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Denial of NLRA Protection for Dissident Unionized Employees and Limitations under Section 704(a) of Title VII - Emporium Capwell Co. v. Western Addition Community Organization

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DENIAL OF NLRA PROTECTION FOR DISSIDENT UNIONIZED EMPLOYEES AND LIMITATIONS UNDER SECTION 704(a) OF TITLE VII—*EMPORIUM CAPWELL CO. V. WESTERN ADDITION COMMUNITY ORGANIZATION**

In *Emporium Capwell Co. v. Western Addition Community Organization*,[1] the Supreme Court dealt a staggering blow to minority workers who, despite a collective bargaining agreement with a no-strike provision, picketed their employer to protest alleged racial discrimination. The Court characterized the unauthorized picketing as an attempt to bargain over terms and conditions of employment in derogation of the exclusive bargaining representative.[2] By denying the terminated employees protection under sections 7[3] and 8(a)(1)[4] of the National Labor Relations Act, the Court refused to accommodate the underlying principles of the NLRA to the pursuit of substantive Title VII rights.[5] The *Emporium* decision not only precluded these employees from gaining reinstatement and back pay through proceedings before the National Labor Relations Board, but may also frustrate protection of self-help activities under section 704(a) of Title VII.[6] This Note will analyze the

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* This Note has benefited from the comments of Professor Elliott Goldstein, DePaul College of Law.

1. 420 U.S. 50 (1975).

2. *Id.* at 60-61. Section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a) (1970) provides in part:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

3. National Labor Relations Act § 7, 29 U.S.C. § 157 (1970). Section 7 provides in part: Employees shall have the right to self-organization . . . 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 . . . .

4. National Labor Relations Act § 8(a)(1), 29 U.S.C. § 158(a)(1) (1970). Section 8(a)(1) provides:

> (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

5. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000a *et seq.* (1970), *as amended*, 42 U.S.C. § 2000a *et seq.* (Supp. III, 1973), prohibits discrimination by employers, employment agencies and labor organizations on the basis of an individual's race, color, religion, sex or national origin. The term "substantive Title VII rights" refers to the rights of persons to be free from any prohibited discrimination.

6. Civil Rights Act of 1964 § 704(a), 42 U.S.C. § 2000e-3(a) (1970), *as amended*, 42 U.S.C. § 2000e-3(a) (Supp. III, 1973). Section 704(a) provides:

Emporium Court's reasoning and discuss its effect on subsequent interpretations of section 704(a).

The series of events culminating in the *Emporium* decision began with a list of grievances presented to the Department Store Employees Union. After investigating the complaints, the Union concluded that the company was discriminating and promised to process every grievance through to arbitration if necessary. Four employees thought this was an unsatisfactory approach to eliminate what they believed was a pattern of racial discrimination. When their subsequent demand to meet separately with top company officials fell on deaf ears, they picketed and distributed handbills during non-working hours. The employees involved were discharged for these activities.[7] Western Addition Community Organization, a civil rights group, filed charges against the company, alleging that the terminations constituted violations of section 8(a)(1) of the NLRA. The Board found that the activities of the employees were unprotected and refused to reinstate them.[8]

Upon review, the court of appeals attempted to reconcile the anti-discrimination policy embodied in Title VII with the demands of section 9(a) exclusivity.[9] Under the court's standard, if a union failed to remedy the alleged discrimination to the "*fullest extent possible, by the most expedient and efficacious means*,"[10] minority employees would be allowed to bypass their bargaining agent and press their employer directly for equal employment opportunity. The appellate court felt that the national policy in favor of eliminating employment discrimination re-

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It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

7. For a detailed presentation of the facts in *Emporium* see Meltzer, *The National Labor Relations Act and Racial Discrimination: The More Remedies, The Better?* 42 U. CHI. L. REV. 1, 27-30 (1974).

8. Emporium, 192 N.L.R.B. 173 (1971). The trial examiner, whose findings were adopted by the Board, found that the dissident employees had attempted to bargain. Section 7 protection was denied because their activities were violative of the exclusivity principle in section 9(a).

