

Fall 1980

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Seymour Moskowitz

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Recommended Citation

Seymour Moskowitz, *New Opportunities for Unions to Foster Equal Employment Opportunity*, 15 Val. U. L. Rev. 1 (1980).

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Valparaiso University Law Review

Volume 15

Fall 1980

Number 1

**NEW OPPORTUNITIES FOR UNIONS TO FOSTER
EQUAL EMPLOYMENT OPPORTUNITY**

SEYMOUR MOSKOWITZ*

INTRODUCTION

Discrimination in the workplace has been part of a larger web of segregation, exclusion, restriction, and inferior treatment of minorities and women throughout American society.¹ In the labor context, these conditions have produced high unemployment, inferior occupational status, and low income levels for minorities and women.² In an attempt to alter these conditions, Congress has repeatedly enacted statutes setting out broad policies favoring equal opportunity in employment and granting individuals the right to sue in federal court.³ Individual and institutional litigants have likewise invoked constitutional principles in the quest for equality in the workplace.⁴ In short, as Justice Powell noted in *Alexander v. Gardner-Denver Co.*, "national labor policy embodies the principles of non-discrimination as a matter of highest priority. . . ."⁵ Despite this official policy of non-discrimination, the ratio of blacks unemployed in 1978 to similarly unemployed whites was even higher than in

* Visiting Associate Professor of Law, Valparaiso University School of Law.

1. See G. BECKER, *THE ECONOMICS OF DISCRIMINATION* (2d ed. 1971); G. MYRDAL, *AN AMERICAN DILEMMA* (1944).

2. See EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *EQUAL EMPLOYMENT OPPORTUNITY REPORT—1975, JOB PATTERNS FOR WOMEN IN PRIVATE INDUSTRY* (1977); UNITED STATES COMMISSION ON CIVIL RIGHTS, *SOCIAL INDICATORS OF EQUALITY FOR MINORITIES AND WOMEN* (1978).

3. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1976); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1976); Equal Pay Act of 1963 (EPA), 29 U.S.C. § 206(d)(1) (1976); Vocational Rehabilitation Act of 1973 (VRA), 29 U.S.C. §§ 701-794 (1976). In addition, several of the Reconstruction statutes are frequently utilized in employment discrimination cases, most notably, 42 U.S.C. § 1981 and 42 U.S.C. § 1983 (1976).

4. See, e.g., *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (irrebuttable presumption of physical incompetency violates due process). Equal protection analysis has been less persuasive. See, e.g., *NYC Transit Auth. v. Beazer*, 440 U.S. 568 (1979).

5. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974).

1962.⁶ One of the reasons for this lack of progress may have been excessive reliance on litigation to accomplish equal opportunity.

Such an emphasis on litigation has a number of inherent difficulties. The flood of employment discrimination cases into the courts has strained the resources of the federal system.⁷ The Equal Employment Opportunity Commission (EEOC),⁸ which is charged with the prime responsibility for administering Title VII of the 1964 Civil Rights Act, is even less able than the courts to cope with its workload.⁹ Perhaps most importantly, many private litigants are often without the resources to sustain either the complex and lengthy court proceedings or the extensive discovery involved in employment discrimination cases.¹⁰ These inherent difficulties re-

6. In 1962 the nonwhite unemployment rate was 124% higher than the white rate. See 110 CONG. REC. 6547 (1964) (remarks of Senator Humphrey). In 1978 the black unemployment rate was 129% higher than the white rate. See U.S. BUREAU OF LABOR STATISTICS, DEPT. OF LABOR, MONTHLY REP. 78 (Mar. 1979), cited in *United Steelworkers v. Weber*, 443 U.S. 193, 205 n.4 (1979).

7. During fiscal 1979, 5,477 cases were filed under Title VII of the 1964 Civil Rights Act in the federal district courts. *Analysis of the Workload of the Federal Courts*, DIRECTOR OF THE OFFICE OF U.S. COURTS ANN. REP. 71 (1979). This total represented over 40% of the civil rights cases in the federal courts and an astronomical increase from 1970, when 344 such cases were filed.

8. 42 U.S.C. § 2000e-4(a) (1976).

9. The number of charges filed with the EEOC increased from 8,854 in fiscal year 1966 to 77,000 in fiscal year 1976. Hill, *The Equal Employment Opportunity Acts of 1964 and 1972: A Critical Analysis of the Legislative History and Administration of the Law*, 2 INDUS. REL. L.J. 1, 71 (1977). The accumulation of unresolved cases before the EEOC has traditionally caused serious delays in the processing of new charges. There is an estimated backlog of more than 100,000 charges currently pending before the EEOC. Siegel, *Arbitration of EEO Issues: A Positive View*, 32d ANNUAL N.Y.U. CONFERENCE ON LABOR (1979).

10. A reader of the equal employment opportunity reporting services cannot fail to note the lengthy history of Title VII cases. The pre-trial period may last years. Once tried, cases are often appealed several times with subsequent hearings before district courts. See, for example, the history of *Bowe v. Colgate-Palmolive Co.*, 443 F. Supp. 696 (S.D. Ind. 1977), a sex discrimination case first filed in 1967. "After more than 11 years, 387 docket entries here in the trial court, and 3,934 pages of transcripts, the case is now before the court for an award of attorney fees." *Id.* at 698.

See also, *Pettway v. American Cast Iron Pipe Co.*, 17 Fair Empl. Prac. Cas. 1712 (5th Cir. 1978):

This case presents a striking illustration of the limitations of a court, and particularly an appellate court in resolving satisfactorily the complex and difficult issues that are raised in the Title VII context. The questions before us today have been at once highly technical and disturbingly elusive. They have required an examination of a voluminous and at times impenetrable record and have necessitated an exceedingly lengthy opinion. After twelve years in the courts and scores of pages of appellate

quire consideration of alternate possibilities for furthering the national policy of equal employment opportunity (EEO).

The collective bargaining relationship provides one possible alternative context which would avoid many of the problems of litigation while serving similar ends. Collective bargaining in its most general form reduces the employer's unilateral control over the job. It establishes contract rights and a measure of industrial democracy.¹¹ Unions may come to use this bargaining relationship to advance EEO because of the requirements placed on them by federal law and because many of the traditional issues which arise in EEO litigation vitally concern, and sometimes threaten, the traditional self-interest of unions and their members. As this article will show, the use of unions' strategic position in collective bargaining to further equal employment opportunity can provide women and minorities with enforcement tools and remedies which are at least the equal of those available in federal court while avoiding the disadvantages of litigation.¹²

consideration, we still cannot say with confidence that the end of this struggle is in sight.

Id. at 1761.

One significant delay-producing factor in judicial handling of EEOC cases is the frequent litigation of procedural questions. Such procedural questions frequently deal with deferral of EEOC charges, joinder of parties, mootness and related issues. *E.g.*, *Love v. Pullman Co.*, 404 U.S. 522 (1972) (deferral of EEOC charges); *Berg v. LaCross Cooler Co.*, 548 F.2d 211 (7th Cir. 1977) (mootness); *Evans v. Sheraton Park Hotel*, 503 F.2d 177 (D.C. Cir. 1974) (joinder of parties). A vast number of cases have been litigated regarding the propriety of class actions. *E.g.*, *East Texas Motor Freight Sys. v. Rodriguez*, 431 U.S. 395 (1977) (typicality); *Harris v. Pan Am. Airways*, 74 F.R.D. 24 (N.D. Calif. 1977) (adequacy of representation); *Ruhe v. Philadelphia Inquirer*, 14 Fair Empl. Prac. Cas. 1304 (E.D. Pa. 1975) (numerosity).

The dramatic changes that have occurred in EEO law over the past decade have likewise contributed to the length of such cases. One particularly dramatic change was the reversal of a long line of cases regarding seniority systems, *e.g.*, *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968) by *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

Moreover, the costs of discovery attendant to such prolonged litigation are often staggering. *See, e.g.*, *Hill v. Western Elec. Co.*, 12 Fair Empl. Prac. Cas. 1175 (E.D. Va. 1976) (\$50,000 in out-of-pocket expenses to prove liability against one part of employer's operation in one geographic region).

11. *See generally* A. COX, D. BOK & R. GORMAN, *CASES AND MATERIALS ON LABOR LAW* 474-78 (1977).

12. The emphasis in this article is on *union* opportunities to advance EEO because my own experience indicates that most advances in this field stem from union initiatives. Most of the concepts discussed, however, are equally applicable to employer initiatives.

Reliance upon the union in EEO matters has a number of important advantages. It enlists the strength of an ongoing organization familiar with the detailed realities of the industrial process and of the employer's personnel policies. As opposed to episodic litigation, a collective bargaining approach focuses attention on the continuing and long-term contractual relationship between union and management and on the grievance and arbitration machinery as a problem-solving process. Although not without difficulties for aggrieved employees, the grievance and arbitration process presents important advantages over litigation in terms of both speed and cost.¹³ Critically, reliance on the union enhances the ability to implement, monitor, and internally police detailed and intricate EEO decisions.¹⁴

Reliance upon unions is not without its dangers and drawbacks. The interest of minority employees can conflict with the perceived interest of the majority and sometimes of the entrenched union leadership. There will always be competing demands for bargaining power. Consequently, many unions have had, at best, a checkered history in EEO matters.¹⁵ Nonetheless, the collective bargaining approach remains an underused and potentially effective avenue for change. Removal of discriminatory barriers can improve employment opportunities for all employees. The posting of notices of job vacancies,¹⁶ the elimination of non-job-related tests,¹⁷ and the integration of previously segregated jobs¹⁸ can improve the condition of majority as well as minority workers. Moreover, a number of labor organizations have consistently advocated expansion of transfer rights

13. Blumrosen, *Individual Worker-Employer Arbitration Under Title VII*, 31st Annual N.Y.U. CONFERENCE ON LABOR 329 (1978).

14. Gould, *The Seattle Builders Trades Order: The First Comprehensive Relief Against Employment Discrimination in the Construction Industry*, 26 STAN. L. REV. 773 (1974).

15. See R. MARSHALL & V. BRIGGS, *THE NEGRO AND APPRENTICESHIP* (1967); S. SPERO & A. HARRIS, *THE BLACK WORKER* (1931); U.S. COMMISSION ON CIVIL RIGHTS, *THE CHALLENGE AHEAD: EQUAL OPPORTUNITY IN REFERRAL UNIONS* (1976); Marshall, *The Negro in Southern Unions, The Negro and the American Labor Movement* (J. Jacobson ed., Anchor 1968); Falk, *Women and Unions: A Historical View*, 1 WOMENS RIGHTS L. REP. 54 (1973).

16. *EEOC v. American Tel. & Tel.*, 419 F. Supp. 1022 (E.D. Pa. 1976), *aff'd*, 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978).

17. *Dickerson v. United States Steel*, 472 F. Supp. 1304 (E.D. Pa. 1978); see notes 57-62 *supra*.

18. *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). In *Weber*, white, as well as black employees were able to participate in the special training for craft jobs that was established pursuant to an affirmative action program.

and the liberalized use of seniority systems.¹⁹ Pressure from female and minority members should increasingly cause other unions to follow suit.

In addition to these voluntary union efforts a number of forums have placed greater emphasis on the collective bargaining process as a way to insure equal employment opportunity. The EEOC has formally resolved that it will take into account union and employer "good faith" efforts to eliminate discriminatory practices when making its administrative determination whether or not to file a Title VII action.²⁰ Lower federal courts are increasingly looking to the parties', and particularly to the union's collective bargaining history in determining back pay liability in EEO litigation.²¹ Thus, there is at present not only an opportunity but a pragmatic necessity for unions to further both national labor policy and their own self-interest by using their bargaining strength to achieve equal employment opportunity.

Efforts by employers and unions to change long-term economic inequities need not be limited to practices and systems which overtly violate federal statutes or to the passive avoidance of such violations. Conditions which antedate the enactment of Title VII,²² whether permitted by virtue of statutory exemptions,²³ or because not subject to a timely administrative change,²⁴ may be affirmatively addressed through private collective bargaining even though litigation on such issues is foreclosed. The parties may seek to resolve problems which they may not have created themselves.²⁵ In addition, most affirmative action programs include the establishment of goals and timetables, affirmative recruitment programs, and the revamping of selection instruments or procedures to eliminate exclusionary

19. See, e.g., Kleiman & Frankel, *Seniority Remedies Under Title VII: The Steel Consent Decree: A Union Perspective*, 28th ANNUAL N.Y.U. CONFERENCE ON LABOR 177, 199 (1975).

20. EEOC Resolution to Encourage Voluntary Affirmative Action in Collective Bargaining, [1980] LAB. REL. REP. (BNA) 103:304.

21. See, e.g., *Social Serv. Union Local 535 v. Santa Clara County*, 21 Fair Empl. Prac. Cas. 684 (9th Cir. 1979); *Johnson v. Ryder Truck*, 555 F.2d 1181 (4th Cir. 1977). See also notes 242-45 *infra* and accompanying text.

22. See, e.g., *Hazelwood School Dist. v. United States*, 433 U.S. 299, 309-10 (1977).

23. *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977) (bonafide seniority system that perpetuates pre-Act discrimination).

24. *United Air Lines v. Evans*, 431 U.S. 553 (1977).

25. *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

effects on particular groups.²⁶ These matters are appropriately subject to private collective bargaining.

Bargaining about EEO matters was implicitly endorsed by the Supreme Court's decision in *United Steelworkers v. Weber*.²⁷ *Weber* resolved many of the legal problems that beset unions seeking to implement privately bargained affirmative action programs.²⁸ The decision provides a clear, positive signal to private parties seeking in good faith to address the complex problems of discrimination in the workplace. It places the highest judicial endorsement behind the notion that the parties themselves are often the best-equipped to design effective solutions to problems of discrimination. Neither the statutory limits of Title VII nor the equitable restraint of the judiciary should pose a barrier to voluntary efforts to remedy "traditional patterns of . . . segregation and hierarchy."²⁹ As the Supreme Court emphasized in *Weber*, the principal purpose of Title VII is to induce *voluntary* solutions to problems of discrimination.³⁰ Finally, *Weber* establishes that Title VII does not prohibit remedial solutions based upon race-conscious affirmative action plans.

