EMPLOYMENT DISCRIMINATION: THE LEGALITY OF MINORITY HIRING GOALS

Equal opportunity in employment is of paramount importance in achieving racial equality.[1] Since the enactment of the Civil Rights Act it has become apparent that it is often necessary to impose minority hiring goals[2] to alleviate racial imbalances.[3] Such goals are, however, a form of reverse discrimination, since they deliberately favor minority groups on the basis of race.[4] Thus courts must reconcile the remedial necessity for minority hiring goals with the discriminatory effect such goals may have on individual white workers.[5] A recent Second Circuit decision[6] pro-

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1. *See* Rachlin, *Title VII: Limitations and Qualifications*, 7 B.C. IND. & COM. L. REV. 473, 494 (1966); Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 889 (1972).

2. Court-ordered minority hiring goals require that a union or employer make a good faith effort to achieve a reasonable goal in minority recruitment. Bracy, *The Questionable Legality of Affirmative Action: A Response*, 51 J. URBAN L. 421, 425 (1974).

3. *See* Rachlin, *supra* note 1, at 491; Note, *Minority Workers and the Continuing Effect of Racial Discrimination—the Limits of Remedial Treatment*, 58 IOWA L. REV. 143, 164 (1972); Note, *Constitutionality of Remedial Minority Preferences in Employment*, 56 MINN. L. REV. 842, 844-45 (1972).

The term "racial imbalance" has been equated with "discrimination" under Title VII. 42 TENN. L. REV. 397, 401-02 (1975). Establishing a racially disproportionate impact is not, however, sufficient for a prima facie case of discrimination under the fourteenth amendment. Plaintiffs must show a racially discriminatory purpose. Washington v. Davis, 96 S. Ct. 2040, 2047 (1976) (employment test of the Washington, D.C., police department challenged under due process clause). For a discussion of statistical methods of analyzing employment discrimination beyond simply establishing a disparity between the number of minorities in the union and the minority population of the community see Note, *Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal*, 89 HARV. L. REV. 387 (1975). *See also* Sape, *The Use of Numerical Goals to Achieve Integration in Employment*, 16 WM. & MARY L. REV. 481, 490-93 (1975).

4. Kirkland v. New York State Dep't of Correctional Servs., 520 F.2d 420, 427 (2d Cir. 1975); Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, 1340 (2d Cir. 1973).

5. *See* Kirkland v. New York State Dep't of Correctional Servs., 520 F.2d 420, 429 (2d Cir. 1975); Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, 1341 (2d Cir. 1973). *Compare Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1116 (1971) (it is unjust to impose the cost of remedying society's discrimination on poor whites who may not have been part of the discrimination and who are least able to bear the burden), *with* Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special*

vides substantial support for the legality of minority hiring goals and indicates that courts will attempt to balance these competing interests.

In *Patterson v. Newspaper and Mail Deliverers' Union*,[7] a non-union minority[8] worker sued the Union, alleging racial discrimination[9] and charging that the structure and administration of the collective bargaining agreement[10] violated Title VII of the Civil Rights Act of 1964.[11] Larkin, a non-union white worker, intervened to protect his potential interest in the relief sought.[12] The district court approved a settlement agreement between Patterson and the Union which established a minority hiring goal of 25% and specified a procedure to attain that goal.[13]

Treatment, 61 NW. U.L. REV. 363, 364 (1966) (it is also unfair to leave the burden of remedying society's discrimination on minority workers who are the victims of that discrimination).

6. Patterson v. Newspaper & Mail Deliverers' Union, 514 F.2d 767 (2d Cir. 1975).

7. *Id.* Patterson filed a class action on behalf of minority persons against the Newspaper and Mail Deliverers' Union, The New York Times, The New York Daily News, The New York Post, and fifty other news distributors and publishers in the New York City metropolitan area. Patterson's action was consolidated with an action brought by the Equal Employment Opportunity Commission against the same defendants. *Id.* at 769.

8. The *Patterson* court defined "minority" to include persons who are Black, Spanish-surnamed, Oriental and American Indian. *Id.* at 769 n.1.

9. Union membership was traditionally limited to the first-born son of a union member. At the time of Patterson's suit, 99% of the 4200 union members were white. *Id.* at 769-70.