9. Western Addition Community Org. v. NLRB, 485 F.2d 917 (D.C. Cir. 1973).

10. *Id.* at 931. For critical discussions of the appellate court's opinion *see* Meltzer, *supra* note 7; Note, *Title VII and NLRA: Protection of Extra-Union Opposition to Employment Discrimination*, 72 MICH. L. REV. 313 (1973).

quired that the picketing be accorded section 7 protection, even though it might be somewhat disruptive of established collective bargaining processes. The case was remanded for the Board to consider whether the union had proceeded in the most efficacious manner.[11]

THE *Emporium* COURT'S REASONING

In *Emporium*, both the appellate court and Supreme Court adopted the Board's finding that the discharged employees had attempted to bargain with the company over working conditions affecting minority employees.[12] The appellate court asserted that the dissident employees' acts could be protected concerted activity even though the activities were characterized as attempts to bargain.[13] However, the Supreme Court viewed the finding of an attempt to bargain as determinative of whether section 7 protection could be extended to the concerted activity. By labeling the activity as an attempt to bargain rather than a presentation of grievances,[14] the Court deemed the dissidents' concerted activities too threatening to the collective bargaining process to warrant section 7 protection.[15]

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11. 485 F.2d at 931. The appellate court standard was an attempt to insure that the union would proceed in the most efficient manner. Efficiency, rather than good faith in choosing a particular means, was the criterion. *See* note 29 and accompanying text *infra*.

12. 420 U.S. at 61; 485 F.2d at 929 n.34. The Board's finding of an attempt to bargain was based upon evidence showing that the dissident employees would be satisfied with nothing less than a meeting with the company president. They wanted to "talk to the top management to get better conditions for The Emporium." 192 N.L.R.B. at 185.

13. 485 F.2d at 929. In his dissent, Justice Douglas agreed with the appellate court's reasoning. He stressed that the principle of exclusive representation should not be applied in cases of alleged racial discrimination because the right to nondiscriminatory treatment is derived from law and does not depend upon union demands. 420 U.S. 73 (Douglas, J., dissenting).

14. If the employees were only attempting to present grievances, their actions would have been protected under the first proviso to section 9(a), which reads:

> That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect . . . .

National Labor Relations Act § 9(a), 29 U.S.C. § 159(a) (1970). In their brief, the dissident employees had argued that

> [T]heir protest was intended to publicize, and thus to induce response to, their underlying grievance concerning discrimination. Viewed as either protest or grievance, however, their conduct warranted protection under the Act.

Brief for Respondents at 30, Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975).

15. 420 U.S. at 66-70.

According to the Supreme Court, an employee who is represented by an exclusive bargaining agent cannot pursue his or her substantive Title VII rights in derogation of that agent. The Court discussed the following points in reaching its conclusion: (1) activities in derogation of the majority representative undermine the very principles upon which labor policy is founded;[16] (2) satisfactory safeguards to prevent tyranny of the majority already exist;[17] (3) the grievance process adequately handles discrimination disputes;[18] (4) other means are available to the employee who seeks to eliminate discrimination;[19] and (5) separate bargaining is counterproductive to progress because of the chaos which it potentially can generate.[20]

The *Emporium* Court began its analysis by discussing the fundamental principle that an individual gains the advantage of collective strength in return for relinquishing to the union the right to deal directly with the employer. Majoritarian principles, firmly established in *NLRB v. Allis-Chalmers Manufacturing Co.*,[21] were applied to justify adherence to traditionally acceptable methods of dealing with the employer. Since majority rule and exclusive representation most effectively accomplish improvements in wages, hours, and working conditions for all,[22] the Court concluded that dissident employees should not be allowed to undermine this process.

According to the *Emporium* Court, the power of the majority is checked in several ways. Appropriate units for collective bargaining,[23] the 1959 Landrum-Griffin Act,[24] and the union's duty of fair representa-

16. *Id.* at 62-64. *See* text accompanying notes 21-22 *infra*.

17. *Id.* at 64. *See* notes 23-29 and accompanying text *infra*.

18. *Id.* at 66-67. *See* text accompanying note 30 *infra*.

19. *Id.* at 70. *See* notes 31-33 and accompanying text *infra*.

20. *Id.* at 67-69. *See* notes 34-38 and accompanying text *infra*.

21. 388 U.S. 175 (1967). In *Allis-Chalmers*, the union imposed fines upon members who had refused to honor the union's picket lines and then sued to collect the unpaid fines. The Supreme Court held that the union had not violated section 8(b)(1)(A). This section, which was added to the National Labor Relations Act in 1947, provides that it shall be an unfair labor practice for a union to restrain or coerce employees in the exercise of their section 7 rights. *See* Labor Management Relations Act, 1947 § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) (1970).

22. NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967).

23. Section 9(b) of the National Labor Relations Act, 29 U.S.C. § 159(b) (1970), provides for Board decisions on what constitutes an appropriate unit. *See* Allied Chem. Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 171-72 (1971).

