Recent Employment Law Decisions of the Seventh Circuit and the Indiana Courts

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Introduction

A vast array of legal actions affect the employment relationship. On the federal level, the courts review decisions of such administrative agencies as the National Labor Relations Board (NLRB) and the Occupational Safety and Health Review Commission (OSHRC). The courts decide discrimination cases filed under such statutes as the Civil Rights Act of 1964 and the Age Discrimination in Employment Act, and they protect statutory rights granted by such legislative enactments as the Employee Retirement Income Security Act (ERISA). State courts, too, move in a significant number of areas that touch the relationship between employer and employee. They hear cases involving state and local employees, worker's compensation claims, and common law actions under various wrongful discharge theories. No survey of this short length could comprehensively review each decision from the state courts and the federal courts that cover Indiana. What follows, then, is not an exhaustive accounting of everything the courts accomplished during 1992, but a sampling of their more important and interesting actions.

I. Indiana Cases

A. Employment Evaluations

In *Bals v. Verduzco*,[1] the Indiana Supreme Court opened the door for defamation actions based on information contained in intracompany employee evaluations. The Inland Steel Company terminated Bals following a series of negative evaluations by his supervisor, Verduzco. Bals then filed suit, arguing both defamation and interference with an employment relationship. The trial court granted summary judgment on the latter claim (an action not contested before the supreme court), but allowed the defamation action to proceed to trial. However, the trial court granted judgment for the defendant at the close of plaintiff's case,

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1. 600 N.E.2d 1353 (Ind. 1992).

deciding that an intracompany evaluation was not the kind of publication that would support a defamation action. The court of appeals affirmed.[2]

The supreme court noted the conflict that exists among jurisdictions over this issue. Some states refuse to view intracorporate communications as a publication, reasoning that the corporation is merely communicating with itself. Others, however, overlook the fiction of a single corporate personality and recognize that corporate officers "remain individuals with . . . opinions that might be affected just as surely as those of other employees by the spread of injurious falsehoods."[3] The court aligned Indiana with these states.

Interestingly, the court found support for its position in the Indiana Constitution, which provides that "every person" shall have a remedy for injury "to him in his person, property, or reputation."[4] The court said there was no counterpart to this protection in the federal constitution.[5] Also influential was another provision of the Indiana Constitution that protects the right of free speech, but mandates accountability for those who abuse it.[6] Most persuasive, however, was the court's forthright recognition of an employee's interest in his or her reputation, especially in the work place:

> Upon employment, an individual does not relinquish the value of a good reputation. To the contrary, a person's suitability for continued employment and advancement at work may be substantially influenced by the reputation one earns. When intracompany communications injure an employee's occupational reputation, the result may be among the most injurious of defamations.[7]

Although this decision clears the way for employee actions against superiors—and presumably against corporate employers—for falsehoods in evaluations, the path is not entirely unobstructed. The court recognized that a qualified privilege attaches "to protect personnel evaluation information communicated in good faith."[8] This substantially tempers the likelihood of liability, because such reports will be privileged unless

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2. 564 N.E.2d 307, 309 (Ind. Ct. App. 1990).

3. *Bals*, 600 N.E.2d at 1355. The court said this approach was consistent with the RESTATEMENT (SECOND) OF TORTS § 577 (1977).

4. *Bals*, 600 N.E.2d at 1355 (quoting IND. CONST. art. I, § 12).

5. *Id.*

6. "No law shall be passed restraining the free interchange of thought and opinion, or restricting the right to speak, write or print freely on any subject whatever: but for abuse of that right, every person shall be responsible." IND. CONST. art. I, § 9.

7. *Bals*, 600 N.E.2d at 1355.

8. *Id.* at 1356.

motivated primarily by ill will, publicized excessively, or made without belief or without grounds for belief in their truth.[9] Nevertheless, *Bals v. Verduzco* is a warning to employers that evaluations and other personnel reports must be supportable by facts and cannot be used by superiors for vindictive purposes.

B. Wrongful Discharge

Although not actually an employment case, *Keystone Carbon Co. v. Black*[10] is an important case for those who work as independent contractors under agency agreements and, by analogy, perhaps to employees as well. Lowell Black had been a manufacturer's representative for the defendant Keystone for twenty-nine years. He was Keystone's exclusive sales representative in Indiana and Kentucky. Beginning in the mid-1980s, Black developed a substantial account for Keystone's product with General Electric's Louisville facility.[11] Although sales of Keystone's products were expected to be flat in 1986, Black's sales were expected to increase, largely due to the G.E. account.

Keystone terminated Black's agency agreement in March 1986, relying on a provision of the contract that allowed either party to do so "for any reason" upon sixty days notice. Although Keystone alleged that it terminated Black because of the need to reduce expenses, it admitted that Black worked solely on commission and did not receive expense payments. Moreover, Keystone replaced Black with the son of a corporate executive and paid him expenses, salary, and commission.

Black filed suit claiming that the termination was in bad faith and had cost him approximately $350,000 in commissions over four years. He recovered $160,000 in a jury verdict and Keystone appealed, contending that Indiana law does not recognize a cause of action for wrongful termination of an at will agency agreement.

Although the court of appeals did not say so expressly, Black had apparently based his action on the court's 1975 opinion in *Montgomery Ward and Co. v. Tackett*.[12] In any event, most of the opinion in *Keystone* attempts to recast what the court had said in *Tackett*. Like *Keystone*, the *Tackett* case involved the termination of an agency relationship, though unlike *Keystone*, the agency agreement in *Tackett* did not allow

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9. Bals was unable to overcome the defense of qualified privilege. Although he alleged that Verduzco's reports were made without belief or without grounds for belief in their truth, the court said that he had failed to present any evidence to support those allegations. *Id.* at 1357.

10. 599 N.E.2d 213 (Ind. Ct. App. 1992)

11. At least by 1986, G.E. was expected to be among Keystone's 10 largest customers. *Id.* at 215.

12. 323 N.E.2d 242 (1975).

termination for any reason. Rather, Montgomery Ward had the right to terminate its agency agreement with the Tacketts if they failed to follow "current policies and procedures," a provision Ward claimed the right to invoke because the Tacketts had submitted incorrect inventory clearance documents. Ward, in fact, recovered a judgment for Tackett's failure to pay for merchandise received.

Nevertheless, the court said in *Tackett* that a "principal owes the agent the obligation of exercising good faith in the incidents of their relationship . . . [and] a contract of agency carries an implied obligation of the principal to do nothing to thwart the effectiveness of the agent."[13] The court found there was evidence that Montgomery Ward had failed to exercise good faith in resolving problems in the relationship between the parties.[14] Montgomery Ward, however, argued that even if a principal could be liable for revoking an agency, the contract at issue did not give either side the "absolute right" to continue the relationship. In particular, the agency was terminable for Tackett's failure to follow proper procedures.[15]

The court's reaction to this argument gave hope to disappointed agents such as Black:

> In no respect do we question the validity of the terms governing termination of the franchise agreement. However, we do not believe it consistent with sound public policy to permit Ward to employ those provisions as a shield against liability for termination accomplished in breach of its duty to exercise good faith.[16]

Although not a typical employment case, this sounded remarkably like the public policy exception to the employment at will rule, largely spurned by the Indiana courts.[17]

In *Keystone*, the court took it all back. It acknowledged that its opinion in *Tackett* had created "confusion" and that the opinion could

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13. *Id.* at 246.

14. *Id.* at 245. Tackett did not deny that he had claimed credit improperly, but he alleged that his actions were motivated by inaction on Ward's part in resolving certain payment difficulties.

15. *Id.* at 246.

16. *Id.* at 247.

17. *See, e.g.*, Sheets v. Teddy's Frosted Foods, 427 A.2d 385, 387 (Conn. 1980) ("It would be difficult to maintain that the right to discharge an employee hired at will is so fundamentally different from other contract rights that its exercise is never subject to judicial scrutiny regardless of how outrageous, how violative of public policy, the employer's conduct may be.").