This article will focus upon new union opportunities to advance EEO within the structure of collective bargaining and will advocate the use of such opportunities as one important component of an overall strategy for achieving employment equality. Union opportunities will be examined first with respect to the statutory obligation to bargain in good faith.³¹ Within this context the union may act by negotiating contract provisions,³² grieving and arbitrating EEO claims based on the contract,³³ and securing vital information from the employer.³⁴ Union liability under Title VII and the duty of fair representation³⁵ will then be surveyed to demonstrate the existence

26. EEOC-Affirmative Action Guidelines, 44 Fed. Reg. 4,422 (1979) (29 C.F.R. § 1608.4). See note 138 *infra* and accompanying text. As used in this article, "non-discrimination" refers to the avoidance of practices or policies which violate federal statutes such as Title VII. "Affirmative action" refers to remedial activity in response to past discrimination or voluntary action taken to remedy inequities which may, for various reasons, lie outside the reach of those statutes. As used here, Equal Employment Opportunity is the general theme which underlies both concepts.

27. 443 U.S. 193 (1979).

28. See notes 93-108 *infra* and accompanying text.

29. 443 U.S. at 204.

30. *Id.*

31. See notes 40-52 *infra* and accompanying text.

32. See notes 53-81 *infra* and accompanying text.

33. See notes 82-90 *infra* and accompanying text.

34. See notes 109-91 *infra* and accompanying text.

35. *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944). See generally note 151

infra

of compelling and financial reasons for unions to take advantage of such collective bargaining opportunities.³⁶ These potential sources of litigation and judicial intervention in union activities may also serve minorities, both within and outside the union, as a technique for exerting pressure on unions to become actively involved in bargaining over EEO issues and in enforcing EEO programs already won. It will be urged that courts should explicitly use a union's collective bargaining history in determining union liability for back pay, as the EEOC is already doing in determining whether to press litigation against unions. In this way, union efforts to advance EEO would insulate unions from potentially ruinous back pay claims, providing additional positive incentive to unions to bargain over EEO issues. Such an approach constitutes a necessary and effective combination of collective bargaining and EEO policies while avoiding the financial, personal, and social costs of episodic and uncoordinated litigation. In so doing, the introduction of EEO issues into the bargaining process should be welcomed by all the relevant parties—the unions, the employer, and the hitherto excluded minority work force.

UNION OPPORTUNITIES TO FURTHER EEO WITHIN THE STRUCTURE OF PRIVATE COLLECTIVE BARGAINING

Private collective bargaining is the fundamental mode of dealing with workplace problems in the labor relations system in the United States. This is embodied in the policies underlying the National Labor Relations Act (NLRA)³⁷ which protects employees' right to "form, join and assist labor organizations"³⁸ and promotes labor peace by "encouraging the practice and procedure of collective bargaining. . . ."³⁹ To implement these policies, a duty to bargain is placed upon both employer and union.⁴⁰ This duty is made more specific by Section 8(d) of the NLRA which provides that although the parties are not required to agree to a proposal or to make concessions, they must meet and confer in "good faith" with respect to "wages, hours,

36. See notes 193-247 *infra* and accompanying text.

37. 29 U.S.C. §§ 151-169 (1976) (originally enacted as 49 Stat. 449 (1935)).

38. 29 U.S.C. § 157 (1976).

39. 29 U.S.C. § 151 (1976).

40. (a) It shall be an unfair labor practice for an employer— . . . (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) It shall be an unfair labor practice for a labor organization or its agents . . . (3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a)

29 U.S.C. § 158 (1976).

and other terms and conditions of employment. . . ."⁴¹ While the particular matters subject to the duty to bargain in good faith are not always self-evident, it is firmly established that if a subject is contained within the statutory phrase, it is an unfair labor practice for either employer or union to refuse to bargain about that subject upon a request by the other.⁴² The duty to bargain in good faith extends to the administration of collective bargaining agreements as well as to their negotiation⁴³ and includes the employer's duty to provide the union with information the latter needs to bargain effectively.⁴⁴

This section will examine the basis for asserting that equal employment opportunity has become a mandatory subject of collective bargaining. To the extent that this is the case, unions have been given the opportunity to insist on addressing EEO issues in the bargaining process. Furthermore, as examined in the final portion of this section, they may make attendant demands for information in the possession of the employer relating to EEO matters. In essence, this portion of the argument seeks to demonstrate that unions have the opportunity to play a substantially enhanced role in fostering equal employment opportunity. The final section of this article will examine the existing pressures which may encourage unions to avail themselves of this opportunity, and will suggest ways in which those pressures may be highlighted and increased.

EEO As A Mandatory Subject of Collective Bargaining

The National Labor Relations Board (NLRB) has long held that discrimination in employment is a "term and condition of employment" within the meaning of Section 8(d) and that its elimination or

41. For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .

29 U.S.C. § 158(d) (1976).

42. See, e.g., *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979); *Inland Steel Co. v. NLRB*, 170 F.2d 247 (7th Cir. 1948), cert. denied, 336 U.S. 960 (1949).

43. *NLRB v. Acme Indus. Co.*, 385 U.S. 432 (1967). See notes 52, 82-90 *infra* and accompanying text.

44. See notes 109-91 *infra* and accompanying text.

prevention is a mandatory subject of bargaining.⁴⁵ Discriminatory employment practices are contained within the mandatory scope of collective bargaining, both with respect to overtly discriminatory practices⁴⁶ and practices which are neutral on their face but have a discriminatory impact or effect.⁴⁷ This principle has already had far-reaching effects in certain industries.

NLRB decisions which find that discriminatory practices affect the terms and conditions of employment applicable to the bargaining unit are in accord with judicial⁴⁸ and congressional⁴⁹ policy against discrimination in the workplace. "Indeed, an employer may have no objection to incorporating into a collective agreement the substance of his obligation not to discriminate in personnel decisions."⁵⁰ Title VII of the 1964 Civil Rights Act, the most important legislative enactment in the area of equal employment opportunity, was intended to spur private activity of this sort on the part of employers and of unions.⁵¹

Furthermore, the duty to bargain in good faith about EEO, as with other mandatory subjects, is not restricted simply to the negotiation of collective agreements. Collective bargaining is a con-

45. *Farmers Coop. Compress*, 169 N.L.R.B. 290, 67 L.R.R.M. 1266 (1968), *enforced on this point sub nom. United Packinghouse Workers v. NLRB*, 416 F.2d 1126 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 903 (1969). *See also* *Jubilee Mfg. Corp.*, 202 N.L.R.B. 272, 273, *aff'd*, 504 F.2d 271 (D.C. Cir. 1974); *Southwestern Pipe, Inc.*, 179 N.L.R.B. 364, 72 L.R.R.M. 1377 (1969).

46. For example, in *Farmers Coop. Compress*, the Board dealt with racially segregated employment conditions in a situation where the employer had refused to bargain with the union about such conditions. In finding a violation of Section 8(a)(5), the Board stated:

[B]argaining in good faith by respondent meant that respondent must bargain in depth and meaningfully concerning any and all racial questions which were alluded to by union negotiators during the bargaining. Respondent's duty was and is to discuss with an open mind conditions as they actually exist in the plant, including racial conditions and any racial discrimination.

169 N.L.R.B. at 296.

47. *See, e.g., Dickerson v. United States Steel Corp.*, 472 F. Supp. 1304, 1354 (E.D. Pa. 1978) (union successfully grieved and arbitrated battery of tests for craft jobs which had discriminatory impact on blacks; arbitrator found that use of such tests violated contractual provisions).

48. *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 69 (1975).

49. *See* note 3 *supra*.

50. *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. at 66.

51. *United Steelworkers of America v. Weber*, 443 U.S. 193, 204 (1979).

tinuous process involving "pay adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract."⁵² The full bargaining context thus includes the task of administering and policing such agreements, particularly the processing of grievances based upon contract violations.

The legal recognition of the right to bargain about EEO matters has already had significant results in the negotiation of contract provisions and in grievance and arbitration processing. A 1979 survey of 400 sample collective bargaining agreements found that eighty-four per cent of the contracts banned discrimination on the basis of race, color, creed, sex, national origin, or age, as compared to only twenty-eight per cent of such contracts in 1965.⁵³ Sixteen per cent of the contracts containing such general non-discrimination clauses further include a statement that the employer would comply with any federal, state or local law prohibiting discrimination.⁵⁴ Numerous arbitration decisions have dealt with the application of such contract terms to specific individual situations.⁵⁵

Beyond such general non-discrimination guarantees, unions have the opportunity to negotiate for specific contract provisions which deal with many of the issues that have been litigated in EEO cases. The most successful and comprehensive application of this negotiation method has occurred in the steel industry.⁵⁶ While the use of tests by employers, for example, has been challenged in a multitude of Title VII lawsuits,⁵⁷ the steel industry has addressed this problem through the bargaining process. Thus, a provision first

52. Conley v. Gibson, 365 U.S. 41, 46 (1957).

53. [1979] BASIC PATTERNS IN UNION CONTRACTS (BNA) § 95:5.

54. *Id.*

55. See, e.g., Shop Rite Foods, Inc., 67 Lab. Arb. 159 (1976) (Weiss, Arb.) (discharge based on sex discrimination); Middletown Bd. of Educ., 56 Lab. Arb. 830 (1971) (Hogan, Arb.) (mandatory maternity leave policy violates contract clause incorporating federal civil rights laws); Hough Mfg. Corp., 51 Lab. Arb. 785 (1968) (Mueller, Arb.) (employer's refusal to assign job vacancy to woman violated contract provisions and state fair employment practice laws).

56. For a frank and thorough discussion of the Steelworker Union's negotiating posture and strategy, see Kleiman & Frankel, *Seniority Remedies Under Title VII: The Steel Consent Decree—A Union Perspective*, 28th ANNUAL N.Y.U. CONFERENCE ON LABOR 177 (1975). See also Breedhof, "Collective Bargaining and Equal Employment Opportunity: The Advantages of Voluntary Action"—unpublished paper, ABA National Institute: Labor Law in the New Decade, May, 1980.

57. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albermarle Paper Co. v. Moody, 422 U.S. 405 (1972); Washington v. Davis, 426 U.S. 229 (1976).

included in the basic labor agreement between the steel industry and the United Steelworkers of America in 1968 provides that:

[W]here tests are used as an aid in making determinations of the qualifications of an employee, such a test must . . . be job-related. A job-related test, whether oral, written, or in the form of an actual work demonstration, is one which measures whether an employee can satisfactorily meet the specific requirements of that job including the ability to absorb any training which may necessarily be provided in connection with that job. A written test may not be used unless the job requires reading comprehension, writing, or arithmetic skills and may be used to measure the comprehension and skills required for such a job All tests shall be a) fair in their makeup and their administration; b) free of cultural, racial, or ethnic bias.

. . . .

Testing procedures shall in all cases include notification to an applicant of his deficiencies and an offer to counsel him as to how he may overcome such deficiencies.⁵⁸

Similar contract provisions cover testing requirements for admission into sought-after apprenticeship programs.⁵⁹ The Steelworkers Union advocated the testing clauses both because of the discriminatory impact of the tests and because of their tendency to undermine seniority rights.⁶⁰ In addition, the union successfully grieved and arbitrated under the contract's arbitration clause the discriminatory impact of a battery of apprenticeship and craft tests used by United States Steel in its plants around the country. After an adverse arbitration ruling, the employer discontinued the use of the tests.⁶¹

58. Agreement Between United States Steel Corporation and the United Steelworkers of America, Appendix "F", Memorandum of Understanding on Testing, unpublished, *reprinted in* [1977] COLL. BARG. NEGOTIATIONS & CONT. (BNA) 29:66.

59. In the determination of relative ability and physical fitness as used to fill apprenticeship vacancies . . . the Company shall be limited to use of such examinations and testing procedures which are a) job related; b) fair in their makeup and in their administration; c) free of cultural, racial or ethnic bias.

Agreement between U.S. Steel Corp. and United Steelworkers of America, Appendix "G", Memorandum of Understanding on Apprenticeship Training, *reprinted in* [1977] COLL. BARG. NEGOTIATIONS AND CONT. (BNA) 29:66-67. This issue has also been extensively litigated. *Local 53, Heat & Frost Insulators v. Vogler*, 407 F.2d 1047 (5th Cir. 1969); *United States v. Sheet Metal Workers Local 36*, 416 F.2d 123 (8th Cir. 1969).

60. See Kleiman & Frankel, *supra* note 19, at 208.

61. Unpublished ruling, *cited in* *Dickerson v. United States Steel Corp.*, 472

Another frequently litigated Title VII issue is the discriminatory impact of seniority systems which lock in prior discriminatory employment decisions.⁶² In the steel industry this problem was ameliorated by collective bargaining, although the bargaining was initiated by a Title VII lawsuit.⁶³ A consent decree,⁶⁴ arrived at after six months of intensive negotiations between government agencies, the companies, and the union, was made a part of the Basic Labor Agreement in the industry.⁶⁵ This decree, emerging from a combination of litigation and collective bargaining, governs the seniority system at more than 200 steel facilities across the country. It fundamentally altered the system of seniority in the industry by changing its basis from department to the entire plant.⁶⁶ It also initiated an affirmative action program for trade and craft jobs,⁶⁷ established goals and timetables for greater employment of females and minorities in occupations and job categories from which they were excluded in the past,⁶⁸ and included significant back-pay recovery.⁶⁹ The decree likewise provided for the establishment of Plant Implementation Committees⁷⁰ and an industry-wide Audit and Review Committee⁷¹ to assure future compliance with the decree. To the extent that the union and management remain in compliance, the federal government agreed that Title VII and Executive Order 11246 are satisfied.⁷² Particularly in light of recent Supreme Court

F. Supp. 1304, 1354 (E.D. Pa. 1978) (Title VII suit to enjoin same apprenticeship tests at issue in the arbitration proceeding).

62. See, e.g., *California Brewers Ass'n v. Bryant*, ___ U.S. ___, 20 Empl. Prac. Dec. ¶ 30,281 (1980); *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); *Macklin v. Spector Freight Sys., Inc.*, 478 F.2d 979 (D.C. Cir. 1973).

63. *United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 881 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). See also Kleiman & Frankel, note 19 *supra*.

64. The Consent Decrees are published in [1974] FAIR EMPL. PRAC. MAN. (BNA) 431:125-52.

65. "The terms of this decree shall be fully binding on the companies and union, and the arrangements provided herein are hereby made a part of the defendants' Basic Labor Agreement as though expressly incorporated therein." *Id.* at 142, ¶ 14.

66. *Id.* at 133, ¶ 4.

67. *Id.* at 138, ¶ 10.