24. Labor-Management Reporting & Disclosure Act of 1959, 29 U.S.C. §§ 401-531 (1970). The Act insures that unions are operated in a democratic manner. The Bill of Rights, sections 411-15, provides that each member shall enjoy equal voting rights, participation in deliberations, and freedom of speech and assembly. Section 412 makes these rights enforceable through a civil action in federal district court. For a complete discussion

tion[25] reconcile union strength and the individual's rights. However, the duty of fair representation, in particular, has shortcomings which the Court failed to consider. This duty is breached when a union's conduct toward a member of the unit is arbitrary, discriminatory, or in bad faith.[26] Minority employees, taking issue with the manner in which the union protests the employer's discriminatory practices, implicitly have no recourse through the duty of fair representation unless the union acts in bad faith.[27] This was the dilemma facing the dissident employees in *Emporium*. In their estimation, processing individual grievances to redress the alleged sweeping, company-wide discrimination was hopelessly inadequate.[28] However, if the union's decision to process individual grievances was not made in bad faith, the dissidents' belief that their union representatives had failed to press far enough probably would not have been enforced through the duty of fair representation.[29]

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of the Bill of Rights *see* Beyer, *Title I of the LMRDA: Rights and Remedies of Union Members with Respect to Their Unions*, 11 WILLAMETTE L.J. 258 (1975). *See also* Schneidmann, *Application and Limitation of Union Power*, 22 LAB. L.J. 424, 437 (1971).

25. The duty to fairly represent every member in the bargaining unit was first articulated in Steele v. Louisville & N.R.R., 323 U.S. 192 (1944). In Miranda Fuel Co., 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963), the Board first held that a union's breach of the duty of fair representation is an unfair labor practice violating section 8(b).

26. *See* Vaca v. Sipes, 386 U.S. 171 (1967); Local 12, United Rubber Workers, 150 N.L.R.B. 312 (1964), *enforced*, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967). *United Rubber Workers* dealt with a union's summary refusal to process discrimination grievances. The fifth circuit held that arbitrary treatment or inaction constitutes a breach of the duty of fair representation. However, the court stated that if a union makes a good faith investigation of the merits and decides not to proceed, the duty is satisfied. *Id.* at 17.

27. For a complete discussion of the duty of fair representation *see* Comment, *Fair Representation and Breach of Contract in Section 301 Employee-Union Suits: Who's Watching the Back Door?* 122 U. PA. L. REV. 714 (1974); Comment, *Post-Vaca Standards of the Union's Duty of Fair Representation: Consolidating Bargaining Units*, 19 VILL. L. REV. 885 (1974).

28. 420 U.S. at 54. The collective bargaining agreement contained a clause prohibiting employment discrimination and providing that violations could be processed through the grievance procedure. *Id.* at 53.

29. Justice Douglas indicated that the dissident employees would probably not prevail in a suit against the union for breach of the duty of fair representation. He said, "They theoretically had a cause of action against their Union . . . . But as the law on that phase of the problem has evolved it would seem that the burden on the employee is heavy." 420 U.S. at 73-74 (Douglas, J., dissenting).

The appellate court also addressed the inadequacy of the duty of fair representation for the Emporium employees. "Yet, even where there might be no bad faith on the part of the union, we recognize that the method chosen by a union might not be the most efficacious or expedient." 485 F.2d at 931. *See* notes 10-11 and accompanying text *supra*.

The Supreme Court disagreed with the dissident employees regarding the adequacy of filing individual grievances. Processing separate claims can be effective, according to the Court, because "one would hardly expect an employer to continue in effect an employment practice that routinely results in adverse arbitral decisions."[30]

In addition, the Court stressed the availability of other avenues through which the employer's alleged discrimination could be challenged. The administrative processes of the Equal Employment Opportunity Commission (EEOC)[31] as well as a class action pursuant to Title VII[32] could be utilized. Also, recent interpretations of the NLRA have affirmatively involved labor law in the struggle against employment discrimination.[33] According to the Court, these developments supply satisfactory alternatives for the dissident employees in *Emporium* and render unauthorized attempts to bargain unnecessary.

Not only was the picketing in *Emporium* deemed inessential to the pursuit of racial equality on the job, but it was also characterized as counterproductive to that end. The Court stated that unauthorized concerted activity can divide the employees and pit one group against the other.[34] In addition, the Court noted that the employer has a legitimate interest in seeing that strife does not result from fragmentation of the

30. 420 U.S. at 67.

