

THE CIVIL RIGHTS ACT OF 1991 AND EEOC ENFORCEMENT

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I. INTRODUCTION

On November 21, 1991, a new era of aggressive civil rights enforcement was introduced when President Bush signed the Civil Rights Act of 1991 (the Act)¹ into law. Although Congress and the administration hotly debated whether the Act was a “quota bill,”² and the Act's proponents publicly touted it as no more than the undoing of several “pro-employer” Supreme Court decisions, the centerpiece of the Act and *the* crowning achievement of the groups propelling it through Congress has little to do with affirmative action and nothing whatsoever to do with prior decisions of the Supreme Court. The Act's lasting impact is far more likely to come from the amendment to section 1981 of the Civil Rights Act of 1866,³ authorizing judges and juries to award compensatory and punitive damages to victims of intentional gender, national origin, and religious employment discrimination under federal law. This change, far more than

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1. Pub. L. No. 102-166, 105 Stat. 1071-1100 (codified as amended in scattered sections of 42 U.S.C. (Supp. III 1992)).

2. See, e.g., Editorial, *The House Vote on Civil Rights*, WASH. POST, June 3, 1991, at A8 (“By now the apocalyptic scare and hate rhetoric on the subject [of quotas] has moved far out ahead of any prospective impact this legislation is likely to have.”); 137 CONG. REC. H3834-35 (daily ed. June 4, 1991) (statement of Rep. Brooks) (“I want to say a few words about the issue that has drawn the most attention in this bill and that has provided the most controversy [T]hose who want to tear this legislation down have kept up their glib demagogic mantra of ‘quota bill.’”); 137 CONG. REC. S8989 (daily ed. June 27, 1991) (statement of Sen. Durenberger) (During the debates, “[t]ensions were high, and America focused on ‘quotas’ [and] on ‘affirmative action.’”); 137 CONG. REC. S15,240 (daily ed. Oct. 25, 1991) (statement of Sen. Gorton) (“[I]t was the obvious intent of Senator Kennedy's original bill to force employers to impose quotas Most Americans agreed that the legislation was a quota bill and vehemently and overwhelmingly opposed it as such.”).

3. 42 U.S.C. § 1981 (1988).

any other, seems to be driving the huge and unprecedented increase in charges of discrimination being filed with the EEOC under Title VII.⁴ Predictably, there will be a significant and steady escalation in federal lawsuit filings by individuals complaining of unlawful employment discrimination.⁵

The Civil Rights Act of 1991 amends five statutes: (1) Title VII of the Civil Rights Act of 1964;⁶ (2) the newly enacted Americans with Disabilities Act of 1990;⁷ (3) the Age Discrimination in Employment Act of 1967;⁸ (4) the Civil Rights Act of 1866;⁹ and (5) the Civil Rights Attorney's Awards Act of 1976.¹⁰

Generally, the Act responds to eight Supreme Court decisions; provides for compensatory and punitive damages and jury trials in cases of intentional discrimination; prohibits the practice often referred to as "race norming" or "within-group scoring;" provides an opaque endorsement of arbitration of employment discrimination disputes; and provides protections to employees of Congress, the White House, and the political appointees of state and local officials. The cases addressed by the Act are: (1) *Wards Cove Packing Co. v. Atonio*;¹¹ (2) *Patterson v. McLean Credit Union*;¹² (3) *Price Water-*

4. During the EEOC's 1992 fiscal year, charges of discrimination filed with the agency increased 15%, from approximately 60,000 charges filed in fiscal year 1991 to 70,000 charges in fiscal year 1992. Over the same period, charges of sexual harassment increased nearly 70%, from 3,295 in 1991 to 5,629 in 1992; charges of gender discrimination increased 21% overall, from 17,677 to 21,517; and charges of race discrimination increased 5.3%, from 27,995 to 29,468. Charges of age discrimination increased from 17,070 to 19,271. The EEOC's fiscal year runs from October 1st to September 30th. EEOC CENTRAL DATA BASE (June 1993).

5. The composition of charges heard by the EEOC is essentially identical to the makeup of cases filed in federal court. Each contain the same proportion of hiring and firing disputes, race and sex claims, and so on. John J. Donohue & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 985 (1991). The volume of federal employment discrimination litigation has grown from fewer than 350 cases in fiscal year 1970 to a peak of approximately 9,000 cases in 1983. There was a 2166% growth in the number of employment discrimination suits filed between fiscal years 1970 and 1989, compared with an increase in the general federal civil caseload of about 125% over the same period. *Id.*

6. 42 U.S.C. §§ 2000e-1 to -17 (1988 & Supp. III 1992).

7. 42 U.S.C. §§ 12101-12113 (Supp. III 1992).

8. 29 U.S.C. § 621 (1985). The ADEA had itself only recently been amended by the Older Workers Benefit Protection Act in response to the Supreme Court's holding in *Public Employees Retirement Sys. of Ohio v. Betts*, 492 U.S. 158 (1989). *See supra* note 186.

9. 42 U.S.C. § 1981 (1988).

10. 42 U.S.C. § 1988 (1981).

11. 490 U.S. 642 (1989).

12. 491 U.S. 164 (1989).

house v. Hopkins;¹³ (4) *Martin v. Wilks*;¹⁴ (5) *EEOC v. Arabian American Oil Co. (Aramco)*;¹⁵ (6) *Lorance v. AT&T Technologies, Inc.*;¹⁶ (7) *Library of Congress v. Shaw*;¹⁷ and (8) *West Virginia University Hospitals, Inc. v. Casey*.¹⁸

The Civil Rights Act of 1991 comes with new and complex issues of statutory construction. It contains numerous ambiguous provisions that will present litigants with difficult threshold legal issues that will delay and, in many instances, obstruct final resolution of complaints. To date, the most conspicuous difficulty has been determining whether Congress intended the Act and its damages provisions to apply to pre-Act conduct. However, there are many less obvious, but equally vexatious, issues that should soon begin to wind through the lower courts.

Some of the more significant issues include whether, and under what circumstances, a victim of race discrimination can recover damages and receive a jury trial under Title VII;¹⁹ whether individuals can be personally liable for compensatory and punitive damages;²⁰ whether the Supreme Court decisions that were “reversed” by the Act have continuing vitality under the Age Discrimination in Employment Act of 1967 (ADEA) and the Americans with Disabilities Act of 1990 (ADA);²¹ whether the provision providing protection for United States citizens employed by United States corporations overseas protects job applicants;²² whether victims of unlawful retaliation under the ADA are entitled to seek damages and trial by jury;²³ whether the new proof scheme for “mixed motive” cases implicates voluntary affirmative action;²⁴ and whether Congress has endorsed the compulsory arbitration of employment discrimination disputes.²⁵ This Article discusses these and other issues in a section-

13. 490 U.S. 228 (1989).

14. 490 U.S. 755 (1989).

15. 111 S. Ct. 1227 (1991).

16. 490 U.S. 900 (1989).

17. 478 U.S. 310 (1986).

18. 499 U.S. 83 (1991).

19. See *infra* notes 48-129 and accompanying text.

20. See *infra* notes 87-99 and accompanying text.

21. See *infra* notes 80-84 and accompanying text.

22. See *infra* notes 171-78 and accompanying text.

23. See *infra* notes 80-84 and accompanying text.

24. See *infra* notes 150-61 and accompanying text.

25. See *infra* notes 221-50 and accompanying text.

by-section analysis of many of the provisions of the Act.

II. FINDINGS AND PURPOSE OF THE CIVIL RIGHTS ACT OF 1991

The Civil Rights Act of 1991 states as its purpose an intent to provide appropriate remedies for harassment and intentional discrimination and to clarify authority and guidelines for disparate impact suits.²⁶ Although the Act further states that it is a response to recent decisions of the Supreme Court "in order to provide adequate protection to victims of discrimination,"²⁷ the only decision named specifically is *Wards Cove*.²⁸

III. CLAIMS UNDER 42 U.S.C. § 1981

From at least 1975 until 1989, it was generally understood that 42 U.S.C. § 1981 afforded a federal remedy against racial discrimination during the course of employment.²⁹ In 1989, however, in *Patterson v. McLean Credit Union*, the Supreme Court held that section 1981 prohibited racial discrimination only during the initial formation of a contract or when it impaired the right to enforce contract obligations through legal process.³⁰ Section 1981 did not, under *Patterson*, prohibit racial harassment and other types of racial dis-

26. Section 2, 105 Stat. at 1071 (codified as amended at 42 U.S.C. § 1981 note (Supp. III 1992)).

27. *Id.*

28. Section 3(2) of the Act states that a purpose of the Act is "to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs v. Duke Power Co.* . . . and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio* . . ." 105 Stat at 1071 (citations omitted).

29. See, e.g., *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459 n.6 (1975).

30. *Patterson v. McLean Credit Union*, 491 U.S. 164, 164 (1989). Although the Supreme Court had never squarely held that § 1981 reached postformation conduct, it was generally accepted that discriminatory conduct after contract formation was actionable under § 1981 based on the "rational direction and purpose in the law." *Id.* at 222. In his *Patterson* dissent, Justice Stevens observed:

The Court's repeated emphasis on the literal language of § 1981 might be appropriate if it were building a new foundation, but it is not a satisfactory method of adding to the existing structure. In the name of logic and coherence, the Court today adds a course of bricks dramatically askew from "the secure foundation of the courses laid by others," replacing a sense of rational direction and purpose in the law with an aimless confinement to a narrow construction of what it means to "make" a contract.

Id. at 222. For a discussion on the law of § 1981 pre-*Patterson*, see *Gersman v. Group Health Ass'n*, 975 F.2d 886, 901 (D.C. Cir. 1992).

crimination arising *during* employment. According to *Patterson*, section 1981 reached only refusals to hire and, to a very limited extent, refusals to promote that involved “the opportunity for a new and distinct relationship between the employee and the employer.”³¹ Section 1981 did not govern such postformation conduct as racially discriminatory firings,³² demotions,³³ disciplinary practices,³⁴ transfers,³⁵ assignments,³⁶ vacation pay,³⁷ disability benefits,³⁸ evaluations,³⁹ and basic working conditions.⁴⁰

Although most of the conduct in the employment sphere that was thought to be covered by section 1981 was also covered by Title VII, *Patterson* was seen as an important setback for victims of racial discrimination. Section 1981 had allowed a plaintiff to obtain a jury trial and to recover compensatory and punitive damages,⁴¹ neither of which was available under Title VII. Moreover, section 1981 did not require a complainant to utilize Title VII's elaborate administrative procedures.⁴²

31. *Patterson*, 491 U.S. at 166.

32. *See, e.g.*, *Hayes v. Community Gen. Osteopathic Hosp.*, 940 F.2d 54 (3d Cir. 1991) (stating that discharge is postformation conduct outside of the scope of § 1981); *McKnight v. General Motors Corp.*, 908 F.2d 104 (7th Cir. 1990) (stating that discharge does not implicate the right to make contracts).

33. *See, e.g.*, *Alexander v. New York Medical College*, 721 F. Supp. 587 (S.D.N.Y. 1989) (noting that because demotions take place after initial employment is made, they do not implicate the process of making an employment contract).

34. *See, e.g.*, *Lewis v. B. P. Oil, Inc.*, 52 Fair Empl. Prac. Cas. (BNA) 797 (E.D. Pa. 1990) (stating that a claim of discriminatory disciplinary practices does not state a claim under § 1981 because the challenged conduct occurred after formation of the employment contract).

35. *Id.*

36. *Id.* *See also* *Williams v. Miracle Plywood Corp.*, 52 Fair Empl. Prac. Cas. (BNA) 1221 (S.D.N.Y. 1990) (stating that § 1981 does not cover incidents that occur within the employment relationship, such as an assignment to a less visible office).

37. *Lewis*, 52 Fair Empl. Prac. Cas. (BNA) 797 (stating that § 1981 does not cover a claim for vacation pay).

38. *Id.* (stating that § 1981 does not cover a claim for disability benefits).

39. *Williams*, 52 Fair Empl. Prac. Cas. (BNA) 1221 (stating that § 1981 does not cover a claim for failure to promote unless the promotion would result in a new, distinct contractual arrangement).

40. *See, e.g.*, *HSU v. Raytheon Co.*, 53 Fair Empl. Prac. Cas. (BNA) 618 (D. Mass. 1990) (holding that § 1981 does not cover a variety of discriminatory actions relating to working conditions because § 1981 applies only to the making and enforcing of contracts and not to postformation conflicts which arise out of continuing employment).

41. *See Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 457-61 (1975).

42. *See Patterson*, 491 U.S. at 180-81. Section 1981, unlike Title VII, also covers businesses with fewer than 15 employees; back pay awards are not limited to the two

In section 101 of the Civil Rights Act of 1991, Congress responded to *Patterson* by adding a subsection (b) to section 1981 prohibiting discrimination both during contract formation and during the course of employment.⁴³ Under this provision, it is now unlawful for an employer to discriminate on the basis of race in “the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.”⁴⁴

In addition, Congress added subsection (c) codifying that portion of *Patterson* that reaffirmed *Runyon v. McCrary*.⁴⁵ In *Runyon*, the Court had construed section 1981 to extend beyond discriminatory acts by governmental entities to prohibit discriminatory acts of a purely *private* nature.⁴⁶ Apparently to secure *Runyon's* interpretation from future Supreme Court decisions, Congress provided that the right to make and enforce contracts is “protected against impairment by nongovernmental discrimination and impairment under color of State law.”⁴⁷

IV. DAMAGES AND JURY TRIALS IN CASES OF INTENTIONAL DISCRIMINATION

A. Generally

Section 102 of the Civil Rights Act of 1991 makes compensatory⁴⁸ and punitive damages⁴⁹ available for intentional violations of

years specified for back pay recoveries under Title VII; and § 1981 does not offer government assistance in investigation and conciliation. *Johnson*, 421 U.S. 454.

43. Section 101, 105 Stat. at 1071-72 (codified as amended at 42 U.S.C. § 1981(b) (Supp. III 1992)).

44. *Id.*

45. 427 U.S. 160 (1976).

