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Comment

Knocking on the Courtroom Door: Finally an Answer From Within for Employment Testers

Daniel M. Tardiff*

I. INTRODUCTION

The legacy of slavery and racial prejudice continues to affect American culture,¹ and, over the years, it has served as the subject of numerous studies and essays.² While discrimination appears in many forms and in many areas of American life, often very subtle in nature,³

* J.D. expected May 2002. I would like to dedicate this Comment to Sarah because your love and your sense of faith truly make me a better person; I am lucky to share my life with you. To my mom, Jane Tardiff, and my sister, Suzanne Tardiff, thank you for being a part of my foundation, you will always be close to my heart. To George, Barbara and Matthew Lynch, thank you for your love, guidance and presence in my life. I would also like to thank Dan Traver, Laura Scotellaro and the editorial staff of this Journal for their editing advice and expertise.

1. John J. Donohue III, *Historical Background*, in FOUNDATIONS OF EMPLOYMENT DISCRIMINATION LAW 3 (John J. Donohue III ed., 1997).

2. Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 818 (1991) (studying the disparities among experiences between African-American and white as well as male and female purchasers in retail car sales negotiations); Faye Crosby, Stephanie Bromley & Leonard Saxe, *Recent Unobtrusive Studies of Black and White Discrimination and Prejudice: A Literature Review*, in FOUNDATIONS OF EMPLOYMENT DISCRIMINATION LAW, *supra* note 1, at 113-19 (discussing various studies conducted on attitudes towards racism and prejudice in America); Floyd D. Weatherspoon, *The Devastating Impact of the Justice System on the Status of African-American Males: An Overview Perspective*, 23 CAP. U. L. REV. 23, 52-55 (1994) (discussing the unemployment of African-American males and the effects of employment discrimination on that segment of the population) [hereinafter Weatherspoon, *Devastating Impact*].

3. Donohue, *supra* note 1, at 3; Stephen E. Haydon, Comment, *A Measure of Our Progress: Testing for Race Discrimination in Public Accommodations*, 44 UCLA L. REV. 1207, 1214-16 (1997) (discussing the concept of testing vis-à-vis public accommodations and the significant disparities in attitudes between whites and African-Americans regarding the extent of discrimination in the United States). As Professor Charles Lawrence notes, "[w]e do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation." Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987).

an organized civil rights movement to eradicate discrimination in the area of employment began to take shape around the time of World War II.⁴ Congress, however, did not pass specific legislation prohibiting discrimination in employment until it implemented Title VII of the Civil Rights Act of 1964 (“Title VII”).⁵ Today, Title VII prohibits discrimination on the basis of race, color, religion, sex, or national origin,⁶ but it has been, and continues to be, subject to Congressional amendments and judicial interpretation.⁷

After the passage of Title VII, employment discrimination litigation proliferated quickly and, according to some commentators, continues to impose a serious burden on federal judges.⁸ Studies in the early 1990s showed that employment discrimination litigation increased at a rate far greater than the general civil caseload in federal courts.⁹ As employment discrimination litigation began to grow, civil rights organizations adopted a method for ferreting out discrimination known as “testing.”¹⁰ In the employment context, a tester is an individual who is hired by a civil rights organization to approach employers while posing as a job applicant.¹¹ The tester, however, is not genuinely interested in the position but collects information to determine whether the particular employer is engaging in discriminatory conduct.¹² If the civil rights organization uncovers discrimination, the tester may file a claim under Title VII against the employer.¹³

4. 1 KENT SPRIGGS, REPRESENTING PLAINTIFFS IN TITLE VII ACTIONS § 1.02[1], at 1-6 to 1-8 (2d ed. Supp. 2000) (describing the evolution of federal employment discrimination legislation).

5. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1994, Supp. 1996, Supp. 1997, Supp. 1998 & West Supp. 2000).

6. *Id.* § 2000e-2(a)(1)-(2).

7. Most recently, Title VII was amended by the Civil Rights Act of 1991. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991); *see also* 1 SPRIGGS, *supra* note 4, § 1.02[6], at 1-12.1 to 1-13; *infra* Part II.A (discussing the historical framing of Title VII and the Civil Rights Act of 1991).

8. John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 983-84 (1991) (reporting on the dramatic rise in employment discrimination lawsuits and analyzing trends associated with that increase).

9. *Id.* at 985. Donohue and Siegelman estimated that employment discrimination cases were increasing at a rate of 344 cases per year. *Id.* at 987.

10. Steven G. Anderson, Comment, *Tester Standing Under Title VII: A Rose by Any Other Name*, 41 DEPAUL L. REV. 1217, 1219-20 (1992); *see also infra* Part II.D (discussing the purpose, methods and goals of testers in discrimination investigations).

11. Anderson, *supra* note 10, at 1219-20.

12. *See id.*; *see also infra* Part II.D.

13. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1)-(2) (1994); Anderson, *supra* note 10, at 1221. Title VII makes it unlawful “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

Critics argue that employment testing is deceiving and ethically unfair to employers, and, among other things, that it unjustly increases the costs of hiring.¹⁴ As a result, lawsuits by testers have been contested on the grounds that the tester-plaintiff lacks standing¹⁵ because the tester is not genuinely interested in the job and, therefore, fails to allege a sufficient injury.¹⁶ Because the use of testing programs is relatively new, the issue of tester standing has not been confronted extensively by federal courts.¹⁷ Nevertheless, initial responses to the use of testers were not favorable.¹⁸ In July 2000, however, the Seventh Circuit issued a landmark ruling in *Kyles v. J.K. Guardian Security Services, Inc.* (“*Kyles II*”),¹⁹ holding that employment testers do have standing to sue under Title VII.²⁰

national origin.” 42 U.S.C. § 2000e-2(a)(1). In addition, it is unlawful “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.” § 2000e(a)(2).

14. Shannon E. Brown, Comment, *Tester Standing Under Title VII*, 49 WASH. & LEE L. REV. 1117, 1140-41 (1992).

15. Standing is “[a] party’s right to make a legal claim or seek judicial enforcement of a duty or right.” BLACK’S LAW DICTIONARY 1413 (7th ed. 1999); see also *infra* Part II.E (discussing generally the problem of standing for testers and the constitutional and prudential requirements for standing in all cases).

16. HAROLD S. LEWIS, JR., CIVIL RIGHTS AND EMPLOYMENT DISCRIMINATION LAW § 13.10, at 513-14 (1997).

17. The significant use of testing programs appeared during the late 1980s and early 1990s. See *infra* Parts II.E-F (discussing the standing requirements at issue when testers bring Title VII claims and how testers have been treated by lower federal courts), III.A-C (discussing the treatment of employment testers by the Fourth, District of Columbia and Seventh Circuits).

18. Fair Employment Council of Greater Washington v. BMC Mktg. Corp., 28 F.3d 1268 (D.C. Cir. 1994) [hereinafter *BMC II*] (holding that employment testers lack standing to seek monetary damages or equitable relief under Title VII); *Sledge v. J.P. Stevens & Co.*, 585 F.2d 625 (4th Cir. 1978) [hereinafter *Sledge II*] (noting that tester plaintiffs suffer no real injury because they are not genuinely interested in the job); *Kyles v. J.K. Guardian Sec. Servs., Inc.*, No. 97 C 8311, 1998 U.S. Dist. LEXIS 15428 (N.D. Ill. Sept. 18, 1998) [hereinafter *Kyles I*] (holding that employment testers lack standing under Title VII); *Sledge v. J.P. Stevens & Co.*, No. 1201, 1975 U.S. Dist. LEXIS 14689 (E.D.N.C. Dec. 22, 1975) [hereinafter *Sledge I*] (dismissing the Title VII claim of an apparent “test” plaintiff on the merits). *Contra Kyles v. J.K. Guardian Sec. Servs., Inc.*, 222 F.3d 289 (7th Cir. 2000) (holding that testers do have standing to sue under Title VII) [hereinafter *Kyles III*]; Fair Employment Council of Greater Washington v. BMC Mktg. Corp., 829 F. Supp. 402 (D.D.C. 1993), *rev’d* Fair Employment Council of Greater Washington v. BMC Mktg. Corp., 28 F.3d 1268, 1272, 1274 (D.C. Cir. 1994) [hereinafter *BMC I*] (holding that employment testers have standing under Title VII); see *infra* Parts II.F (discussing the unfavorable treatment employment testers received in federal district courts), III.A-B (discussing the Fourth Circuit’s and District of Columbia Circuit’s resistance to tester standing).

19. *Kyles II*, 222 F.3d 289 (7th Cir. 2000).

20. This decision marked the first time a federal court explicitly held that testers have standing to sue under Title VII. *Id.* at 300; Allan Gunn et al., *Employment Testers Granted Right to Sue Employer*, 11 ILL. EMP. L. LETTER, Issue 1, Aug. 2000.

This Comment will first chronicle the legislative history of Title VII as well as the Civil Rights Act of 1991,²¹ both of which evoked important changes in employment discrimination litigation.²² It will then explore the procedure for filing a claim under Title VII²³ as well as the legal theories of recovery under Title VII.²⁴ Part II of this Comment will also examine the concept of employment testing in general²⁵ and discuss the constitutional and prudential standing requirements that are at issue in suits initiated by testers under Title VII.²⁶ Finally, Part II will address the treatment of employment testers in the lower federal courts.²⁷ Part III of this Comment will then trace the progression of the treatment of employment testers in the Fourth, District of Columbia and Seventh Circuits.²⁸ Part IV will then critically analyze why the Seventh Circuit's decision to grant standing to testers was appropriate and briefly examine why the Fourth and District of Columbia Circuits missed the mark on tester standing.²⁹ Finally, this Comment will propose that the Seventh Circuit's decision should be followed in all jurisdictions as a just method of enforcing Title VII,³⁰ and it will also propose that the Equal Employment Opportunity Commission ("EEOC") be authorized by Congress to conduct its own testing programs to further Title VII enforcement.³¹

II. BACKGROUND

When it passed the Civil Rights Act of 1964, Congress sought to eradicate discrimination from the workplace.³² Filing a lawsuit under Title VII, however, requires that the plaintiff overcome several procedural³³ and legal³⁴ hurdles. Employment testers³⁵ also face the

21. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

22. *Infra* Part II.A.

23. *Infra* Part II.B.

24. *Infra* Part II.C.

25. *Infra* Part II.D.

26. *Infra* Part II.E.

27. *Infra* Part II.F.

28. *Infra* Parts III.A-C.

29. *Infra* Parts IV.A-C.

30. *Infra* Part V.A.

31. *Infra* Part V.B.

32. *Infra* Part II.A (discussing the historical, social and political processes and goals of Title VII and the Civil Rights Act of 1991).

33. *Infra* Part II.B (explaining the procedural requirements for filing a Title VII claim).

34. *Infra* Parts II.C, E (discussing the legal theories and standing requirements for filing a Title VII claim).

35. *Infra* Part II.D (explaining the use and methods of "testing" in employment discrimination

added obstacle of obtaining legal standing to sue, an endeavor that met great resistance from several federal courts.³⁶

A. The Legislative History of Title VII and the Civil Rights Act of 1991

During the years surrounding World War II, African-Americans and women entered the workforce en masse for the first time due to the increased need for laborers.³⁷ While the war itself created a labor shortage, President Roosevelt facilitated the entry of women and African-Americans by passing Executive Order 8802 and creating the President's Committee on Fair Employment Practices ("FEPC") to prohibit discrimination in the government and defense industries.³⁸ Throughout the next several years, dramatic gains were made in those areas.³⁹ Following the war, however, Congress disbanded the FEPC and racial and gender discrimination in employment increased once again.⁴⁰

As the civil rights movement began to grow in the early 1950s, its initial focus was the desegregation of public accommodations and the institution of fair voting practices in the south.⁴¹ By the early 1960s, however, the quest for employment opportunities became an important focus of the movement.⁴² Due to increasing social and political pressure to end various forms of discrimination, Congress promoted Title VII of the Civil Rights Act of 1964⁴³ as the "centerpiece of federal efforts to end discrimination in the workplace."⁴⁴ Congress designed Title VII to assure equality in employment opportunities and to remove

cases).

36. *Infra* Part II.F (discussing the differing results of the Fourth, District of Columbia and Seventh Circuits on questions of whether employment testers have standing to file an employment discrimination action).

37. 1 SPRIGGS, *supra* note 4, § 1.02[1], at 1-6 to 1-7.

38. 1 *id.* President Franklin Roosevelt issued Executive Order 8802 on June 25, 1941. 1 *id.* It outlawed discrimination in the government and defense industries on the basis of "race, creed, color or national origin." 1 *id.* While racial equality drove the politics of the Executive Order, Roosevelt added prohibitions against discrimination on the basis of creed (religion) and national origin as well. 1 *id.* Roosevelt created the Committee on Fair Employment Practices to monitor enforcement of the Executive Order. 1 *id.*

39. 1 *id.*

40. 1 *id.* at 1-7.

41. 1 *id.*

42. 1 *id.* at 1-8. The importance of equality in the workplace is noted by the title given to a 1963 march in Washington, D.C., the "March on Washington for Freedom and Jobs." 1 *id.*

43. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1994, Supp. 1996, Supp. 1997, Supp. 1998 & West Supp. 2000).

44. 1 SPRIGGS, *supra* note 4, § 1.02[5], at 1-12 (citing 42 U.S.C. § 2000e-17).

the discriminatory practices preventing equality.⁴⁵ Until 1972, the scope of Title VII only applied to private actions and consequently banned discrimination lawsuits against federal, state and municipal government agencies.⁴⁶ Congress, however, passed an amendment in 1972⁴⁷ that expanded the coverage of Title VII to allow discrimination lawsuits against federal, state and local governments.⁴⁸

Title VII prohibits public and private discrimination on the basis of race, color, religion, sex, or national origin,⁴⁹ and the types of employment practices outlawed are defined in very broad terms.⁵⁰ To ensure enforcement, Congress created a private right of action for any person claiming to be aggrieved,⁵¹ thereby allowing individuals, as well as the EEOC, to bring lawsuits.⁵² Over time, the federal courts allowed both disparate treatment⁵³ and disparate impact⁵⁴ claims in Title VII suits, and Congress made it illegal for employers to retaliate against individuals who opposed illegal practices and participated in the enforcement process of Title VII.⁵⁵ Originally, a plaintiff successful on the merits could only receive equitable relief from the court because

45. Anderson, *supra* note 10, at 1236 (discussing *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971)).

46. 42 U.S.C. § 2000e(a), (b); *see* Equal Employment Opportunity Act of 1972, Pub. L. 92-261, § 2, 86 Stat. 103 (1972).

47. Equal Employment Opportunity Act § 2.

48. 42 U.S.C. § 2000e(a), (b); 1 SPRIGGS, *supra* note 4, § 1.02[5], at 1-12.1.

49. 42 U.S.C. § 2000e-2(a)(1)-(2).

50. 1 SPRIGGS, *supra* note 4, § 1.02[5], at 1-12.

51. 42 U.S.C. § 2000e-5(f)(1). Title VII provides that:

If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge . . . the Commission has not filed a civil action under this section . . . a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

Id.

52. *Id.* § 2000e-5(f)(1)(A); Anderson, *supra* note 10, at 1236 & n.113, 1237-38 (discussing the legislative history and comments of various legislators regarding the scope of Title VII).

53. Disparate treatment is “[t]he practice . . . of intentionally dealing with persons differently because of their race, sex, national origin, age or disability . . . the plaintiff must prove that the defendant acted with discriminatory intent or motive.” BLACK’S LAW DICTIONARY 381 (7th ed. 1999); *see also infra* Part II.C (differentiating between recovery in disparate treatment and disparate impact cases).

54. Disparate impact is “[t]he adverse effect of a facially neutral practice . . . that nonetheless discriminates against persons because of their race, sex, national origin, age or disability and that is not justified by business necessity.” BLACK’S LAW DICTIONARY 381 (7th ed. 1999); *see also infra* Part II.C (describing the history and elements of disparate impact cases).

55. 1 SPRIGGS, *supra* note 4, § 1.02[5], at 1-12 to 1-12.1.

Title VII prohibited recovery of monetary damages.⁵⁶ While courts held that back pay was a form of equitable relief for plaintiffs unjustly terminated, Title VII provided injunctive or declaratory relief for plaintiffs subjected to discriminatory hiring practices.⁵⁷

In June 1989, the Supreme Court of the United States dramatically cut back several anti-discrimination protections through a number of key decisions.⁵⁸ In response to the “June 1989 Massacre,” Congress passed a broad package that sought to restore Title VII to its previous power.⁵⁹ President George H. Bush vetoed this package,⁶⁰ however, on October 22, 1990.⁶¹ Despite the Presidential veto, Congress again passed the same package of reforms in 1991.⁶²

Though a veto on this version of the bill appeared certain, legislators garnered enough support for the Civil Rights Act of 1991 (“Act”) to override another Presidential veto and essentially forced President Bush to acquiesce.⁶³ The President signed the Act into law on November 21,

56. 1 *id.* at 1-12.1.

57. 1 *id.*

58. *Pub. Employee Ret. Sys. v. Betts*, 492 U.S. 158 (1989) (holding that the provisions of a bona fide employee benefit plan are exempt from the Age Discrimination in Employment Act if they are not used to discriminate in other non-fringe-benefit aspects); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (holding, *inter alia*, that 42 U.S.C. § 1981 does not apply to racial harassment relating to conditions of employment after the contract has been formed); *Lorance v. AT&T Techs.*, 490 U.S. 900 (1989) (holding that the statute of limitations begins at the adoption of a seniority system and that proof of intentional discrimination is an essential element when challenging seniority systems under Title VII); *Martin v. Wilks*, 490 U.S. 755 (1989) (reversing trial court’s dismissal of white firefighters’ reverse discrimination claims on *res judicata* grounds); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (holding that plaintiffs failed to make a *prima facie* case of disparate impact by showing a racial imbalance in one segment of the employer’s workforce); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that an employer who had allowed a discriminatory impulse to play a motivating part in an employment decision could avoid liability by showing by a preponderance of the evidence that it would have made the same decision in the absence of discrimination); *see also* 1 SPRIGGS, *supra* note 4, § 1.02[6], at 1-12.1.

59. 1 SPRIGGS, *supra* note 4, §1.02[6], at 1-12.1 to 1-13.

60. Civil Rights Act of 1990, S. 2104, 101st Cong. (1990).

61. 1 SPRIGGS, *supra* note 4, §1.02[6], at 1-13.

62. 1 *id.* The Congressional passage of the 1991 Act required no hearings and no reports but only limited debate on the final provisions of the Act. DAVID A. CATHCART ET AL., THE CIVIL RIGHTS ACT OF 1991, § 1.02, at 7 (1993).

63. 1 SPRIGGS, *supra* note 4, §1.02[6], at 1-13. The President was forced to acquiesce because Congress obtained a two-thirds majority to override the Presidential veto. 1 *id.* According to the Constitution:

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall . . . proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent,

1991,⁶⁴ thereby restoring Title VII to the stature it held prior to the Supreme Court's "June 1989 Massacre."⁶⁵ For the first time, plaintiffs could recover compensatory and punitive damages for claims of intentional discrimination under Title VII and the Americans with Disabilities Act ("ADA").⁶⁶

B. Procedure for Filing a Title VII Claim

Two main procedures enforce the rights guaranteed by Title VII.⁶⁷ The first procedure involves individual charge-initiated actions.⁶⁸ The second procedure allows the EEOC to initiate suits when it believes there is a systematic pattern or practice of discrimination by a particular employer.⁶⁹ Though EEOC initiated suits are authorized, most Title VII suits are privately initiated.⁷⁰ In private suits, there are two main conditions that must be satisfied.⁷¹ First, a charge must be filed with the

together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law If any Bill shall not be returned by the President within ten Days (Sunday excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

U.S. CONST. art. I, § 7, cl. 2.

