July 1976

Casenote: Employment Discrimination - Title VII - Unlawful to Use Conviction Records as an Absolute Bar to Employment

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EMPLOYMENT DISCRIMINATION—TITLE VII—UNLAWFUL TO USE CONVICTION RECORDS AS AN ABSOLUTE BAR TO EMPLOYMENT

The Missouri Pacific Railroad (MoPac) had an absolute policy of rejecting applicants with records of criminal convictions other than minor traffic offenses.[1] In applying for employment as a clerk at MoPac's corporate headquarters, appellant, a black, revealed that he had been convicted for refusing military induction at the height of the Vietnam war.[2] MoPac informed appellant that his conviction record disqualified him for employment. Thereupon, appellant instituted suit under Title VII of the Civil Rights Act of 1964[3] on his own behalf and as a class action, alleging that MoPac's conviction bar policy was an unlawful employment practice.[4] Appellant sought declaratory and injunctive relief and back pay. The federal district court held that the appellant had failed to establish a Title VII violation since MoPac's conviction bar policy had only a de minimus discriminatory impact on blacks and further found that the employer's policy had arisen from business necessity.[5] On appeal, *held*, affirmed in part, reversed in part. Statistics which show that a conviction bar policy has a disparate impact on black job applicants and on blacks residing in the vicinity of the employer's business establish a prima facie case of discrimination under Title VII; a conviction record may not be used as an absolute bar to employment unless that record bears significantly upon the requirements of the particular job for which application was made.[6] *Green v. Missouri*

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1. MoPac had voluntarily discontinued use of arrest records as a bar to employment after the decision in *Gregory v. Litton Systems, Inc.*, 472 F.2d 631 (9th Cir. 1972). Green v. Missouri Pac. R.R., 523 F.2d 1290, 1293 (1975).

2. Appellant's conviction came after an unsuccessful attempt to obtain classification as a conscientious objector. He requested and was denied post-conviction review in a panel of the instant court alleging the unconstitutionality of his draft classification. He subsequently served 21 months in prison. Green v. Missouri Pac. R.R., 523 F.2d at 1293 n.5.

3. 42 U.S.C. §§ 2000e to 2000e-17 (1970), *as amended* (Supp. III, 1973).

4. Appellant also had alleged violations of the Civil Rights Act of 1870, 42 U.S.C. § 1981 (1970), which provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactations of kind, and to no other.

5. 381 F. Supp. 992, 996-97 (E.D. Mo. 1974).

6. The instant court affirmed the trial court in refusing to broaden the class to allow appellant to represent those blacks discriminatorily denied employment with MoPac for

Pacific Railroad, 523 F.2d 1290 (1975).

Title VII prohibits discriminatory employment practices based on an individual's race, creed or sex.[7] Though the Act took effect in 1965,[8] it was not until 1971 that the Supreme Court considered its meaning and scope in the landmark case of *Griggs v. Duke Power Co.*[9] The Court held that the Act is directed at the consequences of discriminatory employment practices rather than at the employer's motivation in applying the illegal standards. Therefore, practices fair in form but discriminatory in operation are unlawful.[10] The *Griggs* test for Title VII violations is that any standard or practice which has a disparate impact upon minorities is prohibited unless justified by business necessity—a manifest relation between the employment practice and satisfactory job performance.[11] While the Court established the two pronged disparate impact-business necessity test, it did not propound standards for its application to job entry requirements other than the pencil and paper tests found illegal in *Griggs*.[12] Subsequent lower court decisions have expanded the two pronged test by applying it to a wide range of employment standards and job entry requirements.

One of the earliest federal district court decisions in this expansionist trend was *Johnson v. Pike Corporation of America*.[13] Applying a *Griggs* analysis, the court found that the employer's policy of terminating employees whose wages had been frequently

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any reason and those black employees of the defendant allegedly frozen in racially segregated job classifications. Green v. Missouri Pac. R.R., 523 F.2d at 1299.

7. 42 U.S.C. § 2000e-2(a), *as amended*, (Supp. IV, 1974), provides in relevant part that:

> (a) It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

8. Section 716 of Pub. L. 88-352 (1964) provides that the Title shall become fully effective one year after the date of its enactment. 42 U.S.C. § 2000e (1970) (EFFECTIVE DATE).