31. *Id.* at 65 n.16, 70, 72. The procedures to be followed when presenting a complaint to the EEOC are set forth in section 706 of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5 (1970), *as amended*, 42 U.S.C. §2000e-5 (Supp. III, 1973). Some of the problems encountered in utilizing the EEOC processes are discussed in notes 71-75 and accompanying text *infra*.

32. Under Title VII, discrimination on the basis of race, color, religion, sex or national origin is considered class discrimination by definition. *See* Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 719 (7th Cir. 1969); Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir. 1968).

33. *See* United Packinghouse Workers v. NLRB, 416 F.2d 1126 (D.C. Cir.), *cert. denied*, 396 U.S. 903 (1969) (employer discrimination on the basis of race or national origin violates section 8(a)(1) of the NLRA because such discrimination inherently interferes with an employee's section 7 rights). *But cf.*, Jubilee Mfg. Co., 202 N.L.R.B. 272 (1973), *enforced*, 504 F.2d 271 (D.C. Cir. 1974) (Board, rejecting *United Packinghouse* rationale, held in a sex discrimination case that an employee must demonstrate an actual nexus between discriminatory act and alleged interference with section 7 rights). For a discussion approving of the Board's standard in *Jubilee see* Note, *Employer Discrimination: How Far Does NLRB Jurisdiction Reach?* 59 CORNELL L. REV. 1078 (1974).

In a parallel development, not referred to by the *Emporium* court, the processes of the NLRB have been withheld from unions which discriminate. *See* NLRB v. Mansion House Center Mgmt. Corp., 473 F.2d 471 (8th Cir. 1973); Bekins Moving & Storage Co., 211 N.L.R.B. No. 7 (June 7, 1974).

34. 420 U.S. at 67. *But see* Atleson, *Work Group Behavior and Wildcat Strikes: The Causes and Functions of Industrial Civil Disobedience*, 34 OHIO ST. L.J. 751 (1973).

unit, and the union has an obvious interest in maintaining a cohesive front.[35] If minority employees are permitted to economically coerce the employer to adopt new procedures, others, who must resort to the grievance procedure, will resent the group receiving favored treatment. The Court's view was that under such circumstances "headway against discriminatory practices would be minimal"[36] because of the disrupted bargaining order.

Assumptions concerning the subversion of industrial harmony if separate bargaining and economic coercion by a minority group is allowed underscored the Court's opinion. Without the emphasis on the potential conflict that can result when the established channels are circumvented, the Court might have construed the unauthorized activity as supportive of, instead of derogating from, the union's position.[37] The union in *Emporium* had opposed the company's racially discriminatory practices; the actions of the four protestors could have been deemed a consistent extension of the union's stance.[38]

The *Emporium* Court's choice of priorities closely resembled those in *NLRB v. Draper Corp.*[39] There the Fourth Circuit Court of Appeals refused to extend protection to minority workers who engaged in a wildcat strike. Although the strike was mobilized to protest a delay in negotiations and to give unsolicited support to the union's position, the court characterized the strike as disruptive to the designated representative's authority and the collective bargaining process. The picketing undertaken in *Emporium* did not interfere with production as did the strike in *Draper*. However, the exclusivity principle was used to limit the scope of section 7 protected concerted activity in both cases.[40]

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35. 420 U.S. at 70.

36. *Id.* at 69.

37. *See* NLRB v. R.C. Can Co., 328 F.2d 974 (5th Cir. 1974) (protection extended to employees who engaged in unauthorized strike when the employer was not forced to choose between the demands of the union and the splinter qroup); Western Contracting Corp. v. NLRB, 322 F.2d 893 (10th Cir. 1963). *But see* NLRB v. Tanner Motor Livery, Ltd., 419 F.2d 216 (9th Cir. 1969); NLRB v. Tanner Motor Livery, Ltd. 349 F.2d 1 (9th Cir. 1965) (same case) (protection denied where employees failed to first seek union assistance to eradicate racial discrimination prior to their protest).

38. The appellate court in *Emporium* took that position. "[W]e find it significant that the Union and the petitioners were *not* working at cross-purposes, but were both attempting to eradicate racially discriminatory employment practices." 485 F.2d at 930.

39. 145 F.2d 199 (4th Cir. 1944), *discussed in* Comment, *Majority Participation Factor in Wildcat Strikes*, 30 WASH. & LEE L. REV. 683 (1973). *See also* Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944) (first case to apply the exclusivity principle under the NLRA). In both *Draper* and *Medo*, the power of the majority representative was consolidated, rank and file dissent being relegated to intra-union channels. *Emporium* is a further extension of this policy.