46. *Id.*

47. Section 101, 105 Stat. at 1072 (codified as amended at 42 U.S.C. § 1981(c) (Supp. III 1992)).

48. As traditionally used, “compensatory damages” refers to “all loss recoverable as a matter of right and includes all damages (beyond nominal damages) other than punitive or exemplary damages.” 22 AM. JUR. 2D § 23, at 50 (1988). Compensatory damages may be recovered “for any proximate consequences which can be established with requisite certainty, including damages for future or prospective injuries that are reasonably certain to result, but not for any consequences which are remote and indirect or which are merely speculative and cannot be established with any degree of certainty.” 22 AM. JUR. 2D § 28, at 56 (1988). Among harms compensated in this manner are “actual loss in time or money . . . bodily pain and suffering, permanent disfigurement, disabilities or loss or health, injury to character and reputation, and . . . wounded feelings and mental an-

either Title VII, section 102 of the ADA, or section 501 of the Rehabilitation Act of 1973.⁵⁰ Inexplicably, Congress accomplished this by amending section 1981, and creating a new section 1981a, rather than by separately amending the affected statutes. This makes the new section 1981a a rather odd provision. Instead of providing remedies for violations of section 1981, it provides damages for violations of related statutes while specifying that the new damages are beyond the reach of those who can assert section 1981 claims, presumably because similar damages are otherwise available under section 1981.⁵¹

B. Caps on Damages

The Act places limits on the total amount of compensatory and punitive damages that can be recovered under Title VII, the ADA, and the Rehabilitation Act.⁵² Included under the compensatory damages cap “are damages for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.”⁵³ The size of the employer determines the amount of damages that may be recovered. For employers with more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, the enhanced damages “for each complaining party” may total \$300,000; for employers with more than 200 but fewer than 501 employees, the cap is \$200,000; for those with more than 100 but fewer than 201 employees, the cap is \$100,000; and, for those with more than 14 but fewer than 101

guish.” *Id.* These types of harm are consistent with those found compensable in civil rights cases under §§ 1981 and 1983. *See* *Donovan v. Reinbold*, 433 F.2d 738, 743 (9th Cir. 1970) (awarding compensatory damages for emotional and mental distress in § 1983 discharge case); *Sebastian v. Texas Dep't of Corrections*, 558 F. Supp. 507, 509 (S.D. Tex. 1983) (granting compensatory damages under § 1983 for humiliation, mental distress, and harm to plaintiff's reputation).

49. However, punitive damages may not be awarded against governmental entities. *See* Section 102, 105 Stat. at 1073 (codified as amended at 42 U.S.C. § 1981a(b)(1) (Supp. III 1992)).

50. Section 102, 105 Stat. at 1072-74.

51. *See* *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975). “An individual who establishes a cause of action under § 1981 is entitled to both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages.” *Id.* at 460.

52. Section 102, 105 Stat. at 1073 (codified as amended at 42 U.S.C. § 1981a(b)(3) (Supp. III 1992)).

53. *Id.*

employees, the cap is \$50,000.⁵⁴

Because only *future* pecuniary losses fall under the recovery cap, a reasonable interpretation of section 102 is that past pecuniary losses, such as past medical expenses, are fully recoverable without regard to the statutory damage limitations. However, because the statute does not specify the point at which a pecuniary loss is considered to be a *future* loss, it is unclear whether future losses are losses incurred after suit resolution, suit filing, EEOC charge filing, or at some other date.⁵⁵

C. Jury Trials

Prior to the 1991 Act, it was generally accepted that jury trials were not available under Title VII.⁵⁶ Now however, either party may insist upon a jury trial if the plaintiff requests compensatory or punitive damages. A jury trial may be requested in a case alleging intentional discrimination under sections 703, 704, and 717 of the Civil Rights Act of 1964,⁵⁷ section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act),⁵⁸ or section 102 of the ADA.⁵⁹

The Act directs courts not to inform juries of the damage caps.⁶⁰ As a result, the limitations on damages will not influence a jury to return higher or lower awards than it might otherwise have rendered.⁶¹

In the EEOC's first case tried under the damage and jury trial provisions of the Civil Rights Act of 1991, the jury, unaware of the limitation on damages imposed by the Civil Rights Act,⁶² returned a

54. *Id.*

55. A section-by-section analysis placed in the Congressional Record by Senator Dole concludes that "future pecuniary losses" are pecuniary losses that occur after the date that a charge of discrimination is filed. 137 CONG. REC. S15,473 (daily ed. Oct. 30, 1991).

56. See BARBARA L. SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1135 (2d ed. 1983) ("The overwhelming weight of authority is that there is no right to a jury trial under Title VII.").

57. 42 U.S.C. §§ 2000e-2 and 2000e-3 (1988 & Supp. III 1992).

58. 29 U.S.C. § 791 (1981).

59. 42 U.S.C. § 12112 (Supp. III 1992).

60. Section 102, 105 Stat. at 1073 (codified as amended at 42 U.S.C. § 1981a(c)(2) (Supp. III 1992)).

61. 137 CONG. REC. S15,484 (daily ed. Oct. 30, 1991) (statement of Sen. Danforth). "The bill specifically provides that the jury shall not be informed of the existence or amount of the caps on damage awards. Thus, no pressure, upward or downward, will be exerted on the amount of jury awards by the existence of the statutory limitations." *Id.*

62. See *supra* note 60 and accompanying text.

punitive damage verdict for the plaintiff in excess of the \$200,000 damage cap applicable to the defendant. In this ADA discharge case, *EEOC v. AIC Security Investigations, Ltd.*,⁶³ the jury separately imposed punitive damages of \$250,000 on the employer-company and \$250,000 on the individual-owner, for a total of \$500,000 in punitive damages.⁶⁴ Later, the United States Magistrate entered judgment for \$222,000.⁶⁵ He ruled that section 1981a required the compensatory and punitive damages award be limited to a total of \$200,000 based upon the size of the defendant employer. It is certainly conceivable that the jury would have awarded an amount less than \$200,000 if it had known that \$200,000 was the maximum amount that could be levied.

D. Title VII Damages are Limited to
Complaining Parties Who Cannot Recover
Under Section 1981

Ideally, during the course of legislating a new civil rights statute, Congress would take the opportunity to survey the landscape of overlapping civil rights laws and pass one clear, nonrepetitive statute. Congress could be expected to excise undesirable elements of earlier statutes, eliminate redundancy, and streamline the law enforcement system. Unfortunately, congressional failure to act so methodically has produced one of the new Act's most obvious and intriguing issues of statutory interpretation: whether a victim of race discrimination is eligible to seek compensatory and punitive damages under Title VII.

The new enhanced remedies and jury trials are available under Title VII if "the complaining party cannot recover" under section 1981.⁶⁶ On the surface, this seems plain enough. Congress provided damage remedies and jury trials under Title VII only to those vic-

63. 823 F. Supp. 571 (N.D. Ill. 1993).

64. The total jury verdict was \$572,000. This verdict was composed of \$22,000 in back pay, \$50,000 in unspecified compensatory damages, and \$250,000 each against AIC and its owner in punitive damages. Jury Returns \$572,000 Verdict in First EEOC Suit under Americans with Disabilities Act; Discrimination Found in Discharge of Working Cancer Patient, EEOC Press Release (Mar. 19, 1993).

65. The judgment included \$20,000 in back pay plus \$50,000 in compensatory damages plus \$150,000 in punitive damages. Court Enters Judgment in First EEOC Suit Under the Americans with Disabilities Act, EEOC Press Release (June 8, 1993).

66. Section 102, 105 Stat. at 1072 (codified as amended at 42 U.S.C. § 1981a(a)(1) (Supp. III 1992)).

tims of intentional employment discrimination who could not recover damages already available under the overlapping statute. Since the overlapping statute provides recourse to victims of racial and ethnic discrimination,⁶⁷ it seems reasonable that Congress intended to enact a provision that would provide enhanced damage remedies to Title VII's other protected classifications — religion, sex, national origin, and possibly color.

However, like many other provisions of the 1991 Act, section 102 is not free of ambiguity.⁶⁸ Does “cannot recover” under section 1981 mean there are no circumstances which would permit a victim of racial discrimination to seek damages under Title VII? Or does it mean, as voiced by Senator Kennedy, that a victim of racial discrimination *can* seek damages under Title VII so long as he, “for whatever reason, cannot recover under § 1981 against the Title VII defendant?”⁶⁹ If the former is correct, a complaining party seeking damages under Title VII would need to demonstrate that he or she could *never* have pursued the action under section 1981. If the latter is correct, the complainant would only need to prove that he or she cannot *presently* assert a cause of action under section 1981,⁷⁰ as for example “where the relevant section 1981 statute of limitations has run, or where a Title VII plaintiff files with the court a binding stipulation waiving any section 1981 claim against the Title VII defendant for the act of alleged discrimination at issue.”⁷¹ Al

67. See *infra* text accompanying notes 77-79.

68. An earlier version of the bill that became the Civil Rights Act of 1991 was clearer. Under S. 1209, the Civil Rights and Remedies Act of 1991, would have permitted damages under Title VII only where the employer intentionally engaged in an unlawful employment practice “on the basis of the religion, sex, or national origin of an individual.” See 137 CONG. REC. S7024 (daily ed. June 4, 1991).

Senator Danforth was the architect of the compromise that ultimately became the Civil Rights Act of 1991. He originally introduced his compromise as three separate companion bills: S. 1207, the Civil Rights Restoration Act of 1991; S. 1208, the Equal Employment Opportunity Act of 1991; and S. 1209. See 137 CONG. REC. S7020-28 (daily ed. June 4, 1991). The bills were later combined in a somewhat different form in S. 1745, the “Civil Rights Act of 1991.”

69. 137 CONG. REC. S15,234 (daily ed. Oct. 25, 1991) (statement of Sen. Kennedy).

70. *But see* 137 CONG. REC. S15,234 (daily ed. Oct. 25, 1991) (statement of Sen. Kennedy) (“The complaining party need not prove that he or she does not have a cause of action under section 1981 in order to recover damages in the title VII action.”).

71. 137 CONG. REC. S15,234 (daily ed. Oct. 25, 1991) (statement of Sen. Kennedy). This also appears to be the view of Senator Danforth who expressed the opinion that the “cannot recover” language was intended to prevent “duplicative damage awards” against the same respondent under both § 1981 and § 1981a. 137 CONG. REC. S15,484 (daily ed.

though the first approach seems to follow a more natural reading of the language of section 102, the other approach is consistent with the view expressed by Senator Kennedy and others that the purpose of the “cannot recover” language is to protect against double recoveries.⁷² They view section 1981a as permitting a victim of racial discrimination to recover compensatory and punitive damages under either section 1981 or Title VII, but not under both.⁷³

An obvious corollary issue of primary importance to the EEOC, is whether the EEOC can seek damages on behalf of a victim of racial discrimination who could have privately sought redress under section 1981. The EEOC has determined that it can. The EEOC reasons that since it has no jurisdiction to sue under section 1981, and since it sues as a “complaining party”⁷⁴ under Title VII, it is a “complaining party” who cannot recover under section 1981, and thus not limited by section 1981a’s exclusionary provision.⁷⁵ Consequently, the EEOC believes that it is eligible to seek damages under Title VII where it sues in its own right. Interestingly, if EEOC’s interpretation is correct, and if it should be determined that section 1981a precludes Title VII damages in all private Title VII actions where a section 1981 claim could have been asserted by the private litigant, victims of racial or ethnic based employment discrimination

Oct. 30, 1991) (statement of Sen. Danforth). Representative Edwards expressed the more expansive view that a victim of racial discrimination may proceed to seek damages under either Title VII, § 1981, or both, but “they . . . cannot recover double damages for the same harm arising out of the same facts and circumstances.” 137 CONG. REC. H9526 (daily ed. Nov. 7, 1991) (statement of Rep. Edwards).

72. *See supra* notes 69-71.

73. *See supra* notes 69-71. This discussion might seem more theoretical than practical because it is reasonable to believe that most individuals asserting race claims will utilize § 1981 rather than Title VII. The potential for larger damage awards is obviously much greater. However, the issue is likely to arise in cases where the individual complaining party seeks damages under Title VII after the § 1981 statute of limitations has expired and in race cases pursued by the EEOC under Title VII where the individual beneficiary of the EEOC action could have privately sought damages under § 1981.

74. Section 102(d)(1)(A) of the Act defines “complaining party” to include “the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under Title VII of the Civil Rights Act of 1964.” 105 Stat. at 1073.

75. The EEOC has determined, where damages seem appropriate, it will seek damages in conciliation and litigation of racial discrimination charges, even if the complaining party has an ongoing § 1981 court action, as long as the complaining party has not recovered under § 1981. Enforcement Guidance: Compensatory and Punitive Damages Available Under § 102 of the Civil Rights Act of 1991, EEOC Policy Document N915.002 (July 14, 1992).

would only be eligible for Title VII compensatory or punitive damages or jury trials when the suit is brought by the EEOC.⁷⁶

The distinction between national origin discrimination and discrimination based upon ethnic characteristics could prove critical under the Civil Rights Act of 1991. The Supreme Court's decision in *St. Francis College v. Al-Khazraji*⁷⁷ lends support to the conclusion that allegations of discrimination against members of an identifiable ethnic group, such as Hispanics, states a claim of race discrimination under section 1981.⁷⁸ Under the interpretation that section 102 damages are recoverable under Title VII only where a claim could not be stated under section 1981, it is plausible that damages under the 1991 Act are not recoverable where the employee demonstrates that he or she was a victim of discrimination against Hispanics. But damages would be recoverable under Title VII if the employee could prove discrimination based upon Mexican or some other specific national origin. Whereas the former claim might be cognizable under section 1981, the latter claim is not.⁷⁹

E. Damages Under the Americans with Disabilities Act

The Act amends the ADA to permit damages in cases of intentional discrimination against a qualified individual with a disability. However, the Act explicitly states that the enhanced remedies are not available under the ADA or the Rehabilitation Act in "reason-

76. See, e.g., *St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987). Section 1981 protects persons subject to intentional discrimination "solely because of their ancestry or ethnic characteristics." *Id.* at 613. "If respondent . . . can prove that he was subjected to intentional discrimination based on the fact that he was born an Arab, rather than solely on the place or nation of his origin, or his religion, he will have made out a § 1981 case under § 1981." *Id.*

77. 481 U.S. 604 (1987).

78. *Id.* at 613. The Court distinguished between ethnicity and national origin discrimination, implicitly holding that discrimination based "solely on the place or nation of . . . origin" would not state a claim of race discrimination under § 1981. *Id.*

79. This issue is further complicated by the holding of *Shaare Tefila Congregation v. Cobb*, that Jews are entitled to protection as a racial group under 42 U.S.C. § 1982. 481 U.S. 615 (1987). The holding creates at least the possibility that Jews suing for religious discrimination under Title VII are ineligible for damages under section 102 of the 1991 Act because they can recover for racial discrimination under § 1981. The more reasonable interpretation is that Jews who are the victims of religious discrimination can recover damages under Title VII, and those who are the victims of discrimination based upon ethnicity can recover damages under § 1981.

able accommodation” cases where the employer made good faith efforts at accommodation in consultation with the qualified individual with a disability.⁸⁰ This should provide a bonus for defendants who can demonstrate good faith accommodation efforts at the summary judgment stage. They stand to avoid not only liability for damages but also the risks inherent in a jury trial.⁸¹

Probably as a result of a drafting glitch, victims of unlawful retaliation under the ADA appear to be ineligible for jury trials or for compensatory and punitive damages. The Civil Rights Act of 1991 specifically provides compensatory and punitive damages under the ADA only for violations of section 102.⁸² However, the ADA's anti-retaliation provision is not in section 102, but rather is in section 503.⁸³ This seems to support the argument that, unlike under Title VII, Congress did not intend damages and jury trials in ADA retaliation cases.⁸⁴ The EEOC has not yet taken a position on the issue.

