Indiana Law Review

Volume 8 1975 Number 3

Proscribing Retaliation Under Title VII

DELBERT L. SPURLOCK, JR.*

Title VII of the Civil Rights Act of 1964[1] protects individuals from employment discrimination because of their racial, ethnic, religious and sex status.[2] In addition, employers and labor

*Acting Professor of Law, University of California, Davis. B.A., Oberlin College, 1963; L.L.B., Howard University, 1967; L.L.M., George Washington University, 1972. Mr. Spurlock served as Special Assistant to Commissioners Elizabeth J. Kuck and Colston A. Lewis of the Equal Employment Opportunity Commission from 1969-1972.

[1]Sections 701-18, 42 U.S.C. §§ 2000e to 2000e-17 (1970), *as amended,* (Supp. III, 1973) [hereinafter cited as Act].

[2]Act § 703, 42 U.S.C. § 2000e-2 (1970), *as amended,* (Supp. III, 1973), provides:

> (a) 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.
>
> (b) 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.
>
> (c) 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

unions are prohibited from discriminating against persons because of their opposition to employment discrimination.[3] Given the ever expanding definition of employment discrimination[4] and the burgeoning number of Title VII complaints,[5] employers and unions might wonder whether they have been relieved of all discretion to select and discipline their employees and members. Their wonderment is without justification. Employers and unions are as free now as prior to the enactment of Title VII to engage in the kinds of discretionary decision-making which seek and supply a stable, efficient, unified and productive work force. The only discretionary acts proscribed by Title VII are those invidious and sometimes unconscious acts which have penalized generations of minorities and women and which seemingly would have yielded the antithesis of stability and productivity had women and minorities ever comprised significant proportions of the work force. This Article discusses one form of unlawful discrimination—that which is occasioned by opposition to discrimination. The problems posed to the Equal Employment Opportunity Com-

---

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.

[3]Act § 704(a), 42 U.S.C. § 2000e-3(a) (1970), *as amended,* (Supp. III, 1973), provides:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

[4]*See* Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and Its Concept of Employment Discrimination,* 71 MICH. L. REV. (1972); Jones, *Federal Contract Compliance in Phase II—The Dawning of the Age of Enforcement of Equal Employment Obligations,* 4 GA. L. REV. 756 (1970); Note, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 84 HARV. L. REV. 1109 (1971).

[5]1972 EEOC ANNUAL REPORT. The report announced the Commission's incoming workload for fiscal year 1972 as 51,969 charges. *Id.* at 36. The Commission's Chairman, John Powell, recently stated that in fiscal year 1975 the Commission would receive 75,000 charges. Singer, *Employment Report: Internal Problems Hamper EEOC Anti-bias Effort,* NATIONAL JOURNAL REPORTS 1229 (August 17, 1974).

mission (EEOC) and the courts by this form of discrimination are manifold and are accentuated because they often closely resemble the proper exercise of employer discretion.

I. The Burden and Necessity of Opposition

Section 704(a)[6] of the Civil Rights Act of 1964 protects individuals who oppose unlawful employment discrimination from reprisals because of their opposition. This protection is assuredly important to the immediate victims of section 704(a) discrimination. The protection is additionally important because the enforcement scheme of Title VII,[7] through design and happenstance, relies almost entirely upon the willingness of the victims to shoulder the responsibility of "opposition."[8] Recognition of this fact and the unschooled nature of lay "opposition" has permitted courts to overlook technical deficiencies in administrative complaints filed with the EEOC.[9] This has led to an expansive reading of such complaints to include "similarly situated" classes of discriminatees[10] and "like or related" forms of discrimination.[11]

A. Enforcement of Title VII

The enforcement provisions of federal antidiscrimination laws were never designed to be expeditious or efficient.[12] The Commission established by Congress in 1964[13] had neither adjudicatory nor rulemaking power. Neither did it have power to support its own administrative findings except through the filing of amicus briefs in pending litigation. What the Commission did have, however, was a meagre budget and, almost from its inception, a back-

---

[6] 42 U.S.C. § 2000e-3(a) (1970), *as amended,* (Supp. III, 1973).

[7] See text accompanying notes 12-25 *infra.*

[8] The term is used throughout this Article to connote opposition to practices unlawful under section 704(a).

[9] *See* Note, *supra* note 4, at 1198-1218.

[10] *See* Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970); Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968).

[11] Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970).

[12] *See generally* U.S. Civil Rights Comm'n, Federal Civil Rights Enforcement Effort 55-423 (1971); R. Nathan, Jobs and Civil Rights 1-149 (1969).

[13]

> There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party. Members of the Commission shall be appointed by the President by and with the advice and consent of the Senate for a term of five years.

Act § 705(a), 42 U.S.C. § 2000e-4(a) 1970, *as amended,* (Supp. III, 1973).

log of uninvestigated and unresolved charges which now approaches 90,000.[14]

There can be little argument with the view that the Commission's major accomplishment to date has been its definition of employment discrimination through interpretive guidelines.[15] Nor can there be argument with the fact that its major failure has been its inability to redress discrimination suffered by the individual charging party.[16] Ironically, this circumstance has not and will not improve even with the enforcement powers conferred upon the Commission by the 1972 Amendments to Title VII[17] and the significant budgetary increases that the Commission has received during the past several years.[18]

Despite the presence of the little and ineffectively used Commissioner's charge device, the burden of triggering the Commission's enforcement scheme remains largely upon the individual.[19]

---

[14]Singer, *supra* note 5, at 1226.

[15] *See* Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971).

[16]Persons filing charges of discrimination with the EEOC must wait an average of two years for the agency to process administratively the complaint. *See* H.R. REP. No. 238, 92d Cong., 1st Sess. 61 (1971). *See also* S. REP. No. 415, 92d Cong., 1st Sess. 4-8 (1971).

[17]

> If within thirty days after a charge is filed with the Commission . . . the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge.

Act § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1) (Supp. III, 1973), *amending id.* § 2000e-5 (1970). *See also* Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 840-84 (1972).

[18]In fiscal year 1966, the first full year of Commission charge handling, the Commission operated on a budget of $3.25 million. 1966 EEOC ANNUAL REPORT 56. In fiscal year 1972, the last year preceding the Commission's receipt of enforcement power, the Commission's budget totaled $23 million. 1972 EEOC ANNUAL RERORT 50. In fiscal year 1972, the Commission operated on a budget of $43 million. 119 CONG. REC. 20,383 (daily ed. Nov. 14, 1973).

[19]

> Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, [or] labor organization . . . has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, [or] labor organization . . . within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires.

Act § 706(b), 42 U.S.C. § 2000e-5(b) (Supp. III, 1973), *amending id.* (1970).

Also, under the 1972 Amendments, charged employers or unions must be notified within ten days that a charge has been lodged against them.[20] The Commission has reasonably interpreted this notice provision to require the inclusion of the name of the charging party.[21] However, it is unreasonable that the Commission will not investigate a charge or, more importantly, establish its involvement in regard to a charge for more than two years.[22] Even then, in all but a paltry number of cases the Commission will do no more than investigate the charge and attempt conciliation when appropriate. In the two years since the passage of the 1972 Amendments the Commission has brought approximately 328 suits.[23] Further, the Commission's litigation tracking system[24] dictates a future highly select and meagre caseload. Quite clearly then, the primary responsibility for enforcing Title VII will remain with the individual charging party and his attorney, if he is fortunate enough to secure one. The principal enforcement device will remain the traditional section 706 suit[25] instituted by the

---

[20] *Id.*

[21] *But see* 37 C.F.R. § 1601.13 (1973):

> Within 10 days after the filing of a charge, the Commission shall furnish the respondent with a notice thereof by mail or in person (including the date, place, and circumstances of the alleged unlawful employment practice). Unless otherwise determined by the Commission, the notice shall not identify the person filing the charge or on whose behalf it was filed.

Despite the apparent viability of the regulation, Commission procedures were amended to provide for the inclusion of the charging party's name in the official ten day notice afforded the named respondent. *See* 1 EEOC COMPLIANCE MANUAL § 10-3 (Feb. 27, 1973).

[22] See note 16 *supra.*

[23] According to General Counsel William Carey, the Commisison, since the passage of the 1972 Amendments, has filed 328 direct suits, intervened in fifty-one suits brought by individuals, and sought preliminary relief in fourteen suits. 2 CCH EMPL. PRAC. GUIDE ¶ 5269 (1974) (testimony of Mr. Carey before the Equal Opportunities Subcommittee of the House Committee on Education and Labor, Sept. 17, 1974).

[24] The Commission's Track System targets large national and regional respondents for litigation from the beginning of the compliance process. Through the assignment of litigation teams comprised of investigators and attorneys to handle cases consolidating all outstanding charges against a designated respondent, the Commission seeks to utilize fully its inadequate litigation and compliance resources. Thus far five national respondents have been so targeted. *See* U. S. CIVIL RIGHTS COMM'N, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—A REASSESSMENT 88 (1973); BNA Daily Lab. Rep. No. 137 A-7-10 (July 17, 1973).

[25]

> If a charge filed with the Commission . . . is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge . . . the Commission has not filed a civil action under this section or the Attorney General has not filed a civil

charging party who can expect as little assistance from the Commission as he has received in the past.

B. Those Who Oppose

Persons who oppose unlawful discrimination come in various sizes, shapes, stations, colors and sexes. Their methods of opposition are equally varied. Some file administrative complaints with state or federal agencies and courts; others disobey orders, file grievances, organize opposition groups, picket, encourage boycotts, or threaten all or some of these tactics. The employer and union are not, however, without an arsenal; they may, among other things, dismiss, demote, or reassign opposing employees, as well as deny them promotions or fail to support their grievances. Other weapons include ostracism, harassment, suspension, and surveillance. Thus, it is not surprising that the burden upon the employee, prospective employee or union member inclined to opposition concerns not the *form* but the *fact* of opposition. It is one thing to know of the existence of employment discrimination and even the possible methods by which it might be exposed; it is quite another thing to expose oneself in the process of opposition. Moreover, in the area of employment discrimination, the exposure occasioned by opposition is virtually complete. For example, an individual filing a simple failure-to-promote complaint may allege directly the unlawful prejudices of his superiors and his union with whom he must maintain a continuing acceptable relationship, and he invariably asserts indirectly that his personal qualifications are superior or equal to those of peers with whom he must work in future years. The pressures inherent in such a situation are present absent a possibility of reprisal. But the possibility or likelihood of reprisal immensely magnifies these pressures and adds more fundamental ones concerning an employee's ability to provide for his family, his ultimate lifetime opportunities and

---

> action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved, or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

Act § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1) (Supp. III, 1973), *amending id.* § 2000e-5 (1970).

his relationship with or responsibility for other similarly situated class members.

In the ten years since the passage of Title VII, the nation has witnessed the rise of females and minorities to white collar positions, the virtual elimination of blatantly racist practices, and the dissolution of unions segregated on the basis of race and sex. Such "progress" and the rhetoric of "equal opportunity employers" have led minorities and women to believe, rightly or wrongly, that opportunity may be realized if they bide their time and maintain a low profile. Their situation is not unlike that of the aspiring Black assistant principal in the segregated schools of the South, who sought security by acquiescing to his White school board's discriminatory policies. The "era of equal employment" has thus created a neat "Catch 22" for some minority and female workers: the less one asserts one's rights to nondiscriminatory employment decision-making, the greater the opportunity for personal advancement, while the less one personally opposes employment discrimination, the greater the likelihood that it will continue to exist. The employee's decision to oppose discriminatory practices is, therefore, a significant one for himself and for those who would help him realize the fruits of nondiscriminatory employment. If section 704(a) is to achieve the broad protective character envisioned by the Commission and the courts, the decision to oppose as well as its permissible manifestations must be protected.