9. 401 U.S. 424 (1971). "The Court of Appeals was confronted with a question of first impression, as are we, concerning the meaning of Title VII." *Id.* 428.

10. *Id.* 431.

11. Thus, a job related qualification is one required by business necessity.

12. Note, *Business Necessity under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L.J. 98 (1974).

13. 332 F. Supp. 490 (C.D. Cal. 1971).

garnished violated Title VII. The court further found disparate impact by citing two general studies which showed that minorities suffered garnishments substantially more often than whites, even though these statistics did not specifically relate to plaintiff's case before the court.[14] With a prima facie case of discrimination thus established, the court then rejected the company's business necessity defenses which alleged that a garnisheed employee experienced a loss of morale which in turn impaired the quality and quantity of his work. The court held that garnishments have no demonstrated effect on job performance.[15]

The Ninth Circuit similarly applied *Griggs* in *Gregory v. Litton Systems, Inc.*,[16] in holding discriminatory the policy of refusing positions to persons with records of numerous arrests. The appellate court[17] impliedly accepted the district court's definition of a discriminatory yet lawful job standard as one necessary for the safe and efficient operation of a business.[18] The Eighth Circuit in *Carter v. Gallagher*[19] took the *Gregory* decision one step further. The plaintiffs charged the city of Minneapolis with discriminatory practices in hiring firefighters, alleging in part that the city's absolute policy of rejecting applicants convicted of any felony had an illegal discriminatory impact upon minorities.[20] Citing *Griggs*, the court held that denial of employment on the basis of a conviction record must have a bearing on the suitability of

14. *Id.* 494. These studies were: WESTERN CENTER ON LAW AND POVERTY, WAGE GARNISHMENTS, IMPACT AND EXTENT IN LOS ANGELES COUNTY (1970) and D. CAPLOVITZ, THE POOR PAY MORE (1967). The court's reliance on such general studies without showing that they actually applied to the plaintiffs before the court is strongly criticized in Wilson, *A Second Look at Griggs v. Duke Power Company: Ruminations on Job Testing, Discrimination and the Role of the Federal Courts*, 58 VA. L. REV. 844, 850 & n.8 (1972).

15. 332 F. Supp. at 495. Wilson, *supra* note 14, and 85 HARV. L. REV. 1482 (1972), criticize the court's rejection of defendant's business necessity defense. Business necessity, they note, is only meaningfully measured in monetary terms, and it makes little difference to the employer whether additional costs arise from the employee's inability to perform a specific job or from administrative costs in handling the garnishment.

16. 472 F.2d 631 (9th Cir. 1972).

17. *Id.* The appellate court noted that the trial judge correctly anticipated the subsequent Supreme Court decision in *Griggs*. *Id.* 632.

18. 316 F. Supp. 401 (1970). The problems presented by the use of arrest records and possible alternatives are noted in Note, *Discrimination on the Basis of Arrest Records*, 56 CORNELL L. REV. 470 (1970-71); Comment, *Discriminatory Hiring Practices Due to Arrest Records—Private Remedies*, 17 VILL. L. REV. 110 (1971-72); Note, *Title VII—Racial Discrimination in Employment—Employers Use of Record of Arrest Not Leading to Conviction*, 17 WAYNE L. REV. 228 (1971).

19. 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972). This action was based on the equal protection clause of the fourteenth amendment and the Civil Rights Act of 1870, 42 U.S.C. § 1981 (1970).

20. The district court found that black males made up 4.7 percent of the population of the city of Minneapolis, but accounted for 12.19 percent of convicted male felons on a county wide basis. 3 Lab. Rel. Rep. F.E.P. Cas. 692 (D. Minn. 1971).

the applicant from the standpoint of protecting both the public as well as other firefighters, and prohibited the use of conviction records as an absolute bar to employment.[21]

The Supreme Court further elucidated its *Griggs* decision in *McDonnell Douglas Corp. v. Green*[22] and *Albemarle Paper Co. v. Moody*.[23] In *McDonnell Douglas*, Justice Powell noted that a Title VII complainant has the burden of establishing a prima facie case of discrimination. He also warned that the Court would not countenance any employment standard which would act as a "sweeping disqualification" of persons with conviction records unrelated to job qualifications.[24]