F. Multiple Recoveries

One of the more interesting issues raised by *EEOC v. AIC Security Investigations, Ltd.*⁸⁵ is whether separate damage caps can be imposed on each of multiple defendants. In that case, the magistrate limited the plaintiff to one damage cap, even though the jury returned judgments against two separate defendants. The magistrate's ruling appears to be supported by section 102(b)(3) of the 1991 Act which provides that the sum of the amount of compensatory and punitive damages “shall not exceed” the statutory limits

80. Section 102, 105 Stat. at 1072-73 (codified as amended at 42 U.S.C. § 1981a(a)(3) (Supp. III 1992)).

81. The right to a jury trial is specifically tied to a prayer for damages. *See* section 102, 105 Stat. at 1073 (codified as amended at 42 U.S.C. § 1981a(c) (Supp. III 1992)).

82. Section 102(a)(2) of the Act provides that a complaining party may recover compensatory and punitive damages “against a respondent who engaged in unlawful intentional discrimination . . . under . . . section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12112), or committed a violation of section 102(b)(5) of the Act.” 105 Stat. at 1072.

83. 42 U.S.C. § 12203 (Supp. III 1992).

84. Enhanced damages and jury trials are available in Title VII unlawful retaliation cases. Section 102 of the Civil Rights Act of 1991 specifically extends to § 704 of the Civil Rights Act of 1964. Section 704(a) is the primary source of Title VII's protection against unlawful retaliation.

85. 823 F. Supp. 571 (N.D. Ill. 1993). *See also supra* notes 62-65 and accompanying text.

“for each complaining party.”⁸⁶ This language strongly suggests that a plaintiff cannot circumvent the applicable statutory damage cap by aggregating separate damage awards against multiple defendants. It remains to be seen, however, whether the courts will limit plaintiffs to one damage cap where the plaintiff proves *separate* acts of unlawful discrimination by two or more defendants.

G. Personal Liability for Compensatory and Punitive Damages

In *AIC Security Investigations*, the magistrate imposed personal liability upon the owner of the business by holding both the company and its owner jointly and severally responsible for payment of the damage award. However, it is not at all clear that individuals can be held personally liable for damages under section 102 of the 1991 Act. Current case authority on individual liability under Title VII of the Civil Rights Act of 1964 is divided.⁸⁷ Prior to the passage of the Civil Rights Act of 1991, a number of courts relied upon Title VII's broad definition of “employer” to justify imposing personal back pay liability upon supervisory personnel and other agents of the employer who commit unlawful employment practices.⁸⁸ Both Title VII and the ADA define “employer” broadly to include “an agent” of the actual employer.⁸⁹

In *Hamilton v. Rodgers*,⁹⁰ the Fifth Circuit relied upon Title VII's definitional section to uphold the application of Title VII's damages provisions upon individual supervisors who intentionally

86. *Id.* at 575 (emphasis added).

87. Compare *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583 (9th Cir. 1993) with *Hamilton v. Rodgers*, 791 F.2d 439 (5th Cir. 1986).

88. See *Sosa v. Hiraoka*, 920 F.2d 1451, 1455 (9th Cir. 1990); *Hamilton*, 791 F.2d at 442-43.

89. Section 701(b) of Title VII defines “employer” to mean “a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such person.” 42 U.S.C. § 2000e(b) (1988).

Section 701(a) of the Civil Rights Act of 1964 provides:

The term “person” includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

42 U.S.C. § 2000e(a). Section 101(7) of the ADA defines “person” to have “the same meaning given such term[] in section 701” of Title VII.

90. 791 F.2d 439 (5th Cir. 1986).

discriminated against a black employee. The court held that a person is an “agent” under Title VII, and thereby is subject to liability as an employer, “if he participated in the decisionmaking process that form[ed] the basis of the discrimination.”⁹¹ Similarly, in *York v. Tennessee Crushed Stone Ass'n*,⁹² the Sixth Circuit held that an individual may be sued as an employer in Title VII cases if the individual is a “supervisory or managerial employee to whom employment decisions have been delegated by the employer.”⁹³

More recently, however, the Ninth Circuit decided in *Miller v. Maxwell's International Inc.*⁹⁴ that Title VII does not impose individual liability. The court concluded that the purpose of the “agent”

91. *Id.* at 442-43 (citing *Jones v. Metropolitan Denver Sewage Disposal Dist.*, 537 F. Supp. 966, 970 (D. Colo. 1982)). *Hamilton* may have been limited by *Harvey v. Blake*, which held that a city official could be a defendant in a Title VII action, but was subject to Title VII liability only in her official capacity. *Harvey v. Blake*, 913 F.2d 226, 227-28 (5th Cir. 1990).

92. 684 F.2d 360, 362 (6th Cir. 1982).

93. *Id.* at 362. See *Sandoval v. Pagano*, 763 F. Supp. 1087, 1091 (D. Colo. 1991) (stating that an individual who had supervisory responsibilities may be sued because he “is an agent for the purposes of Title VII”); *Burrell v. Truman Medical Ctr., Inc.*, 721 F. Supp. 230, 232 (W.D. Mo. 1989) (stating that “individual defendants may be used pursuant to Title VII if they qualify as statutory ‘agents’”); *Mason v. Twenty-Sixth Judicial Dist. of Kan.*, 670 F. Supp. 1528, 1532 (D. Kan. 1987) (stating that individuals who were in supervisory positions are agents and thus employers under Title VII); *Hendrix v. Fleming Companies*, 650 F. Supp. 301, 302 (W.D. Okla. 1986) (stating that individuals who are officers, directors, or supervisors are proper parties under Title VII); *Barger v. State of Kan.*, 630 F. Supp. 88, 89-91 (D. Kan. 1985) (stating that individuals may be liable under Title VII if agents of an employer); *Tafoya v. Adams*, 612 F. Supp. 1097, 1105 (D. Colo. 1985) (stating that supervisory employee is subject to Title VII), *aff'd on other grounds*, 816 F.2d 555 (10th Cir.), *cert. denied*, 484 U.S. 851 (1987); *McAdoo v. Toll*, 591 F. Supp. 1399, 1405-06 (D. Md. 1984) (stating that individuals who are charged with making or contributing to employment decisions are liable as agents under Title VII); *Thompson v. International Ass'n of Machinists*, 580 F. Supp. 662, 668-69 (D.D.C. 1984) (stating that an individual officer of a labor union could be subject to liability as an “employer”); *Jeter v. Boswell*, 554 F. Supp. 946, 953 (N.D. W. Va. 1983) (stating that a plant manager responsible for making personal decisions could be sued as an “employer”); *Jones v. Metropolitan Denver Sewage Disposal Dist. No. 1*, 537 F. Supp. 966, 970 (D. Colo. 1982) (stating that a person who participates in the decisionmaking process is an agent under § 2000e(b)); *Munford v. James T. Barnes & Co.*, 441 F. Supp. 459, 466 (E.D. Mich. 1977) (stating that company managers were considered within the statutory definition of “employer” because they had responsibility for personnel decisions); *Compston v. Borden, Inc.*, 424 F. Supp. 157, 158 (S.D. Ohio 1976) (stating that a supervisor is an “employer” under the statutory definition). *But see Weiss v. Coca-Cola Bottling Co. of Chicago*, 772 F. Supp. 407, 410-11 (N.D. Ill. 1991) (dismissing claim against supervisor in his “individual capacity” because “the damages available under Title VII are damages which an employer, not an individual, would generally provide”).

94. 991 F.2d 583 (9th Cir. 1993).

provision was not to impose personal liability on individuals, but rather “to incorporate respondeat superior liability into the statute.”⁹⁵ The court reasoned “Title VII limits liability to employers with fifteen or more employees” to protect small entities with limited resources from “the costs associated with litigating discrimination claims.” The court found it “inconceivable” that Congress intended to protect small businesses while simultaneously allowing “civil liability to run against individual employees.”⁹⁶

Similarly, *Miller* suggests that Congress did not intend to impose individual liability under the Civil Rights Act of 1991 for compensatory or punitive damages.⁹⁷ According to *Miller*, if Congress had intended to impose individual liability under the Civil Rights Act of 1991, it “would have discontinued the exemption for small employers.”⁹⁸

The *Miller* decision makes a compelling case that the Civil Rights Act of 1991 does not subject individuals to the threat of compensatory or punitive damage liability. It appears that individual liability is inconsistent with the exemption for small employers and with a statutory scheme limiting damages depending on the number of employees working for the employer. Nonetheless, the statute is subject to a contrary interpretation. The 1991 Act imposes compensatory and punitive damage liability upon “a respondent” and defines “respondent” to include “an employer.”⁹⁹ The inclusion of an employer's “agent” within the definition of “employer” certainly pro-

95. *Id.* at 587.

96. *Id.*

97. However, Judge Fletcher in dissent stated:

I am concerned that the majority's overbroad language may unnecessarily cloud decisionmaking under the Civil Rights Act of 1991, which now permits compensatory and punitive damages for intentional discrimination. 42 U.S.C.A. § 1981a (1992 Supp.). This significant revision may permit suits against individuals for compensatory and punitive damages where the discrimination was intentional. *But see id.* at § 1981 a(b)(3)(A)-(D) (establishing compensatory damage sum limitations by categories determined by `respondent[s]` number of employees). What can be said, and all that should be said, is that under Title VII prior to its amendment, an employee could not be held liable for back pay.

Id. at 589 (Fletcher, J., dissenting).

98. *Miller*, 991 F.2d at 558 n.2.

99. Section 104 provides, “[t]he term `respondent` means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 717.” 105 Stat. at 1074 (codified as amended at 42 U.S.C. § 2000e(n) (Supp. III 1992)).

vides a logical basis for concluding that Congress intended that owners, supervisors and other managerial personnel be subject to Title VII liability, including liability for compensatory and punitive damages, where they participated in discriminatory decisionmaking.

H. Damages Against Labor Unions

The damage provisions pose a special interpretation problem with respect to the limitation on compensatory and punitive damages in actions against small labor unions. Section 701(e) of Title VII extends Title VII's coverage to those unions with fifteen or more *members*.¹⁰⁰ A small union could quite conceivably have sufficient membership to be covered by the requirements of Title VII, but not have sufficient employees to qualify for the protection of the damages caps, which, by their terms, attach only to covered entities with fifteen or more *employees*. This creates an inexplicably harsh and seemingly nonsensical result with small unions subject to unlimited damages while larger unions are protected by damage caps. As a result, the EEOC has determined that the sum of compensatory and punitive damages available against labor unions with fewer than 101 employees, including those with fewer than fifteen, is limited to \$50,000.¹⁰¹

I. Damage Caps in EEOC Actions

An additional issue with respect to the damage caps is whether the EEOC is limited to a single damage cap when it sues as “a complaining party” on behalf a numerous beneficiaries. Since “a complaining party” is the EEOC, the Attorney General, or “a person who may bring an action” under Title VII or the ADA, the statute could be read to mean that in a “class-type” case brought by the EEOC, the EEOC is the only “complaining party,” and that EEOC suits would therefore be limited by the statutory caps, regardless of the number of victims.¹⁰² The EEOC, however, has determined that damage caps are to be applied to each aggrieved individual when the EEOC is pursuing a claim on behalf of more than one person.¹⁰³

100. 42 U.S.C. § 2000e (emphasis added).

101. EEOC Policy Document, *supra* note 75.

102. Section 102, 105 Stat. at 1073-74 (codified as amended at 42 U.S.C. § 1981a(d) (Supp. III 1992)).

103. EEOC Policy Document, *supra* note 75.

Under the EEOC's interpretation, for example, if the EEOC brings suit on behalf of 10 persons against an employer with more than 500 employees, damages of up to the cap of \$300,000 could be sought for *each* aggrieved individual, and the total liability could be as much as \$3,000,000.¹⁰⁴

J. The Standard for Punitive Damages

Punitive damages are only available in cases of intentional discrimination where the respondent is shown to have discriminated "with malice or with reckless indifference to the federally protected rights of an aggrieved individual."¹⁰⁵ Since "intent" is an essential requirement for the underlying violation, and the Act seems to impose the *additional* requirement of "malice" or "reckless indifference" before a victim is entitled to punitive damages,¹⁰⁶ it appears that Congress intended the evidentiary threshold for punitive damages under the Act to be higher than that for establishing liability in the first instance.

The legislative history and the structure of section 102 of the Civil Rights Act of 1991 supports the view that punitive damages are not recoverable in every case of intentional discrimination, but only "in extraordinarily egregious cases."¹⁰⁷ The Act sets forth the entitlement to punitive damages in two separate provisions. The first states that intentional discrimination must be found before punitive damages can be awarded.¹⁰⁸ The other provides that punitive damages are only available where "the complaining party dem-

104. The policy reasons for this result include the desirability of avoiding duplicative actions (*i.e.* if the Commission could not seek damages on behalf of each aggrieved person, it would have to file numerous individual suits or suggest that individuals separately intervene in Commission actions) and the fulfillment of the congressional purpose that damages be available to fully compensate persons harmed by discrimination and to deter discrimination.

105. Section 102, 105 Stat. at 1073 (codified as amended at 42 U.S.C. § 1981a(b)(1) (Supp. III 1992)).

106. *Id.*

107. 137 CONG. REC. H9543-48 (daily ed. Nov. 7, 1991) (section-by-section analysis by Rep. Hyde); *see also* 137 CONG. REC. S15,484 (daily ed. Oct. 30, 1991) (Sponsors' Interpretative Memorandum) (stating that punitive damages may be awarded "in egregious cases"); 137 CONG. REC. S15,473 (daily ed. Oct. 30, 1991) (section-by-section analysis by Sen. Dole and the Administration) (stating that punitive damages should only "be awarded only in extraordinarily egregious cases").

