

4-1988

Hybrid Employees: Defining and Protecting Employees Excluded from the Coverage of the National Labor Relations Act

Patrick S. Bryant

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



Part of the [Labor and Employment Law Commons](#)

Recommended Citation

Patrick S. Bryant, Hybrid Employees: Defining and Protecting Employees Excluded from the Coverage of the National Labor Relations Act, 44 *Vanderbilt Law Review* 601 (1991)

Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol44/iss3/10>

This Note is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

Hybrid Employees: Defining and Protecting Employees Excluded from the Coverage of the National Labor Relations Act*

I.	INTRODUCTION	601
II.	STATUTORY DEFINITION OF “EMPLOYEE”: WHO IS COVERED BY THE ACT?	603
	A. <i>Background</i>	603
	B. <i>Statutes</i>	604
III.	DEFINITION OF “EMPLOYEE”: CASE LAW	605
	A. <i>Managerial Employees</i>	605
	B. <i>Confidential Employees</i>	608
	C. <i>Professional Employees Under the Yeshiva Rationale</i>	610
	D. <i>Implications of Yeshiva</i>	611
	1. <i>Limitation to the Faculty Context?</i>	611
	2. <i>Impact on Other Professionals</i>	612
	3. <i>Broader Implications for Labor-Management Relations</i>	614
IV.	ALTERNATE FORMS OF PROTECTION FOR EXCLUDED EMPLOYEES	614
	A. <i>The Age Discrimination in Employment Act</i>	615
	B. <i>Title VII</i>	619
	1. <i>Disparate Treatment</i>	620
	2. <i>Disparate (Adverse) Impact</i>	620
	3. <i>Title VII Versus ADEA</i>	621
	C. <i>Employment-at-Will</i>	622
V.	CONCLUSION	624

I. INTRODUCTION

Any discussion of labor-management relations naturally assumes two parties: labor and management. Fundamental to both the industrial

* Throughout the Special Project, this piece is cited as Special Project Note, *Hybrid Employees*.

philosophy and labor legislation¹ of the United States has been the assumption of mutually exclusive and largely adversarial camps of "employers" and "employees." This rigid dichotomy, however, fails to recognize the existence of a third group of workers that fits neither the labor nor the management typology. These workers are best described as hybrid employees: workers who arguably deserve many of the statutory protections afforded to labor but who may be aligned too closely with the employer's interests to warrant the protection of the National Labor Relations Act (the Act or NLRA).

The primary justification for excluding the hybrid group from the protections of the Act is a "conflict of interest" rationale. Justice Powell noted in his partial dissent in *NLRB v. Hendricks County Rural Electric Membership Corp.*² that including these hybrid employees, whose interests are aligned with managements, in a group of rank-and-file employees necessarily hinders the functioning of the adversarial model of labor-management relations. Under this adversarial model, the "conflict of interest" rationale is a persuasive reason for excluding the hybrid group from the protections of the Act. This rationale, however, loses some of its persuasiveness upon consideration of a cooperative model of labor-management relations. The continuing decline in unionization³ and the trend toward greater cooperation between labor and management call for a reconsideration of the overall scheme of labor-management relations and increased efforts to incorporate the hybrid group into the system.

Part II of this Special Project Note examines the Act itself in order to determine which workers are excluded from the statutory definition of "employee."⁴ Next, Part III examines certain specific groups of hybrid employees as they have been defined and treated by the United States Supreme Court. Part IV discusses possible alternative protections for employees excluded from the coverage of the Act. Possible protections include The Age Discrimination in Employment Act (ADEA), Title VII of the Civil Rights Act of 1964, and employment-at-will actions. Part V concludes that United States labor legislation

1. See *supra* Special Project Note, *Future Cooperative Efforts*, at notes 75-82 and accompanying text.

2. *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 193 (1981) (Powell, J., concurring in part, dissenting in part). "In the adversary system which our labor laws envision, neither management nor labor should be forced to accept a potential fifth column into its ranks." *Id.*

3. According to the United States Bureau of Labor Statistics, union membership in the non-agricultural workforce has declined from a high of 35.5% in 1947 to 18% by 1985. S. LEVITAN, P. CARLSON & I. SHAPIRO, *PROTECTING AMERICAN WORKERS* 145 (1986) (citing data prepared by United States Bureau of Labor Statistics).

4. National Labor Relations Act, § 2(3), 29 U.S.C. § 152(3) (1982) [hereinafter NLRA].

should be modified to accommodate the hybrid employees if labor-management relations truly are becoming more cooperative than adversarial.

II. STATUTORY DEFINITION OF "EMPLOYEE": WHO IS COVERED BY THE ACT?

A. Background

Congress passed the original National Labor Relations Act, the 1935 Wagner Act, with two primary goals in mind: (1) the furtherance of industrial peace and (2) the equalization of bargaining power between labor and management.⁵ Underlying this legislation was an assumption that the labor system consisted of two groups whose interests were diametrically opposed.⁶ Section 1 of the 1935 Act reflects the drafters' concerns over the strife, unrest, and inequality of bargaining power that seemed to characterize the labor-management relationship in 1935.⁷ Although the original Act proscribed only employer unfair labor practices, the 1947 Taft-Hartley Amendments, in response to a perception that labor unions were also guilty of abusing their power, recognized unfair labor practices by labor organizations.⁸ A final statement of policy in section 1 of the 1935 Act emphasized Congress' desire

5. S. 2926, 73d Cong., 2d Sess. 1 (1934), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 1, 1 (1985).

6. See *supra* notes 1-2 and accompanying text.

7. NLRA § 1, 29 U.S.C. § 151 (1982). The Act states:

The denial by *some* employers of the right of employees to organize and the refusal by some employers to accept the *procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce. . . .*

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of *contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the *stabilization of competitive wage rates and working conditions* within and between industries.*

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce . . . by removing certain recognized sources of industrial strife and unrest . . . and by restoring equality of bargaining power between employers and employees.

Id. (changes made by the 1947 Taft-Hartley Amendments are italicized).

8. *Id.*

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair . . . the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

Id. (changes made by the 1947 Taft-Hartley Amendments are italicized.)

to eliminate the obstructions to commerce caused by the adversarial relationship between employers and employees by encouraging collective bargaining and protecting the workers' right to organize.⁹

B. Statutes

A logical starting point for determining who is protected by the Act is the language of the statute itself. The most important rights in Section 7 of the Act are granted to "employees,"¹⁰ who are defined in section 2(3) of the Act.¹¹ The statutory definition, however, is frustratingly circular and of little real value in determining who is protected under the Act. Section 2(3) states, "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise. . . ."¹²

The statute expressly exempts certain workers from the definition of employee: agricultural workers, domestic servants, individuals employed by parents or spouses, independent contractors, supervisors, employees subject to the Railway Labor Act, and employees of other persons not employers within the meaning of section 2(2).¹³ The ration-

9. *Id.*

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Id.; see *supra* Special Project Note, *Future Cooperative Efforts*.

10. Section 7 states:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) of this title.

NLRA § 7, 29 U.S.C. § 157 (1982).

11. NLRA § 2(3), 29 U.S.C. § 152 (1982).

12. *Id.* The full text of § 2(3) reads as follows:

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, . . . or by any other person who is not an employer as herein defined.

NLRA § 2(3), 29 U.S.C. § 152(3) (1982).

