# Developments in Employment Discrimination Law

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This Article will survey significant developments in employment discrimination law, with the main focus on decisions arising under Title VII[1] and the Age Discrimination in Employment Act ("ADEA").[2] Both the United States Supreme Court and the United States Court of Appeals for the Seventh Circuit rendered several noteworthy employment discrimination decisions within the Survey period.

## I. Supreme Court Survey

### *A. The ADEA and Bona Fide Occupational Qualification*

The United States Supreme Court decided on the same day in June, 1985, two age discrimination cases involving mandatory retirement ages. The ADEA prohibits discrimination on the basis of age against employees who are at least forty years of age but less than seventy years of age, except where age is shown to be "a bona fide occupational qualification ["BFOQ"] reasonably necessary to the operation of the particular business."[3] In both cases, the defendants asserted BFOQ defenses.

In *Johnson v. Mayor and City Council of Baltimore,*[4] six Baltimore firefighters brought an ADEA action in the Maryland District Court challenging city code provisions mandating retirement age lower than seventy. The district court rejected Baltimore's contention that the lower age was a BFOQ, ruling that the city had not met its burden of showing the existence of a BFOQ.[5]

The United States Court of Appeals for the Fourth Circuit reversed,[6] however, determining that because a *federal* civil service statute requires federal firefighters to retire at age fifty-five, the same age is a BFOQ for state and local firefighters as a matter of law. The Fourth Circuit relied on language in *EEOC v. Wyoming*[7] in which the Supreme Court

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[1]42 U.S.C. §§ 2000e-2000e-17 (1982).

[2]29 U.S.C. §§ 621-634 (1982).

[3]*Id.* § 623(f)(1).

[4]105 S. Ct. 2717 (1985).

[5]Johnson v. Mayor and City Council of Baltimore, 515 F. Supp. 1287 (D. Md. 1981).

[6]Johnson v. Mayor and City Council of Baltimore, 731 F.2d 209 (1984).

[7]460 U.S. 226 (1983).

observed that the ADEA tests a state's discretion to impose a mandatory retirement age "against a reasonable federal standard."[8] The court of appeals went on to conclude that this federal civil service statute was the "reasonable federal standard" by which to test the asserted BFOQ because Congress has selected fifty-five as the retirement age for most federal firefighters.[9]

A unanimous Supreme Court reversed the Fourth Circuit,[10] explaining that the appeals court had misinterpreted the language from *EEOC v. Wyoming*. That language, the Court maintained, does not mean that what is permissible under the ADEA can be determined simply by reference to a federal statute establishing a retirement age for a class of federal employees.[11] The "reasonable federal standard" referred to in the *Wyoming* case is the "standard supplied by ADEA itself—that is, whether the age limit is a BFOQ."[12] The federal rule applicable by its terms only to federal employees does not necessarily authorize a state or local government to adopt the same rule and have it held to be a BFOQ *as a matter of law.*[13]

The Court found it improper to conclude that Congress intended the federal provision to be dispositive in other realms because it may have imposed the age limit for other (non-BFOQ) reasons.[14] The Court did go on to say, however, that the particular evidence Congress had considered and the conclusion it reached might be *admissible* in making the BFOQ determination as it related to city employees.[15]

In the second age discrimination case, *Western Air Lines, Inc. v. Criswell,*[16] the defendant airline challenged the BFOQ instructions given to a jury that rendered a verdict for the plaintiffs.[17] The action had been brought by two pilots denied reassignment as flight engineers upon reaching age sixty and a flight engineer forced to retire at sixty pursuant to Western's mandatory retirement policy for flight engineers.[18]

At trial, Western defended its policy by arguing that age sixty is a BFOQ for flight engineers.[19] The district court's instructions to the jury

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[8]*Id.* at 240.

[9]731 F.2d at 213.

[10]105 S. Ct. at 2721.

[11]*Id.* at 2722.

[12]*Id.*

[13]*Id.*

[14]*Id.* at 2723-26.

[15]*Id.* at 2726-27.

[16]105 S. Ct. 2743 (1985).

[17]Western Air Lines, Inc. v. Criswell, 514 F. Supp. 384 (C.D. Cal. 1981).

[18]105 S. Ct. at 2747. The Federal Aviation Administration has established by regulation a mandatory retirement age of sixty for pilots and copilots, but sets no mandatory retirement age for flight engineers. 14 C.F.R. § 121.383(c) (1985); 49 Fed. Reg. 14,695 (1984).

[19]*Id.* (citing 514 F. Supp. 384).

followed the analysis elucidated by the United States Court of Appeals for the Fifth Circuit in *Usery v. Tamiami Trail Tours, Inc.*[20] In *Tamiami*, the Fifth Circuit maintained that the BFOQ inquiry, where public safety is a factor, is accomplished by asking, first, if the employer's restrictive job qualifications are "reasonably necessary" to further the overriding interest in public safety.[21] Once that initial inquiry has been answered in the affirmative, the employer is required to show that age qualifications are reasonably *necessary* to the particular business, and not merely convenient or reasonable.[22] To make that showing, the employer must show that it was compelled to rely on age as a proxy in determining a person's qualification for a job. This latter burden may be satisfied by establishing that there was a reasonable cause for believing that all or substantially all persons over the age qualification would be unable to perform the duties of the job safely and efficiently. The employer could alternatively establish age as a legitimate proxy by proving that it would be "impossible or highly impractical" to deal with the older employees on an individual basis.[23]

Western contended that the *Tamiami* standard did not give sufficient deference to the airline's concern for passenger safety. It asserted as error the district court's rejection of its tendered instruction that would have allowed the BFOQ defense if there was a "rational basis in fact" for the defendant to believe that having flight engineers over age sixty would increase the risk to passengers.[24] Western's argument was rejected by the Ninth Circuit.[25]