10. The collective bargaining agreement, adopted by the Union and newspaper publishers in 1952, divided the industry's work force into those who held regular positions and those who arrived each day to do any extra work ("shapers"). The order in which shapers were chosen for extra work on each shift was determined by their group membership and their seniority within the group. Group I, the highest priority group, consisted of persons who once held a regular position in the industry and had been laid off or voluntarily transferred from one employer to another. Each employer had a separate Group I list. Group II consisted of all regular position holders and Group I members throughout the industry, enabling them to obtain extra daily work with employers other than their own. Group III consisted of those persons who had not held a regular position in the industry but who reported for daily work on a regular basis. Although the Union represented all delivery workers, membership was limited to regular position holders and Group I members. *Id.*

Regular vacancies were filled from the Group I list. When the Group I list was exhausted, vacancies were filled from the Group III list. Group I lists, however, were artificially inflated by voluntary transfers from one employer to another, fictitious layoffs and false assertion of Group I membership by family and friends of union members. No Group III workers had advanced to regular positions since 1963, thus preserving the Union's all-white membership. *Id.*

11. 42 U.S.C. § 2000e-2(c) (1970).

12. Larkin represented approximately 100 white, non-union, Group III workers. 514 F.2d at 769.

13. *Id.* at 770-71. The settlement agreement provided that the union be permanently enjoined from discriminatory practices in violation of Title VII, an administrator be

Larkin appealed, arguing that the relief granted to minority workers resulted in relatively fewer employment opportunities for non-union white workers and was thus discriminatory.[14] The Court of Appeals for the Second Circuit upheld the affirmative hiring plan, finding it fair to both minority and white workers.[15]

Title VII prohibits employment discrimination[16] and grants broad remedial power to the federal courts.[17] The courts have developed a variety of remedies under Title VII[18] to alleviate job discrimination. As a

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appointed to ensure compliance with the agreement, and a minority hiring goal of 25% be established. The 25% goal was to be reached within five years by moving all incumbent minority persons in Group III to Group I, hiring new Group III workers in a ratio of three minorities to two whites, filling Group I vacancies on an alternating one-to-one basis between minority and white workers, and eliminating all voluntary transfers until the goal was achieved. *Id.*

14. Larkin argued that since Group III white workers had also suffered from the union policies, they should receive the same relief as minorities; that the relief granted to minorities was at the expense of the Group III white workers; and that the 25% goal was too high. *Id.* at 771.

15. *Id.* at 775. Judge Feinberg concurred but added a strong note of caution. He asserted that minority hiring quotas should be approached somewhat gingerly: "A racial quota is inherently obnoxious, no matter what the beneficent purpose. Such a quota is demeaning and divisive. At best it is a lesser evil. It is not to be encouraged." *Id.* at 776.

16. 42 U.S.C. § 2000e to 2000e-15 (1970), *as amended*, 42 U.S.C. § 2000e to 2000e-15 (Supp. IV, 1974).

17. *Id.* § 2000e-5(g), *as amended*, 42 U.S.C. § 2000e-5(g) (Supp. IV, 1974):

> 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 . . . order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.

See Alexander v. Gardner-Denver, Co., 415 U.S. 36, 44-45 (1974); United States v. IBEW Local 212, 472 F.2d 634, 636 (6th Cir. 1973); United States v. St. Louis-S.F. Ry., 464 F.2d 301, 309 (8th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973); United States v. Ironworkers Local 86, 443 F.2d 544, 553 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 428 (8th Cir. 1970); Hutchings v. United States Indus., Inc., 428 F.2d 303, 310 (5th Cir. 1970); Local 53, Heat & Frost Insulators v. Vogler, 407 F.2d 1047, 1052-53 (5th Cir. 1969); Sape, *supra* note 3, at 496; 60 IOWA L. REV. 693 (1975); 42 TENN. L. REV. 397.