108. Section 102, 105 Stat. at 1072 (codified as amended at 42 U.S.C. § 1981a(a)(1) (Supp. III 1992)).

onstrates . . . malice or . . . reckless indifference.”¹⁰⁹ During the legislative debates, various Representatives emphasized that this coupling made punitive damages available only for intentional discrimination that is particularly deplorable.¹¹⁰

Given this, it does not seem unreasonable to assume that Congress intended a two-tiered scheme of proof in section 1981a employment discrimination actions. The first, lesser tier, must be sufficient to establish an intentional violation; and the second, more difficult tier, is applicable to claims for punitive damages. To recover punitive damages under this scheme, the victim of intentional discrimination would need to produce some quantum of evidence over and above what is necessary to establish intentional discrimination under the burden-shifting framework described in *McDonnell Douglas Corp. v. Green*.¹¹¹

However, a different picture emerges from the body of case law under sections 1981 and 1983. The language of section 102, requiring a showing of “malice” or “reckless indifference” to the federally protected rights of others, is similar to the standard for punitive damages articulated by the Supreme Court under section 1983 in *Smith v. Wade*,¹¹² and subsequently extended by the courts to section 1981.¹¹³ In *Smith*, the Court held that a jury is permitted to assess punitive damages “when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless indifference to the federally protected rights of others.”¹¹⁴ Given the similarity between this standard and the standard in the new Act, it is reasonable to assume that Congress intended the same standard to

109. Section 102, 105 Stat. at 1073 (codified as amended at 42 U.S.C. § 1981a(b)(1) (Supp. III 1992)).

110. See *supra* note 107 and accompanying text.

111. 411 U.S. 792 (1973). For example, in *Beauford v. Sisters of Mercy*, the Sixth Circuit found that although the plaintiff presented sufficient evidence to submit the issue of intentional discrimination to the jury, he did not produce evidence of malice or reckless indifference sufficient to submit the issue of punitive damages. 816 F.2d 1104 (6th Cir. 1987).

112. 461 U.S. 30 (1983). This standard itself “tracks almost exactly” the same standard governing punitive damages under the common law. *Rowlett v. Anheuser-Busch*, 832 F.2d 194, 205 (1st Cir. 1987) (citing RESTATEMENT (SECOND) OF TORTS § 908(2) (1979) (“[P]unitive damages may be awarded for conduct that is outrageous, because of defendant's evil motive or his reckless indifference to the rights of others.”)).

113. See, e.g., *Rowlett*, 832 F.2d 194.

114. *Smith*, 461 U.S. at 56.

apply under Title VII as under sections 1981 and 1983.¹¹⁵

Under sections 1981 and 1983, punitive damages are within the jury's discretion once the plaintiff has demonstrated intentional wrongdoing by the defendant.¹¹⁶ In *Smith v. Wade*, the Court rejected the employer's argument that the deterrent purpose of punitive damages is served only if the threshold for punitive damages is higher in every case than the underlying standard for liability.¹¹⁷ The Court suggested that the improper motive of the employer is both "a necessary element" to a liability finding and "a reason for awarding punitive damages."¹¹⁸ In other words, the state of mind necessary to trigger punitive damages under sections 1981 and 1983, and inferentially under Title VII, appears to be no greater than that required to establish core liability.¹¹⁹ The saving grace for employers, if there is one, is that punitive damages are not *automatic* upon a demonstration of liability on the underlying claim. Although the question whether to award punitive damages will likely be left to the jury in every case, the jury may determine not to make such an award based in the exercise of its "discretionary moral judgment."¹²⁰

115. See 137 CONG. REC. H9527 (daily ed. Nov. 7, 1991) (Rep. Edwards' Interpretative Memorandum) ("Punitive damages are available under [§ 1981A] to the same extent and under the same standards that they are available to plaintiffs under 42 U.S.C. § 1981. No higher standard may be imposed.").

116. *Smith*, 461 U.S. 30 (holding that punitive damages were available under § 1983). See, e.g., *Rowlett*, 832 F.2d 194, 205 (holding that punitive damages under § 1981 are discretionary in cases of intentional wrongdoing); *Garza v. City of Omaha*, 814 F.2d 553, 556 (8th Cir. 1987) (noting the question of whether malice or reckless disregard was shown in § 1983 action "necessarily requires the type of moral judgment uniquely suited to the jury").

117. *Smith*, 461 U.S. at 51.

118. *Id.* at 49-50, 56.

119. *Rowlett*, 832 F.2d at 206-07.

120. *Smith*, 461 U.S. at 52. Courts have upheld the awards of punitive damages in a wide variety of circumstances. See, e.g., *Brown v. Freedman Baking Co.*, 810 F.2d 6, 11 (1st Cir. 1987) ("The jury heard evidence that could have led it to conclude that plaintiffs suffered and lost their jobs because of racial discrimination. It would not be unreasonable for the jury to view such conduct as unreasonable and deserving of substantial punitive damages."); *Yarbrough v. Tower Oldsmobile*, 789 F.2d 508, 510 (7th Cir. 1986) (affirming award of punitive damages under § 1981 where plaintiff testified that the supervisor reprimanded him and transferred him to less desirable area after saying "[w]e don't want no black guy in the front of the shop").

In other cases, courts have reversed punitive damage awards. See, e.g., *Beauford v. Sisters of Mercy*, 816 F.2d 1104, 1108 (6th Cir. 1987) (affirming judgment NOV reversing jury's award of punitive damages under § 1981 and stating that such award was improper "[i]n the absence of any evidence of egregious conduct, willfulness, or malice on the part

K. The Federal Standard for
Punitive Damages Could Prove Easier to
Satisfy than State Standards

In *Stender v. Lucky Stores, Inc.*,¹²¹ the United States District Court for the Northern District of California suggested that the standard for punitive damages under the Civil Rights Act of 1991 is easier to satisfy than the standard applicable under the California Fair Employment and Housing Act.¹²² This, advised the court, is because (1) the “reckless indifference” standard applicable under federal law is easier to satisfy than the state’s “oppressive [conduct], fraud, or malice” standard; and (2) the federal standard requires proof by only a “preponderance of the evidence,” whereas state law requires proof by “clear and convincing” evidence.¹²³ If *Lucky Stores* proves correct, the decision could well portend a shift from plaintiffs’ reliance upon previously more favorable state statutes to reliance on the Civil Rights Act of 1991.

In appropriate cases, the EEOC will seek compensatory and punitive damages during conciliation. Section 706(a) of Title VII provides that if the EEOC finds discrimination it shall attempt to

of the defendants”); *Lavicky v. Burnett*, 758 F.2d 468, 477 (10th Cir. 1985) (holding “[o]fficials cannot be held liable for punitive damages [in a § 1983 case] simply because they did not know the rules of conduct they should follow”); *Foster v. MCI Telecommunications Corp.*, 555 F. Supp. 330, 337 (D. Colo. 1983) (holding plaintiff established discrimination by individuals and was entitled to back pay, but failure to implicate company policy precluded punitive damage award), *aff’d*, 773 F.2d 1116 (10th Cir. 1985).

This conclusion is further supported by the case law for the recovery of liquidated damages under the ADEA. In *Trans World Airlines v. Thurston*, the Supreme Court held that a victim of age discrimination is entitled to recover liquidated damages if the defendant “knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.” 469 U.S. 111, 126 (1985). Lower courts added other proof requirements in individual cases of disparate treatment, reasoning that the unadjusted standard “would defeat the two-tiered system of liability intended by Congress, because every employer that engages in informal age discrimination knows or recklessly disregards the illegality of its conduct.” *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701, 1709 (1993). In *Hazen Paper*, the Court held that once it has been shown that the defendant acted in contravention of the standard, the victim “need not additionally demonstrate that the employer’s conduct was outrageous, or provide direct evidence of the employer’s motivation, or prove that age was the predominant rather than a determining factor in the employment decision.” *Id.* at 1709.

121. 803 F. Supp. 259 (N.D. Cal. 1992).

122. *Id.* at 324.

123. *Id.* at 324 n.24.

eliminate the unlawful employment practice by informal methods such as conference, conciliation, and persuasion.¹²⁴ Section 706(e) states broadly that the EEOC may file suit if, within thirty days after a charge is filed, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission.¹²⁵ This language has been interpreted to give the Commission considerable leeway regarding what it may demand in conciliation,¹²⁶ and has allowed the EEOC to seek any amount in conciliation that it had a reasonable expectation of obtaining at trial.¹²⁷

The EEOC has determined that it will not assume that a victim of intentional employment discrimination has suffered compensable emotional harm. The person filing a charge with the EEOC must present evidence to the EEOC of a causal connection between the respondent's unlawful conduct and his or her emotional injury. Additionally, the Commission will require both medical evidence of the emotional injury and adequate documentation of actual loss.¹²⁸ Similarly, the EEOC will not seek past pecuniary losses absent receipts or some other form of validation.

In assessing whether to seek punitive damages, the EEOC will consider several factors. The EEOC will review (1) the degree of egregiousness and nature of the conduct; (2) the nature, extent, and severity of the harm; (3) the duration of the conduct; (4) the existence and frequency of past discriminatory conduct; (5) whether the employer attempted to conceal discriminatory practices; (6) the em-

124. 42 U.S.C. § 2000e-5(b) states "if the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate only such alleged unlawful employment practice by informal methods of conference, conciliation, persuasion."

125. 42 U.S.C. § 2000e-5(f)(1) states:

If within thirty days after a charge is filed with the Commissioner within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge.

Id.

126. *See, e.g.*, EEOC v. Newtown Inn Assoc., 647 F. Supp. 957, 960 (E.D. Va. 1986); EEOC v. Wayside World Corp., 646 F. Supp. 86, 89 (W.D. Va. 1986).

127. EEOC v. California Teachers Ass'n, 534 F. Supp. 209, 213 n.2 (N.D. Cal. 1982) (stating that the EEOC's efforts at conciliation would survive a stringent inquiry into reasonableness because the EEOC could seek relief that it reasonably believes it might ultimately obtain at trial).

128. EEOC Policy Document, *supra* note 75.

ployer's actions after being informed of discrimination; and (7) whether the employer made threats or engaged in deliberate retaliatory action.¹²⁹

V. ATTORNEYS FEES

Section 103 of the Civil Rights Act of 1991 amends 42 U.S.C. § 1988 by adding section 102 of the Civil Rights Act¹³⁰ to the list of civil rights actions for which a court may award fees to a prevailing party.¹³¹

VI. STANDARDS FOR DISPARATE IMPACT CASES¹³²

Sections 104 and 105 of the Civil Rights Act of 1991 establish the standard for disparate impact cases¹³³ by adding new subsections to Title VII's section 701.¹³⁴ These new provisions have the effect of restoring to the employer the pre-*Wards Cove* burden of persuasion for establishing the "business necessity" of a challenged practice.¹³⁵

As a result of political compromise, section 104 does not contain an explicit definition of business necessity. Section 104 defines "respondent" for purposes of disparate impact cases, to include employers, employment agencies, labor organizations, joint labor-management committees and federal entities subject to Title VII's section 717.¹³⁶ Thus, disparate impact theories would not appear to be applicable to discrimination claims by employees of Congress.

Section 105 of the Civil Rights Act of 1991 amends section 703

129. *Id.*

130. See Civil Rights Act of 1991, § 1977A (codified as amended at 42 U.S.C. § 1988 (Supp. III 1992)).

131. Section 103, 105 Stat. at 1074 (codified as amended at 42 U.S.C. § 1988 (Supp. III 1992)).

132. For further elaboration on this topic, see Honorable Theodore McMillian, *The Civil Rights Act of 1991 — One Step Forward on a Long Road*, 22 STETSON L. REV. 69, 70-74 (1992).

133. Sections 104 & 105, 105 Stat. at 1074-75 (codified as amended at 42 U.S.C. § 2000e (Supp. III 1992)).

134. Disparate impact analysis is designed for situations in which the employer distinguishes among applicants or employees according to a criterion that is facially independent of prohibited factors. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

135. See *supra* note 111 and accompanying text.

136. Section 104, 105 Stat. at 1074 (codified as amended at 42 U.S.C. § 2000e(n) (Supp. III 1992)).

of Title VII by adding section 703(k)(1)(A)(i). This section provides that a petitioner may establish the existence of disparate impact by demonstrating that a respondent uses a *particular* employment practice that causes a disparate impact and which “is [not] job related for the position in question and consistent with business necessity.”¹³⁷ Section 703(k) also provides that if more than one practice is challenged, each practice must be shown to cause a disparate impact, except when the complaining party can show that the elements of the decisionmaking process “are not capable of separation for analysis,” in which case the whole process may be analyzed as one practice.¹³⁸

Section 105 provides that a policy that has a disparate impact but is related to the position in question and consistent with “business necessity” is nonetheless unlawful if a plaintiff demonstrates that the respondent refuses to adopt a less discriminatory alternative which would serve the employer's business needs.¹³⁹ Moreover, section 105 specifically notes that the business necessity defense does not apply to intentional discrimination claims;¹⁴⁰ permits barring employment of persons currently using illegal drugs;¹⁴¹ and restricts the legislative history of the section to the interpretive memorandum published in the Congressional Record on October 25, 1991.¹⁴² Because the legislative history indicates the concepts of

137. Section 105, 105 Stat. at 1074 (emphasis added).

138. Section 105, 105 Stat. at 1074 (codified as amended at 42 U.S.C. § 2000e-2(k)(1)(B)(i) (Supp. III 1992)).

139. *Id.*

140. Section 105, 105 Stat. at 1074 (codified as amended at 42 U.S.C. § 2000e-2(k)(2) (Supp. III 1992)).

141. Section 105, 105 Stat. at 1075 (codified as amended at 42 U.S.C. § 2000e-2(k)(3) (Supp. III 1992)).

142. Section 105, 105 Stat. at 1075 (codified as amended at 42 U.S.C. § 2000e-2(b) (Supp. III 1992)). The interpretive memorandum reads:

The final compromise on S. 1745 agreed by several Senate sponsors, including Senators Danforth, Kennedy, and Dole, and the Administration states that with respect to Wards Cove — Business necessity/cumulation/alternative business practice — the exclusive legislative history is as follows:

The terms “business necessity” and “job related” are intended to reflect the concepts enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

When a decisionmaking process includes particular, functionally-integrated practices which are components of the same criteria, standard, method of administration, or test, such as the height and weight requirements designed to measure strength in *Dothard v. Rawlinson*, 433 U.S.

business necessity and job relatedness are to be interpreted in the light of pre-*Wards Cove* decisions,¹⁴³ and because the statute does not offer specific definitions of the terms, it appears that fleshing out these concepts will remain within the province of the courts as they respond to the factual contexts of litigation.