40. For a discussion criticizing the extension of exclusivity in this manner *see* Schatzki,

IMPACT OF *Emporium* ON SECTION 704(a)

The most significant question raised by the *Emporium* decision is whether protection for unauthorized concerted activity opposing discrimination will now be precluded under section 704(a) of Title VII.[41] Prior to *Emporium*, section 704(a) presented a potential source of protection from employer retaliation against employees protesting discriminatory practices. In *Pettway v. American Cast Iron Pipe Co.*,[42] the Fifth Circuit Court of Appeals asserted that the purpose of section 704(a) is "to protect the employee who utilizes the tools provided by Congress to protect his rights."[43] The employee had been terminated because he filed charges with the EEOC. This retaliatory firing was deemed violative of section 704(a). Although *Pettway* did not discuss the scope of protection afforded by 704(a) or whether acts, other than filing charges, in opposition to employment discrimination should be shielded from employer retaliation, one footnote expounding upon the breadth of section 704(a)[44] has been cited in EEOC decisions as authority for a broad interpretation.[45]

Two EEOC decisions are of particular interest because they dealt with employee activity proscribed by a collective bargaining agreement yet

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Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity Be Abolished? 123 U. PA. L. REV. 897 (1975).

41. The text of the statute is set forth in note 6 *supra*. Section 704(a) proscribes employer retaliation against employees who, on the basis of a good faith belief, oppose practices which may unlawfully discriminate. Protection is not conditioned on a finding that any such practices actually exist. *See* EEOC Decision No. 71-1115, 1973 CCH EEOC DECISIONS ¶6201 (Jan. 11, 1971); EEOC Decision No. 71-2374, 1973 CCH EEOC DECISIONS ¶6260 (June 3, 1971). For a complete discussion of section 704(a) *see* Spurlock, *Proscribing Retaliation Under Title VII*, 8 IND. L. REV. 453 (1975).

42. 411 F.2d 998 (5th Cir. 1969).

43. *Id.* at 1005.

44. The protective provisions of Title VII are substantially broader than even those included in the Fair Labor Standards Act and the National Labor Relations Act in that, in addition to protecting charges and testimony, Title VII also specifically protects assistance and participation. This indicates the exceptionally broad protection intended for protestors of discriminatory employment practices. The protection of assistance and participation in any manner would be illusory if employer could retaliate against employee for having assisted or participated in a Commission proceeding.

411 F.2d at 1006 n.18.

45. *See* EEOC Decision No. 72-1114, 1973 CCH EEOC DECISIONS ¶6347 (February 18, 1972). An employee who attempted to call a meeting and walkout to protest the religious statements of his supervisor was wrongfully discharged by his employer in violation of section 704(a). The *Pettway* footnote was cited for the proposition that section 704(a) was intended to provide exceptionally broad protection for protestors of discriminatory practices. *See also* EEOC Decision No. 73-0519, 2 CCH EMP. PRAC. G. ¶6388 (June 1, 1973).

undertaken to protest an employer's discriminatory practices. Both decisions stated that the right to oppose discrimination by protesting is not affected by a collective bargaining agreement with a no-strike clause. In one case,[46] an employee had established a one-man picket line in front of his employer's plant to protest discriminatory practices. He was fired for violating the no-strike provision in the contract but was later reinstated pursuant to an EEOC finding that terminating this employee violated section 704(a). In the other EEOC decision,[47] several women employees refused to report to work in a protest against discriminatory employment policies. Although the refusal violated the collective bargaining agreement, it was held to be protected activity under section 704(a). These decisions demonstrate that prior to *Emporium*, section 704(a) was successfully utilized to protect activities other than filing charges, even in the face of a collective bargaining agreement.

Furthermore, dicta in *McDonnell Douglas Corp. v. Green*[48] referred to section 704(a) as relating "to discrimination against an applicant or employee on account of his participation in legitimate civil rights activities or protests . . . ."[49] This reference indicates that the Supreme Court did not construe section 704(a) as restricted to protection for filing charges. The Court's statement regarding 704(a), read in conjunction with the *Pettway* footnote and the EEOC interpretations discussed above, strongly suggests that before *Emporium*, section 704(a) included protection for picketing and protesting as well as filing charges.[50]

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46. EEOC Decision No. 71-1804, 1973 CCH EEOC DECISIONS ¶6264 (April 19, 1971). Justice Douglas expressed agreement with this EEOC finding in his dissent in *Emporium*. 420 U.S. at 74 (Douglas, J. dissenting).

