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## No Harm, No Fraud: The Invalidity of State Fraud Claims Brought Against Employment Testers

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## I. INTRODUCTION

In the summer of 1995, two female African-American students at Northwestern University began their summer jobs as part of the Legal Assistance Foundation of Chicago's ("L AFC") employment discrimination testing project.<sup>1</sup> The women, Kyra Kyles and Lolita Pierce, were hired as employment "testers"<sup>2</sup> for the project, where they were to gather data about Chicago-area employers by taking part in the application process for numerous potential jobs.<sup>3</sup> As part of the testing process, the project manager paired Kyles and Pierce with two white female L AFC employees, forming a pair of interviewing teams that each consisted of one African-American tester and one white tester. The two members of each team were

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1. See Memorandum in Support of Defendants' Combined 2-615 and 2-619 Motions to Dismiss at 3, *K & J Management, Inc. v. Kyles*, No. 98 L 012726 (Cir. Ct. Cook Cnty. 1999). The Legal Assistance Foundation of Chicago ("L AFC") is a not-for-profit organization "whose goal is to provide equal access to justice in civil matters to poor people in the City of Chicago." *Id.* Funded by the United Way of Chicago, this particular project was organized and enacted by L AFC in an effort to uncover racial discrimination in the hiring practices of hundreds of Chicago employers. See *id.* In the summer of 1996, the author worked as an employment tester at L AFC, on a gender testing project unrelated to the subject of this Note.

2. The Equal Employment Opportunity Commission ("EEOC") has defined testers as "individuals who apply for employment which they do not intend to accept, for the sole purpose of uncovering unlawful discriminatory hiring practices." EEOC Compl. Man. ¶ 2170 (May 22, 1996).

3. See Memorandum in Support of Defendants' Combined 2-615 and 2-619 Motions to Dismiss at 2-3, *K & J Management* (No. 98 L 012726).

then to pursue the same employment opportunities at a particular company.<sup>4</sup>

Before the women went out to interview for actual jobs, each tester worked closely with LAFC's project manager to develop a fictitious resume that she would use during her tests in the field.<sup>5</sup> These resumes portrayed the African-American testers as possessing employment credentials comparable or superior to those of their white counterparts, so that a pattern of hiring only white testers would constitute more plausible evidence of racial discrimination.<sup>6</sup> In addition to the resume development program, the four testers also took part in a training program, where they learned proper interviewing skills,<sup>7</sup> as well as how to react to a number of situations that they might encounter in the field.<sup>8</sup> As part of the training, LAFC instructed each tester "to make positive statements about their interest in the job and ask questions about the company to indicate their interest in being hired for the position."<sup>9</sup> Despite this apparent interest, however, the women were told by LAFC to decline any offers that they might receive during the course of the project.<sup>10</sup>

In June of 1995, all four testers appeared separately at the Chicago offices of J.K. Guardian Security Services ("Guardian").<sup>11</sup> While at Guardian, each woman expressed her interest in applying for a receptionist position pursuant to Guardian's advertisement in the *Chicago Tribune*.<sup>12</sup> Even though Kyles and Pierce possessed superior credentials to their white counterparts, neither one of

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4. See Complaint at 2-3, *Kyles v. J.K. Guardian Sec. Servs., Inc.*, No. 97 C 8311, 1998 WL 677165 (N.D. Ill. Sept. 22, 1998).

5. See Brief of the EEOC as *Amicus Curiae* in Support of Defendants' Motion to Dismiss at 3, *K & J Management* (No. 98 L 12726). The resumes reflected a "work history based partially on actual experience but supplemented with work histories, educational background, and other data designed to make the testers attractive to employers." *Id.* at 2 (internal quotes omitted).

6. See Complaint at 3, *Kyles*, (No. 97 C 8311).

7. See *id.* at 4.

8. See Michelle Landever, *Tester Standing in Employment Discrimination Cases Under 42 U.S.C. § 1981*, 41 CLEV. ST. L. REV. 381, 383 (1993) (discussing the general employment testing process and noting that in these organized audits, "testers go through a comprehensive training program where they learn techniques for observing their experiences, as well as the proper method for reporting facts concerning audits").

9. First Amended Complaint at 3, *K & J Management* (No. 98 L 012726).

10. See *id.*

11. See *id.* at 5-7.

12. See Memorandum in Support of Defendants' Combined 2-615 and 2-619 Motions to Dismiss at 1, *K & J Management* (No. 98 L 012726).

them was as successful as her testing partner in the application process.<sup>13</sup>

Kyles interviewed with the company's director of human resources, who told her that he planned to meet with the company's president and vice-president before ultimately selecting three or four applicants to call back for a second interview.<sup>14</sup> However, when Kyles' white counterpart, Anna Marrs, applied for the job the very next day, she interviewed with both the director of human resources as well as with Guardian's vice-president.<sup>15</sup> Marrs then returned a day later for a typing test, and was offered the job on the spot.<sup>16</sup> Shortly after Marrs turned down this offer, Kyles called Guardian to inquire about her application and was told by the company that the human resources director had not yet decided on who he planned to call back for second interviews.<sup>17</sup> After this phone call, Kyles never heard from Guardian again.<sup>18</sup>

A few days later, Pierce applied for the same job at Guardian.<sup>19</sup> Like Kyles, she interviewed with the director of human resources, who told her he would be conducting second interviews after consulting with the company's president or vice president.<sup>20</sup> Pierce's white testing partner, Eve Loftman, also interviewed with the human resources director that same day, and she was also given a typing test in addition to the interview.<sup>21</sup>

One week later, Guardian called Loftman and invited her to come in for a second interview.<sup>22</sup> After conducting this interview, Guardian offered Loftman the job.<sup>23</sup> Despite this outstanding offer, when Pierce called to inquire about the status of her application, the director of human resources told her that the company was "running behind" in the selection process.<sup>24</sup> Shortly thereafter, Loftman turned down the job offer, but Guardian made no further attempt to contact Pierce regarding the position.<sup>25</sup>

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13. See *Kyles v. J.K. Guardian Sec. Servs., Inc.*, No 98-3652, 2000 WL 892805 at \*2 (7th Cir. July 5, 2000).

14. See *id.*

15. See *id.*

16. See *id.*

17. See *id.*

18. See *id.*

19. See *id.*

20. See *id.*

21. See *id.*

22. See *id.*

23. See *id.*

24. *Id.*

25. See *id.*

This alleged disparate treatment accorded to the two sets of testers did not constitute all of LAFC's research on Guardian. Rather, supplemental undercover tests<sup>26</sup> and additional hiring information compiled by LAFC also indicated that Guardian had engaged in questionable hiring practices.<sup>27</sup> As a result, Kyles and Pierce filed a complaint against Guardian in district court on December 1, 1997.<sup>28</sup> Their suit alleged violations of the Civil Rights Act of 1866 and Title VII of the Civil Rights Act of 1964 ("Title VII").<sup>29</sup> The testers' claims stemmed not only from the fact that both white testers received job offers while neither African-American tester received an offer, but also from the allegedly inferior treatment that the African-American testers received throughout the hiring process.<sup>30</sup>

In response to the employment discrimination claim brought by Kyles and Pierce, Guardian counterclaimed for fraud.<sup>31</sup> Guardian also moved for summary judgment, arguing that since Kyles and Pierce were testers with no intent to take jobs with Guardian if offered, the women lacked standing to sue under Title VII.<sup>32</sup> The district court agreed, entering summary judgment in favor of Guardian on standing grounds.<sup>33</sup> In dismissing the plaintiffs' case,

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26. See Complaint at 4, *Kyles v. J.K. Guardian Sec. Servs., Inc.*, No. 97 C 8311, 1998 WL 677165 (N.D. Ill. Sept. 22, 1998). As supplemental research to the undercover tests, LAFC also executed a "Resume Test" of Guardian in the spring of 1995. *Id.* In response to an advertisement in an April issue of the *Chicago Tribune*, the testing project coordinators from LAFC mailed the resumes of hypothetical job applicants to Guardian. *See id.* The design and content of these resumes made it clear that one applicant was African-American, while the other applicant was obviously white. *See id.* Although the African-American applicant had more receptionist experience and skills than the identifiably white candidate, only the identifiably white candidate received a call from Guardian about the job. *See id.* at 4-5. Both the vice president of Guardian and the human resources manager left phone messages for the identifiably white candidate, while no one from Guardian ever contacted the identifiably black candidate. *See id.* at 5.

27. See Brief of the EEOC as *Amicus Curiae* in Support of Defendants Motion to Dismiss at 3, *K & J Management, Inc. v. Kyles*, No. 98 L 012726 (Cir. Ct. Cook Cnty. 1999). In its research of Guardian, LAFC had learned that Guardian had hired only one African-American as a receptionist since 1987, and that Guardian's interviewer had used racial coding on the African-Americans' applications, but not on others. *See id.* Moreover, LAFC obtained evidence that, even though fifteen persons occupied the receptionist position between June 1994 and June 1998, none was African American. *See id.*

28. See Memorandum in Support of Defendants' Combined 2-615 and 2-619 Motions to Dismiss at 4, *K & J Management* (No. 98 L 012726).

29. *See id.*

30. *See Kyles*, 1998 WL 677165, at \*1.

31. *See id.* at \*4.

32. *See id.*

33. *See id.* The court held that the plaintiffs had "no concrete and personal injury," and therefore, "[a] favorable outcome would result in nothing more for them personally than perhaps

the court found that Kyles and Pierce had experienced no redressable harm and had no standing to assert the rights of others.<sup>34</sup> Moreover, the court also dismissed Guardian's fraud counterclaim based on lack of jurisdiction.<sup>35</sup>

The district court's dismissal of the testers' case, however, did not end the dispute. Kyles and Pierce filed an appeal that was argued before the United States Court of Appeals for the Seventh Circuit in February 1999.<sup>36</sup> After hearing the testers' case, the appellate court overturned the district court's decision, holding that "testers are situated similarly to unlawfully discharged employees who are ineligible for reinstatement because of wrongdoing discovered after they were fired."<sup>37</sup> In finding that employment testers had standing to sue in the Seventh Circuit, the court noted that "[w]hen a job applicant is not considered for a job simply because she is African-American, she has been limited, segregated or classified in a way that would tend to deprive not only her, but any other individual who happens to be a person of color, of employment opportunities."<sup>38</sup> Hence, the Seventh Circuit remanded the case to the district court for adjudication of the testers' Title VII claims.<sup>39</sup> Upon remand, however, a jury decided in September 2000 that Guardian had not engaged in biased hiring practices, and that the testers' were not entitled to damages under Title VII.<sup>40</sup>

Conversely, after Kyles and Pierce appealed to the Seventh Circuit, Guardian filed suit against the testers in the Illinois State Circuit Court for Cook County under its corporate parent's name of K & J Management.<sup>41</sup> The state suit alleged that Kyles, Pierce, and LAFC had committed fraud by creating fictitious resumes and making false representations.<sup>42</sup> K & J Management argued that by

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some satisfaction that their summer work was championing the rights of humanity at large against racial discrimination." *Id.* at \*2.

34. The court further ruled that the federal judicial system only settles discrete disputes and redresses actual harms; its purpose is not to provide advisory opinions. *See id.* at \*2-3.

35. *See id.* The court held that "[a]s the counterclaims are premised on state law and not federal law, the court has no independent jurisdiction over even them." *Id.* at \*4.

36. *See Kyles v. J.K. Guardian Sec. Servs., Inc.*, No. 98-3652, 2000 WL 892805 (7th Cir. July 5, 2000).

37. *Id.* at \*8.

38. *Id.* at \*7.

39. *See id.* at \*14.

40. *Key Ruling in Ill. Hiring Bias Case*, AP ONLINE, Sept. 18, 2000, available at 2000 WL 26677189.

41. *See First Amended Complaint at 1, K & J Management, Inc. v. Kyles*, No. 98 L 0012726 (Cir. Ct. Cook Cnty. 1999).