In *Albemarle*, Justice Stewart, writing for the majority, read *Griggs* together with *McDonnell Douglas* to hold that a complainant established a prima facie case of discrimination by showing that job entry tests favored applicants in a racial pattern significantly different from the pool of applicants.[25] The burden then shifts to the employer to show that the tests are nevertheless justified by business necessity. Even if the employer can meet its burden, the complainant may show that alternative tests or selection devices would serve the employer's interests without disparate impact, thereby demonstrating that the tests actually used were discriminatory.[26]

The principal case presented three major issues, two procedural and one substantive. The first procedural consideration was class size. Appellant sought to represent all blacks discriminatorily denied employment by MoPac for any reason as well as blacks allegedly restricted to inferior job classifications. The instant court, affirming the decision of the trial court, restricted appellant's class solely to blacks summarily denied employment because of their conviction records.[27]

The substantive issue was whether MoPac's absolute conviction bar policy complied with the two pronged *Griggs* test. To establish disparate impact, the instant court examined two statistical pools: residents of the general area from which MoPac employees were drawn and MoPac applicants. Because the court found a disparate impact in each statistical pool, it held that

21. 452 F.2d at 326.
22. 411 U.S. 792 (1973).
23. 422 U.S. 405 (1975).
24. 411 U.S. at 806.
25. 422 U.S. at 425.
26. *Id.* For a discussion on this aspect of the *Albemarle* decision, see Bartosic, *Labor Law Decisions of the Supreme Court 1974-75 Term*, 89 LAB. REL. REP. 365 (1975).
27. 523 F.2d at 1299.

appellant had established a prima facie case of racial discrimination.[28] Citing *Carter* and *McDonnell Douglas*,[29] the court held that no conceivable business necessity would justify placing all persons with conviction records in the ranks of the permanently unemployed.[30] In rejecting the company's business necessity defenses, the instant court noted that the Equal Employment Opportunity Commission (EEOC) had established guidelines requiring that employment tests demonstrate a significant relationship to job behavior.[31] Although test is defined under the guidelines to include personal history or background requirements as well as standardized tests,[32] the instant court declined to consider whether they would apply to the use of conviction data.[33]

The final procedural issue was back pay. Having found MoPac's absolute conviction bar policy discriminatory, the instant court enjoined its future use, and held that the appellant was entitled to back pay if the district court, on remand, found that his work experience had qualified him for any position with MoPac at the time of his original application.[34] The instant court refused to hold MoPac liable for back pay to others in appellant's certified class—blacks denied employment because of prior convictions—stating that the record did not disclose whether they had otherwise been qualified for employment with MoPac.[35]

Analysis of these three issues reveals that the instant court erred in its rulings on the scope of the class and the back pay issue. To expedite the national goal of equality in employment opportunities, Title VII encourages plaintiff class action suits to avoid the delays of individual case by case determinations.[36] The instant court's refusal to expand appellant's class to include all black applicants allegedly denied employment and black employees allegedly frozen into inferior job classifications seems to run directly counter to Title VII policy and practice. In the principal case, the district court initially refused to broaden the class, holding that it found no question of law or fact common to a class composed of blacks who were refused employment *and* those who

28. *Id.* 1295.
29. *Id.* 1296.
30. *Id.* 1298.
31. *Id.* 1299, n.13. The Commission's guidelines can be found in 29 C.F.R. §§ 1607-1607.14 (1975).
32. 29 C.F.R. § 1607.2 (1975).
33. *Id.* 523 F.2d 1299 n.13.
34. *Id.* 1299.
35. *Id.*
36. *See, e.g.*, Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968).

were hired.[37] The instant court summarily affirmed this part of the decision, stating that the district court was vested with some discretion in determining the parameters of the class.[38] This holding seems antipodal, however, to the instant court's earlier decision in *Reed v. Arlington Hotel Co.*[39] in which a dismissed employee (who would not return to employment with the defendant company) was permitted standing to bring a Title VII action on behalf of all blacks who allegedly had been discriminated against by the defendant company. The court found that a class under Title VII is not defined by employment status, but by discriminatory impact in any phase of employment.[40] Although the instant court noted its decision in *Reed*, it nevertheless refused to broaden appellant's class.[41] The court also ignored its holding in *Parham v. Southwestern Bell Telephone Co.*[42] that one alleged discriminatory employment practice is a sufficient basis for the court to commence a complete inquiry into a company's employment practices.

