

Developments in Employment Discrimination Law

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During the survey period, the United States Supreme Court and the United States Court of Appeals for the Seventh Circuit decided a number of significant employment discrimination cases. This Article will survey those cases that are most interesting and significant to Indiana attorneys practicing in that area. Developments under Title VII of the Civil Rights Act of 1964,¹ particularly the subject of sexual harassment, will be the primary focus.

I. SEXUAL HARASSMENT

*Meritor Savings Bank v. Vinson*² marks the Supreme Court's first opinion on the subject of sexual harassment in the workplace. The Equal Employment Opportunity Commission (EEOC) and most courts that have considered the issue have found sexual harassment to be a violation of Title VII.³ There nevertheless have been many unresolved issues, such as the extent of an employer's liability for actions of its supervisors.⁴ The Court in *Vinson* resolved some issues, but left others for a later day.

Mechelle Vinson was hired in 1974 by Sidney Taylor, a vice-president of what later became Meritor Savings Bank, to be a teller trainee in the branch of which Taylor was the manager. Vinson worked in the same branch for four years, moving through the ranks as teller, head teller and assistant manager. In September 1978, Vinson left work to take an indefinite sick leave. She was terminated by the bank in November 1978 for abuse of that leave.⁵

Vinson filed suit against the bank and Taylor under Title VII, claiming that she had been sexually harassed by Taylor throughout the four years of her employment.⁶ She sought injunctive relief, compensatory and punitive damages, and attorney's fees.⁷

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¹42 U.S.C. §§ 2000e-2000e-17 (1982) [hereinafter Title VII].

²106 S. Ct. 2399 (1986).

³See, e.g., the EEOC's guidelines on sexual harassment, 29 C.F.R. § 1604.11 (1986); *Phillips v. Smalley Maintenance Serv., Inc.*, 711 F.2d 1524 (11th Cir. 1983); *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983); *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981).

⁴Jongleux, *Developments in Employment Discrimination Law*, 19 IND. L. REV. 215, 225-26 (1986).

⁵*Vinson*, 106 S. Ct. at 2402.

⁶*Id.*

⁷*Id.* Vinson initially did not seek reinstatement nor allege that her discharge violated Title VII. Shortly before trial, her attempt to amend her complaint to add those elements

At trial, the district court heard eleven days of testimony.⁸ Vinson testified that shortly after she had completed the teller trainee program, Taylor had invited her to dinner and suggested that they have a sexual relationship.⁹ She testified that she had declined at first, but then acquiesced for fear of losing her job.¹⁰ She testified that over the next several years, Taylor demanded sexual favors on numerous occasions, fondled her in front of other employees, and forcibly raped her on several occasions.¹¹

Taylor flatly denied that he had sexually harassed or engaged in a sexual relationship with Vinson.¹² He claimed that Vinson's accusations were motivated by a business dispute.¹³ The bank's evidence was that it had no knowledge of Vinson's being sexually harassed, and that if harassment had occurred, it was without the bank's consent or approval.¹⁴

The district court ruled against Vinson, finding that she "was not the victim of sexual harassment or sexual discrimination" when she was employed by the bank.¹⁵ The court did not resolve the credibility dispute between Vinson and Taylor. Rather, its decision was based on a finding that if there had been a sexual relationship, it was voluntary and had "nothing to do with [Vinson's] continued employment at [the bank] or her advancement or promotions at that institution."¹⁶ The district court apparently believed that sexual harassment, in order to be actionable, must be accompanied by tangible job detriment.¹⁷

Even though the trial court found no sexual harassment, it nevertheless went on to discuss the bank's potential liability for Taylor's acts. The court noted that the bank had an express policy against discrimination and an internal process by which complaints could be remedied.¹⁸ It found that since Vinson had not notified the bank of the alleged sexual harassment through the procedure or otherwise, the bank was without notice and not liable for Taylor's actions.¹⁹

Vinson appealed to the United States Court of Appeals for the District of Columbia Circuit.²⁰ The circuit court, drawing from its earlier deci-

and non-federal claims was denied by the district court. *Vinson v. Taylor*, 753 F.2d 141, 143 n.12 (D.C. Cir. 1985).

⁸*Vinson*, 106 S. Ct. at 2402.

⁹*Id.*

¹⁰*Id.*

¹¹*Id.*

¹²*Id.* at 2403.

¹³*Id.*

¹⁴*Id.*

¹⁵*Vinson v. Taylor*, 23 Fair Empl. Prac. Cas. (BNA) 37, 43 (D.D.C. 1980).

¹⁶*Id.* at 42 (footnote omitted).

¹⁷*Id.*; 106 S. Ct. at 2403.

¹⁸*Vinson*, 106 S. Ct. at 2403.

¹⁹*Vinson*, 23 Fair Empl. Prac. Cas. at 41.