42. *See id.* at 9-10. Although Loftman and Marrs participated in the challenged employment test along with Kyles and Pierce, the two white testers were not named as defendants in

holding themselves out as willing to work for Guardian, the defendants had defrauded the company.<sup>43</sup> The claim sought to recover Guardian's costs and fees for defending the tester case in federal court and prosecuting the state court case, and it also sought punitive damages.<sup>44</sup>

After granting K & J Management several opportunities to replead its complaint so that it contained more specific damages, in May of 2000 the state court ultimately dismissed K & J Management's claims.<sup>45</sup> As of July 2000, K & J Management had not appealed the dismissal of its fraud claim.<sup>46</sup> Nevertheless, because this apparent resolution of *K & J Management* carries the force of law in only one state, the issue of potential fraud claims brought against employment testers remains unsettled in the vast majority of American jurisdictions.

Thus, the *K & J Management* decision raises fundamental questions about the validity and legitimacy of employment testing as a Title VII research methodology. Indeed, if a court subsequent to *K & J Management* were to break with the decision and allow a company to bring fraud claims against testers, the suit could "torpedo testing as a tool to ferret out employment discrimination."<sup>47</sup> Allowing actions against individual testers to proceed to trial would seriously hamper the effectiveness of one of the most valuable weapons currently available for locating and redressing discrimination in the hiring context. In essence, granting the adjudication of fraud claims against employment testers "would have devastating implications for the use of testing to address employ-

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the state fraud suit. *See id.* at 1. The lawsuit also alleged a maintenance claim against LAFC, arguing that it was the foundation's idea to file suit, and not the testers'. *See id.* at 13. Maintenance is defined as "an officious intermeddling in a lawsuit by a non-party by maintaining, supporting or assisting either party, with money or otherwise, to prosecute or defend the litigation." BLACK'S LAW DICTIONARY 954 (6th ed. 1990). Although the Maintenance claim is still being adjudicated between the two parties, it is beyond the scope of this Note.

43. *See* First Amended Complaint at 10, *K & J Management* (No. 98 L 0012726).

44. *See id.* at 12.

45. *See* Order of Dismissal, *K & J Management v. Kyles*, No. 98 L 012726 (Cir. Ct. Cook Cnty. 2000)

46. *See id.* In response to the state fraud claims, the testers filed charges with the EEOC, arguing that the employer's lawsuit against them is "retaliation" for their attempts to enforce the federal law against employment discrimination. Press Release, LAFC (Apr. 1999) (on file with author). EEOC determined that the evidence established reasonable cause to believe that the employer discriminated against the testers on the basis of race and retaliated against the testers by bringing the common law fraud claim against them for engaging in activity protected by Title VII. *See Kyles v. J.K. Guardian Sec. Servs., Inc.*, No. 98-3652, 2000 WL 892805, at \*2 (7th Cir. July 5, 2000).

47. *Employer Pursues State-Law Fraud Lawsuit Against Testers Who Posed as Job Applicants*, EMPL. DISCRIM. REP. (BNA) 238 (Feb. 17, 1999).



ment discrimination."<sup>48</sup> The threat of a state fraud claim against employment testers would not only provide a shield for employers to use against Title VII, but it would also grant less scrupulous businesses a sword to wield against those who oversee and maintain the statute's effectiveness by managing and participating in employment testing programs.<sup>49</sup> Moreover, the real possibility of being held personally liable for statements and representations made throughout the job search process would discourage all but the most determined individuals from undertaking the watchdog role of employment tester.<sup>50</sup>

Part II of this Note addresses the history of employment tester litigation under Title VII of the 1964 Civil Rights Act. This history reveals that while legal precedent involving employment testing is rare, courts generally have held that employment testers possess standing to sue as members of a protected class under Title VII. Beyond the standing issue, however, the law regarding common law claims against the testers themselves has been left virtually unexplored by both state and federal courts. In Part III, this Note addresses whether the provisions of Title VII preempt state fraud actions taken against employment testers. More specifically, this Part agrees with the court's decision in *K & J Management*, and argues that allowing fraud claims against employment testers frustrates Title VII's objectives of preventing and eliminating employment discrimination in the hiring process. Furthermore, two courts have held that employers' counterclaims and state actions are illegal under federal law.<sup>51</sup> Part IV examines the nature of the common law fraud claim itself and reveals the difficulty that employers could encounter in sufficiently establishing the necessary elements of common law fraud. Part V then examines the possibility that fraud claims brought against employment testers may constitute illegal retaliation under Title VII's anti-retaliation provision. Finally, Part VI concludes that because employment testing is by far the most effective means of enforcing Title VII, the small price of misrepresentation to employers is justified by the preservation of such a potent weapon against discrimination in the hiring process.

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48. *Id.* (quoting LeeAnn Lodder, manager of LAF's employment testing project).

49. *See id.*

50. *See id.*

51. *See United States v. Wisconsin*, 395 F. Supp. 732, 734 (W.D. Wis. 1975); *Education/Instruccion, Inc. v. Copley Management & Dev. Corp.*, No. 81-532-Z, 1982 U.S. Dist. LEXIS 16667, at \*6 (D. Mass. Oct. 14, 1982).

## II. EMPLOYMENT TESTERS AS LITIGANTS: THE DEBATE OVER STANDING

### A. *The Statutory and Administrative Development of Employment Testing*

#### 1. Title VII and the Equal Employment Opportunity Commission

The statutory origin of employment testing lies in Title VII of the Civil Rights Act of 1964.<sup>52</sup> This legislation makes it illegal for both public and private employers to discriminate against applicants and employees on the basis of their race, color, sex, religion, or national origin.<sup>53</sup> In enacting the statute, Congress wanted to give Title VII a "far-reaching public dimension, intending to eradicate discriminatory practices in the workplace."<sup>54</sup>

In addition to crafting this pervasive new statutory weapon against employment discrimination, Congress also established the Equal Employment Opportunity Commission ("EEOC") to help enforce the provisions of Title VII.<sup>55</sup> Although initially granted little enforcement capability,<sup>56</sup> the EEOC has become "the major federal agency responsible for the enforcement of laws prohibiting discrimination in employment."<sup>57</sup> Today, the EEOC wields the statutory authority to issue procedural regulations regarding Title VII and to promulgate its substantive interpretations of the statutes through comprehensive policy *Guidelines*.<sup>58</sup> Although these *Guidelines* lack the force of law, "the courts, including the Supreme Court, will defer to the EEOC's substantive interpretations of the law when they find those interpretations to be reasonable and consistent with the purposes of the statute."<sup>59</sup>

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52. See 42 U.S.C. §§ 2000-2000e (1994). The Supreme Court has stated that Congress's objective in passing Title VII was to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971).

53. See 42 U.S.C. § 2000a (1994).

54. Jonathan Levy, *In Response to Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.: Employment Testers Do Have a Leg to Stand On*, 80 MINN. L. REV. 123, 137 (1995) (citations omitted).

55. See ROBERT BELTON & DIANNE AVERY, *EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE* 37 (1999).

56. See *id.*

57. *Id.*

58. See *id.* at 38.

59. *Id.*

## 2. Title VII, the Fair Housing Act, and Undercover Testing

While Title VII serves as the "touchstone of employment discrimination legislation,"<sup>60</sup> the statute does not explicitly mention employment testers.<sup>61</sup> Instead, the earliest undercover research efforts designed to detect racial discrimination involved housing testers who brought claims under the Fair Housing Act of 1968.<sup>62</sup> Because the Fair Housing Act ("FHA") provided the framework for the subsequent legitimization of employment testing under Title VII, it is useful to examine the judicial and legislative response to both housing and employment testing. Indeed, courts have consistently held that the purpose and structure of Title VII match the statutory construction and intentions of the FHA,<sup>63</sup> and that the two statutes' goals "are opposite sides of the same coin."<sup>64</sup>

Although the statutory justification for housing testing stemmed from the FHA's enactment in the late 1960s, it was not until the early 1990s that a governmental entity announced that it would accept charges of discrimination from employment testers.<sup>65</sup> In a November 20, 1990 policy guidance, the EEOC announced that "[w]hether or not a person intends to accept a position for which she applied, she has a statutory right, pursuant to Title VII, § 703(a)(1), not to have been rejected on the basis of race, color, religion, sex or national origin."<sup>66</sup> The EEOC stated that the "discriminatory rejection itself constitutes an injury, even though the

60. Levy, *supra* note 54, at 137.

61. See 42 U.S.C. § 3604(d) (1994). The Fair Housing Act ("FHA") declares it unlawful, with certain exceptions:

[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin . . . [or to] represent to any person because of race color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

42 U.S.C. § 3604 (1994).

62. See, e.g., *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1978) (using Title VII's definition of "person aggrieved" to adjudicate an FHA claim).

63. See, e.g., *EEOC v. Bailey Co. Inc.*, 563 F.2d 439, 453 (6th Cir. 1977) (holding that "on this issue of standing the Supreme Court does not conceive Title [ ] VII and [the FHA] to be different") (disapproved of on other grounds); *Waters v. Heublein, Inc.*, 547 F.2d 466, 469 (9th Cir. 1976) (finding that the extension of the FHA to the Title VII area "really makes no new law").

64. *Waters*, 547 F.2d at 469.

65. See EEOC Compl. Man. ¶ 2314 (Nov. 20, 1990).

66. *Id.*

tester may not have suffered the loss of a real employment opportunity or any monetary loss.”<sup>67</sup>

In its policy notice, the EEOC drew a comparison between employment tests and the more legitimately recognized and accepted housing tests, stating that “[c]onceptually, there is no difference between a tester in the fair housing context and a tester in the equal employment context.”<sup>68</sup> The opinion further noted that “[a]lthough the employment tester might, in some instances, have a more difficult and elaborate role to play, she performs precisely the same role in the furtherance of Title VII as does the tester for housing discrimination.”<sup>69</sup>

Unfortunately, mounting political backlash and criticism surrounding the decision to accept charges from employment testers forced the EEOC to terminate plans to establish its own testing program.<sup>70</sup> Despite the forced abandonment of its own program, however, the EEOC remains supportive of the use of testers by public interest organizations such as LAFC and the Fair Employment Council, and the commission continues to accept discrimination charges from employment testers.<sup>71</sup>

## *B. The Jurisprudential Debate Over Tester Standing*

### *1. Havens Realty and the Early Tester Cases*

As the *Kyles* decision indicates, much controversy remains regarding whether employment testers have standing to sue under Title VII.<sup>72</sup> The debate centers upon whether the testers have “suf-

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67. *Id.*

68. *Id.*

69. *Id.*

70. See Richard Lowry, *Testing Bias*, NAT'L REV., Feb. 9, 1998, at 4 (discussing the EEOC's plan to run a \$200,000 pilot program with two groups in Chicago and Washington, D.C., and quoting former EEOC general counsel Don Livingston as criticizing the policy for “rais[ing] the question of whether we want our government to be engaging in fraudulent misrepresentation”); Lisa Stoin, *Pressured by Congress, EEOC Drops Job Testers*, NAT'L L.J., Aug. 17, 1998, at A10 (noting that the EEOC's use of testers “drew fire from the Hill and business groups, who charge that hiring decisions are inherently more subjective than selecting tenants, and that testers represent a deceptive, and potentially pricey, way of doing business”); Tammy Webber, *Using Fakery to Hunt Bias*, ORANGE COUNTY REGISTER, Dec. 11, 1998, at C3 (reporting that the EEOC had dropped plans for its own testing program after then-House Speaker Newt Gingrich promised to support a budget increase for the EEOC only if it promised not to spend any money on programs that would create new employment discrimination litigation).

71. See Brief of the EEOC as *Amicus Curiae* in Support of Defendants' Motion to Dismiss at 1, *K & J Management, Inc. v. Kyles*, No. 98 L 012726, (Cir. Ct. Cook Cnty. 1999).