13. *Id.*

ale for excluding these workers from the coverage of the Act is their assumed alignment with management.¹⁴

Related to the provisions exempting certain employees are those which give the National Labor Relations Board (the Board) the authority to decide which employees should be grouped together for collective bargaining purposes.¹⁵ A proviso to section 9(b), however, limits the Board's ability to group certain employees into units with other employees.¹⁶ One such limitation prohibits the Board from declaring appropriate a unit that includes both professional and nonprofessional employees, unless a majority of the professional employees votes for inclusion in the unit.¹⁷

III. DEFINITION OF "EMPLOYEE": CASE LAW

A. Managerial Employees

Certain types of workers, though not explicitly excluded from the coverage of the Act, arguably do not need protection from employers. The National Labor Relations Board and the courts began differentiating between these workers and protected employees in bargaining unit cases. One group of workers not expressly excluded from the statute are "managerial employees," who were held by the Supreme Court in *NLRB v. Bell Aerospace Co.*¹⁸ to be implicitly excluded from the Act's coverage. This case involved a determination of whether certain "buyer" employees of Bell Aerospace should be excluded from the Act's coverage as "managerial employees." The employer asserted that the buyers were managerial employees and, as such, were excluded automatically from protection under the Act.¹⁹ The NLRB, however, had certified an election based on its conclusion that the buyers were covered by the Act.

Because the determination of whether the buyers were "managerial employees" depended largely on the buyers' job description, the Court focused its analysis on this description.²⁰ At Bell Aerospace the buyers could authorize purchases of "routine" items "off the shelf" from a ven-

14. See *supra* note 2 and accompanying text.

15. NLRA § 9(b), 29 U.S.C. § 159(b) (1982). Section 9(b) provides that "[t]he Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." *Id.*

16. *Id.*

17. *Id.* Professional employees are defined in § 2(12) of the Act. NLRA § 2(12), 29 U.S.C. § 152 (1982); see *infra* notes 77-78 and accompanying text.

18. *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267 (1974).

19. *Id.* at 269.

20. *Id.* at 270.

dor. If the requested item was special, the buyer was authorized to draw up invitations for bids and to decide which vendors to use in matters involving up to \$5000. For amounts above \$5000, however, buyers had to obtain supervisory approval.²¹

The Court denied enforcement of the Board-certified election, holding that managerial employees as a class were not protected under the Act.²² Basing its inquiry on relevant Board and court decisions, as well as the legislative history of the 1947 Taft-Hartley Act, the Court concluded that Congress originally had intended to exclude from the Act's protection all employees classified as managerial.²³ The Court noted that the Wagner Act did not expressly mention the term "managerial employee."²⁴ Then the Court traced the Board's development of the concept of managerial employees through a number of cases involving the appropriateness of bargaining units. In these cases, the Board had concluded that managerial employees were not to be included in units with rank-and-file employees.²⁵ The Court summarized the Board's policy on managerial employees as expressed in *Ford Motor Co.*:²⁶

We have customarily excluded from bargaining units of rank and file workers executive employees who are in a position to formulate, determine and effectuate management policies. These employees we have considered and still deem to be "managerial," in that they express and make operative the decisions of management.²⁷

Despite the Board's determination that managerial employees were inappropriate for inclusion in rank-and-file bargaining units, the Court was concededly less certain whether the Board had intended to exclude all managerial employees from the protection of the Act.²⁸ To resolve this issue, the Court examined the narrower but analogous category of "supervisory employees," who had been explicitly excluded from the protections of the Act by Congress in the 1947 Taft-Hartley Amendments.²⁹ This legislative exclusion of supervisors was a direct response

21. *Id.*

22. *Id.* at 289. The Supreme Court did not decide whether the buyers were "managerial employees," but remanded that issue to the Board "to apply the proper legal standard in determining the status of these buyers." *Id.* at 289-90 (footnote omitted).

23. *Id.* at 274-75.

24. *Id.* at 275.

25. *Id.* at 275.

26. 66 N.L.R.B. 1317, 17 L.R.R.M. (BNA) 394 (1946).

27. *Bell Aerospace*, 416 U.S. at 276 (quoting *Ford Motor Co.*, 66 N.L.R.B. at 322, 17 L.R.R.M. (BNA) at 395).

28. *Id.* at 276.

29. Section 2(3) of the NLRA, as amended in 1947 by the Taft-Hartley Act, states in part: "The term 'employee' . . . shall not include . . . any individual employed as a supervisor. . . ." NLRA § 2(3), 29 U.S.C. § 152(3) (1982).

to the Supreme Court's five-to-four decision in *Packard Motor Car Co. v. NLRB*,³⁰ in which the Court had upheld a Board decision that supervisors, specifically foremen, were "employees" within the meaning and protection of the Act.³¹

Because the *Packard* decision was nullified by the 1947 Taft-Hartley Amendments, the Court in *Bell Aerospace* focused on Justice Douglas' dissent in *Packard* as the correct statement of national labor policy. Justice Douglas had argued that if foremen are employees within the Act, so are vice presidents, managers, assistant managers, superintendents, and even presidents, all of whom are on the payroll and are commonly referred to as "management."³² Justice Douglas also had noted that the Act was intended to protect laborers and workers, whose rights to organize and bargain collectively had not been recognized by industry. Foremen, managers, and vice presidents, Justice Douglas explained, had endured no similar history of oppression.³³ This historical lack of oppression suggested that managerial employees warranted the protections of the Act no more than the supervisory employees who had been specifically excluded under Taft-Hartley.

Finally, the Court in *Bell Aerospace* summarized the legislative history of Taft-Hartley. Although both the House and Senate had agreed that certain persons—including workers in "labor relations, personnel and employment departments," and "confidential employees"³⁴—were plainly outside the coverage of the Act, the two houses disagreed on the necessity of making these exclusions from the statute explicit. The House wanted specifically to exclude these workers from the coverage of the legislation. In the conference committee, however, House and Senate representatives agreed that a specific exclusion was unnecessary because the Board had long considered these persons to be

The term "supervisor" was defined by the Taft-Hartley Amendments in § 2(11):

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

NLRA § 2(11), 29 U.S.C. § 152(11) (1982) (changes made by the 1947 Taft-Hartley Amendment are italicized).

30. 330 U.S. 485 (1947).

31. 330 U.S. at 490-91.

32. *Bell Aerospace*, 416 U.S. at 278 (quoting *Packard Motor Car*, 330 U.S. at 494-95 (Douglas, J., dissenting)).

33. *Id.* at 279 (citing *Packard Motor Car*, 485 U.S. at 496-97 (Douglas, J. dissenting)); see *supra* note 1.