18. *See, e.g.*, Franks v. Bowman Transp. Co., 96 S. Ct. 1251 (1976) (retroactive seniority); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (backpay); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (prohibition of the use of non-job-related discriminatory tests); Muller v. United States Steel Corp., 509 F.2d 923 (10th Cir. 1975) (modification of promotion); Rodriguez v. East Tex. Motor Freight, 505 F.2d 40 (5th Cir. 1974) (modification of transfer practices); Cornist v. Rickland Parish School Bd., 495 F.2d 189 (5th Cir. 1974) (reinstatement); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974) (modification of apprenticeship program); United States v. IBEW Local 212, 472 F.2d 634 (6th Cir. 1973) (modification of union referral system); United States v. Sheetmetal Workers Local 36, 416 F.2d 123 (8th Cir. 1969) (employer must publicize its nondiscriminatory hiring practices). *See generally* United States v. Ironworkers Local 86, 443 F.2d 544, 553 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); Parham v. Southwestern Bell

last resort, courts have imposed minority hiring goals.[19] This type of relief has generated substantial controversy, however, since such goals deliberately favor the hiring of minority persons on the basis of race.[20] The Supreme Court has recognized the breadth of the courts' remedial power under Title VII[21] but has yet to specifically approve minority hiring goals.[22]

The minority hiring goal established in *Patterson* is the latest development in the Second Circuit's gradual acceptance of hiring goals. Initially, the Second Circuit reluctantly approved hiring goals to correct

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Tel. Co., 433 F.2d 421, 428 (8th Cir. 1970); Sape, *supra* note 3 at 497; 60 IOWA L. REV. 693, 698; 42 TENN. L. REV. 397, 398.

19. *See* Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622, 629-31 (2d Cir. 1974) and cases cited therein.

20. Kirkland v. New York State Dep't of Correctional Servs., 520 F.2d 420, 427 (2d Cir. 1975).

21. *See* Franks v. Bowman Transp. Co., Inc., 96 S. Ct. 1251, 1267 (1976), *and* Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975), *quoting* Louisiana v. United States, 380 U.S. 145, 154 (1965) (voting rights): A court has "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of past as well as bar like discrimination in the future."

22. The Supreme Court has avoided the specific issue of minority percentage goals. McDonald v. Santa Fe Transp. Co., 96 S. Ct. 2574, 2578 n.8 (1976). *See* DeFunis v. Odegaard, 416 U.S. 312 (1974). The Court has, however, recognized the appropriateness of mathematical ratios in school desegregation, Swann v. Charlott-Mecklenburg Bd. of Educ., 402 U.S. 1 (1970), and has affirmed the use of ratios in faculty desegregation. United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969). Mathematical ratios might easily be extended from faculty desegregation to employment. *See Employment Discrimination: A Title VII Symposium*, 34 LA. L. REV. 540, 555 (1974). The Court has also approved preferential treatment in the employment of Indians, but in doing so noted that the classification was based on "federally recognized tribes" not race and that the preferential treatment was within the unique Congressional obligation to Indians under article I, § 8 and article II, § 2 of the United States Constitution. Morton v. Mancari, 417 U.S. 535, 551 (1974).

The Court has approved affirmative relief short of imposed quotas. It has approved backpay awards and modification of seniority systems. *See* Franks v. Bowman Transp. Co., 96 S. Ct. 1251 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). But the Court has also acknowledged the problem of reverse discrimination. McDonald v. Sante Fe Trail Transp. Co., 96 S. Ct. 2574, 2577 (1976) ("Title VII of the Civil Rights Act of 1964 prohibits the discharge of 'any individual' because of 'such individual's race' . . . . Its terms are not limited to discrimination against members of any particular race"). The Court has interpreted the Civil Rights Act to require employment on the basis of qualification not race: "In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1974). *See generally* Ely, *The Constitutionality of Reverse Discrimination*, 41 U. CHI. L. REV. 723 (1974); *Developments in the Law—Employment Discrimination*, *supra* note 5.

discriminatory practices in public employment.[23] The court sanctioned the use of hiring goals in the public sector because there was no other method of affording relief without disrupting essential public services,[24] but refused to extend such affirmative relief to promotions.[25]

The Second Circuit extended its approval of hiring goals to private employment[26] in *Rios v. Enterprise Association Steamfitters Local 638.*[27] In *Rios* the district court found that the defendant union had