64. 1 SPRIGGS, *supra* note 4, § 1.02[6], at 1-13 n.30.

65. 1 *id.* at 1-13.

66. CATHCART, *supra* note 62, §§ 1.01, 1.03, at 2, 9. In addition to recovering monetary damages, the 1991 Act also gave plaintiffs the right to a jury trial. *Id.* at 2. Damages were only recoverable, however, in cases of intentional discrimination, not in disparate impact cases, which focus on the discriminatory results of facially neutral practices. *Id.* at 9. Furthermore, damages were only recoverable if the plaintiff could not recover damages under 42 U.S.C. § 1981, and the Act set caps on the damages anywhere between \$50,000 to \$300,000 depending upon the employer's size. *Id.* at 5, 9. Allowing plaintiffs to recover damages and seek jury trials marked a fundamental change in the nature of employment discrimination legislation. *Id.* at 9. Prior to the 1991 amendment, damages were not recoverable under Title VII, and the focus was on conciliation and improving employer-employee relationships. *Id.* For a discussion of the recovery of compensatory and punitive damages in cases involving testers, see Michael J. Yelnosky, *Filling an Enforcement Void: Using Testers to Uncover and Remedy Discrimination in Hiring for Lower-Skilled, Entry-Level Jobs*, 26 U. MICH. J.L. REFORM 403, 442-45 (1993).

67. 1 CHARLES A. SULLIVAN ET AL., EMPLOYMENT DISCRIMINATION § 11.1, at 424 (2d ed. 1988).

68. Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(b) (1994); 1 SULLIVAN, *supra* note 67, at 424. An individual charge-initiated action is one in which the plaintiff is an individual bringing the lawsuit against the employer, as opposed to suits initiated by the EEOC. 1 SULLIVAN, *supra* note 67, at 424-25.

69. 42 U.S.C. § 2000e-6(a), (c); 1 SULLIVAN, *supra* note 67, at 426.

70. LEWIS, *supra* note 16, at 278.

71. 1 SULLIVAN, *supra* note 67, at 427.

appropriate administrative agency.⁷² Second, a civil suit must be timely filed by either the EEOC or the individual.⁷³

Before filing a lawsuit, an individual claiming to be aggrieved by a discriminatory practice, or someone acting on behalf of an aggrieved person,⁷⁴ must first file a formal charge with the EEOC or a similar state agency.⁷⁵ Agreements between the EEOC and state or local agencies help to ensure that aggrieved persons are better able to bring lawsuits against discriminating employers by allowing charges filed with one agency to constitute filing with another agency.⁷⁶ These agreements also allow aggrieved individuals to file with the EEOC prior to filing with the local or state entity.⁷⁷

Whenever a charge is filed with the EEOC, if the EEOC subsequently files a charge against an alleged discriminating employer, it must give the employer notice of the charge within ten days of the individual's charge, and it must then determine whether reasonable cause exists for the charge.⁷⁸ If the EEOC finds reasonable grounds for the charge, it

72. 42 U.S.C. § 2000e-5(b); 1 SULLIVAN, *supra* note 67, at 427.

73. 42 U.S.C. § 2000e-5(f)(1); 1 SULLIVAN, *supra* note 67, at 425, 427.

74. Specifically, Title VII provides that charges may be "filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission." 42 U.S.C. § 2000e-5(b); 1 SULLIVAN, *supra* note 67, at 424-25. Those who may file on behalf of an aggrieved person are members of the EEOC. 1 SULLIVAN, *supra* note 67, at 425.

75. 42 U.S.C. § 2000e-5(c); LEWIS, *supra* note 16, at 278-79. If state or local law prohibits the particular practice and gives power to an administrative agency to grant or seek relief, the aggrieved individual must follow state or local procedure first. LEWIS, *supra* note 16, at 278-79 (referring to the statutory guidelines of 42 U.S.C. § 2000e-5(c)). If a state or locality does not have procedures for handling charges of employment discrimination, the individual need only conform with EEOC requirements. *Id.*

If required to file a charge with a state or local agency, a complainant must file that charge within 240 days of the incident. 42 U.S.C. § 2000e-5(c); LEWIS, *supra* note 16, at 279. Upon filing a charge with the state agency, the complainant has a few options for filing with the EEOC, beyond any agreements between the federal and state agencies. 42 U.S.C. § 2000e-5(c); LEWIS, *supra* note 16, at 279. First, the complainant can file a charge with the EEOC sixty days after filing a charge with the local or state entity. 42 U.S.C. § 2000e-5(c); LEWIS, *supra* note 16, at 279-80. In addition, the complainant can file a charge with the EEOC within thirty days of receiving notice that the state or local agency plans to terminate its proceedings, or within 300 days of the incident, whichever happens earlier. 42 U.S.C. § 2000e-5(e)(1); LEWIS, *supra* note 16, at 279-80.

In jurisdictions where there is no authorized state or local agency, the complainant must file a charge directly with the EEOC within 180 days of the alleged unlawful practice. 42 U.S.C. § 2000e-5(e); LEWIS, *supra* note 16, at 279. When filing with the EEOC, the date of the unlawful employment practice is generally considered as the date on which the complainant learns or should have learned that the practice was unlawful, not necessarily when the consequences of that practice become manifest. LEWIS, *supra* note 16, at 280.

76. LEWIS, *supra* note 16, at 279.

77. *Id.*

78. 42 U.S.C. § 2000e-5(b), 5(e)(1).

must seek alternative methods of resolution prior to filing a civil suit.⁷⁹ If the EEOC does not find reasonable grounds, the complainant has ninety days to file a private civil suit.⁸⁰ Finally, if the EEOC does not file suit within 180 days after the complainant filed a charge with the EEOC, the complainant may request a right to sue letter from the EEOC and file a private, civil action within ninety days of receiving the right to sue letter.⁸¹

C. *The Legal Theories of a Title VII Claim*

Regardless of who initiates the Title VII lawsuit, most Title VII discrimination claims fall into two main categories: disparate treatment or disparate impact.⁸² Disparate treatment claims involve situations in which the plaintiff received different treatment because of membership in a protected class.⁸³ Unlike disparate treatment cases, disparate or adverse impact cases focus on whether facially neutral employment practices adversely impact a protected class member.⁸⁴ Put another

79. Specifically, "[i]f the Commission determines after [its] investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." *Id.* § 2000e-5(b); 1 SULLIVAN, *supra* note 67, at 425.

80. 42 U.S.C. § 2000e-5(f)(1); 1 SULLIVAN, *supra* note 67, at 425.

81. 42 U.S.C. § 2000e-5(f)(1); 1 SULLIVAN, *supra* note 67, at 425. A right to sue letter testifies that the complainant followed all of the relevant procedural requirements prior to filing a lawsuit in court. *See* 1 SULLIVAN, *supra* note 67, at 472-74. Because each complainant has an unqualified right to the letter from the EEOC, receipt of the letter is essentially a formality. *Id.* While courts generally consider the letter an important formality, suits are permitted prior to receipt of the letter when the EEOC unjustifiably fails to issue one in a timely manner. *Solomon v. Hardison*, 746 F.2d 699, 702 (11th Cir. 1984) (reversing the district court's dismissal of the plaintiff's case for failure to obtain a right to sue letter when the plaintiff made a diligent attempt to obtain the letter prior to filing suit but the Attorney General refused to issue the letter); 1 SULLIVAN, *supra* note 67, at 474.

82. Anderson, *supra* note 10, at 1225.

83. *Id.*

84. 1 BARBARA LINDEMANN & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 81, 81 (Paul W. Crane, Jr. ed., 3d ed. 1996); Anderson, *supra* note 10, at 1225-26. While disparate treatment cases are often initiated by individuals that "challenge discrete acts of intentional discrimination," disparate impact cases are often class actions that "challenge facially neutral employment practices." 1 LINDEMANN & GROSSMAN, *supra*, at 82.

Perhaps the most important disparate impact case occurred in 1971 with *Griggs v. Duke Power Co.* *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Several African-American employees of Duke Power Company in North Carolina brought claims under Title VII challenging the company's high school diploma and general intelligence test requirements. *Id.* at 425-26. Prior to the adoption of Title VII, the defendant employer openly discriminated against African-Americans by placing them in jobs within the lowest paying department of the company. *Id.* at 426-27. At that time, the Labor Department was the only department that did not require a high school diploma. *Id.* at 427. On the eve of Title VII's adoption when the company could no longer limit African-Americans to only the Labor Department, however, the defendant expanded

way, disparate treatment covers discriminatory intent, while disparate impact deals with discriminatory results.⁸⁵ Generally, lawsuits by testers fall into the disparate treatment category because the testers present an employer with a choice between two equally qualified applicants⁸⁶ where one is a member of a protected minority group.⁸⁷ If the employer consistently chooses the applicant not belonging to a protected class over the equally qualified protected class member, such decisions are deemed intentional and labeled disparate treatment discrimination.⁸⁸

1. Recovery in Disparate Treatment Cases

Disparate treatment cases may be proven by direct or circumstantial evidence.⁸⁹ Direct evidence, such as a memorandum stating that a particular plaintiff was not hired because he was a member of a class

the diploma requirement to every department. *Id.* In addition, the company also required employees to achieve satisfactory scores on two general intelligence tests. *Id.* at 427-28.

The plaintiffs challenged these requirements, both facially neutral as all employees were required to meet them, on the grounds that the requirements had a disparate impact upon African-Americans. *Id.* at 425-26. In striking down both requirements, the Supreme Court found that neither test was related to job performance. *Id.* at 431. Under a disparate impact analysis, the challenged practice must be job related and utilized out of business necessity. *Id.* The Court recognized the disparate impact of these requirements because African-Americans "have long received inferior education in segregated schools." *Id.* at 430. Furthermore, disparate impact analysis is justified under Title VII because "Congress directed the thrust of [Title VII] to the consequences of employment practices, not simply the motivation." *Id.* at 432.

In *Dothard v. Rawlinson*, the Court again addressed the business necessity issue. *Dothard v. Rawlinson*, 433 U.S. 321 (1977). The plaintiff in *Dothard* challenged the height and weight requirements for the position of correctional counselor in the Alabama state correctional system. *Id.* at 323-24. The state required applicants to weigh at least 120 pounds, and stand five feet, two inches tall. *Id.* According to the plaintiff, such requirements had a disparate impact on women and were, therefore, discriminatory in violation of Title VII. *Id.* at 323, 328-29. Noting that its decision in *Griggs* served as a guide for disparate impact cases, the Court undertook a statistical analysis of the impact of the requirements on male and female job applicants. *Id.* at 330. In order to justify its policies, the defendant argued that the height and weight requirements had a direct relationship to strength, which is required for the position of correctional counselor. *Id.* at 331. Yet, the defendant failed to introduce any evidence in the district court that the requirements had any relationship to strength. *Id.* Accordingly, the Supreme Court stated that "[i]f the job-related quality that the appellants identify is bona fide, their purpose could be achieved by adopting and validating a test for applicants that measures strength directly." *Id.* at 332. Without a showing that a relationship existed between the requirements and the need for strength in the applicant, the Court held that the requirements were a violation of Title VII. *Id.* at 332; *see also infra* Part II.C.2 (surveying the history of recovery in disparate impact cases).

85. 1 LINDEMANN & GROSSMAN, *supra* note 84, at 81.

86. *See infra* notes 123-30 and accompanying text (discussing the role of employment testing in ferreting out discriminatory hiring practices).

87. Anderson, *supra* note 10, at 1226 n.50.

88. *Id.*

89. 1 LINDEMANN & GROSSMAN, *supra* note 84, at 10-11.

protected under Title VII, directly proves the defendant's discriminatory intent.⁹⁰ Circumstantial evidence, however, requires the fact finder to infer discrimination from the facts at hand but does not offer direct proof of the defendant's discriminatory intent.⁹¹ Many cases of discrimination rely upon circumstantial evidence because plaintiffs often cannot produce direct evidence of discrimination.⁹²

A trio of United States Supreme Court cases laid out the framework for proving discrimination claims with circumstantial evidence: *McDonnell Douglas Corp. v. Green*,⁹³ *Texas Department of Community Affairs v. Burdine*,⁹⁴ and *St. Mary's Honor Center v. Hicks*.⁹⁵ Under this framework, the plaintiff must first prove her prima facie case

90. 1 *id.* at 11.

91. 1 *id.* Circumstantial evidence is "[e]vidence based on inference and not on personal knowledge or observation." BLACK'S LAW DICTIONARY 457 (7th ed. 1999). For example, if the plaintiff offers evidence that the defendant never hires women, despite the fact that several qualified women have applied over the years, the fact finder may infer that such evidence indicates a discriminatory motive on the part of the employer. 1 LINDEMANN & GROSSMAN, *supra* note 84, at 11.

92. 1 LINDEMANN & GROSSMAN, *supra* note 84, at 11.

93. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In *McDonnell Douglas*, the plaintiff was an African-American male laid off from his position with the defendant employer. *Id.* at 794. After being fired, the plaintiff and other civil rights activists staged a "stall-in" to block the roads leading into the defendant's St. Louis plant. *Id.* at 794-95. When McDonnell Douglas later advertised for job openings, the plaintiff reapplied for a position. *Id.* at 796. The defendant rejected the plaintiff's application, basing its decision in part on the plaintiff's participation in the stall-in. *Id.* In considering the plaintiff's disparate treatment claim, the Supreme Court, for the first time, clearly articulated the plaintiff's burden in establishing a prima facie case. *Id.* at 802. Because the plaintiff established a prima facie case, and the defendant's reason for not rehiring the plaintiff was legitimate, the Court remanded the case to give the plaintiff an opportunity to show that the defendant's reason was pretextual. *Id.* at 807.

94. *Tex. Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981). In *Burdine*, a female plaintiff filed suit against her former employer alleging that the failure to promote her to a supervisory position that remained open for about six months and her subsequent termination was predicated on gender discrimination. *Id.* at 251. The Supreme Court considered the case in order to reexamine the burden on the defendant to rebut the plaintiff's prima facie case in light of the Court's decision in *McDonnell Douglas*. *Id.* at 252.

95. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993). The plaintiff in *Hicks* was an African-American male who worked as a correctional officer in the Missouri Department of Corrections and Human Resources ("MDCHR"). *Id.* at 504-05. After the MDCHR underwent an investigation and supervisory changes, the plaintiff experienced problems with his new boss. *Id.* Eventually, the defendant demoted the plaintiff from his shift commander position and terminated him shortly thereafter. *Id.* at 505. In considering the relationship among the shifting burdens of proof in a disparate treatment case, the Court held that the plaintiff first established his prima facie case and that the defendant adequately rebutted the presumption created by the prima facie case. *Id.* at 506-07. The real import of the *Hicks* decision, however, is the Supreme Court's holding that a court is not compelled to find for the plaintiff merely because he rebuts a defendant's legitimate reason for the practice. *Id.* at 511. Put simply, the plaintiff may need to provide additional evidence of discrimination in order to convince the trier of fact to find in his favor. *Id.* Thus, the court may find for the plaintiff, but is not compelled to do so. *Id.*

according to the standard laid out in *McDonnell Douglas Corp. v. Green*.⁹⁶ To do so, the plaintiff must show that 1) the plaintiff belongs to a protected group, 2) the plaintiff was qualified and applied for the job for which the defendant was seeking applications, 3) though qualified, the plaintiff was rejected, and 4) the defendant continued to solicit applications from individuals as qualified as the rejected plaintiff.⁹⁷ Though the plaintiff's prima facie case consists of these four elements, the Supreme Court recognized that each case will present different circumstances, and, thus, the elements of a prima facie case must be adaptable to the case at hand.⁹⁸

In *Texas Department of Community Affairs v. Burdine*, the Supreme Court reaffirmed that upon proving a prima facie case under the *McDonnell Douglas* standards, the plaintiff creates a presumption that the defendant employer acted in a discriminatory manner and made the hiring decision based upon impermissible factors.⁹⁹ This presumption is created because the plaintiff's prima facie case eliminates the most likely legitimate reasons for rejection—lack of qualifications and lack of a job opening.¹⁰⁰

Once this presumption is created, the burden then shifts to the defendant to offer a legitimate, nondiscriminatory reason to rebut the inference of discrimination.¹⁰¹ However, the burden on the defendant is light, as the plaintiff always bears the ultimate burden of persuasion.¹⁰²

96. *McDonnell Douglas*, 411 U.S. at 802; 1 LINDEMANN & GROSSMAN, *supra* note 84, at 13.

97. *McDonnell Douglas*, 411 U.S. at 802; 1 LINDEMANN & GROSSMAN, *supra* note 84, at 14-15.

98. The Supreme Court noted in *McDonnell Douglas* that the factual scenario presented by every case will not be the same. *McDonnell Douglas*, 411 U.S. at 802 n.13. Thus, the elements of the prima facie case are slightly adaptable to the circumstances presented in any particular case. *Id.*; *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978). For example, a plaintiff alleging that an employer's seniority system is discriminatory generally does not need to prove that she applied for the promotion if the employer routinely offers promotions to persons with her seniority and position. LEWIS, *supra* note 16, at 227 (citing *Loyd v. Phillips Bros., Inc.*, 25 F.3d 518 (7th Cir. 1994)). Likewise, the first element of showing membership in a protected class is "pro forma." *Id.* Even a white male can establish himself as a member of a protected class on religious, racial, or national origin grounds compared to the class he alleges is preferred. *Id.*; see also 1 LINDEMANN & GROSSMAN, *supra* note 84, at 15.

99. *Burdine*, 450 U.S. at 254-55; 1 LINDEMANN & GROSSMAN, *supra* note 84, at 16.

100. *Burdine*, 450 U.S. at 254-56; LEWIS, *supra* note 16, at 227; 1 LINDEMANN & GROSSMAN, *supra* note 84, at 16.

101. *Burdine*, 450 U.S. at 254-55; LEWIS, *supra* note 16, at 228-29; 1 LINDEMANN & GROSSMAN, *supra* note 84, at 17.

102. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993); 1 LINDEMANN & GROSSMAN, *supra* note 84, at 17. The Supreme Court noted that:

[T]he Court of Appeals' holding that rejection of the defendant's proffered reasons compels judgment for the plaintiff disregards the fundamental principle of Rule 301

Furthermore, the defendant does not even need to prove that it was motivated by its proffered reason.¹⁰³ Rather, the defendant need only raise “a genuine issue of fact as to whether [the employer] discriminated against the plaintiff.”¹⁰⁴ Some commentators believe that courts have considered nearly any reason offered by the defendant as legitimate, so long as the defendant does not rely on the plaintiff’s race, color, religion, sex, or national origin.¹⁰⁵ Such decisions show deference to the employer’s knowledge of its own productivity, safety and efficiency requirements.¹⁰⁶

If the employer creates a fact issue by providing evidence of a legitimate, nondiscriminatory motive, the burden shifts back to the plaintiff to prove that the defendant’s justification was a pretext for discrimination.¹⁰⁷ Prior to *St. Mary’s Honor Center v. Hicks*,¹⁰⁸ a plaintiff could prove that the defendant’s explanation as to why the plaintiff was not hired was pretextual by showing through affirmative, direct evidence that the employer relied on the plaintiff’s protected class status.¹⁰⁹ The plaintiff could also prevail by persuading the trier of fact with indirect evidence that the defendant’s explanation was implausible.¹¹⁰ The *Hicks* Court held, however, that a finding for the plaintiff is not mandated if a plaintiff is able to show through circumstantial evidence that the defendant’s explanation for not hiring the plaintiff was pretextual.¹¹¹ While the Court rejected a “pretext-plus” rule, which would require the plaintiff to disprove the defendant’s explanation as well as provide direct evidence of discrimination, the *Hicks* decision has left the lower courts uncertain.¹¹² Ultimately, if the plaintiff can convince the fact finder that the defendant’s reason for rejecting the plaintiff was a pretext for discrimination, the plaintiff will

that a presumption does not shift the burden of proof, and ignores our repeated admonition that the Title VII plaintiff at all times bears the “ultimate burden of persuasion.”

Hicks, 509 U.S. at 511 (emphasis in original).

103. *Burdine*, 450 U.S. at 254-55.

104. *Id.*

105. LEWIS, *supra* note 16, at 229.

106. *See Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978) (discussing how courts are incompetent to restructure business practices and should not do so without a mandate from the legislature); LEWIS, *supra* note 16, at 229.

107. 1 LINDEMANN & GROSSMAN, *supra* note 84, at 22 (relying on *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254-56 (1981)).

108. *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

109. LEWIS, *supra* note 16, at 231.

110. *Id.*

111. *Id.*

112. *Id.* at 231-32.

succeed.¹¹³ Exactly what standards determine whether a plaintiff is successful are still debated in many ways.¹¹⁴

2. Recovery in Disparate Impact Cases

While disparate treatment cases focus on the discriminatory intent of employers, disparate impact cases focus on the results of facially neutral employment practices on members of a protected class.¹¹⁵ In 1971, the Supreme Court decided the seminal disparate impact case, *Griggs v. Duke Power Co.*¹¹⁶ The *Griggs* Court held that Title VII proscribes overt discrimination as well as practices that discriminate in their operation.¹¹⁷ The Court later clarified the procedure for disparate impact claims by stating that the plaintiff must first make a prima facie case by showing that the defendant's practice or policy selects applicants in a racial pattern significantly different from that of the pool of applicants.¹¹⁸

Once the plaintiff establishes a prima facie case, the defendant must demonstrate that the practices or policies are "job-related" and consistent with "business necessity."¹¹⁹ The Civil Rights Act of 1991's amendment to this step generated controversy because it imposed a burden of proof, in addition to the burden of production, upon the defendant to prove that the decision was out of business necessity.¹²⁰

113. *Id.* at 236-37.

114. *Id.* at 237.

115. 1 LINDEMANN & GROSSMAN, *supra* note 84, at 82; *see supra* notes 83-84 and accompanying text (describing the differences between disparate impact and disparate treatment cases).

116. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); 1 LINDEMANN & GROSSMAN, *supra* note 84, at 83; *see also supra* note 84 and accompanying text (discussing the factual and procedural background of *Griggs*).

117. *Griggs*, 401 U.S. at 431 ("[Title VII] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If the employment practice . . . cannot be shown to be related to job performance, the practice is prohibited."); 1 LINDEMANN & GROSSMAN, *supra* note 84, at 84.

118. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); 1 LINDEMANN & GROSSMAN, *supra* note 84, at 84-85 (clarifying the allocation of the burden of proof for job-relatedness of validation tests in Title VII cases).

119. 1 LINDEMANN & GROSSMAN, *supra* note 84, at 85; *see Griggs*, 401 U.S. at 431.

120. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(k)(1)(A) (1994); CATHCART, *supra* note 62, at 20. In many ways, the 1991 Act was a response to the Supreme Court's decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), which established a very broad, employer-friendly definition of "business necessity." CATHCART, *supra* note 62, at 25. The 1991 Act's amendments to Title VII, however, do not specifically define the term "business necessity." *Id.* at 26-27. Instead, the 1991 Act indicates that an Interpretive Memorandum should serve as the exclusive legislative history on the meaning of "business necessity." *Id.* at 27 (citing 137 CONG. REC. S15276 (Oct. 25, 1991)). Section 3 of the 1991 Act and that Memorandum merely say that

However, if the defendant is able to offer sufficient justification for the challenged practice, the burden shifts back to the plaintiff to show that there were “less discriminatory alternatives” available to the defendant.¹²¹ This final step gives the plaintiff the opportunity to show that the defendant refused to implement an effective alternative practice or policy that would have less of an adverse impact on the members of the protected class.¹²²

D. Employment Discrimination “Testing”

Employment testing is a means by which civil rights organizations uncover discriminatory hiring practices in violation of Title VII.¹²³ An employment tester does not have a genuine interest in accepting an employment offer but gathers evidence of discriminatory hiring practices by posing as an applicant.¹²⁴ Testers have long been used in the housing sector to determine if landlords or sellers of real estate were engaged in discriminatory conduct.¹²⁵

the terms “business necessity” and “job related” refer to the meaning given those terms by the *Griggs* Court and in other Supreme Court decisions prior to *Wards Cove*. *Id.* Because the 1991 Act’s definition of the terms is vague, and the Supreme Court’s post-*Griggs*, pre-*Wards Cove* decisions do not reflect a uniform interpretation of the terms, “business necessity” and “job related” could still be defined by a conservative federal bench along *Wards Cove* lines. LEWIS, *supra* note 16, at 270.

121. LEWIS, *supra* note 16, at 266; 1 LINDEMANN & GROSSMAN, *supra* note 84, at 87; *see also supra* notes 94, 101 and accompanying text (discussing the burden on the defendant to show a nondiscriminatory reason to rebut the plaintiff’s case-in-chief). An example of a sufficient justification by the employer is noted by the Supreme Court in *Hicks*. *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993). The Court held that the employer met its burden of production by offering the severity and accumulation of the plaintiff’s rules violations as its nondiscriminatory reason for terminating his employment. *Id.* at 507-08.

122. 42 U.S.C. § 2000e-2(k)(1)(A)(ii), (k)(1)(C); 1 LINDEMANN & GROSSMAN, *supra* note 84, at 87. However, there are two areas of disagreement among parties. 1 LINDEMANN & GROSSMAN, *supra* note 84, at 87. The first is over how effective the alternative(s) must be or from whose perspective it must be effective. 1 *id.* The second centers on the employer’s knowledge as to the existence of a less restrictive alternative. 1 *id.* Employers argue that the test can only be met if the employer had actual knowledge of the alternative, while plaintiffs argue that the employer is liable if they knew or should have known about the alternative.

123. *See* Anderson, *supra* note 10, at 1219-20. The Legal Assistance Foundation of Chicago and the Fair Employment Council of Greater Washington are two organizations that hired testers and initiated lawsuits with testers as plaintiffs in recent years. *Kyles II*, 222 F.3d 289, 291 (7th Cir. 2000); *BMC II*, 28 F.3d 1268, 1270 (D.C. Cir. 1994).

124. *Kyles II*, 222 F.3d at 291; *Standing of Testers to File Charges of Employment Discrimination*, 1 EEOC Compl. Man. (BNA) No. N-915-062 (Nov. 20, 1990), *superseded by Enforcement Guidance of Whether Testers Can File Charges and Litigate Claims of Employment Discrimination*, 2 EEOC Compl. Man. (BNA) No. 915.002 (May 22, 1996) [hereinafter *EEOC Enforcement Guidance*].

125. *See, e.g.*, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982) (finding that housing testers had standing to sue under the Fair Housing Act, 42 U.S.C. § 3604). The use of

Generally, testers are paired together, usually one white tester and one minority tester, given fictitious credentials and trained to respond to potential employers.¹²⁶ At times, the credentials given to the member of a protected class are slightly better than those given to the white

testers in housing discrimination cases differs substantially from the use of employment testers with respect to the necessary credentials of the tester. 2 SPRIGGS, *supra* note 4, § 22.12[2], at 22-63. Searching for a house to buy, or an apartment to rent, is not exactly the same as searching for a job, and landlords will not be looking for the same level of qualification from renters as employers will with job applicants. *See 2 id.* Essentially, it requires more training and preparation to design credentials for individuals posing as job applicants than potential homebuyers or renters. *See 2 id.*

126. *See Kyles II*, 222 F.3d at 292; *see also* Anderson, *supra* note 10, at 1219-21. The use of testers also presents an issue with respect to the protocols the testers must follow while in the field. Ayres, *supra* note 2, at 822-23. Professor Ian Ayres conducted a testing program that focused on buying new cars by sending several testers out to ninety Chicago car dealerships in an effort to determine whether minorities would be treated differently than white male testers. *Id.* Each tester employed the same bargaining tools, yet the results were dramatically different. *Id.* at 819, 822.

Professor Ayres developed distinct protocols for the testers to follow during the bargaining process and instructed the testers to be concerned only with the price of the car. *Id.* at 823-24. The testing project focused on the differences experienced between the initial price of the car the testers were given and the final offers made after completing the negotiating process. *Id.* at 825. The testers were trained to control their answers, including the tone of voice and inflection they used in answering dealers' questions. *Id.* at 825-26. Though they were given uniform responses to certain questions, the testers were also given the freedom to utilize a list of contingent responses depending upon the questions asked by the dealer. *Id.* at 826. The process was designed to let the sales people control the process without knowing they were doing so. *Id.*

Ayres' article also discussed the ethical ramifications of this testing project. *Id.* at 822 n.18. In order to avoid wasting the time of dealers because the testers had no intention of purchasing a car, Ayres sent the pairs out during the least busy times for most dealerships. *Id.*; *see also* John T. Sanders, *How Ethical Is Investigative Testing?*, EMP. TESTING - L. & POL'Y REP., Feb. 1994, at 17 (discussing the ethical considerations when utilizing testing programs and arguing that testing is justified when it stems from an actual complaint, rather than the general goals of an anti-discrimination agency). Ultimately, the results of roughly 180 tests revealed that white males were treated better than black males, white females or black females. Ayres, *supra* note 2, at 828. As an example, the average dealer profit for final offers (following the completion of the negotiation process) was \$362 with white males, \$504 with white females, \$783 with black males and \$1,237 with black females. *Id.*

Finally, Ayres attempted to explain the results of this testing project and posited that the disparities were best explained by a revenue-based theory. *Id.* at 845. Essentially, revenue-based discrimination, according to Ayres, is based on a dealer's estimation of whether or not a particular consumer is likely to shop around. *Id.* If the consumer is willing and readily able to shop around, the dealer may be more willing to negotiate in order to earn the consumer's business. *Id.* If, however, the dealer believes that the consumer cannot shop around for a better price, the dealer is more likely to make a higher initial offer and less likely to negotiate the price down. *Id.* Often, the testers were sent by the dealership to dealers of an identical racial background. *Id.* at 848. Ayres theorizes that minority dealers may be better able to determine whether a minority consumer is able and willing to shop around. *Id.* In addition, the more sophisticated a tester seemed, based upon the contingent responses used by the tester, the more likely the dealer was to negotiate, and vice versa. *Id.* at 848-49.

tester.¹²⁷ The testers are then sent to the same employers and attempt to complete the job interviewing process.¹²⁸ Upon completion of the process, each tester will prepare a report of her experience, and the civil rights organizations determine if discriminatory practices are being used.¹²⁹ If the civil rights organization detects such practices, the testers may pursue administrative and judicial remedies.¹³⁰

Testing is valuable for several reasons.¹³¹ First, evidence obtained from testers is usually of probative value because the testing project can be controlled for any variable.¹³² By setting up the responses testers will give to employers during interviews, civil rights organizations are better able to monitor whether employers are engaging in discriminatory practices.¹³³ Second, by creating the credentials for testers, one can

127. *Kyles II*, 222 F.3d at 292.

128. *Id.*

129. *Id.*

130. *Id.* If legal remedies are pursued, the testers will generally assign their right to damages to the civil rights organization, so as to maintain objectivity and neutrality. *Id.*

131. 2 SPRIGGS, *supra* note 4, § 22.12[2], at 22-63 to 22-64; Yelnosky, *supra* note 66, at 410. The Seventh Circuit has long noted the indispensable role testers play in eradicating discrimination. *Richardson v. Howard*, 712 F.2d 319, 321-22 (7th Cir. 1983) (holding that the district court committed reversible error when it discredited the “key testimony” of a witness simply because of her status as professional housing tester). In *Richardson v. Howard*, the court noted that:

It is frequently difficult to develop proof in discrimination cases and the evidence provided by testers is frequently valuable, if not indispensable. It is surely regrettable that testers must mislead commercial landlords and home owners as to their real intentions to rent or buy housing. Nonetheless, we have long recognized that this requirement of deception was a relatively small price to pay to defeat racial discrimination. The evidence provided by testers both benefits unbiased landlords by quickly dispelling false claims of discrimination and is a major resource in society’s continuing struggle to eliminate the subtle but deadly poison of racial discrimination. We have discovered no case in which the credibility of testimony provided by a tester has been questioned simply because of the tester’s ‘professional’ status. Indeed, tester evidence may well receive more weight because of its source. Testers seem more likely to be careful and dispassionate observers of the events which lead to a discrimination suit than individuals who are allegedly being discriminated against.

Id.

132. 2 SPRIGGS, *supra* note 4, § 22.12[2], at 22-63.

133. 2 *id.* For example, in the Ayres study, testers were trained to control their tone of voice and inflection. Ayres, *supra* note 2, at 825-26. They were also given uniform responses to certain questions and instructed on how to utilize a list of contingent responses depending upon the questions posed by the car dealer. *Id.* at 826. Thus, Ayres was able to control the testers’ behavior and eliminate the effects of personality traits or negotiation skills from the picture, thereby making race the only variable. *See id.* at 825-26. In the employment context, civil rights organizations are similarly able to make testers more or less appealing by controlling how the tester will dress, speak and respond to employers. *See Kyles II*, 222 F.3d at 292; *see also* Anderson, *supra* note 10, at 1219-21. Furthermore, by creating or enhancing the credentials of testers, organizations are able to ensure that applicants are equally qualified, leaving race as the

make certain that the credentials of white and minority testers are at least identical.¹³⁴ Third, the use of testers can corroborate the claims of other individuals previously rejected for a position.¹³⁵

Furthermore, the use of testers fills a gap in the enforcement of Title VII with respect to low-skill, entry-level positions.¹³⁶ Because of the high transaction costs associated with litigating claims of hiring discrimination, under-enforcement of Title VII has resulted, and testing projects “can uncover employment discrimination that otherwise is unprovable because of its subtle form.”¹³⁷ Finally, testing is also important because it highlights that racial discrimination still exists in American society, something many Americans are not willing to acknowledge.¹³⁸ While people’s perceptions about race relations today may not be the way they were during the Civil War, or during the 1960s, racism and discrimination have not been eliminated.¹³⁹ Employment testing is one way to continue working towards the goal of Title VII, to eradicate discrimination from the workplace.¹⁴⁰

E. Knocking on the Courtroom Door: The Requirement of Standing

Although testers may accurately follow the procedure for properly bringing a Title VII claim and may have a factually strong case of discrimination, a ruling that testers lack standing will result in the

only variable for the employer to consider. *Kyles II*, 222 F.3d at 292; see also Anderson, *supra* note 10, at 1219-21. Thus, when both white and minority testers share identical credentials and qualifications, the inference is that the employer does not hire the minority tester because of her minority status. See *Kyles II*, 222 F.3d at 292; see also Anderson, *supra* note 10, at 1219-21.

134. 2 SPRIGGS, *supra* note 4, § 22.12[2], at 22-63.

135. 2 *id.* at 22-64 (discussing a study conducted by the Fair Employment Council of Greater Washington in 1992 that found discrimination against Hispanic testers 22.4% of the time).

136. Yelnosky, *supra* note 66, at 410.

137. *Id.* at 411, 413. In response to Professor Yelnosky, Professor Leroy D. Clark argues that testing would be an effective method for ferreting out discrimination on all levels, including high-skill jobs. Leroy D. Clark, *Employment Discrimination Testing: Theories of Standing and a Reply to Professor Yelnosky*, 28 U. MICH. J.L. REFORM 1, 21 (1994).

138. Haydon, *supra* note 3, at 1214-15 (discussing the concept of testing vis-à-vis public accommodations and the significant disparities in attitudes between whites and African-Americans regarding the extent of discrimination in the United States). According to Haydon, “when anecdotal evidence of the subtle forms that discrimination can take abounds, a healthy paranoia may be warranted.” *Id.* at 1215.

139. John F. Wymer III & Deborah A. Sudbury, *Employment Discrimination “Testers”—Will Your Hiring Practices “Pass?”*, 17 EMPLOYEE REL. L.J. 623 (1992) (discussing a then recent study conducted by the Urban Institute to determine whether discrimination exists against African-American job seekers and concluding that African-Americans experience discrimination almost three times as often as white applicants); see also *supra* notes 1-3 (discussing the economic and social effects of racism in the United States).

140. Yelnosky, *supra* note 66, at 410; Anderson, *supra* note 10, at 1236.

dismissal of their lawsuit, effectively closing the courtroom door.¹⁴¹ Because Article III of the United States Constitution limits the jurisdiction of the federal courts to actual “cases or controversies,”¹⁴² testers can face challenges to their legal standing¹⁴³ from the defendant or the court itself.¹⁴⁴

The central issue in relation to standing is whether a plaintiff has alleged a sufficient injury to warrant judicial intervention.¹⁴⁵ Though Article III of the Constitution establishes a constitutional limitation on standing, the federal courts have also created judicially imposed prudential requirements.¹⁴⁶ Nevertheless, Congress may enact a statute that confers standing upon a plaintiff who would otherwise be barred due to judicial standing requirements.¹⁴⁷ When Congress has done so, the plaintiff must overcome the constitutional requirements only.¹⁴⁸ Otherwise, a plaintiff must overcome the judicially imposed prudential requirements as well as the various constitutional requirements.¹⁴⁹

1. Constitutional Requirements

Article III establishes three requirements for standing.¹⁵⁰ First, the plaintiff must establish that a case or controversy exists by alleging an “injury in fact” that is “concrete and particularized.”¹⁵¹ A plaintiff asserting a right to have the government act in accordance with the law

141. LEWIS, *supra* note 16, at 509 (characterizing standing as a “potentially crippling roadblock”).

142. U.S. CONST. art. III, § 2, cl. 1; *see* LEWIS, *supra* note 16, at 509.

143. *Supra* note 15 and accompanying text (defining standing as a party’s right to seek judicial redress).

144. LEWIS, *supra* note 16, at 509.

145. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 75 (4th ed. 1991) (“Whether a party has ‘alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of the issues’ is . . . ‘the gist of the question of federal standing.’”).

146. LEWIS, *supra* note 16, at 509.

147. *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (holding that plaintiffs seeking to challenge a town’s zoning practices for excluding low to moderate income residents from the town lacked standing to sue because they could not allege an injury the court was capable of redressing); NOWAK & ROTUNDA, *supra* note 145, at 76; LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 112 (2d ed. 1988).