Before the Supreme Court, Western conceded that the *Tamiami* standard identifies the relevant general inquiries for applying a BFOQ test, but it urged the Court to modify the standard to accord greater weight to the public safety concern.[26] In arguing that the Court should adopt a more lenient standard for an employer asserting the BFOQ defense when public safety is involved, Western maintained that because the conflicting testimony of experts (here, medical experts) can never be resolved to a certainty and because public safety is at issue, a jury should be instructed to defer to the defendant's judgment in establishing job qualifications if they "are reasonable in light of the safety risks."[27] The Court rejected this "rational basis in fact" test, observing that Congress clearly intended to impose a "reasonably necessary"

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[20]531 F.2d 224 (5th Cir. 1976).
[21]*Id.* at 233.
[22]*Id.* at 235.
[23]105 S. Ct. at 2752.
[24]*Id.* at 2755.
[25]Western Air Lines, Inc. v. Criswell, 709 F.2d 544 (1983).
[26]105 S. Ct. at 2753.
[27]*Id.* at 2755-56.

standard.[28] Furthermore, the Court noted that a jury, in a close case, could be expected to err on the side of caution.[29] The Court adopted the *Tamiami* standard as "properly [identifying] the relevant considerations for resolving a BFOQ defense to an age-based qualification purportedly justified by considerations of safety."[30]

### *B. Affirmative Action*

In June of 1984, the Supreme Court rendered a decision that is important to parties attempting to structure settlements in class action systemic discrimination cases. In *Firefighters Local Union No. 1784 v. Stotts,*[31] the Court clarified the relationship between seniority systems and enforcement of consent decrees entered in employment discrimination lawsuits between cities and plaintiffs charging racial discrimination.

The *Stotts* case had its genesis in 1977 when Stotts, a black Memphis, Tennessee firefighter, filed a Title VII class action race discrimination suit against the city of Memphis. Stotts alleged that the Memphis Fire Department and the city were engaging in a pattern or practice of making hiring and promotion decisions on the basis of race.[32] In 1980, the district court approved and entered a consent decree based upon a settlement agreed to by the city and the plaintiffs. As the Court noted, "the stated purpose of the decree was to remedy the hiring and promotion practices 'of the Department with respect to blacks.' "[33]

Under the terms of the consent decree, the city, while not admitting any Title VII liability, agreed to promote thirteen individually named plaintiffs, to provide back pay to eighty-one fire department employees, and to adopt the long-term goal of increasing the proportion of minority employees in each job classification within the fire department to approximate the proportion of blacks in the labor force in that county.[34] No provision was made for dealing with layoffs or reductions in rank or for competitive seniority.[35] In approving the decree, the district court retained jurisdiction over the matter "for such further orders as may be necessary or appropriate to effectuate the purpose of this decree."[36]

In 1981, the city of Memphis announced that budget deficits required layoffs of city employees that would be based on the "last hired, first fired" rule of seniority, pursuant to the seniority system contained in

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[28] *Id.* at 2756.
[29] *Id.* at 2754.
[30] *Id.* at 2753.
[31] 104 S. Ct. 2576 (1984).
[32] *Id.* at 2581.
[33] *Id.* (citing Stotts v. Memphis Fire Dept., 679 F.2d 541 (6th Cir. 1982)).
[34] *Id.* at 2581.
[35] *Id.*
[36] *Id.* (citing 679 F.2d at 578).

the city's collective bargaining agreement with Firefighters Local Union No. 1784. At the request of Stotts and others, the district court entered a temporary restraining order forbidding the layoff of any black city employee.[37] The union, which had not been a party to the consent decree, intervened. After a hearing, the court issued a preliminary injunction prohibiting the city from applying its seniority policy insofar as it would decrease the percentage of blacks at various levels of employment.[38] The modified layoff plan implemented by the city in compliance with the court's order resulted in some non-minority employees with more seniority than minority employees being laid off or demoted.[39]

The Sixth Circuit Court of Appeals affirmed the district court's action primarily on contract principles and the policy favoring settlements.[40] Although it disagreed with the district court's conclusion that the city's seniority system was not bona fide within the meaning of section 703(h) of Title VII,[41] the circuit court nevertheless held that the injunction had done no more than enforce the terms of the previously agreed-upon consent decree.[42] The circuit court also reasoned that because the decree permitted the district court to enter any later orders that "may be necessary or appropriate to effectuate the pruposes of [the] decree," the city had agreed in advance to an injunction that would prohibit layoffs reducing the proportion of black employees.[43]

On appeal, the Supreme Court reversed the Sixth Circuit.[44] The Court first rejected the argument that the case was moot, holding that the injunction continued to force the city of Memphis to disregard its seniority agreement in making future layoffs.[45]

On the merits, the Court first rejected the Sixth Circuit's conclusion that the district court had merely enforced the express terms of the consent decree. Citing *United States v. Armour & Co.*,[46] the Court found, as had both lower courts, that the "four corners" of the decree did not provide for layoffs or demotions. The Court concluded that, absent some indication

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[37]*Id.* at 2582.

[38]*Id.*

[39]*Id.*

[40]Stotts v. Memphis Fire Dept., 679 F.2d 541, 561-62 (1982).

[41]Section 703(h) provides that:

> it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to a *bona fide seniority or merit system* . . . provided that such differences are not the result of an *intention to discriminate* because of race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(h) (1982) (emphasis added).

[42]679 F.2d at 561-62.

[43]*Id.* at 562-63.

[44]104 S. Ct. at 2581.

[45]*Id.* at 2583-85.