The Indiana Supreme Court has embraced the public policy exception only in limited circumstances; *see, e.g.*, McClanahan v. Remington Freight Lines, 517 N.E.2d 390 (1988).

be read to sanction an action like the one brought by Black. However, the Indiana Supreme Court had made it clear that "an 'at will' agency contract may be terminated without cause or regardless of bad faith."[18] The court said its decision in *Tackett* was actually a holding that Montgomery Ward's termination for the audit discrepancies was "pretextual," an odd characterization given the fact that the jury had upheld Ward's claim against the Tacketts.[19] It seems more likely that the *Tackett* court had meant just what it said: notwithstanding Ward's right to terminate the agreement, it still owed its agent the obligation of good faith.

After *Keystone*, no such obligation can be implied. "When the rights of the parties are controlled by an express contract, recovery cannot be based on a theory implied in law."[20] This case not only frustrates the expectations of agents like Black, it further demonstrates the resolve of the Indiana courts to rebuff efforts to impose good faith obligations on employers who hold their employees to at will relationships.

The court of appeals demonstrated similar dedication to the employment-at-will doctrine in *Griffin v. Elkhart General Hospital, Inc.*[21] The hospital employed plaintiff as a construction manager under a written agreement which provided, in part:

> a) The position, as we discussed, is projected to enjoy a duration of approximately three years. I am unable to guarantee a specific timeframe for the position, nor to predict a precise termination point.
> b) Your ability to maintain this position will, as with all positions at EGH, be predicated on your performance in this new capacity.[22]

The hospital terminated the plaintiff nine months later. Griffin sued, claiming a violation of the written agreement, as supplemented by oral assurances from a vice president.[23] The trial court granted summary judgment for defendant and plaintiff appealed.

Even if the court had treated the oral assurances as a guarantee of employment for a specific term, they probably would not have survived the statute of frauds. Even so, the court might have constructed similar

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18. Keystone Carbon Co. v. Black, 599 N.E.2d 213, 216 (Ind. Ct. App. 1992).
19. *Id.*
20. *Id.*
21. 585 N.E.2d 723 (Ind. Ct. App. 1992).
22. *Id.* at 724.
23. The plaintiff testified in a deposition that the vice president told him he would be employed for three years "no problem" and that his term of employment could have "lasted longer, 10 years, 12 years." *Id.* at 725.

guarantees out of the contract portions reprinted above. Thus, although the employer was unwilling to guarantee a specific term of employment, it contracted to employ plaintiff for the duration of the building project, which had a termination point that can be objectively ascertained. Thus, the contract did not create the open-ended relationship to which the employment at will rules typically apply.

The court noted that at least one other state had used similar reasoning to circumvent the harshness of the rule,[24] but it eschewed any such innovation in Indiana. Instead, relying on ample precedent from both its own opinions and those of the supreme court, the court declared that only agreements for a definite term escape the at-will doctrine.[25] Tying plaintiff's employment to the completion of the construction project did not satisfy the definite term requirement.[26]

C. Collateral Estoppel

During 1992, Indiana courts also struggled with issues that have often confronted—and confounded—the United States Supreme Court. In *Commissioner of Labor v. Talbert Manufacturing Co.*,[27] the Commissioner filed an action on behalf of an employee named Bougher who claimed that Talbert had discharged him in retaliation for filing an Indiana Occupational Safety and Health Aact (IOSHA)[28] complaint. While the lawsuit was pending, the employer and union arbitrated a contractual claim based on the same facts under the collective bargaining agreement that covered Bougher. The arbitrator found no merit in the grievance. Subsequently, the trial court granted the employer's motion for summary judgment, ruling that the arbitrator's decision precluded further litigation under the doctrines of res judicata and collateral estoppel.[29]

A divided court of appeals reversed.[30] The majority (Judges Staton and Hoffman) took refuge in a series of United States Supreme Court

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24. Whitlock v. Haney Seed Co., 715 P.2d 1017 (Idaho 1986).

25. *Griffin*, 585 N.E.2d at 724.

26. The court of appeals also displayed a similar disposition to reject any erosion of traditional at will employment rules in more traditional employment actions. In Mehling v. Dubois County Farm Bureau, 601 N.E.2d 5 (Ind. Ct. App. 1992), the court reiterated the rule that Indiana does not recognize a covenant of good faith and fair dealing in employment contracts, and advised potential plaintiffs to address for reform to the legislature or the supreme court. In Wheeler v. Balemaster, 601 N.E.2d 447 (Ind. Ct. App. 1992), the court adhered to the notion that employers in at will relationships are free to change the terms of employment unilaterally, leaving employees with the dubious alternatives of quitting or accepting the changes.

27. 593 N.E.2d 1229 (Ind. Ct. App. 1992).

28. *See* IND. CODE § 22-8-1.1-38.1 (1988).

29. *Talbert*, 593 F.2d at 1230.

30. *Id.*

opinions that had considered similar issues, and one Seventh Circuit case decided on virtually identical facts. The starting point was the Supreme Court's decision in *Alexander v. Gardner-Denver Co.*,[31] in which an employee lost an arbitration while a claim on the same facts was under investigation by the Equal Employment Opportunity Commission (EEOC). The employee filed suit in federal court, claiming a violation of his rights under Title VII of the Civil Rights Act of 1964.[32]

As in *Talbert*, the employer claimed that the prior arbitration award should have preclusive effect, a position that found support among established federal law. The Supreme Court disagreed, noting the distinction between the contractual rights enforced in arbitration and the statutory rights protected by Title VII. The Court also questioned whether arbitrators were expert in such questions of law and whether the informal procedures of arbitration would adequately protect a plaintiff's statutory rights.[33] These same themes were repeated in two subsequent decisions, which again pitted arbitration decisions against attempts to enforce statutory rights judicially.[34]

The Seventh Circuit decision is *Marshall v. N.L. Industries*,[35] in which an employee filed an Occupational Safety and Health Act (OSHA) complaint following his discharge for refusing to work in conditions he believed to be unsafe. After an arbitrator had denied a similar claim under the collective bargaining agreement, the Secretary of Labor filed suit seeking, among other things, the employee's reinstatement. Relying on *Gardner-Denver*, the Seventh Circuit said that occupational safety and health legislation was intended to create individual rights broader than those protected by a collective bargaining agreement. Thus, the court refused to give preclusive effect to the arbitration.

Those same observations were apt in *Talbert*. The Indiana Court of Appeals was comfortably within the universe of federal cases dealing with the same issue when it said "the rights afforded by the statute are designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination."[36] That does not mean, however, that its decision is free from controversy, as Judge Sullivan pointed out in a long and thoughtful dissenting opinion.

What made the case difficult was not what the Supreme Court had said in *Gardner-Denver* and like cases. Rather, the controversy arose

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31. 415 U.S. 36 (1974).

32. Codified at 42 U.S.C. § 2000e-1 to -17 (1988).

33. *Alexander*, 415 U.S. at 56.

34. *See* McDonald v. City of W. Branch, 466 U.S. 284 (1984); Barrantine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728 (1981).

35. 618 F.2d 1220 (7th Cir. 1980).

36. Commissioner of Labor v. Talbert Mfg. Co., 593 N.E.2d 1229, 1232 (Ind. Ct. App. 1992).

from what the Court said in 1991, in its opinion in *Gilmer v. Interstate/ Johnson Lane Corp.*[37] There, the Court enforced the provisions of an individual employment agreement that required an employee to submit his age discrimination claim to arbitration rather than taking it to federal court. Although the Age Discrimination in Employment Act was intended by Congress to further important social goals, those goals were not undermined by enforcing an agreement to arbitrate the claim.[38] The Federal Arbitration Act demonstrated the importance of the arbitral forum and was a congressional attempt to ease the traditional hostility of the judiciary toward arbitration.[39]

Certainly, there are differences between the kinds of arbitration at issue in *Gardner-Denver* and *Gilmer*. *Gardner-Denver* involved arbitration under a collective bargaining agreement, in which arbitrators are assumed to be expert in the enforcement of contract rights implemented by majority rule. Labor contracts commonly exclude arbitrators from construing the law or relying on what the Supreme Court has characterized as their "own brand of industrial justice."[40] By contrast, the *Gilmer* arbitration was to be convened under the Federal Arbitration Act, which does not apply to labor arbitration. Moreover, unlike the situation in *Gardner-Denver*, in which the employee was not actually a party to the arbitration, the employee in *Gilmer* had expressly agreed to submit his statutory claim to an arbitrator.