148. NOWAK & ROTUNDA, *supra* note 145, at 76; TRIBE, *supra* note 147, at 112.

149. NOWAK & ROTUNDA, *supra* note 145, at 76; TRIBE, *supra* note 147, at 112.

150. *Allen v. Wright*, 468 U.S. 737, 751 (1984); TRIBE, *supra* note 147, at 111.

151. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (holding respondents lacked standing because they did not demonstrate an injury in fact under the Endangered Species Act); *Gladstone v. Village of Bellwood*, 441 U.S. 91, 99 (1979) (holding respondents had standing under the Fair Housing Act to challenge real estate agents who steered prospective buyers to specific areas by race); LEWIS, *supra* note 16, at 509; TRIBE, *supra* note 147, at 111.

is not enough to make the injury concrete.¹⁵² The best examples of concrete and particularized injuries are economic injury or the threat of criminal prosecution.¹⁵³ In addition to being concrete, the injury must be “actual or imminent, not conjectural or hypothetical.”¹⁵⁴

Second, the injury must be “fairly traceable” to the defendant.¹⁵⁵ If the plaintiff’s alleged injury is not a result of conduct by the defendant, courts will deny standing.¹⁵⁶ In *Allen v. Wright*,¹⁵⁷ the Supreme Court denied standing to African-American parents who challenged the grant of tax exemptions by the IRS to racially discriminatory schools.¹⁵⁸ According to the Court, the connection between the schools’ discrimination and the granting of tax exempt status was “attenuated at best.”¹⁵⁹ Thus, the plaintiffs failed to meet the second constitutional requirement because there was no proof that the denial of tax exempt status would eliminate the discrimination.¹⁶⁰ Due to the manner in which it has been applied, this requirement has come under attack as a way for judges to screen cases they substantively disfavor from their dockets.¹⁶¹

The final constitutional provision requires that the injury will “likely” be “redressed” by the court.¹⁶² This requirement asks whether favorable judicial relief will remove the plaintiff’s burden or alleviate the injury.¹⁶³ It is sometimes co-mingled with the causation requirement because the defendant’s actions may not be seen as the cause of the plaintiff’s injury if the court is unable to alleviate the burden on the plaintiff with a favorable decision.¹⁶⁴ However, the redressability

152. LEWIS, *supra* note 16, at 509.

153. Eric J. Kuhn, Comment, *Standing: Stood Up at the Courthouse Door*, 63 GEO. WASH. L. REV. 886, 891-92 (1995).

154. LEWIS, *supra* note 16, at 509 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992)). For example, a plaintiff alleging only psychological harm from observing conduct with which she disagrees is generally not enough to make the injury concrete. *Id.*

155. *Allen*, 468 U.S. at 751; LEWIS, *supra* note 16, at 510; TRIBE, *supra* note 147, at 111.

156. Kuhn, *supra* note 153, at 892-93 (discussing *Allen v. Wright*, 468 U.S. 737 (1984)).

157. *Allen v. Wright*, 468 U.S. 737 (1984).

158. *Id.* at 754-55.

159. *Id.* at 757.

160. *Id.* at 758.

161. TRIBE, *supra* note 147, at 130.

162. *Allen*, 468 U.S. at 751 (denying standing to African-American parents challenging the grant of tax exempt status to schools practicing racial discrimination); TRIBE, *supra* note 147, at 111.

163. Kuhn, *supra* note 153, at 893.

164. TRIBE, *supra* note 147, at 129-30. In *Warth v. Seldin*, for example, the Supreme Court denied standing to nonresidents of the defendant municipality who alleged that the town’s zoning practices intentionally excluded low to moderate income residents from the town. *Warth v.*

requirement is usually distinguished from causation and treated separately by the court.¹⁶⁵

2. Prudential Requirements

In addition to the Article III limitations on standing, judges have imposed additional standing requirements to avoid questions of broad social significance that do not vindicate any individual rights and to limit judicial access to plaintiffs who are best suited to litigate a claim.¹⁶⁶ First, the plaintiff cannot allege any “generalized

Seldin, 422 U.S. 490, 493 (1975). According to the Court:

The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered “some threatened or actual injury resulting from the putatively illegal action”

Id. at 499. The individual plaintiffs argued that if the Court declared the defendant's zoning practices unconstitutional, they would be able to find affordable housing within the town. *Id.* at 503.

The Court found, however, that “none of these petitioners has a present interest in any Penfield property; none is himself subject to the ordinance's strictures; and none has ever been denied a variance or permit by respondent officials.” *Id.* at 504. As a result, the Court denied standing and held:

[A] plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm *him*, and that he personally would benefit in a tangible way from the court's intervention. Absent the necessary allegations of demonstrable, particularized injury, there can be no confidence of “a real need to exercise the power of judicial review” or that relief can be framed “no broader than required by the precise facts to which the court's ruling would be applied.”

Id. at 508 (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221-22 (1974) (emphasis in original)).

165. *Allen*, 468 U.S. at 753 n.19. The Court held:

The “fairly traceable” and “redressability” components of the constitutional standing inquiry were initially articulated by this Court as “two facets of a single causation requirement.” To the extent there is a difference, it is that the former examines the causal connection between the assertedly unlawful conduct and the alleged injury, whereas the latter examines the causal connection between the alleged injury and the judicial relief requested. Cases such as this, in which the relief requested goes well beyond the violation of law alleged, illustrate why it is important to keep the inquiries separate if the “redressability” component is to focus on the requested relief. Even if the relief respondents request might have a substantial effect on the desegregation of public schools, whatever deficiencies exist in the opportunities for desegregated education for respondents' children might not be traceable to IRS violations of law—grants of tax exemptions to racially discriminatory schools in respondents' communities.

Id. (quoting C. WRIGHT, LAW OF FEDERAL COURTS § 13, at 68 n.43 (4th ed. 1983)); Kuhn, *supra* note 153, at 893.

166. *Gladstone v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979) (stating that courts should “avoid deciding questions of broad social import where no individual rights would be vindicated

grievances.”¹⁶⁷ This requirement means that the court will not hear cases where the plaintiff’s claim is indistinct from other citizens.¹⁶⁸ The court will hear cases only when a large group of people is affected, but not when an individual litigates to force the government to implement a law properly.¹⁶⁹ In the latter situation, every citizen is affected identically by the lack of implementation, and, thus, the plaintiff’s injury is not unique.¹⁷⁰

The second prudential limitation prevents the plaintiff from asserting the rights of third parties,¹⁷¹ which generally occurs when an association attempts to bring a claim on behalf of its members.¹⁷² This requirement

and to limit access to the federal courts to those litigants best suited to assert a particular claim”); Kuhn, *supra* note 153, at 893-94.

167. *Warth*, 422 U.S. at 499, 518 (holding that plaintiffs seeking to challenge a town’s zoning practices for excluding low to moderate income residents from the town lacked standing to sue because they could not allege an injury the court was capable of redressing); LEWIS, *supra* note 16, at 512. A “generalized grievance” is one in which the harm to the general population is no different from the harm alleged by the particular plaintiff. *Warth*, 422 U.S. at 499.

In *Clay v. Fort Wayne Community Schools*, citizens of the town sought to require the school board to consider an African-American candidate for superintendent. *Clay v. Fort Wayne Cmty. Sch.*, 76 F.3d 873, 874 (7th Cir. 1996). In holding that the plaintiffs lacked standing, the court discussed that the plaintiffs “fail[ed] to allege so much as a scintilla of evidence that the harms suffered by them are distinct from the harms suffered by the citizenry of Fort Wayne.” *Id.* at 879.

168. Kuhn, *supra* note 153, at 895 (discussing the Court’s disinclination to hear generalized grievances).

169. *Id.* In *Schlesinger v. Reservists Committee to Stop the War*, a group of present and former members of the Armed Forces Reserves brought suit to stop the United States’ involvement in Vietnam. *Schlesinger*, 418 U.S. 208, 210 n.1 (1974). The plaintiffs, in their capacities as citizens and taxpayers, challenged the military reserve membership of congressmen as violative of the Incompatibility Clause of Article I, § 6, clause 2. *Id.* at 210-11. In discussing their standing as citizens the Court noted that, “[t]he only interest all citizens share in the claim advanced by respondents is one which presents injury in the abstract. Respondents seek to have the Judicial Branch compel the Executive Branch to act in conformity with the Incompatibility Clause, an interest shared by all citizens.” *Id.* at 217. Furthermore,

[a]ll citizens, of course, share equally an interest in the independence of each branch of Government. In some fashion, every provision of the Constitution was meant to serve the interests of all. Such a generalized interest, however, is too abstract to constitute a “case or controversy” appropriate for judicial resolution. The proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries.

Id. at 226-27. Accordingly, the Court denied the plaintiffs standing because their claim amounted only to a generalized grievance. *Id.* at 227-28.

170. Kuhn, *supra* note 153, at 895.

171. *Warth*, 422 U.S. at 499-500; LEWIS, *supra* note 16, at 512.

172. Kuhn, *supra* note 153, at 894. In *Hunt v. Washington State Apple Advertising Commission*, the Washington State Apple Advertising Commission challenged a North Carolina statute regulating the grade of apples brought into the state as violative of the Commerce Clause. *Hunt v. Washington State Apple Adver. Comm’n*, 432 U.S. 333, 335 (1977). North Carolina challenged the standing of the Commission on the grounds that the Commission lacked a personal stake in the outcome of the litigation because the Commission did not engage in the production,

prohibits the plaintiff from asserting the rights of parties not present in the litigation.¹⁷³ It also seeks to prevent premature judicial intervention, show respect for the decisions of third parties not to be part of the litigation, and ensure concrete and sharp presentation of the issues by those parties who are representing their own rights.¹⁷⁴ The third-party standing requirement has several exceptions, however, which seemingly undermine the rule.¹⁷⁵ Both generally, and because of those exceptions, the third-party standing requirement is similar to the “zone of interests” requirement.¹⁷⁶

The final prudential limitation on standing is known as the “zone of interests” requirement.¹⁷⁷ To meet this requirement, the plaintiff must fall within the zone of interests of the statute under which the plaintiff invokes standing.¹⁷⁸ The limitation focuses on whether Congress intended for the plaintiff to seek remedy within the courts¹⁷⁹ and often

sale or shipment of apples into North Carolina. *Id.* at 341. The Court noted that associations have standing “when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Id.* at 343. Because the Commission met the associational standing requirements and operated no differently from a traditional trade association, the Court held that it had standing to sue on behalf of its members. *Id.* at 344-45.

173. *TRIBE, supra* note 147, at 135-36.

174. *Id.* at 136.

175. *Clay v. Fort Wayne Cmty. Sch.*, 76 F.3d 873, 878 n.5 (7th Cir. 1996); *TRIBE, supra* note 147, at 136-42 (discussing the growing number of exceptions to this requirement); *see supra* note 167 and accompanying text (discussing the facts of *Clay v. Fort Wayne Community School*). In *Clay*, the Seventh Circuit noted that, “[e]xceptions to the third-party standing rule are permitted where it would be difficult if not impossible for the harmed individual to present his claims before the court. In such cases, courts have permitted plaintiffs to advance claims on behalf of incapacitated third parties.” *Clay*, 76 F.3d at 878 n.5 (citations omitted).

According to Professor Laurence Tribe, “[t]he third-party standing rule is frequently relaxed in cases ‘[w]here practical obstacles prevent a party from asserting rights on behalf of itself’ and where the litigant ‘can reasonably be expected properly to frame the issues and present them with the necessary adversary zeal.’” *TRIBE, supra* note 147, at 136. Tribe argues, however, that these exceptions are in name only, and are “more persuasively rationalized as *sub silentio* recognitions of *first-party* rights—of interests of the *litigant* that are purportedly interfered with by the challenged action. This reformulation of third-party standing emphasizes how closely the doctrine correlates with the inquiry framed by the zone-of-interests test.” *Id.* (emphasis in original).

176. *TRIBE, supra* note 147, at 136.

177. *Air Courier Conf. of Am. v. Am. Postal Workers Union*, 498 U.S. 517, 523-24 (1991) (denying standing to postal employees’ unions challenging the United States Postal Services’ decision to suspend the Private Express Statutes); *Allen v. Wright*, 468 U.S. 737, 751 (1984) (denying standing to African-American parents who challenged the grant of tax exemptions by the IRS to racially discriminatory schools); *TRIBE, supra* note 147, at 142.

178. *TRIBE, supra* note 147, at 142; *Kuhn, supra* note 153, at 895.

179. *TRIBE, supra* note 147, at 142-43.

arises when litigants challenge agency action under the Administrative Procedure Act.¹⁸⁰ To determine whether the plaintiff falls within the statute's zone of interests, the court must look to the legislative history and language of the statute involved.¹⁸¹ While these prudential limitations are relevant, they can be avoided in cases where a federal statute clearly intends to extend standing under that statute to the limits of Article III.¹⁸²

F. Decisions in the Lower Courts Regarding Tester Standing

Prior to the Seventh Circuit's decision in *Kyles II*,¹⁸³ a few federal district courts considered the issue of employment testers in the context of employment discrimination suits under Title VII.¹⁸⁴ With one exception, these cases reveal that the lower federal courts were not receptive to the idea of employment testing.¹⁸⁵

1. An Initial Case on the Merits Revealed Grim Prospects for Testers: *Sledge v. J.P. Stevens & Company, Inc.*

One of the earliest cases dealing directly with the issue of employment testers was *Sledge v. J.P. Stevens & Company, Inc.* ("*Sledge I*") in 1975.¹⁸⁶ In *Sledge I*, thirteen African-American plaintiffs brought a class action suit alleging discrimination claims under Title VII and 42 U.S.C. § 1981.¹⁸⁷ Following an arduous

180. Administrative Procedure Act, 5 U.S.C. § 702 (1994); Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970) (stating that "the Administrative Procedure Act grants standing to a person 'aggrieved by agency action within the meaning of a relevant statute'"); Kuhn, *supra* note 153, at 895.

181. Block v. Cmty. Nutrition Inst., 467 U.S. 340, 345 (1984) (noting that the court must look to the express language of the statute, the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved when determining whether the relevant statute precludes judicial review under the Administrative Procedure Act); Kuhn, *supra* note 153, at 895.

182. NOWAK & ROTUNDA, *supra* note 145, at 76; TRIBE, *supra* note 147, at 112.

183. *Kyles II*, 222 F.3d 289 (7th Cir. 2000).

184. *Kyles I*, No. 97 C 8311, 1998 U.S. Dist. LEXIS 15428 (N.D. Ill. Sept. 18, 1998) (holding that employment testers lack standing under Title VII); *Sledge I*, No. 1201, 1975 U.S. Dist. LEXIS 14689 (E.D.N.C. Dec. 22, 1975) (dismissing the Title VII claim of an apparent "test" plaintiff on the merits). *Contra BMC I*, 829 F. Supp. 402 (D.D.C. 1993) (holding that employment testers have standing under Title VII), *rev'd*, *BMC II*, 28 F.3d 1268, 1272, 1274 (D.C. Cir. 1994).

185. *Kyles I*, 1998 U.S. Dist. LEXIS 15428, at *10-11 (holding that employment testers lack standing under Title VII); *Sledge I*, 1975 U.S. Dist. LEXIS 14689, at *6-7 (dismissing the Title VII claim of an apparent "test" plaintiff on the merits). *Contra BMC I*, 829 F. Supp. at 407-08 (holding that employment testers have standing under Title VII).

186. *Sledge I*, No. 1201, 1975 U.S. Dist. LEXIS 14689 (E.D.N.C. Dec. 22, 1975).

187. 42 U.S.C. § 1981 (1994); *Sledge I*, 1975 U.S. Dist. LEXIS 14689, at *1. Section 1981

procedural history,¹⁸⁸ the district court dismissed the claims of the individual plaintiffs but proceeded to render a decision on the merits with respect to the class as a whole by finding the defendant liable for discrimination.¹⁸⁹ The court then issued three types of relief for the class members, including enjoining all racially discriminatory practices by the defendant, awarding back pay to class members, and awarding attorneys' fees to the plaintiffs.¹⁹⁰

The court confronted the issue of employment testing, however, in its decision to dismiss the claims of one of the named plaintiffs.¹⁹¹ Thomas Hawkins, an African-American male, applied for a job with the defendant on July 21, 1969 and listed one of the plaintiffs' attorneys as a personal reference.¹⁹² The defendant rejected Hawkins for employment, and five days later, Hawkins filed a charge with the EEOC.¹⁹³ In dismissing the individual claim filed by Hawkins for failing to prove that his rejection was racially motivated, the district court also suspected that Hawkins was not genuinely interested in the job and merely filed an application in order to join the lawsuit.¹⁹⁴ While

grants "[a]ll persons . . . the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . ." 42 U.S.C. § 1981(a); *Sledge I*, 1975 U.S. Dist. LEXIS 14689, at *60. Title VII claims are often combined with § 1981 claims because the plaintiff will argue that in utilizing discriminatory practices the defendant not only violated Title VII, but also violated § 1981 by unlawfully prohibiting the plaintiff from entering an employment contract. Michelle Landever, Note, *Tester Standing in Employment Discrimination Cases Under 42 U.S.C. § 1981*, 41 CLEV. ST. L. REV. 381, 386-87 (1993) (arguing that testers have standing under § 1981).

188. *Sledge I*, 1975 U.S. Dist. LEXIS 14689, at *1, *62-63. In November 1972, a bench trial was held on the plaintiffs' Title VII and § 1981 claims. *Id.* at *1. Following further arguments in the spring of 1973, the district court took the case under advisement in order to wait for a decision in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). *Id.* The court awaited the *Albemarle* decision because it involved a similar back pay issue central to the issue in *Sledge I*. *Id.* Following the Supreme Court's decision in *Albemarle*, the *Sledge I* court issued its opinion in December 1975. *Id.*

While the *Sledge I* court dismissed the individuals claims of the named plaintiffs, a procedural anomaly exists that allows class action suits to proceed even after the claims of all named plaintiffs are dismissed in the Fourth Circuit. *Id.* at *62-63. In employment discrimination class actions in the Fourth Circuit, dismissal or mootness of individual plaintiffs does not destroy their ability to litigate claims on behalf of the entire class. *Id.* at *62. Based on this procedural twist, the *Sledge I* court found the defendant liable for discrimination because it failed to rebut the plaintiffs' prima facie case. *Id.* at *62-63, *68. Accordingly, the *Sledge I* court awarded class-wide relief. *Id.* at *68.

189. *Id.* at *68, *76.

190. *Id.* at *68.

191. *Id.* at *6-7.

192. *Id.* at *5, *6.

193. *Id.* at *6.