[46]402 U.S. 673, 681-82 (1971).

that the parties intended to depart from the seniority system agreed to by the city and the union, it was improper to find that they had agreed in advance to the entry of an injunction disregarding that system.[47]

The Court then addressed the argument that the district court's injunction was proper because it carried out the purposes of the consent decree. Emphasizing that the decree's purpose was to "remedy past hiring and promotion practices," the Court noted that, in implementing that remedy, the parties had not provided for the displacement of non-minority employees with greater seniority by blacks.[48] Finally, the Court noted that neither the union nor the non-minority employees had been parties to the action when the consent decree was entered and found it "highly unlikely" that the city would have purported to bargain away seniority rights in contravention of the agreement between the city and the union.[49] Thus, the city had no intention of departing from its seniority system when it agreed to the consent decree.[50]

Having found no basis in the consent decree itself for the injunction, the Court then considered whether the district court had the inherent authority to modify the consent decree to prevent layoffs that might undermine the affirmative action outlined in the decree. The Sixth Circuit had held that the court's inherent authority did extend that far, even though the modification conflicted with the city's bona fide seniority system.[51] The Supreme Court held that section 703(h) of Title VII requires that the city's seniority system be upheld absent evidence of an intent to discriminate.[52] Both lower courts had found that there had been no intent to discriminate either in the seniority system as originally agreed to with the union nor in the layoff plan, which had merely followed the seniority system. Nor had the city admitted in agreeing to the consent decree that it had engaged in intentional discrimination. Therefore, the city had been justified in following its established seniority system.[53]

The Sixth Circuit had reasoned that the district court had the power to override the seniority provisions to effectuate the consent decree because it would have had that power if the case had actually been tried and the plaintiffs had proved a pattern and practice of discrimination.[54] The Supreme Court took issue with the Sixth Circuit's reasoning. In a strongly-worded passage reinforcing its decision in *Teamsters v. United States,*[55] the Court concluded that the district court could not

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[47]104 S. Ct. at 2586.
[48]*Id.*
[49]*Id.*
[50]*Id.*
[51]679 F.2d at 560-61.
[52]104 S. Ct. at 2587.
[53]*Id.* at 2586.
[54]679 F.2d at 566.
[55]431 U.S. 324 (1977).

properly have awarded competitive seniority, given the facts before the Court, even after a trial at which a pattern and practice of discrimination had been established.[56] The Court in *Teamsters* held that competitive seniority is an appropriate remedy only to individual class members who have demonstrated that they were actual victims of discrimination. Even with such a showing, a court must balance the equities to determine whether a non-minority employee with greater seniority should be laid off to make room for the discriminatee.[57] In this case, the Court found that there had been no showing that any of the blacks protected by the district court's injunction had been the actual victims of discrimination, nor had the parties identified any specific persons entitled to relief. Thus, the Court held, the court of appeals had awarded a greater remedy as an adjunct to settlement than the plaintiffs could have recovered if they had shown a pattern and practice of discrimination at trial.[58]

Having held that the district court's injunction had been neither an enforcement of the terms of the consent decree nor a legitimate modification of the decree, the Court reversed the judgment of the court of appeals.[59] The Court specifically reserved the question whether the relief ordered by the district court would have been lawful as a voluntary remedy by the city in a consent decree or an affirmative action program.[60]

The *Stotts* case has been more notable for its aftermath than for its holding. The Court's holding is that a district court cannot contravene a bona fide seniority system in enforcing a pattern and practice consent decree if the consent decree does not provide competitive seniority for minorities or address demotion or layoff of non-minority employees, particularly if the non-minority employees and their collective bargaining agent were not parties to the consent decree.

Shortly after *Stotts* was decided, however, the United States Department of Justice ("DOJ") sent letters to fifty local government jurisdictions subject to affirmative action provisions in judicial decrees. The letters requested the governments voluntarily to modify the consent decrees to eliminate racial hiring and promotion quotas in light of DOJ's interpretation of *Stotts*.[61] DOJ's overly broad reading of *Stotts* to prevent all voluntary preferential hiring provisions has met with little success. For example, in *United States v. Albrecht,*[62] the court held that *Stotts* does not require the replacement of a consent decree with one deleting hiring goals.[63]

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[56]104 S. Ct. at 2587-88.

[57]431 U.S. at 371-76.

[58]104 S. Ct. at 2588.

[59]*Id.* at 2590.

[60]*Id.*

[61]*See* NAACP Legal Defense Fund v. United States Department of Justice, 612 F. Supp. 1143 (D.D.C. 1985).

[62]38 Empl. Prac. Dec. (CCH) ¶ 35,512 (N.D. Ill 1985); *accord* United States v. City of Buffalo, 38 Empl. Prac. Dec. (CCH) ¶ 35,545 (W.D.N.Y. 1985).

[63]38 Emp. Prac. Dec. (CCH) ¶ 35,512 at 39,220-21.

The Seventh Circuit Court of Appeals recently distinguished *Stotts* in a suit challenging a collective bargaining agreement that prohibited layoffs of minority teachers.[64] In that case, there had been findings of discrimination in both judicial and administrative proceedings. The contract did not require that white teachers be laid off or that their advancement be blocked by the layoff prohibition. The court distinguished *Stotts* by noting that, unlike *Stotts*, neither court-ordered affirmative action nor the override of a good faith seniority system was involved.[65]