These were the distinctions drawn by the Supreme Court in *Gilmer*, in which the employee had argued that it made no sense to force him to arbitrate a claim when, under *Gardner-Denver*, the arbitration would not preclude further federal court litigation. The Court, however, distinguished labor arbitration and pointed to the federal policy favoring arbitration of statutory claims represented by the Federal Arbitration Act.

In his dissenting opinion, Judge Sullivan had the courage to say what the Supreme Court has yet to admit—that cases like *Gardner-Denver* and *Barrantine v. Arkansas-Best Freight Systems, Inc.*,[41] represent a "rationale [that] can be described as a basic distrust of the arbitration system and a strong preference for judicial resolution of statutory claims."[42] Judge Sullivan noted that the Indiana Supreme Court, which has recently

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37. 111 S. Ct. 1647 (1991).

38. *Id.* at 1653.

39. *Id.*

40. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960).

41. 450 U.S. 728 (1981).

42. Commissioners of Labor v. Talbert Mfg. Co., 593 N.E.2d 1229, 1234 (Ind. Ct. App. 1992).

adopted Rules for Alternative Dispute Resolution, observed in the preamble to those rules that "[t]he interests of the parties can be preserved in settings other than the traditional judicial dispute resolution method."[43] That recognition, he said, should dispel the fears of "inadequacy or unfairness" that influenced decisions like *Gardner-Denver*.[44]

Judge Sullivan is surely right. The Supreme Court's characterization of labor arbitration in cases like *Gardner-Denver* is unrealistic. It ignores what labor arbitrators do and what the parties expect them to do. Moreover, it portrays the aggrieved employee as an unwilling captive of the union who is powerless to influence the course of the litigation. Although *Gilmer* arose in a different setting, it raises hope that the Supreme Court might someday substitute action for some of its favorable rhetoric about arbitration. Because state courts are not bound by *Gardner Denver* when employees seek to enforce state statutory rights, the court of appeals missed an opportunity to do the same thing in Indiana.

D. Fair Share

Another troublesome issue at both the state and federal levels has been the determination of so-called fair share fees, paid by nonmembers for the union's representational efforts in collective bargaining and contract enforcement. Cases involving such employees have often occupied the courts' time, as was the case in Indiana in 1992. In January, two districts of the court of appeals decided the same issues in different ways, prompting the Indiana Supreme Court to grant transfer and settle the matter.

The cases involved, among other issues, the question of how to determine what portion of a union's expenditures are chargeable to represented nonmembers.[45] A recent United States Supreme Court decision established criteria for the assessment of a service fee on nonmember public employees.[46] The expenses must be germane to the union's collective bargaining role, justified by the policies eliminating free riders and assuring labor peace, and they must not add significantly to the burden of free speech "inherent in the allowance of a union or agency

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43. *Talbert*, 593 N.E.2d at 1234.

44. *Id.*

45. Both federal and state collective bargaining laws adopt the so-called principle of exclusive representation. Collective bargaining units are designated by naming groupings of jobs. Everyone who holds one of those jobs is in the bargaining unit and is represented for the union for purposes of collective bargaining, whether or not the employee belongs to the union. Thus, all employees benefit (or suffer) from the contracts negotiated by the union.

46. *See* Lenhert v. Ferris Faculty Ass'n, 111 S. Ct. 1950, 1959 (1991).

shop."[47] This opinion, and others like it, have encouraged what one Supreme Court justice has characterized as "give-it-a-try litigation,"[48] prompting nonmembers (and employer dominated associations like the National Right to Work Committee) to file actions challenging virtually every expenditure the union makes.

One response by unions has been to quantify all those expenses that are *not* chargeable, often by keeping time records and other accounts of expenses incurred in activities which previous court decisions have identified as nonchargeable. Unions then subtract this amount from total expenses and assume that nonmembers have to pay their "fair share" of the remaining sum. It was this method of computation that was at issue in the two court of appeals opinions.

In *Fort Wayne Education Ass'n. v. Aldrich*,[49] the third district considered the union's challenge to a trial court order which compelled the union to assess each member and nonmember a pro rata share of the amount actually spent on bargaining. The court of appeals rejected the trial court formula, noting that it had "consistently approved" a calculation based on union dues, "less a pro rata share of non-assessable expenses."[50] Nine days later, the second district issued its opinion in *Albro v. Indianapolis Education Ass'n.*,[51] expressly rejecting the *Aldrich* approach.

Although Judge Shields' opinion recognized that the *Aldrich* approach was supported by precedent (indeed, the court even cited *Aldrich*), it concluded that the United States Supreme Court's opinion in *Lenhert v. Ferris Faculty Ass'n.*[52] compelled a different calculation.[53] Rather than compute non-chargeable expenses and deduct them from total expenditures, the court said the union has the burden of affirmatively proving chargeable expenses.[54] The previous methodology, the court said, "effectively shifts the burden of proof [of chargeable expenses] onto the nonunion members of the bargaining unit."[55] An admission that certain expenses are nonchargeable does not compel a conclusion that the remaining expenditures are appropriately charged to nonmembers.

In June, the supreme court granted transfer on the consolidated *Aldrich* and *Albro* cases and adopted the *Albro* opinion authored by

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47. *Id.* at 1952.
48. *Id.* at 1975 (Scalia, J., concurring in part and dissenting in part).
49. 585 N.E.2d 6 (Ind. Ct. App. 1992).
50. *Id.* at 9.
51. 585 N.E.2d 666 (Ind. Ct. App. 1992).
52. 111 S. Ct. 1950 (1991).
53. *Albro*, 585 N.E.2d at 669.
54. *Id.*
55. *Id.*

Judge Shields.[56] This action works a significant change in the methodology unions must use in order to calculate their fair share fees. In *Albro*, the court of appeals said that *Lenhert* "distilled" a standard in which the "paramount consideration . . . is whether the particular expense can be proved to be *chargeable*."[57] In the future, unions must affirmatively prove that each expenditure satisfies the *Lenhert* criteria, a requirement that will add significantly to the union's burden. Whether this increased standard of proof will add appreciably to the constitutional protections afforded non-member employees is debatable. It will, however, insure further litigation and more cost, thereby serving the interests of those who oppose the imposition of service fees on free riders.

E. Covenants Not to Compete

Employers sometimes add extra incentive to employee non-competition agreements by requiring the employees to repay training expenses should they quit and accept employment with a competitor. It was this kind of clause that was at issue in *Brunner v. Hand Industries, Inc.*[58] Brunner worked for a company, Hand, that performed finishing work on orthopedic appliances. The employment agreement acknowledged that because Hand had expended considerable sums in training him, Brunner would repay a portion of his training costs if he resigned within three years of employment and accepted employment with a competitor. The reimbursement amounts were set forth in a schedule in the agreement. After approximately twenty-eight months with Hand, Brunner resigned and took a job with a competitor. Hand then filed suit seeking $20,000, the amount provided by the schedule. Hand recovered in the trial court, less a deduction for unpaid wages.[59]

Because the reimbursement provisions of the contract applied only to former employees who accepted employment with a competitor, the court classified it as a covenant in restraint of trade and said it was subject to heightened scrutiny.[60] Such covenants are protected only if they reasonably protect the employer's interest without unreasonably restricting the activities of employees.[61]

Although an employer has a legitimate interest in preventing an employee from exploiting confidential business information or otherwise appropriating the employer's good will, both Indiana and other juris-

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56. 594 N.E.2d 781 (Ind. 1992).
57. *Albro*, 585 N.E.2d at 670.
58. 603 N.E.2d 157 (Ind. Ct. App. 1992).
59. *Id.* at 159.
60. *Id.*
61. *Id.*

dictions have held that employees cannot be prevented from transferring to another work place skills and abilities developed with an employer.[62] A contrary rule could seriously interfere with an employee's ability to make a living, because most employers could claim that employees perfected their skills through the work experience.