As authority for restricting the class to blacks denied employment by MoPac on the basis of conviction records, the instant court mistakenly relied on the dicta in both *Brito v. Zia Co.*[43] and *Johnson v. Georgia Highway Express, Inc.*[44] It cited these cases for the proposition that the trial court has some discretion in determining the parameters of a class action under rule 23 of the Federal Rules of Civil Procedure.[45] The issue with which the *Brito* court dealt, however, was the threshold question of the propriety of maintaining a class action under the requirements of rule 23. This was not the issue before the instant court. The district court had already certified the appellant's action as a suitable class action;[46] the question at issue was the scope of the class. In citing *Brito*, the instant court failed to distinguish between the initial requirements for a class action and the factors which determine the scope of the action once it has begun.[47] The court's reliance

37. 62 F.R.D. 434, 435 (E.D. Mo. 1973) (motion to dismiss).
38. 523 F.2d at 1299.
39. 476 F.2d 721 (8th Cir. 1973).
40. *See id.* 723.
41. 523 F.2d at 1299.
42. 433 F.2d 421 (8th Cir. 1970).
43. 478 F.2d 1200 (10th Cir. 1973).
44. 417 F.2d 1122 (5th Cir. 1969).
45. FED. R. CIV. P. 23.
46. 381 F. Supp. at 993.
47. FED. R. CIV. P. 23(c)(1) provides:

As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An

on *Johnson* is even more questionable. There, the plaintiff alleged that he was discharged for racially motivated reasons and brought an action charging the company with discrimination in all facets of its employment practices. The court of appeals termed the action an "across the board" attack which allowed plaintiff to represent all black employees of the company as potential victims of its racial policies.[48] The class members in *Johnson* and in the principal case were nearly identical and plaintiffs in both cases had made like challenges encompassing all phases of the employers' hiring practices. In view of these similarities, it seems completely inapposite to invoke the *Johnson* dictum to bar appellant in the principal case from expanding the scope of his class in the manner permitted in *Johnson*.

In its analysis of the substantive issue in the principal case, the instant court approved three statistical methods for determining whether an action met the disparate impact prong of the *Griggs* rule.[49] The first considers whether the employment practice in question excludes blacks as a class or in a specified geographical area at a substantially higher rate than whites, whereas the second compares the percentages of white and black applicants actually excluded by that practice. The third procedure examines the level of employment of blacks by the employer relative to the percentage of blacks in the employer's hiring area.[50] The trial court, as the instant court noted approvingly, employed the first two tests in making its determination as to disparate effect, finding first that blacks in the general population were from 2.2 to 6.7 times more likely to incur a conviction than were whites, and second that MoPac's conviction bar policy rejected two and one-half times more black than white applicants.[51] Though recognizing that these statistics established disparate impact, the trial court went one step further, comparing the number of blacks rejected to the total pool of applicants. The resulting figure, concluded the trial court showed only a de minimus discriminatory impact when compared with the percentage of blacks in the hiring area.[52]

The instant court correctly found two critical defects in the trial court's analysis. First, by comparing the number of black

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order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

3B J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE 23-1101 to 23-1105 (2d ed. 1975).

48. 417 F.2d at 1124.

49. 523 F.2d at 1293-94.

50. *Id.*

51. *Id.* 1294-95.

52. 381 F. Supp. at 996.

applicants barred from employment because of conviction records with the total number of applicants, the trial court had diluted the actual discriminatory impact, because there were more white than black applicants. More importantly, the instant court observed that a comparison of blacks rejected because of the policy in question with the percentage of blacks in the geographic area is irrelevant to the Title VII issue of whether the employment practice has a disparate impact on black applicants.[53] The trial court mistakenly computed whether the number of persons hurt by the practice was statistically large, whereas the instant court's numerical determination provides an accurate method for establishing disparate impact.