72. See Marcia Coyle, *EEOC Plans to Try Out Workplace Bias Tests*, NAT'L L.J., Jan. 19, 1998, at A10.

ferred a constitutionally sufficient 'injury in fact' sufficient to create a 'Case or Controversy' under Article III of the Constitution."<sup>73</sup> Courts repeatedly have held that a plaintiff must "demonstrate that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision."<sup>74</sup> Thus, the plaintiff's claims are limited "to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process."<sup>75</sup>

With regard to discrimination actions brought under Title VII and the other civil rights statutes, the Supreme Court has adopted an expansive view toward the standing requirements of all plaintiffs who are members of a protected class.<sup>76</sup> More specifically, the Court has recognized that certain testers can indeed suffer actionable injury under Article III.<sup>77</sup> This recognition stretches back to two early "tester" cases from the 1950s, when African-Americans in the segregated South visited public bus facilities to determine whether they would receive non-discriminatory treatment.<sup>78</sup> In *Evers v. Dwyer*, the Court held that the fact that the plaintiffs "may have boarded this particular bus for the purpose of instituting this litigation is not significant."<sup>79</sup> The Court also noted

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73. Brief of the EEOC as *Amicus Curiae* at 6, *Kyles v. J.K. Guardian Sec. Servs., Inc.*, No. 98-3652, 2000 WL 892805 (7th Cir. July 5, 2000) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)).

74. *See id.* (internal quotes omitted).

75. *Flast v. Cohen*, 392 U.S. 83, 97 (1968).

76. *See* Brief of the EEOC as *Amicus Curiae* at 7, *Kyles* (No. 98-3652); *see also* *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 382 (1982) (holding that housing discrimination testers can file discrimination claims under the FHA); *Gilmore v. City of Montgomery*, 417 U.S. 556, 569 (1974) (finding that African Americans could challenge the city's policy of allowing racially segregated private groups to reserve temporary exclusive use of public parks); *Norwood v. Harrison*, 413 U.S. 455, 467-68 (1973) (holding that African-American parents had standing to challenge a state policy of providing school books to racially segregated private schools); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 212 (1972) (ruling that white tenants had standing to sue landlord for discrimination against minorities); *Pierson v. Ray*, 386 U.S. 547, 558 (1967) (ruling that African Americans had standing to challenge discriminatory treatment at a local bus terminal).

77. *See* Brief of the EEOC as *Amicus Curiae* at 7, *Kyles* (No. 98-3652).

78. *See Pierson*, 386 U.S. at 558 (rejecting the argument that African-American clergymen had suffered "self-inflicted injury" by going to the "Jackson bus terminal for the sole purpose of testing their rights to unsegregated public accommodations"); *Evers v. Dwyer*, 358 U.S. 202, 204 (1958) (holding that an African-American who was arrested for riding in the front of the bus has standing to sue).

79. *Evers*, 358 U.S. at 204. The *Evers* Court further held that "[a] resident of a municipality who cannot use transportation facilities therein without being subjected by statute to special disabilities necessarily has, we think, a substantial, immediate, and real interest in the validity of the statute which imposes the disability." *Id.*

that Article III requires only that a plaintiff suffer injury to some *statutory right* for standing to exist, and that the plaintiff's individual motives and inclinations behind his or her actions are irrelevant when determining the plaintiff's right to adjudicate.<sup>80</sup> Thus, because the statute at issue in *Evers* imposed no requirement regarding the plaintiffs' intent, the Court found that the plaintiffs' thoughts and motivations did not affect the validity of their civil rights claims.<sup>81</sup>

The first Supreme Court decision that directly addressed the propriety of undercover discrimination research involved housing testers.<sup>82</sup> In *Havens Realty Corporation v. Coleman*, the Supreme Court held that housing testers who had been denied housing on the basis of their race had "suffered injury in precisely the form the statute [§ 804(d) of the FHA] was intended to guard against, and therefore had standing to maintain a claim for damages under the Act's provisions."<sup>83</sup> The Court further reasoned that the fact that the plaintiffs expressed interest to the defendant without any intention of buying or renting a home did not negate their injury under the FHA.<sup>84</sup> Thus, the *Havens* decision marks the Supreme Court's first explicit recognition of the standing of undercover testers.

The *Havens* Court relied significantly upon *Trafficante v. Metropolitan Life Insurance Co.*, a 1972 decision in which the Court unanimously held that the term "person aggrieved" should be "interpreted broadly" in a number of situations.<sup>85</sup> These situations include those in which: 1) the actions brought by private plaintiffs are the primary method of achieving compliance with the statute; 2) the language of the statute reveals a congressional intent to interpret standing as broadly as is allowed by Article III of the Constitution; 3) the statute's legislative background indicates a congressional intent to broadly construe standing; and/or 4) the governmental agency charged with enforcing and applying the statute broadly construes standing.<sup>86</sup> Because the *Trafficante* Court had broadly defined the term "person aggrieved," the *Havens*

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80. *See id.*

81. *Id.*

82. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). In granting housing testers the standing to allege illegal conduct under the FHA, the Court held that the plaintiffs approaching of the real estate agent "without any intention of buying or renting a home, does not negate the simple fact of injury with the meaning of § 804(d)." *Id.* at 374.

83. *Id.* at 373-74.

84. *See id.* at 374 (citing *Pierson v. Ray*, 386 U.S. 547, 558 (1967)).

85. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972).

86. *See EEOC Compl. Man* ¶ 2168 (Nov. 20, 1990).

Court found that the tester plaintiffs had standing to assert violations of the FHA.<sup>87</sup>

## 2. The Lower Courts' Adoption of Tester Standing

Although the Supreme Court's decision in *Havens* involved housing testers, a number of other courts had extended Article III standing to employment testers prior to the Seventh Circuit's decision in *Kyles*.<sup>88</sup> At the federal appellate level, the Fourth Circuit first recognized employment tester standing in 1971.<sup>89</sup> In *Lea v. Cone Mills Corporation*, the court addressed a dispute over whether an African-American woman who had applied for a job merely to test the defendant's employment practices—rather than to seek actual employment—had suffered a sufficient injury under Article III.<sup>90</sup> In answering this policy question in the affirmative, the court held that even though “specific employment was not sought, and even if the application was solely a predicate for this suit, these facts ought not to defeat the claim.”<sup>91</sup> Furthermore, the defendants never even challenged the woman's standing in *Lea*. This decision marked the earliest recognition of employment tester standing at the appellate court level.<sup>92</sup>

As was referenced in the Introduction of this Note, the most recent decision involving employment tester standing was the Seventh Circuit's decision in *Kyles*.<sup>93</sup> In upholding both *Kyles* and *Pierce*'s standing to sue, the court noted that “[t]he fact that testers have no interest in a job does not diminish the deterrent role they play by filing suit under Title VII.”<sup>94</sup> The court applied a

87. See *Havens Realty Corp.*, 455 U.S. at 376 n.17 (citing *Trafficante*, 409 U.S. at 209-11).

88. See, e.g., *Lea v. Cone Mills Corp.*, 438 F.2d 86, 87 (4th Cir. 1971) (finding that an African-American plaintiff had standing to assert an employment discrimination claim even though she had no intention of taking the job if offered); *Molovinsky v. Fair Employment Council of Greater Wash., Inc.*, 683 A.2d 142, 146 (D.C. 1996) (holding that “plaintiff testers in this case alleged a violation of their statutory right”).

89. See *Lea*, 438 F.2d at 87.

90. *Id.*

91. *Id.* at 88. The court also noted that the plaintiffs' test case served an important purpose by “open[ing] the way for employment of Negro women in the Cone Mills plant . . . . This pronouncement upon their rights, and the requirement of Cone Mills to observe them in the future, were ordered in implementation of the Equal Employment Opportunities Act. Plaintiffs should not be denied attorneys' fees merely because theirs was a ‘test case.’” *Id.*

92. *Id.* at 87-88. Even though the issue of standing was not disputed by the defendant in *Lea*, one of the justices noted that the “entire case smacks of nothing but manufactured litigation.” *Id.* at 90 (Boreman, J., concurring in part and dissenting in part).

93. *Kyles v. Guardian Sec. Servs. Inc.*, No. 98-3652, 2000 WL 892805, at \*1 (7th Cir. July 5, 2000).

94. *Id.* at \*8.

broad reading to the statutory purpose behind Title VII, finding that “[t]he statute confers upon all individuals a right to be free from racial discriminatory practices in employment.”<sup>95</sup> Moreover, the court found that the testers’ lack of genuine interest in the jobs for which they were applying could only limit their injuries under Title VII; it could not preclude them from asserting a claim under the statute altogether.<sup>96</sup>

In addition to the Fourth and Seventh Circuits, the Court of Appeals for the District of Columbia also has extended Article III standing to employment testers.<sup>97</sup> In *Molovinsky v. Fair Employment Council of Greater Washington, Inc.*, the court held that it did not matter whether the plaintiff intended to keep the job for which she had interviewed.<sup>98</sup> Rather, the court held that the “plaintiff testers in this case alleged a violation of their statutory right to be free from sexual harassment. . . . [T]he injury to their rights was direct and personal.”<sup>99</sup> Finding that the use an employment tester intends to make of his or her application or of any subsequent employment offer is irrelevant to standing, the court stated that the “[v]iolation of a plaintiff’s statutory rights may itself constitute an . . . injury sufficient to confer Article III standing.”<sup>100</sup> The *Molovinsky* decision thus marked a decisive victory for employment testing programs.

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95. *Id.* at \*9.

96. *Id.* The court held:

[T]he fact that [the testers] had no interest in actually working for the company certainly speaks to the nature and extent of their injuries as well as the appropriate relief. But it does not rule out the prospect that they were injured. We have long recognized that humiliation, embarrassment, and like injuries—the very type of injuries that Kyles and Pierce allege they suffered—constitute cognizable and compensable harms stemming from discrimination.

*Id.* (citations omitted).

97. *See* *Molovinsky v. Fair Employment Council of Greater Wash., Inc.*, 683 A.2d 142, 146 (D.C. 1996).

98. *Id.* at 146. The court noted that “the statutory violation and accompanying injury exist without respect to the testers’ intentions in initiating the encounters.” *Id.* The factual dispute in *Molovinsky* centered around a fair employment organization program that had hired four testers to pose as job seekers on its behalf in a sex discrimination testing program. *See id.* at 145. The testers’ disparate treatment resulted in the filing of a sex discrimination suit against the defendant. *See id.* at 144-45. In his appeal, the defendant contended that the Fair Employment Council and the individual testers lacked standing to bring an action against him. *See id.* at 146.

99. *Id.*

100. *Id.* (internal quotes omitted).



### 3. The Movement Against Tester Standing

Despite the decisions in *Molovinsky*, *Lea*, and *Kyles*, the controversy surrounding employment tester standing remains far from settled in most jurisdictions. In *Parr v. Woodmen of the World Life Insurance Society*, the plaintiff sued an insurance company for allegedly failing to hire him because of his interracial marriage.<sup>101</sup> In dismissing the plaintiff's case, the District Court for the Middle District of Georgia held that because the plaintiff's primary purpose interviewing for a job was to create the basis for a Title VII EEOC charge and lawsuit, he was not the bona fide applicant for the position he sought and therefore failed to make out a prima facie case of employment discrimination.<sup>102</sup>

Similarly, in *Allen v. Prince George's County*, the District Court for Maryland found that because the plaintiffs could not prove that they were bona fide applicants for the job that they were seeking, they could not prove a prima facie case of discrimination under Title VII.<sup>103</sup> Hence, the court held that a plaintiff must show a genuine intention to accept the employment if offered in order to pursue a federal discrimination claim.<sup>104</sup> In essence, the *Parr* and *Allen* decisions stand for the proposition that Title VII claims are different from actions brought under the FHA. Proponents of this view argue that the rights granted by Title VII are narrower in that they require a bona fide applicant who genuinely seeks employment, whereas the FHA confers the right to truthful information to *anyone* who requests it.<sup>105</sup>

#### C. Judicial Justifications for Employment Testing

The contrasting case history discussed above indicates that the law remains unresolved as to whether employment testers have suffered injuries sufficient to establish standing under Title VII. More generally, a broad public policy debate rages over whether testing should be used at all as a Title VII research vehicle.<sup>106</sup> Nevertheless, despite sharp criticism from organized busi-

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101. *Parr v. Woodmen of the World Life Ins. Soc'y*, 657 F. Supp. 1022 (M.D. Ga. 1987).