194. *Id.* at *6-7. According to the *Sledge I* court, it had "the impression that Hawkins was not seriously seeking employment with Stevens but rather filed his application . . . with the view to joining this lawsuit." *Id.*

the district court did not explicitly call Hawkins a tester, the Fourth Circuit would soon place that label on him.¹⁹⁵

2. Tester Standing is Squarely Confronted for the First Time: *Fair Employment Council of Greater Washington v. BMC Marketing Corp.*

Over two decades later, the standing of employment testers would be directly confronted by a district court in the District of Columbia in *Fair Employment Council of Greater Washington v. BMC Marketing Corp.* (“*BMC I*”).¹⁹⁶ In *BMC I*, two African-American testers and a civil rights organization brought claims under the District of Columbia Human Rights Act,¹⁹⁷ Title VII and § 1981.¹⁹⁸ The Fair Employment Council of Greater Washington sent both African-American and white testers to the defendant employment agency in search of job referrals.¹⁹⁹ The white testers, who had comparable qualifications to the African-American testers, received job referrals, while the African-American testers did not receive referrals.²⁰⁰

The defendants argued that the individual plaintiffs lacked standing because the testers admitted that they were not genuinely interested in receiving a job referral.²⁰¹ In examining the standing of the testers under Title VII, the district court first noted the constitutional requirements imposed by Article III as well as the judicially imposed prudential standing requirements.²⁰² The court then reviewed the Supreme Court’s holding that housing testers suffer a sufficient injury for claims brought under the Fair Housing Act²⁰³ (“FHA”).²⁰⁴ The district court then found the provision of Title VII which establishes a right to nondiscriminatory job referrals²⁰⁵ remarkably similar to the

195. See *infra* Part III.A (discussing the Fourth Circuit’s view that testers do not allege a sufficient injury because they are not genuinely interested in the job, but allowing Hawkins the opportunity to show that he was a bona fide job applicant).

196. *BMC I*, 829 F. Supp. 402 (D.D.C. 1993).

197. District of Columbia Human Rights Act, D.C. CODE ANN. § 1-2512(b) (1981); *BMC I*, 829 F. Supp. at 403.

198. 42 U.S.C. § 1981 (1994); 42 U.S.C. § 2000e-2(b) (1994); *BMC I*, 829 F. Supp. at 403.

199. *BMC I*, 829 F. Supp. at 403.

200. *Id.*

201. *Id.*

202. *Id.*; see also *supra* Part II.E (discussing the constitutional and judicially imposed standing requirements).

203. Fair Housing Act, 42 U.S.C. § 3604(d) (1994).

204. *BMC I*, 829 F. Supp. at 404 (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982)).

205. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(b) (1994).

FHA and held that employment testers suffer a sufficient injury to confer standing under Title VII.²⁰⁶

The defendant also argued that the testers lacked standing with respect to the testers' claim for injunctive relief.²⁰⁷ Relying upon *City of Los Angeles v. Lyons*,²⁰⁸ the defendants argued that the testers failed to show that they would be subject to future injury.²⁰⁹ The district court, however, distinguished *BMC I* from *Lyons* by stating that the testers in *BMC I* had the power to return to the defendant agency and seek another referral.²¹⁰ Thus, the court believed that the testers could easily demonstrate a probability of future injury.²¹¹ Accordingly, the district court denied the defendants' motion to dismiss for lack of standing under Title VII.²¹² Though the initial response by this court was favorable, the District of Columbia Circuit would see things differently on appeal.²¹³

3. A Setback for Employment Testers: *Kyles v. J.K. Guardian Security Services, Inc.*

Only a few short years after testers received a favorable reception from a district court in *BMC I*,²¹⁴ another federal district court squarely confronted the issue of tester standing in *Kyles v. J.K. Guardian Security Services, Inc.* ("*Kyles I*").²¹⁵ In *Kyles I*, two African-American female testers, using fictitious credentials, applied for a job with the defendant security agency.²¹⁶ Hired by the Legal Assistance Foundation of Chicago to participate in a testing program, the women had no interest in the job and were required to refuse any offers for

206. *BMC I*, 829 F. Supp. at 404.

207. *Id.* at 405.

208. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). *Lyons* involved an African-American motorist pulled over by the Los Angeles Police Department who was subjected to a dangerous chokehold. *Id.* at 97. The plaintiff sought to enjoin officers from using chokeholds in the future, *id.* at 100, but the Supreme Court held that the plaintiff could not prove he would be subjected to future injury, *id.* at 108. Because the police controlled whether the plaintiff would be pulled over again, the Court considered it "speculation" that *Lyons* would be injured in the future. *Id.* at 108. Accordingly, the Court denied the plaintiff injunctive relief. *Id.*

209. *BMC I*, 829 F. Supp. at 405.

210. *Id.*

211. *Id.*

212. *Id.* at 408.

213. See *infra* Part III.B (discussing the District of Columbia Circuit's holding in *BMC II*, 28 F.3d 1268 (D.C. Cir. 1994)).

214. *BMC I*, 829 F. Supp. at 408.

215. *Kyles I*, No. 97 C 8311, 1998 U.S. Dist. LEXIS 15428 (N.D. Ill. Sept. 18, 1998).

216. *Id.* at *1-2.

employment.²¹⁷ Both testers interviewed with the defendant, but neither received an offer.²¹⁸ Through the Legal Assistance Foundation of Chicago, both testers subsequently brought claims for employment discrimination under Title VII and § 1981²¹⁹ seeking compensatory and punitive damages,²²⁰ injunctive relief and attorneys' fees and costs.²²¹ The defendant also filed state law counterclaims for fraud and misrepresentation against the plaintiffs, and both parties moved for summary judgment.²²²

In examining whether the plaintiffs had standing to sue under Title VII or § 1981, the district court first considered the constitutional requirements of Article III²²³ and the judicially imposed prudential standing requirements.²²⁴ The court held that the plaintiffs failed to meet the constitutional requirement of "injury in fact" because they were not genuinely interested in the job.²²⁵ Absent a genuine interest, the court concluded that the plaintiffs could not be injured by the defendant's refusal to hire them.²²⁶ Furthermore, Article III limitations prevented the court from addressing abstract questions of wide public significance.²²⁷

After finding that the plaintiffs lacked Article III standing, the district court next examined their standing under Title VII and § 1981 together.²²⁸ The court then held that the plaintiffs also lacked statutory

217. *Id.* at *2.

218. *Id.*

219. *See supra* note 187 and accompanying text (discussing the relationship between § 1981 and Title VII claims).

220. *Kyles I*, 1998 U.S. Dist. LEXIS 15428, at *1. The plaintiffs sought compensatory damages as a result of the amendments to Title VII by the Civil Rights Act of 1991. *See supra* Part II.A (discussing the legislative history of Title VII and the Civil Rights Act of 1991).

221. *Kyles I*, 1998 U.S. Dist. LEXIS 15428, at *1.

222. *Id.* Interestingly, the district court neglected to give a factual account of the treatment of the white testers by the defendant. *Id.* Because the court was required to read all facts in a light most favorable to the plaintiffs, as it granted the defendant's motion for summary judgment, a more descriptive factual account may have been warranted. *Id.* at *2-3.

223. U.S. CONST. art. III, § 2, cl. 1; *see supra* Part II.E.1 (discussing the constitutional standing requirements).

224. *Kyles I*, 1998 U.S. Dist. LEXIS 15428, at *4-7; *see supra* Part II.E.2 (discussing the prudential standing requirements imposed by courts).

225. *Kyles I*, 1998 U.S. Dist. LEXIS 15428, at *5-6.

226. *Id.*

227. *Id.* at *7 (citing *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). According to the district court, the plaintiffs' "summer work was championing the rights of humanity at large against racial discrimination . . . [and] federal courts are not the proper forums to address the rights of humanity at large." *Id.* at *6. Both testers were students at Northwestern University and were hired as testers for a summer job. *Id.* at *1-2.

228. *Id.* at *7-10; *see supra* note 187 and accompanying text (discussing the relationship

standing because they were not bona fide job applicants.²²⁹ Though standing is a procedural matter distinct from the merits of a case, the court discussed whether the plaintiffs were bona fide applicants within the context of a plaintiff's prima facie case of discrimination.²³⁰ By doing so, the court equated the standing requirements with the requirements for making a prima facie case on the merits.²³¹

The *Kyles I* court also distinguished the use of housing testers²³² on the grounds that Title VII and § 1981 confer narrower rights than the Fair Housing Act,²³³ and, thus, housing testers can be injured without being bona fide applicants.²³⁴ Conversely, the *Kyles I* court concluded that employment testers cannot be injured unless they are genuinely interested in the job.²³⁵ Finally, the court then drew upon the District of Columbia Circuit's decision in *Fair Employment Council of Greater Washington v. BMC Marketing Corp.*²³⁶ and held that the *Kyles I* plaintiffs lacked standing under Title VII for injunctive relief because there was no threat of future harm.²³⁷ Upon holding that the plaintiffs in *Kyles I* lacked standing for their Title VII and § 1981²³⁸ claims, the

between § 1981 and Title VII claims).

229. *Kyles I*, 1998 U.S. Dist. LEXIS 15428, at *10.

230. *Id.* at *7-8.

231. *Id.*; see discussion *infra* Part III.C (noting the distinction between the elements of a plaintiff's prima facie case and the requirement of standing made by the Seventh Circuit in *Kyles II*, 222 F.3d 289, 299-300 (7th Cir. 2000)).

232. *Kyles I*, 1998 U.S. Dist. LEXIS 15428, at *9-10. The *BMC I* court relied on the similarities between housing and employment testers as well as the similarities between Title VII and the FHA in holding that the employment testers in *BMC I* had standing to sue. *BMC I*, 829 F. Supp. 402, 404 (D.D.C. 1993). While the *BMC I* court relied upon the Supreme Court's decision in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), the *Kyles I* court apparently did not find the *Havens* decision dispositive. *Kyles I*, 1998 U.S. Dist. LEXIS 15428, at *9-10; 2 SPRIGGS, *supra* note 4, § 22.12[3], at 22-67 to 22-68.

233. Fair Housing Act, 42 U.S.C. § 3604(d) (1994).

234. *Kyles I*, 1998 U.S. Dist. LEXIS 15428, at *9-10.

235. *Id.* at *10.

236. *Fair Employment Council of Greater Washington v. BMC Marketing Corp.*, 28 F.3d 1269 (D.C. Cir. 1994); see also *infra* Part III.B (discussing the District of Columbia Circuit's holding that testers lack standing to sue in *Fair Employment Council of Greater Washington v. BMC Marketing Corp.*, 28 F.3d 1269 (D.C. Cir. 1994)).

237. *Kyles I*, 1998 U.S. Dist. LEXIS 15428, at *8; see also *infra* Part III.B (discussing the District of Columbia Circuit's finding that a lack of future harm precluded the testers from having standing).

238. The court gave cursory treatment to the plaintiffs' § 1981 standing but held that they lacked standing under that statute because § 1981 does not protect the right to refuse to enter an employment contract or to enter a void contract. *Kyles I*, 1998 U.S. Dist. LEXIS 15428, at *9; see also *infra* Part III.B (surveying the District of Columbia Circuit's holding regarding the employment testers claims for equitable relief).

court granted the defendant's motion for summary judgment and relinquished jurisdiction of the defendant's state law counterclaims.²³⁹

III. DISCUSSION

In the lower federal courts, employment testers did not receive a favorable response in either the Fourth or Seventh Circuits, but they had some success in the District of Columbia.²⁴⁰ On appeal, however, a sentiment disfavoring testers remained the status quo in the Fourth Circuit,²⁴¹ while the Seventh Circuit and the District of Columbia Circuit each reversed the results reached by their respective lower courts.²⁴²

A. *The Fourth Circuit Still Does Not Favor Testers: Sledge v. J.P. Stevens & Company, Inc.*

When the Fourth Circuit heard *Sledge v. J.P. Stevens & Company, Inc.* ("*Sledge IP*")²⁴³ on appeal, it considered whether the individual discrimination claims brought by Thomas Hawkins, whose genuine interest in employment with the defendant was seriously questioned by the district court,²⁴⁴ were properly dismissed on their merits.²⁴⁵ Ultimately, Hawkins received a minor reprieve, but one that did not really amount to acceptance of employment testers.²⁴⁶ On appeal, eight of the thirteen individual plaintiffs challenged the dismissal of their claims, the defendant challenged the finding of discrimination by the district court, and the plaintiffs also challenged the back-pay claim filing requirements imposed by the district court.²⁴⁷

239. *Kyles I*, 1998 U.S. Dist. LEXIS 15428, at *10-11.

240. *See id.* (holding that employment testers lack standing under Title VII); *Sledge I*, No. 1201, 1975 U.S. Dist. LEXIS 14689 (E.D.N.C. Dec. 22, 1975) (dismissing the Title VII claim of an apparent "test" plaintiff on the merits). *But see BMC I*, 829 F. Supp. 402 (D.D.C. 1993) (holding that employment testers have standing under Title VII), *rev'd*, *BMC II*, 28 F.3d 1268, 1272, 1274 (D.C. Cir. 1994) (holding that testers do not have standing to seek monetary or equitable relief under Title VII); *see also supra* Parts II.F.1-3 (discussing lower court decisions regarding tester standing).

241. *Sledge II*, 585 F.2d 625, 641 (4th Cir. 1978); *see also infra* Part III.A (discussing the Fourth Circuit's unfavorable treatment of testers).

242. *Kyles II*, 222 F.3d 289, 300 (7th Cir. 2000); *BMC II*, 28 F.3d 1268, 1272-73 (D.C. Cir. 1994); *see also infra* Parts III.B-C (discussing the District of Columbia and Seventh Circuits' treatment of testers).

243. *Sledge II*, 585 F.2d 625 (4th Cir. 1978).

244. *Sledge I*, 1975 U.S. Dist. LEXIS 14689, at *6-7.

245. *Sledge II*, 585 F.2d at 641.

246. *Id.*

247. *Id.* at 633.

Before deciding the validity of the named plaintiffs' claims, the Fourth Circuit held that the district court properly found the defendant liable for discrimination, except with respect to the defendant's seniority system.²⁴⁸ The court then turned to the individual plaintiffs and noted that all of the individual plaintiffs had three common characteristics.²⁴⁹ First, dismissal of their claims only affected the awarding of back-pay.²⁵⁰ Second, the timing of dismissals altered the criteria on appeal because the district court bifurcated the trial.²⁵¹ Finally, even though bifurcation was acceptable, the individual plaintiffs should not be subjected to a higher burden of proof simply because each testified before the district court found class-wide discrimination.²⁵²

The *Sledge II* court then examined each of the named plaintiffs' individual claims.²⁵³ Five of the individual plaintiffs were employees of the defendant at some point, two were unsuccessful applicants, and the remaining plaintiff, Thomas Hawkins, appeared to be a tester.²⁵⁴ While

248. *Id.* at 636; *see supra* note 188 and accompanying text (discussing the procedural treatment of the case by the district court). The Fourth Circuit noted that the finding of discrimination by the district court as to the defendant's seniority system was erroneous because Title VII exempts seniority systems. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h) (1994); *Sledge II*, 585 F.2d at 636. An employer's seniority system is exempt from Title VII so long as the system does not intentionally discriminate on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(h); *Sledge II*, 585 F.2d at 636. Specifically, Title VII provides that,

It shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(h). Because the plaintiffs in *Sledge II* did not challenge the bona fide nature of the defendant's seniority system, the court reversed the findings that the system violated Title VII and § 1981. *Sledge II*, 585 F.2d at 636.

249. *Sledge II*, 585 F.2d at 636-39.

250. *Id.* at 637. Because the other relief granted was an injunction against future discrimination, and the named plaintiffs were not eliminated from the class, the only remedy they would be deprived of by dismissal was back pay. *Id.*

251. *Id.* The appellate court noted that once liability for discrimination of the class as a whole is proven, it is assumed that the individual decisions were discriminatory as well. *Id.* The burden then shifts to the employer to provide a legitimate justification for the decision, and if that burden is met, the plaintiffs have an opportunity to show the explanation is pretextual. *Id.* In this case, however, the district court dismissed the individual claims before proceeding with respect to the class as a whole. *Id.* Thus, on appeal, the court can only affirm the dismissal of the individual claims if it is clear the plaintiff is not a class member, or if the defendant had an "acceptable and unassailable" reason for its actions. *Id.* at 638.

252. *Id.* at 638.

253. *Id.* at 639-43.

254. *Id.* at 641. The court's opinion does not indicate that a civil rights organization hired

discussing Hawkins' individual claims, the court questioned the same facts mentioned by the district court.²⁵⁵ Specifically, the *Sledge II* court commented on the sequence of Hawkins' application and rejection for a job with the defendant and his subsequent filing of an EEOC charge within five days of that rejection.²⁵⁶ In addition, the court found it suspicious that Hawkins listed one of the plaintiffs' attorneys as a reference on his job application.²⁵⁷

The court also discussed the district court's impression that Hawkins was a "test" plaintiff and for the first time clearly stated that testers are not harmed when they are not hired because they are not genuinely interested in the job.²⁵⁸ However, the *Sledge II* court reversed the

Hawkins in the same manner that most testers are hired. *Id.* The opinions, at both the district and appellate levels, merely express skepticism over Hawkins' interest in the job. *Id.*; *Sledge I*, No. 1201, 1975 U.S. Dist. LEXIS 14689, at *6-7 (E.D.N.C. Dec. 22, 1975). Specifically, both courts note that one of Hawkins' references was one of the plaintiffs' attorneys, and that Hawkins filed his EEOC charge only five days after being rejected by the defendant. *Sledge II*, 585 F.2d at 641; *Sledge I*, 1975 U.S. Dist. LEXIS 14689, at *6. Thus, it appears that Hawkins could have been recruited as a tester of sorts, but there is no conclusive proof of that fact in the courts' opinions. *Sledge II*, 585 F.2d at 641; *Sledge I*, 1975 U.S. Dist. LEXIS 14689, at *6-7.

255. *Sledge II*, 585 F.2d at 641; *Sledge I*, 1975 U.S. Dist. LEXIS 14689, at *5-6.

256. *Sledge II*, 585 F.2d at 641.

257. *Id.*

258. The Fourth Circuit stated that, "[s]uch 'test' plaintiffs are not, of course, harmed by a refusal to hire since they are not seriously interested in the job for which they apply." *Id.* (citing *Lea v. Cone Mills Corp.*, 438 F.2d 86, 88 (4th Cir. 1971)). *Lea v. Cone Mills Corp.* actually represents the first case that implicates the issue of testing. *Lea*, 438 F.2d 86, 88 (4th Cir. 1971). *Lea* pre-dates *Sledge I* by only four years but considers an award of back pay and attorneys fees to the plaintiffs. *Id.* at 87. The plaintiffs in *Lea*, a group of African-American women, instituted a class action alleging violations of Title VII because the defendant hired white females and African-American males, but not African-American females. *Id.* The district court enjoined the defendant's conduct, finding it discriminatory, but did not allow back pay to the plaintiffs. *Id.* at 87, 88. The Fourth Circuit affirmed that finding. *Id.* The district court also disallowed an award of attorneys' fees to the plaintiffs, but the Fourth Circuit reversed that decision. *Id.* at 88. Though the district court believed the plaintiffs' motivation was to "test" the defendant's employment practices, and the appellate court agreed with that conclusion, the majority in *Lea* relied upon *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), in holding that the "[p]laintiffs should not be denied attorneys' fees merely because theirs was a 'test case.'" *Id.*

In his dissent/concurrence, Judge Boreman agreed with the majority's finding that a Title VII violation had occurred, but vehemently disagreed that the plaintiffs were entitled to attorneys' fees. *Id.* (Boreman, J., dissenting). According to Boreman, the district court's decision to disallow attorneys' fees should only be disturbed if there is a clear showing of abuse of discretion. *Id.* (Boreman, J., dissenting). Boreman believed there was no such abuse by the district court in this case. *Id.* (Boreman, J., dissenting). According to him, the district court was correct because the plaintiffs in *Lea* were merely pawns or puppets in a case that "smacks of nothing but manufactured litigation." *Id.* at 90 (Boreman, J., dissenting). The plaintiffs did not know the attorneys involved, merely signed identical charges filed with the EEOC, and it was clear that the attorneys would not seek fees from the plaintiffs if the case was not successful. *Id.* at 89 (Boreman, J., dissenting). Overall, Boreman's opposition to the award of fees was based primarily on the fact that the plaintiffs appeared to be testers. *Id.* at 89-91 (Boreman, J.,

dismissal of Hawkins' claims because he was not given the chance to prove whether he was a bona fide applicant.²⁵⁹ While this apparent tester received a small reprieve, the language of both the District and Fourth Circuit Courts clearly indicated that testers do not suffer an injury sufficient enough to give them legal standing to sue.²⁶⁰ Furthermore, even though the decisions in *Sledge I* and *Sledge II* addressed the merits of the case, the overall treatment testers received did not establish strong precedent for tester standing.²⁶¹

B. The Courtroom Door is Slammed Shut: Fair Employment Council of Greater Washington v. BMC Marketing Corp.

Unlike *Sledge II*, in which the Fourth Circuit only questioned the nature of Thomas Hawkins' discrimination claims,²⁶² the District of Columbia Circuit in *Fair Employment Council of Greater Washington v. BMC Marketing Corp.* ("*BMC IP*") flatly rejected the standing of two

dissenting).