### *C. A State's Accommodation of Religious Worship*

In *Thornton v. Caldor, Inc.*,[66] the Supreme Court struck down a Connecticut statute providing employees the absolute right not to work on their chosen Sabbath. The plaintiff's decedent, a Presbyterian who observed a Sunday Sabbath, was the manager of a department store and was required to work every third or fourth Sunday. He initially complied with the obligation, but later refused and invoked the protection of the statute. The employer offered to transfer him to a store in another state that was closed on Sunday or to give him a non-supervisory position at lower pay. The plaintiff rejected these offers and the employer subsequently transferred him to a clerical position. The employee then resigned and filed a grievance with the Connecticut Board of Mediation and Arbitration.[67] The Board and reviewing court rejected the defendant's argument that the Connecticut statute violated the Establishment Clause of the first amendment.[68] The Connecticut Supreme Court, however, invalidated the statute, finding that it did not have a "clear secular purpose."[69]

The United States Supreme Court, with little hesitation or discussion, affirmed the state supreme court.[70] Applying the test enunciated in *Lemon v. Kurtzman*,[71] the Court ruled that the statute's "unyielding weighting in favor of Sabbath observers over all other interests" contravened a

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[64]Britton v. South Bend Community School Corp., 38 Emp. Prac. Dec. (CCH) ¶ 35,679 (7th Cir. 1985).

[65]*Id.* at 40,046-47. A number of jurisdictions have similarly distinguished *Stotts*. *See* Deveraux v. Geary, 765 F.2d 268, 273 (1st Cir. 1985); EEOC v. Local 638, 753 F.2d 1172, 1186 (2d Cir. 1985); Vanguards of Cleveland v. City of Cleveland, 753 F.2d 479, 485-89 (6th Cir. 1985); Diaz v. American Telephone & Telegraph Co., 752 F.2d 1356, 1360 n.5 (9th Cir. 1985); Turner v. Orr, 759 F.2d 817, 823-26 (11th Cir. 1985); Kromnick v. School District of Philadelphia, 739 F.2d 894, 911 (3d Cir. 1984).

[66]Estate of Thornton v. Caldor, Inc., 105 S. Ct. 2914 (1985).

[67]*Id.* at 2915-17.

[68]*Id.* at 2916-17.

[69]Caldor, Inc. v. Thornton, 191 Conn. 336, 349, 464 A.2d 785, 793 (1983).

[70]105 S. Ct. at 2917.

[71]403 U.S. 602, 619 (1971).

fundamental principle of the first amendment and that the statute went beyond having an incidental or remote effect of advancing religion.[72]

## II. Seventh Circuit Decisions

### *A. Sexual Harassment*

In *Horn v. Duke Homes,*[73] the Seventh Circuit addressed the extent of an employer's liability under Title VII for sexual harassment by a supervisory employee. Horn, a former employee of Duke Homes, filed suit alleging that she was terminated as a result of her refusal to submit to the sexual advances of Frank Haas, Duke's plant superintendent.[74]

At the trial court, Horn testified that Haas' sexual advances began several months after she was hired by Duke Homes. The advances included leers, obscene gestures, lewd comments, remarks about her sexual needs, and promises that he would make it "easy" for her at Duke if she would "go out" with him. Following Horn's rejection of these advances, Haas orally reprimanded her for allegedly substandard work, then transferred her to another section. A week later, Haas called her into his office and terminated her. Horn's testimony was corroborated by a male witness who testified that he had overheard one of Haas' remarks to Horn and by three former female employees of Duke who described similar advances by Haas.[75]

Haas denied harassing Horn and testified he had terminated her for poor job performance related to her marital problems. There was testimony that Horn had complained to Haas' supervisor after her termination about Haas' advances. After an apparently perfunctory investigation, he had concluded Haas' authority to hire and fire should not be interfered with.[76]

The district court credited Horn and her witnesses and concluded that Haas had sexually harassed Horn.[77] Additionally, the court found that the complaints about Horn's work performance were pretextual, and that, therefore, no legitimate cause for Horn's termination had been shown.[78] He found that consent to Haas' sexual advances had been made a condition of Horn's employment in violation of her Title VII rights.[79]

On appeal, Duke did not challenge the district court's findings of fact. Rather, it argued that there is no cause of action under Title VII

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[72]105 S. Ct. at 2918.
[73]755 F.2d 599 (1985).
[74]*Id.* at 601.
[75]*Id.* at 601-02.
[76]*Id.* at 602.
[77]*Id.* at 602-03.
[78]*Id.*
[79]*Id.*

for sexual harassment. In the alternative, Duke contended that it should not be held liable for Haas' behavior "because the district judge found that the supervisory hierarchy above Haas neither knew nor approved of Haas' sexual misconduct."[80]

The Seventh Circuit gave short shrift to Duke's first contention. It held that "sexual consideration constitutes precisely the kind of 'artificial, arbitrary, and unnecessary barrier[] to employment' that Title VII was intended to prevent." The court reasoned that, because Haas would not have demanded sex as a condition of employment if Horn had not been a woman, Horn was disadvantaged on the basis of her sex.[81]

In response to Duke's second argument, the Seventh Circuit held actual or constructive knowledge by the employer to be unnecessary to a finding of employer liability for a supervisor's conduct.[82] The court adopted the strict liability standard articulated by the EEOC in its Guidelines on Sexual Harassment. The court noted that "every circuit that has reached the issue has adopted the EEOC's rule . . . ."[83]

The court advanced several reasons for its adoption of the strict liability rule. First, the court responded to Duke's rhetorical question, "How can a company be held responsible for such actions unless it is notified of them?" The court answered that the "company" is merely a legal fiction that can only act through its appointed agents. Here, the court observed, where the supervisor was given absolute authority to hire and fire, the supervisor was the company for all intents and purposes.[84]

Second, the court discussed application of the doctrine of respondeat superior in the context of these facts. It noted that the policy rationale in favor of respondeat superior liability rests primarily in risk allocation: "the employer, not the innocent plaintiff, should bear the cost of the torts of its employees as a required cost of doing business, insofar as such torts are reasonably foreseeable and the employer is a more efficient cost avoider than the injured plaintiff."[85] Duke had attempted to avoid respondeat superior liability by arguing Haas acted outside the scope of his employment. The court rejected that argument, noting that the complained-of harassment arose out of Haas' performance of his supervisory duties. Therefore, the court reasoned, so long as the tort was caused by the exercise of the supervisory power delegated to him, public policy justified limiting the scope of employment exception to respondeat superior liability.[86]

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[80] *Id.* at 603.