102. *See id.* at 1032.

103. *Allen v. Prince George's County*, 538 F. Supp. 833, 841-43 (D. Md. 1982).

104. *See id.*

105. *See Kyles v. J.K. Guardian Sec. Servs., Inc.*, No. 97 C 8311, 1998 WL 677165, at \*3 (N.D. Ill. Sept. 22, 1998).

106. *See Morning Edition* (National Public Radio broadcast, Feb. 3, 1999) (quoting a spokesperson from the National Federation of Independent Business as saying, "[t]o trap an employer

ness lobbyists and political conservatives, the Supreme Court has advocated the need for "private attorneys general" such as employment testers,<sup>107</sup> who serve the invaluable function of promoting the "strong public interest in having injunctive actions brought under Title VII to eradicate discriminatory employment practices."<sup>108</sup> Subsequent decisions by the Court have reaffirmed the desirability of employing "private attorneys general" in the Title VII context.<sup>109</sup>

Lower court decisions also have endorsed the use of testers in civil rights actions. In *Richardson v. Howard*, the Court of Appeals for the Seventh Circuit noted:

It is frequently difficult to develop proof in discrimination cases and the evidence provided by testers is frequently valuable, if not indispensable. It is surely regrettable that testers must mislead commercial landlords and home owners as to their real intentions to rent or buy housing. Nonetheless, we have long recognized that this requirement of deception was a relatively small price to pay to defeat racial discrimination.<sup>110</sup>

Although *Richardson* involved housing testers, an implicit endorsement of the validity of employment testers came from the Circuit Court for the District of Columbia in *Fair Employment Council v. BMC Marketing Corp.*<sup>111</sup> In *Fair Employment Council*, the court addressed the issue of employment testers' standing prior to the enactment of the Civil Rights Act of 1991, concluding that, absent any monetary remedies, the testers had not suffered a cognizable injury.<sup>112</sup> In the 1991 amendments, however, Congress authorized the pleading of compensatory and punitive damages, and gave plaintiffs an accompanying right to a jury trial.<sup>113</sup> Although the court noted that the Civil Rights Act of 1991 had expanded Title VII's remedies to include compensatory damages, the court held that the statute did not apply retroactively, making it impossible for the plaintiffs to claim sufficient injury under Article

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by lying about [the employee's] real purposes for why the employee is there just doesn't seem like the solution that will actually work in the long run").

107. *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968) (per curiam).

108. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975).

109. *Id.*; see also *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 417 (1978) (finding that a prevailing plaintiff is entitled to attorney's fees while acting as a "private attorney general").

110. *Richardson v. Howard*, 712 F.2d 319, 321 (7th Cir. 1983).

111. *Fair Employment Council v. BMC Mktg. Corp.*, 28 F.3d 1268, 1272 (D.C. Cir. 1994).

112. See *id.* at 1272.

113. See 42 U.S.C. § 1981a(b)(1) ("A complaining party may recover punitive damages under this section against a respondent . . . if the complaining party demonstrates that the respondent engaged in a discriminatory practice . . . with malice or with reckless indifference to the federally protected rights of an aggrieved individual.").

III.<sup>114</sup> Despite this seemingly adverse ruling, the implication remains that had damages been available at the time the plaintiffs brought their claims, the court's decision probably would have differed.<sup>115</sup> Under today's version of Title VII, the new remedies promulgated in the 1991 amendments are available to prospective plaintiffs, thus removing the impediment to standing that supported the court's decision in *Fair Employment Council*.<sup>116</sup>

#### *D. The Development of Fraud Claims Against Testers*

Although there is significant case law regarding the issue of tester standing, only two decisions have directly addressed the validity of actions taken to stop or punish testers.<sup>117</sup> Both of the cases involved housing discrimination claims filed under Title VIII ("the Fair Housing Act" or "the FHA"), rather than employment discrimination claims brought under Title VII.<sup>118</sup> Nonetheless, the decisions reveal that common law fraud claims imposing liability on any type of tester impedes the purpose and objectives of both Title VII and Title VIII.<sup>119</sup>

In *Education/Instruccion, Inc., v. Copley Management & Development Corp.*, the defendant brought a counterclaim for misrepresentation against a group of housing testers, alleging that they had "falsely represented to defendants that they were interested in renting apartments and that they had various levels of income."<sup>120</sup> In its decision, the court conceded that testing inherently involves a certain degree of deception.<sup>121</sup> The court noted, however, that such deceptive practices were explicitly sanctioned by the Supreme Court in *Havens* as a small price to pay in the war against race discrimination.<sup>122</sup> The court determined that permitting a claim for misrepresentation "obstructs the accomplishment of an important

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114. See *Fair Employment Council*, 28 F.3d at 1272. The court distinguished *Fair Employment Council* from *Havens* because damages were available only under the FHA at the time the plaintiffs filed their Title VII claims. See *id.*

115. See Brief of the EEOC as *Amicus Curiae* at 14, *Kyles v. J.K. Guardian Sec. Servs., Inc.*, No. 98-3652, 2000 WL 892805.

116. See *Fair Employment Council*, 28 F.3d at 1272.

117. See *Education/Instruccion, Inc. v. Copley Mgmt. & Devt. Corp.*, No. 81-532-2, 1982 U.S. Dist. LEXIS 16667, at \*6 (D. Mass. Oct. 14, 1982); *United States v. Wisconsin*, 395 F. Supp. 732, 734 (W.D. Wis. 1975).

118. See cases cited *supra* note 117.

119. See *Copley*, 1982 U.S. Dist. LEXIS 16667 at \*6 (dismissing a counterclaim that asserted the tort of misrepresentation against a plaintiff who had filed an action under the FHA).

120. *Id.* at \*1.

121. See *id.* at \*2.

122. See *id.*

Congressional objective and must be held invalid by virtue of the operation of the Supremacy Clause.”<sup>123</sup> Hence, the *Copley* court found that the FHA preempted fraud counterclaims against undercover testers, observing that “[a] contrary holding would not merely chill but would significantly impede the exercise of the right to obtain non-discriminatory housing” by imposing potential tort liability on undercover testers.<sup>124</sup>

Judicial protection for undercover testers grew even stronger with a Wisconsin district court’s invalidation of a law that purported to criminalize and fine undercover testers.<sup>125</sup> Seeking preemption of the law, the United States Attorney General challenged the statute on the theory that it conflicted with the FHA.<sup>126</sup> The court in *United States v. Wisconsin* sustained this challenge, holding that regardless of whether federal law explicitly invalidates conflicting state legislation, a state law is preempted if it interferes with the general scheme of federal legislation.<sup>127</sup> Accordingly, because the Wisconsin law hampered the residents’ rights to equal housing opportunities, thereby interfering with the objectives of Title VIII, the court found that the FHA preempted the state statute.<sup>128</sup> In doing so, the court endorsed the use of undercover testing, reasoning that the challenged statute “ma[de] it difficult or impossible for persons seeking housing without discrimination based on race, color, religion or national origin to determine whether unlawful discrimination has been practiced against them, and chill[ed] the exercise of the right to equal housing [and employment] opportunity.”<sup>129</sup>

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123. *Id.* at \*6.

124. *Id.*

125. See *United States v. Wisconsin*, 395 F. Supp. 732, 734 (W.D. Wis. 1975). The former statute read, in relevant part:

*Testing Prohibited.* It is unlawful for any person not having any bona fide intention to avail himself of any rights under this section to solicit offers, to buy or lease from property owners or lessees or their agents, to demand the services or facilities of any place of public accommodation, to demand facilities or to demand any employment for the sole purpose of securing evidence of a discriminatory practice.

Wis. Stat. § 101.22(4m).

126. See *Wisconsin*, 395 F. Supp. at 733.

127. See *id.* at 734.

128. See *id.* at 734. The court concluded that “it is plain that the Attorney General of the United States had reasonable cause to believe that a group of persons had been denied a right granted by the Fair Housing Act of 1968, and that such denial raises an issue of public importance.” *Id.* at 733-34.

129. *Id.* at 733.

## III. THE TITLE VII PREEMPTION ARGUMENT

## A. Preemption in General

In theory, an act of Congress may preempt a state statute where it is determined that this preemption is "the clear and manifest purpose of Congress."<sup>130</sup> Congress possesses this power under the Constitution's Supremacy Clause,<sup>131</sup> and when settling preemption claims, the court "must make an independent determination as to whether there is a conflict between the Act and the state law."<sup>132</sup> This determination requires the court to consider whether the state statute at issue presents "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>133</sup> In determining whether a state statute is preempted by federal law, therefore, the court's main responsibility is to "ascertain the intent of Congress."<sup>134</sup> Congress typically preempts state laws either explicitly or by legislating in such a manner as to occupy an entire legislative field, thereby precluding state regulation in the same area.<sup>135</sup> Nevertheless, the preemption doctrine dictates that a federal law will displace a conflicting state law statute even if Congress has not explicitly addressed the issue of preemption within the text of the statute.<sup>136</sup>

The Supreme Court has found direct conflict to occur when the state statute at issue "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>137</sup> When this occurs, "the state law must yield to the regulation of Congress within the sphere of its delegated power" in order to negate any interference with the congressional intent behind the superseding federal statute.<sup>138</sup>

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130. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The *Rice* Court held that in determining preemption claims, the court must begin with the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 230.

131. See U.S. CONST. art. VI, cl. 2. The Supremacy Clause states that the federal statutes of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." *Id.*

132. *Wisconsin*, 395 F. Supp. at 734.

133. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

134. *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987).

135. See *id.* at 280-81.

136. See *Florida Lime & Avocado Growers, Inc. v. Panl*, 373 U.S. 132, 142 (1963); see also *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) (striking down state law that conflicted with federal law).

137. *Hines*, 312 U.S. at 52, 67 (1941).

138. *Savage v. Jones*, 225 U.S. 501, 533 (1912).

## B. Preemption Under Title VII

### 1. The Statutory Case Against Preemption

As a general proposition, state laws that correlate with the legislative purpose of Title VII are not preempted, but merely supplemented by Title VII.<sup>139</sup> The Supreme Court has held that “[i]n two sections of the 1964 Civil Rights Act . . . Congress has indicated that state laws will be pre-empted only if they actually conflict with federal law.”<sup>140</sup> Thus, there is a strong argument that state laws prohibiting employment testing are *not* preempted by Title VII, because “Congress never considered whether testing was an appropriate means of enforcing Title VII.”<sup>141</sup> Since Title VII is silent regarding the use of testers, one commentator has argued that “[s]tate law restrictions on the use of testers would not interfere with the enforcement procedures Congress outlined in Title VII.”<sup>142</sup> In essence, this theory suggests that § 2000e-7 of Title VII is an “anti-preemption” provision that expressly allows tort claims to be pursued.<sup>143</sup>

### 2. The Statutory Case for Preemption

While those opposed to preemption of state fraud claims against testers adopt a narrow reading of Title VII, proponents of preemption take a much broader view of the intent behind the

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139. See Brief of the Equal Employment Opportunity Commission as *Amicus Curiae* in Support of Defendants' Motion to Dismiss at 8-9, *K & J Management, Inc., v. Kyles*, No. 98 L 012726 (Cir. Ct. Cook Cnty. 1998) (citing 42 U.S.C. § 2000e-7 (1994)).