34. *Id.* at 283.

excluded from the Act.³⁵ The Court, reasoning that this list of excluded workers did not exhaust the entire universe of impliedly excluded persons, held that the drafters of Taft-Hartley considered some additional employees to be so high in the management structure as to be impliedly excluded.³⁶

B. Confidential Employees

In *NLRB v. Hendricks County Rural Electric Membership Corp.*³⁷ the Supreme Court considered whether "confidential" employees should be excluded from the coverage of the Act. *Hendricks County* involved the discharge of Mary Weatherman, the personal secretary to the general manager and chief executive officer of a rural electric membership cooperative. Weatherman was dismissed several days after she signed a petition seeking the reinstatement of a friend and fellow employee who had lost his arm in a work-related accident.³⁸ After her dismissal, Weatherman filed with the NLRB an unfair labor practice charge against her employer, alleging a violation of section 8(a)(1) of the Act.³⁹ Part of the company's defense was that Weatherman, as a "confidential" secretary, was impliedly excluded from the Act's definition of employee under section 2(3) and was, therefore, not entitled to the Act's protection.⁴⁰ The administrative law judge rejected the company's argument, explaining that the Board's decisions on confidential employees had excluded only those employees who, in a confidential capacity, help to formulate and effectuate management policies regarding

35. *Id.*

36. *Id.* To support this conclusion, the Court cited a House Report discussion of confidential employees which acknowledged that "[m]ost of the people who would qualify as 'confidential' employees are executives and are excluded from the act in any event." (quoting H.R. REP. NO. 245, 80th Cong., 1st Sess. 23 (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 292, 314 (1985) (emphasis added)).

37. 454 U.S. 170 (1981).

38. *Id.* at 172.

39. *Id.* Section 8(a)(1) of the Act states: "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 157 of this title." NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1) (1982). Section 7 states the rights of employees under the Act as follows:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

NLRA § 7, 29 U.S.C. § 157 (1982) (changes made by the 1947 Taft-Hartley Amendments are italicized).

40. *Hendricks County*, 454 U.S. at 172-73; see *supra* note 12 reprinting the full text of NLRA § 2(3).

labor relations.⁴¹ This test, known as the “labor nexus” test, embodies the Board’s practice of excluding from protected status only those “confidential employees” whose duties include participation in labor related matters.⁴² The administrative law judge’s application of the test found that Weatherman was not a confidential employee with such a “labor nexus,” and the Board affirmed this finding.⁴³

Relying on language in a footnote in *Bell Aerospace*, however, the Seventh Circuit held that all confidential secretaries should be excluded from the Act, regardless of a labor nexus.⁴⁴ The Supreme Court reversed, holding that the Board’s long standing practice of excluding only those confidential employees who satisfied the Board’s “labor nexus” test had a reasonable basis in law.⁴⁵ The Supreme Court found that the Court of Appeals had erred in overruling the Board’s determination that Weatherman lacked the sufficient labor nexus to be excluded as a confidential employee.⁴⁶

Justice Powell’s partial dissent, joined by Chief Justice Burger and Justices Rehnquist and O’Connor, argued that the majority, in refusing to exclude the personal secretary from the Act’s coverage as a “confidential” employee, reached a result contrary to a primary purpose of the Act: to hold firm the division between management and labor.⁴⁷ The partial dissent further argued that the extension of the Act’s coverage to confidential secretaries, who are clearly aligned with management and privy to confidential management information, may subject these

41. See *Hendricks County Rural Elec. Membership Corp.*, 1978 N.L.R.B. Dec. (CCH) ¶ 19,623.

42. *Hendricks County*, 454 U.S. at 176.

43. *Id.* at 173.

44. 603 F.2d 25, 30 (1979) (citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 283 n.12 (1974)).

45. *Hendricks County*, 454 U.S. at 190.

46. *Id.* at 191.

47. Justice Powell stated:

[W]hen the Board in *Bell Aerospace* departed from its own recognition that “[i]t was the clear intent of Congress to exclude from the coverage of the Act all individuals allied with management,” this Court responded by again requiring the Board to adhere to the dividing line between management and labor—a line fundamental to the industrial philosophy of the labor laws in this country.

Indeed, it was to assure that those employees allied with management were not included in the ranks of labor that the Board originally developed the “supervisory,” “managerial,” and “confidential” employees exclusions from the Wagner Act. The Board recognized that employees who by their duties, knowledge, or sympathy were aligned with management should not be treated as members of labor. In the adversary system which our labor laws envision, neither management nor labor should be forced to accept a potential fifth column into its ranks.

Id. at 193 (Powell, J., concurring in part, dissenting in part) (footnotes omitted, emphasis in original) (quoting *In re Swift & Co.*, 115 N.L.R.B. 752, 753-54 (1956) (emphasis added)).

employees to intense conflicts of loyalty.⁴⁸

C. *Professional Employees Under the Yeshiva Rationale*

The most significant recent case to address the issue of employees found to be outside the coverage of the Act is *NLRB v. Yeshiva University*.⁴⁹ In *Yeshiva* the Supreme Court considered whether university faculty members should be defined inside or outside the coverage of the Act. The Board had reasoned that faculty members were "professional" employees within the meaning of section 2(12),⁵⁰ but had not decided whether these professional employees were denied coverage under the express exclusion of supervisors or the implied exclusion of managerial employees.⁵¹ The Court explained that both exemptions arise from the single principle that "the employer is entitled to the undivided loyalty of its representatives."⁵² The *Yeshiva* Court defined managerial employees as those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer."⁵³ The Court also stated that managerial employees must, of necessity, be aligned with management.⁵⁴ In general, explained the Court, an employee is excluded as managerial only if he exercises discretion in a manner that controls or implements the policies of the employer.⁵⁵

The Board had argued that the status of employees must be determined by reference to the "alignment with management" criterion.⁵⁶ Based on this criterion, the Board had concluded that the faculty employees were not aligned with management because they were expected to use "independent professional judgment."⁵⁷ In its previous faculty decisions, the Board had developed three presumptions: first, that faculty authority was collective;⁵⁸ second, that a faculty exercised authority in its own interests rather than the university's interest;⁵⁹ and third, that final authority rested with the board of trustees rather than the faculty.⁶⁰

By a margin of five to four, however, the Supreme Court held the

48. *Id.* at 200.

49. 444 U.S. 672 (1980).

50. *Id.* at 678; see *infra* notes 77-78 and accompanying text.

51. *Id.* at 679.

52. *Id.* at 682.

53. *Id.* (quoting *NLRB v. Bell Aerospace Co., Div. of Textron Co.*, 416 U.S. 267, 281-82 (1973)).

54. *Id.* at 683.

55. *Id.*

56. *Id.* at 684.

57. *Id.*

58. *Id.* at 685.

59. *Id.*

60. *Id.*

Yeshiva University faculty to be managerial employees and not covered by the Act.⁶¹ One of the majority's stated reasons for excluding the faculty from the Act's coverage was a desire to preclude divided loyalties among the faculty. The controlling consideration in the majority's view, however, was that the Yeshiva University faculty was exercising authority that in any other context would be managerial.⁶² Such managerial authority, the majority argued, was evident from a consideration of the "industrial analogy":⁶³ the Yeshiva faculty determined "the product to be produced, the terms on which it [would] be offered, and the customers who [would] be served."⁶⁴

In dissent, Justices Brennan, White, Marshall, and Blackmun argued that the Yeshiva faculty could not be deemed managerial because the faculty was not accountable to the administration.⁶⁵ The dissent further argued that the majority's suggestion that a university faculty's role is one of undivided loyalty to management is completely contrary to the concept of academic freedom.⁶⁶ Faculty members, urged the dissent, generally are not accountable to the administration for exercising their "faculty governance functions."⁶⁷ The dissent concluded that the Court's decision effectively removed the administration's incentive to resolve disputes with the faculty through discussion and mutual agreement.⁶⁸

D. Implications of Yeshiva

1. Limitation to the Faculty Context?

Although the majority attempted to limit its holding, some commentators have suggested that *Yeshiva's* reasoning could apply to cases in which the distinction between manager and worker is not clear or to cases in which the employees, through an employee stock option plan or some other device, participate in the ownership of the business.⁶⁹ While the applicability of the *Yeshiva* rationale to such cases is still uncertain, both faculty and nonfaculty cases do acknowledge that *Yeshiva* supplies the leading definition of managerial status.⁷⁰

61. *Id.* at 679.