The court noted that Brunner had received short term training in polishing and finishing orthopedic appliances, a skill he no doubt honed in his twenty-eight months of employment. Even so, there was no evidence that he had access to confidential business information, such as customer lists or trade secrets.[63] He took nothing to the competitor, then, except his own abilities, albeit Hand had incurred the expense of perfecting them.

The court was also influenced by what appeared to be unreasonable reimbursement requirements, given Hand's wage rates. The jobs at issue were not particularly lucrative, paying between $5.50 and $9.50 an hour. The court said that the reimbursement levels, which ranged from $2200 to $20,000, could exceed an employee's actual earnings and were likely to constitute one-half to two-thirds of an employee's total pay.[64]

Despite the court's discussion of the unreasonable reimbursement amounts, it is not clear that this factor was essential to its decision. The opinion appears broader in scope and seems to say that employee mobility cannot be restricted merely by transfer of job skills from one work place to another. Rather, the employee must transport something that is uniquely the employer's, like trade secrets or customer lists, before a restrictive covenant will be enforced.

II. Seventh Circuit Cases

A. 1991 Civil Rights Act

In *Mozee v. American Commercial Marine Service Co.* (Mozee III),[65] the court considered the retroactivity of the Civil Rights Act of 1991.[66] The case at issue had been pending since 1977 and had been the subject of two previous Seventh Circuit opinions.[67] In the second opinion, Mozee II, the court remanded to the district court certain questions concerning

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62. *See, e.g.*, Donahue v. Permacel Tape Corp., 127 N.E.2d 235 (1955).
63. *Brunner*, 603 N.E.2d at 160.
64. *Id.* at 160-61.
65. 963 F.2d 929 (7th Cir. 1992) [hereinafter *Mozee III*].
66. Pub. L. 102-166, 105 Stat. 1074.
67. Mozee v. American Commercial Marine Serv. Co., 940 F.2d 1036 (7th Cir. 1991) [hereinafter *Mozee II*]; Mozee v. Jeffboat, Inc., 746 F.2d 365 (7th Cir. 1984).

the plaintiffs' Title VII claims.[68] Both parties filed a petition for rehearing, and while they were pending, Congress passed the 1991 Act. The question at issue in *Mozee III* was twofold: (1) whether the 1991 Act applies retroactively on appeal, so that it might affect the court's decision in *Mozee II*; and (2) whether it applies to the issues remanded, which really means whether the Act applies retroactively to conduct or actions that predated it.

Not surprisingly, the plaintiffs contended that Congress intended the 1991 Act to be retroactive, and the defendant argued a contrary conclusion. Moreover, both pointed to various portions of the legislative history to support their contentions. The court, however, rebuffed any attempt to decide the issue on the basis of such evidence. Calling the language of the Act "hopelessly ambiguous,"[69] the court concluded "[w]hether Congress intended prospective or retroactive application of the 1991 Civil Rights Act cannot be deciphered from either the language of the statue or from the legislative history."[70] Unable to resolve the question through the statute or its history, the court turned to "judicially derived rules of construction."[71]

The court acknowledged that the judicial path was not free of obstructions. Until 1968, the Seventh Circuit said that the Supreme Court had always assumed statutes were to be applied prospectively. Then, in *Thorpe v. Housing Authority of Durham*,[72] the Court applied the opposite presumption, albeit without offering much explanation for its change in direction. The Court subsequently reaffirmed its commitment to *Thorpe* in 1974,[73] then apparently reversed course eight years later,[74] and since then has applied one rule or the other from "two seemingly contradictory lines of cases."[75] The Seventh Circuit said its task was the difficult one of reconciling these two lines of decision "in a manner that comports with the policies underlying the need for prospective versus retroactive application."[76]

The court decided that the presumption of prospective application embodied in the Supreme Court's 1988 opinion in *Bowen v. Georgetown*

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68. *Mozee II*, 940 F.2d at 1055.

69. *Mozee III*, 963 F.2d at 933. The court's characterization applied to § 402(a), which provides that the Act "shall take effect upon enactment." Pub. L. No. 102-166, § 402(a).

70. *Mozee III*, 963 F.2d at 932.

71. *Id.* at 934.

72. 393 U.S. 268 (1969).

73. *See* Bradley v. School Bd., 416 U.S. 696 (1974).

74. *See* United States V. Security Indus. Bank, 459 U.S. 70 (1982).

75. *Mozee III*, 963 F.2d at 935.

76. *Id.*

University Hospital[77] stated the general rule. The other line of cases, the court said, had more general applicability. After painstaking analysis of the Supreme Court's opinions, the Seventh Circuit concluded that the fairer rule "is to hold parties accountable for only those acts that were in violation of the law at the time the acts were performed."[78] The *Bowen* presumption applies, the court said, to matters of both substance and procedure, both in issues on appeal and those that were remanded to the trial court.[79] Judge Cudahy dissented, commenting that the majority's protracted analysis of Supreme Court cases was "thorough, but . . . mechanical."[80]

This opinion will not end the controversy. As the Seventh Circuit recognized, numerous other courts have considered the same issue, and their conclusions diverge. Ultimately, then, the Supreme Court will have to address the matter, no doubt parsing the same opinions the Seventh Circuit struggled with in this case.[81]

B. National Labor Relations Act Cases

One of the more interesting cases from the Seventh Circuit in 1992 was Judge Posner's opinion in *Chicago Tribune v. NLRB*.[82] The dispute involved the union's request for the names of permanent replacements hired by the employer following a strike that began in 1985. The union claimed it wanted the names in order to verify employment, so that it could determine how many places were left for strikers. The employer refused, citing a pattern of violence against the replacement workers. Instead, it offered two alternatives: giving the names to an accounting firm that could verify employment, or furnishing the union with the replacements' birthdate and a partial Social Security number. The union declined the compromise, resting its claim on a line of NLRB cases that gave it a presumptive right to such information, absent an employer showing of a "clear and present danger."[83]

Judge Posner recognized that even the Seventh Circuit had described the Board's position as a "settled rule," but cautioned that it should not be taken literally. He characterized the union's request as nothing more than a discovery request, opined that no statute gave the union a right to the information, and said:

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77. 488 U.S. 204 (1988).
78. *Mozee III*, 963 F.2d at 936.
79. *Id.* at 935-36.
80. *Id.* at 940.
81. The Court will not take on the task in *Mozee III*, having denied certiorari. Mozee v. American Commercial Marine Serv. Co., 113 S. Ct. 207 (1992).
82. 965 F.2d 244 (7th Cir. 1992).
83. *Id.* at 246.

> Where the Board got the idea that a union's demand for the names of replacement workers is to be handled not like any other discovery request but by placing on the company an insuperable burden of proving the union will in fact use the information to harass workers beats us.[84]

Although his rhetoric is folksy, if not clever, Judge Posner's law may need some work. The union's request was not a mere discovery device. Further it is inaccurate to say that no statute entitles the union to the names of replacement workers. Although no one could presume to speak for the Board, it may have "got the idea" that the presumption ran in the union's favor from the Supreme Court and the National Labor Relations Act. In *NLRB v. Truitt Manufacturing Co.*,[85] the Supreme Court held that section 8(a)(5) of the Act requires the employer to furnish on request information that is important to the bargaining process.[86] Although the right is not without limits,[87] *Truitt* has been understood to mean that the employer has the burden of establishing that the information the union requests is privileged or irrelevant.[88]

Posner does not even cite *Truitt*, the principal Supreme Court case on the subject. Rather, in mischaracterizing the tenor of the union's request, he refers only to *NLRB v. Acme Industrial Co.*,[89] which dealt with the union's right to information in contract enforcement proceedings like arbitration, where the request might be more comparable to discovery than what was at issue in *Chicago Tribune.*

The effect of *Chicago Tribune* is to hold that a union which is obligated by law to act as exclusive representative for the replacement workers is not even entitled to discover their identity. The court concluded that the union's rejection of the employer-offered alternatives "suggests" that it wanted the names to harass the workers, directly or indirectly. Perhaps, however, the union wanted the names so it could solicit membership among the replacements who became members of the bargaining unit the minute they were hired. The court is able to ignore this possibility by neatly dividing the case into two distinct components.