II. The Problem of Rapid Relief: Section 704(a) and Others

Recognition of the potential hardships suffered by individuals actively opposing employment discrimination, and of the necessity for their continued willingness to actively "oppose," mandates the effective enforcement of section 704(a) and similar remedies. Unredressed retaliation stifles the legitimate protests of depressed classes of discriminatees and thus reduces the effectiveness of the Act. Title VII, and indeed any antidiscrimination legislation, has an effect and purpose far beyond the immediate redress of individual grievances. The maintenance of continued faith in equality through law for those who oppose and all who would follow their example is at stake in every decision to oppose acts thought to be discriminatory. Rapid relief against retaliation for "opposing" is a cornerstone in the maintenance of that faith.

A. Pettway v. American Cast Iron Pipe Co.[26]

Peter Wrenn, a Black employee and spokesman for a Black employee group, filed a complaint with the EEOC and allegel that

[26] 411 F.2d 998 (5th Cir. 1969).

his employer was engaged in systemic racial discrimination violative of section 703.[27] During the pendency of his action before the district court, Wrenn was suspended for engaging in an altercation with a White worker. Wrenn again filed charges with the EEOC and alleged that his suspension was based upon his race and therefore was violative of section 703. The Commission found that the suspension was not racially motivated but permitted a "request for reconsideration" to be filed.[28] He seized this opportunity to challenge substantively the Commission's conclusions and investigative techniques and to allege that his employer had bribed the Commission's investigator. His employer, after being served with a copy of the request for reconsideration, promptly fired Wrenn and claimed that his allegations were false and malicious. Subsequent to the district court's dismissal of his original action on jurisdictional grounds and his notice of appeal, Wrenn almost simultaneously filed a new charge with the EEOC and petitioned the district court for injunctive relief pending his appeal pursuant to Federal Rule of Civil Procedure 62(c).[29] In his new allegations Wrenn alleged that his dismissal was racially motivated and was made in retaliation for his opposition to racial discrimination.

The district court dismissed Wrenn's rule 62(c) motion and found that it was ancillary to his primary action which had previously been dismissed on jurisdictional grounds. However, the court treated the motion as a new cause of action under section 704(a) despite Wrenn's failure to comply with the jurisdictional prerequisites to such a suit.[30] Not surprisingly, the court then found that Wrenn's discharge "was for good and sufficient cause and in no way motivated by an intention to retaliate . . . and that such discharge did not contravene the provisions of . . . Section 704(a) . . . ."[31]

> The Fifth Circuit Court of Appeals reversed, stating:
> [T]he Trial Court could not, during the pendency of the appeal, take action, with respect to the order then under

---

[27] 42 U.S.C. § 2000e-2 (1970), *as amended*, (Supp. III, 1973).

[28] The Commission no longer honors requests for reconsideration but reserves the right to reconsider its determinations on its own motion. *See* 37 C.F.R § 1601.19d(b), (d) (1973).

[29] FED. R. CIV. P. 62(c) provides:

> When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

[30] See note 25 *supra*.

[31] 411 F.2d at 1004 n.13.

> review which would hinder or frustrate determination by the Court of Appeals. . . .
>
> . . . .
>
> . . . [T]he District Court should have considered the motion as ancillary to *Pettway I*. Considering that the denial of a preliminary injunction was for nearly all practical purposes the ultimate determination of Wrenn's case on the merits—maybe as to both *Pettway I* as well as *II*—we look upon it in that light, uninsulated by the usual principle that tests a grant or denial of preliminary injunctions in terms of abuse of discretion.[32]

The circuit court further found that Wrenn's request for reconsideration was a charge within the meaning of section 704(a) and was protected, notwithstanding the malicious material contained therein. In discussing the purpose of section 704(a) the court reasoned:

> In unmistakable language it is to protect the employee who utilizes the tools provided by Congress to protect his rights. The Act will be frustrated if the employer may unilaterally determine the truth or falsity of charges and take independent action.[33]

Quite clearly the court's delineation of the section's purpose was directed solely at the specific clause of section 704(a) which prohibits discrimination against one who has "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title."[34] The court properly concluded that "exceptionally broad protection" was intended for those whose actions fell within this clause.[35] The limits of the "specific clause" protection and the question of whether similar limits exist for those whose opposition is protected solely by the "general opposition clause"[36] are principal inquiries of this Article.

---

[32] *Id.* at 1003.

[33] *Id.* at 1005.

[34] 42 U.S.C. § 2000e-3(a) (1970), *as amended*, (Supp. III, 1973).

[35] 411 F.2d at 1006 n.18.

[36] Act § 704(a), 42 U.S.C. § 2000e-3(a) (1970), *as amended*, (Supp. III, 1973) (emphasis added), provides:

> It shall be unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, *because he has opposed any practice made an unlawful employment practice by this title.*

B. *Protection of Pending Actions*

Federal courts possess inherent equitable powers to protect from reprisal litigants whose administrative or judicial actions are pending disposition.[37] Section 704(a) amplifies these powers for the benefit of Title VII charging parties. In *Drew v. Liberty Mutual Insurance Co.*,[38] the plaintiff, Ms. Drew, was fired the day after she filed charges with the EEOC accusing her employer of sex discrimination. Twelve days later she petitioned the district court on the basis of section 704(a) for an injunction restoring her former position and prohibiting future reprisal. The EEOC also complained of section 704(a) violations and joined in the action pursuant to section 706(f)(2).[39] The district court dismissed Ms. Drew's complaint on the ground that she had not complied with the jurisdictional time requirements for suit.[40] The court also found that the EEOC was a proper party and had established substantial section 704(a) violations. In Ms. Drew's challenge to the district court's dismissal of her action, the court of appeals treated her action not as one arising under section 704(a) but as one seeking "temporary relief pending the action of the Commission."[41] As such, the district court was found to have had jurisdiction to fashion an equitable remedy to protect Ms. Drew's right to invoke the administrative process. The court of appeals concluded:

> [I]n the limited class of cases, such as the present, in which irreparable injury is shown and likelihood of ulti-

---

[37]*See* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 677-86 (1965).

[38]480 F.2d 69 (5th Cir. 1973).

[39]Act § 706(f)(2), 42 U.S.C. § 2000e-5(f)(2) (Supp. III, 1973), *amending id.* § 2000e-5 (1970), provides:

> Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

[40]If the Commission dismisses the charge or has neither brought suit nor entered a conciliation agreement to which the person aggrieved is a party, it must, upon demand of the aggrieved party, issue a notice of right to sue. Such notice is required prior to suit, which must be instituted within ninety days of receipt of such notice. Act § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1) (Supp. III, 1973), *amending id.* § 2000e-5 (1970).

[41]480 F.2d at 73 n.5.

> mate success has been established, (here this has been determined by the trial court), the individual employee may bring her own suit to maintain the status quo pending the action of the Commission on the basic charge of discrimination.[42]

The court's reasoning followed that of Judge Higginbotham in *Pennsylvania v. Engineers Local 542*,[43] a case in which the court sought to preserve its own jurisdiction to award complete relief and to protect litigants engaged in the vindication of federal rights. In *Local 542*, White union members committed acts of violence against members of a class of Black workers involved in a pending general discrimination suit. The court found five jurisdictional bases,[44] including section 704(a), for the award of pendente lite relief and enjoined the union and its members from further acts of intimidation, retaliation or interference in any manner with a Black worker's right to institute the original suit. Significantly, the court began hearings on the motion for pendente lite relief on the same day that the assaults on the Black workers took place.[45]

Pettway, Local 542 and *Drew* irresistibly point to the conclusion that judicial action in contravention of reprisal for filing charges *may* and, to be effective, *must* be immediate. Thus, when one who "opposes" qualifies as a "charging party" and suffers retaliation for his efforts, courts should not observe the Act's ar-

---

[42] *Id.* at 72.

[43] 347 F. Supp. 268 (E.D. Pa. 1972).

[44]

> There are five alternative grounds on which plaintiffs could predicate jurisdiction on their claim for an injunction pendente lite:
>
> (1) The Court's inherent power to protect federal court litigants from violence, intimidation or harassment when designed to deter use of the federal courts.
>
> (2) Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., 78 Stat. 253 (1964), as amended.
>
> (3) 42 U.S.Code § 1981, 16 Stat. 144, § 16 Act of May 30, 1870, Civil Rights Act of April 9, 1866, 14 Stat. 27.
>
> (4) 42 U.S.C. § 1985(2), 17 Stat. 13, Act of April 20, 1871.
>
> (5) 42 U.S.Code § 1985(3), 17 Stat. 13, Act of April 20, 1871.

Id. at 284-85. *But see* Tramble v. Converters Ink Co., 343 F. Supp. 1350, 1354 (N.D. Ill. 1972):

> An employer theoretically could discharge every one of its employees who makes charges against it before the EEOC irrespective of whether they are white, black or oriental. As the racial motivation which is the central crux of a § 1981 action is not necessarily involved in such a retaliatory discharge, we conclude that a discharge of an employee because of his bringing charges before the EEOC, while clearly a violation of Secton 704(a) of Title VII, is not a violation of § 1981.

[45] 347 F. Supp. at 271 n.6.

bitrary one hundred and eighty day time requirement[46] before entertaining a motion or a new action for protective relief. It is apparent that any prophylactic time requirement is totally misplaced as it relates to all section 704(a) violations. Surely one of the most efficient ways of guaranteeing detrimental effects of retaliatory action is to insulate it against countermeasures for a period of six months. Fortunately, when formal charges occasion the alleged retaliation, court-ordered relief will not be delayed because of Title VII's general time requirements. Further, the substantive principles governing the propriety of the relief sought apparently will be those of section 704(a) regardless of which jurisdictional vehicle—a motion for an injunction pending appeal, a pendente lite motion or a new cause of action—is used to present the issue to the court. This tacit acknowledgment on the part of the courts in *Pettway, Local 542* and *Drew* is clearly appropriate.

C. Section 706(f)(2)

The 1972 Amendments to Title VII in section 706(f)(2) clothed the EEOC with the power to seek "temporary or preliminary relief pending final disposition" of a charge before it.[47] The Commission has secured relief in only one such case to date, *Drew*, and then only after the original charging party sought judicial relief on her own. Theoretically, section 706(f)(2) and the Commissioner's charge device[48] provide the EEOC with a flexible and efficient vehicle for attacking reprisal actions. A problem of effecting any kind of Commission action in this respect, however, exists within the Commission itself. As the Fifth Circuit Court of Appeals accurately noted in *Drew*, the Commission has neither the time nor the mechanisms for identifying and prosecuting reprisal actions requiring immediate attention.[49] Until the EEOC finds the time and creates those mechanisms, section 706(f)(2) will remain an infrequently used remedy. Regardless of how often this remedy is used, the Fifth Circuit seems correct in its holding that section 706(f)(2) neither preempts nor destroys the ability of private litigants to

---

[46]See note 25 *supra*.

[47]42 U.S.C. § 2000e-5(f)(2) (Supp. III, 1973), *amending id.* § 2000e-5 (1970).

[48]Act § 706(b), 42 U.S.C. § 2000e-5(b) (Supp. III, 1973), *amending id.* § 2000e-5 (1970), authorizes the institution of charges by a member of the Commission. The 1972 Amendments deleted the original requirement that the Commissioner's charges could issue only after the Commissioner first made a determination of reasonable cause and set forth the facts upon which the charge was based. Act of July 2, 1964, Pub. L. No. 88-352, § 706(a), 78 Stat. 241.