VII. USE OF TEST SCORES — “WITHIN GROUP SCORING”

Section 106 of the Civil Rights Act of 1991 prohibits practices often referred to as “within group scoring” or “race norming.” The Act makes it unlawful to adjust scores, to use different cutoff scores, or to alter the results of “employment related” tests on the basis of race, color, religion, sex or national origin.¹⁴⁴ The practice of score adjustment arose as a means of alleviating the disparate impact of certain selection tests. It had been adopted by some employers and test developers in lieu of the more difficult task of developing valid, non-discriminatory selection procedures.¹⁴⁵

Section 106 precludes “within group scoring” of, for example, the General Aptitude Test Battery (GATB).¹⁴⁶ On December 13, 1991,

321 (1977), the particular, functionally-integrated practices may be analyzed as one employment practice.

137 CONG. REC. S15,276 (daily ed. Oct. 25, 1991).

143. *Id.* See also *supra* note 28 and accompanying text.

144. Section 106, 105 Stat. at 1075. The section amends § 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 to provide:

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

Id.

145. One leading test developer, promoting score adjustments through the use of its ethnic conversion table, stated:

Percentile Selection assures a parity of selection rates across all protected classes and results in meaningful selection within each class. This method satisfies the requirements of Title VII of the Civil Rights Act of 1964, as amended, and Executive Order 11246, as amended. While validation remains a desirable element of any testing program, Percentile Selection relieves employers, employment agencies and labor union apprentice programs of their obligation to validate the Wonderlic Personnel Test according to the strict formula of the EEOC and OFCC [Office of Federal Contract Compliance] testing guidelines.

The Wonderlic Personnel Test, Percentile Selection through the Ethnic Conversion Table, E. F. WONDERLIC & ASSOCIATES, INC. (1976).

146. The GATB is a standardized employment aptitude test of cognitive skills used

the Department of Labor (DOL) announced the termination of the use of within group conversion scoring or other race- or ethnicity-based adjustments to GATB scores in making selection or referral decisions.¹⁴⁷ The DOL called on users of the GATB to make the test only one factor of several to be utilized in the selection and referral process.

The Act does not define “employment related” for purposes of this section.¹⁴⁸ However, if it is construed narrowly to refer only to tests used to predict future performance of a specific job or task, employers could continue to weigh other more general selection criteria, which are not tied to the specific job in question, such as educational requirements. Such a practice might exacerbate disparate impact if used to increase minority or female representation in an applicant pool which the employer would further screen through the use of a more specific “employment related test.”

The extent to which “banding” is permissible under the 1991 Act is uncertain. Generally, banding involves the selection of employees from persons scoring within a certain band of scores, as opposed to straight “top-down” selection. Also uncertain is the extent to which Congress intended section 106 to apply where employers use tests to adjust for physiological differences between men and women. These include skin-fold tests to measure stamina or employment policies regarding height and weight standards.¹⁴⁹

mainly be state employment service agencies in making job referrals. As reported by Stuart Taylor:

The scoring system converts all job applicants' raw scores on the test battery to percentile ranks within the population categories of “black,” “Hispanic,” and “other,” which includes non-Hispanic whites and Asians.

The effect is to give black and Hispanic applicants reported scores far above those of whites and Asians with the same (or even higher) actual scores.

Stuart Taylor, Jr., *Rigging Test Scores by Race*, LEGAL TIMES, May 13, 1991, at 21.

147. Department of Labor Announces GATB Policy, United States Department of Labor Press Release, USDL 91-649 (Dec. 13, 1991).

148. In an interpretative memorandum submitted on behalf of Senator Danforth and the bill's other co-sponsors, “employment related” is equated with “found by a court to satisfy the business necessity standard.” 137 CONG. REC. S15,484 (daily ed. Oct. 30, 1991). If this interpretation is correct, the prohibition on score adjustment would not preclude an employer from using norming to avoid test validation. “The prohibitions of this section only become applicable once a test is determined to be employment related.” *Id.*

149. It seems fairly clear that weight-by-height standards will result in disparate impact absent gender adjustment.

*VIII. MIXED MOTIVE CASES AND
VOLUNTARY AFFIRMATIVE ACTION*

In *Price Waterhouse v. Hopkins*,¹⁵⁰ a plurality of the Supreme Court held that “once a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability [] by proving that it would have made the same decision even if it had not allowed gender to play such a role.”¹⁵¹

Section 107 of the Civil Rights Act of 1991 responds to *Price Waterhouse* by amending section 703 of Title VII to provide that a statutory violation occurs any time an employment decision is motivated by an impermissible factor.¹⁵² The Act amends section 703 by adding a new subsection, (m), providing that a party establishes an unlawful employment practice by demonstrating “that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though such a practice was also motivated by other factors.”¹⁵³

This section of the Act also amends section 706(g) of Title VII to provide a limitation on available relief in cases where the employer can demonstrate it would have made the same decision in the absence of the impermissible factor.¹⁵⁴ In such cases the court: (1) “may grant declaratory relief, injunctive relief . . . , and attorney’s fees and costs;” and (2) “shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment” available under section 706(g).¹⁵⁵

According to one interpretation, voluntary affirmative action may be implicated by section 107. Because voluntary affirmative action seemingly is motivated by considerations of “race, color, religion, sex, or national origin,” it can be expected that the provision will be cited in challenges to employment decisions made pursuant to voluntary affirmative action plans. It is doubtful, however, that

150. 490 U.S. 228 (1989).

151. *Id.* at 244-45 (footnote omitted).

152. Section 107, 105 Stat. at 1075-76 (codified as amended at 42 U.S.C. §§ 2000e-2(m), -5(g) (Supp. III 1992)).

153. *Id.*

154. Section 107, 105 Stat. at 1075-76 (codified as amended at 42 U.S.C. § 2000e-5(g) (Supp. III 1992)).

155. *Id.*

the provision will be construed to outlaw voluntary affirmative action, in part because section 116 provides “[n]othing in the amendments shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements that are in accordance with the law.”¹⁵⁶ In addition, Senator Dole, in a memorandum submitted on behalf of the Administration for the Congressional Record, stated that the legislation does not purport to resolve the question of the legality under Title VII of affirmative action programs that grant preferential treatment to some on the basis of race, color, religion, sex, or national origin, and thus “tend to deprive” other “individual[s] of employment opportunities . . . on the basis of race, color, religion, sex, or national origin.”¹⁵⁷ “In particular,” Senator Dole stated, “this legislation should in no way be seen as expressing approval or disapproval of *United Steelworkers v. Weber* . . . or *Johnson v. Transportation Agency* . . . or any other judicial decision affecting court-ordered remedies, affirmative action, or conciliation agreements.”¹⁵⁸ Statements by Senator Kennedy are consistent with this.¹⁵⁹

Relying upon section 116 and the legislative history to section 107, the EEOC has determined that section 107 does not affect otherwise lawful voluntary affirmative action plans.¹⁶⁰ The only court to have dealt with this issue has also concluded that section 107 does not limit voluntary affirmative action.¹⁶¹

IX. CHALLENGES TO PRIOR DECREES

In *Martin v. Wilks*¹⁶² the Supreme Court held that a person

156. Section 116, 105 Stat. at 1079 (codified as amended at 42 U.S.C. § 1981 (Supp. III 1992)).

157. 137 CONG. REC. S15,477 (daily ed. Oct. 30, 1991) (statement of Sen. Dole).

158. *Id.* (citations omitted).

159. 137 CONG. REC. S15,235 (daily ed. Oct. 25, 1991) (statement of Sen. Kennedy) (noting “the bill is intended not to change the law regarding what constitutes lawful affirmative action”).

160. Revised Enforcement Guidance on Recent Developments in Disparate Treatment Theory, EEOC Policy Document N915.002 (July 14, 1992).

161. *Officers for Justice v. Civil Serv. Comm'n of San Francisco*, 979 F.2d 721 (9th Cir. 1992). “The City properly argues that a more natural reading of the phrase ‘in accordance with law’ is that affirmative action programs that were in accordance with law prior to passage of the 1991 Act are unaffected by the amendments. The language of the statute is clear, and the City’s interpretation is consistent with that language.” *Id.* at 725.

162. 490 U.S. 755 (1989).

could not be precluded from filing a separate lawsuit challenging a consent decree unless that person was a party to the consent decree action, even if that person had an opportunity to be heard by the court prior to the entry of the decree.¹⁶³

Section 108 of the Civil Rights Act of 1991 responds to *Martin* by adding section 703(n) to Title VII. This section provides that an employment practice implementing a litigated or consent judgment or order resolving a claim of employment discrimination under the United States Constitution or federal civil rights laws cannot be challenged by a person who had notice¹⁶⁴ and an opportunity to present objections to the judgment or order,¹⁶⁵ or by a person whose interests were adequately represented by another person. A person adequately represents another if the representative raised the same legal grounds and had “a similar factual background” as the person who challenged the judgment or order.¹⁶⁶ Section 108 also provides that it does not alter standards for intervention under the Rules of Civil Procedure;¹⁶⁷ does not apply to rights of parties or class members; and does not prevent challenges to judgments or orders based on claims of collusion, fraud, invalidity, or lack of subject matter jurisdiction.¹⁶⁸

Section 108 does not apply to the rights of members of a group on whose behalf relief was sought in an action by the EEOC or another agent of the federal government.¹⁶⁹ Actions not precluded by section 108 must be brought in the court that entered the original order or judgment, and, if possible, before the same judge.¹⁷⁰

163. *Id.* at 760-69.

164. Section 108, 105 Stat. at 1076 (codified as amended at 42 U.S.C. § 2000e-2(n)(1)(B)(i)(I) (Supp. III 1992)).

165. *Id.*

166. Section 108, 105 Stat. at 1076 (codified as amended at 42 U.S.C. § 2000e-2(n)(1)(B)(ii) (Supp. III 1992)).

167. FED. R. CIV. P. 24.

168. Section 108, 105 Stat. at 1076 (codified as amended at 42 U.S.C. § 2000e-2(n)(2) (Supp. III 1992)).

169. Section 108, 105 Stat. at 1076 (codified as amended at 42 U.S.C. § 2000e-2(n)(2)(B) (Supp. III 1992)).

170. Section 108 is not as expansive as earlier versions of the Act which would have barred a non-party's challenge to a decree “if the court that entered the judgment or order concludes that reasonable efforts were made to provide notice to interested persons.” H.R. 1, the *Civil Rights Act of 1991*, as introduced by Representative Jack Brooks on January 3, 1991.

X. EXTRATERRITORIAL COVERAGE

Section 109 of the Civil Rights Act of 1991 responds to the Supreme Court's decision in *EEOC v. Aramco*,¹⁷¹ which held that Title VII does not cover United States' citizens employed by American employers abroad.¹⁷² Section 109(a) amends the definition of "employee" in section 701(f) of Title VII,¹⁷³ and section 101(4) of the ADA,¹⁷⁴ to provide that "an individual who is a citizen of the United States" is an employee "[w]ith respect to employment in a foreign country."¹⁷⁵ By limiting the coverage to United States citizens, this language preserves the exemption of section 702, which provides that Title VII "shall not apply to an employer with respect to the employment of aliens outside of any State."¹⁷⁶

Although Title VII generally protects both employees and applicants for employment,¹⁷⁷ section 109 appears to limit Title VII's extraterritorial coverage to employees only. The status of applicants for overseas employment appears to remain controlled by *EEOC v. Aramco*.¹⁷⁸

XI. EXPANSION OF THE RIGHT TO CHALLENGE DISCRIMINATORY SENIORITY SYSTEMS¹⁷⁹

In *Lorance v. AT&T Technologies, Inc.*,¹⁸⁰ the Supreme Court held that the time period for filing a charge challenging an employ-

171. 111 S. Ct. 1227 (1991).

172. *Id.* at 1230-36.

173. 42 U.S.C. § 2000e(f) (Supp. III 1992).

174. 42 U.S.C. § 12111(4) (Supp. III 1992).

175. Section 109(a), 105 Stat. 1077-78 (codified as amended at 42 U.S.C. §§ 2000e(f), 2000e-1, 12111(4), 12112 (Supp. III 1992)).

176. Section 109, 105 Stat. at 1077 (codified as amended at 42 U.S.C. § 2000e-1(a) (Supp. III 1992)).

177. *See* 42 U.S.C. § 2000e-2(a).

178. Section 109 of the Civil Rights Act of 1991 was patterned from the ADEA. 29 U.S.C. § 630(f). The language of the ADEA strongly supports the interpretation that the statute does not provide extraterritorial coverage for applicants for employment. *See* Laird M. Street, *Application of U.S. Fair Employment Laws to Transnational Employers in the United States and Abroad*, N.Y.U. J. INT'L L. & POL., 357, 370-71 (1987).

179. This section borrows heavily from the EEOC general counsel's memorandum of March 1993. *Litigation Guidance on the Civil Rights Act 1991 and Related Matters*, Gen. Couns. Mem. (Mar. 1, 1993).

180. 490 U.S. 900 (1989).

ment decision made pursuant to a provision of a seniority system runs from the date of adoption of the provision.¹⁸¹ Congress responded to this decision by enacting section 112 of the Civil Rights Act of 1991 which provides that the period for filing a charge challenging a provision in a seniority system runs from any of three events: 1) the adoption of the provision; 2) an individual's becoming subject to the provision; or 3) an injury caused by application of the provision to an individual.¹⁸² This provision applies regardless of whether the discriminatory purpose "is apparent on the face of the seniority provision."¹⁸³

Expectedly, defendants may rely on *Lorance* to argue that the time for challenging employment actions based on policies or systems other than seniority systems also runs from the date of adoption of the policy or system,¹⁸⁴ or that the time to bring ADEA challenges to seniority systems runs from the date of adoption.¹⁸⁵ It seems, however, that *Lorance* no longer has any applicability to the statutes the EEOC enforces, primarily because the amendments to the ADEA effectuated by the Older Workers Benefit Protection Act of 1990 (OWBPA),¹⁸⁶ have eliminated the rationale that would support an extension of *Lorance* to other contexts.¹⁸⁷

The holding in *Lorance* was based on the fact that, under the Court's interpretation of section 703(h), a showing of intentional discrimination in adoption is "a necessary element of Title VII actions challenging seniority systems."¹⁸⁸ Because the Court had pre-

181. *Id.* at 911-13. In *Lorance*, female employees of AT&T Technologies alleged that they were demoted from their jobs as testers pursuant to a provision in a seniority system which was adopted for the purpose of keeping women out of tester jobs and which therefore had a discriminatory effect on female testers. *Id.* at 901-03. The lower courts rejected their claims because none of the women filed a charge within 300 days of the adoption of the challenged provision. *Id.* at 903.