[81] *Id.* (citing Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

[82] *Id.* at 604.

[83] *Id.* The Court relied on the EEOC guideline set out at 29 C.F.R. § 1604.11(c) (1985).

[84] 755 F.2d at 604-05.

[85] *Id.* at 605.

[86] *Id.*

Returning from its sojourn into the common law of agency, the court determined that adoption of a strict liability rule was warranted given Congress' desire that employers bear under Title VII the cost of remedying and eradicating employment discrimination.[87] The court noted that sexual harassment is the only Title VII context in which employers have not routinely been held strictly liable for discriminatory behavior of their supervisors.[88]

A secondary issue in *Duke Homes* was the propriety of the district court's denial of back pay to the plaintiff.[89] The district judge had asserted that he had discretion to deny back pay and that he deemed the record inadequate for an award in this case.[90] The Seventh Circuit reversed on this issue, saying that it was Congress' intent that back pay be awarded absent special factors, those special factors being limited to circumstances " 'where state legislation is in conflict with Title VII.' " The court added that the employer's good faith and lack of specific intent to discriminate did not constitute a special factor justifying denial of back pay.[91]

*Horn v. Duke Homes* is significant not only for the questions it answers, but also for the issues it leaves open. The court clearly limited its holding to those cases in which an employee with substantial supervisory authority imposes sexual consideration as a condition of employment.[92] It specifically disclaimed that its holding applied to acts of sexual harassment by nonsupervisory co-employees.[93] In addition, it would appear that the court's holding is not meant to apply in "hostile environment" sexual harassment cases.[94] *Horn v. Duke Homes* is a *quid*

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[87]*Id.* at 605-06.

[88]*Id.* at 605 (citing Development, *New EEOC Guidelines on Discrimination Because of Sex: Employer Liability for Sexual Harassment Under Title VII,* 61 B.U.L. Rev. 535, 540 (1981); Note, *Sexual Harassment and Title VII: The Foundation for the Elimination of Sexual Cooperation as an Employment Condition,* 76 Mich. L. Rev. 1007, 1025 (1978)).

[89]755 F.2d at 606.

[90]*Id.* (citing Transcript of Proceedings at 320).

[91]*Id.* at 606-08 (citing cases).

[92]*Id.* at 603.

[93]*Id.* at 603 n.2. The EEOC approves the application of a "knew of should have known" standard in co-employee harassment situations. 29 C.F.R. § 1604.11(d) (1985). *Accord* Barrett v. Omaha National Bank, 726 F.2d 424 (8th Cir. 1984); Katz v. Dole, 709 F.2d 251 (4th Cir. 1983); Hinson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981).

[94]Many courts and commentators have adopted the terms "hostile environment" or "work environment" and "quid pro quo" to describe the different types of sexual harassment. The former refers to the third division in the EEOC's definition of sexual harassment: " 'an intimidating, hostile [and] offensive work environment.' " *Katz*, 709 F.2d at 255 (citing 29 C.F.R. § 1604.11(a)(3)). Usually no back pay is sought by the plaintiff, who is still at work. Frequently co-employees will be the offending parties. "Quid pro quo" refers to the kind of sexual harassment in which a plaintiff suffers some kind of tangible job detriment, such as demotion or discharge, as a result of rejection of sexual demands. *See, e.g.*, Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).

*pro quo* case: Horn rejected Haas' advances and as a result lost her job. The court apparently used the term "condition of employment" to refer to the adverse consequences that resulted from Horn's rejection of Haas' advances. Thus, the court rejected Duke's argument that the district court had found the advances created an intolerable atmosphere and were not the cause of her termination. It noted the district court's finding that "Haas demanded sex as a condition of employment."[95]

*Horn v. Duke Homes* therefore apparently does not require the application of the strict liability standard in hostile environment cases. Some courts presented with that issue have applied a "knew or should have known" standard.[96] The United States Supreme Court will have an opportunity to address the strict liability issue, particularly as it relates to employees with minimum supervisory power and hostile environment situations, in *PSFS Savings Bank v. Vinson.*[97]

### *B. Tolling of the Statute of Limitations*

Section 706(f)(1) of Title VII[98] requires a plaintiff to file his or her complaint within ninety days of receiving a right-to-sue notice form the EEOC. In *Brown v. J.I. Case Co.,*[99] the Seventh Circuit recognized that certain efforts of the plaintiff may toll the statute of limitations.

On July 27, 1981, the plaintiff (Brown) received a notice of right to sue from the EEOC stating that his Title VII charge had been dismissed by the EEOC for lack of reasonable cause to believe Brown's allegations of racial discrimination. Eighty-eight days after receiving this notice, Brown filed several documents with the Court for the Southern District of Indiana: (1) an affidavit of financial status in civil actions, (2) a financial affidavit in support of request for an attorney, (3) a pauper affidavit and order, and (4) the notice of right to sue.[100] The first form included an outline of the plaintiff's futile attempts to secure representation and a request for court-appointed counsel. The pauper affidavit and order contained Brown's sworn statement that he was unable to pay court costs and an order requiring only the district judge's signature to authorize Brown's proceeding *in forma pauperis.* Nearly two years later, the court denied Brown's request to proceed as a pauper but did not mention his request for court-appointed counsel. One month following this order, Brown filed his complaint pro se and also asked that the

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[95]755 F.2d at 606 n.9. Some courts have held that a hostile environment can be a condition of employment. *See, e.g.,* Katz v. Dole, 709 F.2d 251 (4th Cir. 1983); Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981).