[49]480 F.2d at 74.

invoke the inherent equitable powers of federal courts to redress reprisal actions.[50]

III. Establishing a Prima Facie Violation

The elements of a section 704(a) violation are clearly set forth in the statute. The complaining party must establish that he has *opposed employment discrimination, or* that he has *made a charge or participated in a proceeding* in which an employment practice is alleged to be unlawful pursuant to Title VII. The complainant must further establish that he has been made the object of *discrimination by the respondent,* and that the discrimination took place *because of* the complaint's opposition, charge or participation. Too often courts and the EEOC, through its administrative decisions, have failed to make findings with respect to each element of the alleged violation. As a result, the parameters of the elements, with the possible exception of "charging" or "participating," have remained blurred. This failure has also led to the erroneous confusion of the principles which should govern the establishment of a prima facie violation with those which should be confined to permissible defenses.

A. Challenging Discrimination

1. Charges and Participation

The clearest and most easily recognized form of opposition to practices thought to be unlawfully discriminatory is the filing of formal charges with an administrative agency or court. All of the allegations, arguments and surplusage contained in a document or communication purporting to be a charge are merged into the liberal definition of a charge for purposes of section 704(a) protection. In the words of the Fifth Circuit Court of Appeals in *Pettway:*

> The Employee is not stripped of his protection because he says too much. If he says enough the Employee can suffer no detriment by virtue of having filed charges with EEOC which also contain false or malicious statements. By utilizing EEOC machinery he is exercising a protected right.[51]

The *Pettway* court specifically left open the question of whether a defective charge would be protected. The broad purposes of Title VII, its enforcement scheme and section 704(a), however, would seemingly dictate that a defective charge should also be protected.

---

[50] *Id.* at 75-76.

[51] 411 F. 2d at 1007.

In section 704(a) cases, no purpose would be served by distinguishing between writings that are cognizable as charges and those that are not. The Commission must accept charges based upon the mere belief that discrimination exists. If employees are to be encouraged to act upon their beliefs and to utilize an appropriate vehicle for redress, their intention to charge should govern. Also, an employee's filing of a writing or communication with the EEOC is a definitive expression of his intent to file a charge. Even if a writing does not qualify as a charge, it should nevertheless constitute "opposition" within the meaning of section 704(a)'s general opposition clause. This approach, however, may yield less definitive protection.

A similar problem is posed when a "charging party" publicly reveals the content of his charge. The confidentiality requirements of Title VII[52] were an important consideration in the protection of the alleged malicious material in *Pettway*. The failure to honor the premium that the Act places upon confidentiality—though arguably inapplicable to the charging party[53]—might logically result in a court's treating a charge containing *malicious material* or *disparaging comments* under the general opposition clause. This problem might be compounded by the fact that statements contained in the publicized charge may be actionable in state courts.[54] If the

---

[52]Act § 706(b), 42 U.S.C. § 2000e-5(b) (Supp. III, 1973), *amending id.* § 2000e-5(b) (1970), provides:

> If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

Act § 709(e), 42 U.S.C. § 2000e-8(e) (1970), provides:

> It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commisson pursuant to its authority under this section prior to the institution of any proceeding under this title involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

[53]*Cf.* H. Kessler & Co. v. EEOC, 472 F.2d 1147 (5th Cir. 1973).

[54]*See* EEOC Decision No. 74-77, Jan. 18, 1974, in 2 CCH EMPL. PRAC. GUIDE ¶ 6417 (1974), in which the Commission specifically left open this question when the charged employer filed a cross-claim against the charging party's state court suit for breach of contract. In holding that the employer's

charge contains only a bare allegation of discrimination, no sound reasons exist for treating a publicizing employee differently from a nonpublicizing employee, notwithstanding possible confidentiality requirements. The Commission's processes cannot operate in a vacuum. The existence of a charge will eventually become known generally in the working environs where an effective investigation is taking place after notice to the respondent. Thus, an employee's publication of a charge containing no malicious or extraneous material works no additional hardship upon the respondent and in no way impedes the administrative enforcement of the Act. Accordingly, there appear to be no significant reasons for denying the publicizing charging party the absolute protection afforded those who do not publicize. The Act's general confidentiality requirements should not be construed to compromise a substantive right specifically protected by section 704(a).

Drew, Local 542 and *Pettway* establish a firm judicial policy of protecting Title VII litigants who are seeking federal administrative or judicial relief from employment discrimination.[55] That policy should extend identical federal court protection to persons who have administrative actions pending in state antidiscrimination deferral agencies;[56] those agencies attain such status only by virtue of Title VII and are part of the overall enforcement scheme of federally established rights.[57] Thus, in theory and in fact, a complaint lodged with a state deferral agency is a charge with the EEOC at the time of filing. For these reasons section 704(a) should proscribe retaliation for invoking or participating in the process of these state deferral agencies.[58] The EEOC has gone even further and has held

---

cross-claim, based upon the charge filed with the EEOC, was proscribed by section 704(a), the Commission reasoned that:

> [T]he filing of a charge of unfair employment practices with the Commission carries with it a privilege broad enough to proscribe the bringing of a libel action against the person filing the charge, unless he or she publishes the alleged libel to other than Commission officials or employees.

[55]The Commission has been equally diligent in the protection of charging parties. *See* EEOC Decision No. 70-661, Mar. 24, 1970, in CCH EEOC Decisions ¶ 6138 (1973); EEOC Decision No. 71-2338, June 2, 1971 in CCH EEOC Decisions ¶ 6247 (1973).

[56]When a charge is filed alleging an unlawful employment practice in a state which "has a state or local law prohibiting the unlawful employment practice alleged and establishing or *authorizing a state or local authority* to grant or seek relief from such practice," the Commission must defer to the appropriate authority or agency for a period of sixty days or until final action is taken by the agency, whichever is earlier. Act § 706(c), 42 U.S.C. § 2000e-5(c) (Supp. III, 1973), *amending id.* § 2000e-5(c) (1970) (emphasis added).

[57]*See* 37 C.F.R. § 1601.12 (1973).

[58]*See* EEOC Decision No. 70-683, Apr. 10, 1970, in CCH EEOC Decisions ¶ 6145 (1973).

that persons complaining to nondeferral state agencies of practices which would be unlawful pursuant to Title VII are no less deserving of section 704(a) protection than are those who file charges with the EEOC.[59]

It is obvious that the Commission and the courts would be hamstrung in their enforcement responsibilities if potential witnesses could be coerced into silence. Accordingly, the Commission and the courts appear most willing to extend the protection of section 704 (a) to broad categories of "participation" in Commission or court proceedings brought under Title VII.[60] The Commission has held in one of the few prospective applications of section 704(a) that employer rules which advise "employees not to cooperate with any government investigation without first obtaining" company permission are designed to coerce employees and to inhibit the free assistance and participation of employees in the Commission's processes.[61] Likewise, under this theory any employer attempt to tailor the character of employee testimony would appear to be inherently destructive of free employee participation. The EEOC has found a section 704(a) violation in such a situation, but only after the respondent employer had begun specific acts of retaliation against the employee whom it had been unable to control.[62]

2. *"General Opposition"*

The "general opposition" clause of section 704(a) forbids retaliation against those who oppose practices made unlawful by Title VII. In *Green v. McDonnell-Douglas Corp.*,[63] an employer refused to rehire plaintiff Green, a Black mechanic, because of his opposition to the employer's allegedly discriminatory policies. Prior to 1964 Green had complained persistently to McDonnell officials of the imminency of a layoff induced by work reduction. When the

[59]*See* EEOC Decision No. 70-661, Mar. 24, 1970, in CCH EEOC Decisions ¶ 6138 (1973), in which the Commission found that an employer's harassment of a female employee who sued for back wages under Pennsylvania's Equal Pay Act violated section 704(a).

[60]*See* EEOC v. Plumbers Local 189, 311 F. Supp. 464 (S.D. Ohio 1970) (union attorney's inherently coercive questioning of witnesses at job site); EEOC Decision No. 71-2312, June 1, 1971, in CCH EEOC Decisions ¶ 6243 (1973) (harassment and forced resignation because of witness' failure to follow supervisor's order to fabricate statements to investigator in exculpation of employer); EEOC Decision No. 71-1151, Jan. 14, 1971, in CCH EEOC Decisions ¶ 6208 (1973) (charging party 'interviewed" in presence of seven managerial officials).

[61]Unpublished EEOC Decision No. 72-0299.

[62]EEOC Decision No. 71-2312, June 1, 1971, in CCH EEOC Decisions ¶ 6248 (1973).

[63]318 F. Supp. 846 (E.D. Mo. 1970), *rev'd*, 463 F.2d 337 (8th Cir. 1972), *vacated and remanded*, 411 U.S. 792 (1973).

layoff materialized in 1964, Green initiated protests by writing letters, filing charges, picketing and by various other means. He also spearheaded demonstrations aimed at McDonnell's employment practices, including a traffic "stall-in" during a shift change which resulted in the blockage of a main access route to the McDonnell plant. Green was also at least tangentially involved in a "lock-in" demonstration at the main office building in which the front doors were chained and padlocked during office hours. He was cited for and pleaded guilty to obstruction of traffic in connection with the "stall-in."

Green filed suit in federal district court and alleged that McDonnell's refusal to rehire him was racially motivated and was made in retaliation for his opposition to discriminatory employment practices. The district court's confused treatment of the difficult section 704(a) issues began with its framing of those issues: "(1) whether the plaintiff's *misconduct* is sufficient to justify defendant's refusal to rehire, and (2) whether the 'stall-in' and 'lock-in' are the *real reasons* for defendant's refusal to rehire the plaintiff."[64]

The court had a problem. Section 704(a) protects opposition to unlawful employment practices. Conduct construed in normal circumstances to be misconduct may nevertheless constitute opposition within the meaning of section 704(a) and may ultimately be deserving of its protection. By assuming that Green's actions were misconduct unprotected by section 704(a), the court rendered its second issue superfluous. Under the court's initial formulation there was, in fact, nothing in Green's conduct deserving protection. The "real reason" for the refusal to rehire, whatever it might have been, was of no moment in securing the protection of section 704(a) since Green was not "opposing" within the meaning of the section.

While this rather confusing issue formulation did not prevent the court from engaging in a more reasoned analysis of the case, it did lead to a rather unreasonable holding:

> [D]efendant's reasons for refusing to rehire plaintiff were motivated solely and simply by the plaintiff's participation in the "stall-in" and "lock-in" demonstrations. The *burden of proving other reasons was on the plaintiff.*[65]

Indeed, Green must have felt under some handicap when asked to disprove his own case.

The decision in *Green* is not without its redeeming aspects. The court at least attempted, though in conclusionary fashion, to define the permissible limits of the protection afforded those who oppose:

---

[64]318 F. Supp. at 850 (emphasis added).

[65]*Id.* (emphasis added).

> Protest must be kept within reasonable limits if it is to be protected. Impeding the flow of traffic into or from an employer's plant exceeds such reasonable limits. Title VII of the Civil Rights Act of 1964 does not protect such activity as employed by the plaintiff in the "stall-in" and "lock-in" demonstrations. . . .
>
> . . . The Court finds that conduct such as the plaintiff's, which creates situations fraught with danger to other employees or to the general public, is not protected by Title VII. . . .
>
> . . . The purpose of the Act is to secure effective redress of employees' rights, to secure for them the right to exercise their lawful civil rights without discrimination because of this exercise, not to license them to commit unlawful or tortious acts or to protect them from the consequences of unlawful conduct against their employers.[66]

One can hardly question these characterizations. A problem develops, however, in construing their applicability to the section 704(a) situation. Did all or some of Green's actions constitute "opposition"? Did McDonnell treat Green differently from other similarly situated nonopposing parties? If so, was that treatment motivated by Green's "opposition"? Finally, was McDonnell perhaps justified in its treatment of Green because of particular reasons inextricably bound to the character or quality of the opposition which, in some circumstances, would be deserving of protection?