23. In Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, 1339 (2d Cir. 1973), the court order established a "minority pool" and required that 50% of the current 10 vacancies, 75% of the next 20 vacancies, and 50% of all vacancies occurring thereafter be filled from the minority pool until the police force was composed of 15% minority persons. Additionally, in Vulcan Soc'y v. Civil Serv. Comm'n, 490 F.2d 387, 398-99, (2d Cir. 1973), the court affirmed a district court order requiring that minority firemen be hired in a ratio of one minority to three whites. *Accord,* Western Addition Community Organization v. Alioto, 514 F.2d 542 (9th Cir. 1975) (the court ordered the Civil Service Commission to hire firemen in a ratio of one minority to one white applicant until a list of qualified minority applicants was exhausted); NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974) (court-ordered affirmative hiring plan to achieve 25% minority employment in the Alabama State Troopers); Erie Human Relations Comm'n v. Tullio, 493 F.2d 371 (3d Cir. 1974) (court ordered that 50% of the 20 vacancies on the police force be filled with minority persons); Pennsylvania v. O'Neil, 473 F.2d 1029 (3d Cir. 1973) (court affirmed a district court order enjoining the hiring of Philadelphia policemen except in a ratio of at least one minority person to two whites); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied,* 406 U.S. 950 (1972) (court ordered that one out of every three persons hired by Minneapolis Fire Department be a minority person until 20 minority persons were hired).

24. Vulcan Soc'y v. Civil Serv. Comm'n, 490 F.2d 387, 398 (2d Cir. 1973). *See* Kirkland v. New York State Dep't of Correctional Servs., 520 F.2d 420, 427 (2d Cir. 1975); Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622, 638 (2d Cir. 1974) (dissenting opinion); Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, 1340 (2d Cir. 1973).

25. Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333 (2d Cir. 1973). Promotion to sergeant, lieutenant and captain required three years time-in-grade for each promotion. Such requirements would delay the achievement of a racial balance in positions above patrolman, but the court asserted that imposing goals above the patrolman level would "obviously discriminate against those whites who have embarked upon a police career with the expectation of advancement only to be now thwarted because of their color alone." *Id.* at 1341. The court suggested that the time-in-grade requirements might be shortened and that seniority might be given less weight in promotion decisions as alternative means of alleviating the racial imbalance above the patrolman level. On remand these suggestions were adopted and affirmed. 497 F.2d 1115 (2d Cir. 1974). In Kirkland v. New York State Dep't of Correctional Servs., 520 F.2d 420, 429 (2d Cir. 1975), the court, quoting *Bridgeport,* reversed a district court order imposing a goal of one minority for every three whites promoted to sergeant.

26. *See* United States v. Wood, Wire & Metal Lathers, Local 46, 471 F.2d 408 (2d Cir.), *cert. denied,* 412 U.S.939 (1973), in which an administrator ordered an affirmative hiring plan in an out-of-court settlement. The court held that § 703(j) of the Civil Rights Act of 1964 (*see* note 31 *infra*) did not apply because the union had waived the benefits of § 703(j) by accepting the out-of-court settlement.

27. 501 F.2d 622 (2d Cir. 1974), *noted in* 60 IOWA L. REV. 693, *and* 42 TENN. L. REV. 397.

discriminated against minority persons and ordered an affirmative action plan to achieve a 30% minority membership.[28] On appeal by the Union,[29] the Second Circuit remanded for a recalculation of the percentage goal[30] but held that the district court order did not violate section 703(j) of the Civil Rights Act of 1964,[31] which provides that the Act does not require a union to grant preferential treatment to anyone because of his race.[32]

The *Patterson* court summarily rejected the section 703(j) challenge in a footnote.[33] Section 703(j) had been a significant obstacle to the use of hiring goals.[34] If interpreted literally, section 703(j) would virtually nullify Title VII.[35] The Civil Rights Act, on the other hand, is a clear mandate to remedy racial discrimination.[36] The courts and commentators have resolved this apparent conflict by narrowly construing section 703(j) to allow the imposition of hiring goals.[37] The Second

28. 501 F.2d 622.

29. The Union argued that the minority goal ordered by the district court violated the due process and equal protection clauses of the fourteenth amendment and § 703(j) (*see* note 31 *infra*) of the Civil Rights Act of 1964. *Id.* at 628.

30. *Id.* at 633. The *Rios* court established guidelines for determining specific percentage goals. It held that hiring goals must reflect the percentage of minority persons in the labor force in the relevant geographic area as found in U.S. census reports, rather than the percentage of minority persons in the general population. *Id.*

31. 501 F.2d 622. 42 U.S.C. § 2000e-2(j) (1970) provides:

> Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization or joint labor-management committee . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin . . . in the available work force. . . .