While the *Lea* decision moderately raised the issue of whether testers suffer an injury, the *Sledge II* court only relied upon *Lea* as an example of a decision in which the Fourth Circuit affirmed the disallowance of back pay to "test" plaintiffs. *Sledge II*, 585 F.2d at 641. However, the *Sledge II* court's decision strikes closer to the issue of tester standing because the *Sledge II* court actually discusses whether testers suffer an injury. *Id.* The *Lea* decision speaks more to whether test plaintiffs are entitled to attorneys' fees. *Lea*, 438 F.2d at 88.

259. *Sledge II*, 585 F.2d at 641.

260. *Id.*; *Sledge I*, 1975 U.S. Dist. LEXIS 14689, at *6-7.

261. *Sledge II*, 585 F.2d at 641; *Sledge I*, 1975 U.S. Dist. LEXIS 14689, at *6. Nearly two decades after both *Sledge* and *Lea*, a district court in Georgia considered *Parr v. Woodmen of the World Life Insurance Society*, a case on the merits apparently involving another "test" plaintiff. *Parr v. Woodmen of the World Life Ins. Soc'y*, 657 F. Supp. 1022 (M.D. Ga. 1987). The plaintiff in *Parr* was a white male who filed claims under Title VII and § 1981 alleging that he was not hired by the defendant because he was married to a black woman. *Id.* at 1022. The district court initially granted the defendant's motion to dismiss the case, but that ruling was overturned by the Eleventh Circuit. *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888 (11th Cir. 1986). The case was then remanded back to the district court, where a bench trial ensued. *Parr*, 657 F. Supp. at 1022.

According to the district court, the plaintiff proved all but one of the elements of his prima facie case because he failed to prove that he "applied" for a job with the defendant as he was not genuinely interested in the job. *Id.* at 1032. Put simply, the plaintiff was only attempting to create a basis for an EEOC charge and a Title VII claim by applying for a job with the defendant and informing them that he was married to an African-American woman. *Id.* at 1032-33. Since he could not be considered a bona fide job applicant, the court saw him as a "test" plaintiff who suffered no injury, *id.* (quoting *Sledge II*, 585 F.2d 625, 641 (4th Cir. 1978)), in a case that "smacks of nothing but . . . [litigation manufactured by plaintiff Parr]," *id.* at 1033 (quoting *Lea v. Cone Mills Corp.*, 438 F.2d 86, 90 (4th Cir. 1971) (Boreman, J., dissenting)). As a result, judgment was entered for the defendant. *Id.* Though a decision on the merits as well, the *Parr* decision represents another example where the court seriously questioned the validity of a tester and utilized the language developed by the *Sledge* and *Lea* courts to do so. *Id.*

262. *Sledge II*, 585 F.2d at 641.

employment testers under Title VII.²⁶³ In so doing, the *BMC II* court established clear precedent against tester standing.²⁶⁴

The *BMC II* court first addressed the testers' claims for monetary damages.²⁶⁵ The court held that because the alleged discrimination took place in 1990, at a time when Title VII only allowed for equitable relief,²⁶⁶ the statute could not be applied retroactively.²⁶⁷ Thus, the testers could not recover damages.²⁶⁸ The *BMC II* court also held that the testers lacked standing for injunctive relief because they did not sufficiently allege that they would be subject to any future harm or discrimination.²⁶⁹ While the district court distinguished the case,²⁷⁰ the circuit court relied upon *City of Los Angeles v. Lyons*²⁷¹ to find that the testers in *BMC II* failed to demonstrate any threat of future discrimination from the defendants.²⁷² The plaintiffs' complaint alleged that the testers would continue to feel the effects of the past discrimination.²⁷³ According to the *BMC II* court, however, the complaint did not sufficiently allege that the testers would actually return to the defendant agency and be subject to discriminatory conduct again.²⁷⁴

263. *BMC II*, 28 F.3d 1268, 1274 (D.C. Cir. 1994); see also *supra* note 187 and accompanying text (discussing the interplay between Title VII and § 1981 claims). The court first held that the testers did not have standing under § 1981 because they did not allege an injury cognizable under the statute. *BMC II*, 28 F.3d at 1270-72. The reasons for this conclusion were twofold. *Id.* First, the testers only lost an opportunity to enter a void contract with defendant if they had received employment referrals from the defendant because they used false information in applying. *Id.* Second, the plaintiffs were only deprived of the right to refuse to enter a contract with prospective employers because the plaintiffs were required to reject any job offer they received. *Id.* Thus, the plaintiffs lacked standing because § 1981 does not protect the right to enter invalid contracts, nor does it protect a person's right to refuse to enter a contract. *Id.*

264. *BMC II*, 28 F.3d at 1270-74.

265. *Id.* at 1272.

266. Prior to the passage of the Civil Rights Act of 1991, only equitable relief was allowed under Title VII. CATHCART, *supra* note 62 § 1.01, at 2, 9; see also *supra* Part II.A (discussing the legislative history of Title VII and the Civil Rights Act of 1991).

267. *BMC II*, 28 F.3d at 1272.

268. *Id.*

269. *Id.* at 1274.

270. *BMC I*, 829 F. Supp. 402, 405 (D.D.C. 1993).

271. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983); see *supra* note 208 and accompanying text (discussing the facts of *Lyons*); see also *supra* Part II.F.2 (discussing how the District of Columbia District Court distinguished the employment testers' claims for equitable relief from *Lyons* in *BMC I*, 829 F. Supp. 402, 405 (D.D.C. 1993)).

272. *BMC II*, 28 F.3d at 1272-73.

273. *Id.* at 1273.

274. *Id.*

The district court distinguished *Lyons* on the ground that the testers controlled whether they would return to BMC for a referral.²⁷⁵ However, the circuit court viewed that fact as merely a possibility, rather than something *likely* to occur.²⁷⁶ To the District of Columbia Circuit, there was no likelihood that the testers would return because they were known to BMC, and BMC no longer had a duty to continue to consider the testers for referrals because of the testers' deception.²⁷⁷ In addition, even if the testers did return, there was no guarantee that BMC would actually discriminate against them.²⁷⁸ As a result, the testers in *BMC II* were just like the plaintiff in *Lyons* who could not control whether he would be pulled over and choked again.²⁷⁹ The court concluded that absent any showing that future harm is likely, rather than a remote possibility, the testers did not have standing for any type of relief under Title VII.²⁸⁰

Accordingly, the District of Columbia Circuit reversed the district court's finding and remanded the case.²⁸¹ Ultimately, the *BMC II* court negatively answered only half of the standing question by denying the plaintiffs' standing for equitable relief because Title VII precluded recovery of monetary damages at the time of the alleged discrimination.²⁸² However, the *BMC II* decision, combined with the treatment of testers in the Fourth Circuit,²⁸³ apparently shut the courtroom door on employment testers.

C. Finally, the Knock is Answered: Kyles v. J.K. Guardian Security Services, Inc.

The courtroom door opened wide with the Seventh Circuit's landmark ruling in *Kyles v. J.K. Guardian Security Services, Inc.* ("*Kyles II*").²⁸⁴ At the outset of its opinion, the Seventh Circuit

275. *BMC I*, 829 F. Supp. at 405.

276. *BMC II*, 28 F.3d at 1273.

277. *Id.*

278. *Id.*

279. *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983); *BMC II*, 28 F.3d at 1274; *see also supra* note 208 and accompanying text (discussing the facts of *Lyons*).

280. *BMC II*, 28 F.3d at 1274.

281. *Id.* at 1281.

282. *Id.* at 1272.

283. *See supra* Parts II.F.1 (surveying the district court's decision in *Sledge I*, No. 1201, 1975 U.S. Dist. LEXIS 14689 (E.D.N.C. Dec. 22, 1975)), III.A (detailing the Fourth Circuit's decision in *Sledge II*, 585 F.2d 625 (4th Cir. 1978)).

284. *Kyles II*, 222 F.3d 289, 300 (7th Cir. 2000). At the time the plaintiffs entered the courtroom in *Kyles I*, there was little precedent supporting their argument for standing under Title VII and § 1981. *See supra* Parts II.F.1.3, III.A-B (discussing the unfavorable treatment testers

explained the nature of employment testing,²⁸⁵ as well as the particular project in which the plaintiffs participated.²⁸⁶ In addition, the *Kyles II* court provided more detail than the district court did as to how the white and African-American testers were treated by the defendant.²⁸⁷ The *Kyles II* court described how both white testers who applied for the same jobs as the plaintiffs were offered a position, while the plaintiffs did not receive an offer.²⁸⁸

The court then canvassed the constitutional²⁸⁹ and prudential²⁹⁰ standing requirements any plaintiff must overcome.²⁹¹ The court also noted that these limitations are generally used because it is judicial policy to avoid deciding questions of broad social import where no individual rights are vindicated.²⁹² The Seventh Circuit discussed, however, that Congress has the power to extend standing to the limits of Article III, and if it does so, the court cannot deny standing.²⁹³ Thus, the *Kyles II* court recognized that Congress can create legal rights via statute, where those rights would not exist absent the statute.²⁹⁴ Accordingly, the Seventh Circuit determined that the Article III standing of the testers in this case depended upon whether Title VII,²⁹⁵ the applicable statute, confers standing.²⁹⁶

received in the district and circuit courts in the Fourth and District of Columbia Circuits). As a result, perhaps, the *Kyles I* court denied the testers standing and granted the defendant's motion for summary judgment. *Kyles I*, No. 97 C 8311, 1998 U.S. Dist. LEXIS 15428, *10-11 (N.D. Ill. Sept. 18, 1998).

285. See *supra* Part II.D (explaining the concept of employment testing).

286. *Kyles II*, 222 F.3d at 292-93.

287. Compare *id.* at 292-93 (providing a detailed factual account of the experiences of both tester plaintiffs, including comparing their experience with the white testers), with *Kyles I*, 1998 U.S. Dist. LEXIS 15428, at *1-2 (giving a cursory review of the facts and eliminating any detail as to how the white testers were treated).

288. *Kyles II*, 222 F.3d at 292-93.

289. The Article III requirements include: 1) an injury in fact that is a) concrete and particularized, and b) actual or imminent, not hypothetical, 2) the injury is fairly traceable to the defendant, and 3) the injury is redressable. *Id.* at 294; see also *supra* Part II.E.1 (discussing the constitutional standing requirements of Article III).

290. The judicially imposed prudential limitations require that 1) the injury be unique from other people, 2) the plaintiff cannot claim the rights of third parties, and 3) the plaintiff must fall within the zone of interests protected by the statute. *Kyles II*, 222 F.3d at 294; see also *supra* Part II.E.2 (covering the judicially imposed, prudential standing requirements).

291. *Kyles II*, 222 F.3d at 294.

292. *Id.* (quoting *Gladstone v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979)).

293. *Id.*

294. *Id.*

295. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1994).

296. *Kyles II*, 222 F.3d at 294. The Seventh Circuit did not bifurcate the standing question into a consideration of Article III standing and then statutory standing as did the district court. *Id.*; *Kyles I*, No. 97 C 8311, 1998 U.S. Dist. LEXIS 15428, *4, *8 (N.D. Ill. Sept. 18, 1998).

In answering the standing question, the *Kyles II* court concluded that Congress intended to extend standing under Title VII to the Article III limits, thereby giving private citizens the right to act as “private attorneys general.”²⁹⁷ As with any plaintiff, the central question for the court became whether employment testers could allege an “injury in fact” as aggrieved persons.²⁹⁸ To answer that question, the court turned to Title VIII of the Civil Rights Act of 1968, commonly known as the Fair Housing Act.²⁹⁹ Similar to Title VII, the FHA allows a suit to be filed by any “aggrieved” person.³⁰⁰ Relying on *Havens Realty Corp. v. Coleman*,³⁰¹ the Seventh Circuit noted that the Supreme Court held that housing testers³⁰² have standing to sue under the FHA.³⁰³ Furthermore, according to the *Kyles II* court, Congress intended standing under the FHA to extend to the limits of Article III as well,³⁰⁴ making the sole requirement for standing “injury in fact.”³⁰⁵ The injury protected against by the FHA is misrepresentations concerning the availability of housing;³⁰⁶ that statute creates both a legal right to be free of any

297. *Kyles II*, 222 F.3d at 295 (citing *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972)). The phrase “private attorneys general” refers to Congress’ decision to authorize civil actions by private individuals as well as the EEOC. 42 U.S.C. § 2000e-5(f)(1); *Kyles II*, 222 F.3d at 295; Yelnosky, *supra* note 66, at 424-25. Thus, not only can the EEOC enforce Title VII, but private citizens can also enforce their rights under the statute, thereby acting as “private attorneys general.” 42 U.S.C. § 2000e-5(f)(1); *Kyles II*, 222 F.3d at 295; Yelnosky, *supra* note 66, at 424-25.

298. *Kyles II*, 222 F.3d at 295.

299. Fair Housing Act, 42 U.S.C. §§ 3601-3631 (1994). Because the FHA is considered the “functional equivalent” of Title VII, *Kyles II*, 222 F.3d at 295, EEOC v. Bailey Co., 563 F.2d 439, 453 (6th Cir. 1977), the two acts are given like construction and application by the courts, *Kyles II*, 222 F.3d at 295, *Metro. Housing Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1289 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).

300. 42 U.S.C. § 3610(a)(1)(A)(i).

301. *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). *Havens* involved a defendant who was found liable under the FHA for practicing racial steering by showing African-Americans apartments only in certain areas and misinforming them as to the availability of housing in other areas. *Id.* at 366 n.1. Two testers were plaintiffs in the action, and the Court held that an African-American tester had standing under the FHA. *Id.* at 368, 374.

302. See *supra* text accompanying note 125 (comparing the use of testers in the housing and employment sectors).

303. *Kyles II*, 222 F.3d at 295-96.

304. *Gladstone v. Village of Bellwood*, 441 U.S. 91, 103 n.9, 109 (1979); *Kyles II*, 222 F.3d at 296.

305. *Warth v. Seldin*, 422 U.S. 490, 501 (1975) (holding that plaintiffs seeking to challenge a town’s zoning practices for excluding low to moderate income residents from the town lacked standing to sue because they could not allege an injury the court was capable of redressing); *Kyles II*, 222 F.3d at 296.

306. Fair Housing Act, 42 U.S.C. § 3604(d) (1994).

misrepresentations and the ability to enforce that right through a private civil action.³⁰⁷

The *Kyles II* court noted that a housing tester has standing, regardless of the tester's intent to rent an apartment or purchase a home, because all individuals have a right to be free of misrepresentations about the availability of housing.³⁰⁸ Relying upon the landmark ruling in *Havens Realty Corp. v. Coleman*,³⁰⁹ the *Kyles II* court then discussed how the Seventh Circuit subsequently held that housing testers have standing to sue for additional violations of the FHA.³¹⁰ Thus, the *Kyles II* court noted that in the Seventh Circuit, housing testers clearly have standing to sue for a number of violations of the FHA.³¹¹

Having concluded that housing testers have standing under the FHA, the *Kyles II* court compared Title VII to the FHA.³¹² While Title VII does not have a section comparable to § 3604(d) of the FHA,³¹³ the court noted that the two statutes are similar in three other important respects.³¹⁴ First, both statutes take a broad aim at discrimination.³¹⁵ Second, the Seventh Circuit recognized that both statutes authorize "private attorneys general,"³¹⁶ thereby permitting any aggrieved person

307. *Kyles II*, 222 F.3d at 296.

308. *Id.*

309. *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982); *supra* note 301 and accompanying text (discussing the Supreme Court's holding that housing testers have standing to sue under the FHA).

310. 42 U.S.C. § 3604(a), (b); *Kyles II*, 222 F.3d at 296-97 (discussing *Village of Bellwood v. Dwivedi*, 895 F.2d 1521 (7th Cir. 1990)). The FHA prohibits anyone from refusing to sell or rent after making a bona fide offer or to negotiate for the sale or rental of housing on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 3604(a). Similarly, § 3604(b) prohibits discrimination in the terms of sale or rental, or the services provided in connection with such sale or rental on the basis of race, color, religion, sex, or national origin. *Id.* § 3604(b).

311. *Kyles II*, 222 F.3d at 297.

312. *Id.* at 297-98.

313. 42 U.S.C. § 3604(d); *Kyles II*, 222 F.3d at 297.

314. *Kyles II*, 222 F.3d at 297-98.

315. *Id.* at 297 (citing *EEOC v. Bailey Co.*, 563 F.2d 439, 453 (6th Cir. 1977)). On its face, Title VII provides that it is unlawful for any employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (1994). Furthermore, it is illegal "to limit, segregate, or classify [any] employees or applicants for employment in any way . . . because of such individual's race, color, religion, sex, or national origin." *Id.* § 2000e-2(a)(2). Similarly, the FHA takes a broad aim at discrimination by prohibiting any misrepresentation on the availability of housing, or refusing to sell or rent on the basis of race, color, religion, sex, or national origin. *Id.* § 3604(a), (d).

316. *Kyles II*, 222 F.3d at 297 (citing *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972)); *see also supra* note 297 and accompanying text (discussing Congress' decision to authorize private individuals as well as the EEOC to bring civil actions to enforce their rights under Title VII).

to file a civil suit.³¹⁷ Finally, the court noted that both statutes reveal Congress' intent to extend standing to the limits of Article III because of their breadth and scope.³¹⁸

Based upon these similarities, the Seventh Circuit proffered three reasons why employment testers have standing to sue under Title VII.³¹⁹ First, the Supreme Court's decision in *Havens Realty Corp. v. Coleman*,³²⁰ as well as the Seventh Circuit's conclusion that testers have standing to sue for additional violations of the FHA,³²¹ indicate that employment testers have standing because Title VII created a broad right to be free of discrimination.³²² The *Kyles II* court stated that Title VII created a broad right, beyond a mere refusal to hire, because it protects any individual, including a tester, from being limited, classified, or segregated in any way on the basis of race, color, religion, sex, or national origin.³²³ Thus, if a tester is not considered for a job because she is African-American, she has been improperly limited or segregated, and, therefore, she has suffered a sufficient injury under Title VII according to the Seventh Circuit.³²⁴

Second, the court stated that the standing of employment testers is consistent with the statutory purpose of Title VII because Title VII reflects a strong public interest to eradicate discrimination from the workplace.³²⁵ According to the *Kyles II* court, individuals serve this

317. *Kyles II*, 222 F.3d at 297. Arguably, Title VII is even broader than the FHA because it authorizes a suit by any person "claiming" to be aggrieved, while the FHA requires that a person actually be given a misrepresentation about housing. 42 U.S.C. §§ 2000e-5(f)(1), 3604(d).