The factual pattern in *Green* provided the district court with an ideal vehicle for the establishment of definitive principles governing resolution of issues arising under the general opposition clause of section 704(a). The court missed this opportunity as did the Eighth Circuit when it disposed of the section 704(a) issue on appeal[67] by merely concluding that the protection of section 704(a) extended to lawful "protests" in the same manner as the filing of charges but that no protection is extended "to activities which run afoul of the law."[68] Such cursory treatment does little to enhance the section's potential for extending effective protection to the opposing worker. The concept of opposition, unlike the terms "charges" and "participation," is not easily defined. Yet in many cases the fact of opposition, its form and its substance are ignored by courts. Because the fact of opposition is the initial element in

---

[66]*Id.* at 850-51.

[67]Green v. McDonnell-Douglas Corp., 463 F.2d 337 (8th Cir. 1972), *vacated and remanded*, 411 U.S. 792 (1973).

[68]463 F.2d at 341.

establishing a section 704(a) violation, its definition in each case is crucial.

a. The Easy Case

Certain classes of employee actions are easily defined as "opposition"[69] within the meaning of section 704(a). Among these are concerted actions as typified by *Green*. In addition, "opposition" clearly encompasses such activities as picketing,[70] filing of formal discrimination-based grievances under a collective bargaining agreement,[71] complaining about one's treatment to employers and collective bargaining representatives,[72] and filing section 703 administrative or civil actions.[73] Such actions obviously constitute "opposition" since the intention of the parties to oppose Title VII discrimination is usually discernible from the act of opposition. Likewise, there is little chance in such a case that the employer or union charged with the section 704(a) violation could effectively challenge the existence of an employee's intent to oppose, notwithstanding employer or union disagreement with the propriety and form of opposition.

b. The Difficult Case

The burden of proving intent to oppose takes on a more difficult but crucial function in other contexts. An employee's decision to oppose may have been the result of painstaking calculation, but

[69]"Opposition" is used throughout the remainder of the Article to denote employee actions which fall within the "general opposition" clause of section 704(a). See note 36 *supra*.

[70]*See* EEOC Decision No. 71-1804, Apr. 19, 1971, in CCH EEOC Decisions ¶ 6264 (1973) (one-man picket opposing alleged racially discriminatory employment practices protected by section 704(a) from dismissal despite valid no strike clause); *cf.* Western Addition Commun. Organ. v. NLRB, 485 F.2d 917 (D.C. Cir. 1973), *cert. granted*, 415 U.S. 913 (1974).

[71]*See* EEOC Decision, May 28, 1969, in CCH EEOC Decisions ¶ 6039 (1973); *cf.* EEOC Decision No. 71-1551, Mar. 30, 1971, in CCH EEOC Decisions ¶ 6246 (1973) (employee's contractual rights under a collective bargaining agreement are concurrent with right to proceed against employer under Title VII).

[72]*See* Johnson v. Lillie Rubin Affiliates, 5 CCH Empl. Prac. Dec. ¶ 8542 (M.D. Tenn. 1973) (employee discharged for complaining to NAACP about employer's discriminatory practices); EEOC Decision, May 28, 1969, in CCH EEOC Decisions ¶ 6039 (1973) (employee discharged for complaining to his employer and filing grievances with his union objecting to racial epithets); EEOC Decision No. 71-1545, Mar. 30, 1971, in CCH EEOC Decisions ¶ 6261 (1973) (continued job tenure conditioned upon employee's ceasing "pestering for equal rights").

[73]*See* Barela v. United Nuclear Corp., 317 F. Supp. 1217, *aff'd*, 462 F.2d 149 (10th Cir. 1972).

spontaneity or timidity on the part of the employee may produce a form of opposition which masks that intent.

Company policies and procedures and direct orders of supervisors are often discriminatory. An aggrieved worker or other concerned employees sometimes violate these policies or orders because of their discriminatory content. Such deliberate violations may constitute "opposition" within the meaning of section 704(a).[74] Obviously an employee's burden of demonstrating that he was "opposing" should be a heavy one since section 704(a) was not intended to serve as an excuse for employee recalcitrance. An opposing employee should be required to demonstrate that the policy or order disobeyed was at least superficially discriminatory, that he had knowledge of the discriminatory effect, and that his participation would victimize or implicate him in the discriminatory action. For example, an employment applicant may question or refuse to take a battery of tests required as a condition for employment. The knowledge, long extant in minority communities, that testing devices are often instruments of discrimination should be enough to bring the applicant's *questioning* of the test's validity within the ambit of "opposition" for the purposes of section 704(a) protection.[75] That knowledge, coupled with the employer's poor image for minority employment or promotion, should satisfy the "opposition" burden for even a refusal to take the test.[76] Satisfaction of this burden, however, is insufficient to prove that an employee's questioning of or refusal to submit to a test resulted in a retaliatory action.

Clearly all that the applicant has proven thus far is that his actions constituted "opposition" within the meaning of the Act. He has not proven that his questioning of or refusal to submit to the test resulted in a retaliatory action, nor has the employer been given the opportunity to demonstrate that his own response was justified, as when the actions of the opposing applicant were unreasonable in view of existing mechanisms for exercising opposition. These and other issues must be addressed prior to any finding that 704(a) has been violated, but only after it has been concluded that "opposition" has occurred within the meaning of the Act. In merging the issues the Commission and the courts open the door to gross

[74] *See* EEOC Decision No. 70-601, Mar. 9, 1970, in CCH EEOC Decisions ¶ 6124 (1973) (employee refused a work assignment made in retaliation for his filing of charges against the employer).

[75] *Cf.* O'Brien v. McGuire, Mass. Comm'n Against Discrimination Decision No. 73-EMP-294-S, Oct. 12, 1973, in 2 CCH EMPL. PRAC. GUIDE ¶ 5196 (1973) (tenure denied for inquiry into basis of possible adverse action).

[76] *See* EEOC Decision No. 74-33, Sept. 28, 1973, in 2 CCH EMPL. PRAC. GUIDE ¶ 6406 (1973) (suspension for refusal to take discriminatory test violates section 704(a)).

oversimplification and fail to provide guidance to opposing parties or to potential respondents.

The Eighth Circuit's reasoning in *Green* that section 704(a) did not protect "protests" which "run afoul in the law"[77] is an excellent illustration of a court's oversimplification of the issues. Practical as well as substantive problems are inherent in this characterization. For example, lying about one's arrest record on public employment application forms may constitute a criminal offense. On the other hand, seeking or using certain criminal record information is unlawful under Title VII.[78] Therefore, when a public employer refuses to process the application of or hire an otherwise qualified applicant who has lied on his application form, the refusal is directed at a form of "opposition" as well as at the "unlawfulness" of the applicant's action. Indeed, the form of opposition may eventually prove undeserving of protection under section 704(a), but to base such a decision ab initio upon the mere unlawfulness of the act would sanction the continued existence of the original discrimination.

Peacefully protesting employees may raise similar issues by their violation of state statutes which prohibit criminal trespass, disturbance of the peace, and unlawful assembly. The price that opposing employees seem willing to pay for the elimination of discriminatory practices has historically included penalties for violation of such statutes and ordinances. In fact, it was such protests which brought about the enactment of Title VII. It would be anomalous now to view the peaceful protests of workers as something less than opposition within the meaning of section 704(a) merely because they committed technical violations of municipal ordinances or state laws. Furthermore, the function of determining the existence of a criminal act would unjustifiably fall upon the employer since the decision on the question of employee or applicant discipline would almost always precede an adjudication of lawfulness. The Eighth Circuit's blanket exemption of "criminal" acts from the protections of section 704(a) thus goes too far. Its application to the testing example is both illogical and violative of substantial federal interests which are embodied in section 704(a). In this situation the criminal act was occasioned by a discriminatory demand. Equally illogical results would obtain in the application of the exemption of peaceful protests "which run afoul of the law."

Threatening to oppose discriminatory acts, either by filing formal complaints or by engaging in forms of concerted activity,

---

[77] 463 F.2d at 341.

[78] *See* Gregory v. Litton Systems, Inc., 472 F.2d 631 (9th Cir. 1972); *cf.* Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *modified en banc*, 452 F.2d 327 (8th Cir.), *cert. denied*, 406 U.S. 950 (1972).

may also constitute "opposition" within the meaning of section 704(a).[79] Constant generalized threats obviously serve no useful purpose and are undoubtedly disruptive of morale and efficiency. On the other hand, threatening to oppose discriminatory practices, if performed judiciously, is a reasonable negotiating technique which can yield progressive institutional change without the necessity of outside assistance. As in the case of violations of company rules,[80] the determination of which threats are deserving of section 704(a) protection must ultimately rest upon the balancing of institutional interests against the interests of federal policy in protecting "opposing" employees or applicants. But since the Act protects "opposition" and not mere threats, the threshold question must be: Does the threat constitute "opposition" within the meaning of section 704(a)? Again, the intention of the protesting party should be the determinative factor.

In some contexts the mere assertion of rights—one's own or those of others—takes on the mantle of "opposition." Examples are legion: the minority applicant who bids for a formerly White job, the White worker who refers Blacks to or assists them in securing a job formerly held by Whites, female workers who organize for purposes of group discussion or mutual self-help, or females or minorities who run for union office.

Employees engaging in such activities may have only a suspicion that their employer or union is unlawfully discriminating, or they may have no knowledge in this respect. By their actions employees merely intend to assert rights consistent with principles of nondiscrimination.[81] But, in the minds of some unions and employ-

---

[79] *See* EEOC Decision No. 6247, Sept. 28, 1973, in CCH EEOC Decisions ¶ 6247 (1973).

[80] See text accompanying notes 74-78 *supra*.

[81] *See* EEOC Decision No. 71-345, Oct. 13, 1970, in CCH EEOC Decisions ¶ 6167, at 4,280 (1973), in which a White employee was discharged for referring a Black friend to the employer. The Commission reasoned that:

> [I]f Charging Party's referral was interpreted by Respondent as opposition to or interference with its policy of refusing to hire Negro females, and if Respondent retaliated against her because it viewed her action in this light, then Charging Party was discharged "for opposing practices made unlawful by Title VII" in violation of Section 704(a) whether or not she either knew of Respondent's policy or intended to oppose it.

EEOC Decision No. 71-2040, June 3, 1971, in CCH EEOC Decisions ¶ 6275 (1973) (female employee lost overtime because she asked to be upgraded); *cf.* EEOC Decision No. 71-1850, Apr. 21, 1971, in CCH EEOC Decisions ¶ 6245 (1973) (White union organizer forced into resignation because of harrassment resulting from his participation in civil rights demonstrations in the area); EEOC Decision No. 72-1704, Apr. 26, 1972, in CCH EEOC Decisions ¶ 6365 (1973) (notation placed in the charging party's personnel file indicat-

ers, those who assert such rights appear as "trouble-makers" and "militants." In such circumstances, the assertions of employees seeking their rights become opposition to those who would retaliate. It should be treated as such by the courts.

There is another and perhaps more fundamental reason for viewing such assertions as "opposition" within the meaning of section 704(a): peers may view them as such. The chilling effect upon similarly situated employees is not diminished because a class member is disciplined for the assertion of rights rather than for opposing under section 704(a). Indeed, it is probable that the chill would harden to a deep-freeze of all rights-seeking when unremedied retaliation is the expectation.