68. *Id.* at 150, ¶ 2(a)(1)-(3)(b) + (c).

69. *Id.* at 143, ¶ 18.

70. *Id.* at 140, ¶ 12. At least one representative union member of the largest minority group in the plant was to be included in each committee.

71. *Id.* at 141, ¶ 13. See also Introductory ¶ C of Consent Decrees I & II. The industry-wide committee was composed of five members from management, five from the union, and one from government.

72. *Id.* at 126, ¶ C.

pronouncements,⁷³ this solution to seniority issues produced through negotiation and consent, represents an effective alternative to full-scale adversarial litigation; the result obtained is at least as satisfactory to the minority workforce as any that might reasonably have been expected from a court.

Perhaps most importantly, the decree achieved its substantive results in a fashion that also conformed to the traditional bargaining structure of the steel industry.⁷⁴ Fundamental terms and conditions of employment remain uniform throughout the industry. All major companies must meet the same basic standards. The inequitable burden placed upon one company sued in a Title VII suit, both in terms of legal costs and in terms of any resulting idiosyncratic alteration of wages and seniority arrangements, was thereby avoided. Most critically, as the decree is applied to practice, its terms allow the parties to utilize their established *private* dispute resolution mechanism to resolve future issues that may arise under it.⁷⁵ Thus, the bargaining process was substituted in part for litigation, and, at least potentially, the arbitration mechanism is made available for the solution of future disputes.

Numerous other unions have employed private collective bargaining to deal with EEO issues. The International Union of Electrical Workers (IUE) has consistently sought the elimination of sex discriminatory practices through contract provisions in the area of insurance and maternity benefits, job assignments, and wage rates.⁷⁶ The United Auto Workers secured a pledge of non-discrimination in hiring from General Motors⁷⁷ and established

73. *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977) (bona fide seniority systems, even if they perpetuate the effects of pre-Act discrimination, do not violate Title VII); *United Air Lines v. Evans*, 431 U.S. 553 (1977). See generally Note, *Seniority—The Relevant Scope of Inquiry for Determining the Legality of a Seniority System*, 31 VAND. L. REV. 151 (1978). In the aftermath of *Teamsters*, the lower federal courts have attempted to apply the Supreme Court's definition of "bona fide" seniority system under § 703(j). See, e.g., *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310 (5th Cir. 1977); *Nickel v. Highway Indus.*, 441 F. Supp. 477 (W.D. Wis. 1977).

74. See Breedhof, note 18 *supra*.

75. E.g., *United States Steel Corp.*, 66 Lab. Arb. 663 (1976) (Das, Arb.) (employer must grant job to employee with plant-wide seniority pursuant to Steel Consent Decree). See also *United States Steel Corp.*, 66 Lab. Arb. 687 (1976) (Garrett, Arb.) (in dispute over job bidding, matter was referred to Audit and Review Committee established under Consent Decree).

76. See discussion *infra* at notes 129-33.

77. *General Motors & United Automobile Workers Letter of Agreement of September 14, 1979*, reprinted in [1979] COLL. BARG. NEGOTIATIONS & CONT. (BNA) § 21:94 (Doc. #27).

"equal application" committees on both the national and the local level to deal with EEO disputes.⁷⁸ The Communication Workers of America bargained for and secured a maternity leave policy that anticipated some of the benefits granted women by the 1978 amendments to Title VII.⁷⁹ The International Woodworkers of America, as part of its EEO program, initiated a special union-employer grievance and arbitration procedure for individual claims of discrimination. All costs, including those of the grievant and his representative, are paid by the employer.⁸⁰ Many unions have also negotiated worksharing plans to offset the disparate impact that layoffs may have on minorities and women.⁸¹

Unions have important opportunities to advance EEO within the grievance-arbitration process as well. Contract clauses governing this process can and should be broadened to enable the arbitrators to apply relevant statutes, regulations and court decisions.⁸² The Supreme Court decision in *Alexander v. Gardner-Denver Co.*, holding that an unfavorable arbitration ruling does not bar an employee from bringing a subsequent Title VII action,⁸³ could undermine the finality of an arbitrator's ruling. Nevertheless, even that holding suggests that under proper circumstances the court in which such subsequent action is eventually brought may accord the prior ruling great weight.⁸⁴ The court may look to a variety of factors in determining the weight to assign the arbitrator's decision including the degree to which the contract provisions conform to Title VII, procedural fairness, the adequacy of the record and the competence of the arbitrator.⁸⁵ To the extent these conditions are met it may be anticipated that most employees will have little incentive to

78. *Id.* (Doc. #28).

79. Collective Bargaining Agreement between Ohio Bell & Communications Workers of America, 1977-80, Attachment "A" Maternity Payment Plan, reprinted at [1979] COLL. BARG. NEGOTIATIONS & CONT. (BNA) § 22.45. See Pub. Law #95-555 (Oct. 31, 1978), 42 U.S.C. § 2000e(k), which restored benefits and protections to pregnant women which had been severely limited in *General Elec. v. Gilbert*, 492 U.S. 125 (1976).

80. Youngdahl, *Equal Employment and Affirmative Action: The Union Role*, 27TH N.Y.U. ANNUAL CONFERENCE ON LABOR 179 (1975).

81. Sixteen percent of 400 sample contracts contain some form of work-sharing (cutting back the hours of all employees equally) as an alternative or a prelude to layoffs. [1979] COLL. BARG. NEGOTIATIONS & CONT. (BNA) § 60:3.

82. Middletown Bd. of Educ., 56 Lab. Arb. 830 (1971) (Hogan, Arb.). See generally Newman, *Post Gardner-Denver Developments in the Arbitration of Discrimination Claims*, PROCEEDINGS OF THE 28TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 36 (1975).

83. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

84. *Id.* at 60, n.21.

85. *Id.*

re-litigate their discrimination claim.⁸⁶ The American Arbitration Association has, in fact, drafted a set of rules designed to cover many of these issues.⁸⁷

The processing of grievances can also affect a general class of workers. Grievances are not inherently limited to the correction of individual cases of discrimination.⁸⁸ Claims of systemic discrimination, functionally akin to class actions in the courts, can be raised before an arbitrator in many circumstances.⁸⁹ Even individual arbitration rulings have potentially broader effects since "one would hardly expect an employer to continue in effect an employment practice that routinely results in adverse arbitral decision."⁹⁰

Clearly, therefore, not only is the duty to bargain in good faith about EEO matters well entrenched in both theory and actual labor practice, but the arbitration mechanism provides a potential alternative enforcement mechanism for the routine implementation of the rights and programs won through collective bargaining. Certain industries already provide models for other unions to follow in voluntarily fulfilling that duty. In addition, the National Labor Relations Board has recognized the value of this approach as a remedial mechanism for dealing with past discrimination. It has ordered one union engaged in discriminatory conduct to propose specific contractual provisions designed to prohibit racial discrimination and to bargain in good faith with the employer to obtain such provisions.⁹¹ Similarly, in a case involving discrimination in job assignments be-

86. Blumrosen, *Individual Worker-Employer Arbitration Under Title VII*, 31ST ANNUAL N.Y.U. CONFERENCE ON LABOR LAW 329, 335 (1979).

87. See Coulson, *Employment Dispute Arbitration Rules—An Available Alternative*, 25TH ANNUAL SOUTHWESTERN LEGAL FOUNDATION INSTITUTE ON LABOR LAW 311 (1979). The rules are contained in an Appendix. *Id.* at 325-34. Arbitration of discrimination claims has generated considerable controversy. See, e.g., Gould, *Labor Arbitration of Grievances Involving Racial Discrimination*, 118 U. PA. L. REV. 40 (1960); Glanston, *Arbitration of EEO Issues: A Dissenting View*, 32d ANNUAL N.Y.U. CONFERENCE ON LABOR LAW 155 (1979); and Newman, note 82 *supra*.

88. See the unpublished arbitration of a grievance concerning employer's use of non-validated tests cited in *Dickerson v. United States*, 472 F. Supp. 1304, 1354 (E.D. Pa. 1978).

89. See, e.g., *ASG Indus., Inc.*, 62 Lab. Arb. 849 (1974) (Foster, Arb.) (elimination of unvalidated tests); *Middletown Bd. of Educ.*, 56 Lab. Arb. 830 (1971) (Hogan, Arb.).

90. *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 67 (1975).

91. *Local Union 12, Rubber, Cork, Linoleum & Plastic Workers, (Business League of Gadsden)*, 150 N.L.R.B. 312, 322, *aff'd sub. nom. Local 12, Rubber Workers v. NLRB*, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967).

tween black and white drivers, the EEOC found that the union had failed in representing its black members because it was "obligated to propose to the employer contract provisions aimed at prohibiting continued racial discrimination" in terms and conditions of employment.⁹² Thus both federal agencies principally involved in administering national labor policy have harnessed private collective bargaining for EEO goals.

The ultimate judicial authorization for and endorsement of private actions seeking to respond to EEO concerns is a very recent matter. Only in *United Steelworkers of America v. Weber*⁹³ did the Supreme Court affirm the use of such private mechanisms beyond those necessary to comply with the requirements of Title VII, even though they entail a degree of race-conscious selection which might hitherto have posed the threat of a Title VII-based reverse discrimination claim. In 1974, the U.S.W.A. and Kaiser Aluminum & Chemical Corporation entered into a master collective bargaining agreement covering the terms and conditions of employment at fifteen Kaiser plants. This agreement contained an affirmative action plan designed to eliminate long-standing racial imbalance in Kaiser's almost exclusively white craft work force. Hiring goals were set for each plant based on the percentage of blacks in the local labor force. To meet such goals, on-the-job training programs were established to teach unskilled incumbent production workers—black and white—the skills necessary to become craft workers. Selection of trainees was made on the basis of seniority, with a proviso that at least fifty per cent of the new trainees were to be black until the percentage of black skilled craft workers approximated the percentage of blacks in the local labor force.⁹⁴

The Supreme Court affirmed the legality of the U.S.W.A.-Kaiser plan against a challenge by a white worker who alleged that the program had resulted in a black employee, junior in seniority, receiving training in preference to himself, violating § 703(a)⁹⁵ and

92. EEOC Decision 71-1477, 3 Fair Empl. Prac. Cas. 494 (1971).

93. 443 U.S. 193 (1979).

94. *Id.* at 208-09.

95. It shall be an unlawful employment practice for as employer—

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

(2) limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his

(d)⁹⁶ of Title VII. The Court noted that the issue was the "narrow statutory" one of whether Title VII forbids private employers and unions from voluntarily agreeing to bona fide affirmative action programs that accord racial preferences in the manner and for the purpose provided in the Kaiser-U.S.W.A. plan.⁹⁷

The legislative history of Title VII makes it clear that Congress did not intend to prohibit voluntary and private affirmative action efforts designed to solve the problem of minority disadvantage in the workplace:

No bill can or should lay claim to eliminating all of the causes and consequences of racial and other types of discrimination against minorities. There is reason to believe, however, that national leadership provided by the enactment of Federal legislation dealing with the most troublesome problems *will create an atmosphere conducive to voluntary or local resolution of other forms of discrimination.*⁹⁸

Rather than prohibiting the private sector from initiating affirmative action programs, Title VII was intended to galvanize employer and union evaluation of their employment practices and to spur voluntary elimination of imbalances in traditionally segregated job categories.⁹⁹ The Kaiser-U.S.W.A. plan, designed to eliminate conspicuous racial imbalance, fell within the area of discretion thus left to the private sector by Title VII.¹⁰⁰

Weber constitutes a vigorous endorsement for such private initiatives.¹⁰¹ The decision should serve to dispel any genuine fears on

status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1976).

96. It shall be an unlawful employment practice for any employer, labor, organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

42 U.S.C. § 2000e-2(d) (1976).

97. *United Steelworkers v. Weber*, 443 U.S. at 197.

98. H.R. REP. NO. 914, 88th Cong., 1st Sess. 18, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2355, 2393, *quoted in* *United Steelworkers v. Weber*, 443 U.S. at 203-04 (emphasis added).

99. *United Steelworkers v. Weber*, 443 U.S. at 203-09.

100. *Id.* at 209.

101. Although the plan was voluntary, both the employer and the union may have acted in response to outside pressures. The company feared action by the Office

the part of either employers or unions that they will be subject to liability under a Title VII reverse discrimination theory for private affirmative measures.¹⁰² Thus, neither would have to admit past discriminatory practices, with attendant potential liability, in order to justify internal remedial efforts. The practical significance of this is incalculable. Through their own negotiated mechanisms, the parties may structure solutions to problems of discrimination on an employer-wide or even an industry-wide level, so long as they do not "trammel the interest of non-minority employees."¹⁰³ They may also apportion the cost of such programs among themselves and within the industry, taking into account such factors as the distribution of labor costs and the structure of collective bargaining in the industry.

The decision in *Weber*, however, does not merely deny reverse discrimination as a potential challenge to private EEO activity. It endorses that private activity and actively extends its jurisdiction by validating a program collectively bargained over, agreed to, and enforced by the parties, which goes beyond the bare requirements of Title VII. The parties are given discretion to attack problems and fashion remedies beyond those that would have been open to the EEOC and the courts. They may produce results which are beyond those which Title VII requires, or those which a court might order to remedy a proven violation of the Act.¹⁰⁴ In this way, the *Weber* court has both removed a potential obstacle to private EEO measures and affirmatively added an active incentive, at least for minority group members, to seek to utilize those private mechanisms in vindicating their claims. In addition, the affirmative action program in *Weber* was designed "to eliminate conspicuous racial imbalance in traditionally-segregated job categories."¹⁰⁵ The Court did not define such categories, but the fact that it affirmed a program a designed to "abolish traditional patterns of racial seg-

of Federal Contract Compliance under Executive Order 11246, and both company and union sought to obviate private Title VII actions. *Weber v. Kaiser Aluminum Corp.*, 562 F.2d 216, 228-29 (5th Cir. 1977) (Wisdom, J., concurring).

102. *Weber v. Kaiser Aluminum Corp.*, 415 F. Supp. 761 (E.D. La. 1976).

103. The Supreme Court noted that the affirmative action here required no discharges of white employees, did not create an absolute bar to the advancement of whites, and was temporary in nature. *United Steelworkers v. Weber*, 443 U.S. at 208.

104. *Id.* at 200. See also *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 779 (1976) (collective bargaining serves the policies of Title VII, sometimes "furthering public policy interests beyond what is required by statute. . .").