62. *Id.* at 686.

63. *Id.*

64. *Id.*

65. *Id.* at 699 (Brennan, J., dissenting).

66. *Id.* at 700.

67. *Id.* (quoting *In re Northeastern Univ.*, 218 N.L.R.B. 247, 257, 89 L.R.R.M. (BNA) 1862, 1874 (1975) (Kennedy, Board Member, concurring in part, dissenting in part) (footnote omitted)).

68. *Id.* at 705.

69. Schlossberg & Fetter, *U.S. Labor Law and the Future of Labor-Management Cooperation*, 37 *LAB. L.J.* 595, 603 (1986).

70. *Boston Univ. Chapter v. NLRB*, 835 F.2d 399, 401 (1st Cir. 1987); *NLRB v. Cooper*

Although several recent cases, based on a rigid application of *Yeshiva*, have denied faculty employees protection,⁷¹ other faculty cases have suggested the limited applicability of *Yeshiva* by distinguishing the case and finding that the faculty members concerned were not managerial employees under the Act.⁷² In *Loretto Heights College* the Tenth Circuit held that although the faculty members assisted in formulating and implementing management policy, the faculty members were not managerial employees because their participation in management policymaking did not constitute "effective recommendation or control."⁷³ The court's analysis of the faculty's role in management policy revealed that the major faculty committee responsible for participation in governance of the college made recommendations to committees or administrators and shared in the decisionmaking process in matters such as the college's philosophy, objectives, curriculum, admission, graduation, and academic calendar.⁷⁴ Despite this authority held by the faculty and the similarities to the facts of *Yeshiva*, the Tenth Circuit held that the faculty members were not managerial employees.⁷⁵ These faculty members, the court explained, were not like the faculty in *Yeshiva*, who had absolute academic authority. In *Loretto Heights College* the administration, not the faculty, retained control of policymaking.⁷⁶

2. Impact on Other Professionals

Yeshiva's consideration of the professional employee raises the issue of professional employees' status under the Act. Section 9(b)(1) provides that the Board may not group professional and nonprofessional employees into the same bargaining unit unless a majority of the professional employees votes for inclusion in the unit.⁷⁷ Section 2(12) of

Union for Advancement of Science, 783 F.2d 29, 31 (2d Cir. 1986); *NLRB v. Lewis Univ.*, 765 F.2d 616, 621 (7th Cir. 1985); *NLRB v. Louisville Gas & Elec. Co.*, 760 F.2d 99, 101 (6th Cir. 1985); *NLRB v. Escambia River Elec. Coop., Inc.*, 733 F.2d 830, 831 (11th Cir. 1984); *Walla Walla Union Bulletin, Inc. v. NLRB*, 631 F.2d 609, 612-13 (9th Cir. 1980).

71. See *Boston Univ. Chapter*, 835 F.2d at 401-02; *Lewis Univ.*, 765 F.2d at 628; *Livingston College*, 286 N.L.R.B. No. 124, 126 L.R.R.M. (BNA) 1332 (1987) (LEXIS, Labor library, Cases file).

72. *Loretto Heights College v. NLRB*, 742 F.2d 1245 (10th Cir. 1984); *Cooper Union for Advancement of Science*, 783 F.2d at 31-32.

73. 742 F.2d at 1252 (quoting *Yeshiva*, 444 U.S. at 683 n.17).

74. *Id.* at 1249.

75. *Id.* at 1256.

76. *Id.* at 1255.

77. NLRA § 9(b)(1), 29 U.S.C. § 159(b)(1) (1982). Section 9(b)(1) reads, in pertinent part: The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof:

the Act defines "professional employee" by reference to the essential requisites of professional status. A professional employee is one whose work either (A) (1) is predominantly varied and intellectual; (2) consistently requires the exercise of discretion or judgment; (3) cannot be standardized in terms of time and output; and (4) requires study in a specialized discipline ordinarily taught in a university or hospital; or (B) is done in preparation for a professional career, under another professional person, by one who has completed study in a specialized discipline ordinarily taught in a university or hospital.⁷⁸ Under the *Yeshiva* rationale, professional employees may be excluded from the coverage of the Act if their duties constitute managerial activities.⁷⁹

Some commentators argue that *Yeshiva* has had a wide ranging impact on the ability of many private professionals to organize.⁸⁰ One group contends that *Yeshiva* virtually has stifled union organization in private institutions.⁸¹ One example of *Yeshiva's* influence on other professionals is the Board's decision in *NLRB v. FHP, Inc.*,⁸² in which full-time physicians and dentists employed by a health maintenance organization served on various employer committees.⁸³ The Board concluded, based on the *Yeshiva* rationale, that the doctors who actively participated in management of their facilities by serving on the employer committees were not entitled to organize under the Act.⁸⁴ The Board in *FHP, Inc.* also noted the fine line separating mere professional employ-

Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees unless a majority of such professional employees vote for inclusion in such unit. . . .

Id.

78. NLRA § 2(12), 29 U.S.C. § 152(12) (1982).

79. See *infra* notes 82-85 and accompanying text.

80. See, e.g., Schlossberg & Fetter, *supra* note 69, at 604.

81. *Id.* (citing Daily Lab. Rep. (BNA), Feb. 21, 1986, No. 35, at A-3 (statement of the National Center for the Study of Collective Bargaining in Higher Education and the Professions) (LEXIS, Labor library, DLABRT file)).

82. 274 N.L.R.B. No. 168, 1985-86 NLRB Dec. (CCH) ¶ 17,229 (Mar. 27, 1985), 118 L.R.R.M. (BNA) 1525 (1985).

83. *Id.* at 1526-27. These committees included a Peer Review Committee, Physician and Therapeutics Committee, Advisory Committee on Provider Work Environment, Emergency Services Committee, Patient Services Committee, and Advisory Committee to the Board of Directors.

84. The Board stated:

We find . . . that the full-time staff physicians and dentists at FHP, like the faculty of Yeshiva University, possess and exercise authority to formulate and effectuate management policies. . . .

. . . [W]e conclude that the committees perform managerial functions within the meaning of the *Yeshiva* decision. . . .

. . . We therefore find that [the full-time staff physicians and dentists] are excluded from coverage under the Act as managerial employees.

Id. at 1527-28.

ees from professionals whose work includes managerial activities.⁸⁵

Some observers have argued that barring professionals from union membership eliminates from participation the individuals who are best suited to help the cause of labor-management cooperation.⁸⁶ These commentators argue that professionals with experience in structuring shared decisionmaking relationships that "blur the distinction between employer and employee" are potentially some of the most effective advocates of employee causes.⁸⁷

3. Broader Implications for Labor-Management Relations

A broader criticism of *Yeshiva* is that the decision impedes problem solving by discouraging cooperative relations between management and employees.⁸⁸ Many employees will avoid participation in cooperative ventures with management if the cost of cooperation is exclusion from union membership and loss of protection under the Act.⁸⁹ To the extent that *Yeshiva* establishes the wrong incentives, it is legitimate progeny of United States statutory labor laws, which were written at a time when labor-management relations were assumed to be largely adversarial.⁹⁰ To the extent that the trend in labor-management relations is toward cooperation and away from antagonism, Congress should consider amending United States labor laws to reflect this shifting orientation.