Although the parameters of "opposition" suggested above are broad, one must not forget that "opposition" is nothing more than a response to perceived discrimination. The varieties of discrimination for which redress is sought are countless. The ultimate temperance of acts made in opposition to discriminatory practices can only be made in reference to the environment and to the exigencies of the situation in which they arise. Such an inquiry is misplaced, however, at this stage. If the courts are to avoid the traps of overly restrictive definitions of "opposition" and to protect the inclination to oppose as well as the form of opposition, they must first determine whether any opposition has occurred. Most important, this determination should be made without regard to the propriety of the form of opposition. Only in this sense may the suggested parameters of "opposition" be said to be broad—but necessarily so.

B. Retaliation

There are two additional elements in the establishment of a prima facie violation of section 704(a). The plaintiff must first demonstrate that the defendant employer or union has *discriminated* against him. Secondly, the plaintiff must show that he was discriminated against *because of* his "opposition." Together, these two elements require a finding that the respondent employer or union has engaged in intentional discrimination against an opposing party. The definition of intentional discrimination has been established in decisions striking down the White primary,[82] discriminatory jury selection,[83] and public school segregation.[84] Its founda-

---

ing that charging party copied address from equal employment opportunity poster).

[82] *See* Smith v. Allwright, 321 U.S. 649 (1944).

[83] *See* Norris v. Alabama, 294 U.S. 587 (1935); Strauder v. West Virginia, 100 U.S. 303 (1880); *cf.* Swain v. Alabama, 380 U.S. 202 (1965).

[84] *See* Brown v. Board of Educ., 347 U.S. 483 (1954).

tion lies in the concept of unequal or disparate treatment of similarly situated persons.

Proof of disparate treatment is particularly difficult for opposing parties because discrimination arising under section 704(a), unlike section 703, is not by nature class discrimination.[85] Typically the section 704(a) discriminatee is "out there by himself," highly visible and particularly vulnerable. This does not mean, however, that the opposing party's status as an object of retaliation is devoid of class considerations. Indeed, he is concerned with protecting class interests. Generally, however, section 704(a) discrimination is sporadic and highly individualized, even when used to undermine the prospective opposition of large numbers of employees.[86] Thus, there is little or no possibility to prove gross statistical disparities between identifiable classes of opposing or nonopposing employees or applicants capable of supporting a finding of disparate treatment. This fact also explains why disparate effect,[87] a section 703 class based concept, is not utilized in section 704(a) cases. However, if the Commission and the courts are to protect the interests of opposing parties and those similarly prone, diligence and understanding in the discovery of section 704(a) retaliation must match that exhibited in the proscription of section 703 discrimination.

1. Disparate Treatment: The "Discrimination" Element

Two comparative inquiries are basic to the issue of whether section 704(a) "discrimination" has occurred: Was the opposing party treated differently than similarly situated employees or, alternatively, did the employer's treatment of the opposing party change after his registry of opposition? It is clear, however, that in some circumstances the inquiry cannot end here. Uniformly applied company rules may unreasonably impede opposition, and com-

---

[85] *See* Francis v. American Tel. & Tel. Co., 55 F.R.D. 202 (D.D.C. 1972).

[86] *See* United States v. Hayes Int'l Corp., 7 CCH Empl. Prac. Dec. ¶ 9164 (N.D. Ala. 1973) (disparate treatment not shown in discharge of one of many Black plaintiffs in former Title VII suit); Pennsylvania v. Engineers Local 542, 347 F. Supp. 268 (E.D. Pa. 1972).

[87] *See* Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971):

> What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification. . . . [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability. . . . Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.

pany or union actions in such circumstances may be inherently destructive of the right to oppose or participate.

In *EEOC v. Plumbers Local 189*,[88] Black plumbers who had filed affidavits in a pending racial discrimination suit against the union were questioned under oath by the union's attorney. The questioning took place in a trailer at a construction site in the presence of a stenographer and the union's business agent. Alleging violations of section 704(a), the EEOC moved to strike the elicited testimony proffered by the union at the trial. The court sustained the motion to strike and reasoned that:

> However subtle they may be, the psychological pressures exerted upon these individuals, in view of the total power held jointly by the respondent union and the employer over their present and future job prospects, leads this Court to the inescapable conclusion that *the circumstances under which these conversations were held were coercive by their very nature* and any statement made during this course thereof cannot be said to be truly voluntary.[89]

Questions concerning the union's treatment of similarly situated, nonparticipating or nonopposing members correctly have no place in measuring section 704(a) violations in such circumstances. Thus, at least when the rights to participate or to oppose through administrative or court proceedings are at issue, respondents may not be permitted to engage in "*conduct which would tend to infringe* on that right to be practiced with impunity."[90]

In virtually all other contexts the discrimination element must be established by either of the two comparative inquiries stated above.[91] In other words, the worker who complains of a section 704(a) violation must be able to demonstrate a difference between the pre-opposition and post-opposition treatment afforded him. In the alternative he may carry his burden of proof on this element by establishing a difference in the respondent's post-opposition treatment of himself and that afforded nonopposers. Because the gravamen of a section 704(a) action is retaliation and not race or sex bias, the class of "nonopposers" may, and probably will, include women and minorities. This fact should not weaken the opposing party's claim of retaliation.

However, the opposing party may be faced with a more difficult problem of proof when his opposition has been combined with that of many other workers who claim to have suffered no

---

[88] 311 F. Supp. 464 (S.D. Ohio 1970).

[89] *Id.* at 466 (emphasis added).

[90] *Id.* at 467 (emphasis added).

[91] *But see* discussion of "chilling effect" doctrine in indirect proscriptions of the right to oppose. Notes 104-11 *infra* & accompanying text.

section 704(a) discrimination.[92] In this situation, it might appear reasonable to compare only the treatment afforded the section 704(a) opposing party and that afforded other opposing parties.[93] Certainly such a comparison is probative of the discrimination issue as well as the issue of whether the discrimination was *because of* the charging party's opposition. However, to limit the inquiry to such a narrow focus would open the door to selective retaliation among opposers, an evil no less invidious and no less capable of stifling dissent than wholesale reprisal. Accordingly, the disparate treatment inquiry should consistently compare the treatment of the charging party to that of the class of nonopposers and should compare the differences in treatment afforded the charging party before and after his opposition.

The usual forms of discrimination generally proscribed by the Act[94] are well known and need no elaboration here. However, there are forms of discrimination peculiar to section 704(a) which deserve mention. These include indirect proscriptions of the right to oppose and the manufacture of reasons for discipline.

a. Indirect Proscriptions

Some significant attacks upon the right to oppose appear, at first blush, to be no more than normal and permissible exercises of labor-management prerogatives. For instance, why should a union not be permitted to condition its representation of a Black member's failure-to-promote grievance upon his withdrawal of an employer-directed charge of discrimination previously filed with a state fair employment practices commission?[95] Why may not an employer consider an applicant's pending discrimination charge against a former employer in making a hiring determination? Certainly a union has the discretion not to expend its resources in support of certain grievances.[96] Likewise, employers have a

[92] *See* United States v. Hayes Int'l Corp., 7 CCH Empl. Prac. Dec. ¶ 9164 (N.D. Ala. 1973).

[93] *Id.* (no section 704(a) discrimination on the facts presented).

[94] *See* Act § 703(a)-(c), 42 U.S.C. § 2000e-2(a)-(c) (1970), *as amended*, (Supp. III, 1973).

[95] *See* EEOC Decision No. 71-1551, Mar. 30, 1971, in CCH EEOC Decisions ¶ 6246 (1973) (union suspended action on opposing party's grievance when it learned that he had filed a charge with the Fair Employment Practices Commission upon the same subject matter); EEOC Decision No. 71-2338, June 2, 1971, in CCH EEOC Decisions ¶ 6279 (1973).

[96] *Compare* Humphrey v. Moore, 375 U.S. 335 (1964), *with* Conley v. Gibson, 355 U.S. 41 (1957):

> The Railway Labor Act, in an attempt to aid collective action by employees, conferred great power and protection on the bargaining agent chosen by a majority of them. As individuals or small groups the employees cannot begin to possess the bargaining power of their

right to condition employment upon their assessment of an applicant's commitment to the employment opportunity. The legitimate discrimination permitted in such circumstances and the impermissible discrimination prohibited by section 704(a) are separable, if at all, by a fine line which is only discernible in many instances by an examination of the effects of employer actions.

Barela v. United Nuclear Corp.[97] squarely represents the dilemma faced by the employer. Plaintiff Barela, a Mexican-American, sought work with defendant, United Nuclear. The position sought was vacant and there was no question that Barela was qualified. During the job interview the defendant's personnel officer discovered that Barela had filed a charge of national origin discrimination with the EEOC against his former employer. The defendant's representative then asked Barela if he intended to pursue the pending charge to its conclusion and, if successful, whether he intended to resume his former employment. Upon receiving an affirmative response, the personnel officer informed Barela that his application would not be processed further, since the defendant was seeking only permanent employees. Barela returned later that day to inquire whether he would be hired if he dropped his pending charge.[98] The defendant's representative refused to process the application further and indicated that Barela's charge against his former employer must be disposed of first.

> The issue, as framed by the district court, was
> whether defendant's refusal to further process plaintiff's application and hire him . . . was based upon the personnel manager's honest belief that the plaintiff was only seeking interim employment or whether the refusal to hire plaintiff was simply because he had filed with the E.E.O.C. a charge against another employer. The latter reason would amount to a violation of 42 U.S.C.A. § 2000e-3(a).[99]

Based upon this formulation the court found that the defendant's first refusal to process the application was permissible but that

---

representative in negotiating with the employer or in presenting their grievances to him. Nor may a minority choose another agent to bargain in their behalf. We need not pass on the Union's claim that it was not obliged to handle any grievances at all because we are clear that once it undertook to bargain or present grievances for some of the employees it represented it could not refuse to take similar action in good faith for other employees just because they were Negroes.

Id. at 47.

[97]317 F. Supp. 1217, *aff'd*, 462 F.2d 149 (10th Cir. 1972).

[98]In the interim Barela asked the EEOC whether he could drop his charge of discrimination against his former employer. 317 F. Supp. at 1218.

[99]*Id.*

the second failure violated section 704(a) since Barela had made clear that he was willing to drop the charge and that he was seeking permanent employment.

The court's characterization of the issue, its failure to determine whether discrimination existed, and its apparent insistence that retaliatory motives provide the only basis for the refusal to hire inevitably resulted in a practical obliteration of the section 704(a) protection. The only basis for finding a violation was Barela's willingness to abandon his original charge, exactly what section 704(a) was designed to prevent.

The Tenth Circuit Court of Appeals affirmed, reasoning that:

> Factually the case boils down to United Nuclear's agent . . . telling the plaintiff that notwithstanding his qualifications for the vacancy his application could not be processed until there was no longer a dispute between him and [his former employer] . . . . The trial court was faithful to the evidence and legally correct in recognizing that the filing of a charge is a protected right under the Act and that *conduct infringing the right* is a violation of the Act. With respect to the asserted need for permanent employees and its relation to the need for refusing employment to Title VII claimants, the business necessity defense of United Nuclear was not established.[100]

The thrust of this decision, despite its affirmance of the district court's decision in its entirety, was obviously aimed at the defendant's *original* failure to process the application. Such reasoning, if applied to the second refusal, would be superfluous.