182. Section 112, 105 Stat. at 1078-79 (codified as amended at 42 U.S.C. § 2000e-5(e) (Supp. III 1992)).

183. *Id.*

184. *See* EEOC v. City Colleges of Chicago, 944 F.2d 339 (7th Cir. 1991) (stating *Lorance* governs a challenge to the application of employee benefit plan).

185. *See* Barrow v. New Orleans S.S. Ass'n, 932 F.2d 473 (5th Cir. 1991) (applying *Lorance* to an ADEA challenge to a seniority system).

186. Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-433, 104 Stat. 978 (codified as amended in scattered sections of 29 U.S.C. (1990)).

187. *Cf.* 137 CONG. REC. S15,485 (daily ed. Oct. 30, 1991) (statement of Sen. Danforth) (Section 112 is aimed to correct those cases which have improperly applied the *Lorance* rationale "outside the context of seniority systems.").

188. *Lorance*, 490 U.S. at 908.

viously held in *Machinists Local Lodge No. 1424 v. NLRB*,¹⁸⁹ that a claim is untimely where proof of a necessary element depends on events occurring outside the limitations period,¹⁹⁰ it appears the Court felt compelled to find the charges untimely in *Lorance*.¹⁹¹

Under this analysis, *Lorance* is based on a general principle that may be relevant outside the context of challenges to seniority systems.¹⁹² It can be argued that, under *Lorance*, whenever a plaintiff must prove as an element of his claim that an employment system was adopted for a discriminatory purpose once the limitations period for challenging adoption of the system has run, subsequent applications of the system may not be timely challenged. For example, in *EEOC v. City Colleges of Chicago*,¹⁹³ the Seventh Circuit determined that *Lorance* governs the timeliness of challenges to application of provisions of a bona-fide employee benefit plan adopted outside the limitations period. The Supreme Court held in *Public Employees Retirement System of Ohio v. Betts*¹⁹⁴ that under section 4(f)(2) of the ADEA, the plaintiff had the burden of proving that a bona-fide employee benefit plan was a subterfuge to avoid the purposes of the statute.¹⁹⁵ There is a compelling argument that *Lorance* foreclosed challenge to application of the provisions of the plan once the limitations period for challenging adoption of the plan had run. However, *City Colleges* is likely to have no prospective significance because it was decided under the ADEA before the enactment of the OWBPA. In the OWBPA, Congress amended section 4(f)(2) of the ADEA to provide explicitly that the employer has the burden of proof under that section. In addition, Congress changed the focus of the defense from the employer's subjective purpose in adopting the plan to a more objective question, the cost-justification for any age differentiation in the plan.¹⁹⁶ This sug

189. 362 U.S. 411 (1960).

190. *Id.*

191. *Lorance*, 490 U.S. at 908.

192. *But see* *Beavers v. American Cast Iron Pipe Co.*, 975 F.2d 792, 800 (11th Cir. 1992) (holding that *Lorance* is restricted to cases involving seniority systems and noting that the narrow scope of the amendment to the Civil Rights Act of 1991 and the Act's legislative history "evidence[] Congress's view that *Lorance* was limited to the context of seniority systems").

193. 944 F.2d 339 (7th Cir. 1991).

194. 492 U.S. 158 (1989).

195. *Id.* at 159.

196. Section 103 of the OWPBA provides that age based benefits discrimination can

gests that the plaintiff's case will not be dependent on events preceding the limitations period. Thus, even under this analysis, *Lorance* would not foreclose challenges to present application of the terms of an employee benefit plan under the ADEA as amended by the OWBPA.

The OWBPA's amendment to ADEA's section 4(f)(2) also provides that employers have the burden of proving that seniority systems are bona-fide.¹⁹⁷ Accordingly, *Lorance* also would not foreclose challenges to the present application of the terms of a seniority system under the ADEA. Thus, the decision in *Barrow*,¹⁹⁸ applying *Lorance* to an ADEA challenge to a seniority system, is not likely to be viewed as controlling precedent.¹⁹⁹ It is unclear whether there are other contexts in which a defendant could invoke the *Lorance* principle to argue that a discrimination charge is untimely.²⁰⁰

XII. EXPERT FEES

In *Crawford Fitting Co. v. J.T. Gibbons, Inc.*,²⁰¹ the Supreme Court held that, absent express statutory authority, federal courts cannot award a prevailing party more than \$30 per day for an expert witness fee.²⁰² The Supreme Court extended *Crawford Fitting* to the Civil Rights Fee Awards Act of 1976 in *West Virginia University Hospitals, Inc. v. Casey*.²⁰³ Section 113 of the Civil Rights Act of 1991²⁰⁴ responds to *Crawford Fitting Co.* and *West Virginia Uni*

only be justified where "the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker" 104 Stat. at 979.

197. In this respect, the ADEA now differs from Title VII since the Civil Rights Act of 1991 did not address the holding in *Lorance* that Title VII plaintiffs have the burden of proving that seniority systems are not bona-fide.

198. *See supra* note 185.

199. Since the OWBPA vitiates the holding in *Barrow*, it is not necessary to rely on the questionable proposition that section 112 of the Civil Rights Act of 1991, which amends only section 706(e) of Title VII, affects the timeliness of an ADEA challenge to a seniority system.

200. *But see* *EEOC v. R.R. Donnelley & Sons, Inc.*, 792 F. Supp. 56 (S.D. Ind. 1992) (applying *Lorance* in a religious accommodation case under Title VII to hold that a charge of discrimination was untimely because it was filed seven years after the employer accommodated the employee's religious objection to Saturday work by excusing the employee on Saturdays but paying him the lower Saturday rate for Sunday work).

201. 482 U.S. 437 (1987).

202. *Id.*

203. 499 U.S. 83 (1991).

204. Section 113, 105 Stat. at 1079 (codified as amended at 42 U.S.C. §§ 1988, 2000e-

versity Hospitals by amending section 706(k) of Title VII to provide for recovery of expert fees as part of an attorney's fees award, making expert fees available to prevailing plaintiffs in the same manner as attorney's fees.

**XIII. PROVIDING FOR INTEREST AND
EXTENDING THE STATUTE OF LIMITATIONS IN
ACTIONS AGAINST THE FEDERAL GOVERNMENT**

In *Library of Congress v. Shaw*,²⁰⁵ the Supreme Court held that interest is not awardable in Title VII actions against the federal government. Section 114 responds to *Shaw* by permitting interest on awards of backpay and attorneys fees to federal employees. Section 114 also amends section 717 of Title VII to extend the time for federal employees to file a civil action from “[w]ithin thirty days of receipt of notice of final action taken by a department, agency, or unit” to within ninety days of such receipt. Federal employees are thereby afforded the same suit filing period as is available to private sector employees.²⁰⁶

**XIV. NOTICE OF LIMITATIONS PERIOD UNDER
THE AGE DISCRIMINATION IN
EMPLOYMENT ACT OF 1967**

Section 115 amends section 7(e) of the ADEA by eliminating the two and three year statute of limitations and making ADEA suit filing periods similar to those under Title VII.²⁰⁷ The amendment requires the EEOC to provide notice to charging parties upon termination of the Commission's investigation, and provides private claimants with a civil action filing period beginning sixty days after charge-filing and running until ninety days from the date of receipt of the Commission's notice.

5(k) (Supp. III 1992)).

205. 478 U.S. 310 (1986).

206. Section 114, 105 Stat. at 1079 (codified as amended at 42 U.S.C. § 2000e-16 (Supp. III 1992)).

207. Section 115, 105 Stat. at 1079 (codified as amended at 29 U.S.C. § 626(e) (Supp. III 1992)).

XV. GENERAL APPLICABILITY OF
THE 1991 ACT TO THE AGE DISCRIMINATION IN
EMPLOYMENT ACT OF 1967

A significant question that may have been overlooked by the proponents of the Civil Rights Act of 1991 is whether older workers gain the benefit of the provision designed to respond to a series of Supreme Court cases that were viewed by the lower courts as equally applicable to both Title VII and the ADEA. There is a very strong likelihood that those court decisions continue to have vitality under the ADEA.

The substantive provisions of the ADEA were borrowed *in haec verba* from Title VII of the Civil Rights Act of 1964.²⁰⁸ The only substantive change was that the word “age” was substituted for the phrase “race, color, religion, sex or national origin.”²⁰⁹ With few exceptions, the prohibitions of the ADEA are identical to those of Title VII of the Civil Rights Act of 1964.²¹⁰ Because of this duality, the Supreme Court has determined that certain interpretations of Title VII apply equally in the context of age discrimination.²¹¹ Expectedly, prior to the Civil Rights Act of 1991, at least four circuit courts applied *Wards Cove Packing Co. v. Atonio* to ADEA disparate impact cases;²¹² three applied *Lorance v. AT&T Technologies* to

208. See *Trans World Airlines v. Thurston*, 469 U.S. 111, 121 (1985).

209. *Hodgson v. First Fed. Sav. & Loan Ass'n*, 455 F.2d 818, 820 (5th Cir. 1972).

210. Remedies under the statutes have always been different. Under the ADEA, Congress empowered the courts to grant “legal or equitable relief,” and a right to trial by jury. *Lorillard v. Pons*, 434 U.S. 575, 579 (1978). Congress did not authorize legal relief under Title VII under passage of the Civil Rights Act of 1991.

211. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979). See also *Trans World Airlines*, 469 U.S. at 120 (citing *Lorillard v. Pons*, 434 U.S. 575, 584 (1978)).

212. *MacPherson v. University of Montevallo*, 922 F.2d 766, 771-73 (11th Cir. 1991); *Davidson v. Board of Governors of State Colleges & Univ.*, 920 F.2d 441, 444 (7th Cir. 1990); *Abbott v. Federal Forge, Inc.*, 912 F.2d 867, 873 (6th Cir. 1990); and *Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364, 1369-72 (2d Cir. 1989).

There is a strong argument that *Wards Cove* never applied to the ADEA because Title VII's disparate impact theory of liability does not extend to the ADEA. See, e.g., *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701, 1710 (1993) (Kennedy, J., concurring) (stating “there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA”). The Supreme Court has yet to address the issue. The point to be made here is that if *Wards Cove* was applicable to the ADEA at the time that it was decided, it probably remains applicable to cases under the ADEA because the legislative response to *Wards Cove* applies only to Title VII.

ADEA statute of limitations cases;²¹³ and five applied *Price Waterhouse v. Hopkins* to ADEA mixed motive cases.²¹⁴

The rule that ADEA interpretations should follow those of Title VII does not apply when the dispute centers on a discrete question of statutory construction and the language of the statutes differ. Consequently, although it may seem incongruous and against congressional intent not to apply the new provisions to ADEA claims,²¹⁵ the two statutes are now quite different. Congress explicitly amended only Title VII and not the ADEA in sections 105 (overriding *Wards Cove*), 107 (overriding *Price Waterhouse*), and 112 (overriding *Lorance*) of the 1991 Act.²¹⁶ Courts interpreting the Act are likely to follow the general rule of statutory construction that the omission of the new provisions from a similar statute concerning a related subject is significant to show that a different Congressional intent existed.²¹⁷ Because Congress is presumed to legislate intentionally and purposely in the disparate exclusion of language in related statutory provisions,²¹⁸ courts will likely conclude that Congress intended to limit the scope of the 1991 Act. It seems unlikely that courts will ascribe the language difference between the statutes to “a simple mistake in draftsmanship.”²¹⁹

213. *Barrow v. New Orleans S.S. Ass'n*, 932 F.2d 473, 477-78 (5th Cir. 1991) (stating ADEA challenge to seniority system time-barred); *EEOC v. City Colleges of Chicago*, 944 F.2d 339, 340-43 (7th Cir. 1991) (stating challenge to employee benefit plan must be within three years after plan is adopted); *Hamilton v. 1st Source Bank*, 928 F.2d 86, 88 (4th Cir. 1990) (stating ADEA pay discrimination case held time-barred).

214. *Beshears v. Asbill*, 930 F.2d 1348, 1353-54 (8th Cir. 1991); *Visser v. Packer Eng'g Assoc.*, 924 F.2d 655, 658 (7th Cir. 1991) (en banc); *Burns v. Gadsden State Community College*, 908 F.2d 1512, 1518-19 (11th Cir. 1990); *Gagne v. Northwestern Nat'l Ins. Co.*, 881 F.2d 309, 315-16 (6th Cir. 1989); and *Grant v. Hazelett Strip-Casting Corp.*, 880 F.2d 1564, 1568-69 (2d Cir. 1989).

215. See LEX K. LARSON, CIVIL RIGHTS ACT OF 1991, at 8 (1991) (stating that it would be “astonishing if the courts hearing ADEA cases do not feel compelled to follow the [new mixed-motive] rules applicable to Title VII under the Civil Rights Act of 1991,” and that, in ADEA disparate impact cases, the courts “will no doubt be guided by Congress' expression of [the Title VII disparate impact rules] in the new law”).

216. Compare section 108 responding to *Martin v. Wilks* which by its terms extends beyond Title VII to any “claim of employment discrimination under the Constitution or Federal civil rights laws.” Section 108, 105 Stat. at 1076 (codified as amended at 42 U.S.C. § 2000e-2(n)(1)(B) (Supp. III 1992)).

217. *Water Quality Ass'n Employees' Benefit Corp. v. United States*, 795 F.2d 1303, 1307-08 (7th Cir. 1986).

218. *Russello v. United States*, 464 U.S. 16, 23 (1983).

219. *Id.* See also *Binder v. Long Island Lighting Co.*, 933 F.2d 187, 193 (2d Cir. 1991) (Title VII's explicit limitation on the use of conciliation material does not apply in an

Moreover, the fact that Congress expressly amended section 7(e) of the ADEA to make its suit filing period coexistent with Title VII's, it seems to foreclose the argument that the failure to address the ADEA in sections 105, 107, and 112 of the 1991 Act was an inadvertent oversight that should be corrected by the courts. This amendment demonstrates that Congress, when drafting the Civil Rights Act of 1991, was well aware of the ADEA and its relationship to other federal employment discrimination statutes. Congress contemplated amendments to the ADEA as part of its omnibus legislation, and Congress amended the ADEA where deemed necessary. District court decisions addressing whether Congress intended the new Title VII principles to apply to cases under the ADEA have held that the Civil Rights Act does not apply to ADEA cases.²²⁰

XVI. ALTERNATIVE DISPUTE RESOLUTION

A. Generally

Section 118 of the Civil Rights Act of 1991 expresses approval of appropriate alternative means of dispute resolution, "including settlement negotiations, conciliation, facilitation, mediation,

ADEA action because the ADEA does not contain a similar provision.); *EEOC v. Gear Petroleum*, 948 F.2d 1542, 1544 (10th Cir. 1991) (To overlook "the difference in language between the two statutes" would have the effect of "rewriting the ADEA from the bench."); *Lubniewski v. Lehman*, 891 F.2d 216, 221 (9th Cir. 1989) (stating "Congress' deletion of a provision of section 15 of the ADEA virtually identical to the one in § 2000e-16(c) of Title VII," is significant). It demonstrates that Congress did not intend that the ADEA claims of federal employees be subject to the 30-day filing deadline applicable to their Title VII claims under § 2000e-16(c).