47. EEOC Decision No. 74-56, 2 CCH EMP. PRAC. G. ¶6438 (Nov. 16, 1973).

48. 411 U.S. 792 (1973), *discussed in* Note, *Burdens of Proof in Employment Discrimination Cases—McDonnell Douglas Corp. v. Green*, 15 B.C. IND. & COM. L. REV. 654 (1974).

49. *Id.* at 799. The plaintiff in *McDonnell Douglas* had participated in an illegal protest to oppose the company's alleged discriminatory practices. In that protest, stalled cars were used to block the main roads leading to the company plant during the morning shift change. The Eighth Circuit Court of Appeals held that this activity was beyond the purview of section 704(a). Green v. McDonnell Douglas Corp., 463 F.2d 337 (8th Cir. 1972), *vacated and remanded*, 411 U.S. 792 (1973). The Supreme Court did not review this finding, but dealt primarily with the order and nature of proof required of the plaintiff bringing a private, non-class action suit pursuant to sections 703(a)(1) and 704(a) of Title VII. Although the 704(a) claim was properly dismissed, the Court found that the dismissal of plaintiff's 703(a)(1) claim was harmful error because the issues raised in the 703(a)(1) action were not identical to those in the 704(a) suit.

50. *But see* Meltzer, *supra* note 7, at 37-38. Meltzer argued that Title VII promotes its policy within a framework of procedural protections and thus it is unlikely that section 704(a) protection would cover picketing. However, the *Emporium* court indicated that the scope of section 704(a) protection was not conclusively decided in *Pettway* and *McDonnell Douglas*. 420 U.S. at 71 n. 25.

The *Emporium* decision may now prevent protection under section 704(a) for a dissident minority of union members that pickets the employer in an attempt to eradicate alleged racial discrimination. The Court in *Emporium* advised, "[i]f the discharges in this case are violative of §704(a) of Title VII, the remedial provisions of that title provide the means by which Hollins and Hawkins may recover their jobs with back pay."[51] As the EEOC decisions reflect,[52] 704(a) was being interpreted to protect employees who picketed to protest discrimination despite a no-strike provision. However, the *Emporium* decision may impede that line of decisions as precedent. Protecting such picketing, undertaken to bargain directly with the employer, in a Title VII forum[53] would frustrate the *Emporium* decision and directly contradict its stated policy preferences.

The following hypothetical illustrates the effect of extending section 704(a) protection to employees, such as Hollins and Hawkins, who have attempted to bargain outside the established channels. Faced with several picketing employees who are expressing their opposition to alleged discriminatory practices, an employer probably would not fire the employees to halt the picketing if it is clear that reinstatement and back pay would be ordered by a court pursuant to 704(a). This employer would either endure the dissidents' picketing for an indefinite period or take concrete strides to correct the alleged discriminatory practices so that the picketing and resultant economic harm would cease.[54] However, the Supreme Court has refused to sanction the process whereby racial discrimination is eliminated as a result of an employer's capitulation to the demands of minority workers in an organized unit. The *Emporium* decision held that once a collective bargaining framework has been established an employer need not be subjected to the demands of dissident employees engaged in unauthorized activity.[55] When, under the pressure of section 704(a), the hypothetical employer responds to the dissident employees by changing his or her employment policies, the process of change condemned in *Emporium* would occur. Because the *Emporium* Court held that the improvement of working conditions, including improvements derived from the implementation of fair employment prac-

51. 420 U.S. at 72.

52. *See* notes 46-47 and accompanying text *supra*.

53. The term "Title VII forum," as used herein, refers to proceedings before the EEOC and/or the courts to enforce the rights guaranteed by Title VII.

54. An analogous situation was presented in NLRB v. Draper Corp, 145 F.2d 199 (4th Cir. 1944), *discussed in* note 39 and accompanying text *supra*. The court stressed that if protection were extended to the wildcat strikers they would have more leverage than the other employees in the unit and would be able to pressure the employer.

55. 420 U.S. at 68-69.

tices, is the exclusive duty of the bargaining agent,[56] Title VII forums will probably refuse to protect dissident employees who have circumvented the bargaining agent in an attempt to eradicate racial discrimination. In practical terms, the manner in which section 704(a) rights can be exercised by dissident employees such as those in *Emporium* will probably be limited as a result of the importance of exclusivity and the preference for arbitration of all labor disputes.[57]

It is equally unlikely that unionized dissidents, who merely picket without making verbal bargaining demands,[58] will enjoy section 704(a) protection for their activities. Assume these employees go directly to a Title VII forum and are not encumbered by an NLRB determination that they attempted to bargain. The issue of whether they did, in effect, attempt to bargain in derogation of the exclusive agent would probably still be raised. In the Title VII forum the employer would no doubt argue that the employees' picketing has a coercive effect even though no demands have been issued.[59] The employer would also contend that he or she must deal with both the union and the picketing employees on the question of racial discrimination. Since, according to *Emporium*, the employer should not be put in this position where a binding agreement is in effect,[60] the employer would argue that section 704(a) protection cannot be extended without directly contradicting the *Emporium* decision. At that point, the Title VII forum would probably defer to the NLRB, and would not extend section 704(a) protection unless the Board found that the employees had not attempted to bargain.[61]

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56. *Id.* at 69-70. The Court's reasoning in arriving at this conclusion is discussed in notes 21-22 and accompanying text *supra*.