318. *Kyles II*, 222 F.3d at 297-98; see also *supra* note 299 and accompanying text (noting that Title VII is treated similar to the FHA because it is the "functional equivalent" of the FHA).

319. *Kyles II*, 222 F.3d at 298-99.

320. *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) (holding that housing testers have standing to sue under the FHA for being misinformed as to the availability of housing).

321. *Village of Bellwood v. Dwivedi*, 895 F.2d 1521 (7th Cir. 1990) (holding that housing testers had standing to sue a real estate brokerage firm engaging in racial steering for additional violations of the FHA; specifically the court noted that Congress was within its power to enact laws creating substantive legal rights and to grant standing to individuals injured under the statute).

322. *Kyles II*, 222 F.3d at 298.

323. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1)-(2) (1994); *Kyles II*, 222 F.3d at 298.

324. *Kyles II*, 222 F.3d at 298. The court noted the contradictory language found in *Sledge II*, 585 F.2d 625 (4th Cir. 1978) (stating that "tester" plaintiffs are not harmed by a refusal to hire because they are not actually interested in the job), and *Parr v. Woodmen of the World Life Insurance Society*, 657 F. Supp. 1022 (M.D. Ga. 1987) (finding that a plaintiff without a genuine interest in employment could not establish a prima facie case of employment discrimination), but did not find them dispositive. *Kyles II*, 222 F.3d at 298.

325. *Kyles II*, 222 F.3d at 298-99; see *supra* Part II.A (discussing the legislative history of Title VII and the Civil Rights Act of 1991).

purpose by acting as private attorneys general in enforcing Title VII through private civil actions.³²⁶ Testers, likewise, advance this interest because it is difficult to prove discrimination, and testers provide evidence about discrimination that is frequently valuable, if not indispensable.³²⁷ Finally, the court noted that the EEOC supports the standing of employment testers and has formally issued that opinion.³²⁸ While the EEOC's position is not binding upon the court, it is helpful because the EEOC is the administrative agency charged with enforcing Title VII on a daily basis.³²⁹

Before concluding, however, the court made two brief comments about the district court's opinion.³³⁰ First, the Seventh Circuit rebutted the district judge's analysis on the role of a bona fide applicant in a Title VII claim, stating that such a consideration applies only to the merits of the case, not to whether the plaintiff has standing.³³¹ Second, and more importantly, the court said that a bona fide interest in the job is not necessary to make out a prima facie case of discrimination.³³² As a result, the Seventh Circuit held that the tester plaintiffs had standing to sue under Title VII.³³³ Ultimately, that decision serves as a landmark

326. *Kyles II*, 222 F.3d at 299 (citing *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968)).

327. *Id.* (quoting *Richardson v. Howard*, 712 F.2d 319, 321 (7th Cir. 1983)); see also *supra* note 131 and accompanying text (discussing the Seventh Circuit's endorsement of testers in *Richardson*, 712 F.2d at 321-22).

328. *Kyles II*, 222 F.3d at 299 (discussing *EEOC Enforcement Guidance*); see also *supra* note 124.

329. *Id.*

330. *Id.* at 299-300.

331. *Id.* (citing *Allen v. Prince George's County, Md.*, 538 F. Supp. 833, 841-43 (D. Md. 1982), and *Parr v. Woodmen of the World Life Ins. Soc'y*, 657 F. Supp. 1022, 1032-33 (M.D. Ga. 1987)). In fact, the Supreme Court noted that "standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal." *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (denying standing to nonresident plaintiffs challenging the zoning practices of the defendant municipality as exclusionary).

332. *Kyles II*, 222 F.3d at 300. The plaintiff's intent matters only for the type of remedy available because Title VII prohibits an individual from being discriminated against "in any way." *Id.* *Contra Sledge II*, 585 F.2d 625, 641 (4th Cir. 1978) (reversing the district court's dismissal on the merits of an apparent tester's claim because the tester was not given an opportunity to prove whether he was a bona fide applicant); *Parr v. Woodmen of the World Life Ins. Soc'y*, 657 F. Supp. 1022, 1032-33 (M.D. Ga. 1987) (holding that the plaintiff failed to make out a prima facie case of discrimination under Title VII because he was not genuinely interested in the job).

333. *Kyles II*, 222 F.3d at 300. Consequently, the *Kyles II* court reversed the district court's grant of summary judgment in favor of the defendant and remanded the case back to the lower court. *Id.* at 305. As for the plaintiffs' § 1981 standing, the court affirmed the district court's denial of standing. *Id.* at 304-05. Essentially, the court denied the plaintiffs standing under § 1981, which forbids racial discrimination in the making of public and private contracts, because the court concluded that Congress did not intend to extend standing to the limits of Article III

response to the knock of employment testers seeking to sue under Title VII and opened wide the courtroom door.³³⁴

IV. ANALYSIS

Examining the rationale behind each of the cases concerning the issue of tester standing or the injury suffered by a tester³³⁵ reveals a clear split among a few federal jurisdictions.³³⁶ Prior to the Seventh Circuit's decision in *Kyles II*,³³⁷ no federal circuit court had held that employment testers have standing under Title VII.³³⁸ With the Seventh Circuit's decision in *Kyles II*, however, the standing of employment testers under Title VII is clearly and properly recognized.³³⁹ The precedent established within the Seventh Circuit should be followed in every jurisdiction,³⁴⁰ despite groundless criticism from opponents of employment testing.³⁴¹ Accordingly, courts should cast aside the misplaced treatment testers received in the District of Columbia and Fourth Circuits.³⁴²

with § 1981. *Id.* at 303. Thus, § 1981 only protects parties genuinely interested in a contractual relationship. *Id.* The court noted a potential split among the circuits as to its holding, as the Third and Eleventh Circuits have seemingly found that testers do have standing under § 1981. *Id.* at 301-02. However, the Seventh Circuit sides with the District of Columbia Circuit's decision in *BMC II*, 28 F.3d 1268 (D.C. Cir. 1994), to deny standing. *Id.* at 302. For a discussion of the standing of employment testers under § 1981 discrimination cases, see Landever, *supra* note 187, at 385-92. See also *supra* note 187 and accompanying text (discussing the interplay between Title VII and § 1981 claims).

334. See *Kyles II*, 222 F.3d at 300.

335. See *supra* Parts II.F.1-3 (canvassing the lower federal courts' responses to employment testers), III.A-C (discussing the treatment of employment testers in the Fourth, District of Columbia and Seventh Circuits).

336. Compare *Kyles II*, 222 F.3d at 300 (holding that employment testers have standing under Title VII), with *BMC II*, 28 F.3d at 1272-74 (holding that testers did not have standing to recover damages because the alleged discriminatory conduct took place at a time when Title VII did not permit recovery of damages, and that testers lacked standing for equitable relief), and *Sledge II*, 585 F.2d at 641 (indicating that "test" plaintiffs are not harmed by discriminatory conduct because they lack genuine interest in the position).

337. *Kyles II*, 222 F.3d at 300.

338. *BMC II*, 28 F.3d at 1272, 1274; see also *Sledge II*, 585 F.2d at 641.

339. *Kyles II*, 222 F.3d at 300; *infra* Part IV.A (arguing that the Seventh Circuit's granting of legal standing to employment testers was correct because the Court properly analyzed testers' standing under Title VII and properly recognized EEOC support for testing, and because the lingering effects of discrimination necessitate this decision).

340. *Kyles II*, 222 F.3d at 300 (holding that employment testers have standing to sue under Title VII).

341. *Infra* Part IV.B (arguing that the efficacy of testing overcomes any possible ethical or financial concerns).

342. *BMC II*, 28 F.3d at 1272-74 (holding that testers lack standing to sue under Title VII for monetary or equitable relief); *Sledge II*, 585 F.2d at 641 (stating that test plaintiffs do not suffer an injury because they are not genuinely interested in employment); *infra* Part IV.C (arguing that

A. *The Courtroom Door Was Properly Opened: An Analysis of the Kyles II Decision*

The Seventh Circuit is correct in holding that testers suffer a sufficient injury to have legal standing to sue under Title VII for three reasons.³⁴³ First, the Seventh Circuit's legal analysis of the doctrine of standing,³⁴⁴ as it applies to Title VII claims brought by employment testers, is sound.³⁴⁵ Second, the EEOC, the administrative agency charged with enforcing Title VII on a daily basis, also supports the standing of testers.³⁴⁶ Finally, the lingering presence of discrimination in the United States demands that every effective method for combating discrimination be employed, especially seeking redress in federal courts.³⁴⁷

The *Kyles II* court's legal analysis is well reasoned and supported by several strong arguments in favor of the standing of testers in employment discrimination litigation.³⁴⁸ The ambiguity or obscurity of the doctrine of standing has been noted by legal commentators as well as by the Supreme Court,³⁴⁹ but a plaintiff cannot enter the courtroom, or at least remain for very long, if the court does not find some justification for standing in the particular case.³⁵⁰ The "case and controversy" requirement of Article III of the United States Constitution³⁵¹ provides some guideline for determining whether a plaintiff can properly seek redress in the federal courts,³⁵² but the federal judiciary has also imposed its own prudential requirements.³⁵³

the District of Columbia Circuit improperly denied testers equitable relief).

343. *Kyles II*, 222 F.3d at 300.

344. See *supra* Part II.E (discussing the constitutional and prudential standing requirements); see also *supra* note 15 and accompanying text (defining standing as the right to bring a legal claim before a court).

345. Yelnosky, *supra* note 66, at 426-27.

346. *EEOC Enforcement Guidance*, *supra* note 124.

347. See Ayres, *supra* note 2, at 818; Floyd D. Weatherspoon, *Remedying Employment Discrimination Against African-American Males: Stereotypical Biases Engender a Case of Race Plus Sex Discrimination*, 36 WASHBURN L.J. 23, 24 (1996) [hereinafter Weatherspoon, *Remedying*].

348. *Kyles II*, 222 F.3d at 295-300; see Yelnosky, *supra* note 66, at 427 (arguing against requiring that an applicant for employment have a bona fide interest in the job in order to confer legal standing to sue).

349. Yelnosky, *supra* note 66, at 417-18 (discussing the vagueness of standing law and noting several Supreme Court cases in which the Court acknowledged the same).

350. See Anderson, *supra* note 10, at 1240.

351. U.S. CONST. art. III, § 2, cl. 1.

352. *Supra* Part II.E.1 (explaining the constitutional standing requirements in federal courts).

353. *Supra* Part II.E.2 (discussing the prudential standing limitations imposed by federal courts).

According to the Seventh Circuit in *Kyles II*, however, Congress has the power to create rights and give individuals the power to enforce those rights.³⁵⁴ The court correctly noted that Congress has the ability to create standing through a statute, where plaintiffs would otherwise not have standing.³⁵⁵

In the context of employment discrimination claims, the Seventh Circuit properly recognized that Congress created “private attorneys general”³⁵⁶ through Title VII by giving any person claiming to be aggrieved the right to enforce Title VII through a civil action.³⁵⁷ As a result, the real issue with tester standing under Title VII depends upon the interpretation of the statute.³⁵⁸ In interpreting Title VII, the *Kyles II* court turned to the FHA and correctly noted that Title VII and the FHA are nearly identical in their reach and functionality because they are both broad civil rights laws.³⁵⁹ Both the FHA and Title VII prohibit discrimination on the basis of race, color, religion, sex, or national origin, and their enforcement provisions are nearly the same as well.³⁶⁰ The core of Title VII enforcement is preventing discrimination in the workplace, whether a result of disparate treatment or disparate impact.³⁶¹ As the Seventh Circuit rightfully noted, the use of testers clearly comports with the intent of Title VII to eradicate discrimination because testers are valuable enforcement tools.³⁶²

By looking to the actual language of Title VII, it is evident that Congress did not intend to require a bona fide interest in the job in order to have standing.³⁶³ It is illegal for any employer to fail or refuse to hire

354. *Kyles II*, 222 F.3d 289, 295 (7th Cir. 2000).

355. Yelnosky, *supra* note 66, at 417-19.

356. *Kyles II*, 222 F.3d at 295; *see also supra* note 297 and accompanying text (discussing the origin and definition of the term “private attorneys general”).

357. Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(1) (1994). The *Kyles II* court noted that Title VII:

expressly permits a charge to be filed with the [EEOC] “by or on behalf of a person claiming to be aggrieved,” § 2000e-5(b), and likewise a civil action in court “by the person claiming to be aggrieved,” § 2000e-5(f)(1). That language signals a congressional intent to extend standing to the outermost limits of Article III.

Kyles II, 222 F.3d at 295.

358. Yelnosky, *supra* note 66, at 424.

359. *Kyles II*, 222 F.3d at 295 (citing EEOC v. Bailey Co., 563 F.2d 439, 453 (6th Cir. 1977)); Yelnosky, *supra* note 66, at 424.

360. 42 U.S.C. §§ 2000e-2(a)(1)–(2), 3604(a)–(d) (1994); Yelnosky, *supra* note 66, at 424.

361. Anderson, *supra* note 10, at 1263; *see supra* Part II.C (discussing recovery in disparate treatment and disparate impact cases).

362. *Kyles II*, 222 F.3d at 299; Yelnosky, *supra* note 66, at 425; Anderson, *supra* note 10, at 1263; *see supra* text accompanying notes 131-40 (discussing the benefits of employment testing).

363. 42 U.S.C. § 2000e-2(a)(1)–(2); Yelnosky, *supra* note 66, at 427.

any individual, or to limit, segregate, or classify any job applicant in any way on the basis of race, color, religion, sex, or national origin.³⁶⁴ Accordingly, it is apparent that, as the *Kyles II* court found, anything less than nondiscriminatory treatment of any person applying for any job amounts to a violation of Title VII.³⁶⁵ Title VII does not speak to the required intent of the individual discriminated against.³⁶⁶ In the case of housing testers, the *Kyles II* court noted that the tester's intent does not negate his injury when he is lied to about the availability of housing.³⁶⁷ Furthermore, both Title VII and the courts do not even require a plaintiff to prove that he would accept a position to make out a prima facie case of discrimination.³⁶⁸

When the treatment of housing testers and the broad purpose of Title VII is combined with the federal courts' tradition of liberally applying the standing requirements in civil rights litigation,³⁶⁹ testers clearly must have standing to sue under Title VII regardless of whether they have a bona fide interest in the job.³⁷⁰ The Seventh Circuit properly relied on the Supreme Court's approval of the standing of housing testers in *Havens Realty Corp. v. Coleman*.³⁷¹ Accordingly, the *Kyles II* decision properly illustrates that granting standing to employment testers is a logical extension of standing for housing testers under the FHA and is based on sound judicial reasoning.³⁷²

364. 42 U.S.C. § 2000e-2(a)(1)–(2).

365. *Kyles II*, 222 F.3d at 298.

366. *Id.* at 296.

367. *Id.*

368. Yelnosky, *supra* note 66, at 427; *see supra* text accompanying notes 96-100 (discussing the framework laid out in *McDonnell Douglass Corp. v. Green* for proving a prima facie case of discrimination). Perhaps the real ambit of the tester's injury is that the tester had an interest in not being discriminated against by the defendant, rather than an actual interest in securing a job. The right not to be the subject of discrimination in any way within the employment context is statutorily protected by Title VII. 42 U.S.C. § 2000e-2(a)(1)–(2). The injury suffered by a tester is that the tester was discriminated against, not that they could not get the job. *Id.* § 2000e-2(a)(1)–(2); *see Yelnosky, supra* note 66, at 427. The only issue really affected by the applicant's interest in the position is the type of remedy available, which requires a finding of discrimination on the merits and, thus, standing. Yelnosky, *supra* note 66, at 427. *See generally* *Lea v. Cone Mills Corp.*, 438 F.2d 86, 88 (4th Cir. 1971) (affirming the district court's refusal to award back pay to tester plaintiffs, but awarding attorneys' fees).

369. *EEOC Enforcement Guidance, supra* note 124; Brown, *supra* note 14, at 1130; Jonathan Levy, Comment, *In Response to Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.: Employment Testers Do Have a Leg to Stand On*, 80 MINN. L. REV. 123, 143 n.99 (1995) (discussing the traditionally liberal application of the standing doctrine in civil rights cases by federal courts).

370. Yelnosky, *supra* note 66, at 427.

371. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982); *see also* Brown, *supra* note 14, at 1130.

372. *Kyles II*, 222 F.3d 289, 300 (7th Cir. 2000); *see also* Brown, *supra* note 14, at 1130.

In addition to the legal foundation upon which the *Kyles II* court laid its decision, the court noted the administrative support from the EEOC for the standing of employment testers.³⁷³ The court's recognition of the EEOC's position properly acknowledged an important source of support for the standing of testers.³⁷⁴ In November 1990, the EEOC issued its first *Policy Guidance* on the standing of testers for claims of employment discrimination brought under Title VII.³⁷⁵ That opinion was later superseded by an EEOC *Enforcement Guidance* supporting the same conclusion.³⁷⁶

Because Title VII authorizes charges by or on behalf of a person claiming to be aggrieved,³⁷⁷ the question is whether a tester constitutes an aggrieved person.³⁷⁸ The EEOC recognized the role that housing testers play in ferreting out discrimination and stated its belief that there is no difference between testers used in fair housing cases and employment testers.³⁷⁹ Similar to the Seventh Circuit's rationale, the EEOC relied upon a broad interpretation of standing under Title VII and the historical context of civil rights litigation, especially in fair housing litigation, to issue its approval of the use and standing of testers.³⁸⁰ In issuing that approval, the EEOC also agreed to accept charges of employment discrimination from testers.³⁸¹

Furthermore, the EEOC is not alone in its support for the use of testers.³⁸² In January 1996, the Office of Federal Contract Compliance Programs ("OFCCP"), which enforces an executive order prohibiting discrimination by federal government contractors, began a testing program of its own.³⁸³ Ultimately, the EEOC's support for the standing

373. *Kyles II*, 222 F.3d at 299.

374. *Id.* at 299; *EEOC Enforcement Guidance*, *supra* note 124. The Supreme Court even noted that, "while not controlling upon the courts by reason of their authority, [EEOC guidelines] do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986) (noting EEOC support for the position that sexual harassment leading to non-economic injury is a legally cognizable claim under Title VII).

375. *EEOC Enforcement Guidance*, *supra* note 124.

376. *Id.*

377. Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(b) (1994).

378. *Yelnosky*, *supra* note 66, at 424.

379. *EEOC Enforcement Guidance*, *supra* note 124.

380. *Id.*

381. *Id.*; Eric Matusewitch, Commentary, *Companies May be Sued for Discrimination by Employment Testers*, ANDREWS EMP. LITIG. REP., Apr. 22, 1997, at 22, 165.