²⁰*Vinson v. Taylor*, 753 F.2d 141 (D.C. Cir. 1985).

sion in *Bundy v. Jackson*,²¹ described two types of sexual harassment. The first is the so-called quid pro quo type of harassment, involving conditioning of concrete employment benefits on sexual favors. The second is the hostile environment type of sexual harassment, involving no economic detriment but rather affecting the work environment to such an extent that it becomes hostile or offensive.²² The circuit court concluded that Vinson had stated a claim for the hostile environment kind of sexual harassment and remanded because the district court had not considered whether the testimony described that kind of violation.²³

The circuit court also held that Vinson's voluntariness was not relevant to a finding that sexual harassment had occurred.²⁴ The appropriate inquiry was whether Taylor had made toleration of his sexual advances a condition of Vinson's employment.²⁵ The court, uncertain what the district court meant by its voluntariness conclusion, speculated that certain evidence that had been admitted by the district court about Vinson's "dress and personal fantasies" had led that court to conclude that her participation in the sexual relationship had been voluntary.²⁶ The circuit court concluded that that evidence "had no place in this litigation."²⁷

The D.C. Circuit rejected the district court's conclusion that the bank could not be liable for Taylor's actions because it had no notice of them.²⁸ Instead, the court concluded that general Title VII principles should be applied to impose vicarious liability on employers for sexual harassment, just as it is imposed for other types of discrimination.²⁹ The court relied in part on Title VII's definition of employer as including "agents," and held that Taylor was an agent of the bank with respect to the other employees in the branch of which he was manager.³⁰ Ironically in light of the EEOC's arguments before the Supreme Court, the court attached "considerable weight" to the EEOC's guidelines, which provide for liability "regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence."³¹

The Supreme Court thus had before it several issues. First, the divergence between the district court and the circuit court decisions raised

²¹641 F.2d 934 (D.C. Cir. 1981).

²²*Vinson*, 753 F.2d at 144-45 (citing *Bundy*, 641 F.2d 934; *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977)); see also *Jongleux*, *supra* note 4, at 225 n.94.

²³*Vinson*, 753 F.2d at 145 (footnotes omitted).

²⁴*Id.* at 146.

²⁵*Id.* ("[A] victim's capitulation to on-the-job sexual advances cannot work a forfeiture of her opportunity for redress.").

²⁶*Id.* at n.36.

²⁷*Id.*

²⁸*Id.* at 147.

²⁹*Id.* at 149.

³⁰*Id.* at 147-48.

³¹*Id.* at 149 (quoting 29 C.F.R. § 1604.11(c) (1984)).

the issue of whether a hostile environment created by sexual harassment without tangible economic loss was a violation of Title VII. The second issue presented to the Court was whether the fact that Vinson voluntarily entered into the sexual relationship with Taylor precluded her succeeding in her Title VII case. Finally, and most significantly, the Court was presented with the issue of whether an employer can be liable for actions of a supervisor that create a hostile working environment if the supervisor's behavior has not been brought to the employer's attention.³²

The Court first ruled unequivocally that no tangible economic loss was necessary for sexual harassment to constitute a violation of Title VII.³³ The Court first looked to the statute itself and found no indication that Congress intended to limit Title VII's scope as urged by the bank.³⁴ The Court then approved the definition of sexual harassment in the EEOC's guidelines.³⁵ Reviewing the "substantial body of judicial decisions and EEOC precedent" upon which the EEOC's guidelines were based, the Court concluded that the EEOC's guidelines "were fully consistent with . . . existing law" in providing that "hostile environment" sexual harassment is sex discrimination.³⁶ Thus, "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment."³⁷ But the Court went on to caution that sexual harassment must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive work environment'" in order to constitute actionable sexual harassment.³⁸

The Court then examined two alternative bases for the district court's conclusion that Vinson had not been the victim of sex discrimination, to determine whether that conclusion had disposed of Vinson's claims. It held that both bases were erroneous as a matter of law and upheld the appellate court's order to remand.³⁹ First, the trial court had failed to consider a hostile environment theory of sexual harassment because of an erroneous view that some economic effect on Vinson's employment was necessary.⁴⁰ A second possible basis for the district court's decision

³²Some courts, while imposing strict liability in quid pro quo cases, have applied a "knew or should have known" standard in hostile environment cases. *See, e.g., Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983).

³³*Vinson*, 106 S. Ct. at 2404.

³⁴*Id.* at 2404-05.

³⁵*Id.* at 2405.

³⁶*Id.* The EEOC's guidelines provide that "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" are actionable sexual harassment where "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a)(3) (1986).

³⁷*Vinson*, 106 S. Ct. at 2405-06.

³⁸*Id.* at 2406 (citing *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)).