The last part of the opinion deals with the union's loss of majority status after the replacement workers were hired. A recent opinion of the Supreme Court refused to presume that strike replacements do not

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84. *Id.* at 247.
85. 351 U.S. 149 (1956).
86. *Id.* at 155.
87. *See, e.g.*, Detroit Edison v. N.L.R.B., 440 U.S. 301 (1979).
88. *See, e.g.*, JULIUS G. GETMAN & BERTRAND E.. POGREBIN, LABOR RELATIONS: THE BASIC PROCESSES, LAW AND PRACTICE (1988).
89. 385 U.S. 432 (1967).

support the union.[90] In *Chicago Tribune* the court noted that the union's support had eroded by mid 1987, and it approved the employer's refusal to execute a contract even though it acknowledged that the union had accepted the offer.[91] In doing so, Posner stepped a little clumsily over one of the Seventh Circuit's own cases,[92] but he professed to be guided by the interests of employees.[93]

Perhaps the union did want to harass the strike replacements; or perhaps, as the employer suggested, its only interest in the Tribune bargaining unit was the tactical advantage it might obtain for other employees working for a different newspaper. However, there is danger in allowing employers to assert the best interest of their employees, which in employers' eyes are too often tied to nonunion workplaces, exactly the outcome of this case. The replacements might have spurned the union in any event, but this decision gives the employer yet another weapon in the decertification arsenal. Not only can it hire replacement workers for economic strikers, it can now effectively deprive the union of any opportunity to contact these employees it represents, thus virtually assuring their rejection of representation in any subsequent election or poll.

Equally disturbing is Judge Posner's opinion in *Graphics Communications International Union Local 508 v. NLRB*,[94] in which the employer, Nielson Lithographing Co., had also replaced striking workers. In 1983, the company entered collective bargaining by demanding seventy-six concessions from the union that were intended to reduce labor costs. The employer said it needed the concessions "to compete," because costs were "prohibitive," and "the company is making a profit . . . [but] couldn't compete."[95] There is no mystery about why it framed its justification in this manner.

In *NLRB v. Truitt Manufacturing Co.*,[96] the employer resisted a union's wage demands by pleading that meeting them would break the company.[97] The union requested that the employer furnish information substantiating its claim, and filed a section 8(a)(5) charge when the employer refused. The Supreme Court enforced the Board's order to disclose, saying:

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90. NLRB v. Curtin Matheson Scientific, Inc., 110 S. Ct. 1542 (1990).
91. Chicago Tribune v. NLRB, 965 F.2d 244, 247-48 (7th Cir. 1992).
92. *See* Continental Web Press, Inc., v. NLRB, 742 F.2d 1087 (7th Cir. 1984).
93. *Chicago Tribune*, 965 F.2d at 250.
94. 977 F.2d 1168 (7th Cir. 1992).
95. *Id.* at 1169.
96. 351 U.S. 149 (1956).
97. *Id.* at 150.

> Good faith bargaining necessarily requires that claims made by either bargainer be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some proof of its accuracy.[98]

Finding an obvious parallel between the employer in *Truitt*, who had resisted a wage increase, and Nielsen Lithographing, which had asked for a decrease, the union demanded that the employer open its financial records for examination. The Seventh Circuit, for the second time in four years, found that *Truitt* had no application.[99]

In a previous decision, the court had said that *Truitt* applied only in those instances in which an employer pleaded an inability to pay. Nielsen had not overstepped that line, which apparently is bright to the point of radiance. Nielsen did not say that it had to cut wages and benefits because it couldn't afford to pay them. Rather, "[a]ll that Nielsen was claiming was that if it didn't do anything about its labor costs it would continue to lose business and layoff workers. It didn't claim that it was in any financial trouble."[100] Part of the problem, Posner said, was that Nielsen used to enjoy a competitive advantage due to superior equipment.[101] However, as competitors acquired the same equipment and presumably the same production efficiencies, Nielsen's comparatively higher wages put it at a disadvantage.[102]

No one could doubt the competency of Nielsen's legal advice or, for that matter, the gullibility of the Seventh Circuit. Its desire to cut wages, Nielsen said, was really a desire to "protect the jobs of our employees."[103] The court swallowed this, apparently without a grimace. Relying, no doubt, on his considerable expertise in economics, Posner declared that the employer could simply "minimize its costs at a lower volume of output."[104] That is, rather than lose money, the employer would just control costs by cutting jobs. However, even if it got down

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98. *Id.* at 152-53.

99. A full review of the case's history is beyond the scope of this Article. The Seventh Circuit had first considered that matter in 1988, following the Board's order that the employer disclose the information. The court refused to enforce, Nielson Litho Co. v. NLRB, 854 F.2d 1063 (7th Cir. 1988), relying on its decision in NLRB v. Harvstone Mfg. Corp., 785 F.2d 570 (7th Cir. 1986). Properly chastened, the Board reversed course, 305 NLRB No. 90 (1991). The employer then sought review of the Board's decision.

100. Graphics Communications Int'l Union v. NLRB, 977 F.2d 1168, 1170 (7th Cir. 1992).

101. *Id.*

102. *Id.*

103. *Id.* at 1169.

104. *Id.* at 1170.

to one percent of its regular output, the firm might still be profitable, albeit fairly vacant. Whether the employer followed this course or not was none of the union's business, the court said, citing *First National Maintenance v. NLRB*.[105]

The effect of this decision is clear. Rather than saying that continuing at the present level of operations without a wage cut could cause it to lose money, the employer said the same thing but with a different spin. It could not continue at the same level of wages without cutting employees. This, the court declared, made all the difference in the world. Because the union has no right to bargain over decisions to decrease the work force, the court decided there was no duty to furnish information about such plans. Even with such a duty, the union knew that other companies were becoming more productive, which was the real cause of Nielsen's woes. One must wonder whether any employer will ever again be so foolish as to plead inability to pay. Now employers can avoid the effects of *Truitt* merely by professing a concern for employees' jobs rather than shareholders' profits.

Judge Posner also authored the opinion in another case involving the Chicago Tribune, *Chicago Tribune Co. v. NLRB*.[106] During the term of a collective bargaining agreement, the employer unilaterally adopted a drug and alcohol policy that governed employees both on and off the work place. Employees suspected of use or impairment on the job could be forced to assent to blood or urine tests. The employer claimed that its action was justified by a management's right clause that read, in pertinent part, "except as expressly limited by the express language of this agreement . . . the company has and retains exclusively to itself . . . the exclusive right . . . to establish and enforce reasonable rules and regulations relating to the operation of its facilities and to employee conduct."[107]

Although the management rights clause was not unusual, another provision of the contract is not typically found in collective bargaining agreements, at least outside the printing industry. The parties agreed that the "general laws" of the international union would "govern relations between the parties on those subjects concerning which no provision is made in the agreement."[108] One such "law" provided that "[n]o journeyman shall be required to submit to a physical examination as a condition of employment."[109]

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105. 452 U.S. 666, 686 (1981) (holding that the National Labor Relations Act does not require an employer to bargain with the union representing its employees over decisions to close part of the business).

106. 974 F.2d 933 (7th Cir. 1992).

107. *Id.* at 935.

108. *Id.*

109. *Id.*

The NLRB held that unilateral implementation of the drug and alcohol rule violated section 8(a)(5).[110] The panel majority said the requirement to submit to testing conflicted with the "law" that forbade physical examination of journeymen and was, therefore, a unilateral midterm contract modification.[111] Although employees who used drugs off the job were not subject to testing, the portion of the rule dealing with them also violated section 8(a)(5). The consequence of off duty drug use is a mandatory subject for bargaining, the Board said, and the employer could not act unilaterally without first bargaining with the union. The general language in the management rights clause was not sufficient to relinquish the union's right to bargain since it was not a clear and unmistakable waiver.[112]

As the Board had done as well, the Seventh Circuit debated whether drug testing was a "physical examination" within the meaning of the contract. Judge Posner had his doubts, declaring that a "physical examination" is the "ensemble" and not its separate parts, any more than part of an atom is itself an atom.[113] Although such nit-picking could obviously lead to absurd results, the court seemed more interested in substance than form. Thus, Posner recognized that the "purpose" of the language was to protect jobs, not define medical procedures. As such, medical testing would presumably fit within the term "physical examination."[114]

Nevertheless, the court found the general law prohibiting physical examinations to have no application. Posner's opinion observes that the general laws apply only when a subject is not otherwise covered in the labor contract.[115] Although there was nothing in the agreement about management's right to impose testing or otherwise regulate drug or alcohol use, the management rights clause said the employer had the "exclusive right . . . to establish and enforce reasonable rules . . . relating to . . . employee conduct."[116] The court said it had "no doubt" that the drug and alcohol policy was such a rule.[117]

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110. *Id.* at 934 (citing Chicago Tribune Co., 304 N.L.R.B. No. 62, 138 L.R.R.M. (BNA) 1065 (Aug. 27, 1991)).