382. Matusewitch, *supra* note 381, at 22, 165.

383. *Id.*

of testers is a persuasive argument because that agency is charged with enforcing Title VII's rights on a daily basis.³⁸⁴

Finally, the lingering social atmosphere of discrimination in the United States further supports the legal theory behind granting employment testers standing in federal court.³⁸⁵ A study by the Urban Institute in the early 1990s concluded that unequal treatment of African-American job applicants is entrenched and widespread.³⁸⁶ More specifically, African-American applicants allegedly experienced discriminatory treatment and practices almost three times as often as white applicants.³⁸⁷ In addition, a study by Professor Ian Ayres' documenting the disparities experienced during new car sales negotiations between black and white, male and female buyers further reveals the continued presence of discrimination.³⁸⁸ Likewise, Professor Floyd Weatherspoon revealed that the impact of discrimination against African-American males in society is too costly, as he traced the development and perpetuation of racial stereotypes as the motivating force for such discrimination.³⁸⁹ Professor Weatherspoon also examined the high unemployment rates of African-American males.³⁹⁰ Their rate of unemployment has only increased over the past few decades without showing any signs of improving in the future.³⁹¹ That trend is only one of the many devastating effects of employment discrimination upon that segment of the population.³⁹² Ultimately, however, the rationale for granting standing to employment testers is clearly grounded in sound legal and social analysis of the purpose of Title VII as well as the importance of continuing to utilize all available resources to combat employment discrimination.³⁹³

B. Lingering Questions, Especially from Employers

Though the Seventh Circuit's endorsement of testing is legally and socially sound, many critics, especially employers, argue that testing is

384. *EEOC Enforcement Guidance*, *supra* note 124.

385. Ayres, *supra* note 2, at 818; Weatherspoon, *Remedying*, *supra* note 347, at 24; Wymer & Sudbury, *supra* note 139, at 623.

386. Wymer & Sudbury, *supra* note 139, at 623.

387. *Id.*

388. Ayres, *supra* note 2, at 818.

389. Weatherspoon, *Remedying*, *supra* note 347, at 28-41.

390. Weatherspoon, *Devastating Impact*, *supra* note 2, at 52.

391. *Id.*

392. *Id.*

393. *Kyles II*, 222 F.3d 289, 300 (7th Cir. 2000); *see also EEOC Enforcement Guidance*, *supra* note 124; Yelnosky, *supra* note 66, at 427.

ethically unfair.³⁹⁴ That argument, however, is misplaced.³⁹⁵ When the EEOC first endorsed the use of testers in 1990, employer groups rallied to voice their opposition to the idea.³⁹⁶ Employers' concerns focused on the deceptive nature of testing, the potential detrimental impacts of testing on employers, the possible undermining of the EEOC's effectiveness and authority, and the increased costs associated with addressing testing in the hiring process.³⁹⁷

In his support for the use of testing to ferret out discrimination in low-skill, entry-level positions, Professor Michael Yelnosky also recognized the potential increased costs employers will face as a result of testing.³⁹⁸ Yelnosky, however, further posited that such testing will not dramatically increase the costs for employers because hiring for such jobs is usually a summary process.³⁹⁹ Employers' costs for evaluating applicants for low-skill, entry-level positions are minimal, and spending time evaluating a tester will not be detrimental because the applicant pool for these positions is generally so large.⁴⁰⁰

Despite any debate over what levels to test, many employers believe that testing programs will significantly increase their costs.⁴⁰¹ Employers are not happy with the deceptive nature of testing, even going so far as to call testing entrapment because testers pose as applicants with false credentials.⁴⁰² More appropriately, however, some employers have chosen to address the issue in a positive light by conducting internal testing programs to detect discrimination in the hiring process.⁴⁰³ Ultimately, the costs associated with sensitizing

394. Brown, *supra* note 14, at 1140-41.

395. Yelnosky, *supra* note 66, at 414; *see also* Brown, *supra* note 14, at 1140-41.

396. Yelnosky, *supra* note 66, at 414; *see also* Brown, *supra* note 14, at 1140-41.

397. Yelnosky, *supra* note 66, at 414; *see also* Brown, *supra* note 14, at 1140-41.

398. Yelnosky, *supra* note 66, at 414.

399. *Id.*

400. *Id.* Yelnosky believes, however, that testing for high-skill positions is not desired for several reasons. *Id.* First, the costs to the employer associated with hiring for upper level positions is generally greater, the applicant pool is usually smaller, thereby wasting the employers' time, and discrimination victims in these situations are more likely to sue. *Id.* at 414-15. Responding to Professor Yelnosky, Professor Leroy Clark advocates for testing at all levels, including in upper-level positions. Clark, *supra* note 137, at 21.

401. Wymer & Sudbury, *supra* note 139, at 623.

402. *Id.*

403. *Id.* Employers can further avoid potential claims by conducting training and developing guidelines for interviewers on discriminatory practices. *Id.* Among other things, experts recommend that interviewers make notes following interviews, that employers standardize interviewing questions or processes by developing point systems, that applicants be required to sign a statement confirming their genuine interest in the position, or that interviewers document any "disinterest" exhibited by applicants. *Id.*

employers and their agents to discriminatory employment practices should not be seen as an effective argument for prohibiting testing, let alone the standing of testers.⁴⁰⁴ Perhaps the cost associated with such efforts is precisely what is required to eliminate discrimination.⁴⁰⁵ For businesses that do not employ discriminatory practices, it is logical that there should be little additional cost or risk associated with the prospect of testing because interviewers should be sensitized. On the other hand, those employers who are vociferous in their opposition to testing are those whose behavior needs to be changed. Title VII was passed to prevent discrimination,⁴⁰⁶ and society will inevitably have a price to pay to accomplish that goal.⁴⁰⁷ Let those who discriminate bear the cost.

C. *The BMC II Analysis on Equitable Relief is Erroneous*

The Seventh Circuit did not distinguish between the testers' standing to seek damages and equitable relief under Title VII,⁴⁰⁸ but the District of Columbia Circuit improperly made that distinction.⁴⁰⁹ While the District of Columbia Circuit denied standing to the testers seeking damages in *BMC II* because Title VII did not permit recovery of damages at the time of the alleged discrimination, the court also denied the testers standing to seek equitable relief.⁴¹⁰ However, the District of Columbia Circuit's rationale for denying standing for equitable relief is erroneous.⁴¹¹ By relying upon *City of Los Angeles v. Lyons*,⁴¹² the *BMC II* court failed to recognize important distinctions between the tester-plaintiffs in *BMC II* and the chokehold victim in *Lyons*.⁴¹³

First, the Supreme Court repeatedly noted in *Lyons* that the plaintiff in that case was still left with a damages remedy, while the testers in *BMC II* were left with no remedy.⁴¹⁴ Second, denying testers standing for equitable relief will leave less incentive for employers to comply

404. *See id.*

405. *See Brown, supra* note 14, at 1142 (discussing the indispensable role of testers in discrimination cases).

406. *See supra* Part II.A (describing the legislative history of Title VII and the Civil Rights Act of 1991).

407. *See Kyles II*, 222 F.3d 289, 299 (7th Cir. 2000).

408. *Id.* at 300.

409. *BMC II*, 28 F.3d 1268, 1272-74 (D.C. Cir. 1994).

410. *Id.* at 1274.

411. Levy, *supra* note 369, at 159.

412. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983); *see supra* note 208 and accompanying text (describing the facts and holding in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983)).

413. Levy, *supra* note 369, at 160.

414. *BMC II*, 28 F.3d at 1272, 1274; Levy, *supra* note 369, at 160.

with Title VII.⁴¹⁵ Because bona fide applicants are not likely to discover or become aware of the discrimination, employers utilizing discriminatory practices are more likely to do so successfully.⁴¹⁶ Even if bona fide applicants become aware of the discrimination, the *BMC II* standard requires such precise allegations that the bona fide applicant is threatened with future harm in order to overcome the *Lyons* obstacle.⁴¹⁷ The absence of important federalism concerns in employment tester cases eliminates the need for such strict standards because the courts are not being asked to supervise a local or state governmental agency.⁴¹⁸ Thus, adherence to the *Lyons* standard amounts to “arch-formalism” and is completely inconsistent with the broad standing given by Title VII and accorded by the courts in civil rights cases.⁴¹⁹

Finally, studies have clearly shown how prejudice still plays a significant role with respect to hiring minority job applicants.⁴²⁰ Decisions that severely limit, or in the case of *BMC II* eliminate, even equitable remedies when discrimination is detected by civil rights advocates make it seem as though the justice system sanctions such conduct.⁴²¹ Ultimately, however, the decision to deny the testers standing for equitable relief reflects the continued narrowing of Title VII by the courts and an unjust manipulation of standing doctrine to effectively clear federal court dockets of certain kinds of suits.⁴²² Fortunately, the *Kyles II* court injected a bit of justice into the process.⁴²³

V. PROPOSAL

Despite misplaced objections from employers over the legitimacy of employment testing in Title VII cases,⁴²⁴ and precisely because of the

415. Levy, *supra* note 369, at 160.

416. *Id.* Bona fide job applicants are less likely to discover discriminatory employment practices because they are generally not looking for the subtle ways in which it appears. *Id.* at 125 n.14.

417. *BMC II*, 28 F.3d at 1274; Levy, *supra* note 369, at 160-61.

418. Levy, *supra* note 369, at 160.

419. *See id.* at 161.

420. Weatherspoon, *Devastating Impact*, *supra* note 2, at 53-54; Weatherspoon, *Remedying*, *supra* note 347, at 28-41; *see also* Wymer & Sudbury, *supra* note 139, at 628 (discussing the 1990 study by the Urban Institute, which found that African-Americans experience discrimination three times as often as whites).

421. Weatherspoon, *Devastating Impact*, *supra* note 2, at 53-54.

422. Levy, *supra* note 369, at 163.

423. *Kyles II*, 222 F.3d 289, 300 (7th Cir. 2000).

424. *See supra* notes 385-90 and accompanying text (discussing various studies on discrimination and its effects on segments of the United States population).

demonstrated need to continue to combat discrimination,⁴²⁵ the Seventh Circuit's decision in *Kyles II* should stand as an example for the future of employment discrimination litigation.⁴²⁶ In addition, proposals to authorize the EEOC to conduct testing programs would effectively further the enforcement of Title VII as well as clearly comport with the spirit of the Seventh Circuit's decision.⁴²⁷

A. Keep the Door Open: Testers Should Have Standing in All Jurisdictions

While the early 1990s saw rapid growth in employment discrimination litigation as one of the most contentious areas of civil rights law,⁴²⁸ the use of testing as an acceptable means of combating discrimination will likely cause another hot debate early in the new century.⁴²⁹ The Seventh Circuit's approval of tester standing represents the first clear and convincing affirmation of the use of employment testing by a federal circuit court.⁴³⁰ However, because of the treatment testers received in other circuits, a debate among the jurisdictions on this precise issue is afoot.⁴³¹

The social climate of the United States clearly supports the standing of testers in claims brought under Title VII.⁴³² One need look only as far as the high unemployment rates faced by African-American

425. See *supra* text accompanying notes 374-80 (examining the EEOC's endorsement of the use of employment testers).

426. *Kyles II*, 222 F.3d at 300.

427. Yelnosky, *supra* note 66, at 459.

428. See *supra* notes 8-9 and accompanying text (describing the increased rate of employment discrimination suits in the early 1990s).

429. See Rochelle L. Stanfield, *Measuring Job Bias*, 23 NAT'L J. 2598 (Oct. 26, 1991) (discussing the increased use of employment testing in the early 1990s during a time when employment discrimination litigation dramatically increased).

430. *Kyles II*, 222 F.3d at 300.

431. See *BMC II*, 28 F.3d 1268, 1281 (D.C. Cir. 1994) (denying testers standing under Title VII); see also *Sledge II*, 585 F.2d 625, 641 (4th Cir. 1978) (stating that "test" plaintiffs suffer no real injury because they are not seriously interested in the job for which they apply); *Lea v. Cone Mills Corp.*, 438 F.2d 86 (4th Cir. 1971) (Boreman, J., dissenting) (describing litigation initiated by an apparent "test" plaintiff as "manufactured litigation"); *Parr v. Woodmen of the World Life Ins. Soc'y*, 657 F. Supp. 1022, 1032 (M.D. Ga. 1987) (holding the "test" plaintiff failed to make out a prima facie case of discrimination on the merits because it appeared he was not genuinely interested in the job).

432. Weatherspoon, *Devastating Impact*, *supra* note 2, at 26, 52 (discussing the impact of race discrimination, particularly on African-Americans); Weatherspoon, *Remedying*, *supra* note 347, at 33-41 (examining stereotypes of African-American males and their impact on employment decisions); Yelnosky, *supra* note 66, at 410 (noting the impact of high African-American unemployment and discussing the use of testers as an effective means of enforcing Title VII for low-skill, entry-level jobs).

males,⁴³³ or to the disparities in negotiations over new car purchases experienced between whites and African-Americans, and males and females, to know that discrimination is thriving in America.⁴³⁴ Even if one ignored the social value of employment testing, it is inescapable that the law is on the side of testers.⁴³⁵ While courts may seemingly ignore the law and deny remedies to legitimate plaintiffs,⁴³⁶ thereby narrowing the scope of Title VII,⁴³⁷ the road to the future is paved with sound judicial reasoning.⁴³⁸

Congress clearly intended to extend standing under Title VII to the limits of Article III, similar to standing under the FHA for housing testers⁴³⁹ and gave private citizens the right to enforce their rights under Title VII.⁴⁴⁰ There has even been clear administrative support from the EEOC through its *Policy and Enforcement Guidances* for the standing of employment testers.⁴⁴¹ In addition, support for the standing of employment testers was voiced for several years prior to the decision in *Kyles II*⁴⁴² by numerous legal commentators.⁴⁴³ Finally, many civil rights activists recognize that testing is the most effective way to gather evidence and research on discriminatory practices.⁴⁴⁴ Testing is more accurate than statistical analysis because direct experiences with employers provide more concrete results, and there is more credibility and legitimacy associated with clear evidence of disparate treatment.⁴⁴⁵ As a result, other jurisdictions should follow the example set by the Seventh Circuit and find that employment testers have standing to sue

433. Weatherspoon, *Devastating Impact*, *supra* note 2, at 28.

434. Ayres, *supra* note 2, at 819.

435. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1994); *Kyles II*, 222 F.3d at 300; Yelnosky, *supra* note 66, at 427.

436. *BMC II*, 28 F.3d at 1274 (holding that testers lacked standing to seek equitable and legal relief under Title VII).

437. Levy, *supra* note 369, at 162-63.

438. *Kyles II*, 222 F.3d at 300.

439. 42 U.S.C. § 3604(a)-(d) (1994).

440. 42 U.S.C. § 2000e-5(f)(1); Yelnosky, *supra* note 66, at 428.

441. *EEOC Enforcement Guidance*, *supra* note 124.

442. *Kyles II*, 222 F.3d at 300.

443. 2 SPRIGGS, *supra* note 4, § 22.12[3], at 22-67 to 22-68; Yelnosky, *supra* note 66, at 426-27; Anderson, *supra* note 10, at 1251; Brown, *supra* note 14, at 1130-31; Levy, *supra* note 369, at 159.

444. Stanfield, *supra* note 429, at 2599 (quoting Michael Fix, an attorney for the Urban Institute who designed the method for employment testers); *see supra* notes 130-39 and accompanying text (describing the numerous benefits of employment testing in Title VII enforcement).

445. Stanfield, *supra* note 429, at 2598.

for legal and equitable relief under Title VII, thereby keeping the courtroom doors wide open.⁴⁴⁶

B. Further Improvements—Authorizing the EEOC to Conduct Testing

Another way to increase the resources to combat employment discrimination is to authorize testing programs conducted by the federal government through the EEOC.⁴⁴⁷ First, however, in order for the EEOC to implement testing programs, Title VII must be amended.⁴⁴⁸ Title VII gives the EEOC the power to prevent any employer from utilizing discriminatory practices as set forth in § 2000e-2 or § 2000e-3.⁴⁴⁹ Upon the filing of a charge, the EEOC conducts an investigation.⁴⁵⁰

When Title VII was amended in 1972,⁴⁵¹ however, Congress curtailed the investigative powers of the EEOC in a political move to protect employers' rights.⁴⁵² Accordingly, the EEOC's investigative power was limited to whatever was specifically spelled out in Title VII.⁴⁵³ Because the EEOC was not given the power to conduct undercover investigations, it cannot currently conduct its own testing programs.⁴⁵⁴ Furthermore, if given the authority to use testers, the EEOC could not do so until after a charge is filed because Title VII authorizes an EEOC investigation only after a charge has been filed.⁴⁵⁵

Amending Title VII and authorizing the EEOC to conduct testing would also be beneficial for several procedural reasons. The EEOC is more likely to receive injunctive relief because it cannot recover

446. *Kyles II*, 222 F.3d at 300.

447. Yelnosky, *supra* note 66, at 459.

448. *Id.*

449. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1994); Yelnosky, *supra* note 66, at 459.

450. 42 U.S.C. §§ 2000e-8, 2000e-9; Yelnosky, *supra* note 66, at 459-60.

451. Equal Employment Opportunity Act of 1972, Pub. L. 92-261, sec. 2, 86 Stat. 103 (1972).

452. Yelnosky, *supra* note 66, at 461.

453. *Id.* at 461-62.

454. *Id.* at 462.

455. 42 U.S.C. § 2000e-5(b); Yelnosky, *supra* note 66, at 463. This process is modified slightly by the EEOC's power to file charges itself, but it is unable to conduct an investigation related to any charge it files on its own initiative. Yelnosky, *supra* note 66, at 466. That situation is designed to give complainants the ability to file an anonymous charge, and utilizes the complainant as the source of information. *Id.* The EEOC is also authorized to file "pattern or practice" charges, which seek to make a "positive impact on the employment opportunities available to minorities and women." *Id.* at 466-67. Such charges focus on deep, systemic change, which testing could stimulate. *Id.* However, if private organizations are unable to conduct testing programs, the EEOC will have no pattern or practice cases to file. *Id.* Allowing the EEOC to conduct testing could remedy that problem. *Id.*

attorneys' fees.⁴⁵⁶ Moreover, private individuals face many obstacles to conducting testing programs, and the EEOC can obtain class-wide relief without being certified as a class under Federal Rule of Civil Procedure 23.⁴⁵⁷ While the EEOC could bring tester claims under its "pattern and practice" authority on behalf of aggrieved persons, it lacks the ability to do so if private individuals or groups do not organize testing projects.⁴⁵⁸ Accordingly, amendment of Title VII would not only allow the EEOC to conduct its own testing programs, but it would also signify Congressional approval of the Seventh Circuit's holding⁴⁵⁹ that testers have standing to sue under Title VII.⁴⁶⁰

VI. CONCLUSION

The continued presence of discrimination in the United States reinforces the need for vigorous enforcement of Title VII. One can debate whether the legal theory of tester standing under Title VII supports the Seventh Circuit's holding in *Kyles II*, or whether the social realities of discrimination in the United States necessitate that the federal government utilize every available resource to combat that discrimination. In the end, however, the conclusion should be the same. Enforcement of Title VII's prohibitions on employment discrimination by relying on testing programs is a step forward. With the Seventh Circuit's recognition that employment testers can at least maintain a foothold inside the courtroom door, there is hope that other jurisdictions will also recognize the right of testers to be free from discriminatory employment practices as well as the important role they play in safeguarding federal employment laws.

456. Yelnosky, *supra* note 66, at 469 n.303.

457. *Id.* at 469, 470.

458. *Id.* at 470.

459. *Kyles II*, 222 F.3d 289, 300 (7th Cir. 2000).

460. Yelnosky, *supra* note 66, at 470.