IV. ALTERNATE FORMS OF PROTECTION FOR EXCLUDED EMPLOYEES

Because certain employees are not protected by the Act, they must look elsewhere for protection from employer abuses. Most of the protection available to these employees is provided in statutes independent of the National Labor Relations Act, such as the Age Discrimination in Employment Act (ADEA)⁹¹ and Title VII⁹² of the Civil Rights Act of 1964. These statutes provide protection for employees excluded from the Act's coverage if the claim falls within the statute's protective scope. The judicially created exceptions to the employment-at-will doc-

85. "As professional employees, staff physicians may also be managerial if their activities on behalf of their employer fall outside the scope of decision-making routinely performed by similarly situated health care professionals and that is primarily incident to treatment of their patients." *Id.* at 1527 (footnote omitted).

86. Schlossberg & Fetter, *supra* note 69, at 604.

87. *Id.*

88. *Id.*

89. *See id.*

90. *See* Hendricks Rural County Elec. Membership Corp., 454 U.S. 170, 192-93 (1981) (Powell, J., concurring in part, dissenting in part); *supra* note 1.

91. 29 U.S.C.A. §§ 621-634 (1982 & Supp. 1987).

92. 42 U.S.C. §§ 2000e to 2000e-17 (1982).

trine are another potential source of protection. Despite substantial scholarly attention paid to the ADEA, Title VII, and the exceptions to employment-at-will, little has been written about these sources as alternative actions for employees excluded from bringing suit under the Act. This Special Project Note presents merely an overview of these plaintiff actions as alternatives available to an employee who is excluded from the coverage of the Act. Moreover, the discussion of possible alternative protections is by no means exhaustive. Rather, the analysis is intended to illustrate some of the more obvious and important alternative protections.

A. *The Age Discrimination in Employment Act*

One protective statute on which an excluded employee might rely is the Age Discrimination in Employment Act. During recent years, the number of ADEA lawsuits has increased dramatically.⁹³ Many of these ADEA actions are brought by persons likely to be defined outside the coverage of the National Labor Relations Act.⁹⁴ The ADEA was enacted in 1967 in response to a congressionally requested study, which stated that the essential purpose of the ADEA was to "promote employment of older persons based on their ability" and "to prohibit arbitrary age discrimination in employment."⁹⁵

The ADEA, which protects employees over age forty,⁹⁶ prohibits an employer from discriminating on the basis of age in hiring, wages, discharge, advertisements, classification, benefits, seniority, and all additional terms and conditions of employment.⁹⁷ The ADEA's prohibition against arbitrary age discrimination is enforced by the Equal Employment Opportunity Commission (EEOC) through a provision that incorporates certain remedial provisions of the Fair Labor Standards Act (FLSA).⁹⁸ The remedies available under the ADEA have a "restorative purpose":⁹⁹ to place the party in the position he would have been in had the discrimination not occurred.¹⁰⁰ The remedies available under the

93. 19 EEOC ANN. REP. 17-18 (1984); Stillman & Jepson, *Compliance with the Age Discrimination in Employment Act: Special Problems*, 64 CHI. B. REC. 284, 284 (1983).

94. See Stillman & Jepson, *supra* note 93, at 289-90.

95. 29 U.S.C. § 621(b) (1982).

96. 29 U.S.C.A. § 631(a) (Supp. 1987). The statute was amended in 1986 to remove language denying the protection of the Act to persons over age 70. Prior to 1986 the statute protected only persons "at least 40 years of age but less than 70 years of age." See 29 U.S.C. § 631 (1982).

97. 29 U.S.C. § 623 (1982).

98. *Id.* § 626(a)-(b); see *id.* §§ 211(b), 216 & 217 (1982); see also Marion, *Legal and Equitable Remedies Under the Age Discrimination in Employment Act*, 45 MD. L. REV. 298, 300-01 (1986).

99. Marion, *supra* note 98, at 298.

100. *Id.* (citing *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1097 (8th Cir. 1982)).

ADEA are recovery of back pay, employment reinstatement, promotion, injunctive relief, compulsory hiring, and, for willful violations, liquidated damages.¹⁰¹ Through incorporating by reference the FLSA remedial provisions, the statute also allows for recovery of attorney's fees and court costs.¹⁰² The potential protections afforded to executive employees by the ADEA are, however, restricted by the so-called "executive exemption."¹⁰³

In proving a violation of the ADEA, a plaintiff may put on direct evidence of age discrimination. The general nature of ADEA claims and the employer's typical control over employment records and the personnel in charge of making employment decisions, however, make the availability of direct evidence of discrimination rare.¹⁰⁴ When direct evidence is not available, an ADEA plaintiff may prove a violation of the statute under either of two judicially created schemes of presumptions and inferences—the disparate treatment theory or the disparate impact theory.¹⁰⁵

The initial showing that an ADEA plaintiff must make to establish a prima facie case under the disparate treatment theory is actually an adaptation of a test established in *McDonnell Douglas Corp. v. Green*,¹⁰⁶ a Title VII case involving race discrimination.¹⁰⁷ Under the *McDonnell Douglas* formula, as modified in the ADEA case of *Loeb v. Textron, Inc.*,¹⁰⁸ a plaintiff must prove: (1) that he is a member of the protected age group; (2) that he was performing his job at a level that met the employer's legitimate expectations; (3) that he was fired; and (4) that the employer sought someone else to perform the same work after the plaintiff left.¹⁰⁹ Under the modified *McDonnell Douglas* standard, the plaintiff always maintains the burden of persuasion.¹¹⁰ After the plaintiff meets the initial burden of production, however, that bur-

101. *Id.* § 626(b).

102. *Id.*; *see id.* § 216(b).

103. 29 U.S.C.A. § 631(c)(1) (Supp. 1987). *See Whittlesey v. Union Carbide Corp.*, 742 F.2d 724 (2d Cir. 1984) (construing the "executive exemption"); Note, *ADEA Executive Exemption Plaintiffs as Paradigm Candidates for Front Pay*, 46 U. PITT. L. REV. 1103, 1105 (1985). Under the exemption, persons "employed in a bona fide executive or a high policymaking position" may still be retired at age 65 solely on the basis of age if certain other conditions are met. The most important of these conditions is entitlement of the executive employee to an "immediate nonforfeitable annual retirement benefit" which in the aggregate equals at least \$44,000. 29 U.S.C.A. § 631(c)(1) (Supp. 1987).

104. Note, *The Age Discrimination in Employment Act of 1967 and Trial by Jury: Proposals for Change*, 73 VA. L. REV. 601, 610 (1987).

105. Stillman & Jepson, *supra* note 93, at 285.

106. 411 U.S. 792 (1973).

107. *See Note, supra* note 104, at 610.

108. 600 F.2d 1003 (1st Cir. 1979).

109. *Id.* at 1013-14; *see Note, supra* note 104, at 612-13.