[96]*See, e.g., Katz,* 709 F.2d at 255-56; *Bundy,* 641 F.2d at 943.

[97]*Cert. granted,* 106 S. Ct. 57 (1985).

[98]42 U.S.C. § 2000e-5(f)(1) (1982).

[99]756 F.2d 48 (1985).

[100]*Id.* at 48-49.

court rule on his still-pending request for counsel and reconsider its earlier decision. The district court denied both of these requests.[101]

The district court later also granted the defendant's motion to dismiss on the ground that the complaint was time-barred. In so ruling, the district court rejected Brown's argument that the filing of an application for appointment of counsel, accompanied by the EEOC notice of right-to-sue letter, tolled the ninety-day filing period.[102] The court also held that the papers filed by Brown within the ninety-day period did not constitute the filing of a complaint.[103]

The Seventh Circuit overturned the district court's ruling on the first argument; it therefore found it unnecessary to express an opinion on the latter.[104] The court used this occasion to clarify its earlier holding in *Harris v. National Tea Company.*[105] In *Harris,* the plaintiff had filed a petition for appointment of counsel six days after receipt of notice of right to sue. The court denied the request the next day. The plaintiff made a second petition thirty-six days following receipt of notice of right to sue, which was six days after the running of the thirty-day limitations period that existed at that time.[106] The court granted the second petition and vacated its earlier order. The Seventh Circuit interpreted the granting of the second request as a recognition by the trial court that it had earlier erred and therefore ruled that the running of the limitations period was tolled when the first request was improperly denied.[107]

In *Brown,* the circuit court declared that its holding in *Harris* should not be so narrowly read as to apply only where there has been an erroneous denial of appointed counsel.[108] Instead, it embraced *Harris* as standing "for the general proposition that the filing or initiation of a request for appointed counsel tolls the running of the limitations period until the court acts upon the request."[109]

In its opinion, the *Brown* court emphasized that the remedial purpose of Title VII was served by tolling the statute of limitations in special equitable circumstances such as those raised by the plaintiff.[110] The court further noted that tolling would not be appropriate in the absence of equitable circumstances or where the plaintiff lacked due diligence.[111]

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[101] *Id.* at 49.

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] 454 F.2d 307 (1971).

[106] 42 U.S.C. § 2000e-5(e) (1964), *amended by* Pub. L. No. 92-261, § 4(a), 86 Stat. 104 (1972).

[107] 454 F.2d at 310.

[108] 756 F.2d at 50.

[109] *Id.*

[110] *Id.* at 50-51.

[111] *Id.* at 51.

### C. *Use of Statistics*

In *Coates v. Johnson & Johnson,*[112] the Seventh Circuit Court of Appeals discussed at great length the proper use of statistics in a class action alleging a pattern or practice of disparate treatment. The court of appeals found fault with the district court's handling of statistical evidence[113] but nevertheless affirmed the holding for the defendant.[114]

*1. Background of the Case.*—The named plaintiff, Wesley Coates, originally filed an individual charge of racial discrimination with the EEOC after he was discharged by the defendant, Johnson & Johnson, for sleeping on the job. Coates had just been reinstated from a suspension for damaging company property. The court of appeals noted that company officials decided not to lessen his punishment because an undercover investigator working inside the Johnson & Johnson plant reported that Coates was selling drugs on company property.[115]

Coates' complaint was later amended to allege class discrimination under Title VII[116] and to add a count alleging individual and class discrimination under 42 U.S.C. section 1981.[117] He contended that he and over two hundred other blacks were discharged "as a consequence of a uniform policy and practice to reduce black employment and discriminatorily discharge black employees at defendants' plant."[118] The district court later certified the class, and in the words of the appellate court, "Coates, a somewhat less than exemplary employee, became the named class representative."[119]

The primary issues in this case involved the disciplinary system for the wage employees at Johnson & Johnson's midwest diaper plant, which was constructed in 1973 and closed in 1981 for financial reasons. The class complaint alleged an articulated plan to reduce the number of blacks at the plant and a "highly discretionary discipline-discharge-reinstatement system under which blacks were treated less favorably than whites."[120] Under the defendants' system, first-line supervisors, a group that the court noted included a significant percentage of blacks, had direct responsibility for meting out discipline. The system provided for a grievance procedure to the plant manager (a position held after 1976 by a black) who could uphold or reverse the disciplinary action.[121] As

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[112]756 F.2d 524 (1985).

[113]Coates v. Johnson & Johnson, 28 Empl. Prac. Dec. (CCH) ¶ 32,664 (N.D. Ill. 1982).

[114]756 F.2d at 530.

[115]*Id.* at 529-30.

[116]42 U.S.C. §§ 2000e-2000e-17 (1982).

[117]42 U.S.C. § 1981 (1982).

[118]756 F.2d at 530 (quoting complaint).

[119]*Id.*

[120]*Id.*

[121]*Id.* at 529.

the court noted, this disciplinary procedure necessarily allowed those involved in the process a measure of discretion.[122]

At trial before the Northern District of Illinois, the plaintiffs presented statistical and anecdotal[123] evidence to support their claim that the defendants had engaged in a pattern or practice of discriminatorily firing blacks. The district court found that the plaintiffs' evidence was adequately rebutted by the defendants and that the plaintiffs failed to meet their burden of persuasion.[124] The most significant issues raised before the Seventh Circuit involved the class, rather than the individual, claims of racial discrimination.