105. 443 U.S. at 209.

regation and hierarchy"¹⁰⁶ may well indicate that such plans can deal with patterns of segregation in housing, education, and employment beyond the control of employer and the union,¹⁰⁷ even problems associated with so-called "de facto" segregation.¹⁰⁸ Finally, the private and voluntary nature of the plans should produce greater support for them, both within the union and from employers who have had a share in designing them, thus validating the broader discretion accorded by the *Weber* court to private, non-litigative processes.

In sum, unions may utilize their position in the collective bargaining relationship to secure terms and conditions of employment which are in accord with the purposes of our national non-discrimination policies. They may also advocate affirmative programs designed to alter long-standing and often non-litigable inequities, and as in *Weber*, even majority employees may benefit from the programs generated.

The Employer's Duty To Provide Information To The Union

Intertwined with the duty to bargain in good faith is the employer's duty to supply the union, upon request, with sufficient information to enable the latter to understand, intelligently discuss, and act upon the issues raised in the bargaining process.¹⁰⁹ The concept of good-faith bargaining implies rational dialogue, "an interchange of ideas, [and] communication of facts peculiarly within the knowledge of either party."¹¹⁰ The refusal to supply information is as much a part of a violation of § 8(a)(5) as any other failure to fulfill the duty to bargain.

The Supreme Court endorsed this fundamental principle in *NLRB v. Truitt Mfg. Co.*¹¹¹ During contract negotiations, the employer asserted that it was financially unable to meet the union's wage demands and that satisfaction of the union's demands would put it out of business. The union requested that the employer allow it to examine the company's books and records. In deciding that the company's refusal to allow such an examination violated § 8(a)(5), the

106. *Id.* at 204.

107. Rabin, *Affirmative Action Programs Before and After Weber*, 32d ANNUAL N.Y.U. CONFERENCE ON LABOR 201, 234 (1979).

108. *Keyes v. School Dist. No. 1*, 413 U.S. 189, 208 (1973).

109. *See generally* C. MORRIS, *THE DEVELOPING LABOR LAW*, ch. 11, § IV (1971).

110. *S.C. Allen & Co.*, 1 N.L.R.B. 714 (1936).

111. 351 U.S. 149 (1956).

Supreme Court held that "[G]ood faith bargaining necessarily requires that claims made by either bargainer should be honest claims. . . . If such an argument is important enough to present in the give-and-take of bargaining, it is important enough to require some sort of proof of its accuracy. . . ."¹¹² The Court's decisions in *Truitt* endorsed a long series of Board cases¹¹³ finding violations of the duty to bargain where employers refused to substantiate and prove assertions of poor financial conditions. Moreover, the duty to provide information continues through the life of the agreement, at least to the extent that access to new or additional information is necessary to enable the parties to administer the contract and resolve grievances or disputes. Thus, in *NLRB v. Acme Industrial Co.*,¹¹⁴ the employer's refusal to provide information was found to be a violation of its duty to bargain under § 8(a)(5) when the union had filed grievances regarding a sub-contracting dispute and requested that the company supply it with information concerning the underlying subject matter of the grievance.¹¹⁵

The Supreme Court and the Board have adopted a liberal test for determining what information must be turned over to the union. Information must be conveyed where there is a "probability that the desired information [is] relevant and that it would be of use to the union in carrying out its statutory duties and responsibilities."¹¹⁶ The standard for relevance is to be the relatively broad one used in pre-trial discovery.¹¹⁷ The breadth of this relevancy test has important ramifications for unions which utilize the collective bargaining process to confront EEO issues.

Accurate and comprehensive information is a necessary precondition for union activity which seeks to secure equal employment opportunity. The union needs to know, for example, the distribution and placement of minorities and women through departments and pay grades and the effect of such existing contract provisions as seniority and transfer rules on these groups. Such basic data is critical both for those unions attempting to deal with practices

112. *Id.* at 152-53.

113. *Pioneer Pearl Button Co.*, 1 N.L.R.B. 836, 842-43 (1936); *Fawcett Printing Corp.*, 201 N.L.R.B. 964 (1973). See Fanning, *The Obligation to Furnish Information During the Contract Term*, 9 GEO. L. REV. 375 (1975).

114. 385 U.S. 432 (1967).

115. *Id.* at 439.

116. *Id.* at 437; *NLRB v. Item Co.*, 220 F.2d 956 (2d Cir. 1955); *NLRB v. Jacobs Mfg. Co.*, 196 F.2d 680 (2d Cir. 1952).

117. *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 437 n.6 (1967).

which may violate federal EEO statutes, and for those considering or advocating affirmative programs designed to meet economic inequities. As noted above, it is now clear that privately bargained affirmative programs akin to that instituted in *Weber* may push beyond what Title VII requires of unions, and even beyond what a court might order to remedy a past proven violation of the statute.¹¹⁸ In embarking on such programs the union and the employer are acting in a manner analogous to a legislature, dealing with deeply rooted social and economic problems,¹¹⁹ but without the constitutional ramifications of government action.¹²⁰

The increased number of anti-discrimination clauses in national collective bargaining agreements,¹²¹ along with unions' efforts to enforce these clauses through the collective bargaining process¹²² and through their advocacy of affirmative action measures,¹²³ have brought a number of EEO issues before the NLRB. In particular, union requests for data and information on the racial and sexual composition of the employer's workforce and employer resistance to such demands have sparked a flurry of administrative proceedings before the Board and in the courts. Since 1978, ten cases have been decided by the NLRB on this and related issues.¹²⁴ Numerous other

118. *United Steelworkers v. Weber*, 443 U.S. 193, 202 (1979).

119. *Fullilove v. Klutznick*, ___ U.S. ___, 100 S. Ct. 2758 (1980). *See also Ford Motor Corp. v. Huffman*, 345 U.S. 330, 338 (1953) ("A wide range of reasonableness must be allowed a statutory, bargaining representative serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.").

120. ___ U.S. ___, 100 S. Ct. at 2780.

121. *See* notes 53-56, 77-81 *supra* and accompanying text.

122. *See, e.g., IMC Chemical*, 73 Lab. Arb. 215 (1979) (Owen, Arb.) (arbitration award of "constructive seniority" to applicants rejected because of race or sex). *See also* notes 80-88 *supra* and accompanying text.

123. *E.g., United Steelworkers v. Weber*, 443 U.S. 193 (1979), discussed at notes 93-106 *supra*.

124. *Southwestern Bell Tel. Co. & Communications Workers of America*, 103 L.R.R.M. 1127 (247 NLRB No. 27) (1980); *Brazos Electrical Power Coop., Inc. & IBEW Local 346*, 101 L.R.R.M. 1003 (241 NLRB No. 160) (1979); *Bendix Corp. & IUE Local 759*, 101 L.R.R.M. 1118 (242 NLRB No. 8) (1979); *Safeway Stores, Inc. & Retail Clerks, Local 455*, 100 L.R.R.M. 1382 (240 NLRB No. 138) (1979); *Markle Mfg. & IUE*, 100 L.R.R.M. 1230 (239 NLRB No. 187) (1979); *Safeway Stores, Inc. & Local 455, Retail Clerks*, 100 L.R.R.M. 1251 (239 NLRB No. 187) (1979); *Kentile Floors, Inc. & Rubber Workers, Local 505*, 101 L.R.R.M. 1236 (242 NLRB No. 115) (1979); *GM Corp. & IUE*, 101 L.R.R.M. 1461 (243 NLRB No. 19) (1979); *White Farm Equip. Co. & IUE*, 101 L.R.R.M. 1470 (242 NLRB No. 201) (1979); *The Bendix Corp. & Local 897 IUE*, 101 L.R.R.M. 1459 (242 NLRB No. 170) (1979); *East Dayton Tool & Die Co.*, 99 L.R.R.M. 1499 (239 NLRB No. 20) (1978); *Westinghouse Elec. Corp.*, 99 L.R.R.M. 1482 (239 NLRB No. 19) (1978).

cases are pending before the Board or have been settled.¹²⁵ Seven petitions for Review and Cross-Applications for Enforcement of Board orders are presently pending before the Court of Appeals for the District of Columbia.¹²⁶ The most significant of these involve the Board's decisions in *Westinghouse Electric Corporation*¹²⁷ and *East Dayton Tool & Die Co.*¹²⁸

The International Union of Electrical, Radio and Machine Workers, AFL-CIO, CLC ("IUE") has represented approximately 22,000 employees at forty Westinghouse plants across the country since 1950.¹²⁹ The elimination of race and sex discrimination has been a regular subject of national bargaining between the parties. In 1954, IUE and Westinghouse inserted in their national collective bargaining agreement for the first time a provision "reaffirming their intention that the provisions of this agreement and of local supplements will continue to be applied without discrimination

125. White Consol. Indus., Case No. 8-CA-13941; Emerson Elec. Co., Case No. 14-CA-12654; Chrysler Corp. Airtemp Div., Case No. 9-CA-13941; Ambec Indus., Inc., Case No. 26-CA-7959; Stackpole Carbon Co., Case No. 6-CA-12605; Lucky Markets, Case No. 31-CA-8898; Walt Disney Prods., Case No. 31-CA-9467 (complaint issued, resolved through voluntary settlement); General Elec. Corp., Case No. 1-CA-16074 (complaint issued, resolved through voluntary settlement). Telephone interview with Michael Balsamo, NLRB Office of General Counsel (May 13, 1980).

126. GMC and IUE, NLRB Case No. 9-CA-9275, 243 NLRB No. 19 (June 29, 1979), *petitions for review and application for enforcement pending*, Nos. 79-1682, 79-1892, 79-2563 (D.C. Cir.); White Farm Equip. and IUE, NLRB Case No. 9-CA-8835, 242 NLRB No. 201 (June 22, 1979), *petitions for review and application for enforcement pending*, Nos. 79-1654, 79-1864, 79-2562 (D.C. Cir.); The Bendix Corp. and IUE Local 807, NLRB Case No. 24-CA-7316, 242 NLRB No. 170 (June 11, 1979), *petition for review and application for enforcement pending*, Nos. 79-1609, 79-1795 (D.C. Cir.); Automation and Measurement Div., The Bendix Corp. and IUE, NLRB Case No. 9-CA-8762, 242 NLRB No. 8 (May 8, 1979), *petition for review pending*, No. 79-1479 (D.C. Cir.); Westinghouse Elec. Corp. & IUE, NLRB Case No. 6-CA-7680, 239 NLRB No. 19 (October 31, 1978), *petition for review and application for enforcement pending*, Nos. 78-2067, 78-2262, 80-1181, 80-1182, 80-1183 (D.C. Cir.); East Dayton Tool & Die Co. and IUE, NLRB Case No. 9-CA-8887, 239 NLRB No. 20 (October 31, 1978), *petitions for review and application for enforcement pending*, Nos. 78-2066, 78-2261, 79-2395 (D.C. Cir.); Kentile Floors, Inc. and United Rubber, Cork, Linoleum and Plastic Workers, Local 505, NLRB Case No. 13-CA-15224, 242 NLRB No. 115 (June 4, 1979), *petition for review and application for enforcement pending*, Nos. 79-1641, 79-2055 (D.C. Cir.).

127. 99 L.R.R.M. 1482 (239 NLRB No. 19) (1978).

128. 99 L.R.R.M. 1499 (239 NLRB No. 20) (1978).

129. Westinghouse Elec. Corp., Case No. 6-CA-7680, slip op. at 5, NLRB Region 6, Pittsburgh, Pa. (Decision of Administrative Law Judge Marvin Roth, Feb. 17, 1976) [hereinafter cited as A.L.J. Decision]. See also Note, *The Union as Title VII Plaintiff: Affirmative Obligation to Litigate?* 126 U. PA. L. REV. 1388 (1978).

because of race, creed, color, or national origin."¹³⁰ Over the years the union also proposed, generally without success, contract language dealing with issues of equal pay, pregnancy benefits, plant-wide posting of jobs, and other EEO issues.¹³¹ The anti-discrimination clause of the agreement was amended in 1966 to include a reference to sex and again in 1970 to add age.¹³² The anti-discrimination clause, however, is not subject to contractual arbitration.¹³³ As a consequence, the IUE has made clear that it is willing to institute litigation against the company in order to eliminate what it considers to be discriminatory practices. The union has, in fact, filed charges with the EEOC and instituted class actions against Westinghouse to remedy alleged sex discrimination.¹³⁴

Beginning in 1972, IUE requested that the company furnish various data on the racial and sexual composition of its workforce.¹³⁵ The company generally rejected these requests, although some data was furnished which indicated that female employees were predominantly employed at lower labor grades than men.¹³⁶ In June, 1974, the Union renewed its demand for EEO information, specifically requesting from each Westinghouse location represented by the IUE a breakdown of labor grade, classification and wage rate, day work and incentive basis, seniority, hiring, and promotions or upgrades, all tallied by race, sex, and Spanish surname. The IUE also sought a list of fair employment complaints and charges filed against Westinghouse under federal and state laws.¹³⁷ The union later requested

130. Westinghouse's employment practices, particularly with respect to sex discrimination issues such as wage differentials and pregnancy benefits, have been the subject of numerous administrative and judicial proceedings. As far back as 1945, Westinghouse was found to have long-standing wage differentials between rates for women's and men's jobs; as a result women were paid significantly less than men for performing similar work. General Elec. Co. & Westinghouse Elec. Corp., 28 War Lab. Bd. Rep. 666.

131. A.L.J. Decision, *supra* note 129, at 8.

132. *Id.*

133. *Id.*

134. *See, e.g.,* IUE v. Westinghouse Elec. Corp., 19 Fair Empl. Prac. Cas. 450 (D.N.J. 1979).

135. A.L.J. Decision, *supra* note 129, at 10.

136. *Id.*

137. The union specifically requested the following:

1. The number of male and female employees, blacks, and Spanish-surnamed employees at each labor grade.
2. The number of employees by race, sex, and Spanish surname in each classification in the bargaining unit and the wage rate for each classification.
3. The number of employees by race, sex, and Spanish surname in

copies of Westinghouse's most current Affirmative Action program¹³⁸

each classification in each plant who are paid on a daywork basis and who are paid on an incentive basis.