110. *Loeb*, 600 F.2d at 1011-12.

den shifts to the defendant employer to articulate a nondiscriminatory reason for the employment decision in issue.¹¹¹ At this stage, the employer's burden of production does not require him to prove his explanation for the employment decision.¹¹² The employer meets his burden of production if his proffered reason creates a question of fact as to whether the employer discriminated against the employee.¹¹³

After the plaintiff makes a prima facie case of age discrimination and the defendant counters with a legitimate, nondiscriminatory reason for the alleged discriminatory action, the plaintiff has the burden of proving by a preponderance of the evidence that the employer's stated reason was merely a pretext for the discrimination.¹¹⁴ Because employment decisions can be based on various criteria and motives, the courts have not required an ADEA plaintiff to prove that age discrimination was the sole reason for the employer's action.¹¹⁵ Instead, the plaintiff has been required to prove only that age was a "determining factor" in the employer's alleged discriminatory action.¹¹⁶ Although the "determining factor" test has been articulated in different forms by the courts, the differing definitions have essentially the same meaning: whether the factor was one "that made a difference."¹¹⁷

Under the disparate impact theory, the plaintiff attempts to prove a violation of the ADEA by demonstrating that a practice or policy of the employer has had a disparate impact on persons within the protected employee class.¹¹⁸ This showing typically is made by the use of statistics.¹¹⁹ Disparate impact cases arise less frequently than disparate treatment cases, and for several years the courts were reluctant to recognize disparate impact fact patterns.¹²⁰ In *Geller v. Markham*,¹²¹ however, a federal district court acknowledged that the distinction between disparate treatment and disparate impact exists just as clearly in age

111. *Id.* at 1011 (citing *McDonnell Douglas*, 411 U.S. at 802).

112. Note, *supra* note 104, at 611 (citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981)).

113. Note, *supra* note 104, at 614 (citing *Archambault v. United Computing Sys., Inc.*, 786 F.2d 1507, 1512 (11th Cir. 1986)).

114. *Loeb*, 600 F.2d at 1011-14.

115. *Id.* at 1019; Note, *supra* note 104, at 614.

116. *Loeb*, 600 F.2d at 1019; Note, *supra* note 104, at 614-15.

117. *Cockrell v. Boise Cascade Corp.*, 781 F.2d 173, 179 (10th Cir. 1986). For a list of various formulations of the "determining factor" standard, see *Cuddy v. Carmen*, 694 F.2d 853, 858 n.23 (D.C. Cir. 1982).

118. *Stillman & Jepson*, *supra* note 93, at 287.

119. Harper, *Statistics as Evidence of Age Discrimination*, 32 HASTINGS L.J. 1347, 1347 (1981).

120. *Id.* at 1359 (citing *Coates v. National Cash Register Co.*, 433 F. Supp. 655 (W.D. Va. 1977)).

121. 481 F. Supp. 835 (D. Conn. 1979).

discrimination cases as in Title VII race and sex discrimination cases.¹²² The *Geller* court concluded that the employer's "neutral" practice created a disparate impact that made the practice unlawful.¹²³

An employer faced with an ADEA charge generally can respond with one of two types of defenses. First, the employer can deny that age was a factor in the challenged action.¹²⁴ Second, the employer can admit that age was a determining factor, but can claim an overriding justification for the action.¹²⁵ Under the first type of defense, the employer can claim that the employee was discharged for "good cause"¹²⁶ or because of "reasonable factors other than age."¹²⁷ Under the second type of defense, an employer is entitled to consider age whenever age is a "bona fide occupational qualification" (BFOQ) necessary in the employer's operations.¹²⁸ Employers have faced difficulties in proving age as a BFOQ, and courts generally have restricted proof to cases in which the physical qualifications of employees have been closely related to public safety.¹²⁹ One other option available to the employer is to prove that, in pursuing its alleged discriminatory actions, the employer was observing the terms of a bona fide seniority system or employee benefit plan that was not simply a pretext to avoid its ADEA obligation.¹³⁰

Some data suggests that ADEA plaintiffs are likely to be the same type of employees excluded from the protection of the Act as managers or supervisory employees. Former EEOC Vice Chairman Cathie Shattuck conducted surveys of plaintiffs seeking relief under the ADEA between 1978 and 1983.¹³¹ This data produced the following profile of the average ADEA plaintiff: a fifty-five year old white male, with twenty years employment service, and earning \$32,000 per year in a white collar position before being terminated by his employer.¹³² Other observers, based on their experience with ADEA litigation,¹³³ have suggested a

122. *Id.* at 837.

123. *Id.* at 839.

124. *See* Stillman & Jepson, *supra* note 93, at 287.

125. *Id.*

126. 29 U.S.C. § 623(f)(3) (1982).

127. *Id.* § 623(f)(1).

128. *Id.*

129. *Western Air Lines v. Criswell*, 472 U.S. 400, 418-20 (1985); *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 238 (5th Cir. 1976); *see* Stillman & Jepson, *supra* note 93, at 287-88.

130. Stillman & Jepson, *supra* note 93, at 288.

131. *Higher Paid White Men File the Most Age Discrimination Actions, EEOC Finds*, Daily Lab. Rep. (BNA) No. 228, at A-10 (Nov. 26, 1982) (LEXIS, Labor library, DLABRT file) [hereinafter *Age Discrimination*]; *Recipients of ADEA Settlements Are Mostly Long-Term, Male Employees*, Daily Lab. Rep. (BNA) No. 7, at A-3 (Jan. 12, 1984) (LEXIS Labor library, DLABRT file).

132. *Age Discrimination*, *supra* note 131, at A-10.

133. Stillman & Jepson, *supra* note 93, at 289.

similar profile, which describes the typical ADEA plaintiff as a salaried, nonunion member of management, possible executive, supervisor, staff professional, or skilled worker.¹³⁴ These ADEA plaintiffs, who possess above average educations and are members of the middle to upper-middle class, are typically long-term employees whose services have become less valuable over time.¹³⁵ This experience-based ADEA plaintiff profile also matches the profile of many upper level management or supervisory employees defined outside the Act. Both profiles suggest that the ADEA may serve as an important alternative remedy to supervisory, managerial, confidential, or professional employees who find themselves excluded from the Act's coverage.

B. Title VII

Another potential source of protection for employees excluded from the coverage of the Act is Title VII of the Civil Rights Act of 1964.¹³⁶ Title VII prohibits employment discrimination on the basis of "race, color, religion, sex, or national origin."¹³⁷ As with the ADEA, the agency charged with enforcement of Title VII is the EEOC.¹³⁸ The proscriptions of Title VII apply to certain classes of persons defined in the statute. Persons or organizations subject to the proscriptions of Title VII include employers,¹³⁹ employment agencies,¹⁴⁰ labor organizations,¹⁴¹ and "joint labor-management committee[s] controlling apprenticeship or other training or retraining."¹⁴² The relatively precise definitions of these terms eliminate some of the interpretive problems that characterize other aspects of Title VII.¹⁴³

The two basic definitions of employment discrimination that have evolved under Title VII are disparate treatment and disparate or ad-

134. *Id.*

135. *Id.*

136. 42 U.S.C. §§ 2000e to 2000e-17 (1982).

137. 42 U.S.C. §2000e-2 (1982) provides:

(a) It shall be an unlawful employment practice for an employer—

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

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

138. *Id.* §§ 2000e-4 to 2000e-5.

139. *Id.* § 2000e-2(a).

140. *Id.* § 2000e-2(b).

141. *Id.* § 2000e-2(c).

142. *Id.* § 2000e-2(d).