140. *Guerra*, 479 U.S. at 281. The relevant sections of the 1964 Civil Rights Act include: Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter . . . .

Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of the Act, or any provision thereof.

42 U.S.C. §§ 2000e-7, 2000h-4 (1994).

141. Michael J. Yelnosky, *Filling an Enforcement Void: Using Testers to Uncover and Remedy Discrimination in Hiring for Lower-Skilled, Entry-Level Jobs*, 26 U. MICH. J.L. REFORM 403, 471 (1993).

142. *Id.*

143. See *supra* note 140.

statute.<sup>144</sup> Their basic position is that Title VII does not have to explicitly allow testing in order for a state statute prohibiting testing to create an unacceptable degree of interference with the federal law. The purpose of § 2000e-7, or the so-called "anti-preemption" provision, is simply to preclude Title VII from preempting state anti-discrimination laws that are *more* stringent than Title VII.<sup>145</sup> It is not intended to allow state governments to insert their own regulations that would restrict the use of employment testers merely because they are not explicitly authorized by the Act.<sup>146</sup> Instead, the provision provides a basic federal anti-discrimination threshold that the states must surpass when creating their own employment discrimination legislation.<sup>147</sup>

An examination of judicial treatment of housing testers under Title VIII provides further justification for Title VII preemption of state anti-testing statutes. The FHA includes a provision virtually identical to, and with the same legislative purpose as, § 2000e-7 of Title VII.<sup>148</sup> As suggested above, Titles VII and VIII constitute twin civil rights laws that have been construed as part of a "coordinated scheme" to end discrimination and are to be interpreted *in pari materia*.<sup>149</sup> Courts long have recognized that the purpose, language and function of Title VII and Title VIII are practically identical, and the congressional desire to root out discrimination under each statute is the same.<sup>150</sup>

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144. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) ("Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.").

145. See Defendants' Reply in Support of Their Motion to Dismiss at 4, *K & J Management, Inc. v. Kyles*, No. 98 L 012726 (Cir. Ct. Cook Cnty. 1998).

146. See Defendants' Reply in Support of Their Motion to Dismiss at 4-5, *K & J Management, Inc. v. Kyles*, No. 98 L 012726.

147. See Defendants' Reply in Support of Their Motion to Dismiss at 4-5, *K & J Management, Inc. v. Kyles*, No. 98 L 012726; see also *Local 246, Utility Workers Union v. Southern Cal. Edison, Co.*, 320 F. Supp. 1262, 1264 (C.D. Cal. 1970) (holding that a California statutory provision against requesting or permitting any female employee to lift over 50 pounds was preempted by Title VII).

148. See 42 U.S.C. § 3615 (1995). The statute provides, in relevant part:

Nothing in this [title] shall be construed to invalidate or limit any law of a State or political subdivision of a State, or of any other jurisdiction in which this [title] shall be effective, that grants, guarantees, or protects the same rights as are granted by this [title]; but any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this [title] shall to that extent be invalid.

*Id.*

149. *Huntington Branch NAACP v. Huntington*, 844 F.2d 926, 935 (2d Cir. 1988), *aff'd*, 488 U.S. 15 (1988).

150. See, e.g., *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972) (relying on Title VII terminology to adjudicate a Title VIII claim); *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1529 (7th Cir. 1990) (applying Title VII standards to Title VIII); *EEOC v. Bailey, Co.*, 563

Despite the lack of explicit congressional authorization for undercover testing, courts have nevertheless found attempts to penalize testers to be preempted by federal law.<sup>151</sup> Indeed, although the plaintiffs in *Wisconsin* were housing testers, the wording of the statute that was challenged and eventually preempted explicitly mentioned and penalized both *employment* testing as well as housing testing.<sup>152</sup> Thus, because recent decisions indicate that Title VIII and Title VII should be construed similarly, it becomes reasonable to extend FHA holdings to the employment testing sphere.

Furthermore, there is no evidence that either Congress or the Supreme Court has ever viewed housing discrimination as more important or intolerable than discrimination in the hiring context. In fact, at least one court has found that employment testers are in a protected class under Title VII.<sup>153</sup> In *Latuga v. Hooters*, the court held that plaintiffs "have standing for a claim of discrimination whether they truly sought employment or applied knowing that they would be rejected, as an evidentiary function to this litigation."<sup>154</sup> Moreover, the EEOC has noted that an employment applicant, "like an applicant for housing, 'has a statutory right to be referred and selected without regard to race . . . even if the applicant does not intend to take the position.'"<sup>155</sup> In its policy guidelines, the EEOC has argued that testers may "challenge any discrimination to which they were subjected while conducting the tests."<sup>156</sup> In addition to the EEOC, other federal offices or agencies also have used testing to accomplish the goal of eliminating racial discrimination.<sup>157</sup>

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F.2d 439, 452 (6th Cir. 1977), *cert. denied*, 435 U.S. 915 (1978) (finding that the statutory structure and language of Title VII and Title VIII are "strikingly similar"); *Wators v. Heublein, Inc.*, 547 F.2d 466, 469 (9th Cir. 1976), *cert. denied*, 433 U.S. 915 (1977) (finding Title VII to be "functionally identical" to the FHA in purpose and structure).

151. See *United States v. Wisconsin*, 395 F. Supp. 732, 734 (W.D. Wis. 1975); *Education/Instruccion, Inc. v. Copley Management & Dev. Corp.*, No 81-532-2, 1982 U.S. Dist. LEXIS 16667, at \*2 (D. Mass. Oct 14, 1982).

152. See *Wisconsin*, 395 F. Supp. at 733.

153. See *Latuga v. Hooters, Inc.*, No. 93 C 7709, 1995 U.S. Dist. LEXIS 10713, at \*4 (N.D. Ill. July 27, 1995).

154. *Id.*

155. Memorandum in Support of Defendants' Combined 2-615 and 2-619 Motions to Dismiss at 10, *K & J Management, Inc. v. Kyles*, No. 98 L 012726 (Cir. Ct. Cook Cnty. 1998) (quoting EEOC Policy Guidance No. 915.002, May 22, 1996).

156. *Id.* at 10 n.4 (quoting EEOC Policy Guidance No. 915.002, May 22, 1996).

157. See Memorandum in Support of Defendants' Combined 2-615 and 2-619 Motions to Dismiss at 10, *K & J Management* (No. 98 L 012726). These federal offices or agencies include the Department of Housing and Urban Development, the Department of Justice, the Federal



In summary, the argument for preemption is based upon the notion that the use of testing to uncover illegal racial discrimination is critical to the prevention of disparate hiring practices. To allow employers accused of discriminatory actions to sue those who are responsible for gathering some of Title VII's most useful data would turn the statute on its head, chilling its very purpose.<sup>158</sup> Hence, preemption is proper, because "congressional intent to preempt state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation."<sup>159</sup>

#### IV. THE COMMON LAW FRAUD CLAIM

##### A. *The Elements of Common Law Fraud*

To state an actionable claim for common law fraud, the plaintiff must allege, with specificity, the following elements:

- The defendant provided a false statement of material fact;
- The defendant knew that the statement is false;
- The defendant intended for the statement to induce the other party to act;
- The plaintiff relied upon the truth of the statement; and
- The plaintiff suffered damages resulting from reliance on the statement.<sup>160</sup>

In fraud claims brought against former employees or job applicants, a "misrepresentation could be a basis for tort liability if the employer would not have considered the application but for the misrepresentation and the employer suffers damages as a result of its reliance on the misrepresentation."<sup>161</sup>

In *Fried v. AFTEC*, a New Jersey state superior court addressed the issue of misrepresentation in an employment setting.<sup>162</sup> The case involved a former employee who had sued his old employer, alleging that he was illegally denied a termination

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Trade Commission, the Federal Reserve Bank, and the office of the Comptroller of the Currency. *See id.*

158. *See* Moon, Moss, McGill, Hayes & Shapiro, P.A., *Employer Fights Back by Suing Job Testers' for Fraud*, MAINE EMPLOYMENT LAW LETTER, May 1999.

159. California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 280-81 (1987).

160. *See* Gibbs v. Ernst, 647 A.2d 882, 890 (Pa. 1994); Gerill Corp. v. Jack L. Hargrove Builders, Inc., 528 N.E.2d 530, 536 (Ill. 1989).

161. Yelnosky, *supra* note 141, at 450.

162. *Fried v. AFTEC*, 587 A.2d 290 (N.J. Super. Ct. App. Div. 1991).

bonus.<sup>163</sup> The employer subsequently counterclaimed for fraud after discovering that the plaintiff had materially misrepresented his background, training and skills.<sup>164</sup> The court held that because the employer had relied upon the plaintiff's misrepresentations, the employer had an actionable fraud claim against the former employee.<sup>165</sup>

### *B. The Difficulty in Proving Materiality*

In common law fraud claims brought against employment testers, the most pressing issues involve (1) whether there was a false statement of material fact; and (2) whether the employer has actually suffered any damages. A "misrepresentation is 'material' and therefore actionable if it is such that had the other party been aware of it, he would have acted differently."<sup>166</sup> This definition poses a significant problem for many employers because it requires that in order for the applicant's misrepresentations to be material, the employers must prove that they had decided to interview the applicants *only* because of the specific information given to them either through initial contact or on the resumes.<sup>167</sup> If the company adhered to a policy of interviewing *all* applicants (as the plaintiffs alleged in the *Kyles* Title VII suit), the materiality element remains unfulfilled because the misrepresentation did not change the employer's subsequent conduct.<sup>168</sup> To show that employment testers provided materially false information, the employer must prove that it had decided to interview the testers because of specific and unique information on their resumes.<sup>169</sup> The employer also must demonstrate that it had specifically relied on these false or misleading statements in making an employment decision.<sup>170</sup>

In essence, even if the employer can prove that it had relied on unique information on the testers' applications, the potential

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163. *See id.* at 291.

164. *See id.* at 297.

165. *See id.* at 298.

166. *Mack v. Plaza Dewitt Ltd.*, 484 N.E. 2d 900, 906 (Ill. App. Ct. 1985) (finding that a residential condominium unit owner, who brought an action seeking damages for statutory fraud and common-law fraud against developer and marketer of the condominium, failed to state a cause of action since the pleadings did not state facts that would show that any alleged misrepresentation was material).

167. *See Memorandum in Support of Defendants' Combined 2-615 and 2-619 Motions to Dismiss at 12, K & J Management, Inc. v. Kyles*, No. 98 L 012726 (Cir. Ct. Cook Cnty. 1998).

168. *See id.*

169. *See id.*

170. *See Connick v. Suzuki Motor Co.*, 675 N.E.2d 584, 591 (Ill. App. Ct. 1996).

fraud claim remains premised upon the employment testers' false expressions of interest in obtaining employment with the company.<sup>171</sup> The employer's claim stems from the fact that its human resources department would not have reviewed the employment testers' applications or interviewed them if the company had known that the testers were working undercover and had no interest in the position.<sup>172</sup> Even if this conduct constituted a misrepresentation, the degree of its materiality is far less concrete, because, as at least one court has noted, "an application for employment is not a contract; it is a mere solicitation of an offer of employment."<sup>173</sup>

An applicant's expression of interest in a job that she does not intend to take probably is not tangible enough to constitute a materially false statement of fact.<sup>174</sup> Pursuing a job interview without a commitment to accept the position if offered is quite natural behavior; it occurs every day, and employers are well aware that job applicants "play the field."<sup>175</sup> Both applicants and employers understand that, at the interview stage, neither party's expression of interest in the other amounts to a representation that the applicant intends to accept the job or the employer intends to offer it.<sup>176</sup> Thus, statements made by employment testers that they are interested in the job do not appear to qualify as a fraudulent misrepresentation of material fact.<sup>177</sup>

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171. See Memorandum in Support of Defendants' Combined 2-615 and 2-619 Motions to Dismiss at 12, *K & J Management* (No. 98 L 012726).