Having found disparate impact, the instant court turned to MoPac's business necessity defenses. Echoing precedent, the court rejected the absolute bar policy, stating that no conceivable business necessity could justify placing every ex-convict in the ranks of the permanently unemployed. Not surprisingly, the instant court refused to apply the EEOC guidelines in deciding this issue. The guidelines require elaborate statistical validation of employment tests to ensure job relatedness.[54] Criminal activities and the elements of the socially deviant personality, however, include so many facets as to defy quantification. The very definition of crime is an evanescent thing which changes with society's perception of itself and taboo activities. Thus, it seems nearly impossible to establish objective, concrete standards for determining when to bar an applicant with a particular conviction record from broad categories of jobs. In clear cases, of course, the determination is simple; for example, a convicted arsonist should not be a firefighter, nor a dangerously violent convict a police officer. For an employer to decide whether to bar a thief from employment because of the threat he poses is a more difficult determination to make.

The job relatedness of a conviction must, of necessity, be analyzed on a case by case basis. The EEOC's interpretation of Title VII supports this conclusion. In the Commission's view, it is unlawful to refuse employment to a minority group applicant on the basis of a conviction record unless the particular circumstances of each case clearly indicate that employment of that applicant is incompatible with the safe and efficient operation of the position for which application was made.[55] This case by case ap-

53. 523 F.2d at 1295.

54. See note 30 *supra*.

55. No. 72-1460, [1973] CCH EEOC DEC. ¶ 6341, at 4621 (Mar. 19, 1972).

proach, however, places employers in an untenable position. Employers, left with no real guidelines as to what constitutes a job related conviction, must make independent daily determinations. The back pay penalty for an incorrect decision can be heavy, and good faith, as the decision in *Albemarle* makes clear, is no defense.

A possible solution would be the creation of an ad hoc administrative panel within the EEOC to which an employer could turn for determination of the job relatedness of a particular applicant's conviction. The panel would hold informal hearings to analyze the relationship between the applicant's conviction record and the type of position for which he applied. Consideration would be given to such factors as the number and severity of past offenses, social conditions that may have contributed to the offense, age at the time of the offense, and evidence of rehabilitation, including performance in previous jobs. Direct appeal to a federal court of appeals could be provided should a party be dissatisfied with the outcome of the hearing. An employer would retain his good faith defense in such an appeal.

There are several advantages to the panel approach. First, it precludes employer liability for a good faith mistake, while allowing the applicant to argue the merits before an impartial body. Second, the panel would develop a body of precedent to guide employers' future decisionmaking. Finally, an applicant would retain his right to bring an action under Title VII if the employer refused to submit the job relatedness issue to the panel. The primary problem with this proposal is the strong possibility of administrative and judicial delay which could prevent quick and impartial decisionmaking.

Analysis of the principal case reveals two policy considerations implicit in the instant court's rejection of MoPac's absolute bar scheme. The first is a sort of judicial amnesty for Vietnam era draft-resisters. The instant court carefully noted that appellant had committed a non-violent crime and had served time in prison rather than escape to Canada or evade sanctions.[56] The court hinted that a person willing to serve a prison term rather than transgress his ethical beliefs was, contrary to MoPac's fears, a paragon of moral virtue.[57]

The second policy consideration implicit in this decision is the

56. 523 F.2d at 1299 n.14.

57. The court further noted that appellant had worked as a clerk both in prison and after his release for the city of St. Louis, receiving "superior" ratings from his supervisors. *Id.*

court's attempt to promote employment of ex-convicts.[58] As one commentator observed, the abolition of the conviction bar requires an employer to recognize that moral character is not as job related as general intelligence or mechanical aptitude and, accordingly, that criminal records have little relevancy to one's ability to perform a job successfully.[59]

Despite these policy considerations, the instant court refused to award back pay to those blacks in appellant's certified class who had been denied employment solely because of their conviction records. The Supreme Court in *Albemarle Paper Co. v. Moody*[60] stated that Congress had empowered the courts to award back pay as part of a complex legislative design directed at the eradication of a national evil. The role of back pay in this objective is to spur employers to eliminate discriminatory practices and to compensate those who have suffered on account of such practices.[61] Any court which declines such an award must carefully state its reasons.[62]