111. Chicago Tribune Co., 304 NLRB No. 62, 138 L.R.R.M. (BNA) (Aug. 27, 1991), slip op. at 3. Although the reach of the NLRA's requirement that the parties bargain in good faith is beyond the scope of this article, the Board has held that an employer violates section 8(a)(5) when it modifies a contract unilaterally during its term. *See generally* GETMAN & POGREBIN, supra note 88, at 133-34.

112. *Chicago Tribune Co.*, 304 NLRB No. 62, 138 L.R.R.M. (BNA) 1065 (Aug. 27, 1991), slip op. at 3.

113. Chicago Tribune Co. v. NLRB, 974 F.2d 933, 936 (7th Cir. 1992).

114. *Id.*

115. *Id.*

116. *Id.* at 937.

117. *Id.* The court noted that the union argued to the contrary, a contention Posner

This characterization of the employer's rule effectively decided the case. The general law, the court said, was a "gap filler."[118] However, there was no gap to be filled. The management rights clause gave the employer "carte blanche to impose rules relating to employee conduct."[119] Because the contract specifically allowed the employer to promulgate rules, including rules requiring drug and alcohol testing, there was no occasion to apply the general law. It was preempted by the express terms of the contract.

The court also rejected the union's challenge to the off duty rules, where testing was not a factor.[120] Indeed, the rule allowed discharge of any employee arrested (not convicted) for illegal activity related to drugs and alcohol.[121] Without commenting about whether this provision was reasonable, the court said that its unilateral implementation was not an unlawful refusal to bargain.[122] It questioned the Board's assertion that waiver of a statutory right—like the right to bargain—must be "clear and unmistakable."[123] Even if this standard applied, however, it was satisfied.

The parties agreed to a provision that allowed the employer to promulgate reasonable rules and the language they used did not distinguish between on the job and off the job activity. Rather, they used broad language that must be interpreted in light of ordinary contract principles. There is, the court said, no rule that tilts the decision toward the union. The only question is what the contract means, a determination not necessarily within the Board's area of expertise.[124] The court held that the Board had misconstrued the contract, which it found sufficient to waive the union's right to bargain.[125]

The implications of this decision are surely disturbing to unions. There was nothing very special about the management rights clause the parties negotiated. Versions of the same language appear, no doubt, in thousands of collective bargaining agreements. Even without this boilerplate, most labor professionals would concede that the employer has the right to implement reasonable rules to govern the work place. But the ordinary understanding—recognized expressly in the management

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said "we barely understand." *Id.* at 935. The union's argument is not explained in the opinion.

118. *Id.*
119. *Id.* at 935.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* at 936.
124. *Id.* at 937.
125. *Id.*

rights clause itself—is that such general grants of authority do not override specific provisions.

The court, however, found a loophole in the specific provision at issue here. The general laws are to apply only in those instances in which the parties had not otherwise bargained language.[126] Of course, they bargained no language about either drug testing or physical examinations, both common subjects addressed in labor negotiations. All they did was agree to boilerplate that allowed the company to promulgate rules. One must question why this imprecise proclamation of a generally recognized authority should outweigh a specific restriction on the treatment of journeymen employees.

In its zeal to protect employer prerogatives, the court got it backwards. The question was not whether the restriction on examinations should apply. Rather, as the NLRB found, the issue was whether a general management rights clause repudiated a protection that the parties did not need to put in the agreement, because it was already in the general laws they had incorporated by reference.

No doubt the court was influenced by the same consideration that motivated member Oviatt to dissent from his colleagues' NLRB opinion.[127] The employer's policy is in line with the national policy against unlawful drug use. However, employers have no power to implement such policies in ways that violate employee rights bargained under the protection of federal law. Moreover, there is nothing in the court's opinion that limits it to matters of important national interests. To the contrary, Posner said the employer had carte blanche to implement reasonable rules, presumably no matter what the general laws provide. The rules, of course, could not violate a *specific* provision of the agreement, but following this opinion, the general laws do not constitute such provisions. They yield to the management rights clause.

The decision pays little heed to the bargaining history between the parties. One must ask, however, whether the parties deferred to the general laws when they negotiated their contract. That is, if the general laws dealt with a specific problem—physical examinations, for example—the parties may have elected to omit any such reference in the agreement itself. They had already agreed to be bound by the general laws unless the contract said otherwise. The court's opinion, however, virtually nullifies any subject in the general laws that might conceivably become a rule regulating the work place or employer conduct, a broad spectrum indeed. In that event, the management rights clause did more than give

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126. *Id.* at 935.

127. Chicago Tribune Co., 304 N.L.R.B. No. 62, 138 L.R.R.M. (BNA) 1065 (Aug. 27, 1991).

the employer the right to make rules. It erased those protections the parties had negotiated but codified only in the general laws.

C. Age Discrimination Cases

Other civil rights statutes intended to protect certain classes have sometimes been interpreted to prohibit so-called reverse discrimination. Title VII of the Civil Rights Act of 1964,[128] for example, has been held applicable to suits filed by whites or by men.[129] The plaintiffs in *Hamilton v. Caterpillar, Inc.*,[130] tried unsuccessfully to raise what the court characterized as a reverse discrimination claim under the Age Discrimination in Employment Act (ADEA).[131] The ADEA protects employees who are at least forty years old from discrimination.[132] Each of the plaintiffs in *Caterpillar* was part of the protected class.[133] They complained that an early retirement program created to temper the effects of plant closings unlawfully excluded them, because it applied only to employees who were at least fifty years old.[134]

The court tipped its hand early in the opinion when it characterized the claim as "more than a little bizarre."[135] In fact, however, the plaintiffs could rely not only on the interpretation of other statutes but also on a regulation promulgated by the Equal Employment Opportunity Commission (EEOC): "It is unlawful in situations where this Act applies, for an employer to discriminate . . . by giving preference because of age between individuals 40 and over."[136] The employer had done exactly that. The plaintiffs alleged that they had the requisite service to qualify for early retirement, but had been denied only because of their age.[137]

The court noted that there was also some "arguable support" in the wording of the statute.[138] Thus, congress legislated against "arbitrary age discrimination"[139] and against a denial of employment opportunities

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128. Codified at 42 U.S.C. § 2000e-a to -17 (1988).

129. Johnson v. Transportation Agency, 107 S. Ct. 1442 (1987).

130. 966 F.2d 1226 (7th Cir. 1992).

131. *Id.* at 1226 (citing 29 U.S.C. § 621-34 (1988)).

132. The prohibition against age discrimination is found in 29 U.S.C. § 623 (1988). The age limitation is contained in 29 U.S.C. § 631 (1988).

133. *Hamilton*, 966 F.2d at 1227.

134. *Id.*

135. *Id.*

136. 29 C.F.R. 1625.2(a) (1991). The regulation goes on to provide the following example: "[I]f two people apply for the same position, and one is 42 and the other 52, the employer may not lawfully turn down either one on the basis of age, but must make such decision on the basis of some other factor." *Id.*

137. *Hamilton*, 966 F.2d at 1226.

138. *Id.* at 1228.