172. See *id.*

173. *Harden v. Maybelline Sales Corp.*, 282 Cal. Rptr. 96, 99 (Cal. Ct. App. 1991).

174. See Defendants' Reply in Support of Their Motion to Dismiss at 7, *K & J Management* (No. 98 L 0012726).

175. *Id.*; see also E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217, 221 (1987) ("[A] party that enters negotiations in the hope of the gain that will result from ultimate agreement bears the risk of whatever loss results if the other party breaks off the negotiations. That loss includes out-of-pocket costs the disappointed party has incurred, any worsening of its situation, and any opportunities that it has lost as a result of the negotiations.").

176. See Defendants' Reply in Support of their Motion to Dismiss at 7, *K & J Management* (No. 98 L 012726); see also *HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc.*, 545 N.E. 2d 672, 682 (Ill. 1989) (stating that "misrepresentations of intention to perform future conduct, even if made without present intention to perform, do not generally constitute fraud").

177. See Memorandum in Support of Defendants' Combined 2-615 and 2-619 Motions to Dismiss at 13, *K & J Management* (No. 98 L 012726). But see RESTATEMENT (SECOND) OF TORTS § 551 cmt. 1 (1965) ("If, however, the applicant becomes aware that the employer is expending significant amounts of time and money considering his suitability for employment or may be bypassing other qualified candidates lack of interest may become basic to the transaction.").

### C. The Challenge of Alleging Sufficient Damages

#### 1. Pecuniary Damages

To fulfill the damages element of a fraud claim, a plaintiff must identify actual pecuniary loss suffered as a result of the actual fraud.<sup>178</sup> Indeed, “[i]f the plaintiff is not materially harmed by the defendant’s conduct, however flagrant it may have been, there may be no recovery.”<sup>179</sup> Moreover, this loss must be significant; the damages suffered cannot be a *de minimis* or trifling amount, because “the tort of common-law fraud is primarily addressed to the invasion of economic interests. ‘[D]eceipt belongs to that class of tort of which pecuniary loss generally constitutes part of the cause of action.’”<sup>180</sup>

When applying these criteria to fraud claims against employment testers, it becomes evident that it would be extremely difficult for an employer to plead sufficient damages in a standard fraud case.<sup>181</sup> The only pecuniary “harm” alleged by the employer is the expenditure of the time spent to interview, screen and process the testers’ applications for employment.<sup>182</sup> Furthermore, in the grand scheme of corporate day-to-day operations, this time expended usually is rather insignificant.<sup>183</sup> Since standard business practice indicates that the processing of job applications usually is conducted by a low-level, low salaried employee, the time spent could quite reasonably be seen as *de minimis* by the courts.<sup>184</sup> In short, “[a] fraud action does not afford a remedy for harm to one’s pride.”<sup>185</sup>

#### 2. Reputational Damages

In addition to pecuniary damages, the employer may also elect to seek damages to its goodwill and reputation to compensate for the negative publicity that surrounded its defense of the test-

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178. See *Gold v. Dubish*, 549 N.E.2d 660, 666 (Ill. App. Ct. 1989).

179. *Shults v. Henderson*, 625 F. Supp. 1419, 1426 (W.D.N.Y. 1986).

180. *Giammanco v. Giammanco*, 625 N.E.2d 990, 1000 (Ill. App. Ct. 1993) (quoting 37 AM. JUR. 2d *Fraud and Deceit* § 283, at 378 (1968)) (citations omitted).

181. See Memorandum in Support of Defendants’ Combined 2-615 and 2-619 Motions to Dismiss at 14, *K & J Management* (No. 98 L 012726).

182. See *id.*

183. See *id.*

184. See *id.*; see also *Shults*, 625 F. Supp at 1426 (“Nominal damages are not awarded in deceit.”).

185. *Giammanco*, 625 N.E.2d at 1000.

ers' federal employment discrimination claims.<sup>186</sup> While this claim of reputational damage avoids the de minimis tendency of pecuniary claims, it nonetheless contains significant shortcomings of its own, because an employer may not recover damages caused by its own conduct.<sup>187</sup> As two recent undercover reporter cases involving hidden cameras indicate, conduct that reveals questionable business practices cannot be considered the cause of reputational injury resulting from the public's learning about such behavior.<sup>188</sup> In *Food Lion v. Capital Cities/ABC, Inc.*, the court held that "tortious activities may have enabled access to store areas in which the public was not allowed . . . but it was the food handling practices themselves—not the method by which they were recorded or published—which caused the loss of consumer confidence."<sup>189</sup> Similarly, in *Medical Laboratory Management Consultants v. ABC*, the court held that the alleged harm occurred not as a result of the broadcaster's "misrepresentation of their identities" in the hidden camera taping, but rather from the lab's poor performance in reading various cancer tests.<sup>190</sup>

These two cases indicate that to assert reputational damages in a tester fraud claim, an employer must demonstrate that its reputation suffered as a direct result of the alleged fraud of the testers, and not from the notoriety associated with defending an employment discrimination charge.<sup>191</sup> Indeed, simply alleging that the employer's reputational damages arose from being the object of a federal employment discrimination lawsuit accomplishes nothing, because these damages occurred in the context of the federal case, and not as part of the state fraud claim.<sup>192</sup> Instead, the employer must prove that its reputation suffered as a direct result of the testers' alleged fraud; the civil rights claim retains no rele-

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186. See Defendants' Reply in Support of their Motion to Dismiss at 9, *K & J Management* (No. 98 L 0012726).

187. See *id.*; see also *Medical Lab. Management Consultants v. ABC, Inc.*, 30 F. Supp. 2d 1182, 1198-99 (D. Ariz. 1998) (holding that a medical laboratory that sued television network for fraud resulting from broadcast concerning faulty pap smear tests could not recover reputational damages); *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 964 F. Supp. 956, 963 (M.D.N.C. 1997) (finding that a grocery store's damaged reputation was not the result of any alleged fraud by undercover reporters who exposed health violations in the store's meat department).

188. See *Food Lion*, 964 F. Supp. at 963.

189. *Id.*

190. *Management Consultants*, 30 F. Supp. 2d at 1898-99.

191. See Defendants' Reply in Support of Their Motion to Dismiss at 9, *K & J Management* (No. 98 L 0012726).

192. See *id.* at 8.

vance.<sup>193</sup> In other words, the employer's reputational harm would remain the same regardless of whether the testers had been bona fide job applicants rather than testers. Thus, because it was within the Federal Title VII lawsuit where the employer's reputation suffered, pursuing reputational damages under a state tort claim becomes futile.<sup>194</sup>

### 3. Attorneys' Fees and Litigation Expenses

Another option an employer may pursue in attempting to fulfill the damages element of a fraud claim involves recovering litigation expenses.<sup>195</sup> While it may first appear that certain cases support an award of attorneys' fees in a common law fraud claim, a closer examination of these cases reveals that fees and litigation expenses are awarded only when contemplated or required under a specific state statute or prior contractual agreement between the parties.<sup>196</sup> In fact, substantial precedent holds that without an explicit statute or contractual agreement between the parties, attorneys' fees and litigation expenses are not usually available to the successful litigant.<sup>197</sup>

### 4. Punitive Damages

It has been observed that, "[i]n assessing whether, as a matter of law, punitive damages can be awarded, the court's role is to act as a gatekeeper, determining whether the plaintiff can demonstrate the level of outrageous conduct by defendants that the common law requires for the imposition of punitive damages."<sup>198</sup> Tradi-

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193. *See id.*

194. *See id.*

195. *See id.* at 10.

196. *See id.*; *see also* *Father & Sons, Inc. v. Taylor*, 703 N.E.2d 532, 536-37 (Ill. App. Ct. 1998) (allowing an award of attorneys' fees under the provisions of the Consumer Fraud Act); *Black v. Iovino*, 580 N.E.2d 139, 142 (Ill. App. Ct. 1991) (supporting an award of attorneys' fees under the Consumer Fraud Act of Illinois).

197. *See, e.g.*, *Hamer v. Kirk*, 356 N.E.2d 524, 525-26 (Ill. 1976) (denying attorneys' fees to successful litigant in a class action for tax equalization or property for townships in county); *In Re Estate of Dyniewicz*, 648 N.E.2d 1076, 1085 (Ill. App. Ct. 1995) (denying attorneys' fees to guardians in an estate settlement action). *But see* *Brundidge v. Glendale Fed. Bank*, 659 N.E.2d 909, 911 (Ill. 1995) (granting attorneys' fees to plaintiffs in a class action suit against bank).

198. Memorandum in Support of Defendants' Combined 2-615 and 2-619 Motions to Dismiss at 21, *K & J Management, Inc. v. Kyles*, No. 98 L 012726, (Cir. Ct. Cook Cnty. 1998) (No. 98 L 012726); *see also* *Cirrincone v. Johnson*, 703 N.E.2d 67, 71 (Ill. 1998) (allowing punitive damages); *Kelsay v. Motorola Inc.*, 384 N.E.2d 353, 359 (Ill. 1978) (finding that it would be improper to grant punitive damages to employee who had claimed that employer wrongfully discharged

tionally, punitive damages are disfavored and rarely applied because of their penal nature.<sup>199</sup> As a result, "punitive damages are recoverable only where the alleged misconduct involve[s] some element of outrage similar to that usually found in crime."<sup>200</sup>

For courts to award punitive damages on a fraud claim, the defendant's misconduct must rise above the conduct constituting the basis of the action.<sup>201</sup> This misconduct includes "aggravating circumstances, such as malice, willfulness, or oppression."<sup>202</sup> Hence, proof of the elements of the cause of action does not suffice to support an award of punitive damages, because merely showing that fraud occurred does not justify penalizing the defendant.<sup>203</sup> A request for punitive damages may be granted only if the plaintiff presents evidence of some "extraordinary or exceptional circumstances clearly showing malice and willfulness" on the part of the defendant.<sup>204</sup>

When seeking punitive damages, an employer must argue that the tester's behavior was so outrageous and self-serving as to justify additional punishment.<sup>205</sup> In light of the fact that testers are acting with the purpose of uncovering illegal race discrimination, the argument for punitive damages becomes rather weak.<sup>206</sup>

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her from her employment following the filing of her claim for injury under Workmen's Compensation Act).

199. See, e.g., *Jannotta v. Subway Sandwich Shops, Inc.*, 125 F.3d 503, 511 (7th Cir. 1997) (overturning punitive damages applied against sandwich shop); *Spires v. Mooney Motors, Inc.*, 595 N.E.2d 225, 230 (Ill. App. Ct. 1992) (holding that no claim for punitive damages existed in an action brought by an employee against his employer for injuries sustained while using a tire changer for personal purposes); *Deal v. Byford*, 537 N.E.2d 267, 272 (Ill. 1989) (finding that punitive damages were proper where tenant brought action to recover damages for injuries sustained in attack on her by apartment inspector).

200. Memorandum in Support of Defendants' Combined 2-615 and 2-619 Motions to Dismiss at 22, *K & J Management* (No. 98 L 012726) (internal quotes omitted).

201. See generally Defendants' Reply in Support of their Motion to Dismiss at 11, *K & J Management* (No. 98 L 0012726) (citing *Parsons v. Winton*, 491 N.E.2d 1236 (Ill. App. Ct. 1986), which held punitive damages to be improper in former employee's suit against employer).

202. *Id.* (internal quotes omitted); see also *Anthony v. Security Pacific Fin. Servs., Inc.*, 75 F.3d 311, 316 (7th Cir. 1996) (holding that an allegation of intentional conduct is insufficient to claim punitive damages); *Malooley v. Alice*, 621 N.E.2d 265, 269-70 (Ill. App. Ct. 1993) (holding that purchasers were not entitled to punitive damages on Consumer Fraud Act claim).

203. See Defendants' Reply in Support of their Motion to Dismiss at 11, *K & J Management* (No. 98 L 0012726).

204. *Id.* (quoting *Home Sav. & Loan Ass'n v. Schneider*, 483 N.E.2d 1225, 1228 (Ill. 1985)).