*2. Individual v. Class Disparate Treatment.*—The first issue addressed by the Seventh Circuit was the plaintiffs' contention that the district court erred

> by confusing the kind of evidence required to rebut a private, non-class disparate treatment prima facie case with that sufficient to rebut a government or class pattern or practice disparate treatment prima facie case.[125]

The plaintiffs argued that the defendants could not rebut the class-wide statistics offered by the plaintiffs merely by articulating a non-pretextual reason for the discharge of every named class representative or other class members who testified. In other words, the plaintiffs claimed that the district court had treated the matter as a group of individual lawsuits rather than as a class claim.[126]

The court of appeals began by setting out the elements of the class case articulated by the Supreme Court in *International Brotherhood of Teamsters v. United States.*[127] Applying *Teamsters,* the court of appeals agreed that explaining the discharge of every named class representative or others testifying would not be enough to defeat a class claim.[128] The court concluded, however, that the district judge had properly weighed other evidence as well in determining that the defendants had rebutted the plaintiffs' prima facie case.[129]

*3. The Statistical Evidence.*—Most of the issues on appeal revolved around the proper components and methodology for the utilization of statistics by both the plaintiffs and the defendants. The plaintiffs' expert initially presented a study showing that the discharge rate from 1973 to

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[122] *Id.*

[123] "Anecdotal" evidence refers to specific evidence regarding the actions of the parties, in contrast to statistical evidence.

[124] 28 Empl. Prac. Dec. (CCH) ¶ 32,664 at 25,036-37.

[125] 756 F.2d at 530.

[126] *Id.* at 533.

[127] 431 U.S. 324 (1977).

[128] 756 F.2d 533.

[129] *Id.*

1981 for black employees was almost twice as high as that for white employees. The expert then refined these rates to determine if factors other than race were responsible for the disparity. In this study, termed a "survival analysis,"[130] the expert controlled for seniority, education, experience prior to hiring, sex, and absences and tardiness.[131] In this analysis, he found a disparity significant at the fourth standard deviation level.[132]

The defendants offered their own expert statistician who presented his own statistical study of the discharge rates and also made several criticisms of the plaintiffs' statistical analyses. The defendants' expert used a somewhat different definition of "discharge" and also analyzed the data on a yearly basis rather than aggregating or "pooling" it over the years covered by the class suit, as the plaintiffs had done. Rather than a survival analysis, the defendants' expert conducted a multiple regression analysis[133] to allow for the same non-discriminatory variables that the plaintiffs had. However, the defendants' expert also included a variable that took into account formal disciplinary actions taken within the twelve months prior to the discharge. From this analysis, he concluded that the differences in discharge rates were not attributable to race but to the employment history of the individual employee, primarily the previous disciplinary actions.[134]

The defendants' expert also criticized the plaintiffs' study for a number of reasons, among them that: (1) the data was pooled over the entire seven-year period rather than analyzed year-by-year; (2) the study included data from 1973, a year prior to the class period; and (3) the data did not include the employees' prior disciplinary records.[135] .

The plaintiffs' expert conducted additional, last-minute studies in response to these criticisms. He argued that including data from 1973 was entirely appropriate in discerning pattern or practice discrimination culminating with discharges beginning in 1974. He also performed a log linear analysis indicating that pooling the data was appropriate. Even when employing a year-by-year analysis, he still found a statistically significant disparity in discharge rates in three of the seven years. He also argued strongly that using an employee's disciplinary record as a relevant variable was entirely improper because disciplinary actions were

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[130]*Id.* at 537 n.12. The expert employed the survival analysis, a technique for refining statistical data, rather than the more commonly-used multiple regression analysis. *Id.*

[131]According to the plaintiffs' expert, absences and tardiness were the only objective indicators of an employee's reliability. *Id.* at 537.

[132]*Id.* The Supreme Court has held that a disparity greater than "two or three" standard deviations is suspect. Castaneda v. Partida, 430 U.S. 483 (1976).

[133]Multiple regression analysis is a method of refining statistical data by estimating the effects of several independent factors on a single dependent variable. *Id.* at 538 n.14.

[134]*Id.* at 538.

[135]*Id.*

subject to the same discriminatory bias as that involved in the discharges.[136] Even so, the plaintiffs' expert analyzed the data taking prior disciplinary actions into account, except that he took into account an employee's entire disciplinary history rather than that of only the twelve months prior to discharge. He found a statistically significant disparity in discharge rates when the data was pooled over the class period.[137]

The district court, apparently exasperated over the volume of the statistics and the differing methodologies, concluded that "the statistical evidence presented by the parties has not been helpful to this court."[138] In sum, though, the district court agreed with the defendants' criticisms of the plaintiffs' analyses and therefore discounted the probative value of the plaintiffs' statistical evidence.[139]

*4. The Value of Statistical Evidence.*—The court of appeals acknowledged the problems that a trial court faces in interpreting statistical evidence when experts for each side formulate their analyses using different theories and then factor in or out different variables. The court, however, articulated some concern over the district court's reluctance to accord the statistical evidence much probative value. The court noted the Supreme Court's approval of statistical proof in *Teamsters* and cited a number of cases in which the court relied on statistical evidence as the best means of showing the cumulative effects of employment actions.[140]

The court of appeals next narrowed its review of the district court's treatment of the statistical evidence to three issues:

> (1) Whether pooling of the data is appropriate;
>
> (2) Which party bears the burden of persuasion on the issue of whether a variable is tainted by past discrimination; and
>
> (3) What is the appropriate measure of disciplinary history.[141]

*5. Pooling of Data.*—At trial, the plaintiffs submitted into evidence the results of their expert's log linear test indicating that pooling of the data was appropriate. They therefore argued on appeal that it was clearly erroneous for the district court to find that pooling was inappropriate.[142] The plaintiffs cited *Capaci v. Katz & Besthoff, Inc.*[143] as rejecting the argument that data must be analyzed in year-by-year samples. The court of appeals was unconvinced; it distinguished *Capaci* by pointing out that it involved much smaller data samples that would be unlikely to yield

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[136] *Id.*

[137] *Id.* at 539.