220. See *Thompson v. Prudential Ins. Co.*, 795 F. Supp. 1337 (D.N.J. 1992) (section 112); *Morgan v. Servicemaster Co. Ltd. Partnership*, 57 Fair Empl. Prac. Cas. (BNA) 1423 (N.D. Ill. 1992) (section 107); cf. *Guillory-Wuerz v. Brady*, 785 F. Supp. 889 (D. Colo. 1992) (section 102). See also *Rebar v. Marsh*, 959 F.2d 216, 219 (11th Cir. 1992) (stating Congress' failure to include a venue provision in the ADEA similar to the one contained in Title VII should be corrected by Congress, not the courts). The House Committee on the Judiciary recognized that *Lorance* could continue to apply to age discrimination cases if Congress failed to amend the ADEA. A judicial committee report stated:

Although the statute of limitations provision under Title VII and the ADEA are not identical, their overall scheme, especially with regard to their charge-filing requirements, is very similar. Because of the similarities between the statutes, the courts have routinely looked to Title VII precedents in interpreting corresponding provisions of the ADEA. Thus, there is a danger that *Lorance* will be applied under the ADEA, if the statute of limitations is changed in Title VII but not in the ADEA.

H.R. REP. NO. 40, 102d Cong., 1st Sess., pt. 2, at 40 (1991).

factfinding, minitrials, and arbitration” and “to the extent authorized by law.”²²¹ Although the provision seems to do little more than express a national public policy encouraging lawful means of non-judicial dispute resolution, it could prove quite significant. The Supreme Court has relied heavily upon considerations of public policy in numerous decisions upholding voluntary compulsory arbitration.²²² Most recently, in *Gilmer v. Interstate Johnson/Lane*,²²³ the Supreme Court, relying in part upon a national public policy favoring arbitration, held that a claim under the ADEA can be subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration application.²²⁴ Enacted in the wake of *Gilmer*, section 118 could be viewed as a codification of *Gilmer's* holding. However, the scope of *Gilmer* is clouded because it leaves many issues unresolved.

B. Arbitration Authorized by Law at the Time Section 118 was Enacted

The legislative history of section 118 is limited by the fact that the Act was enacted without committee or conference reports.²²⁵

221. Section 118, 105 Stat. at 1081 (codified as amended at 42 U.S.C. § 1981 (Supp. III 1992)).

222. *See, e.g.*, *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (stating the United States Arbitration Act “establishes a federal policy favoring arbitration”); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (stating the strong national policy in favor of arbitration is expressed in the Federal Arbitration Act and applies “where a party bound by an arbitration agreement raises claims founded on statutory rights”).

223. 111 S. Ct. 1647 (1991).

224. *Id.* at 1650. The petitioner, Robert Gilmer, had been employed by Interstate/Johnson Lane Corp. as a Manager of Financial Services. As a condition of his employment, he was required to register with the New York Stock Exchange. His registration application provided that he agreed to arbitrate “any dispute” with his employer arising out of his employment or termination of employment. Following his termination, Gilmer brought suit against Interstate/Johnson Lane under the ADEA, contending that he was discharged because of his age. Interstate/Johnson Lane moved to compel arbitration of the dispute under the arbitration provision in Gilmer's stock exchange registration application. The district court denied the motion based upon *Alexander*. The Fourth Circuit reversed, finding no Congressional intent in the ADEA to preclude enforcement of arbitration agreements. *Id.* at 1649.

225. However, there is legislative history of identical alternative dispute resolution provisions under unsuccessful versions of the 1991 Civil Rights Act. *See, e.g.*, the Report of the House Committee on Education and Labor on the Civil Rights and Women's Equity in Employment Act of 1991, at 97 (Apr. 24, 1991); and the Report of the House Committee on the Judiciary on the Civil Rights Act of 1991, at 41 (May 17, 1991).

However, section 118 is identical to section 513 of the ADA enacted over one year earlier. The House and Senate Conference Report on the ADA states the conferee's intent that arbitration agreements in collective bargaining agreements and employment contracts be voluntary and that they not be used to prevent an individual from pursuing rights under the ADA.²²⁶ The report also explicitly adopts the House Judiciary Committee's Report on section 513.²²⁷ That report states that the purpose of section 513 is to encourage the use of alternative means of dispute resolution "that are already authorized by law."²²⁸ Importantly, the report emphasizes that means of alternative dispute resolution are encouraged only to the extent that they "supplement, not supplant, the remedies provided by the [ADA]."²²⁹ The report elaborates:

[T]he Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected persons from seeking relief under the enforcement provisions of this Act. This view is consistent with the Supreme Court's interpretation of Title VII of the Civil Rights Act of 1964, whose remedial provisions are incorporated by reference in Title I. The Committee believes that the approach articulated by the Supreme Court in *Alexander v. Gardner-Denver Co.* applies equally to the ADA and does not intend that the inclusion of section 513 be used to preclude rights and remedies that would otherwise be available to persons with disabilities.²³⁰

At the time the ADA was passed, it was generally recognized that *Alexander v. Gardner-Denver Co.*²³¹ supported the proposition

226. H.R. REP. NO. 558, 101st Cong., 2d Sess., pt. 3, at 85 (1990). "It is the intent of the conferees that the use of these alternative dispute resolution procedures is completely voluntary. Under no condition would an arbitration clause in a collective bargaining agreement or employment contract prevent an individual from pursuing their rights under the ADA." *Id.*

227. *Id.* ("The conferees adopt by reference the statement of the House Judiciary Report regarding this provision.")

228. H.R. REP. NO. 558, 101st Cong., 2d Sess., pt. 3, at 76-77 (1990).

229. *Id.*

230. *Id.*

231. 415 U.S. 36 (1974). In *Alexander*, the Supreme Court held that an arbitration decision under a nondiscrimination clause in a collective bargaining agreement did not preclude the plaintiff from suing on discrimination claims under Title VII. Rejecting the argument that courts should defer to arbitration decisions, the Court stated that deferral to arbitration is inconsistent with the congressional intent that federal courts exercise

that arbitration could not be utilized to displace a judicial forum for the adjudication of substantive rights under federal equal employment opportunity statutes.²³² This rule was applied by the courts in both the collective bargaining context and with respect to arbitration agreements in private employment contracts.²³³

A compelling argument can be made that the legislative history of the ADA reveals a congressional intent that arbitration of ADA cases be encouraged only to the extent that arbitration is coextensive with the ADA's enforcement provisions. It could also be argued that since the Civil Rights Act of 1991 used language identical to ADA's, it was intended by Congress that the ADA interpretation apply equally to cases under the 1991 Act. However, this is not necessarily a correct analysis of Congressional intent. Nearly one year after passage of the ADA, but six months before the effective

final responsibility for enforcement of Title VII. 415 U.S. at 56. The Court also noted arbitration is a "comparatively inappropriate forum for the final resolution of rights created by Title VII." *Id.*

232. See, e.g., *Utley v. Goldman Sachs & Co.*, 883 F.2d 184, 187 (1st Cir. 1989) (noting Title VII claims not subject to compulsory arbitration under individual employment contract), *cert. denied*, 493 U.S. 1045 (1990); *Swenson v. Management Recruiters Int'l, Inc.*, 858 F.2d 1304, 1305-07 (8th Cir. 1988) (stating [t]he analysis of *Alexander* lends strong support that Congress did not intend federal judicial proceeding in discrimination cases be preempted by employment arbitration agreements"), *cert. denied*, 493 U.S. 848 (1989); *Johnson v. University of Wisconsin-Milwaukee*, 783 F.2d 59, 62 (7th Cir. 1986) (stating prior arbitration not to be given preclusive effect in Title VII or age discrimination suit). See also *McDonald v. West Branch, Mich.*, 466 U.S. 284, 289 (1984) (stating *Alexander* rests primarily on the conclusion that arbitration conflicts with Congressional intent that a judicial forum be available to protect against employment discrimination); *Coppinger v. Metro-North Commuter R.R.*, 861 F.2d 33 (2d Cir. 1988) (holding employee's constitutional claims under 42 U.S.C. § 1983 not barred by arbitration decision). See also SCHLEI & GROSSMAN, *supra* note 56, at 1083 ("Even before *Gardner-Denver*, the courts were generally holding that Title VII was an independent statutory remedy supplementing other potential relief, without denying individuals any relief otherwise available under Title VII.").

233. The First, Third, and Eighth Circuits had expressly declined to limit *Alexander* to arbitration under collective bargaining agreements. See *Utley v. Goldman Sachs & Co.*, 883 F.2d 184, 186 (1st Cir. 1989) (stating "the fact that [the plaintiff] signed an individual employment agreement rather than a collective bargaining agreement as in *Alexander* is not significant"); *Nicholson v. CPC Int'l, Inc.*, 877 F.2d 221, 229 (3d Cir. 1989) (refusing to submit ADEA claims to commercial arbitration); *Swenson v. Management Recruiters Int'l, Inc.*, 858 F.2d 1304, 1307 (8th Cir. 1988) (refusing to submit Title VII claims to commercial arbitration). But see the Fourth Circuit's decision in *Gilmer*, which was decided five months before the passage of the ADA. 895 F.2d 195, 197 (4th Cir. 1990) (holding the agreement to arbitrate an age discrimination dispute is enforceable because there is "nothing in the text, legislative history, or underlying purposes of the ADEA indicating a Congressional intent to preclude enforcement of arbitration agreements").

date of the Civil Rights Act of 1991, the Supreme Court decided *Gilmer*. *Gilmer* may well be viewed as having changed and extended congressional understanding of whether agreements to arbitrate employment discrimination disputes are “authorized by law.”²³⁴ The Supreme Court's decision in *Gilmer* specifically rejected the type of broad interpretation of *Alexander* voiced in the ADA's legislative history. The Court held that the courts do not provide the exclusive forum for the adjudication of employment discrimination disputes and that, in some circumstances, individuals can be compelled to submit employment related age discrimination disputes to arbitration.²³⁵

Gilmer made a number of threshold findings that seem to forecast broad judicial acceptance of compulsory arbitration agreements. First, the Court noted that the Federal Arbitration Act (FAA)²³⁶ “manifests a liberal federal policy favoring arbitration agreements.”²³⁷ Second, the Court reiterated that statutory claims may be the subject of arbitration agreements and enforced pursuant to the FAA.²³⁸ Third, the Court noted that the remedial and deterrent functions of the ADEA are satisfied if a litigant can effectively vindicate her statutory cause of action in the arbitral forum.²³⁹

It certainly seems plausible that *Gilmer* changed Congressional understanding of the legal limits on arbitration between the passage of the ADA and the Civil Rights Act of 1991, and that consequently, the legislative history of the ADA is of limited significance to the 1991 Act. Section 118 of the Act could very well be viewed as a more general and broader endorsement of agreements to arbitrate employment discrimination disputes than section 515 of the ADA.

C. Issues Unresolved by *Gilmer*

Among the issues left unresolved by *Gilmer* are: (1) whether the “liberal federal policy favoring arbitration agreements” extends to arbitration agreements contained in employment contracts;²⁴⁰ and

234. *Gilmer*, 111 S. Ct. at 1650.

235. *Id.* at 1649.

236. The FAA was originally enacted in 43 Stat. 883 (1925). It was reenacted in 1947 and codified as Title 9 of the United States Code.

237. *Gilmer*, 111 S. Ct. at 1649 (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

238. *Id.* at 1649.

239. *Id.* at 1653.

240. *Id.* at 1657.

(2) whether an arbitration agreement signed by an employee as a condition of employment is an unenforceable contract of adhesion.²⁴¹ The first issue requires an interpretation of section 1 of the FAA which provides that the FAA does not apply “to contracts of . . . any . . . class of workers engaged in foreign or interstate commerce.”²⁴² In *Gilmer* the Court avoided the issue of whether this exclusion applies to all contracts of employment by holding that *Gilmer's* arbitration agreement was not contained in an employment contract.²⁴³ The second issue — contract adhesion — was not presented in the case.

Shortly after *Gilmer*, in *Dancu v. Coopers & Lybrand*,²⁴⁴ the district court held the FAA's section 1 exemption does not apply to employment contracts generally, because Congress intended to exempt only the contracts of employees actually involved in the movement of goods in interstate commerce.²⁴⁵ At about the same time, the Ninth Circuit in *Mago v. Shearson Lehman Hutton, Inc.*,²⁴⁶ remanded for consideration the question of whether the arbitration agreement in the employee's securities registration agreement was an adhesion contract unenforceable under state law. Many more cases dealing with these issues can be anticipated.

241. *Id.* at 1655.

242. Section 1 defines “commerce” as:

commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

9 U.S.C. § 1 (1988).

243. *Gilmer*, 111 S. Ct. at 1651. “The record before us does not show, and the parties do not contend, that *Gilmer's* employment agreement with Interstate contained a written arbitration clause. Rather, the arbitration clause at issue is in *Gilmer's* securities registration application, which is a contract with the securities exchanges, not with Interstate.” *Id.* “Consequently, we leave for another day the issue [of whether the FAA excludes arbitration agreements in employment contracts].” *Id.* at 1651 n.2.

244. 778 F. Supp. 832 (E.D. Pa. 1991), *aff'd without published opinion* 972 F.2d 1330 (3d Cir. 1992).

245. *Dancu* relied upon *Bacashihua v. United States Postal Serv.*, 859 F.2d 402, 405 (6th Cir. 1988); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972); and *Management Recruiters Int'l, Inc. v. Nebel*, 765 F. Supp. 419, 421-22 (N.D. Ohio 1991).

246. 956 F.2d 932 (9th Cir. 1991).

D. The Effect of *Gilmer* on EEOC Enforcement

In *Gilmer*, the Court acknowledged that “arbitration agreements will not preclude the EEOC from bringing actions seeking class-wide and equitable relief.”²⁴⁷ The EEOC has determined that even if individual class members' claims are subject to arbitration, the EEOC remains able to bring an action to obtain class-wide relief.²⁴⁸ However, substantial uncertainty exists concerning the effect of *Gilmer* on the EEOC's litigation where arbitration of the claim has been completed.