205. See Memorandum in Support of Defendants' Combined 2-615 and 2-619 Motions to Dismiss at 23, *K & J Management* (No. 98 L 012726); see also *Martin v. Heinold Commodities, Inc.*, 643 N.E.2d 734, 756-57 (Ill. 1994) (granting punitive damages to a group of investors suing for breach of fiduciary duty claim).

206. See Memorandum in Support of Defendants' Combined 2-615 and 2-619 Motions to Dismiss at 23, *K & J Management*, (No. 98 L 012726).

The efforts of testers to further an important social purpose by exposing discriminatory practices condemned by Congress are certainly not motivated by self-promotion or the prospect of personal gain.<sup>207</sup> Moreover, because these testers are utilizing a standard investigatory technique with a record of court approval in the civil rights context, testing cannot be considered such outrageous behavior as to justify submitting the issue of punitive damages to a jury.

Furthermore, a federal court recently determined that an award of punitive damages was inappropriate in a case of proven fraud where the defendants were acting to further a matter of public interest.<sup>208</sup> In *WDIA, Inc. v. McGraw-Hill, Inc.*, the court held that because a news article exposing privacy issues in connection with credit reporting practices was a "matter of vital public interest," punitive damages did not apply, even though the information on which the article was based was fraudulently obtained.<sup>209</sup> Likewise, in tester fraud cases, even assuming that the employer fulfills all elements of the fraud claim, punitive damages nonetheless appear inappropriate because the testers functioned in furtherance of a "matter of vital public interest."<sup>210</sup>

#### V. THE RETALIATORY NATURE OF EMPLOYER FRAUD CLAIMS

Since the enactment of Title VII, a number of courts have adopted an adverse position toward retaliatory tactics taken by employers against employees and former employees.<sup>211</sup> The concept that the filing of a suit or counterclaim constitutes an unlawful act of retaliation stems from the Supreme Court's decision in *Bill Johnson's Restaurant, Inc. v. NLRB*.<sup>212</sup> In *Bill Johnson's*, an em-

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207. *See id.*

208. *See* *WDIA, Inc. v. McGraw-Hill, Inc.*, 34 F. Supp. 2d 612, 628 (S.D. Ohio 1998).

209. *Id.*

210. *Id.*

211. *See, e.g.*, *Goff v. Continental Oil Co.*, 678 F.2d 593, 598 (5th Cir. 1982). The *Goff* court provided an eloquent justification for not allowing retaliatory claims against applicants and employees:

The ability to seek enforcement and protection of one's right to be free of racial discrimination is an integral part of the right itself. A person who believes he has been discriminated against because [of an unlawful reason] should not be deterred from attempting to vindicate his rights because he fears his employer will punish him for doing so. Were we to protect retaliatory conduct, we would in effect be discouraging the filing of meritorious civil rights suits and sanctioning further discrimination against those persons willing to risk their employer's vengeance by filing suits.

*Id.*

212. *Bill Johnson's Restaurant, Inc. v. NLRB*, 461 U.S. 731 (1983).



ployer filed suit in state court against several of its former employees following the employees' participation in protected labor activity under the National Labor Relations Act ("NLRA").<sup>213</sup> In response, the National Labor Relations Board ("NLRB") sought to prevent the state court claim as an "unfair labor practice" filed "in retaliation for the [employees'] protected, concerted activities."<sup>214</sup>

In its decision, the Supreme Court ruled that the filing of a lawsuit for a retaliatory purpose constitutes an unlawful act under the NLRA.<sup>215</sup> While the Court acknowledged that the right of access to the courts is an important guarantee under the Bill of Rights, the Justices placed a caveat on this statement.<sup>216</sup> The Court ruled that because litigation "may be used by an employer as a powerful instrument of coercion or retaliation," this guarantee to the courts is not unfettered and absolute.<sup>217</sup> As a result, an employer's pending suit can be enjoined if the claim is "brought with the intent of retaliating against an employee."<sup>218</sup> Furthermore, even when a suit is not baseless, but is nonetheless still "shown to be without merit," the filing of the action will be dismissed if the suit was filed "in retaliation for the exercise of the employees' . . . rights."<sup>219</sup>

Though *Bill Johnson's* involves a claim brought against current employees, the Supreme Court also has found that the filing of a suit or counterclaim against non-employees or former employees can constitute an act of unlawful discrimination under Title VII.<sup>220</sup> Moreover, the statute itself specifically protects "applicants for employment."<sup>221</sup> Thus, the *Bill Johnson's* decision prohibiting employer retaliation applies equally to subsequent conduct taken by employers against previous job applicants.<sup>222</sup>

Furthermore, courts have overwhelmingly held that the anti-retaliation provision of Title VII applies to actions that are not ex-

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213. *See id.* at 733-34. The NLRA was enacted to prevent unfair labor practices taken against employees who have participated in protected activities such as unionization and discrimination lawsuits. *See* 29 U.S.C. §§ 158(a)(1), (4) (1994).

214. *Bill Johnson's*, 461 U.S. at 734-37.

215. *See id.* at 741.

216. *See id.*

217. *Id.* at 740-43.

218. *Id.* at 744.

219. *Id.* at 747.

220. *See, e.g.,* *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341-46 (1997) (holding that retaliatory acts do not have to consist of a specific job-related action to be covered under Title VII).

221. 42 U.S.C. § 2000e-3(a) (1994).

222. *See Bill Johnson's*, 461 U.S. at 763.

clusively job related.<sup>223</sup> One court has held that “the statute itself proscribes ‘discriminat[ion]’ against those who invoke the Act’s protections; the statute does not limit its reach only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer or demotion.”<sup>224</sup>

This broad view of coverage accords with the legislative intent behind Title VII’s anti-retaliation provision.<sup>225</sup> Congress enacted this protection to “ensure that no person [is] deterred from exercising his rights . . . by the threat of discriminatory retaliation.”<sup>226</sup> This explicit effort to provide statutory protection is present in Title VII as well because the statute depends largely on the participation of individual employees and applicants for its efficient enforcement.<sup>227</sup> Since employer retaliation is “likely to cause irreparable harm to the public interest in enforcing the law by deterring others from filing charges,”<sup>228</sup> courts have prohibited employers from enacting policies that might have the effect of deterring employees from engaging in protected activities.<sup>229</sup>

Consistent with *Bill Johnson’s* and the statutory intent behind the anti-retaliation provision, numerous courts have found that the filing of a suit or counterclaim constitutes unlawful retaliation under Title VII.<sup>230</sup> These courts have found that permit-

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223. See, e.g., *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 157 (3d Cir. 1999) (finding retaliation where employer instigated investigation of former employee by state regulatory agency); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (10th Cir. 1996) (finding retaliation in employer’s filing of criminal charges against employee); *Passer v. American Chem. Soc’y*, 935 F.2d 322, 331 (D.C. Cir. 1991) (finding retaliation in employer’s cancellation of symposium honoring employee); *Paxton v. Union Nat’l Bank*, 688 F.2d 552, 572 (8th Cir. 1982) (finding retaliation when employer subjected employee to exhaustive interrogation).

224. *Passer*, 935 F.2d at 331.

225. See generally *Nash v. Florida Indus. Comm’n*, 389 U.S. 235, 238 (1967) (“Congress has made it clear that it wishes all persons with information about [unlawful] practices to be completely free from coercion against reporting them to the [appropriate agency].”).

226. *EEOC v. Ohio Edison Co.*, 7 F.3d 541, 543 (6th Cir. 1993).

227. See Brief of the EEOC as *Amicus Curiae* in Support of Defendants’ Motion to Dismiss at 17, *K & J Management, Inc. v. Kyles*, No. 98 L 012726 (Cir. Ct. Cook Cnty. 1998); see also *EEOC v. Board of Governors*, 957 F.2d 424, 431 (7th Cir. 1992) (“Statutory provisions against retaliation such as those in the ADEA and Title VII protect employees’ right to participate in protected activity and aid the work of the EEOC which depends upon employee cooperation.”).

228. *Garcia v. Lawn*, 805 F.2d 1400, 1405 (9th Cir. 1986).

229. See, e.g., *Holt v. Continental Group, Inc.*, 708 F.2d 87, 91 (2d Cir. 1983) (“A retaliatory discharge carries with it the distinct risk that other employees may be deterred from protecting their rights under the Act or from providing testimony for the plaintiff in her effort to protect her own rights.”).

230. See, e.g., *Steffes v. Stepan Co.*, 144 F.3d 1070, 1075 (7th Cir. 1998) (“[A]ctions taken in the course of litigation could constitute retaliation.”); *Shafer v. Dallas County Hosp. Dist.*, No. CA 3-96-CV-1580-R, 1997 WL 667933, at \*4-5 (N.D. Tex. Oct. 21, 1997) (finding that a defamation counterclaim was retaliatory); *EEOC v. Levi Strauss & Co.*, 515 F. Supp. 640, 643 (N.D. Ill.

ting an employer to use subsequent litigation against an employee "would have a 'chilling effect' on an employee's protected right to challenge discrimination under Title VII."<sup>231</sup>

In *EEOC v. Virginia Carolina Veneer Corporation*, an employee filed a sex discrimination charge against her employer under Title VII.<sup>232</sup> In response, the employer filed an action against the employee, alleging that she had defamed the corporation by filing a written complaint with the EEOC.<sup>233</sup> The court noted that this was the only basis for the employer's actions, and that the employer had alleged no other defamatory writings or statements made by the employee.<sup>234</sup> Hence, the court found the employer's lawsuit retaliatory, justifying its decision by noting that the purpose behind Title VII is to "protect[ ] employees from employer retaliation for filing complaints with the Commission, even if the charges alleged are false or malicious."<sup>235</sup>

The *Bill Johnson's* and *Virginia Carolina Veneer* holdings warn employers that to win on a fraud claim against employment testers, the claim must satisfy Title VII's formidable protections of employees and job applicants. The proposition that testers deserve this high level of protection is further supported by the text of Title VII's anti-retaliation provision, which states that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."<sup>236</sup> In contrast to Title VII's substantive provisions that focus on race or sex discrimination with respect to an individual's "compensation, terms, conditions, or privileges of employment,"<sup>237</sup> the anti-retaliation provision prohibits discrimination of any kind when engaged in as retaliation for participating in a *statutorily protected activity*, omitting any reference to the specific terms of employment.<sup>238</sup> The provision expressly "outlaws all re-

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1981) (finding that a federal court may enjoin a state court defamation action filed in retaliation for protected conduct).

231. *Levi Strauss*, 515 F. Supp. at 642-43.

232. *EEOC v. Virginia Carolina Veneer*, 495 F. Supp. 775 (W.D. Va. 1980), *appeal dismissed sub nom. Cassidy v. Virginia Carolina Veneer Corp.*, 652 F.2d 380 (4th Cir. 1981).

233. *See id.* at 776.

234. *See id.*

235. *Id.* at 778 (citing *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998 (5th Cir. 1969)).

236. 42 U.S.C. § 2000e-3(a) (1994).

237. *Id.* § 2000e-2(a)(1) (emphasis added).

238. *See id.* § 2000e-3(a).

taliatory acts, including lawsuits filed in state tribunals.”<sup>239</sup> Furthermore, it has been held that Title VII’s “provision regarding retaliation may intentionally be broader [than the rest of the Act], since it is obvious that effective retaliation against [statutorily sanctioned conduct] need not take the form of a job action.”<sup>240</sup>

This broad reading of retaliatory conduct taken by the courts serves as a red flag for employers who wish to counterclaim or file state lawsuits against employment testers.<sup>241</sup> Thus, because the language in Title VII’s anti-retaliation provision is “even broader than that contained in the NLRA,”<sup>242</sup> and since the NLRA provided the model for Title VII’s anti-retaliation provision,<sup>243</sup> the strict protection given to employees by the Supreme Court’s *Bill Johnson’s Restaurant* decision accords with employees filing Title VII claims.<sup>244</sup> As a result, any actions brought by employers against employees must negate the presumption of a strong causal relationship between the tester’s Title VII claim and the employer’s adverse counterclaim. Simply stated, the employer must present a very strong case against the testers, and because material damages are already difficult to prove, the taint of retaliatory purpose that is attached to a fraud claim often should prove too strong to overcome.<sup>245</sup>

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239. *EEOC v. Levi Strauss, Co.*, 515 F. Supp. 640, 643 (N.D. Ill. 1981); *see also* *Russello v. United States*, 464 U.S. 16, 23 (1983) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”).

