 142 & 144 *supra*.

178. *Mathis v. Standard Brands Chem. Indus., Inc.*, 10 Empl. Prac. Dec. (CCH) ¶ 10,306, at 5247 n.1 (N.D. Ga. Feb. 20, 1975).

179. See note 58 *supra*.

180. Memorandum of the United States Equal Employment Opportunity Commission at 6, *Mathis v. Standard Brands Chem. Indus., Inc.*, 10 Empl. Prac. Dec. (CCH) ¶ 10,306 (N.D. Ga. Feb. 20, 1975) (emphasis added).

181. *Id.*

operations performed by independent contractors.<sup>182</sup>

Although the *Mathis* court rejected the “continuing basis” distinction,<sup>183</sup> the test embodies concepts espoused by employment cases predating the advent of title VII.<sup>184</sup> The most interesting aspect of the “continuous basis” idea is its focus upon the operations of the defendant employer rather than upon the economic situation of the complainant. Employers utilizing independent contractors on a one-time or irregular basis are apparently immune from the title’s scrutiny although the complainant may be economically dependent upon gaining temporary employment from several employers operating in such a manner.<sup>185</sup> The frequency of the use of independent contractors required to satisfy the “continuing basis” test is as yet undetermined.

By adopting and applying the “deprivation of protected rights” jurisdictional test, the Commission has decided that the public policy considerations underlying title VII<sup>186</sup> and its own role in furthering the advancement of those policies dictate a broad interpretation of the jurisdictional scope of the title. The Commission’s view of its jurisdiction finds support not only in public policy but also in the language of the title. Those courts that have narrowly construed the title have erroneously focused on the terms “employer” and “employee” as used in the title, while ignoring other statutory language extending the title’s proscriptions beyond the traditional employment context. A broad conception of the title’s jurisdictional scope is an important component in securing the full integration of disadvantaged groups into American economic life.

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182. “If such individuals were not covered by the Title, an employer could, of course, avoid its proscriptions against discrimination merely by contracting out all the work performed by its employees.” *Id.* at n.7.

183. The court characterized the Commission’s “continuing basis” test as “an arbitrary cut-off point.” 10 Empl. Prac. Dec. (CCH) ¶ 10,306, at 5247 n.1.

184. See *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947), discussed at note 29 *supra*; *Walling v. Rutherford Food Corp.*, 156 F.2d 513, 516 (10th Cir. 1947), discussed at note 54 *supra*.

185. The application of the continuing basis test to *Smith v. Dutra Trucking Co.*, 410 F. Supp. 513 (N.D. Cal. 1976), *aff’d*, 580 F.2d 1054 (9th Cir. 1978), would plainly include Smith within the scope of title VII, because Dutra regularly utilized subhaulers like Smith. See note 22 *supra* and accompanying text.

186. See notes 68-70 *supra* and accompanying text.

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