[138] 28 Empl. Prac. Dec. (CCH) ¶ 32,664 at 25,035.

[139] *Id.* at 25,026-31.

[140] 756 F.2d at 539-40.

[141] *Id.* at 540.

[142] *Id.* at 541.

[143] 711 F.2d 647 (5th Cir. 1983), *cert. denied,* 104 S. Ct. 1709 (1984).

findings of statistical significance unless aggregated.[144] The court further distinguished *Capaci* by pointing out that Johnson & Johnson's expert testified that he had performed a Chow test[145] that indicated that it was statistically inappropriate to pool the data.[146] Therefore, the district court was left to decide whether the plaintiffs' log linear or the defendants' Chow test was better. The circuit court concluded that the pooling issue presented a close question, but that it could not say that the district court's preference for the defendants' proof was clearly erroneous.[147]

*6. Past Disciplinary Action as Variable.*—At trial, the defendants attempted to show that there was a factor other than race — an employee's prior disciplinary record — that explained the statistical disparity in discharge rates. The plaintiffs objected to prior disciplinary action as an independent variable, contending that the company also discriminated in discipline and therefore should not have been able to use a potentially biased factor as a nondiscriminatory explanation for the disparity in discharge rates without first showing that the factor was unbiased.[148]

The court of appeals characterized the question presented as an issue of which party bears the burden of persuasion regarding possibly biased factors in the defendant's rebuttal evidence.[149] After characterizing it as such, the court then went on to distinguish decisions maintaining that a defendant cannot rely on factors that the court concludes are biased, on the ground that these decisions had not addressed the burden question.[150] The circuit court determined that, consistent with the principle that the plaintiffs in a Title VII case bear the ultimate burden of persuasion on the issue of discrimination,[151] "once a defendant offers statistics using an allegedly biased factor, the plaintiff must bear the burden of persuading the factfinder that the factor is biased."[152]

Given this allocation of burdens, the plaintiffs had the burden of persuading the court that Johnson & Johnson's disciplinary system allowed supervisors to discriminate and that the supervisors had indeed discriminated. The court cited the lack of direct statistical evidence on that issue as a factor that greatly weakened the plaintiffs' case.[153]

*7. Appropriate Measure of Disciplinary History.*—The third issue addressed by the court of appeals involved the appropriate measure of

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[144]756 F.2d at 541.

[145]*See id.* at 541-42 n.18. The Chow test analyzes the relationships between all of the variables in the statistical model. The log linear test employed by the plaintiffs' expert considers only some of the variables. *See id.* at 542.

[146]*Id.* at 541.

[147]*Id.* at 542.

[148]*Id.* at 542-43.

[149]*Id.*

[150]*Id.* at 543-44.

[151]*See* Segar v. Smith, 738 F.2d 1249, 1284 (D.C. Cir. 1984).

[152]756 F.2d at 544.

[153]*Id.* at 545. The concurring judge objected to a mechanical shifting of this burden to the plaintiff. He contended that "[w]hen discrimination in the explanatory factor is

an employee's disciplinary history. The defendants' expert performed a multiple regression analysis that incorporated an employee's disciplinary record for the twelve months preceding discharge as an independent variable.[154] When the plaintiffs' expert, on the other hand, included the employee's *entire* disciplinary record, he found a statistically significant disparity in discharge rates between blacks and whites.[155]

The district court found that the defendants' twelve-month variable was more accurate and therefore discounted the plaintiffs' proof.[156] The circuit court found this to be clearly erroneous but reasoned that it was not reversible error because the district court had not placed much reliance on the parties' statistical evidence anyway.[157]

The court first compared the two studies and found that use of the entire disciplinary record "seemed to improve the results of the statistical analysis."[158] Second, the court criticized the twelve-month time frame dating back from the employee's discharge because it could leave out relevant disciplinary actions. A better method, according to the court, would have been to define the record in terms of the twelve-month period prior to the last, if any, *discipline* the employee had received.[159] Finally, the court observed that the company utilized a "whole man" concept of discipline that involved review of an employee's entire file in meting out discipline.[160]

The Seventh Circuit's decision in *Coates* is noteworthy for a number of reasons. First, it affirms the importance of statistics in Title VII disparate treatment cases and suggests that a trial court is not free to ignore statistics simply because they are methodologically confusing. Second, however, the decision demonstrates that the appellate court will accord a great degree of deference to the trial court's interpretation of statistical data. Finally, the court's placing of the burden on the plaintiff to show discriminatory bias in the defendant's rebuttal factor may prove to be practically significant.

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alleged, a failure to present evidence either way should ordinarily work against the defendant." He agreed with the result, however, finding that the plaintiffs failed to meet their ultimate burden of persuasion. *Id.* at 554 (Cudahy, J., concurring).

[154]*Id.* at 545-46.

[155]*Id.* at 539.

[156]*Id.* at 545-46.

[157]*Id.* at 546-47. The concurring judge was troubled by the majority's treatment of this issue. He found it "odd" that the reviewing court would find the district judge's acceptance of the defendants' measure of disciplinary history clearly erroneous but then excuse it because the district judge had not found the statistical evidence particularly helpful. The concurring judge suggested that the better procedure might be to remand to see if the district judge would find the evidence helpful when he does take it into account. *Id.* at 555 (Cudahy, J., concurring).

[158]*Id.* at 546.

[159]*Id.*

[160]*Id.*