4. The number of employees by race, sex, and Spanish surname who have less than 1 year's seniority, 1-2 years' seniority, 3-4 years' seniority, 5-9 years' seniority, 10-19 years' seniority, and 20 or more years' seniority.
5. The number of persons hired in each classification during the 12-month period ending May 31, 1974, with a breakdown as to sex, race, and Spanish surnames, showing the sex of all black and Spanish-surnamed persons.
6. The number of promotions or upgrades for the 12-month period ending May 31, 1974, broken down by race, sex, and Spanish-surnamed persons showing the job level of each upgraded employee prior to and subsequent to each such upgrade and the race, sex, and whether Spanish-surnamed for each of these upgraded employees.
7. A list of all complaints and charges filed against Westinghouse under the Equal Pay Act, Title VII, Executive Order 11246, and state fair employment practices laws, and copies of each complaint or charge.

Id. at 3.

138. Affirmative Action Programs (AAP) are mandated by the Office of Federal Contract Compliance Programs of government contractors pursuant to Executive Order 11246, 30 Fed. Reg. 12319 (1965). The requirements of such AAPs are set out in Revised Order 4, Affirmative Action Guidelines, 41 C.F.R. 60-2 (1978). An AAP is a "set of specific and result-oriented procedures to which a contractor commits himself to apply every good faith effort. . . ." Revised Order 4, Affirmative Action Guidelines, 41 C.F.R. 60-2 (Oct. 20, 1978). Specific requirements include the following:

An acceptable affirmative action program must include an analysis of areas within which the contractor is deficient in the utilization of minority groups and women, and further, goals and timetables to which the contractor's good faith efforts must be directed to correct the deficiencies and, thus to achieve prompt and full utilization of minorities and women, at all levels and in all segments of his work force where deficiencies exist.

. . . .

§ 60-2.12 Establishment of goals and timetables.

(a) The goals and timetables developed by the contractor should be attainable in terms of the contractor's analysis of his deficiencies and his entire affirmative action program.

. . . .

(c) Goals should be significant, measurable and attainable.

(d) Goals should be specific for planned results, with timetables for completion.

. . . .

§ 60-2.23 Identification of problem areas by organizational units and job group.

. . . .

(b) If any of the following items are found in the analysis, special

and accompanying Work Force Analysis¹³⁹ for each of the plants covered by the national agreement.

The company rejected the union's information request, maintaining that such information was not material or relevant to the existing bargaining relationship, that it would be burdensome to compile, and that it was to be used to secure information on which to base further lawsuits.¹⁴⁰ A series of negotiations followed the union's information requests but the parties ultimately reached impasse on the issue.¹⁴¹

corrective action should be appropriate.

(1) An "underutilization" of minorities or women in specific job groups.

(2) Lateral and/or vertical movement of minority or female employees occurring at a lesser rate (compared to work force mix) than that of nonminority or male employees.

(3) The selection process eliminates a significantly higher percentage of minorities or women than nonminorities or men.

(4) Application and related preemployment forms not in compliance with Federal legislation.

(5) Position descriptions inaccurate in relation to actual functions and duties.

(6) Formal or scored selection procedures not validated as required by the OFCCP Uniform Guidelines on Employee Selection Procedures.

Id.

139. A Work Force Analysis (WFA) is an integral part of the AAP. It is defined as: "A listing of each job title as appears in applicable collective bargaining agreements or payroll records. . . ." *Id.* at 60-2.11.

For each job title the total number of male and female incumbents, and the total number of male and female incumbents in each of the following groups must be given: Blacks, Spanish-surnamed Americans, American Indians, and Orientals. The wage rate or salary range for each job title must be given. All job titles, including all managerial job titles, must be listed.

(b) An analysis of all major job groups at the facility, with explanation if minorities or women are currently being underutilized in any one or more job groups ("job groups" herein meaning one or a group of jobs having similar content, wage rates and opportunities). "Underutilization" is defined as having fewer minorities or women in a particular job group than would reasonably be expected by their availability.

Id.

140. A.L.J. Decision, *supra* note 129, at 11-14.

141. *Id.* at 15. With respect to the AAP, Westinghouse contended it contained confidential financial information and "candid self-analysis." The company counter-proposed furnishing work force data to the union if the union "would agree to treat this information as strictly confidential, commercial, or financial information and agree not to release it or publicize it in any way." *Id.* at 14. The union responded by offering to treat the proffered information as confidential for "representation purposes," which

While the negotiations were proceeding, the union had filed unfair labor practice charges against Westinghouse, and a complaint was issued charging Westinghouse with violations of § 8(a)(5)¹⁴² and § 8(a)(1)¹⁴³ of the NLRA. On February 16, 1976, after a lengthy hearing, Administrative Law Judge Marvin Ross found that Westinghouse had violated the Act by refusing to furnish the IUE with the information requested as that information applied to bargaining unit employees.¹⁴⁴ As a remedy for these unfair labor practices, the Administrative Law Judge ordered Westinghouse to produce, with limited exceptions, the information requested by the union. Both Westinghouse and the union filed exceptions to the Administrative Law Judge's opinion.

Oral arguments before the full 5-member Board were ordered in this and the companion *East Dayton Tool & Die Co.* case.¹⁴⁵ This is an unusual procedure reserved for issues of importance concerning administration of the NLRA. In addition to the charging union and respondent, a number of national organizations participated as *amici curiae* before the Board in these cases.¹⁴⁶ The Board affirmed the Administrative Law Judge's decision in most particulars and found that Westinghouse had violated the Act.¹⁴⁷

The Board's analysis began with a review of the legal principles of the employer's duty to disclose information to a union. Applying the liberal test of relevancy,¹⁴⁸ the Board found that the infor-

it defined as use 1) to formulate demands for collective bargaining negotiations; 2) to decide on the most appropriate course of action in connection with employee grievances; 3) to determine the need for proceeding before federal and state courts and agencies to protect the rights of employees; 4) for use as evidence in grievance proceedings and proceedings before administrative agencies or courts. *Id.* at 15. This was unacceptable to Westinghouse.

142. 29 U.S.C. §§ 158(a)(5), note 40 *supra*.

143. 29 U.S.C. § 158(a)(1) provides: "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

144. A.L.J. Decision, note 129 *supra*.

145. *East Dayton Tool & Die Co.*, 99 L.R.R.M. 1499 (239 NLRB No. 20) (1978). In this case the IUE had requested *inter alia* the number of applicants seeking employment with the company and the number of persons hired, both broken down by race and sex, and the reasons why the company employed so few females and blacks.

146. These included the Equal Employment Opportunity Commission, the United Automobile Workers, the United States Department of Labor, and the Equal Employment Advisory Council.

147. *Westinghouse Elec. Corp.*, 99 L.R.R.M. 1482 (239 NLRB No. 19) (1978). The Board also held that the employer in *East Dayton* had likewise violated the Act. 99 L.R.R.M. 1499 (239 NLRB No. 20) (1978).

148. See note 117 *supra*.

mation requested by the union was undoubtedly relevant to the IUE's role as collective bargaining representative. The contract between the IUE and Westinghouse contained a non-discrimination clause,¹⁴⁹ and the Board found that the union's request for race and sex data constituted an effort by the union to determine whether the contractual non-discrimination policy was being followed. The request was thus an effort by the union to monitor and police the terms of the collective bargaining agreement.¹⁵⁰ The majority view was that even absent an anti-discrimination clause in a collective bargaining agreement, the union's status as a representative of the employees and its consequent duty of fair representation¹⁵¹ entitled the union to information related to race and sex in order to make contract proposals and to take other appropriate action to correct employment discrimination.¹⁵² Setting out a broad rule for future cases, the Board held that it would apply the same procedural stan-

149. See notes 129-37 *supra* and accompanying text.

150. Westinghouse Elec. Corp., 99 L.R.R.M. at 1486.

151. The duty of fair representation (DFR), a corollary of the unions' exclusive representative status, is a judicially created doctrine first enunciated in *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944). In *Steele*, which arose under the Railway Labor Act, 45 U.S.C. §§ 151-163 (1976), the union had excluded blacks from membership and negotiated seniority provisions designed to deprive blacks of job opportunities. The Court held that such actions violated the union's duty to represent employees "without hostile discrimination, fairly, impartially, and in good faith." *Id.* at 204. Nine years later, the duty was applied to unions covered by the NLRA. *Ford Motor Co. v. Hoffman*, 345 U.S. 330 (1953). In the grievance processing context, however, "A breach of the statutory duty of fair representation occurs only when a union's conduct . . . is arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967) (citations omitted). *Vaca* also took cognizance of the NLRB's holding in *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963), that a breach of the DFR constitutes an unfair labor practice under § 8(b) of the NLRA. For breach of the DFR, a union may be sued for damages, *Vaca v. Sipes*, 386 U.S. 171 (1967), or injunctive relief, *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944), or have its NLRB certification revoked, *Hughes Tool Co.*, 104 N.L.R.B. 318, 32 L.R.R.M. 1010 (1953).

The literature on the DFR is extensive. See, e.g., THE DUTY OF FAIR REPRESENTATION: PAPERS FROM THE NATIONAL CONFERENCE ON THE DUTY OF FAIR REPRESENTATION (J. McKelvey ed., Cornell University 1977); Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 COLUM. L. REV. 563 (1962); Clark, *The Duty of Fair Representation: A Theoretical Structure*, 51 TEXAS L. REV. 1119 (1973); Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151 (1957).

152. Westinghouse Elec. Corp., 99 L.R.R.M. at 1486. The Board was silent about whether a union has an affirmative duty to seek out discrimination and try to eliminate it. Member Jenkins added that a union has, "in addition to and because of its duty of fair representation, an obligation to endeavor to prevent the establishment of a discriminatory practice and thus the correlative right to information relating to such discrimination." *Id.* at 1468 n.15. Whether Member Jenkins was here referring to a practice solely under the control of an employer is not clear.

dard to requests for statistical data relating to employment practices as it applied to requests for wage data, namely, that such information is presumed relevant.¹⁵³

Having determined that most of the requested information was relevant, the Board then addressed the company's defenses. Throughout the administrative proceedings, Westinghouse had asserted that the real reason the union requested the data was to prosecute lawsuits against it and not for bargaining purposes or administration of the collective agreement.¹⁵⁴ The majority rejected this contention. "[T]he availability of Title VII does not restrict rights under the National Labor Relations Act, and the existence of Title VII litigation should not restrict the union's statutory right to relevant information concerning alleged discrimination."¹⁵⁵ The use of overlapping forums and remedies in the labor relations area is common,¹⁵⁶ particularly in employment discrimination cases.¹⁵⁷ Therefore, the IUE's actions in filing and prosecuting administrative charges and lawsuits were not inconsistent with its duties as a bargaining representative.¹⁵⁸

The Board likewise rejected Westinghouse's contention that furnishing the information would be unduly burdensome. As a government contractor, Westinghouse already is required to compile most of the requested data.¹⁵⁹ The Board required the company to furnish the union with copies of all complaints and charges filed against it under federal and state fair employment laws, although it could delete the name of the charging party. Unlike the previous

153. The rule governing disclosure of data of this kind is not unlike that prevailing in discovery procedures under modern codes. There the information *must be disclosed unless it plainly appears irrelevant*. Any less lenient rule in labor disputes would greatly hamper the bargaining process, for it is virtually impossible to tell in advance whether the requested data will be relevant except in those infrequent instances in which the inquiry is patently outside the bargaining issue.

99 L.R.R.M. at 1487 (emphasis added) (quoting NLRB v. Yawman & Erbe Mfg. Co., 187 F.2d 947, 949 (2d Cir. 1951)).

154. A.L.J. Decision, *supra* note 129, at 4.

155. Westinghouse Elec. Corp., 99 L.R.R.M. at 1489.

156. *E.g.* NLRB v. C & C Plywood, 385 U.S. 421 (1967) (NLRB and Arbitrators have overlapping jurisdiction to enforce agreements).

157. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (unfavorable arbitration ruling does not prevent later Title VII suit); Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975) (§ 1981 provides remedy independent of Title VII in employment cases).

158. Westinghouse Elec. Corp., 99 L.R.R.M. at 1489.

159. *See* notes 138-39 *supra*.

data which the employer automatically was required to disclose, however, such information was not presumptively relevant. Disclosure was ordered because the union had demonstrated its need for the information. Unions must be able to gauge employee dissatisfaction in order to determine whether contract provisions were being complied with, and to decide what changes are necessary.¹⁶⁰

Finally, Westinghouse unsuccessfully contended that such charges and complaints were intended to be confidential. The majority held that Title VII was binding only upon the EEOC and did not govern relations between private parties. Title VII prohibitions against disclosure¹⁶¹ were aimed at making unproven charges unavailable to the general public¹⁶² and are thus inapplicable to the union acting in its representative capacity.¹⁶³

Board Member Murphy dissented vigorously from almost all aspects of the majority decision.¹⁶⁴ In Murphy's view, the Board's decision will require unions to seek such data from employers in order to protect themselves against potential liability under Title VII or the duty of fair representation. Those unions which do not

160. Westinghouse Elec. Corp., 99 L.R.R.M. at 1490.

161. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. . . . Any person who makes public information in violation of this subsection shall be fined not more than \$1,000 or imprisoned for not more than one year, or both. . . .

42 U.S.C. 2000e-5(b) (1976).

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

Id. at § 2000e-8(e). See also 29 C.F.R. 1601.20-26 (1979).

162. The legislative history of these proposals indicates that the Board is correct. The bans against making charges public were directed "at the making available to the general public of unproven charges." 110 CONG. REC. 12723 (1964) (remarks of Senator Humphrey). Section 709(e) was specifically directed at preventing "the Commission and its employees from making public information obtained by compulsory process in the course of its investigation except in the course of litigation arising under the title." *Id.* These provisions do not reach the issues of whether a union, acting pursuant to its responsibilities under the NRLA should have access to such charges. See also *H. Kessler & Co. v. EEOC*, 472 F.2d 1147, 1150 (5th Cir.), cert. denied, 412 U.S. 939 (1973).

163. Westinghouse Elec. Corp., 99 L.R.R.M. at 1492.

164. *Id.* at 1493-99 (Murphy, M., dissenting).

affirmatively seek out the data will risk being found to have acquiesced in unlawful practices of the employer. Further, she argued, since the requests are not for collective bargaining purposes, the adversarial relationship they engender will not encourage the peaceful settlement of labor disputes which the Act intended. By ordering the employer to turn over copies of the EEOC charges and the information prepared by the employer for federal enforcement agencies, the Board's decision breaches the confidentiality of such information and will make employers less candid in preparing such data. In sum, she urged that the Board's decisions will eventually produce negative results, including increased litigation, confusion among the parties as to their duties, and greater delay in administration of the Act.¹⁶⁵

The dissent's fears are misplaced. The decision of the Board majority in *Westinghouse* correctly applied well-settled labor law principles to a new factual setting.¹⁶⁶ First, the Board's decision provides the discovery tools necessary for unions to pursue effectively EEO issues within the particular collective bargaining relationship. Without the access to generalized data which the *Westinghouse* decision provides, the union must rely solely upon individual grievances and complaints from its members to assess the impact of contract provisions or other workplace practices on minorities and women. The Board's decision thus enables unions to negotiate, grieve and arbitrate, and take other action on behalf of minority workers much more effectively.