³⁹*Id.*

⁴⁰*Id.*

may have been its conclusion that Vinson engaged in the relationship with Taylor voluntarily; the Court rejected that basis as well.⁴¹ Instead of focusing on the fact that Vinson was not forced against her will to participate in the sexual relationship, the district court should have determined whether Vinson "by her conduct indicated that the alleged sexual advances were unwelcome"⁴²

Having determined that a remand was necessary, the Court disagreed with the D.C. Circuit's flat prohibition of any evidence of Vinson's provocative dress or speech, and concluded that "such evidence is obviously relevant" to the issue of whether Vinson found Taylor's sexual advances in fact to be unwelcome.⁴³ In response to Vinson's contention that the relevance of such evidence is outweighed by its prejudicial effect, the Court held that that determination was best made by the district court.⁴⁴

Finally, the Court addressed the question of whether an employer may be held strictly liable for the acts of its supervisors in creating a hostile environment, even if the employer neither knew nor should have known of the misconduct, and whether the existence of an internal grievance procedure and antidiscrimination policy has an effect on that issue. The Court's majority ultimately declined to answer this question, noting that the issue had a "rather abstract quality" given the record before the Court.⁴⁵ The Court's discussion leading to that conclusion provides helpful guidelines for employers seeking to prevent liability for sexual harassment.

The Court first addressed the EEOC's arguments. In an apparent departure from its own guidelines,⁴⁶ the EEOC, appearing as *amicus curiae*, argued that strict liability to employers for sexual harassment by supervisors was appropriate in *quid pro quo* incidents, but not in hostile environment situations.⁴⁷ The agency reasoned that Congress had intended that agency principles apply to analyses under Title VII.⁴⁸ Application of those principles in hostile environment cases might not lead to a conclusion of liability on an agency theory. Rather, the EEOC advocated that in cases where an employer has available a complaint procedure " 'reasonably responsive to the employee's complaint,' " the employer should be shielded from liability for hostile environment sexual harassment if the employee fails to avail herself of the procedure.⁴⁹ Thus, the

⁴¹*Id.*

⁴²*Id.* The Court recognized that the determination of whether advances were unwelcome "presents difficult problems of proof" *Id.*

⁴³*Id.* at 2407.

⁴⁴*Id.*

⁴⁵*Id.* at 2408.

⁴⁶See *supra* note 36.

⁴⁷*Vinson*, 106 S. Ct. at 2407-08.

⁴⁸*Id.* at 2408.

⁴⁹*Id.* (quoting the EEOC's *amicus curiae* brief, at 26).

EEOC advocated strict liability for quid pro quo sexual harassment but liability for hostile environment sexual harassment only if the employer has notice or has no internal complaint procedure designed to resolve sexual harassment claims.

While refusing to "issue a definitive rule" on the subject, the Supreme Court did eliminate two possibilities. First, it rejected the circuit court's conclusion that employers are absolutely liable for the actions of their supervisors, "regardless of the circumstances of a particular case."⁵⁰ Second, it concluded that an employer's lack of notice of sexual harassment does not protect the employer from liability.⁵¹

The Court approved the application of agency principles in determining liability under Title VII, concluding that Congress intended to "place some limits on the acts of employees for which employers under Title VII are to be held responsible."⁵² There is thus the possibility that the Court would approve an employer's assertion of the common law defense that the supervisor was acting outside the scope of his authority when he committed acts of sexual harassment. The bank argued that it was protected from liability because it had in place an internal grievance procedure and anti-discrimination policy that Vinson failed to use.⁵³ The Court noted that those facts were relevant but not dispositive.⁵⁴ The bank's procedure did not address sexual harassment in particular, and it required complaints to be made to the employee's supervisor.⁵⁵ The Court left open the possibility that an employer could insulate itself from liability "if its procedures were better calculated to encourage victims of harassment to come forward."⁵⁶

Four members of the Court joined in a concurring opinion authored by Justice Marshall that did address the issue of employer liability and rejected the EEOC's position.⁵⁷ The opinion took issue with the EEOC's position that supervisors' responsibilities begin and end with hiring, firing, and disciplinary decisions, and concluded that "a supervisor is charged with the day-to-day supervision of the work environment and with ensuring a safe, productive, workplace."⁵⁸ The concurring justices thus rejected the concept that an employer is not liable for a hostile environment created by sexual harassment unless he has notice. Rather, they advocated the application of the same rule applied in all other Title VII cases: "sexual

⁵⁰*Id.* at 2409.

⁵¹*Id.* at 2408.

⁵²*Id.*

⁵³*Id.* at 2408-09.

⁵⁴*Id.* at 2409.

⁵⁵*Id.* Vinson thus would have had to file her complaint with Taylor, the alleged harasser.

⁵⁶*Id.*

⁵⁷*Id.* (Marshall, J., concurring).