Based upon the principle that the EEOC's enforcement actions vindicate the broader public interest in eradicating employment discrimination, the Commission has vigorously argued that preclusion doctrines do not bar EEOC litigation or recovery of additional monetary relief by the Commission on behalf of an individual. This is true even where the challenged employment decision has been subject of a private suit or settlement.²⁴⁹ Nonetheless, it remains to

247. *Gilmer*, 111 S. Ct. at 1655.

248. *See, e.g.*, EEOC v. Kidder Peabody & Co., No. M18-304, 1992 WL 73344 (S.D.N.Y. Apr. 2, 1992). In this case, the EEOC filed suit under the ADEA seeking class-wide relief on behalf of persons subject to individual arbitration agreements.

249. *See, e.g.*, Brief for EEOC, EEOC v. Harris Chernin, Inc., (7th Cir. 1992) (No. 91-3136). This conclusion has been affirmed by a number of courts in a number of different contexts. *See* EEOC v. United Parcel Serv., 860 F.2d 372, 374-76 (10th Cir. 1988) (holding the EEOC can maintain action that was initiated “at the behest of” an employee who had subsequently settled his claim); EEOC v. Goodyear Aerospace Corp., 813 F.2d 1539, 1542-43 (9th Cir. 1987) (holding a private settlement between the employer and the employee did not bar the Commission from maintaining its own enforcement action and obtaining an injunction against future discrimination even though the suit focused on the single incident or discrimination that was subject of the private settlement); New Orleans S.S. Ass'n v. EEOC, 680 F.2d 23, 25 (5th Cir. 1982) (stating that the EEOC “may challenge a transaction which was the subject of prior judicial scrutiny in a private suit, if the subsequent challenge seeks different relief”); EEOC v. McLean Trucking Co., 525 F.2d 1007, 1010-11 (6th Cir. 1975) (holding that the settlement of a private action does not preclude the EEOC from pursuing a case against the employer to eliminate discriminatory practices). *See also* Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 692 (7th Cir. 1986) (en banc) (“The Government is not barred by the doctrine of *res judicata* from maintaining independent actions asking courts to enforce federal statutes implicating both public and private interests merely because independent private litigation has also been commenced or concluded.”); Donovan v. Cunningham, 716 F.2d 1455, 1462 (5th Cir. 1983) (holding “the United States will not be barred from independent litigation by the failure of a private plaintiff”), *cert. denied*, 467 U.S. 1251 (1984). *See also* RESTATEMENT (SECOND) OF JUDGMENTS § 41 cmt. d at 402 (1982); CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 4458, at 520-21 (1988) (The government is not in privity with private parties and is not ordinarily bound by the results of private litigation.).

be seen whether the courts will permit the EEOC to seek individual relief on behalf of class members whose claims have been arbitrated.²⁵⁰

XVII. EFFECTIVE DATE

In enacting the Civil Rights Act of 1991, Congress intentionally transferred to the courts a remarkably difficult issue: Does the Act, or any of its provisions, apply to pre-Act conduct? This seemingly simple issue was greatly complicated by the apparent inconsistency of the Supreme Court's retroactivity decisions. Only the obvious rule seemed intelligible: "Where the congressional intent [on retroactivity] is clear, it governs."²⁵¹

Section 402(a) of the 1991 Act states that "[e]xcept as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment."²⁵² There is no other provision that otherwise delays the effective date for any specific amendment made by the bill. However, in section 402(b) there is an express direction that the statute not apply retroactively to *Wards Cove*²⁵³ and section 109(c) provides that the amendments extending Title VII and the ADA to extraterritorial employment do not apply to conduct occur-

250. See *EEOC v. United States Steel Corp.*, 921 F.2d 489, 495 (3d Cir. 1990) (The doctrine of representative claim preclusion bars the EEOC from recovering individual relief on behalf of those who have privately litigated ADEA claims.); *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1091 (5th Cir. 1987) (A private settlement or release limits the scope of relief that the Commission may seek for the settling individual's benefit.); *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1543 (9th Cir. 1987) (The EEOC's claim for back pay was rendered moot because the employee had "freely contracted away her right to back pay."); *EEOC v. Dayton Tire & Rubber Co.*, 573 F. Supp. 782, 787 (S.D. Ohio 1983) (The EEOC may seek larger back pay award than provided under the private settlement where "only a larger settlement (or award) will deter violations of the discrimination laws" by the employer.).

251. *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990).

252. Section 402 states:

(a) IN GENERAL. — Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment.

(b) CERTAIN DISPARATE IMPACT CASES. — Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983.

Section 402, 105 Stat. at 1099.

253. *Id.* See *Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886, 889 (D.C. Cir. 1992) ("The striking specificity of this last subsection was directed toward *Wards Cove Packing Co., Inc. v. Atonio.*", *cert. granted*, 112 S. Ct. 960 (1992)).

ring before the date of the statute's enactment.²⁵⁴

In order to ensure the Act's passage, Congress apparently effected a compromise that would leave it to the courts to decide the extent to which the Act would apply to pending claims.²⁵⁵ The EEOC, with an inventory of thousands of pre-Act Title VII charges on its investigative docket, had to decide immediately whether to seek the new enhanced damages for victims of pre-Act employment discrimination. On December 27, 1991, one month after the Act's effective date, the EEOC issued policy guidelines on the application of the Act's damages provisions to charges of discrimination then pending before the agency and to future charges involving pre-Act conduct.²⁵⁶ After reviewing the statutory language²⁵⁷ and legislative history,²⁵⁸ and determining that Congress did not provide a clear

254. Section 109 responds to *EEOC v. Aramco*, which held that Title VII does not extend to Americans working abroad. Subsection (c) provides that "the amendments made by this section shall not apply with respect to conduct occurring before the date of enactment of this act." Section 109, 105 Stat. at 1078 (codified as amended at 42 U.S.C. § 2000e note (Supp. III 1992)).

255. See 137 CONG. REC. S15,485 (daily ed. Oct. 30, 1991) (statement of Sen. Kennedy) ("It will be up to the courts to determine the extent to which the bill will apply to cases and claims that are pending on the day of enactment.").

256. Policy Guidance on Application of Damages Provisions of the Civil Rights Act of 1991 to Pending Charges and Pre-Act Conduct, EEOC Policy Document N915.002 (Dec. 27, 1991).

257. The EEOC found that section 402(a) was not clear because it could mean either of two things: (1) that the Act applies to any charge or case in process on or after the date of enactment; or (2) that the Act affects only conduct occurring after that date. The EEOC found that the retroactivity exemptions in 402(b) and 109(c) "may create an inference that the remainder of the Act has retroactive effect," but does not "require[] this result." *Id.*

258. The legislative history, according to EEOC's policy document, "offers conflicting views on the retroactivity of the Act and does not conclusively resolve the issue." *Id.*

As observed in *Gersman*, the Act followed a "tortuous path to enactment" and [d]id not leave behind the more useful footprints of legislative history, such as committee reports of single houses or a conference report. The House of Representatives acted first and passed a comprehensive bill. The Senate deliberated without the benefit of normal committee process, attempting to fashion a proposal that would command the support of a veto-proof bipartisan majority of Senators. The House simply took up and passed the Senate bill without conference.

Gersman, 975 F.2d at 891.

The legislative history that does exist on the question of retroactivity is inconclusive. During the Congressional floor debates, both supporters and opponents of retroactivity expressed views on the issue. These debates were summarized by the Eighth Circuit Court of Appeals in *Fray v. Omaha World Herald Co.*:

Demonstrating a sophisticated understanding of how judges dissect legislative history, congressional proponents of retroactivity argued that *Bradley's* presump-

expression of its intent as to the retroactive or prospective application of section 101(b), the EEOC, relying upon *Bowen v. Georgetown University Hospital*,²⁵⁹ elected not to seek damages for unlawful pre-Act conduct.

The EEOC noted in its policy document that Supreme Court precedent apparently establishes opposing presumptions of retroactivity when congressional intent is unclear. *Bowen* states that when congressional intent is equivocal, "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."²⁶⁰ On the other hand, *Bradley v. Richmond School Board*²⁶¹ holds that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice."²⁶² The Court has noted, but has not resolved, the apparent "tension" between *Bowen* and *Bradley*.²⁶³

Thus far, the Ninth Circuit Court of Appeals is the only federal judicial circuit to hold that a provision of the Act applies to pre-enactment conduct.²⁶⁴ The Second, Fifth, Sixth, Seventh, Eighth, Eleventh, and D.C. Circuit Courts of Appeals have found various provisions of the Act to be prospective only.²⁶⁵

tion of retroactivity would of course apply, while opponents argued with equal vigor that *Georgetown Hospital's* presumption of non-retroactivity would carry the day. The opposing sides also placed conflicting interpretive legal memoranda in the legislative record. Though it appears that a greater number of legislators expressed the prospective-only view, that is hardly conclusive.

960 F.2d 1370, 1376 (8th Cir. 1992). See also *id.* at 1376 n.10, for collection of citations to legislative history.

259. 488 U.S. 204 (1988).

260. *Id.* at 208.

261. 416 U.S. 698 (1974).

262. *Id.* at 711.

263. *Kaiser*, 494 U.S. at 837. In *Kaiser*, Justice Scalia wrote separately to emphasize his view that the "two lines of cases are not merely . . . 'in apparent tension' . . . [but] in irreconcilable contradiction . . ." *Id.* at 841 (Scalia, J., concurring).

264. *Estate of Reynolds v. Martin*, No. 994 F.2d 690 (9th Cir. 1993).

265. See *Butts v. City of New York*, 990 F.2d 1397 (2d Cir. 1993) (holding section 101 should not be applied to causes of action arising before the Act took effect); *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363 (5th Cir. 1992) (holding section 101 should not be applied to a case pending on appeal that was filed and decided by the trial court before the enactment of section 101 and that arises out of conduct occurring before section 101's enactment); *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir. 1992) (specifically holding the Act does not apply to a claim for damages, but also indicating that the entire Act applies prospectively because some provisions affect substantive rights), *cert. denied*, 113 S. Ct. 86 (1992); *Mozev v. American Commercial Marine Serv. Co.*, 963 F.2d 929 (7th Cir. 1992) (holding substantive provisions apply prospectively at any stage of proceedings; damages and procedural provisions might properly apply in new proceedings but in this

On February 22, 1993, the Supreme Court announced that it had granted petitions for writ of *certiorari* in two cases: *Landgraf v. USI Film Products*,²⁶⁶ and *Rivers v. Roadway Express, Inc.*²⁶⁷ On April 19, 1993, the EEOC rescinded its Policy Guidance on Application of Damages Provisions of the Civil Rights Act to Pending Charges and Pre-Act Conduct,²⁶⁸ and on April 30, 1993, joined the United States in a brief *amicus curiae* before the Supreme Court arguing that the *Landgraf* and *Rivers* cases were wrongly decided.²⁶⁹ It is now the position of the United States and the EEOC that the text of the Act indicates that sections 101 and 102 apply to pending cases, that the legislative history does not contradict that conclusion, and that even if the text of the Act were not clear, sections 101 and 102 are procedural and remedial provisions that apply to pending cases unless retroactive application would result in “manifest injustice.”²⁷⁰

case do not apply to case on remand), *cert. denied*, 113 S. Ct. 207 (1992); *Hicks v. Brown Group, Inc.*, 982 F.2d 295 (8th Cir. 1992) (holding section 101 does not apply retroactively); *Baynes v. AT&T Technologies, Inc.*, 976 F.2d 1370, 1375 (11th Cir. 1992) (holding that sections 101 and 102 do not apply “in cases in which a judgment was entered before the Act’s” effective dates); *Gersman v. Group Health Ass’n*, 975 F.2d 886, 892 (D.C. Cir. 1992) (holding substantive statutory amendments do not apply to pre-amendment conduct and specifically holding that section 101 does not apply retroactively).

266. 968 F.2d 427 (5th Cir. 1992) (holding that sections 102(a)(1) and 102(c) of the Act, providing compensatory and punitive damages and the right to a jury trial, do not apply to a sexual harassment action pending on appeal on the Act’s effective date), *cert. granted*, 113 S. Ct. 1250 (1993).

267. 973 F.2d 490 (6th Cir. 1992) (holding that section 101 of the Act does not apply to retaliatory discharge claims pending on appeal on the Act’s effective date), *cert. granted*, 113 S. Ct. 1250 (1993).

268. Rescission of Policy Guidance on Application of Damages Provisions of the Civil Rights Act of Pending Charges and Pre-Act Conduct, EEOC Policy Document N915.002 (Apr. 19, 1993).

269. The United States had previously taken the position in a number of lower court cases that the provisions of the Act has prospective application only. *See, e.g.*, Brief for United States, *Van Meter v. Barr*, 976 F.2d 1 (D.C. Cir. 1992) (No. 92-5046) and Briefs for Appellants and Respondents, *Mojica v. Gannett Co.*, 986 F.2d 1158 (7th Cir. 1993) (Nos. 91-3921 and 92-1104).

270. The brief reconciles *Bradley* and *Bowen* by relying upon a later case, *Bennett v. New Jersey*, 470 U.S. 632 (1985). In *Bennett*, the Court, relying on a “venerable rule of statutory interpretation, *i.e.*, that statutes affecting substantive rights and liabilities are presumed to have only prospective effect,” held that the “substantive provisions of the 1978 Amendments to Title I of the Elementary and Secondary Education Act” do not apply to funds spent more than six years before enactment. *Bennett*, 470 U.S. at 633-34. The *Landgraf* and *Rivers* brief argues that the *Bennett* Court distinguished *Bradley*, and thereby reconcile *Bradley* and *Bowen*, by implicitly finding that *Bradley*’s presumption of retroactivity applies only to procedural and remedial provisions while *Bowen*’s presump-

XVIII. CONCLUSION

The Civil Rights Act of 1991 has injected a large dose of uncertainty into federal employment discrimination law. The EEOC and the courts are just beginning to sift, sort, and clarify the Act's new safeguards, remedies, and obligations. Unfortunately, it will likely be many years before the parameters of the statute's more obtuse provisions are clearly understood.

tion applies to statutes affecting substantive rights and liabilities. Petitioner's Brief, *Landgraf v. USI Film Prod.*, 113 S. Ct. 1250 (1993) *granting cert. to* 968 F.2d 427 (5th Cir. 1992) (No. 92-757) and Petitioner's Brief, *Rivers v. Roadway Express, Inc.*, 113 S. Ct. 1250 (1993) *granting cert. to* 973 F.2d 490 (6th Cir. 1992) (No. 92-938).