What recourse is available to an employer seeking permanent employees? Does he discriminate within the meaning of section 704(a) when he refuses employment to a Title VII claimant qualified for the position sought? Depending upon the employer's course of conduct there are two bases for answering in the affirmative. First, employers would almost invariably engage in disparate treatment by denying an applicant a position because of a pending Title VII action. Employers generally seek no guarantee that new employees remain on the job for a specified number of years, and job turnover is anticipated. The contingencies which lead persons to change employment cannot be anticipated. Recovery in a pending Title VII action is such a contingency. In singling out Barela's status as a Title VII claimant, United Nuclear applied a condition of continued job tenure which it could not and did not apply to the contingencies existing for all other applicants, that is, persons who might move to another area of

[100]Barela v. United Nuclear Corp., 462 F.2d 149, 152 (10th Cir. 1972) (emphasis added and citations omitted).

the country or persons who might abandon their employment for personal reasons. In this sense United Nuclear engaged in classic discriminatory treatment, beginning with its *first refusal* to process Barela's application.

Another basis exists upon which the discrimination element may be established in this setting. The court of appeals in *Barela* held that "conduct infringing" the right to file a charge establishes a prima facie violation of section 704(a). Administrative decisions of the EEOC support this view.[101] The "infringement" theory appears to parallel the "discriminatory effect" theory[102] established in *Griggs v. Duke Power Co.*[103] However, "infringement" is best understood as a variant of the "chilling effect doctrine."[104]

Fundamental constitutional rights are protected from the "chilling effect" of discretionary state action.[105] The focus of the doctrine is upon both the individual who seeks to exercise a fundamental right and the class with whom he is associated. Thus, state instituted loyalty oaths,[106] libel laws,[107] and residency requirements for recipients of welfare benefits[108] have been proscribed when their operation has a "chilling effect" upon the exercise of fundamental constitutional rights. The doctrine was extended to the labor relations context in *Textile Workers v. Darlington Manufacturing Co.*,[109] in which the Supreme Court held that an employer's partial closing of an enterprise "is an unfair labor practice under § 8(a)(3) if motivated by a purpose to chill

[101] *See, e.g.*, EEOC Decision No. 71-1151, June 1, 1971, in CCH EEOC Decisions ¶ 6208 (1973) ("unnatural formality" tending to intimidate charging party created by his "interview" by seven company officials); EEOC Decision No. 71-2338, June 2, 1971, in CCH EEOC Decisions ¶ 6279 (1973) ("Foreseeable effect" of union's failure to process grievance identical to member's state FEPC charge was to stifle the filing of such charges).

[102] See notes 86-88 *supra* & accompanying text.

[103] 401 U.S. 424 (1971). See note 87 *supra*.

[104] *See* Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808 (1969).

[105] *See* Walker v. City of Birmingham, 388 U.S. 307, 338 (1967) (Brennan, J., dissenting):

> To give these freedoms the necessary "breathing space to survive" . . . the Court has modified traditional rules of standing and prematurity. . . . We have molded both substantive rights and procedural remedies in the face of varied conflicting interests to conform to our overriding duty to insulate all individuals from the "chilling effect" upon First Amendment freedoms generated by vagueness, overbreadth and unbridled discretion to limit their exercise.

Id. at 344-45. *See also* Laird v. Tatum, 407 U.S. 567 (1972).

[106] Wiemer v. Updegraff, 344 U.S. 183 (1952).

[107] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[108] Shapiro v. Thompson, 394 U.S. 618 (1969).

[109] 380 U.S. 263 (1965).

unionism in any of the remaining plants of a single employer and if the employer may reasonably have foreseen that such closing will likely have that effect."[110]

The "fundamental rights" in the Title VII context are the rights to oppose, to charge, and to participate in the resolution of discrimination-based disputes. Their unfettered exercise is guaranteed by section 704(a). If discriminatory treatment were the sole probative means of establishing the "discrimination" element of section 704(a) actions, opposing employees would be faced with an untenable burden of proof in cases such as *Barela* in which the chilling effect of employer actions was combined with arguably permissible grounds for such action. The enforcement potential of the Act would suffer a corresponding diminution. Under these circumstances the extension of the "chilling effect" doctrine of section 704(a) actions seems singularly appropriate. Thus, the EEOC and the courts should hold that section 704(a) "discrimination" is established whenever employer or union conduct has the foreseeable effect of chilling the exercise of "opposition."[111] It should be noted that "infringement" or "chilling effect," so framed, does not dispense with the requirement that the "discrimination" took place "because of" the charging party's opposition. In other words, the requirement of intent in section 704(a) violations remains intact. "Chilling effect" merely facilitates proof of "discrimination" by broadening its definition to include the consequence as well as the disparateness of employer actions. *Barela* and *Plumbers Local 189* support this rationale. Future decisions, however, should clearly articulate the bases for concluding that "discrimination" has in fact taken place. If employers are to be judged according to the discriminatory consequences of ordinarily innocuous actions, they should know the judgmental standards.

b. Manufactured Reasons for Discipline

A different problem is posed when an employer succeeds in manufacturing a case for discharging or for otherwise disciplining an opposing employee. In this instance, unlike that in *Barela* in which the applicant was admittedly qualified for the position sought, it is either an employee's qualifications or job performance which is in question. The employer in this instance is usually able to demonstrate a consistent pattern of discipline for employees who engage in the prohibited behavior. Furthermore, the prohibited employee behavior, arguably, will be inimical to the

[110] *Id.* at 275.

[111] See text accompanying notes 88-90 *supra.*

continued successful operation of the employer's business. But the gist of the discrimination is in the "manufacturing" and not in the presence or absence of conduct justifying some discipline under normal circumstances. In the discovery of disparate treatment in this setting, the employer's entire course of conduct in assessing an opposer's fitness should be open to question, including the employer's comparable assessments of previous violators' fitness.

In *Francis v. American Telephone & Telegraph Co.*,[112] the plaintiff, after filing charges of racial discrimination against AT&T, was placed under constant and oppressive supervisory surveillance and was subjected to strict scrutiny in matters of personal deportment. The plaintiff incurred several disciplinary suspensions and was eventually dismissed for failing to comply with "the rules and guidelines that were set forth for all employees."[113] It was true, as AT&T alleged, that the plaintiff frequently violated the rules of her employment. In the words of the court, however, it was also clear that:

> [O]ther employees both white and Negro were equally guilty of similar violations and derelictions of duty and that, prior to the time plaintiff complained to EEOC, there was no substantial difference in the manner the defendant treated those who were guilty of such violations and derelictions of duty.
>
> After plaintiff complained to EEOC, however, the manner in which plaintiff was treated was changed and a procedure applicable only to her and directed solely to her EEOC complaint was inaugurated.[114]

The court held that AT&T's "course of conduct" discriminated against the plaintiff within the meaning of section 704(a).[115]

Francis is an easy case of its genre. The disparate treatment was obvious. When the fact of opposition is abstruse or evidence of disparate employer conduct is scarce, however, the problems of proof are obviously more difficult. Protection of opposing parties in such circumstances may well require courts to infer the existence of a discriminatory course of conduct from the fact that a violation of company rules is found. The rationales for such an inference are twofold: First, only through unusually close surveillance would the violation be discovered,[116] and secondly, equally

---

[112] 55 F.R.D. 202 (D.D.C. 1972).

[113] *Id.* at 207.

[114] *Id.*

[115] *Id.*

[116] *See* EEOC Decision No. 71-382, Oct. 30, 1970, in CCH EEOC Decisions ¶ 6202 (1973) (After employee filed charges with EEOC, notes were kept documenting any of his absences which fell on Monday or Friday, and no such records were maintained for any other employee).

diligent monitoring would reveal similar violations by nonopposers.[117] Such an inference merely shifts the burden of proof to the employer to specify the methods used to discover the violations in this type of case—especially when the violations are unusual or occasion abnormally harsh discipline.[118] It is proper that the burden of proof reside with the employer since he has established and commands the means of discovering employee violations. Furthermore, the relatively close proximity of any disciplinary actions taken against an "opposing" employee will raise the spectre of retaliation and will have a "chilling effect" upon future opposition. Thus, when the employer's course of conduct is at issue, it is not unreasonable to compel him to identify and describe that course of conduct.

2. The "Because of" Requirement

Section 704(a) prohibits discrimination occasioned "because of" opposition. Direct proof of employer motive or intent is difficult, and courts and the EEOC have not required such proof as a condition for satisfying the "because of" requirement. Proof that the employer has received notice of opposition, however, is essential.[119] The required nexus between opposition and discrimination cannot be established without it.

The best evidence of a nexus between opposition and discrimination is the employer's own words. Employers or supervisory employees, however, are seldom so careless as to presage their discrimination with assertions of hostile motive or intent. Thus, the inference of employer discriminatory intent to stifle

---

[117] *See* EEOC Decision No. 71-1115, Jan. 11, 1971, in CCH EEOC Decisions ¶ 6201 (1973) (corrective notices placed only in charging party's personnel folder despite the fact that department supervision was lax and numerous similar unrecorded rule violations were committed by other employees).

[118] *See* EEOC Decision No. 71-1885, Apr. 22, 1971, in CCH EEOC Decisions ¶ 6237 (1973) (In a four year period, charging party's foreman had issued only eleven safety violation reprimands of which only two, those issued to charging party, resulted in suspensions); EEOC Decison No. 71-288, Sept. 17, 1970, in 2 CCH EMPL. PRAC. GUIDE ¶ 6413 (1974) (charging party placed under surveillance and discharged without customary warning notices).

[119] *See* EEOC Decision No. 71-1000, Dec. 29, 1970, in CCH EEOC Decisions ¶ 6194, at 4,330 (1973), in which it was held that:

> In order to find a violation of Section 704(a) the Commission must first find that Respondent's supervisory personnel who participated in the complained-of act have either actual or imputed knowledge of Charging Party's opposition to an allegedly unlawful employment practice or of Charging Party's having previously filed a charge with the Commission or participated in a Commission investigation.

opposition is the primary means of satisfying the "because of" requirement. This inference is drawn from the fact that the respondent has engaged in disparate treatment against an applicant or employee following his registry and the employer's receiving notice of "opposition." The proximity of the discrimination to the notice of opposition is the crucial factor. In some circumstances the inference may be so compelling as to submerge the importance of normally satisfactory explanations for employee discipline.[120] In *Edward G. Budd Manufacturing Co. v. NLRB*,[121] the Third Circuit Court of Appeals upheld an NLRB finding that the discharge of an admittedly recalcitrant and unproductive employee of long tenure was unlawfully motivated by his participation in union organizing activities. In the words of the court:

> [A]n employer may discharge an employee for a good reason, a poor reason or no reason at all so long as the provisions of the National Labor Relations Act are not violated. It is, of course, a violation to discharge an employee because he has engaged in activities on behalf of a union. Conversely an employer may retain an employee for a good reason, a bad reason or no reason at all and the reason is not a concern of the Board. But it is certainly too great a strain on our credulity to assert, as does the petitioner, that Weigand was discharged for an accumulation of offenses. We think that he was discharged because his work on behalf of the CIO had become known to the plant manager. That ended his sinecure at the Budd plant.[122]

Commission decisions have generally followed this proscription in the section 704(a) context[123] and have recognized an infinite variety of ways in which an employer may justify disciplinary actions.[124]

---

[120]*See* Francis v. American Tel. & Tel. Co., 55 F.R.D. 202 (D.D.C. 1972); EEOC Decision No. 71-1885, Apr. 22, 1971, in CCH EEOC Decisions ¶ 6237 (1973) (Within one year after the employee was promoted, as a result of his filing charges with EEOC, he was given three disciplinary notices and two suspensions for safety violations, even though he had received only two disciplinary notices in the previous twenty-six year period he had worked for the respondent).

[121]138 F.2d 86 (3d Cir. 1943).

[122]*Id.* at 90-91.