⁵⁸*Id.* at 2410 (Marshall, J., concurring).

harassment by a supervisor of an employee under his supervision, leading to a discriminatory work environment, should be imputed to the employer for Title VII purposes regardless of whether the employee gave 'notice' of the offense."⁵⁹

The Supreme Court's opinion and the EEOC's position in this case make it clear that in order to avoid liability for sexual harassment, employers should institute internal policies that prohibit discrimination in general and sexual harassment in particular. Internal complaint or grievance procedures should be established and communicated to employees. The identity of the person to whom complaints should be directed should be carefully considered, to avoid the possibility that an employee would have to complain to the alleged harasser. Complaints under these procedures should be investigated and dealt with quickly and appropriately, including taking disciplinary action against violators. Given the EEOC's position in *Vinson*, it is likely that the existence of such policies and procedures can be a significant factor in that agency's handling of a charge of sexual harassment. In addition, the Court's opinion provides a basis for a court in future Title VII litigation to consider the existence of such a procedure and the victim's failure to use it as relevant in a hostile environment case.

In *Zabkowitz v. West Bend Co.*,⁶⁰ the Seventh Circuit decided several interesting issues that may arise in sexual harassment cases in federal court. Zabkowitz sued West Bend, her employer, and three supervisors for failing to protect her from sexual harassment by her co-employees after she had notified them that it was taking place.⁶¹ As a result of the harassment, she had developed physical and emotional symptoms that required her to be off work for approximately three months. West Bend eventually put a stop to the harassment after she filed a charge with the EEOC. Zabkowitz then also sued four of her co-workers, West Bend, the three supervisors, and the union representing her, alleging intentional infliction of emotional distress.⁶² The parties agreed that the tort claims against the individual co-workers would be severed for trial.⁶³ Before trial, the trial court dismissed the intentional infliction of emotional distress claims against West Bend and the supervisors on the ground that they were barred by the exclusive remedy provision of Wisconsin's Worker's Compensation Act.⁶⁴

⁵⁹*Id.* at 2411 (Marshall, J., concurring). The concurring justices acknowledged that there may be circumstances in which some limitation on liability is appropriate, giving the example of a supervisor who commits harassment in an area to which he is not assigned. *Id.*

⁶⁰789 F.2d 540 (7th Cir. 1986). *Zabkowitz* was decided on April 24, 1986, some two months before the Supreme Court's decision in *Vinson*. The Court's decision in *Vinson* did not affect the outcome of any issues in this case.

⁶¹*Zabkowitz v. West Bend Co.*, 589 F. Supp. 780, 781-82 (E.D. Wis. 1984).

⁶²*Zabkowitz*, 789 F.2d at 542.

⁶³*Id.*

⁶⁴*Id.* at 543; WIS. STAT. ANN. § 102.03(1) (West 1973).

The sexual harassment issues under Title VII and the Wisconsin Fair Employment Act were tried to the court, which found that West Bend was liable under both statutes for failing to take corrective measures when it became aware of Zabkowicz' co-workers' offenses.⁶⁵ The court awarded Zabkowicz back pay of \$2,763.20, which represented pay lost during medical leaves.⁶⁶ Having decided all of the federal claims in the case, the court then dismissed the state tort law claims against the co-workers on the ground that it had no independent basis of federal jurisdiction over them and should not assert "pendent party" jurisdiction.⁶⁷ The court also denied Zabkowicz' petition for attorney's fees, asserting that the fee request of some \$127,000 was exaggerated and did not distinguish between hours spent on her Title VII claim and those spent on her other claims.⁶⁸ Zabkowicz appealed the dismissal of her tort claims and the denial of attorney's fees.⁶⁹

The Seventh Circuit first examined the question of whether worker's compensation was Zabkowicz' exclusive state remedy for emotional distress occasioned by sexual harassment. Declining to certify the question to the Wisconsin Supreme Court, the Seventh Circuit consulted cases decided under Wisconsin's statute and determined that under Wisconsin law, emotional distress is compensable as an "injury."⁷⁰ Definitions and cases under Wisconsin's statute provided that emotional stress or strain without accompanying physical trauma could be deemed covered injuries.⁷¹ Further, noting that the focus is on the injury itself and not the acts causing the injury when determining whether an injury was accidental, the court concluded that Zabkowicz' injuries were accidental, even if the sexual harassment was intentional.⁷² Thus, the court upheld the district court's dismissal of those claims as being barred under Wisconsin law.⁷³

The court then turned to the pendent parties doctrine. Issues of pendent jurisdiction are difficult enough in sexual harassment cases when the same parties are involved in both federal and state claims. The courts must in each case determine, pursuant to the test set out in *United Mine*

⁶⁵*Zabkowicz*, 589 F. Supp. at 785.

⁶⁶*Id.*

⁶⁷*Zabkowicz*, 789 F.2d at 543.

⁶⁸*Id.*

⁶⁹*Id.*

⁷⁰*Id.* at 543-44.