57. For articulation of the policy favoring arbitration of disputes see United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); and United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). The policy has been expanded in recent years. *See* Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970), *discussed in* Note, *Labor Injunctions, Boys Markets, and the Presumption of Arbitrability*, 85 HARV. L. REV. 636 (1972); Gateway Coal Co. v. United Mine Workers, 414 U.S. 368 (1974), *noted in* 76 W. VA. L. REV. 249 (1974).

58. The employees in *Emporium* had made verbal bargaining demands in addition to picketing. *See* note 12 and accompanying text *supra*.

59. The Title VII forum is likely to recognize that the picketing has a coercive effect on the employer. Picketing is equally coercive whether the employees' purpose is to bargain with the employer or merely to express opposition to alleged unlawful discrimination.

60. 420 U.S. at 68-69.

61. Dissident minority employees, who picket without making verbal bargaining demands will probably fight an uphill battle at the NLRB. Section 7 protection will most likely be withheld from employees who *picket* in derogation of a bargaining representative. Picketing, in and of itself, will most likely be deemed an attempt to bargain. *See* note 59 *supra*. To do otherwise would permit the existence of two pressure groups, the union and

The foregoing discussion points out that protection under 704(a) for dissident unionized employees who picket in violation of a no-strike provision will probably not be forthcoming after *Emporium*. However, section 704(a) protection for non-unionized employees who picket their employer to protest racially discriminatory employment practices has arguably not been prevented by the *Emporium* decision. According to the *Emporium* Court, when employees enter into a collective bargaining agreement they relinquish their right to deal directly with their employer and must rely on the union to represent their interests.[62] However, in the absence of a labor agreement, employees can protest racial discrimination without undermining the authority of a bargaining agent.[63] Section 704(a) protection, potentially available to all employees prior to *Emporium*,[64] can still be extended to non-unionized employees without contradicting the *Emporium* Court's assertion that changes in terms and conditions of employment must be confined to the collective bargaining framework.

CONCLUSION

Inasmuch as the *Emporium* Court has determined that existing administrative and judicial remedies adequately protect the rights of minority workers, these alternatives should be extended to accommodate the intensified need which now exists. The rights guaranteed to members of a union by the Landrum-Griffin Act[65] and the duty imposed upon a union to fairly represent all of its members[66] should be liberally con-

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the picketing minority group. This factor will probably preclude protection for picketing unionized employees after *Emporium*, whether it is sought under the NLRA or Title VII.

62. 420 U.S. at 63, *quoting from* NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967). *See also* Ciba-Geigy Corp. v. Local 2548, Textile Workers, 391 F. Supp. 287 (D.R.I. 1975). The Ciba-Geigy court held that a majority of employees may bargain away a minority's right to refuse, on the basis of religious beliefs, to work on Sunday. The court cited *Allis-Chalmers* and *Emporium* in deciding that the state's interest in maintaining the majoritarian principle, with its built-in protections for minorities, overrides the burden that Sunday work assignments place on the individual. *Id.* at 301.

63. Peaceful concerted activity protesting racial discrimination has been protected in similar situations. *See generally* New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938) (non-employees); Washington State Serv. Employees, 188 N.L.R.B. 957 (1971)(protests not directed against own employer, but another); Mason-Rust, 179 N.L.R.B. 434 (1969), *enforcement denied on other grounds*, 449 F.2d 425 (8th Cir. 1971)(applicants for employment).

64. *See* notes 42-50 and accompanying text *supra*.

65. *See* note 24 *supra*; Cloke, *Labor Democracy, Free Speech and the Right of Rank and File Insurgency*, 4 U. SAN FERNANDO VALLEY L. REV. 1 (1975).