[123]*See, e.g.*, Francis v. American Tel. & Tel. Co., 55 F.R.D. 202 (D.D.C. 1972); EEOC Decision No. 71-1885, Apr. 22, 1971, in CCH EEOC Decisions ¶ 6237 (1973); EEOC Decision No. 71-1626, Apr. 18, 1971, in CCH EEOC Decisions ¶ 6230 (1973); EEOC Decision No. 71-1115, Jan. 11, 1971, in CCH EEOC Decisions ¶ 6201 (1973).

[124]The proximity factor is also responsible for the view of the courts and the Commission that mixed motives, one permissible and the other

The viability of the inference of respondent's intent may be determined in part by the form of opposition. Some informal forms of opposition, such as threatening or complaining, may not adequately communicate the Title VII basis of the opposition. Suppose, hypothetically, that an employer threatened by informal opposition ran a discrimination free shop and had no inkling that a threatening employee was opposing practices thought to be discriminatory. It would hardly seem just to hold that the employer's reasonable reprimand of the employee constituted discrimination "because of" employee opposition. Certainly no hostile intent could be imputed to an employer who lacked notice of opposition.[125] But an employer who pinions his defense in such situations upon lack of notice should beware. His claim is predicated upon the most tenuous of circumstances. He must be able to demonstrate that it was *reasonable* for him to lack notice of his employee's opposition despite the fact that some complaining, threatening, or rights-seeking had taken place. In the face of an averment that an employer lacked notice, an employee should be permitted to introduce evidence of any section 703 discrimination practiced in the employer's establishment, along with any previous complaint of such discrimination. Proof of present discrimination or prior complaints is probative not only of the "reasonableness" of the plea that no notice was given, but also of the motivation for retaliation generally.

Significant support for the use of section 703 discrimination evidence in this situation and in any circumstance in which the employer offers an alternative ground for the disciplinary action can be found in the Supreme Court's treatment of *McDonnell Douglas Corp. v. Green.*[126] As noted, the Eighth Circuit dismissed Green's section 704(a) claim,[127] on the basis that the section did not protect "activities which run afoul of the law." However, the claim was remanded on the ground that Green was not given an opportunity to present evidence of the alleged section 703 racial discrimination in McDonnell's refusal to rehire him. Since Green chose not to appeal the section 704(a) dismissal, the only questions before the Supreme Court related to section 703.

---

proscribed by section 704(a), established the "because of" element. *See, e.g.*, United States v. Hayes Int'l Corp., 7 CCH Empl. Prac. Dec. ¶ 9164, at 6874 (N.D. Ala. 1973) ("If any element of racial discrimination or retaliation or reprisal played any part in a challenged action, no matter how remote or slight or tangential . . ." a violation of section 704(a) would be established).

[125]*See* EEOC Decision No. 71-1000, Dec. 29, 1970, in CCH EEOC Decisions ¶ 6194 (1973).

[126]411 U.S. 792 (1973).

[127]See text accompanying notes 67-68 *supra.*

In upholding the Eighth Circuit's remand order, the Supreme Court held that Green "must . . . be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext."[128] The Court reasoned that the stated basis for the refusal to rehire must be applied uniformly to avoid racially discriminatory treatment. The Court then elaborated upon the kind of evidence which would be probative of such discriminatory treatment—more particularly discriminatory motive—as follows:

> Other evidence that may be relevant to any showing of pretext includes facts as to the petitioner's treatment of respondent during his prior term of employment; petitioner's reaction, if any, to respondent's legitimate civil rights activities; and petitioner's general policy and practice with respect to minority employment. On the latter point, statistics as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks. In short, on the retrial respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a cover-up for a racially discriminatory decision.[129]

Receipt of such evidence in the section 704(a) context is equally relevant.[130] An employer cannot fairly complain that he lacks notice of the race or sex basis of an employee's complaints or threats when the working environment is rife with unlawful discrimination for which the employer bears responsibility.

While evidence of section 703 discrimination should be probative of the employer's motivation to discriminate and his notice of opposition, it has little relevance in discovering the fact of opposi-

---

[128] 411 U.S. at 804.

[129] *Id.* at 804-05 (citations omitted).

[130] *See* Tidwell v. American Oil Co., 332 F. Supp. 424 (C.D. Utah 1971). *Contra,* Terrell v. Feldstein Co., 468 F.2d 910 (5th Cir. 1972). Terrell complained that he was denied benefits and discharged because he filed charges with the EEOC. The Fifth Circuit Court of Appeals affirmed the district court's finding that Terrell was not an object of section 704(a) discrimination. On the issue of whether the district court should have considered statistical evidence of section 703 class discrimination, the court held:

> Although statistical evidence of a pattern or practice of discrimination is of probative value in an individual discrimination case for the purpose of showing motive, intent, or purpose . . . it is not determinative of an employer's reason for action taken against an individual grievant.

Id. at 911.

tion and the fact of section 704(a) discriminatory treatment. Some EEOC decisions have apparently concluded that the existence of section 703 discrimination presumptively establishes those two elements of a section 704(a) claim for relief.[131] Such reliance upon section 703 evidence is misplaced. Certainly, as illustrated in *Green*, a single employer action may yield simultaneous violations of section 703 and section 704(a), but the violations are distinct. In merging the violations, the Commission only obliterates their distinctions, particularly those characteristic of section 704(a). While this practice may not prove troublesome in the EEOC's conciliation attempts, it will likely inhibit the Commission's ability to isolate significant section 704(a) violations and to act expeditiously in seeking and securing preliminary relief under section 706(f)(2).

This theory of the section 704(a) prima facie case of retaliation is broad. It permits little or no analysis of the propriety of the form of opposition. Thus, the determination of "what constitutes *protected* opposition" is viewed as a premature inquiry at this stage. Likewise, the balancing of legitimate employer interests again the "chilling effect" of his actions has no place in the determination of the prima facie case. If such a reading of section 704(a) seems unduly harsh, it should be remembered that the enforcement scheme of Title VII invites and requires the affirmative participation of parties who would be defenseless without the protections afforded by the section. If section 704(a) is to serve as a deterrent to ill-conceived retaliation, it must effectively notify employers and unions that they will be faced with the burden of affirmatively justifying actions taken against an opposing party. Employers and unions must know that normally permissible acts may be unlawful when preceded by opposition to discriminatory employment practices. Finally, the supposed breadth of section 704(a) protection can be realized only if Commission and court decisions elucidate a comprehensive and consistent format for the determination of the difficult issues. In section 704(a) cases no amount of ultimately correct conclusions

[131] *See, e.g.*, EEOC Decision No. 71-357, Oct. 22, 1970, in CCH EEOC Decisions ¶ 6168 (1973). In that case, the respondent employer knowingly retained foremen who were racially prejudiced. On the basis of one such foreman's statement that the charging party was a racial agitator and took personal affront to every conversation in which race was a factor, the Commission concluded that section 704(a) discrimination was established by charging party's discharge. *See also* EEOC Decision No. 72-1380, Mar. 17, 1972, in CCH EEOC Decisions ¶ 6364 (1973) (section 704(a) violation found when male charging parties were discharged and disciplined for failure to conform to company's sex discriminatory "long hair" and "facial hair" policies).

can compensate for erroneous supportive rationale. The history of *Green* proves this much.

IV. Defenses

Employers have traditionally offered one all-encompassing justification for adverse actions against opposing parties: namely, the existence of "independent grounds" for the action. While permissible independent grounds for adverse action may exist in a given situation, the traditional use of the phrase has camouflaged the significant differences which exist among "independent grounds."

A. Independent Grounds—Employee Misconduct and Lack of Qualifications

An employee's lack of qualifications or his violation of company rules are standard justifications for adverse actions by his employer. It is axiomatic that employers need hire and promote only those who are qualified.[132] No difference exists between section 703 and section 704(a) actions in this respect. Thus, demonstrated inability to perform should rebut the presumption that an opposing party was the object of retaliatory employer action because of his failure to win a job or promotion.[133]

An employee who opposes and, in addition, engages in misconduct presents a different problem. Proof of misconduct alone should not rebut the presumption of retaliation established by the employee. An employer should be required to demonstrate that similar misconduct of other employees consistently resulted in the kind of adverse actions suffered by the opposing party,[134] and that the discovery of misconduct was not the result of abnormal surveillance occasioned by an employee's opposition. The close proximity of opposition and the assigned reason for adverse action dictate such a burden. Furthermore, an employer alleging that independent reasons justify adverse action disavows the sometimes reasonable inference that unlawful mixed motives occasioned his action. Only by revealing his course of conduct with

[132] *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[133] *See* Bradington v. International Bus. Mach. Corp., 360 F. Supp. 845 (D. Md. 1973).

[134] In some situations the exaction of the adverse action may have been accelerated by the employee's opposition. *See* EEOC Decision No. 71-2330, June 2, 1972, in CCH EEOC Decisions ¶ 6247 (1973) (employee was not given the normal two weeks of employment following written notice of intent to resign after she informed her supervisor informally that she was going to file charges and seek employment elsewhere following her denial of promotion).

respect to adverse action—and similar actions—can an employer reveal facts peculiarly within his control capable of rebutting that inference.

B. Business Justifications

Employers occasionally defend section 704(a) actions by asserting that the form of an employee's opposition permitted the adverse action taken against him. Business justification rather than independent grounds is the crux of this defense. Neither the courts nor the EEOC have articulated the rationale for this defense upon such grounds—perhaps because the obvious policy considerations at the heart of this defense are so easily confused with the broad definitions of "opposition" and "discrimination." For example, courts and the Commission have insisted upon determining initially whether employee actions constitute "protected opposition" rather than opposition vel non.[135] Courts and the Commission are concerned with the fact that the form of an employee's opposition may itself, arguably, justify adverse action taken against him by his employer. Thus, while examining an employee's conduct to discover the existence of "opposition," courts go further and reach a judgment regarding the propriety of the form of opposition. As in *Green,* employee action is sometimes found to constitute "unprotected opposition." When this occurs courts are inevitably left with little justification for their conclusion beyond platitudinous rhetoric which defines for all future cases the supposed limits of "protected opposition."[136]

Actually, the limits of "opposition" can correctly be defined only according to the circumstances in which "opposition" arises. What may be permissible opposition for a female bookbinder in Chicago may not be permissible for a Cuban-American salesman in Miami. What appears to be ill considered opposition may prove when judged in context to be restrained and proper. Distinctions of this kind find validity in the balancing of employer interests against the interests embodied in the Act—those of employees and of society in preserving the right to oppose. This balancing has no place in the establishment of an employee's case. In fact, the strength of that case is one of the factors on the employee-society side of the equation. Examination of two possible bases for employer business justifications should reveal this point.

---

[135]*See* Green v. McDonnell-Douglas Corp., 463 F.2d 337 (8th Cir. 1972), *vacated and remanded,* 411 U.S. 792 (1973); Pettway v. American Cast Iron Pipe Co., 411 F.2d 998 (5th Cir. 1969); EEOC v. Plumbers Local 189, 311 F. Supp. 464 (S.D. Ohio 1970).

[136]See text accompanying notes 67 & 68 *supra.*

1. "Disqualification"

In every employment situation there are limits to opposition. Opposing employees, however meritorious their grievances and however frustrated their attempts at redress may be, must act in a reasonable manner if they seek the protection of section 704(a). When opposition exceeds reasonable limits, the opposing employee can accurately be said to have disqualified himself from that protection.[137] The limits in question should not be defined by employer rules of conduct,[138] and the limits should not be so confining as to stifle legitimate opposition. Rather, the limits in each situation should be discoverable only by a court's assessment of the opposing party's good faith in seeking redress of discrimination within the employment relation. Stated positively, an employer disposed to punish opposition on the ground of "disqualification" must be able to demonstrate that his employee's opposition was deliberately destructive of the employment relationship and significantly compromised the rights of others.