Although the instant court cited *Albemarle* in granting back pay to the appellant as class representative, its refusal to extend the remedy to other class members appears inconsistent with *Albemarle*. Since the district court on remand had to determine whether appellant was qualified for employment on the date of his application, it surely could have done so for the other class members whose employment applications showed that they had been rejected solely because of non-job related conviction records. The mechanics of identifying and notifying that affected class would not have presented any particular problems because MoPac had retained employment records dating from 1971[63] which presumably contained the names and last known addresses of all class members. The greatest difficulty may have arisen in the computation of back pay for class members who, on remand, were shown to have been eligible for employment.[64] Regarding

58. For a discussion of the problems of the ex-offender and conviction bars, see Note, *The Revolving Door: The Effect of Employment Discrimination Against Ex-Prisoners*, 26 HASTINGS L.J. 1403 (1975).

59. Wilson, *supra* note 14, at 849-50.

60. 422 U.S. 405, 416 (1975).

61. *Id.* 417-18.

62. *Id.* 421 & n.14. In his concurrence, Justice Marshall states that "only the most unusual circumstances would constitute an equitable barrier to the award of make whole relief where liability is otherwise established." *Id.* 440. *Accord*, Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971); Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969).

63. 381 F. Supp. at 995.

64. For an explanation of the back pay problem and Title VII requirements, see Comment, *Back Pay for Employment Discrimination Under Title VII—Role of the Judici-*

Title VII's strong make-whole policy, the court's back pay calculations in *Weeks v. Southern Bell Telephone & Telegraph Co.*[65] may provide some guidance. The *Weeks* court used as a guage the total earnings, including bonuses and overtime pay, paid to the person hired instead of the aggrieved party. Should the class be too large to determine "who replaced whom," an alternative solution might be a base salary for the period from which each applicant's earnings during the interim are deducted.[66]

The instant court is to be commended for its *Griggs* analysis and in its policies regarding the employment of past offenders. The instant court's refusal, however, to expand the class to include all blacks allegedly injured by MoPac's employment practices contradicts both the Act and prior case law. Similarly, the court may be criticized for its refusal to award back pay to the other members of appellant's class who had been denied employment solely because of their conviction records. These aspects of the decision may have ramifications far beyond the effects on the class litigating the principal case. Should class composition and back pay be similarly restricted in future cases, the plaintiff bar in Title VII litigation may be far less interested in bringing suit.[67] Furthermore, the immediate practical effect is to transform a Title VII class action into an individual action against an employer by greatly reducing any sanction against the company for its discriminatory policies. While it is difficult to divine a rationale for the court's actions, perhaps it is reasonable to presume that in view of MoPac's recent efforts to increase minority employment,[68] the instant court was unwilling to penalize it too harshly for using the "facially neutral" absolute conviction bar. The principal case also indicates the need for an administrative panl within the EEOC to which an employer may turn for guidance. As noted, specific guidelines on this aspect of employment practices are nearly impossible to establish. The Supreme Court

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ary in Exercising Its Discretion, 23 CATHOLIC U.L. REV. 525 (1974); Comment, *Equal Employment Opportunity: The Back Pay Remedy Under Title VII*, 1974 U. ILL. L.F. 379.

65. 467 F.2d 95 (5th Cir. 1975).

66. *See, e.g.*, Stamps v. Detroit Edison Co., 365 F. Supp. 87 (E.D. Mich. 1973).

67. 42 U.S.C. § 2000e-5(k) provides a "reasonable attorney's fee as a part of the costs" in a decision for the complainant under Title VII. The fee, within the discretion of trial court, is usually based on the size of award made to the class.

68. In the dissent to an order for denial of petition for rehearing en banc, the three dissenting judges (Gibson, Stephenson and Henley) noted that 29 percent of the employees hired the year appellant brought the instant action (1970) were black, although blacks composed only 16.4 percent of the population of the city of St. Louis. 523 F.2d at 1299-1300.

has merely indicated that it would not accept any rule which acts as a "sweeping disqualification" of persons with prior conviction records. This leaves employers with little guidance in formulating hiring policies, though Congress has placed the risk of engaging in illegal employment practices on the potential discriminator in its daily employment decisions. It is now up to Congress to provide an impartial body to which both employers and applicants can turn for quick and even-handed determinations in cases where an ex-convict is attempting to re-enter the mainstream of society.

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