⁷¹*Id.* WIS. STAT. ANN. § 102.01(2)(c) (West Supp. 1986) defined a covered injury as "mental or physical harm to an employee caused by accident or disease . . . [including] mental harm or emotional stress or strain without physical trauma, if it arises from exposure to conditions or circumstances beyond those common to occupational or nonoccupational life."

⁷²*Zabkowicz*, 789 F.2d at 545.

⁷³*Id.*

Workers v. Gibbs,⁷⁴ whether the proof, scope of issues, remedies sought, and other aspects of the state law claims predominate over the federal Title VII claims. An affirmative answer dictates the denial of pendent jurisdiction.⁷⁵ The addition to that equation of parties as to whom only state law claims are asserted—pendent parties—makes the courts' decision in each case even more difficult.

The Seventh Circuit analyzed the pendent parties issue in *Zabkowicz*' case by applying a two-part test it drew from the Supreme Court's decision in *Aldinger v. Howard*.⁷⁶ The first part of the test is constitutionally based.⁷⁷ There must be a federal claim of sufficient substance to confer federal jurisdiction, and the federal and state claims must arise from a "common nucleus of operative fact" such that the claims would be expected to be tried in one forum—the *United Mine Workers v. Gibbs* test.⁷⁸ The second prong of the pendent parties test requires the court to look to the basis for federal jurisdiction and deny jurisdiction if it appears that Congress did not intend for a particular pendent claim to be brought in federal court.⁷⁹ As with all pendent jurisdiction decisions, the ultimate exercise of jurisdiction is in the discretion of the trial court, which looks to " 'considerations of judicial economy, convenience and fairness to litigants.' "⁸⁰

Zabowicz' Title VII claims satisfied the first prong of the test, but the court had some difficulty concluding that Congress intended for co-employees to be brought into the case by way of pendent state claims when they could not have been sued under Title VII.⁸¹ The court noted, however, that the Supreme Court under *Aldinger* would permit combination of such claims despite an apparent lack of congressional intent if the grant of federal jurisdiction were exclusive.⁸² Assuming but explicitly not holding that Title VII jurisdiction is exclusively federal,⁸³ the court

⁷⁴383 U.S. 715 (1966).

⁷⁵See, e.g., *Bouchet v. National Urban League*, 730 F.2d 799 (D.C. Cir. 1984), wherein the court somewhat colorfully concluded that "[the state claims] would be pendent to this Title VII litigation much as a dog is pendent to its tail." *Id.* at 805-06.

⁷⁶427 U.S. 1 (1976).

⁷⁷*Zabkowicz*, 789 F.2d at 546 (citing U.S. CONST. art. III).

⁷⁸*Id.* (citing *Gibbs*, 383 U.S. 715).

⁷⁹*Id.* (citing *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373 (1978) (quoting *Aldinger*, 427 U.S. at 18)).

⁸⁰*Id.* (quoting *Gibbs*, 383 U.S. at 726).

⁸¹The court affirmed the district court's conclusion that "Title VII does not provide a means for an employee to sue non-supervisory co-workers for discriminatory acts." *Id.* (citation omitted). See 42 U.S.C. § 2000e-5(f)(1) (1982).

⁸²*Zabkowicz*, 789 F.2d at 547.

⁸³The court has in at least one other case suggested that federal jurisdiction over Title VII claims may *not* be exclusive. *Patzer v. Board of Regents*, 763 F.2d 851, 855 n.4 (7th Cir. 1985).

nevertheless found the district court's dismissal of the claims to be proper because the tort claims had been severed for trial.⁸⁴ The interests of judicial economy, which might have been present if the state law claims had been tried along with the Title VII claims, would not have been served by a separate trial of the state claims in federal court.⁸⁵ It appears that both the district court⁸⁶ and the Seventh Circuit⁸⁷ would have approved the assertion of pendent parties jurisdiction had it not been for the severance of the state claims. That fact should be a tactical consideration for parties in sexual harassment cases involving pendent claims or parties.

The Seventh Circuit then held that the district court's total denial of attorney's fees had been an abuse of discretion.⁸⁸ Conceding that Zabkowicz' fee request was probably "excessive and unreasonable," the court nevertheless held that it was not so egregious as to justify a complete denial of fees.⁸⁹ The court then addressed two issues raised by the parties that should be considered by the district court on remand in deciding the fee to be awarded. First, the circuit court concluded that fees could be awarded for time spent on the non-Title VII claims so long as the other claims arose "out of a common factual core or [were] based on related legal theories."⁹⁰ According to the court, to attempt to separate the time spent on different legal theories would be an "'exercise in futility.'"⁹¹ The tort claims against West Bend, the supervisors, and the co-workers were considered by the court clearly to involve a "common core of facts."⁹² State tort law claims by Zabkowicz' husband, on the other hand, were held to be noncompensable.⁹³ Finally, because Zabkowicz had stipulated to the dismissal of labor law and tort claims against West Bend and the union, apparently without receiving any payment, she should not be entitled to attorney's fees for those claims because they had done nothing to "advance the vindication of . . . her civil rights."⁹⁴ The Seventh

⁸⁴*Zabkowicz*, 789 F.2d at 548.