143. See C. SULLIVAN, M. ZIMMER & R. RICHARDS, FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION 92 (1980).

verse impact.¹⁴⁴ Disparate treatment analysis focuses on an employer's motivation for treating a worker or job applicant less favorably than another worker. Disparate impact analysis, on the other hand, focuses on the effect of an employer's employment decisions.¹⁴⁵

1. Disparate Treatment

According to the statutory language of Title VII, relief is available only if the employer's discriminatory practices are intentional.¹⁴⁶ Because the term "intentional" is not defined in the statute,¹⁴⁷ courts interpreting Title VII have been faced with determining the degree of employer motivation necessary to establish a violation. In *McDonnell Douglas Corp. v. Green*¹⁴⁸ the Supreme Court established a framework for resolving the issue of the employer's motivation. Under the *McDonnell Douglas* test, a plaintiff meets the burden of establishing a prima facie case of disparate treatment by showing: (1) that he is a member of a protected class; (2) that he has applied for and was qualified for a job for which the employer was seeking applicants; (3) that he was rejected by the employer; and (4) that after his rejection the employer continued to seek applicants from persons possessing qualifications similar to those of the complainant.¹⁴⁹

If the plaintiff establishes a prima facie case, the employer bears the burden of showing a legitimate reason for rejecting the employee.¹⁵⁰ If the employer articulates a legitimate reason, then the plaintiff must have an opportunity to demonstrate that the employer's purported reason for rejecting the plaintiff was a mere pretext.¹⁵¹ A final defense for the employer in a disparate treatment case is to show that the challenged practice was justified by business necessity.¹⁵²

2. Disparate (Adverse) Impact

One writer recently has stated that the disparate impact theory is the most important judicial contribution to Title VII.¹⁵³ In contrast to

144. Gold, *Griggs' Folly: An Essay on Theory, Problems, and the Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 *INDUS. REL. L.J.* 429, 431 (1985).

145. *Id.*

146. See 42 U.S.C. § 2000e-5(g) (1982).

147. Belton, *Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Developments*, 20 *ST. LOUIS U.L.J.* 225, 241 (1976).

148. 411 U.S. 792 (1973).

149. *Id.* at 802.

150. *Id.*

151. *Id.* at 804.

152. See *Gilmore v. Kansas City Terminal Ry. Co.*, 509 F.2d 48, 51 (8th Cir. 1975).

153. Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimina-*

disparate treatment analysis, in disparate or adverse impact analysis the employer's intent is irrelevant. Only the effect matters in adverse impact discrimination.¹⁵⁴ Even if an employer utilizes employment decision criteria that are racially neutral on their face, the criteria have an impermissible adverse impact if they disfavor proportionally more qualified blacks than whites and are not mandated by business necessity.¹⁵⁵

The seminal adverse impact case is *Griggs v. Duke Power Co.*,¹⁵⁶ in which the Supreme Court extended Title VII's coverage to facially neutral employment practices that have adverse impacts on persons of a given race, sex, religion, or national origin.¹⁵⁷ Under the *Griggs* analysis, the plaintiff bears the burden of establishing a prima facie case of adverse impact. If the plaintiff fails to meet this burden, the validity of the employment criteria is irrelevant. If, however, the plaintiff demonstrates sufficient adverse impact, the burden shifts to the employer to justify the employment practice by showing that the practice is either job-related or mandated by business necessity.¹⁵⁸ If the defendant succeeds in carrying its burden, the plaintiff has an opportunity to rebut the defendant's evidence by proving that the alleged justification is a pretext or by showing the existence of alternative selection devices or criteria that have comparable utility but could have a less adverse impact than the criteria in question.¹⁵⁹

3. Title VII Versus ADEA

Title VII discrimination differs in several respects from age discrimination, which is proscribed under the ADEA. The sociological differences in discrimination based on sex, race, religion, and national origin compared to age discrimination suggest that the typical Title VII plaintiff differs from the typical ADEA plaintiff.¹⁶⁰ For example, aging is universal; sex and race, on the other hand, are specific and immutable

tion, 73 VA. L. REV. 1297, 1297 (1987).

154. Gold, *supra* note 144, at 431.

155. *Id.*

156. 401 U.S. 424 (1971).

157. *Id.* at 429-33; see Rutherglen, *supra* note 153, at 1297.

158. See Gold, *supra* note 144, at 432-33 (footnotes omitted) (quoting B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 91-92 (2d ed. 1983); Rutherglen, *supra* note 153, at 1297.

159. See Gold, *supra* note 144, at 432; see *Griggs*, 401 U.S. at 431-32; see also *Alhermarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). Because the complexity and indirectness of the methods used to prove employment discrimination have paralleled the typically subtle and indirect character of employment discrimination itself, the courts in Title VII discrimination cases often are required to analyze statistics, patterns, and general employer policies. See Belton, *supra* note 147, at 249. See generally C. SULLIVAN, M. ZIMMER & R. RICHARDS, *supra* note 143, §§ 1.4(c), 1.5(c), 1.8.

160. See Stillman & Jepson, *supra* note 93, at 288-89.

characteristics.¹⁶¹ Thus, white male executives are subject to aging and to age discrimination, but are not likely to be subject to sex or race discrimination. Given that Title VII plaintiffs often are drawn from minorities and disadvantaged groups, Title VII plaintiffs are not likely to be managerial or supervisory employees excluded from the coverage of the Act. Although a profile of the typical Title VII plaintiff apparently is not available,¹⁶² some statistics indirectly suggest that Title VII plaintiffs are less likely than ADEA plaintiffs to be the kind of employees excluded from the Act.¹⁶³ In short, the differences between potential ADEA plaintiffs and potential Title VII plaintiffs indicate that ADEA plaintiffs are more likely than Title VII plaintiffs to be managerial or supervisory employees excluded from the coverage of the Act.

C. *Employment-at-Will*

One other potential source of protection for employees excluded from the coverage of the Act is a wrongful discharge action premised on exceptions to the employment-at-will doctrine. Employment-at-will and wrongful discharge are actually flip sides of the same coin: wrongful discharge represents the employee's perspective and employment-at-will represents the employer's perspective.¹⁶⁴ Employment-at-will is an ancient common law doctrine which holds that an employer can discharge an employee for any reason or for no reason at all. This employer prerogative traditionally has been described in the case law as the ability to fire an employee for "good cause, for no cause or even for cause morally wrong."¹⁶⁵

Employees under the protection of a collective bargaining agreement are protected from arbitrary discharge by contractual grievance requirements which provide that discharges occur only for "just cause."

161. See *id.* at 288.

162. After an exhaustive search the Author was unable to find a Title VII plaintiff profile similar to Ms. Shattuck's profile of the ADEA plaintiff. See *supra* notes 131-32 and accompanying text.

163. See, e.g., 19 EEOC ANN. REP. 20 (1984). The vast majority of issues raised in charges filed under Title VII with the EEOC are race and sex discrimination issues, see *id.*, indicating that a large percentage of persons seeking relief under Title VII are either women or racial minorities, neither of whom are well-represented in the ranks of supervisors, managers, or professional employees likely to be excluded from the coverage of the Act.

From 1981 to 1983 the average monetary benefit under Title VII charges processed by the EEOC was \$4329 per person, as opposed to an average of \$9670 per person under the ADEA. 18 EEOC ANN. REP. 13 (1983); 17 EEOC ANN. REP. 7 (1982). The significantly higher recovery under the ADEA suggests that persons filing charges under the ADEA are higher salaried, longer term employees than their Title VII counterparts.