165. Member Murphy likewise dissented in *East Dayton*. Again she warned that unions now might be held liable for the discriminatory practices of the employers, in this case activity prior to the hiring of the employee. Such matters, in her view, are solely within the control of the employer and not subject to mandatory bargaining with the union. Data concerning applicants for employment was not relevant in any way to the union's representation of unit employees. A request for information concerning the race and sex of applicants for employment was thus not for any legitimate purpose of collective bargaining and properly denied by the company. *East Dayton Tool and Die Co.*, 99 L.R.R.M. at 1502-05 (239 NLRB No. 20) (Murphy, M., dissenting).

166. Unions are similarly requesting information on subjects other than race and sex data. For example, one Administrative Law Judge found that the employer violated §§ 8(a)(5) & 8(a)(1) of the Act by refusing to supply health-related data to the union. *Johns-Manville Sales Corp.*, Case No. 13-CA-17917 (Decision of Administration Law Judge Holley, May 1, 1980). The information at issue included the results of sputum cytology, X-rays, pulmonary function and blood tests administered to unit employees.

The Administrative Law Judge found that since the employees work with asbestos, a known hazardous material, the employer must disclose the test results because safety and health practices are part of the "terms and conditions of employment" contained in § 8(d) of the NLRA. *Id.*

Second, the statistical information requested in *Westinghouse* is undoubtedly relevant to the proper performance of the union's statutory duty of representing unit employees. Such statistics may often give rise to the inference of unlawful employer discrimination.¹⁶⁷ For example, such data may be used to identify jobs held predominantly by women and therefore may enable the union to explore whether wage rates for such jobs are lower in comparison to other jobs requiring equal skill, effort, and responsibility. Such a pattern would indicate a violation of Title VII and the Equal Pay Act.¹⁶⁸ Armed with such information, the union may choose among a variety of extended collective bargaining strategies. It may seek to negotiate new contract provisions, or revise existing contracts.¹⁶⁹ The IUE has, in fact, long attempted to negotiate improved job opportunities for women and minorities.¹⁷⁰ Alternatively, such data may indicate the effects that purportedly neutral contract provisions, such as seniority, transfer, and testing have upon minorities and women. Where these practices conflict with contractual EEO guarantees, such data may provide the basis for the initiation or processing of a grievance under the existing contract. The union's entitlement to data extends to information necessary to the processing of grievances.¹⁷¹ Because there is no basis for distinguishing between grievances based upon substantive contract provisions¹⁷² and those based on a more general non-discrimination clause,¹⁷³ the employer may be required to disclose all relevant data where EEO or other provisions are arbitrable.

Furthermore, the specific information demanded by the union—promotion patterns, job classifications, wage rates, and the

167. *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977); Grossman, *Statistical Proof*, 1979 PROCEEDINGS OF ANNUAL INSTITUTE ON LABOR LAW OF THE SOUTHWESTERN LEGAL FOUNDATION 205.

168. Section 6(d)(1) of the Fair Labor Standards Act of 1963, 29 U.S.C. §§ 201-19. (1976).

169. "The elimination of discrimination and its vestiges is an appropriate subject of bargaining and an employer may have no objection to incorporating into a collective agreement the substance of his obligation not to discriminate in personnel decisions. . . ." *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 69 (1975); *Jubilee Mfg. Co.*, 202 N.L.R.B. 277, 273 (" . . . an employer violates Section 8(a)(5) of the Act by refusing to bargain in good faith concerning the elimination of existing or alleged racial discrimination").

170. A.L.J. Decision, *supra* note 129, at 9.

171. *NLRB v. Acme Indus. Co.*, 385 U.S. 432 (1967).

172. See, e.g., the substantive provisions detailed at notes 56-81 *supra* and accompanying text.

173. See notes 53-55 *supra*.

like—have been traditional subjects of bargaining.¹⁷⁴ They are not made less so by a request for information broken down by race and sex.¹⁷⁵ Proposals to change wage rates of predominantly female job classifications fit precisely within a union's collective bargaining responsibilities. The union has both a statutory¹⁷⁶ and a contractual duty¹⁷⁷ to make a good faith effort to correct such discrimination. It has the corollary right to obtain information which will enable it to determine whether and in what areas to exert its bargaining power. It likewise has a subsequent responsibility to monitor the administration of the collective bargaining agreement so as to secure the contract's full benefits to its members, and this responsibility is not suddenly vitiated when the issues at hand involve equal employment opportunity. The union's only other access to information concerning enforcement of the agreement or EEO practices of the employer would be derived from the often episodic or happenstance filing of individual grievances. But information about individual grievances does not present the kind of overview necessary to evaluate the implementation of contract terms, particularly, as in *Westinghouse*, where the non-discrimination clause is non-arbitrable. In such a situation, employees are likely to proceed directly to the administrative agencies which enforce equal opportunity through the public sector, bypassing the grievance process altogether. The Board's finding that the information requested was presumptively relevant is clearly no more than the literal and necessary application of long-standing labor law principles to a particular substantive area of mandatory bargaining.

Finally, if individual requests for information were subject to demands for proof of their specific relationship to the negotiation or administration of contracts, the day-to-day operation of the collective bargaining process would be undermined. Employers would demand such proof and would be entitled to question the validity of the union response. This would entail additional administrative proceedings and needless delay. In determining that such data requests

174. Section 8(d) of the NLRA, note 41 *supra*, requires employers and unions to bargain collectively with respect to "wages, hours, and other terms and conditions of employment." For a discussion of the scope of such bargaining see C. MORRIS, *supra* note 109, at ch. 15.

175. "[E]limination of discrimination and its vestiges is an appropriate subject of bargaining." *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. at 69.

176. See discussion of the duty of fair representation, note 151 *supra*.

177. See notes 130-37 *supra* and accompanying text.

would be considered presumptively relevant, the Board relied upon its experience in the area of requests for wage data:

[T]his broad rule is necessary to avoid the disruptive effect of the endless bickering and jockeying which has heretofore been characteristic of union demands and employer reaction to requests by unions for wage and related information. The unusually large number of cases coming before the Board involving this issue demonstrates the disturbing effect upon collective bargaining of the disagreements which arise as to whether particular wage information sought by the bargaining agent is sufficiently relevant to particular bargaining issues. I conceive the proper rule to be that wage and related information pertaining to employees in the bargaining unit should, upon request, be made available to the bargaining agent without regard to its immediate relationship to the negotiation or administration of the collective-bargaining agreement.¹⁷⁸

The presumptive relevance standard thus substantially serves the goal of smooth administration of the NLRA.

The fact that the union might additionally use the data obtained for collective bargaining purposes to enforce statutory and contractual rights before a court does not undermine the conclusion that the information must be turned over to the union. Where, as in *Westinghouse*, arbitration is not available on certain issues, the union must seek other forums. Moreover, even if discrimination claims were arbitrable under the *Westinghouse-IUE* contract, the union need not choose between traditional collective bargaining remedies and litigation. The Supreme Court has unequivocally held that "Title VII was designed to supplement rather than supplant existing laws and institutions relating to employment discrimination."¹⁷⁹ As a consequence, overlapping remedies and procedures are common in labor relations. A Title VII action, for example, can be brought after an adverse determination of an ar-

178. *Westinghouse Elec. Corp.*, 99 L.R.R.M. at 1487 (citing *Whiten Machine Works*, 108 N.L.R.B. 1537, 1541 (1954) (Farmer, Chm., concurring)).

179. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48-49 (1974). The supplementary nature of Title VII has been reaffirmed in allied cases involving other remedies for discriminatory conduct. See *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 466 (1975) ("Congress clearly has retained § 1981 as a remedy against private discrimination separate from and independent of . . . Title VII").

bitrator¹⁸⁰ and the NLRB and arbitrators have concurrent jurisdiction to enforce collective bargaining agreements.¹⁸¹ The Board has found that the employer must disclose information where unfair labor practices may be filed,¹⁸² even if the union is at the same time seeking information in state court discovery proceedings.¹⁸³ As the Board noted, "[o]nce the requested information is found to be relevant to the union's representative function, it is not controlling that such information might also be used for other purposes."¹⁸⁴ A union's pursuit of equal employment through contract revision or the grievance process may ultimately prove fruitless. Litigation may then be the only method available to secure change in workplace rules. A strike or a trade-off of legitimate member demands for higher wages or other working conditions ought not to be required of a union seeking conscientiously to implement equal opportunity.¹⁸⁵ Similarly, the union ought not to leave EEO issues to individual litigation. Individual workers lack the union's broad perspective on company practices and policies; the disposition of such matters is of general importance to all employees in the unit. Litigation by the union,¹⁸⁶ then, is a necessary and rightful supplement to collective bargaining avenues for change. The possibility of such litigation provides no legitimate defense for a refusal to turn over information clearly relevant to the bargaining process.

Westinghouse and related cases provide the indispensable procedural mechanism for unions to police the collective bargaining agreement effectively and to meet their statutorily imposed duty of fair representation. Even more significant, these right to information cases provide the means for unions to assess the need for, and the potential success of, affirmative action programs which may go beyond the minimum requirements of the law. The discovery rights they accord to unions are the procedural analogues of the affirm-

180. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

181. *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 272 (1964).

182. *NLRB v. Rockwell-Standard Corp.*, 410 F.2d 953, 957 (6th Cir. 1969) (union entitled to information from employer to determine whether to file grievance or file unfair labor practice with the NLRB).

183. *Curtiss-Wright Corp.*, 193 N.L.R.B. 940, 943 (1971).

184. *East Dayton Tool & Die Co.*, 99 L.R.R.M. at 1499 n.6 (239 NLRB No. 20).

185. Such tactics would probably so divide the union's membership that the ultimate success of a strike action would be unlikely, at least where non-minority group employees comprise the majority of the union's membership.

186. *See, e.g., Social Serv. Union, Local 535 v. County of Santa Clara*, 21 Fair Empl. Prac. Cas. 684 (9th Cir. 1979); *Local 186, Int'l Pulp & Paper Mill Workers v. Minnesota Mining Co.*, 304 F. Supp. 1284 (N.D. Ind. 1969).

ative action sanctioned by the *Weber* case.¹⁸⁷ As discussed above, Title VII does not forbid unions and employers from creating solutions to longstanding workplace inequities even though the union and the employer may not be the origin of such inequities.¹⁸⁸ Moreover, neither the union nor the employer have to admit past violations of the Act, or even "arguable" violations of the Act, in order to institute such affirmative action programs.¹⁸⁹ Rather, the statute was intended to encourage employers and unions to examine and evaluate employment practices, permitting them to "endeavor to eliminate, so far as possible, the last vestiges" of discrimination.¹⁹⁰ The parties may, within limits,¹⁹¹ engage in voluntary race-conscious efforts to abolish "traditional racial patterns of segregation and hierarchy."¹⁹² Without the specific sorts of data discoverable under *Westinghouse*, however, the union would be in a poor position to advocate any such measures. *Weber*-type plans must be designed to deal with specific problems, a process which requires rational discussion and a bilateral approach. Since the employer is the only party with access to such information, unions must be able to secure that data through the processes of the NLRA. For this reason, the requirement that the employer disclose data is founded on the national policies underlying Title VII, as well as on the settled interpretation of the NLRA.

In sum, the Board's disclosure rulings are firmly grounded in past precedent and draw sustenance from general principles underlying our national labor and anti-discrimination policies. They reflect the adaptation of traditional union rights to an appropriate, if recent, EEO emphasis. By recognizing the importance of the sort of data discussed in this section, the NLRB and the courts provide the practical tools necessary to achieve the permissible and desirable goals discussed in the preceding section. The availability of such data is the final necessary component of union activism in EEO issues. Only by combining the full acceptance of EEO matters as a mandatory subject of collective bargaining with the availability of the internal and ongoing grievance and arbitration dispute resolution process is it possible to create an adequate private alternative to the litigation forum. But that alternative, once created, would be

187. *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

188. *Id.* at 200-01.

189. *Weber v. Kaiser Aluminum*, 563 F.2d 216, 230 (5th Cir. 1977) (Wisdom, J., dissenting).

190. *United Steelworkers v. Weber*, 443 U.S. at 208.

191. *Id.* at 204; see note 103 *supra*.

192. *United Steelworkers v. Weber*, 443 U.S. at 208.

hopelessly crippled if the agencies or the courts drew a procedural line where they refuse to draw a substantive one, that is by singling out EEO matters for different treatment with respect to the employer's duty to provide relevant information.

GOOD FAITH EFFORTS TO ACHIEVE EEO SHOULD PROVIDE
INSULATION FROM BACK PAY LIABILITY FOR UNIONS

The preceding section of this article sought to demonstrate that unions which wish to utilize the collective bargaining process have the necessary policy and statutory tools with which to do so. Certainly, the moral rectitude of redressing long-standing economic and social inequities provides a measure of incentive to unions to take up those tools and fashion appropriate EEO programs, particularly in light of labor's traditional concern with ethical and political issues that often transcend the immediate short-term interests of their members. Nevertheless, there are other, less altruistic reasons why unions will be well-served by developing an interest in EEO matters. Not only do these EEO pressures already exist, but they can be emphasized and increased by aggrieved female and minority workers, who provide reason to believe that, as time passes and the desirability and possibility of private EEO processes become more evident, those private processes will become increasingly utilized. This section seeks to detail the recent judicial and administrative policies which will contribute to that development.

Judicial determinations of violation of statutory duties can impose burdensome liability, particularly on financially vulnerable unions. Such litigation most often focuses on the discriminatory effects of collective bargaining agreements. The well-established rule in such cases is that unions which sign such discriminatory collective bargaining agreements, as well as their employer partners, violate Title VII,¹⁹³ and perhaps the duty of fair representation as well.¹⁹⁴ But recent policy initiatives by the EEOC and holdings by the lower

193. See, e.g., *Donnell v. General Motors Corp.*, 576 F.2d 1292 (8th Cir. 1978); *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir.), cert. denied, 404 U.S. 1006 (1971). See generally Note, *Union Liability for Employer Discrimination*, 93 HARV. L. REV. 702, 703-08 (1980).