⁸⁵*Id.*

⁸⁶589 F. Supp. 780.

⁸⁷The Seventh Circuit's attitude toward pendent parties jurisdiction has softened considerably over the past several years. Compare *Hixon v. Sherwin-Williams Co.*, 671 F.2d 1005 (7th Cir. 1982) and *Johnson v. Miller*, 680 F.2d 39 (7th Cir. 1982) with *Thomas v. Shelton*, 740 F.2d 478, 487 (7th Cir. 1984) ("Although pendent party jurisdiction is not dead, neither is it in the best of health") and *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336, 1359 (7th Cir. 1985) ("The 'pendent parties' concept has, it is true, wobbly constitutional foundations.").

⁸⁸*Zabkowicz*, 789 F.2d at 549.

⁸⁹*Id.* at 550.

⁹⁰*Id.* at 551.

⁹¹*Id.* (quoting *Garrity v. Sununu*, 752 F.2d 727, 734-35 (1st Cir. 1984)).

⁹²*Id.*

⁹³*Id.* at 551-52.

⁹⁴*Id.* at 552 (citing *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978)).

Circuit ordered the district court to reexamine the attorney's fee request in light of its decision and to determine which fees were reasonably expended in pursuing her claims.⁹⁵ In the court's view, the small amount of back pay recovered by Zabkowicz should not preclude her recovering a substantial fee; but because she sought only pecuniary and no injunctive or declaratory relief, neither should she or her attorney be permitted a windfall.⁹⁶ The ultimate amount of the fee award was left to the discretion of the district court.⁹⁷

The court's holdings in this case are instructive to Indiana practitioners in the employment discrimination area. Defendant employers have, in some lower federal court cases, asserted with mixed success that worker's compensation was a sexual harassment victim's exclusive remedy for emotional injury. Indiana's worker's compensation law⁹⁸ is not as clear as Wisconsin's apparently was to the Seventh Circuit. While "injury by accident" is defined in terms similar to those in Wisconsin's statute,⁹⁹ it is unclear whether emotional stress can constitute a covered injury without some actual physical trauma associated with it, although one district of The Indiana Court of Appeals has held that no physical injury is necessary.¹⁰⁰ Ultimately, this question may have to be certified to the Indiana Supreme Court for a ruling.

II. AFFIRMATIVE ACTION

The subject of affirmative action continues to be confusing to analysts and alarming to employers attempting to identify standards to avoid liability to both minorities and nonminorities. The United States Supreme Court decided one affirmative action case during the survey period that did little to alleviate the confusion.¹⁰¹

⁹⁵*Id.* at 553.

⁹⁶*Id.* at 552-53.

⁹⁷*Id.* at 553.

⁹⁸IND. CODE ANN. §§ 22-3-1-1 to -10-3 (West 1981 & Supp. 1986).

⁹⁹"'Injury' and 'personal injury' mean only injury by accident arising out of and in the course of the employment and do not include a disease in any form except as it results from the injury." IND. CODE ANN. § 22-3-6-1(e) (West Supp. 1986).

¹⁰⁰*Compare* Campbell v. Kiser Corp. & Diecast, 137 Ind. App. 366, 208 N.E.2d 727 (1965) and Sollitt Constr. Co. v. Walker, 127 Ind. App. 213, 135 N.E.2d 623 (1956) with Hansen v. Von Duprin, Inc., 496 N.E.2d 1348 (Ind. Ct. App. 1986).

¹⁰¹The Court decided two more affirmative action cases on July 2, 1986, each featuring multiple opinions and alignments of justices. Local 28, Sheet Metal Workers v. EEOC, 106 S. Ct. 3019 (1986); Firefighters Local 93 v. Cleveland, 106 S. Ct. 3063 (1986). Both cases involved interpretation under section 706(g) of Title VII, which protects bona fide seniority systems. In *Sheet Metal Workers*, 106 S. Ct. at 3034, the Court upheld court-ordered hiring quotas based on evidence of pervasive past discrimination. In *Cleveland*, 106 S. Ct. at 3072, the Court approved a voluntary consent decree setting up an affirmative action plan that gave blacks preference over whites for promotion even though those benefited

In *Wygant v. Jackson Board of Education*,¹⁰² nonminority teachers who had been laid off in favor of less-senior minority teachers challenged on equal protection grounds a collectively-bargained layoff provision that was enacted for affirmative action purposes.¹⁰³ The parties had agreed upon hiring goals geared to the percentage of minority students in the school system. The layoff provision at issue was intended to preserve the minority percentage achieved by the hiring goals by providing that the percentage of minority teachers laid off could not exceed the percentage that minority teachers represented in the entire workforce.¹⁰⁴