139. 29 U.S.C. § 621(b) (1988).

or benefits "because of . . . [an] individual's age."[140] The court, however, found such language merely to reflect a congressional concern that "discriminating against older people on the basis of their age is arbitrary."[141] Despite what it called the lack of "graceful" language in the statute, the court discerned no congressional intent to "open the floodgates to attacks on every retirement plan."[142] Congress intended to protect "older workers," not those who were denied employment opportunities "because they were too young."[143]

Although the court's decision may be justifiable, the issue is more difficult than the court's opinion indicates. No where in the brief opinion does the court confront directly the fact that the plaintiffs were part of the class the ADEA was intended to protect. To that extent, the analogy the court drew to other civil rights legislation was inapt. Thus, the court said that if Title VII expressly limited potential plaintiffs to women and minorities, a court could not read it to authorize actions by men or by whites. That is, no reverse discrimination actions would be possible. The ADEA, the court noted, limited its protection to those age forty or older.[144] From this the court concluded that there was no congressional intent to provide protection for younger workers:

> There is nothing to suggest that Congress believed age to be the equal of youth in the sense that the races and sexes are deemed equal . . . . If the Act were really meant to prevent reverse age discrimination, limiting the protected classes to those 40 and above would make little sense.[145]

The difficulty with this analysis is the court's characterization of the plaintiffs' claim as one of reverse discrimination.[146] Typically that label has been applied to cases in which a majority member of a class is disadvantaged by efforts to protect or promote minority members. In such cases, the term "reverse discrimination" recognizes that even though the plaintiff is not a member of the class the legislation was intended to benefit, he or she may nonetheless suffer when decisions are made on the basis of some prohibited factor. This was not true in *Caterpillar*. Judge Cudahy wrote the opinion as if the plaintiffs were outside the protection of the Act; as though a group of thirty-something

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140. *Id.* § 623 (1988).
141. *Hamilton*, 966 F.2d at 1228.
142. *Id.*
143. *Id.*
144. *Id.* at 1226.
145. *Id.* at 1227.
146. *Id.*

yuppies was whining about exclusion from the retirement plan. *That* would have been a claim of reverse discrimination.

The court's conclusion that the ADEA evidences no intent to protect young workers may be correct, but it has no application whatever to the case the court decided. The plaintiffs, in fact, were members of the protected class and their allegation was that they were excluded from benefits solely on the basis of their age, an assertion that would seem to have considerable merit. The issue, then, is not whether the ADEA allows reverse discrimination actions. Rather, the issue is whether the ADEA allows employers to make distinctions between members of the protected class when it allocates scarce resources on the basis of age.

Perhaps the employer's retirement plan was protected by the Act's bona fide employee benefit provision.[147] Perhaps some provision of the ADEA allows such distinctions. Although what happened to plaintiffs seems unfair, it is not easy to distinguish their action from one attacking *any* retirement plan, which typically impose minimum age limits on retirement. Whatever the justification, little can be said in defense of the court's opinion. It should have confronted the issue before it rather than pretending that the plaintiffs were somehow excluded from the rights Congress expressly gave them.

Another questionable age discrimination case is *Finnegan v. Trans World Airlines,*[148] in which the court found the disparate impact theory inapplicable to a benefit reduction that fell most heavily on older workers. In response to heavy losses, TWA cut benefits of nonunion workers by reducing wages fourteen percent and by capping vacations at four weeks.[149] Before this change workers with at least sixteen years service were apparently entitled to more than four weeks, up to a high of seven weeks after thirty years service. Most employees with more than sixteen years employment, and all of those who had worked for TWA more than thirty years, were within the class of workers protected by the ADEA.[150] Although the opinion does not fully recite the effects of the reduction, apparently no employee with fewer than sixteen years of service had her vacation reduced. Thus, employees with two or three weeks vacation were not affected by the change.

Although the plaintiffs, all employees age forty or older, tendered a claim of disparate treatment,[151] their primary contention was grounded

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147. 29 U.S.C. § 623(f) (1988).

148. 967 F.2d 1161 (7th Cir. 1992).

149. *Id.* at 1161.

150. *Id.*

151. The employer had an early retirement plan available to older workers and plaintiffs urged that the vacation reduction was intended to goad employees into accepting

in disparate impact theory, defined adeptly by Judge Posner as follows: "[I]f an employment practice bears disproportionately against the members of a protected group, the employer ought to be required to justify it."[152] Obviously, the reduction in vacation benefits fell most heavily—perhaps almost exclusively—on older workers, because they were the ones most likely to have long service. The district court granted summary judgment, holding that any disparate impact was justified by section 4(f)(2) of the ADEA,[153] which shields the impact of bona fide seniority systems or bona fide employee benefit plans.

In dicta, the court opined that section 4(f)(2) was inapplicable.[154] It questioned whether the seniority provision had any application to the action at issue, and it noted that even TWA did not argue that the reductions were protected as part of a benefit plan.[155] These observations were dicta, however, because the court said that disparate impact theory did not apply to the case at all.[156] Indeed, the court even questioned whether disparate impact theory applied under the ADEA, though it recognized that the "weight of authority" was to the contrary.[157] Even if it applies, however, the court said the case "makes no sense in disparate impact terms."[158]

Disparate impact theory, the court said, was intended to force employers to justify a facially neutral employment practice that adversely affected a protected group.[159] Such theories could not be applied to benefit reductions, where virtually any reduction would affect older employees more severely than their younger counterparts.[160] Across the board wage decreases, for example, would likely affect older workers more because their wages are probably higher; reductions in dental insurance would similarly fall on older employees because their teeth are probably worse.[161] Nor could a benefit like vacation be reduced

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that option. Judge Posner said this theory was "implausibly Machiavellian." *Id.* at 1165. Without the benefit of any evidence (the trial court had granted summary judgment) about the value employees placed on extended vacation opportunities, the court said the employer's action was "not likely" to influence employees to retire. *Id.* Judge Posner's opinion also questions whether the plaintiffs had sufficient evidence to prove illicit motive, a matter that might also have been illuminated by a trial. *Id.*

152. *Id.* at 1163.
153. 29 U.S.C. § 623(f)(2) (1988).
154. *Finnegan*, 967 F.2d at 1163.
155. *Id.* at 1162.
156. *Id.* at 1163.
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.* at 1164.

proportionately. A three-sevenths reduction in the two week vacation of a younger employee would leave her with only six days, which would make it difficult for the employer to retain its workforce.[162] (The court did not explain how it arrived at this factual finding in the absence of any evidence.) Four weeks vacation, on the other hand, was "generous" and apparently unlikely to discourage senior employees.[163] There was simply no way to "maintain a rational system of paid vacations" without cutting senior employees more than junior ones.[164]

Disparate impact, the court explained, was intended to remove discriminatory policies that had developed from "inertia or insensitivity."[165] The theory also helped to ferret out practices that had been adopted originally in support of intentional discrimination.[166] These situations, however, were a "far cry" from that faced by the court.[167] Though TWA's benefit reduction fell more heavily on older workers, it was not the result of insensitivity or a remnant of previous discrimination.[168] Rather, it was simply not possible to cut vacation benefits without forcing older workers to bear the brunt of the reduction.[169] Any other result would force the company to "balance its books on the backs of the younger workers."[170]

One might question the court's gloomy assessment of the effect of a proportional reduction on younger employees. One might even suggest that if the employer is put to a choice between hurting the young or the old, Congress has mandated that the old should be protected. In any event, the court should at least have been honest in its assessment of the issue. The arguments supporting the employer's position sound more like a business justification for adverse impact than an argument that the theory simply doesn't apply. The court may have thought so too.

Judge Posner acknowledged that the court could have found an adverse impact with compelling business justification but that "would mean that every time an employer made an across the board cut in wages he was prima facie violating the age discrimination law."[171] That is, if disparate impact theory applied to benefit reductions, employers

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162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.* at 1165.
171. *Id.*

might be forced to prove they were justified. The court, at least, was forthright about this unabashed deference to employer prerogatives.

Although only a preliminary opinion, *Fisher v. Transco Services-Milwaukee*[172] might serve as a warning to employers who plan to implement standardized productivity measurements that adversely affect older workers. The case arose after Transco instituted a computerized "Measured Day Work Program," which measured the performance of certain employees. The program evaluated the time it took for these employees to complete certain work tasks and compared it to computer generated standards. Those who fell within the bottom twenty percent of the measured group (which included fifty-two employees) were subject to a progressive discipline scheme that culminated in discharge. The two plaintiffs, both in their forties, were among eleven employees fired during the forty-eight week duration of the program. Ten of the eleven terminated workers were age forty or older.