194. See, e.g., *Macklin v. Spector Freight Sys., Inc.*, 478 F.2d 979 (D.C. Cir. 1973) (violation of duty of fair representation in contract provisions governing seniority and transfer); *Chrapliwy v. Uniroyal, Inc.*, 458 F. Supp. 252 (N.D. Ind. 1977) (sexually-segregated job classification system violated duty of fair representation). See generally Note, *Making Labor Unions Responsive to Working Women's Needs: Title VII and the Duty of Fair Representation Compared*, 2 HARV. WOMENS LAW J. 141 (1980).

federal courts establish the principle that good faith efforts to eliminate discriminatory employment practices should insulate a union from financial liability. This principle is in accordance with the policy and the text of Title VII as well as with the general rules of liability in labor law cases.

New Policy of the Equal Employment Opportunity Commission

On April 1, 1980, the EEOC adopted a resolution designed to encourage voluntary affirmative action by unions and employees:

1. Through its administrative processes, the Commission shall recognize the "good faith" efforts of unions and employers to eliminate discriminatory employment practices, whether undertaken in cooperation with each other or unilaterally; "good faith" must be of a compelling and aggressive nature evaluated on a case-by-case basis.
2. When engaged in investigation, conciliation, and enforcement, the Commission shall exercise its discretion in recognition of union or employer voluntary affirmative action that meets appropriate standards.¹⁹⁵

Within the EEOC, this discretionary policy will affect the processing of complaints and the decision whether to litigate against a particular respondent. In a memorandum accompanying the resolution, EEOC Vice-Chairman Daniel Leach emphasized that the new strategy is congruent with other recent EEOC initiatives designed to encourage voluntary compliance with the statute.¹⁹⁶ These recent initiatives include the "bottom line" principle of the Uniform Guidelines on Employee Selection Procedures¹⁹⁷ and the protections

195. EEOC, Resolution to Encourage Voluntary Affirmative Action in Collective Bargaining, [1980] 7 LAB. REL. REP. (BNA) 103.

196. Memorandum from EEOC Vice-Chairman Daniel Leach to Chairman Eleanor Holmes Norton (March 18, 1980).

197. 43 Fed. Reg. 38290 (1978). The Guidelines, jointly issued by the EEOC, the Civil Service Commission, the Department of Labor and the Department of Justice set out uniform principles on the use of tests and other selection procedures. The "bottom line" principle which they incorporate states that if the

total selection process for a job does not have an adverse impact, the Federal Enforcement Agency, in the exercise of their prosecutorial discretion, in usual circumstances will not expect a user to evaluate the individual components for adverse impact, or to validate such individual components and will not take enforcement action based upon adverse impact of any component of that process. . . .

Id. at § 4(c). They likewise provide that if the job selection for any race, sex, or ethnic

provided by EEOC's voluntary Affirmative Action Guidelines.¹⁹⁸ Although the EEOC had previously used its discretionary authority to evaluate individual union's and employer's conduct in determining Title VII violations,¹⁹⁹ the April 1, 1980 resolution was its first general policy statement regarding collective bargaining issues. Such general policy guidance helps private parties conform their behavior to legal expectations.

These new EEOC directions mobilize the prosecutorial discretion inherent in a federal enforcement agency to provide specific and meaningful incentives for private parties to comply voluntarily with the law. They are also consistent with the specific role that the EEOC was established to play. Describing Title VII and the functions of the EEOC, Justice Powell in *Alexander v. Gardner-Denver Co.*,²⁰⁰ noted:

Cooperative and voluntary compliance were selected as the preferred means for achieving [the elimination of unlawful employment discrimination]. To this end Congress created the Equal Employment Opportunity Commission. . . . In the Equal Employment Act of 1972, Pub. L. 92-261, 86 Stat. 103, Congress amended Title VII to provide the Commission with further authority to investigate individual targets of discrimination, to promote voluntary compliance with the requirements of Title VII, and to institute civil actions against employers or unions named in a discrimination charge.²⁰¹

Title VII therefore constitutes strong encouragement to employers and labor organizations to act voluntarily to modify discriminatory employment practices and systems without awaiting litigation or

group is greater than 80%, as compared to other applicants, federal enforcement agencies will not generally find "adverse impact" upon the protected group. *Id.* at § 4(d). An employer who reforms his selection process will thus not be sued under Title VII or under Executive Order 11246.

198. 44 Fed. Reg. 4422 (1979). These guidelines provide that when employers who have reason to believe their practices may be discriminatory take voluntary steps to change them, the EEOC will not find them in violation of Title VII on grounds of "reverse discrimination." See also *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

199. See, e.g., EEOC Decision No. 70-112 (Sept. 15, 1969) EMPL. PRAC. GUIDE (CCH) ¶ 6108 (union consistently opposing employer's sex discriminatory wage policies has not violated Title VII even though collective bargaining agreement incorporated discriminatory provisions).

200. 415 U.S. 36 (1974).

201. *Id.* at 44. *Accord*, *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641, 650 (5th Cir. 1974); *Airline Stewards and Stewardesses v. American Airlines, Inc.*, 455 F.2d 101, 109 (7th Cir. 1972). See also *Hutchings v. United States Indus. Inc.*, 428 F. Supp. 303 (5th Cir. 1979).

formal governmental action. The EEOC has stressed that nondiscrimination and voluntary action are mutually consistent and interdependent methods for ameliorating the social and economic conditions which precipitated the enactment of the Civil Rights Act.²⁰² While the details of the EEOC's view of "good faith efforts" to eliminate discrimination have yet to be developed, these recent administrative policies reflect sensitivity to the dynamics of the bargaining process, to the developing case law in the field, and to variation among degrees of culpability in EEO matters. Most important, they recognize the indispensable role that private parties can play and the desirability of providing tangible incentives to encourage such parties to act.

Judicial Determination of Union Liability for Back Pay Under EEO Laws

Labor organizations are subject to our national nondiscrimination policy both under statutory provisions²⁰³ and under the judicially-created duty of fair representation.²⁰⁴ A union thus has a duty to eliminate discriminatory employment practices whether those practices or their impact are of the union's own design and invention, are created as a result of a collective agreement with an employer, or are simply the result of passive acquiescence to

202. EEOC Affirmative Action Guidelines, note 198 *supra*.

203. Sections 703(c) and (d) of Title VII provide:

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

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

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

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

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in any program established to provide apprenticeship or other training.

42 U.S.C. §§ 2000e-2(c) to -2(d) (1976).

204. See note 151 *supra*.

employer practices that a reasonably prudent union should have known about and acted upon. Although statutory liability is imposed without regard to subjective intent,²⁰⁵ the union's aggressiveness, or lack of it, regarding EEO matters is crucial when remedies, particularly back pay, are at issue.

Where unions are the dominant or exclusive force behind the discriminatory practice, issues include discriminatory union hiring halls²⁰⁶ and membership rules,²⁰⁷ limits on apprenticeship opportunities,²⁰⁸ and the like. Also in this category are cases in which unions use their bargaining leverage to force employers to accept discriminatory practices upon union initiative.²⁰⁹ The applicable legal principles and the facts at issue in these cases leave no doubt that such practices clearly violate Title VII.

The second major category of cases concerns union liability for discriminatory practices which are part of, or perpetuated by, collective bargaining agreements. This is by far the largest category of cases. The general rule that has emerged is that a union is liable for such discriminatory practices even if the contract is facially neutral, regardless of the union's good faith in negotiating the contract.²¹⁰ This rule is based on two premises. The first is that unions generally know the effect that the incorporation or continuation of contract provisions has upon unit employees. "Common sense demands that a union be held for the natural consequences of its labors of negotiating a collective bargaining agreement."²¹¹ The fact that the

205. See notes 210-18 *infra* and accompanying text.

206. *E.g.*, *United States v. Local 357, IBEW*, 356 F. Supp. 104 (D. Nev. 1973) (union violates Title VII when it operates hiring hall that limits jobs, information, and membership to whites).

207. *E.g.*, *EEOC v. Enterprise Ass'n Steamfitters Local 638*, 542 F.2d 579 (2d Cir. 1976) (union responsible for discrimination in membership and referral policies); *Local 53, Heat & Frost Insulators v. Vogler*, 407 F.2d 1047 (5th Cir. 1969) (union's membership requirements are discriminatory).

208. *E.g.*, *United States v. Sheet Metal Workers Local 36*, 416 F.2d 123 (8th Cir. 1969) (union's failure to publicize that its apprenticeship training is now open to blacks violates Title VII).

209. *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir. 1974).

210. See, *e.g.*, *Patterson v. American Tobacco Co.*, 535 F.2d 257 (4th Cir. 1976) (both local and international unions liable for seniority provisions that perpetuated effects of past discrimination); *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir.), *cert. denied*, 404 U.S. 1006 (1971) (seniority system perpetuating past discrimination); *Macklin v. Spector Motor Freight Sys., Inc.*, 478 F.2d 979 (D.C. Cir. 1973); *Chrapliwy v. Uniroyal, Inc.*, 458 F. Supp. 252 (N.D. Ind. 1977); *Stevenson v. International Paper Co.*, 14 Fair Empl. Prac. Cas. 1279 (W.D. La. 1977) (collective bargaining agreement segregated women into lowest paying jobs and restricted transfers).

211. *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1381 (5th Cir. 1974).

union may not have "intended" such discriminatory effect is of no moment. In *Griggs v. Duke Power Co.*,²¹² the Court held that the "intentional" discriminatory practices banned by Title VII²¹³ are those which defendants have engaged in deliberately rather than accidentally.²¹⁴ "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation."²¹⁵ In areas such as testing, educational requirements or job classification, practices and procedures neutral on their face (and even those neutral in terms of subjective intent) cannot be maintained if they operate to "freeze the status quo of prior discriminatory employment practices."²¹⁶ Proof of discriminatory intent is specifically not required under the "disparate impact" theory of employment discrimination.²¹⁷ The other premise for finding union liability for collective bargaining provisions is that doing so effectuates the policy of Congress in enacting Title VII. Title VII was enacted to require employers and unions to examine their practices in an attempt to end discriminatory practices voluntarily.²¹⁸ Without such private initiative outside of the courtroom, the aims of the statute might never be achieved.

The third major category of recent cases holding unions responsible for EEO matters often overlaps the collective bargaining situations just discussed. These cases, however, generally concern union acquiescence in employment practices which are *not* embodied in a collective agreement. A number of courts have found that union "passivity" in the face of clear discriminatory practices may violate Title VII and the duty of fair representation. Such practices may include an employer's discriminatory hiring,²¹⁹ testing,²²⁰ or other like

212. 401 U.S. 424 (1971).

213. "If the Court finds that the respondent has *intentionally* engaged in or is intentionally engaging in an unlawful employment practice. . . ." 42 U.S.C. § 2000e-5(g) (1976) (emphasis added).

214. 401 U.S. at 430.

215. *Id.* at 432.

216. *Id.* at 430.

217. *International Bhd. of Teamsters v. United States*, 431 U.S. 342, 335-36 n.15 (1977). Intent may be crucial, however, in cases alleging disparate treatment. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

218. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975).

219. *United States v. City of Buffalo*, 457 F. Supp. 612 (W.D.N.Y. 1978) (allegations of union acquiescence in discriminatory acts of employer states a claim against union for breach of duty of fair representation); *Hairston v. McLean Trucking*, 62 F.R.D. 642 (M.D.N.C.), *vacated on other grounds*, 520 F.2d 226 (4th Cir. 1974) (union knew of employer's discriminatory hiring action and encouraged such by its own inaction).

220. *EEOC v. Detroit Edison*, 515 F.2d 301 (6th Cir. 1975); *Lewis v. Bethlehem Steel Corp.*, 440 F. Supp. 949 (D. Md. 1977); *Dickerson v. United States Steel*, 439 F.

policies. In *McDonald v. Sante Fe Trail Transportation Co.*,²²¹ for example, the Supreme Court found the union to have violated Title VII by not processing a grievance regarding an employer's discharge of a white employee. Other courts, however, have explicitly refused to hold a union liable for employer unilateral discrimination, even though the union had notice of the discriminatory conduct.²²²

Once a violation of the statute has been established in a Title VII action, emphasis shifts to the question of remedy. Section 706(g) provides:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, * * * or any other equitable relief as the court deems appropriate.²²³

Congress has thus granted courts "broad discretion to fashion remedies in Title VII cases as the equities of the particular case compel."²²⁴ The remedies available under § 706(g) include varieties of injunctive relief, back pay, front pay, constructive seniority, affirmative recruitment programs, costs, and attorney fees.²²⁵ Because of the complexity of Title VII actions, the courts have increasingly found it necessary to bifurcate Title VII actions, especially class ac-

Supp. 55 (E.D. Pa. 1977), *rev'd on other grounds*, 582 F.2d 827 (3d Cir. 1978) (union acquiescence in company's discriminatory testing and assignment policies actionable under Title VII and § 1981). In the reverse situation, courts have sometimes found employers liable for union discriminatory conduct. *E.g.*, *Commonwealth v. Local 542*, 469 F. Supp. 329 (E.D. Pa. 1978) (contractors association liable because of acquiescence in union discriminatory membership and hiring hall practices); *accord*, *EEOC v. Enterprise Ass'n Steamfitters Local 638*, 542 F.2d 579 (2d Cir. 1976), *cert. denied*, 430 U.S. 911 (1977) (same).

221. 427 U.S. 273 (1975). *Cf. Peterson v. Rath Packing Co.*, 461 F.2d 312 (8th Cir. 1972) (union violation of duty of fair representation in failure to process grievances).

222. *Thornton v. East Texas Motor Freight*, 497 F.2d 416 (6th Cir. 1974). *See generally* Note, *Union Liability for Employer Discrimination*, 93 HARV. L. REV. 702, 708-24 (1980).

223. 42 U.S.C. § 2000e-5(g) (1976).

224. *LeBlanc v. Southern Bell Tel. & Tel. Co.*, 460 F.2d 1228, 1229 (5th Cir. 1972).