32. Judge Hays strongly disagreed with the majority's interpretation of § 703(j). 501 F.2d at 634-39 (Hays, J., dissenting). He relied heavily on the legislative history of the Civil Rights Act of 1964 to support his interpretation of § 703(j) as prohibiting all preferential treatment. *Id.* at 634-37. *See* Blumrosen, *Quotas, Common Sense, and Law in Labor Relations: Three Dimensions of Equal Opportunity*, 27 RUTGERS L. REV. 675, 691-92 (1974); Sape, *supra* note 3, at 497-98. But as one commentator has noted, Judge Hays, in reviewing the legislative history of the Civil Rights Act, failed to note that in 1972 Congress rejected two amendments to § 703(j) that would have explicitly prohibited racial quotas. 60 IOWA L. REV. 693, 700-02.

33. 514 F.2d at 772 n.3.

34. Note, *Constitutionality of Remedial Minority Preference*, *supra* note 3, at 857-64.

35. United States v. IBEW Local 38, 428 F.2d 144, 149-50 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970).

36. Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970).

37. *See* Carter v. Gallagher, 452 F.2d 315, 325-26 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972) (distinguishing "quotas" from "goals"); Contractors Ass'n v. Secretary of Labor, 442 F.2d 159, 176 (3d Cir.), *cert. denied*, 404 U.S.854 (1971); Quarles v. Phillip

Circuit has held that section 703(j) bars the remedial use of minority hiring goals only when a racial imbalance is the result of a legitimate business necessity.[38] Thus section 703(j) does not apply when the racial imbalance is due to employment discrimination. Other circuits have agreed with this interpretation.[39] The *Patterson* court decided the issue was settled.[40]

Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968) (goals are permitted but not required); Blumrosen, *supra* note 32, at 692 (only national goals are prohibited); Bracy, *supra* note 2, at 425; Cooper & Sobal, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1675 (1969) (§ 703(j) merely precludes any per se rule).

38. Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622, 630 (2d Cir. 1974) (§ 703(j) is limited to racial imbalance attributable to causes other than discrimination); United States v. Wood, Wire & Metal Lathers, Local 46, 472 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); *see* 60 IOWA L. REV. 693, 703-06; 42 TENN. L. REV. 397, 401-04.

Section 703(j) is further limited by the narrowness of the business necessity test. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) ("The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."); United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971) ("If the legitimate ends of safety and efficiency can be served by a reasonably available alternative system with less discriminatory effects, then the present policies may not be continued."). *See generally Symposium, supra* note 22, at 577-80; Comment, *Title VII: Discriminatory Results and the Scope of Business Necessity*, 35 LA. L. REV. 146 (1974); Note, *Business Necessity Under Title VII of the Civil Rights Act of 1964: A No Alternative Approach*, 84 YALE L.J. 98 (1974); 28 RUTGERS L. REV. 1285, 1287 (1975); 42 TENN. L. REV. 397, 402-04.

The *Rios* court also distinguished between "quotas" and "goals." Quotas are mandatory minimum standards that must be met and permanently maintained. Goals merely required that an employer make a good faith effort to reach the suggested standard. Goals are enforced only until they are achieved. The court interpreted § 703(j) to ban permanent quotas but not temporary goals. In Kirkland v. New York State Dep't of Correctional Servs., 520 F.2d 420, 429-30 (2d Cir. 1975), the Second Circuit affirmed in part a district court order imposing an interim hiring goal pending the development of a new selection procedure but reversed that part of the order imposing a permanent hiring quota of one minority to every three whites. *See also* 60 IOWA L. REV. 693, 707-08.

39. *See, e.g.*, United States v. N.L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973); United States v. Carpenters Local 169, 457 F.2d 210 (7th Cir.), *cert. denied*, 409 U.S. 851 (1972); United States v. Ironworkers Local 86, 443 F.2d 544, 553-54 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 250 (10th Cir.), *cert. denied*, 401 U.S. 954 (1970); United States v. IBEW Local 38, 428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 923 (1970). *But cf.* Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971) (§ 703(j) held not to be a limitation on executive orders, implying that it was a limitation on relief granted under Title VII). *See generally* Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622, 629-31, 637-39 (2d Cir. 1974); 60 IOWA L. REV. 693, 703-06.

40. 514 F.2d at 772 n.3. *But cf.* Kirkland v. New York State Dep't of Correctional Servs., 520 F.2d 420, 429 (2d Cir. 1975) in which the court questioned the legality of minority hiring goals on constitutional grounds.