Plaintiffs claimed discrimination under both disparate treatment and disparate impact theories, but the trial court granted summary judgment for the defendant.[173] The court of appeals first considered the case under disparate treatment, holding that plaintiffs had created a genuine issue of material fact about whether the program was a pretext for age discrimination.[174] Of more interest is the disparate impact theory, which the court noted was "the least developed aspect of the case."[175]

Although the program was facially neutral, plaintiffs claimed that it affected older workers more harshly than others, pointing to the fact that ten of the eleven employees fired under the program were over forty. While it recognized the difficulty of generalizing from such small statistical samples, the court observed that when ten of twenty-seven older workers were terminated, as compared to only one of twenty-five younger workers, "it does not require expertise in differential equations to observe that an adverse ratio of ten to one is disproportionate."[176] This discrepancy created a material issue of fact that will have to be "fully developed at trial."[177] Similarly, the court said there was a material issue about whether the program, whose administration had been replete with errors and which had been abandoned after forty-eight weeks, was a business necessity sufficient to overcome the adverse impact.[178]

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172. 979 F.2d 1239 (7th Cir. 1992).
173. *Id.* at 1239.
174. *Id.* at 1244.
175. *Id.*
176. *Id.* at 1245.
177. *Id.*
178. *Id.*

Whether or not plaintiffs marshall sufficient evidence to prevail at their new trial, this decision signals the court's willingness to evaluate the effect of productivity devices, and perhaps new technology and new work patterns, on older workers. The plaintiffs in *Transco* were only forty-two and forty-five at the time of their discharge. Suppose, however, they had been sixty-five or older. Can an employer standardize productivity requirements based on the abilities of younger workers or must it accommodate those who cannot keep pace due to age? Similar issues arise under some cooperative ventures where employees are expected to perform a range of duties which had previously been allocated to separate classifications. If an older worker can perform some, but not all of these functions, can she be terminated?

Transco does not answer these questions. It counsels caution, however, for employers who would standardize requirements without regard to how the abilities of their employees are affected by such factors as age and disability.

D. Title VII

American Federation of State, County, and Municipal Employees v. Ward[179] grew out of the Illinois Department of Employment Security's decision to lay off employees by concentrating the impact in offices heavily populated by blacks. An internal adverse impact analysis demonstrated that, by focusing the layoffs on Chicago area offices, 8.6% of the department's black workers were laid off, compared to only 3% of its white employees.[180] This was sufficient to trigger the EEOC's so-called four-fifths standard, which questions selection procedures that produce discrepancies between blacks and whites of greater than one-fifth.[181] The department reacted by calculating the effect of the layoff on the rate of retention by race, instead of the rate of layoff. As the court observed, this "number juggling" had no real effect on the layoff, but it did avoid the four-fifths rule.[182]

The employees' union and a separate class of black employees sued, claiming intentional discrimination under Title VII,[183] under § 1981,[184]

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179. 978 F.2d 373 (7th Cir. 1992).

180. *Id.* at 375.

181. 29 C.F.R. § 1607 (1991).

182. *Ward*, 978 F.2d at 375. Under a layoff analysis, 3% of white employees were laid off, as compared to 8.6% of black employees, meaning that the number of white employees accounted for only 35% of the layoff. Under a retention analysis, black employees were retained at 94% of the rate of white employees. *Id.*

183. 42 U.S.C. § 2000e to 2000e-17 (1988).

184. *Id.* § 1981.

and under § 1983.[185] The plaintiffs' Title VII claim also asserted that the layoff procedure had an adverse impact on black employees. The district court dismissed the claim of intentional discrimination, holding the plaintiffs had failed to allege "well pleaded facts that would give rise to an inference" of intentional discrimination.[186] The case then proceeded on the disparate impact theory with the trial court ultimately granting summary judgment for defendants.[187] The court found that plaintiffs had failed to identify a "specific employment practice" that produced an adverse impact.[188] Such a practice, the trial court said, must be a "repeated, customary method of operation," a definition the protested layoff could not satisfy.[189]

The Seventh Circuit reversed the trial court on both issues. It did not dawdle over the disparate treatment theory, observing simply that the Federal Rules of Civil Procedure require only a "short and plain statement" of the claim.[190] An identification of the protested layoffs and an allegation that the defendants had acted "knowingly, intentionally, and maliciously" was sufficient.[191] The court then turned to the disparate impact theory where, it noted, there is "precious little case law on the meaning of employment practice."[192]

Title VII outlaws any "employment practice" that discriminates on the basis of race.[193] Since the Supreme Court's opinion in *Griggs v. Duke Power*,[194] plaintiffs have been able to claim discrimination regardless of an employer's intent by alleging that an employment practice adversely affects a member of a protected class. The court observed that the "enumerated acts" of Title VII ("to hire . . . to discharge . . . or otherwise to discriminate against"[195] or "to limit, segregate or classify"[196]) were employment practices, as that term was used in the statute, and most of them could be referred to as "single decisions of an employer."[197] Each of those single decisions would support a claim of intentional

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185. *Id.* § 1983.

186. *Ward*, 978 F.2d at 376.

187. *Id.*

188. American Fed'n. of State, County, and Mun. Employees v. Ward, 771 F. Supp. 247, 251 (N.D. Ill. 1991).

189. *Id.*

190. *Ward*, 978 F.2d at 376-77 (quoting FED. R. CIV. P. 8(a)(2)).

191. *Id.* at 377.

192. *Id.*

193. 42 U.S.C. § 2000e-2(a) (1988).

194. 401 U.S. 424 (1971).

195. 42 U.S.C. § 2000e-2(a)(1) (1988).

196. *Id.* § 2000e-2(a)(2).

197. American Fed'n of State, County, & Mun. Employees v. Ward, 978 F.2d 373, 377 (7th Cir. 1992).

discrimination and "it is difficult to see why the result should be any different when the decision is challenged on the grounds of adverse impact."[198]

The court said the trial court had apparently confused adverse impact theory with the "pattern or practice" cases that allow civil enforcement suits by the attorney general.[199] Such cases, which require proof that an employer "regularly and purposefully discriminates against a protected group," demonstrate a method of proving intentional discrimination.[200] Once the government makes a prima facie case, the burden shifts to the employer to show that it did not discriminate against a particular employee.[201] This, the court said, was to be distinguished from proof of an unlawful employment practice by adverse impact theory.[202]

The court turned to what was undoubtedly the defendant's principal concern. Previous adverse impact cases had largely been like *Griggs*, in which an employer's work policies (e.g., the requirement that all employees have a high school diploma) have the effect of excluding more black employees than white employees. Such practices, which apply neutrally to all employees regardless of race, might nonetheless produce a discriminatory impact. The single layoff decision in *Ward*, however, was not necessarily reflective of an employment policy. It was an isolated decision that just happened to hurt blacks more than whites. The defendant's obvious fear, no doubt shared generally by employers, is the extension of disparate impact to single employment decisions.

The discharge of a single employee who happens to be black, for example, might produce an adverse impact. Similarly, an employer's decision to eliminate a product line or close a plant might affect more black workers than white workers. Such single decisions, however, would ordinarily not be the result of an employment practice applied neutrally to all employees. In the ordinary case, then, the decision could be attacked only if the plaintiff could prove some intent to discriminate.

Presumably, the court's decision does not subject each isolated decision to disparate impact analysis. Plaintiffs face significant difficulties in establishing a prima facie case of adverse impact. Some groups may be too small to yield valid statistical comparisons. Even if they do, courts must take account of "common non-discriminatory reasons for apparent disparities."[203] Nevertheless, "to the extent that members of a protected class can show significant disparities stemming from a single

198. *Id.*
199. *Id.* at 378.
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*

decision . . . there is no reason why that decision should not be actionable."[204] Given the difficulties of proving intentional discrimination, one might expect that plaintiffs will seize on *Ward* as an expansion of disparate impact theory, thereby testing the trial court's prediction that "every single act" of an employer will be reviewed for its adverse effect on protected classes.

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204. *Id.*