225. *See generally* SCHLEI & GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* chs. 37-39 (1979).

tions, into Stage I and Stage II proceedings.²²⁶ In Stage I, the plaintiff and class representative typically have the burden of showing that a challenged practice violates applicable law and that individuals of the class have suffered economic loss or damages. Stage II proceedings determine the appropriate relief to be awarded.²²⁷ At this stage liability for back pay is often the most serious question for a union.

In *Albermarle Paper Co. v. Moody*,²²⁸ the Supreme Court made clear that federal courts have wide discretion, in exercising their equitable powers in Title VII actions, to fashion the most complete relief possible. The Court found that the provisions and objectives of the act were to achieve equality of employment opportunity and to "make persons whole for injuries suffered on account of unlawful employment discrimination."²²⁹ Both purposes are served by the award of back pay to innocent victims. The injured party is placed in the position he would have been in but for the violation of the statute. Back pay likewise helps to remove barriers to equality because it is the reasonably certain prospect of a back pay award that motivates employers and unions to review their practices and endeavor to eliminate unlawful barriers.²³⁰

Union duties in the EEO area may be most effectively addressed in the remedial stage, particularly in the assessment of financial liability. The law must provide concrete incentives and tangible rewards for unions to invest their bargaining power in EEO issues. The courts should explicitly announce a rule that unions that make good faith efforts to assure equal opportunity will be insulated from back pay liability.

Such a rule would rest upon three bases. First, it would provide a tangible incentive for union action regarding EEO, whether that be to end discriminatory practices or to engage in affirmative action designed to remedy problems outside the scope of federal statutes.²³¹ A union can respond to these problems in a variety of

226. See, e.g., *Baxter v. Savannah Refining Corp.*, 495 F.2d 437, 443 (5th Cir.), cert. denied, 419 U.S. 1033 (1974). See also *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 360 (1977).

227. The basic procedure for order and allocation of proof in Stage II proceedings is set out in *International Bhd. of Teamsters v. United States*, 431 U.S. at 356-77.

228. 422 U.S. 405 (1974).

229. *Id.* at 418.

230. *Id.*

231. See notes 98-108 *supra* and accompanying text.

significant ways. It can request information from the employer and examine the effects of the contract on unit employees, propose revisions in the contract, grieve and arbitrate EEO issues where possible, and even initiate administrative or court actions to remedy problem areas.²³² If a union will be liable for back pay despite its best efforts to do away with discriminatory practices, there is little incentive to engage in the effort.

Secondly, § 706(g)²³³ of the Act provides that if a court finds that the respondent has violated the Act, it may enjoin the unlawful employment practice and order such affirmative action as may be appropriate. Such affirmative action includes reinstatement or hiring of employees "with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, *responsible* for the unlawful employment practice) . . ."²³⁴ Liability for back pay is thus squarely placed on the party "responsible" for the illegal act. In this textual context, "responsible" must imply a form of causation for the harm produced.²³⁵ In collective bargaining, a ritualistic assumption that unions have sufficient economic power to negotiate the elimination of all unlawful practices is unrealistic. Unions vary in their bargaining strength and in their commitment to equal employment opportunities. While the wronged plaintiff must be "made whole," the allocation of back pay between employer and union should rest upon an assessment of the particular situation before the court. A union which makes good faith efforts to eradicate unlawful practices should not be financially punished because of its lack of success. That failure may stem from reasons far from the proscriptions of Title VII. Moreover, as an integral part of equitable relief,²³⁶ back pay is subject to the "Chancellor's conscience" and to fundamental concepts of fairness.²³⁷

A third reason for insulating unions which make good faith efforts to eradicate discriminatory practices is the congruence of this

232. See text accompanying notes 37-192 *supra*.

233. 42 U.S.C. § 2000e-5(g) (1976).

234. *Id.* (emphasis added).

235. "Responsible" has been defined as "answerable as the primary cause . . . or agent," WEBSTERS 3RD NEW INTERNATIONAL UNABRIDGED DICTIONARY (1959).

236. See, e.g., EEOC v. Enterprise Ass'n Steamfitters, Local 638, 542 F.2d 579 (2d Cir. 1976); Franks v. Bowman Transp. Co., 493 F.2d 398 (5th Cir. 1974); Head v. Timken Roller Bearing Co., 486 F.2d 870 (6th Cir. 1973); United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971).

237. Franks v. Bowman Transp. Co., 424 U.S. 747 (1976); EEOC v. Lithographers Local 2P, 412 F. Supp. 530 (D. Md. 1976).

standard with principles of liability in the related area of the union's duty of fair representation.²³⁸ In the latter, unions are typically sued for breach of their duty and the employer is sued for breach of contract. The union's liability under the NLRA in such a situation was set out by the Supreme Court in *Vaca v. Sipes*.²³⁹

The governing principle, then, is to apportion liability between the employer and the union according to the damage caused by the fault of each. Thus damages attributable solely to the employer's breach of contract should not be charged to the union, but increases, if any, in those damages caused by the union's refusal to process the grievance should not be charged to the employer.²⁴⁰

The *Vaca* standard thus assigns liability to each party in direct proportion to the fault of each. A number of courts and commentators have equated the standards applicable in Title VII with those in fair representation cases.²⁴¹ A general principle that union liability for back pay should be equivalent to its unlawful conduct would be an appropriate reflection of the clear inter-relationship of these two substantive areas.

In the recent past, a number of Court of Appeal and District Courts have rendered decisions in accordance with the views ad-

238. See note 151 *supra*.

239. 386 U.S. 171 (1967).

240. *Id.* at 197. See also *Czosek v. O'Mara*, 397 U.S. 25 (1969):

Assuming a wrongful discharge by the employer independent of any discriminatory conduct by the union and a subsequent discriminatory refusal by the union to process grievances based on the discharge, damages against the union for loss of employment are unrecoverable except to the extent that its refusal to handle the grievances added to the difficulty and expense of collecting from the employer. If both the union and the employer have independently caused damage to employees, the union cannot complain if separate actions are brought against it and the employer for the portion of the total damages caused by each.

Id. at 29. See also *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42 (1979), where the Supreme Court, in ruling out punitive damages in DFR cases acknowledged the collective interest of union members in protecting limited funds and noted that such awards could impair the financial stability of the union.

241. See, e.g., *Macklin v. Spector Freight Sys., Inc.*, 478 F.2d 979 (D.C. Cir. 1973) (seniority system violates DFR); *Chapliwy v. Uniroyal, Inc.*, 458 F. Supp. 252 (N.D. Ind. 1977) (union acquiescence in employer's discriminatory practices and its negotiation of bidding and bumping procedures in sex segregated units violated its duty of fair representation); *Glus v. G.C. Murphy Co.*, 3 Fair Empl. Prac. Cas. 1094 (W.D. Pa. 1971) (DFR violation in signing contract containing separate seniority lists and lower pay for equal work). See generally 2 HARV. WOMENS L.J. 141, note 193 *supra*.

vocated above. These courts look to the specific conduct of the parties in order to assess back pay liability. The union's advocacy of contract proposals or revisions has been one factor in determining responsibility for back pay,²⁴² as has union conduct in processing grievances based upon discriminatory practices.²⁴³ Union good faith has also been demonstrated by vigorous efforts to correct discrimination through administrative proceedings before the EEOC and through the initiation of litigation.²⁴⁴ In a number of instances, courts have not determined the actual assessment of money liability, but have stated that such a determination will depend on the union's specific conduct.²⁴⁵

The determination of a union's good faith in meeting its responsibilities under the EEO statutes will necessarily vary from situation to situation. Courts will have to look to the specifics of the practice involved, the bargaining history, the amount of economic power wielded by each party and the sincerity of the union's effort. Some degree of imprecision is inevitable, but the judgment that a court will have to make does not differ in kind from that which it must

242. See, e.g., *Social Serv. Union, Local 535 v. Santa Clara County*, 21 Fair Empl. Prac. Cas. 684, 686 (9th Cir. 1979); *Burwell v. Eastern Airlines*, 458 F. Supp. 474 (E.D. Va. 1978).

243. *Dickerson v. United States Steel*, 472 F. Supp. 1304 (E.D. Pa. 1979) (union has not violated Title VII where it processed grievance attacking the discriminatory impact of employers tests and opposed them in court); *Hairson v. McLean Trucking*, 62 F.R.D. 642 (M.D.N.C. 1974).

244. *Social Serv. Union, Local 535 v. Santa Clara County*, 21 Fair Empl. Prac. Cas. 684 (9th Cir. 1979).

Presumably the County recognizes that the union could reasonably believe their vigorous efforts to correct the discrimination prior to suit through negotiations with the County and administrative proceedings before EEOC as well as their initiation and pursuit of this suit itself, would protect them from liability for back pay if the suit succeeded.

Id. at 686.

245. See, e.g., *Johnson v. Ryder Truck*, 555 F.2d 1181, 1182 (4th Cir. 1977) (union not liable for back pay because it initiated the "only" efforts directed at compliance with Title VII); *United Transp. Union Local 974 v. Norfolk & W. Ry.*, 532 F.2d 336, 342 (4th Cir. 1974) ("whether either or both of the unions is to share in N & W's liability for back pay depends on whether they combined with N & W to deprive black employees of income opportunities"); *EEOC v. Detroit Edison*, 17 Empl. Prac. Dec. ¶ 8583 (E.D. Mich. 1978) (employer to be assessed back pay unless union responsible for particular act or practice); *Stevenson v. International Paper Co.*, 14 Fair Empl. Prac. Cas. 1279 (W.D. La. 1977) ("If the unions discharged their duties of fair and equal representation, they will recover their share of back pay claims from the Company"). See also *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir. 1974) (where union rather than employer bore primary responsibility for discriminatory act, it bears full financial liability).

make in any other situation.²⁴⁶ The court, and the EEOC, will look to the particular union's behavior and at the intent manifested by that behavior.²⁴⁷ Some of the guidelines for this inquiry will undoubtedly emerge from the type of union activity described earlier in this article.

In short, the allocation of back pay liability should be consistent with the text of Title VII, the underlying policies of the Act, and doctrine in kindred areas of labor law. It should reflect the actual course of behavior of the parties. Where the union has acted in good faith to eliminate discriminatory practices or to implement affirmative action, according the union insulation from back pay liability satisfies each of these considerations.

246. The determination made by both the NLRB and the courts in judging whether the parties have bargained in "good faith" under § 8(a)(5) is no more difficult or subjective than that which the EEOC and the courts will be called upon to make in determining responsibility for back pay. The Board and the courts have struggled to define this duty to bargain in good faith over the years. *See, e.g.*, NLRB v. Montgomery Ward Co., 133 F.2d 676, 636 (9th Cir. 1943) ("a present intention to find a basis for agreement, . . . an open mind and a sincere desire to reach an agreement"). Although certain behavior is a "per se" violation of this duty, *see, e.g.*, NLRB v. Katz, 369 U.S. 736 (1962), generally the decision is made based on the totality of the conduct. NLRB v. Stevenson Brick & Block Co., 393 F.2d 234 (4th Cir. 1968). *See generally* C. MORRIS, *supra* note 109, ch. 11.

247. *See* text accompanying notes 37-192 *supra*. The ability of the courts to implement such a rule may depend on other substantive and procedural issues. Often one party to a collective bargaining agreement who is sued will cross-claim or counter-claim against the other. This action then requires a determination of the right of one party to secure contribution from the other. Despite the fact that no right of contribution is mentioned in Title VII, two recent appellate court decisions, *Glus v. G.C. Murphy Co.*, 23 Fair Empl. Prac. Cas. 86 (3d Cir. 1980) and *Northwest Airlines v. T.W.U.*, 20 Fair Empl. Prac. Cas. 976 (D.C. Cir. 1979), *cert. granted*, ___ U.S. ___, 100 S. Ct. 1077 (1980), have found that there is such a federal common law right to contribution for back pay awarded under Title VII. A number of district courts have likewise found a federal common law right of contribution for back pay in Title VII actions. *Grogg v. General Motors Corp.*, 72 F.R.D. 523, (S.D.N.Y. 1976); *Lynch v. Sperry Rand Corp.*, 62 F.R.D. 78 (S.D.N.Y. 1973); *Gilbert v. General Elec. Co.*, 59 F.R.D. 267 (E.D. Va. 1973); *Osborne v. McCall Printing Co.*, 4 Fair Empl. Prac. Cas. 276 (S.D. Ohio 1972); *Blanton v. Southern Bell Tel. & Tel. Co.*, 49 F.R.D. 162, 2 Fair Empl. Prac. Cas. 602 (N.D. Ga. 1970); *Bowe v. Colgate-Palmolive Co.*, 272 F. Supp. 332 (S.D. Ind. 1967), *rev'd in part on other grounds*, 416 F.2d 711 (7th Cir. 1969). *See also* *Myers v. Gilman Paper Corp.*, 544 F.2d 837, 860 (5th Cir. 1977); *Electrical Workers (IUE) v. Westinghouse Broadcasting Co., Inc.*, 12 Empl. Prac. Dec. ¶ 11,273 (W.D. N.Y. 1976). *Contra*, *Younger v. Glomorgan Paper & Foundry Co.*, 418 F. Supp. 743 (W.D. Va. 1967). Such a right of contribution effectuates the policies of Title VII because it leads to a more equitable distribution of loss between the defendants, lessens the possibility of collusion between plaintiff and potential defendants, and generally serves to deter violations of Title VII. *See Northwest Airlines v. Transportation Workers Union*, 20 Fair Empl. Prac. Cas. 969 (D.D.C. 1977).

CONCLUSION

The need to deal with historic inequities in the treatment of minority and female workers is as great today as in 1964 when Title VII was enacted. These inequities can be addressed in a variety of ways. The choice of means will necessarily reflect the exigencies of each specific situation.

Collective bargaining is fundamentally a democratic process in which the parties themselves face and resolve problems in the workplace. As the earlier portions of this article have demonstrated, unions today have numerous opportunities to advance equal opportunity through this process. The remedial potential of collective bargaining in many instances will equal or surpass that of litigation. This is particularly true in the aftermath of the *Weber* case, which validated the use of private collective bargaining to implement affirmative action.

But the potential of collective bargaining will not be realized unless unions act aggressively in EEO matters. The union's behavior can and should be influenced by the law. Recent administrative and judicial developments have begun to provide tangible incentives for union activity in this field. Just as important in determining union response, however, will be the conduct of minority and female union members. These members must employ available pressure points within their labor organizations to force EEO issues to the forefront of union concerns in contract negotiation, administration and other activities. The institutional power of unions can be the decisive factor in achieving true equality of opportunity for minorities and women.