Both the district court¹⁰⁵ and the United States Court of Appeals for the Sixth Circuit¹⁰⁶ upheld the provision despite the lack of any demonstrated prior discrimination. Rather, the lower courts held that the school board's articulated goal of remedying societal discrimination by providing role models for school children was an adequate justification under the equal protection clause for race-conscious layoffs.¹⁰⁷ The Supreme Court reversed.¹⁰⁸ The plurality opinion¹⁰⁹ first held that the "role model" theory did not constitute a compelling state purpose and was not an adequate basis for the race-conscious layoff provision.¹¹⁰ To the extent that the purpose of the provision was to remedy past actual discrimination, as opposed to societal discrimination, the Court held that a finding by the district court of prior discrimination was constitutionally necessary to justify the layoff provision.¹¹¹

were not actual victims of discrimination. Two more affirmative action cases under Title VII are set to be argued in the Court's current term. One, *U.S. v. Paradise*, *cert. granted*, 106 S. Ct. 3331 (1986), involves a challenge to promotion goals in an affirmative action plan adopted by the state of Alabama for its state police force. The other, *Johnson v. Transportation Agency*, *cert. granted*, 106 S. Ct. 3331 (1986), involves a challenge to an affirmative action plan intended to remedy sex discrimination.

¹⁰²106 S. Ct. 1842 (1986).

¹⁰³*Id.* at 1845-46. Because no Title VII claim was asserted, the discussion of this case will be somewhat limited, as the Court's discussion was primarily on constitutional grounds.

¹⁰⁴*Id.* at 1845.

¹⁰⁵*Wygant v. Jackson Bd. of Educ.*, 546 F. Supp. 1195 (E.D. Mich. 1982).

¹⁰⁶*Wygant v. Jackson Bd. of Educ.*, 746 F.2d 1152 (6th Cir. 1984).

¹⁰⁷*Id.* at 1156-57.

¹⁰⁸*Wygant*, 106 S. Ct. at 1852.

¹⁰⁹There were five separate opinions. The majority was fashioned through a plurality opinion, most of which was joined by Justice O'Connor, and two opinions by Justices White and O'Connor concurring in the judgment. Justice Marshall filed one dissenting opinion, joined by Justices Brennan and Blackmun, and Justice Stevens authored a second dissenting opinion.

¹¹⁰*Wygant*, 106 S. Ct. at 1847-48. The dissent authored by Justice Marshall concluded that the school board's purpose was more than adequate to justify the race-conscious provision. *Id.* at 1862-63. The dissent noted that the provision was voluntarily adopted pursuant to collective bargaining negotiations, distinguishing *Firefighters v. Stotts*, 467 U.S. 561 (1984), and should be given effect. *Id.* at 1860 (Marshall, J., dissenting).

¹¹¹*Id.* at 1848.

Even if the existence of past discrimination had been demonstrated, however, the Court held that the layoff provision was not "sufficiently narrowly tailored" to accomplish otherwise legitimate purposes.¹¹² Hiring goals were given as an example of a less intrusive means of accomplishing the same objectives.¹¹³ The Court left little doubt that preferential layoff provisions such as the one at issue here impermissibly burden nonminority employees and will not be approved, while hiring goals "do not impose the same kind of injury that layoffs impose."¹¹⁴

III. TIME LIMITS FOR FILING TITLE VII CHARGES

Title VII requires that a charge of discrimination must be filed with the EEOC within 180 days of the alleged discriminatory act, except that in states with so-called deferral agencies, a complainant who institutes a proceeding before the state agency has 300 days within which to file with the EEOC.¹¹⁵ A timely EEOC charge is a prerequisite to a Title VII plaintiff's right to file suit in federal district court.¹¹⁶ The Indiana Civil Rights Commission (ICRC) is a deferral agency under Title VII. Pursuant to Indiana law, charges of discrimination must be filed with the ICRC or a local human rights commission within 90 days of the alleged discrimination.¹¹⁷ At least since the Supreme Court's decision in *Mohasco Corp. v. Silver*,¹¹⁸ commentators and courts have debated whether a Title VII complainant must file a timely state charge in order to be entitled to the extended 300-day filing period, or whether any filing, timely or not, satisfies the deferral requirement. The debate was spurred by a footnote in *Mohasco*:

Under the *Moore* decision, which we adopt today, a complainant in a deferral State having a fair employment practices agency over one year old need only file his charge within 240 days of the alleged discriminatory employment practice in order to insure that his federal rights will be preserved. If a complainant files later than that (but not more than 300 days after the practice complained of), his right to seek relief under Title VII will nonetheless be preserved if the State happens to complete its consideration of the charge prior to the end of the 300-day period.¹¹⁹

¹¹²*Id.* at 1852 (footnote omitted).

¹¹³*Id.* at 1850-51.