Having concluded that section 703(j) does not prohibit hiring goals, the *Patterson* court limited its review of the affirmative hiring plan to determining whether the settlement agreement was fair to both minority and white workers.[41] Affirmative action plans that involved bumping incumbent white workers[42] or establishing goals in promotion[43] had been previously considered unfair. The *Patterson* court found no bumping or promotional goals.[44] The court emphasized that this settlement agreement benefited both minority and white workers; the benefit to the minority workers would be more immediate but was not so unfair as to require rejection of the plan.[45]

The ease with which the court approved a percentage goal in *Patterson*[46] indicates that such goals are now an accepted remedy for discrimination established under Title VII.[47] Affirmative hiring plans may be a

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41. 514 F.2d at 773. The court's review was limited to some extent by the posture of the case. In reviewing a settlement agreement, the court is usually limited to deciding whether the trial judge was guilty of an abuse of discretion. *Id.* at 771. See Patterson v. Newspaper & Mail Deliverers' Union, 384 F. Supp. 585, 587-88 (S.D.N.Y. 1974).

The court did review Larkin's other two objections to the settlement agreement. Larkin argued that all Group III members had been denied access to union vacancies by the structure and administration of the collective bargaining agreement, *see* note 10 *supra*, and thus all white workers were entitled to the same relief as minority workers. The court held that Larkin was not entitled to the same relief as the minority plaintiffs under 42 U.S.C. § 2000e-2(a)(1) (1970) because the discrimination which Larkin alleged was not based on race as prohibited by the statute but on his membership in the Group III work force. 514 F.2d at 772. Larkin also argued that the 25% goal was too high, but the court held that goal was appropriate because the district court had closely followed the guidelines set down in *Rios*. *Id.* *See* note 30 *supra*.

42. *See, e.g.*, United States v. Bethlehem Steel Corp., 446 F.2d 652, 659 (2d Cir. 1971) (bumping occurs when a minority worker is moved into a position held by a white worker as opposed to being hired to fill a vacancy); *cf.* Local 189, United Papermakers v. United States, 416 F.2d 980, 988 (5th Cir. 1969).

43. *See, e.g.*, Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333 (2d Cir. 1973); *accord*, Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972). *But cf.* Pennsylvania v. O'Neil, 473 F.2d 1029 (3d Cir. 1973) (quota for supervisory positions was rejected but only because the promotion test was not proven to be discriminatory); Allen v. City of Mobile, 466 F.2d 122 (5th Cir. 1972), *cert. denied*, 412 U.S. 909 (1973). *See generally Symposium, supra* note 22, at 560-62.

44. 514 F.2d at 774. The court implied, however, that bumping and promotional goals might not be unfair in some circumstances. *Id.* at 775. *But see* Kirkland v. New York State Dep't of Correctional Servs., 520 F.2d 420 (2d Cir. 1975).

45. 514 F.2d at 774.

46. *Patterson* may not have been appropriate for a reconsideration of the legality of minority hiring goals under § 703(j) or the fourteenth amendment, since the settlement agreement did benefit both minority and white workers. 514 F.2d at 776 (Hays, J., concurring).

47. The overwhelming precedent for the legality of minority hiring goals may be sufficient in itself to withstand any future challenge based on § 703(j). *See* Morrow v.

necessary and legitimate means of alleviating the effects of past discrimination. The white intervenors in *Patterson*, however, argued that an affirmative hiring plan which was *at the expense* of white workers was not a legitimate means of alleviating the effects of past discrimination.[48] The Second Circuit decided that question sub silentio by finding that the burden on white workers was not sufficient to make the hiring plan unfair.[49] The court's approach in *Patterson* indicates that it will balance the need for imposing affirmative hiring plans against the burden such plans place on individual white workers,[50] but leaves open the crucial

Crisler, 491 F.2d 1053, 1059 (5th Cir. 1974) (Clark, J., concurring), *cert. denied*, 419 U.S. 895 (1975).