240. *McDonnell v. Cisneros*, 84 F.3d 256, 259 (7th Cir. 1996). Other courts have held that the anti-retaliation provisions of Title VII apply to actions that are not job-related. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 894-96 (1984) (finding that an employer “committed an unfair labor practice by reporting [its] undocumented alien employees to the INS in retaliation for participating in union activities”); *Passer v. American Chem. Soc’y*, 935 F.2d 322, 331 (D.C. Cir. 1991) (holding that “[t]he statute itself proscribes ‘discriminat[ion]’ against those who invoke the Act’s protections; the statute does not limit its reach only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer or demotion”).

241. *See EEOC v. Ohio Edison, Co.*, 7 F.3d 541, 545 (6th Cir. 1993).

242. *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1005-06 (5th Cir. 1969).

243. *See Hearings Before the General Subcomm. on Labor of the Comm. on Education and Labor*, 88th Cong. 83-84 (1963).

244. *See* Brief of the EEOC as *Amicus Curiae* in Support of Defendants’ Motion to Dismiss at 18, *K & J Management, Inc. v. Kyles*, No. 98 L 012726 (Cir. Ct. Cook Cnty. 1998).

245. *See Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 146-47, 149 (3d Cir. 1999) (finding that an employer’s filing of lawsuit against female employee but not male employee served sufficient evidence to demonstrate retaliation against the female employee’s protected activity); *Eiliand v. Trinity Hosp.*, 150 F.3d 747, 753 (7th Cir. 1998) (dismissing a nurse’s claim that her discharge was a result of racial retaliation).

## VI. PUBLIC POLICY

*A. Policy Justifications for Employment Testing*

The usefulness of employment testing in furthering the goals of Title VII has been widely recognized.<sup>246</sup> Testing gives "clear, direct measures" of racial and gender discrimination.<sup>247</sup> Furthermore, it "can document forms of discrimination that other empirical techniques cannot. It can provide unique insights into psychological and social processes and thereby lead to improved anti-discrimination practices."<sup>248</sup>

The utility of employment testing bolsters the case against employment tester fraud claims in that these suits conflict with Title VII's ultimate purpose by undercutting the congressional goal of preventing and eliminating employment discrimination.<sup>249</sup> The imposition of private suits, such as those brought by employment testers, is essential for the efficient enforcement of Title VII.<sup>250</sup> Hence, it is imperative that litigants have access to the courts to assert such claims without fear of redress.<sup>251</sup> Permitting fraud claims to proceed would thwart Title VII's goals, because it would discourage aggrieved applicants from asserting private claims against employers.

*B. Policy Concerns Regarding Employment Testing*

Conversely, there are also public policy arguments against using employment testers, "mainly because employers will have greater cause to fear frivolous litigation in making their hiring de-

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246. See A NATIONAL REPORT CARD ON DISCRIMINATION IN AMERICA: THE ROLE OF TESTING (M. Fix & M. A. Turner, eds. 1997).

247. *Id.* at 1.

248. *Id.* at 58.

249. See generally *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) ("Congress enacted Title VII . . . to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race.").

250. See generally *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 358-59 (1995) (holding that a private litigant fulfills the objectives of the anti-discrimination statutes).

251. See Brief of the EEOC as *Amicus Curiae* in Support of Defendants' Motion to Dismiss at 9, *K & J Management, Inc. v. Kyles*, No. 98 L 012726 (Cir. Ct. Cook Cnty. 1999); see also *Blistein v. St. John's College*, 860 F. Supp. 256, 269 (D. Md. 1994) ("[E]mployees have unfettered rights to file discrimination suits—regardless of their merit."); *EEOC v. Virginia Carolina Veneer, Corp.*, 495 F. Supp. 775, 777 (W.D. Va. 1980) (finding an "absolute privilege for filing of a discrimination charge").

cisions.”<sup>252</sup> More specifically, there is a fear that “the employment tester phenomenon will be a self-fulfilling prophecy, in that some outcome-oriented testers will find the evidence they are looking for, no matter what the employer’s actual hiring practices may be.”<sup>253</sup>

This fear of manufactured litigation is compounded by the potential for misuse of tester data by special interest groups with self-serving motives.<sup>254</sup> The Equal Employment Advisory Council (“EEAC”), a business advisory group, has voiced concern that testers will be used by unions to pressure employers during collective bargaining disputes, and also by rival companies who are engaged in fierce competition in the marketplace.<sup>255</sup> One judge has commented that testing “smacks of nothing but manufactured litigation and . . . ‘ambulance chasing.’”<sup>256</sup>

In addition to those who oppose all forms of undercover testing, there exist a number of commentators who support housing testing, but do not feel that undercover tests should apply to the hiring context.<sup>257</sup> These critics note that it is difficult to make employment candidates appear identically qualified because their personalities and presentation remain different.<sup>258</sup> As a result, housing testers are much more effective, because subjective qualities do not play as large a role in the target landlord/company’s ultimate decision of whether to rent out an apartment as they do in the hiring process.<sup>259</sup>

### C. Why the Benefits of Testing Outweigh its Defects

Despite this concern for increased litigation and abuse of employment testing objectives, the benefits of using employment

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252. Alex Young K. Oh, Note, *Using Employment Testers to Detect Discrimination: An Ethical and Legal Analysis*, 7 GEO. J. LEGAL ETHICS 473, 476 (1993).

253. *Id.*

254. See generally Letter from Equal Employment Advisory Counsel, to EEOC (Feb. 12, 1991) (quoting EEOC’s *Endorsement of Testers in Bias Cases Could Lead to Abuses, Employers’ Group Charges*, Daily Lab. Rep. (BNA) No. 31, at A-10 (Feb. 14, 1991), which questioned “the soundness of a policy that seeks to enforce fairness in the American workplace through reliance on covert activity and deliberate deception by anyone”).

255. See *id.*

256. *Lea v. Cone Mills Corp.*, 438 F.2d 86, 90 (4th Cir. 1971) (Boreman, J., dissenting).

257. See, e.g., Amy Sinatra, *The Sting: Use of Undercover Job Applicants Tested* (last modified Feb. 17, 1999), <<http://www.abcnews.go.com/sanctions/us/DailyNews/test-ers990211.html>> (quoting one former housing tester who is now a corporate discrimination attorney as saying, “I think that the concept of testing is a little naïve as applied to the workplace”).

258. See *id.*

259. See *id.*

testers still outweigh its inherent defects.<sup>260</sup> First and foremost, the deployment of "discrimination testers is an indispensable means of detecting and proving violations that might otherwise escape discovery or proof."<sup>261</sup> Indeed, "[h]iring discrimination can be especially difficult to detect. Applicants often do not know how they are being treated in comparison to others who are equally qualified . . . . Because it can often be difficult to discern, hiring discrimination often slips through undetected."<sup>262</sup> As a result, courts have noted that employment testing is an irreplaceable and extremely valuable tool for uncovering hiring discrimination.<sup>263</sup>

Moreover, employment testers are quite effective at assembling first-hand research and experiences regarding current hiring trends and practices in an area that is extremely difficult to enforce.<sup>264</sup> Interviewing for a job is an inherently private experience; applicants are often too wary and discouraged to dwell on the exact reasons why they did not get the job.<sup>265</sup> Hence, testing "can help to root out discriminatory practices where the disincentives to bring private suit result in underenforcement."<sup>266</sup>

Perhaps most importantly, courts are willing to accept the testimony of testers.<sup>267</sup> Indeed, "[i]t seems clear that the scales of social policy tip markedly in favor of the use of . . . discrimination testers, despite the deceptions necessarily entailed. In a nutshell,

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260. See David B. Isbell & Lucantonio Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation under the Model Rules of Professional Conduct*, 8 GEO. J. LEGAL ETHICS, 791, 801-02 (1995). Isbell and Salvi argue that "the misrepresentations as to identity and purpose employed by discrimination testers for the purpose of gathering information are uniquely used for that purpose, are legal, are long established and widely used, and are generally employed for socially desirable ends." *Id.* at 829.

261. *Id.* at 802. Isbell and Salvi note the Tenth Circuit's decision in *Hamilton v. Miller*, where the court held that "it would be difficult indeed to prove discrimination in housing without [the testor's] means of gathering evidence." *Hamilton v. Miller*, 477 F.2d 908, 909 n.1 (10th Cir. 1973).

262. Coyle, *supra* note 72, at A10.

263. See *Richardson v. Howard*, 712 F.2d 319, 321 (7th Cir. 1983) ("It is frequently difficult to develop proof in discrimination cases and the evidence provided by testers is frequently valuable, if not indispensable.").

264. See *Sinatra*, *supra* note 257.

265. See *id.* (quoting prominent employment lawyer Craig Cornish as stating, "[Tester] evidence is extremely strong evidence. It's the kind of evidence that plaintiffs could never come up with on their own").

266. Yelnosky, *supra* note 141, at 412.

267. See *Northside Realty Assocs., Inc. v. United States*, 605 F.2d 1348, 1355 n.19 (5th Cir. 1979).

there are circumstances where deception is justified in the search for truth."<sup>268</sup>

Although employer fraud suits against testers do not expressly abolish the practice of employment testing, allowing these suits to go forward would nevertheless deter the use of one of the most effective methods in detecting and documenting employment discrimination.<sup>269</sup> In turn, this chilling of employment testing would ultimately interfere with the purposes and objectives of Congress in enacting Title VII.<sup>270</sup> If Title VII's remedial goals are to be achieved, individuals must be permitted to bring claims acting as "private attorneys general" without fear of redress.<sup>271</sup>

## VII. CONCLUSION

Because testing is a legitimate, effective, and statutorily protected method of enforcing Title VII, there is a strong presumption against any attempt to impose state tort liability on employment discrimination testers. Allowing employers to file counter-suits or separate state claims without overwhelming evidence of non-sanctioned tortious conduct by employment testers contravenes Title VII's objectives of preventing and eliminating employment discrimination. Indeed, several courts have explicitly ruled that employers' counterclaims and state actions constitute retaliation and are thus illegal, meaning employers must tread carefully when considering any such actions. Even if these claims were to survive preemption challenges, it would be extremely difficult for employers to allege any material misstatement made by testers, or to claim any legally cognizable damages. Furthermore, even if an employer can state a sufficient cause of action, there are strong public policy arguments against allowing the employer's claim to materialize. Thus, it is imperative that both the legislatures and the courts follow the *K & J Management* decision by understanding the potential for danger that is attached to fraud claims against

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268. Isbell & Salvi, *supra* note 260, at 804.

269. See generally *Richardson v. Howard*, 712 F.2d 319, 321 (7th Cir. 1983) (observing that "[t]esters seem more likely to be careful and dispassionate observers of the events which lead to a discrimination suit than individuals who are allegedly being discriminated against").

270. See generally *Moon, Moss, McGill, Hayes & Shapiro*, *supra* note 158 ("Any time you have an employer use the courts to prevent employees from exercising their rights, that's a problem. It has a dangerous chilling effect. It discourages and chills everything [the EEOC] is trying to do.").

271. *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968) (finding that private attorneys general "advance the public interest by invoking the injunctive powers of the federal courts").



employment testers, and recognizing these claims as lacking substance.

*Robert Thomas Roos\**

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