¹¹⁴*Id.* at 1851. While recognizing the burden that layoffs represent to nonminorities, the dissent concluded that the layoff provision at issue was sufficiently narrow so as not to be an unconstitutional burden. *Id.* at 1865. (Marshall, J., dissenting).

¹¹⁵42 U.S.C. § 2000e-5(e) (1982).

¹¹⁶*Mohasco Corp. v. Silver*, 447 U.S. 807 (1980).

¹¹⁷IND. CODE ANN. § 22-9-1-3 (West 1981).

¹¹⁸447 U.S. 807 (1980).

¹¹⁹*Id.* at 814 n.16 (citing *Moore v. Sunbeam Corp.*, 459 F.2d 811 (7th Cir. 1972)).

In *Martinez v. UAW Local 1373*,¹²⁰ the Seventh Circuit addressed the issue for the first time. The state involved happened to be Indiana. Martinez was a union member who brought suit under Title VII and other statutes against her union for alleged race discrimination.¹²¹ On the 251st day after the alleged discrimination, she filed a charge with the Fort Wayne Human Relations Commission. That agency, declining to process it because it was untimely, transferred the case to the EEOC on the 258th day. The district court granted summary judgment for the union on the ground that Martinez's claim was barred by the applicable statute of limitations.¹²²

The issue presented to the Seventh Circuit was whether Martinez was entitled to the extended filing period despite the fact that the deferral agency had no opportunity to act. The court acknowledged that the "purpose of the longer statute of limitations . . . is to give states an opportunity to remedy problems of discrimination before the federal government gets involved."¹²³ Under the deferral formulation set out in Title VII, a complainant may not file an EEOC charge until the state agency has had the charge for sixty days, unless the state completes its process earlier.¹²⁴ Thus, *Mohasco* and other cases have held that the complainant must file with the state agency on or before the 240th day to ensure a valid EEOC filing by the 300th day.¹²⁵

In Martinez's case, the purpose of state filing was obviated by her untimeliness. The Fort Wayne Commission did not have the 60 days intended by Congress within which to attempt to remedy the alleged discrimination. While it was obviously disturbed by the prospect of complainants being able deliberately to bypass the deferral portion of the Title VII formulation,¹²⁶ the Seventh Circuit nevertheless refused to conclude that Martinez had forfeited her right to the extended filing period.¹²⁷

The court noted cases under the Age Discrimination in Employment Act (ADEA)¹²⁸ that have permitted untimely state filings to satisfy the deferral requirement,¹²⁹ but distinguished them because of the absence of a deferral period in the ADEA.¹³⁰ Referring to other circuits that have decided the issue similarly under Title VII, the Seventh Circuit declined

¹²⁰772 F.2d 348 (7th Cir. 1985).

¹²¹*Id.* at 349.

¹²²*Id.*

¹²³*Id.* at 350.

¹²⁴42 U.S.C. § 2000e-5(c) (1982).

¹²⁵*Supra* note 119.

¹²⁶*Martinez*, 772 F.2d at 351.

¹²⁷*Id.* at 353.

¹²⁸29 U.S.C. §§ 621-634 (1982).

¹²⁹*Martinez*, 772 F.2d at 351 (including the Seventh Circuit decision in *Anderson v. Illinois Tool Works, Inc.*, 753 F.2d 622 (7th Cir. 1985)).

¹³⁰Indiana's age discrimination statute does not cover any entity subject to the ADEA. IND. CODE ANN. § 22-9-2-1 (West 1981). Accordingly, Indiana is not a deferral state under

to make a comprehensive ruling on the subject.¹³¹ Rather, it limited its ruling to the facts of the case and the 90-day filing period in Indiana.¹³² The court concluded that it was inconsistent with congressional intent to allow complainants less than 180 days to file with deferral agencies and at the same time to make that filing a condition to a federal right of action.¹³³ Because Indiana's statute of limitations was only half the 180 days intended by Congress to be permitted, failure to file a timely charge could not be held to preclude the filing of an EEOC charge within the 300-day filing period.¹³⁴ While the court did not address longer state filing periods, the court's holding strongly indicates that it might rule otherwise in a case involving a state filing period of 180 days or longer.

If, as the Supreme Court held in *Mohasco*, the purpose of the extended filing period was to permit states an opportunity to redress discrimination, it makes little sense to say a discrimination plaintiff should have 300 days within which to file if the state agency is powerless to act because of a late filing. Despite authority to the contrary in other circuits,¹³⁵ it is hoped that the Seventh Circuit will apply the logic of this decision to bar a plaintiff who fails to file a timely state charge where the state has a 180-day or longer filing period.

the ADEA, and age discrimination claimants must uniformly file charges with the EEOC within 180 days.

¹³¹*Martinez*, 772 F.2d at 351-52.

¹³²*Id.* at 352.

¹³³*Id.* at 352-53.

¹³⁴*Id.*

¹³⁵*See* cases cited *id.* at 351.