The filing of administrative and judicial actions secures the absolute protection of section 704(a).[139] No matter how harassing and lacking in substance are such charges, an employer is

---

[137]"Disqualification" is a novel concept only in its application in defense of a prima facie case of section 704(a) discrimination. It has its antecedents in the concept of protected concerted activities under section 7, 29 U.S.C. § 157 (1970), and section 8(a)(3), *id.* § 158(a)(3), of the National Labor Relations Act. Section 7 provides that "[e]mployees shall have the right . . . to engage in . . . concerted activities for the purpose of collective bargaining or mutual aid or protection . . . ." Section 8(a)(3) declares that "[i]t shall be an unfair labor practice for an employer . . . by discrimination . . . to encourage or discourage membership in any labor organization." Employer discrimination against an employee for engaging in concerted activities violates section 8(a)(3), NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963), but certain kinds of concerted activities demonstrate such utter disregard of the employment relationship and the welfare of nonparticipating employees that they are deemed unprotected by the Labor Board and the courts. Various forms of concerted activities have been found to be unprotected in some circumstances. NLRB v. Electrical Workers Local 1229, 346 U.S. 464 (1953) (public disparaging of employer's product); NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939) (seizure of employer's plant and engaging in a sit-down strike); Firestone Tire & Rubber Co., 449 F.2d 511 (5th Cir. 1971) (use of physical force and violence); NLRB v. Clearfield Cheese Co., 231 F.2d 70 (3d Cir. 1954) (threat of bodily harm to nonparticipating employees); Hoover Co. v. NLRB, 191 F.2d 380 (6th Cir. 1951) (striking to force employer to commit an unfair labor practice).

[138]*See* NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962) (despite rule against leaving the work station without consent, actions of employees who walked off job complaining that work place was too cold protected under section 8(a)(3)).

[139]*See* Pettway v. American Cast Iron Pipe Co., 411 F.2d 998 (5th Cir. 1969); EEOC v. Plumbers Local 189, 311 F. Supp. 464 (S.D. Ohio 1970).

estopped from engaging in self-help to punish an employee who continuously files charges. The position of some opposing employees, such as those who repetitively threaten their foremen with future charges, is more tenuous. Employees as well as employers can harass, and a point will be reached at which a threatening or complaining employee might logically be expected either to file his charge or to keep his mouth shut. Employers who present evidence of constant employee complaints of discrimination, of attempts to address those complaints or point out the presence of institutional remedies, and of the disruptive nature of the continual complaining might justify their punishment of employee complaints or threats on the basis of a theory of disqualification.[140] It is important to note that it is the *pointless, disruptive constancy* of an employee's complaints in the face of an available remedy—Title VII—which calls his good faith into question. It is qualities such as these which distinguish "disqualification" from an employer's argument that good faith requires a disgruntled employee to always choose the least disruptive—and perhaps the least effective—manner of registering his opposition. Clearly, "disqualification" cannot be interpreted as requiring employees to choose at their peril among various permissible opposition options. If so, the defense would obliterate the reason for the protection conferred by Title VII.

Disqualification is also an alternative to the unwarranted designation of certain kinds of opposition as "unprotected." In *Green,* the "stall-in" used to protest McDonnell's alleged discriminatory practices blocked traffic during a shift change. Green was found guilty of a minor traffic offense as a by-product of his opposition. In predicating their section 704(a) decisions upon the lawfulness of Green's actions, the district court and the court of appeals clearly missed the point. Neither unlawfulness per se nor unlawful conduct directed at McDonnell justified its refusal to rehire. Rather, the adverse action was justified by Green's blatant disregard of his potential employment relationship and of the rights of his fellow employees and employer. The Supreme Court, in its treatment of the race-based charge in *Green,*[141] intimated

[140] *See* Ammons v. Zia Corp., 448 F.2d 117 (10th Cir. 1971) (no violation of section 704(a) shown in employer's discharge of employee on the basis of numerous and repeated complaints regarding her alleged artificially depressed wage rate).

[141] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 803 nn.16-17 (1973), in which the Court reasoned that:

> Respondent admittedly had taken part in a carefully planned "stall-in," designed to tie up access to and egress from petitioners plant at a peak traffic hour. Nothing in Title VII compels an employer to

the propriety of such factors. This recognition of employee responsibility is even more important in the section 704(a) context when the employee seeks protection from discrimination not because of his status but because of his actions. "Disqualification" establishes those responsibilities without destroying the flexibility of employee action or yielding clichéd definitions of "protected opposition."

2. *Overriding Business Interests*

A prima facie case of section 704(a) retaliation may be established in part through the application of the "chilling effect" doctrine in those instances in which an employer's adverse action has first, a neutral basis and no apparent retaliatory motive, and secondly, a foreseeable effect of stifling opposition. When an opposing party's case is established through such means, an employer must be given the opportunity to demonstrate that "overriding business interests" justify his actions notwithstanding a possible "chilling effect."

Unlike the "business necessity" defense applicable to section 703 actions,[142] the "overriding business interests" defense is applicable only to the particular adverse action complained of and does not question the continued validity of the neutral policy as a tool for employer decision-making. These differences are dictated in large measure by the absence of class considerations in section

---

absolve and rehire one who has engaged in such deliberate, unlawful activity against it.

After observing that the absence of personal injury or property damage was fortuitous, the Court noted that Green's unlawful activity was "directed specifically against" the company. The Court pointedly reserved the question of whether unlawful activity not directed against a particular employer might justify a refusal to hire.

[142] *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). In discussing the application of the company's pre-employment tests and high school diploma requirement, each of which disqualified a disproportionately high percentage of Blacks, the Court stated:

> The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operated to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

"Business purpose" alone cannot justify discriminatory policies. United States v. N.L. Indus., 479 F.2d 354 (8th Cir. 1973). Rather, the establishment of business necessity now seems to require a finding that the discriminatory practice is necessary to the safe and efficient operation of the business and that there are no less discriminatory alternatives to the employer's practices. *See* Moody v. Albermarle Paper Co., 474 F.2d 134 (3rd Cir. 1973); Equal Employment Opportunity Comm'n, Guidelines on Employee Selection Procedures, 37 C.F.R. § 1607.3 (1973).

704(a) discrimination. Thus, "overriding business interests" are only those which are concretely operative in the particular situation in which opposition occurs. In *Barela,* for example, the employer's decision not to hire a qualified applicant was allegedly based upon its policy of only hiring permanent employees. Since Barela had a section 703 charge pending against a previous employer which might have entitled him to reassume his former job, United Nuclear reasoned that Barela was not seeking permanent employment and, therefore, refused to process his application. Assuming for purposes of discussion that there was no discriminatory application of the employer's permanent employee rule, Barela should nevertheless have been able to establish his prima facie case through application of the "chilling effect" doctrine.[143] The employer then would have been obligated to assume the burden of justifying its application of the permanent employee role to Barela, a Title VII claimant. On the basis of the "overriding business interests" defense this burden should have required the employer to prove that its waiver of the rule for Barela would so severely impede its business interests as to override the purpose of section 704(a).[144] While the scope of this inquiry is necessarily broad, the burden is not an impossible one, even in the face of opposition which is obviously deserving of protection, such as the filing of a charge. It should include an examination of the necessity for permanency and other job requirements, their susceptibility to accommodating modification, the depth of the "chilling effect," an employee's opportunity for other comparable employment, the reasonableness of the form of opposition, and the state's interest in protecting it.

Unlike the courts' approach in *Barela,* the last two considerations could be weighted heavily against an opposing employee if his opposition itself violated company rules or became harassing. The disciplining of a rule-breaking employee because of his actions may well enable him to establish a prima facie case under the "chilling effect" doctrine. While his actions may not be so patently offensive as to justify "disqualification," the form of his actions, especially in view of alternative means of opposition and their known or predicted effect upon the maintenance of an employer's business, might enable an employer to justify disci-

[143]See notes 101-11 *supra* & accompanying text.

[144]An analogy to section 8(a)(3) protected concerted activities is again appropriate. See note 137 *supra.* The concerted activities of employees may not be so offensive as to constitute breaches of the peace or physical violence, yet may be so injurious to the employer's right to manage and operate his establishment that the action will not secure the protection of section 8(a)(3). *See* NLRB v. Rockway News Supply Co., 345 U.S. 71 (1953); NLRB v. Jamestown Veneer & Plywood Corp., 194 F.2d 192 (2d Cir. 1952).

pline according to "overriding business interests."[145] Quite correctly, opposition has not been construed to guarantee an employee immunity from employer discipline.[146] Proper discipline of employees is a matter of management discretion, and section 704(a) does not alter this facet of employee-management relations. The interests of the government and of employees in protecting the right to oppose practices thought to be violative of Title VII, however, are equally important. The accommodation of these competing interests in the context of violations of reasonable, uniformly applied employer rules will remain difficult. The proper use of the "overriding business interests" concept may ease the burden on the EEOC and the courts in reaching satisfactory accommodations.

"Disqualification" and "overriding business interests" are defenses which qualify opposition. In their broadest sense they provide formulae for measuring the reasonableness of employee opposition and employer response. That measurement must take cognizance of the environment and conditions which spawned the opposition as well as the interests which section 704(a) seeks to protect. Though the responsibility for reasonable action belongs to the opposing party, the burden of establishing "disqualification" and "overriding business interests" should reside with the employer. The extent of the burden and its proper discharge can only be determined after the opposing party has established his prima facie case.

V. Conclusion

Persons who oppose employment discrimination are catalysts for social change. They are at once the rallying point for depressed classes of minorities and women and are a logical target for institutional reprisal. These factors, combined with a cumbersome and thus far inefficient enforcement system, make expeditious and careful judicial scrutiny of reprisal claims essential.

Indeed, the protection of those opposing employment discrimination can, at times, take on an importance far beyond the substantive grievances for which they seek redress. Unremedied retaliation stifles not only opposing parties but also all those grievants who fear similar reprisals. *Pettway* and various court and

[145]Some forms of opposition may have a direct and immediate adverse effect upon the employee's ability to achieve satisfactory results in his assigned tasks. *See* EEOC Decision No. 71-1850, Apr. 21, 1971, in CCH EEOC Decisions ¶ 6245 (1973) (union's discharge of a White organizer who demonstrated against other union's alleged racial bias, thereby decreasing opportunities for union solidarity, violated 704(a)).

[146]*See* United States v. Hayes Int'l Corp., 7 CCH Empl. Prac. Cases ¶ 9164 (N.D. Ala. 1973).

EEOC decisions lend credence to this view and establish the substantive basis for effective enforcement of section 704(a). The emerging problem for the courts resides in the further amplification of the scope of protected activity and, more importantly, in the delineation of the proper order of proof in section 704(a) actions. This problem is compounded by the inevitable tension which exists between an employer's right to discipline and an employee's right to oppose. The balancing of these competing interests within the framework of section 704(a) can best be accomplished by their functional separation. Employees must be given an opportunity consistent with the broad protective character of section 704(a) to establish the existence of a violation. Employers must then be given an opportunity to rebut a prima facie violation established by the employee or to justify its actions according to concepts such as "disqualification" or "overriding business interests."

Employers are now becoming aware of the liabilities of discriminatory employment practices. While this new awareness may not herald an age of enlightenment in equal opportunity, it does set the stage for the development of employer policies which will stimulate self-examination rather than retaliation in the face of employee opposition. Courts will play a positive role in this transformation only if they clearly articulate the scope of the section 704(a) protection.