48. It has been argued that minority preference is a legitimate remedy for racial imbalance as long as white applicants are not refused jobs simply because of their race. *See, e.g.*, Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971) in which the Department of Labor argued that contractors in the Philadelphia area could meet specific hiring goals without adversely affecting the existing labor force. "Some minority tradesmen could be recruited, in other words, without eliminating job opportunities for white tradesmen." *Id.* at 173. *See also* Rachlin, *supra* note 1, at 491-92; Note, *Constitutionality of Remedial Minority Preferences*, *supra*, note 3, at 850. This rationale is less persuasive when high unemployment necessitates the denial of positions to white applicants. *Cf.* DeFunis v. Odegaard, 416 U.S. 312, 336 n.18 (1974) (Douglas, J., dissenting). Justice Douglas distinguished Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1970) (school desegregation), noting that the mathematical ratio approved in *Swann* would not exclude any white person from the public school system while the preferential admissions program attacked in *DeFunis* would exclude some qualified white applicants since positions in law school were scarce.

49. The affirmative hiring plan in *Patterson* affected the Group III white workers in three ways. The immediate transfer of incumbent minority workers to Group I and the filling of Group I vacancies by alternately promoting minority and white workers would: (1) advance white workers less rapidly than they would have advanced under the normal seniority system; (2) drop Group III white workers in daily work priority by whatever number of minority workers with less seniority were promoted; and (3) retard the Group III white worker's progress up the daily work priority ladder. These burdens were off-set by the fact that all Group III workers, white and minority, would eventually be promoted to Group I, an opportunity available to none of them prior to the agreement. 514 F.2d at 773.

It has been argued that any burden a majority places upon itself is acceptable if reasonably related to a legitimate state purpose. Alleviating the effects of past racial discrimination is a legitimate purpose and affirmative hiring plans are a reasonable means of achieving that purpose. The burdens that must be most strictly scrutinized are those that the majority places on a powerless minority. *See* Ely, *supra* note 22.

50. *See* Comment, *The Myth of Reverse Racial Discrimination: An Historical Prospective*, 23 CLEV. ST. L. REV. 319, 323-24 (1974). In Franks v. Bowman Transportation Co., 96 S. Ct. 1251 (1976), the Supreme Court vacated a district court order denying retroactive competitive seniority to minority persons discriminated against by Bowman's hiring practices. Bowman argued that retroactive seniority would conflict with the interests of non-minority employees. *Id.* at 1268. The Court responded that the conflicting interests of non-minority employees will always be affected when scarce employment benefits are distributed according to seniority and that to deny retroactive seniority because of the effect it might have on innocent employees would frustrate the "make

issue of the extent of affirmative relief a court may require without tipping that delicate balance.[51]

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whole" objective of Title VII. *Id.* at 1268-71. Mr. Justice Powell disagreed, arguing that the need to grant retroactive competitive seniority must be balanced against the rights and expectations of the innocent non-minority employees. Awarding monetary damages or backpay penalizes the employer, but retroactive competitive seniority is at the expense of innocent third parties. *Id.* at 1274-78 (Powell, J., concurring). 42 U.S.C. 2000e-5(g) (Supp. IV, 1974) (*see* note 17 *supra*) mandates that a district court determine the "appropriate" relief through its "equitable powers," which necessarily includes the power to "balance equities." 96 S. Ct. at 1278-80. Justice Rehnquist and Chief Justice Burger agreed with Justice Powell's analysis of the court's equitable powers. Thus it appears that the Court does not favor a balancing approach to hiring goals. In McDonald v. Sante Fe Transp. Co., 96 S. Ct. 2574, 2578 n.8 (1976) the Court specifically rejected an argument that discrimination against white persons is tolerable if not unduly burdensome.

51. The court must weigh the burden on white workers on a case-by-case basis. It is clear that a union or employer can be required to fill new vacancies with minority persons without placing an unreasonable burden on white workers. *See* Contractors Ass'n v. Secretary of Labor, 442 F.2d 159, 173 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971). It is also clear that bumping white workers from their positions to alleviate racial imbalance is an unreasonable burden. *See* Kirkland v. New York State Dep't of Correctional Servs., 520 F.2d 420, 429 (2d Cir. 1975); United States v. Bethlehem Steel Corp., 446 F.2d 652, 659 (2d Cir. 1971). The *Patterson* court found that a temporary burden on white workers was not unreasonable. 514 F.2d at 773. The court's extensive discussion of the fairness of the settlement agreement in *Patterson*, however, indicates that a temporary burden on white workers approaches the unreasonable burden that may invalidate an affirmative hiring plan. *Id.* at 773-75.

This balancing approach may not be sufficient to alleviate the effects of past discrimination. Courts should be careful when applying such a test to guard against balancing the mere preferences of white workers against the civil rights of minority workers.