164. 9A Lab. Rel. Rep. (BNA) 505:1.

165. *Payne v. Western & Atl. R.R.*, 81 Tenn. 507, 519-20 (1884), *rev'd on other grounds sub nom. Hutton v. Watters*, 179 S.W. 134, 137 (Tenn. 1915).

Under the common law doctrine, however, employees outside the coverage of both a collective bargaining agreement and the Act essentially are employed "at the will" of their employer.¹⁶⁶ Absent a statutory or judicially created proscription, the employment-at-will doctrine remains in force.¹⁶⁷ Congress, the courts, and state legislatures, however, in recent years have narrowed the scope of the doctrine. Statutes such as the ADEA, Title VII, and OSHA all restrict the ability of an employer to discharge employees at will.¹⁶⁸ For example, the ADEA and Title VII remove the right of the employer to fire employees based on age, race, or sex.¹⁶⁹ Approximately thirty states now have judicially created exceptions to employment-at-will.¹⁷⁰ The law of wrongful discharge has developed from these exceptions.¹⁷¹

The employment-at-will doctrine has three commonly advanced exceptions: the public policy exception, the implied contract exception, and the implied covenant of good faith and fair dealing exception.¹⁷² The public policy exception contends that a discharge is improper if it violates fundamental public policy. Nearly thirty states have recognized some form of public policy exception.¹⁷³ The primary rationale for this exception is that the state should prohibit an employer from discharging an employee because the employee took action that the state desires to promote.¹⁷⁴ States have recognized a public policy exception in cases of three basic types: (1) cases in which the employee's dismissal was based on a refusal to commit an illegal or wrongful act;¹⁷⁵ (2) cases in which an employee was discharged for performance of a public duty, including the "whistleblower" cases;¹⁷⁶ and (3) cases in which an employee was dismissed for exercising a legal right or privilege.¹⁷⁷

The second exception to employment-at-will deems a discharge to be unlawful if prohibited by the existence of an implied contract. A

166. 9A Lab. Rel. Rep. (BNA) 505:1.

167. Murphy, *Employment-At-Will: Judicial Counterpoint to Labor Legislation*, 15 STETSON L. REV. 69, 70 (1985).

168. See *id.* at 69-70.

169. See *supra* notes 93-161 and accompanying text.

170. See generally Annotation, *Modern Status of Rule That Employer May Discharge At-Will Employee for Any Reason*, 12 A.L.R.4th 544 (1982); Lopatka, *The Emerging Law of Wrongful Discharge*, 40 BUS. LAW. 1, 6 n.30 (1984).

171. See generally Annotation, *supra* note 170, at 544; Lopatka, *supra* note 170, at 1.

172. See Murphy, *supra* note 167, at 70; Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1934 (1983).

173. See Murphy, *supra* note 167, at 70.

174. *Id.*

175. Lopatka, *supra* note 170, at 7; see, e.g., *Petermann v. International Bhd. of Teamsters Local 396*, 344 P.2d 25 (Cal. Ct. App. 1959).

176. Lopatka, *supra* note 170, at 8.

177. *Id.* at 11. Each of these three types, see *id.* at 7-12, is fraught with difficult issues beyond the scope of this Special Project Note.

frequent basis for implied contracts are employee handbooks or manuals. Some courts have stated that if an employer's language or actions encourage reliance on handbooks or manuals and the employer fails to issue an express disclaimer that these materials do not constitute implied contracts, then the employer is bound to the terms of the handbook or manual.¹⁷⁸

The third exception to employment-at-will invalidates discharges that breach a covenant of good faith and fair dealing imposed by law on all contracts. Under this broad exception, courts probe the employer's motive for discharge to determine whether the motive is suspect.¹⁷⁹ One commentator has noted that the number of cases imposing wrongful discharge liability based on this theory are increasing.¹⁸⁰

One way to understand the significance of the emerging exceptions to the employment-at-will doctrine is to examine the potential number of employees who would receive new legal protection from these exceptions. Estimates show that over half of the nonagricultural work force is not protected by either a collective bargaining agreement or civil service laws.¹⁸¹ Moreover, the annual number of at-will employees unjustly terminated has been estimated to be between 50,000 and 200,000.¹⁸² Finally, the particular utility of the exceptions to employees excluded from the Act's coverage is demonstrated by one commentator's observation that the exceptions are much more likely to support a cause of action by a dismissed executive or managerial employee than by hourly workers or lower salaried employees.¹⁸³ This observation is consistent with the belief that managerial workers rely on the protection of these exceptions to a greater extent than common workers.¹⁸⁴

V. CONCLUSION

The problems faced by the hybrid group of employees excluded from the coverage of the Act present no easy solutions. On the one hand, these workers deserve some protection against employer abuses. On the other hand, their alignment with management arguably justifies

178. See Murphy, *supra* note 167, at 72-73; see, e.g., Leikvold v. Valley View Community Hosp., 688 P.2d 170, 174 (Ariz. 1984).

179. See Murphy, *supra* note 167, at 73-74; see, e.g., Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251, 1255-56 (1977).

180. Murphy, *supra* note 167, at 74; see, e.g., Crenshaw v. Bozeman Deaconess Hosp., 693 P.2d 487 (Mont. 1984); Gates v. Life of Mont. Ins. Co., 688 P.2d 213 (Mont. 1983).

181. Note, *supra* note 172, at 1934 (1983).

182. Lopatka, *supra* note 170, at 2 (citing Steiber, *The Case For Protection of Unorganized Employees Against Unfair Discharge*, 32 PROC. ANN. MEETING INDUS. REL. RES. ASS'N 160-61 (1980)).

183. Steiber, *Recent Developments in Employment-At-Will*, 36 LAB. L.J. 557, 558 (1985).

184. *Id.* at 563.

their separation from labor under a conflict of interest theory. Among the employees either implicitly or explicitly excluded from the coverage of the Act are managerial, supervisory, confidential, and, under certain circumstances, professional employees. When one of these employees falls outside the coverage of the Act, he may have an alternate source of protection either under a statute, such as the ADEA or Title VII, or in a judicially created protection, such as the wrongful discharge exceptions to the employment-at-will doctrine.

The most fundamental solution to the plight of the hybrid employee lies in the rethinking of the assumptions underlying labor-management relations and United States labor laws. If labor-management relations are still largely adversarial, perhaps the exclusion of managerial and supervisory employees is justified. If, on the other hand, the adversarial system of labor relations is eroding, there may be no compelling reason to exclude these employees from the protection of the Act. Such employees presumably could be segregated from the other employees into their own bargaining units to avoid a potential conflict of interest.

The possibility that hybrid employees do not actually need or necessarily desire protection from their employers is also worthy of consideration. Managers, supervisors, and professionals may be sophisticated enough to resolve problems with their employers without resorting to specialized protective legislation. Further, these employees may not have as strong a desire for representation by labor organizations as common employees. To the extent these assumptions are accurate, concern over exclusion of these employees from the National Labor Relations Act may be unnecessary. If, however, the trend in labor-management relations indeed is shifting away from antagonism toward cooperation, efforts should be made to fit the hybrid employee into a cooperative scheme.

Patrick S. Bryant