66. *See* notes 25-29 and accompanying text *supra*.

strued. Following *United Packinghouse Workers v. NLRB*,[67] which deemed an employer's discriminatory acts to be per se violative of section 7 of the NLRA, the meaning of unfair labor practices should be expanded to include an employer's discriminatory acts.[68] The courts and the Board should reject the more restrictive standard, in which an actual nexus between the discriminatory act and the alleged interference with section 7 rights must be demonstrated.[69] These suggestions would allow greater utilization of the NLRA where racial discrimination is concerned.

Prior to *Emporium*, commentators warned that utilizing the NLRA to enforce rights which are derived from Title VII distorts the application of both Acts and is entirely unnecessary.[70] However, as demonstrated in this Note, preserving the integrity of the collective bargaining construct can restrict the methods available to protect statutory rights guaranteed to all workers by Title VII. The judicial limitation of section 704(a), which will probably take place following the *Emporium* decision, will further weaken Title VII. This legislation has already been criticized for its inadequacy.[71] The *Emporium* case, like many others, was brought to the Board because faster relief and enforceable administrative orders are available there.[72] By contrast, the EEOC is burdened by a tremendous backlog[73] and must ultimately depend upon the parties' willingness to conciliate.[74] This policy of voluntary compliance should be re-

67. 416 F.2d 1126 (D.C. Cir.), *cert. denied*, 396 U.S. 903 (1969), *discussed in* note 33 *supra*.

68. For a complete discussion of this issue *see* Doppelt, *Employer Racial Discrimination: Reviewing the Role of the NLRB*, 8 U. OF MICH. J.L. REFORM 453 (1975).

69. The restrictive standard was announced by the Board in Jubilee Mfg. Co., 202 N.L.R.B. 272 (1973), *enforced*, 504 F.2d 271 (D.C. Cir. 1974), *discussed in* note 33 *supra*.

70. *See* Meltzer, *supra* note 7; Note, *Protected Activity—Concerted Activities to Achieve Racially Nondiscriminatory Employment Conditions are Protected by the NLRA Even Though Unauthorized by the Union*, 87 HARV. L. REV. 656 (1974); Note, *Racial Discrimination in Employment and the Remedy of Self-Help: An Unwarranted Addition*, 15 WM. & MARY L. REV. 615 (1974); *But see* Comment, *The Inevitable Interplay of Title VII and the National Labor Relations Act: A New Role for the NLRB*, 123 U. PA. L. REV. 158 (1974).

71. *See, e.g.*, Doppelt, *supra* note 68; Note, *supra* note 10.

72. *See* Rosen, *Division of Authority Under Title VII of the Civil Rights Act of 1964: A Preliminary Study in Federal-State Interagency Relations*, 34 GEO. WASH. L. REV. 846, 887 (1966).

73. According to the Equal Employment Opportunity Commission Annual Report covering the fiscal year ending June 30, 1972, there were 20,585 charges brought forward from the previous year and 28,337 charges newly received. Investigations were completed on only 10,668 of the above 48,922 charges. Decisions were issued or settlements reached in even fewer cases. 7 EEOC ANN. REP. 36-38 (fiscal 1972). *See also* Doppelt, *supra* note 68.

74. After an investigation shows that there is reasonable cause to believe a charge is

evaluated by Congress. When the EEOC can issue enforceable orders, it will provide a more viable avenue for redress.[75] The improvement of existing channels, to insure that they are not merely theoretical, is the very least that must be done before discriminatory employment practices can become an anachronism in this decade.

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true, the statute directs the EEOC to attempt to eliminate the problem through informal means such as conciliation and persuasion. Equal Employment Opportunity Act of 1972 § 706(b), 42 U.S.C. § 2000e-5(b) (Supp. III, 1973), *amending* 42 U.S.C. § 2000e-5(b) (1970). If conciliation fails, the EEOC is empowered to bring a civil suit against an employer who is not a government, governmental agency or political subdivision. If the EEOC fails to file suit, or the charge is dismissed, or the Attorney General has failed to act against a governmental body, the person aggrieved must be notified. Within 90 days of receipt of the notice, the aggrieved individual may bring a civil action against the party named in the charge. *Id.* § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1).

75. As originally proposed, the EEOC would have been empowered to issue enforceable orders. *See* H.R. 405, 88th Cong., 1st Sess. § 9 (1963). This proposal was stricken from the original bill in a congressional compromise. For suggestions on improving the EEOC as it is currently structured, *see* Blumrosen, *The Crossroads for Equal Employment Opportunity: Incisive Administration or Indecisive Bureaucracy*, 49 NOTRE DAME LAW. 46 (1973); Comment, *EEOC Regulatory Intervention: An Undeveloped Means of Enforcing Title VII*, 62 GEO. L.J. 1753 (1974).