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INTRODUCTION

Congress' purpose in enacting Title VII was to free all individuals from employment discrimination based on race, color, religion, sex, or national origin. Formal and informal remedial procedures were devised to achieve this purpose. The framers of the Act created the EEOC to foster an atmosphere conducive to informal procedures, or voluntary compliance. They also provided a formal procedure: section 706(g) of the Act. Courts, broadly construing that section, have frequently granted preferential, or quota, relief to aggrieved minority persons despite congressional and statutory warnings against

2. 110 Cong. Rec. 7212 (1964) (Clark and Case memorandum).
5. 42 U.S.C. § 2000e-5(g) (1970) provides in pertinent part:
   If the court finds that the respondent has intentionally engaged in or is intentionally engaged in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.
7. To avoid confusion, the following definitions will be used in this article: (1) the terms "preferential treatment" and "quotas" are used interchangeably and include such practices at any stage of the employment process; (2) "majority person" connotes a white person in the context of racial discrimination and a male in the context of sex discrimination; (3) "minority person" connotes any non-white racial group in the context of racial discrimination and females in the context of sex discrimination; and (4) "prohibited classifications" include race, color, religion, sex, and national origin.
8. The legislative history of Title VII suggests that Congress was opposed to the use of quotas and added section 703(j) to the original House bill in order to ensure that no quotas
such extensions of formal remedial procedures. Quotas operate per se to evaluate individuals on the basis of prohibited classifications. When applied in favor of minorities, quotas result in reverse discrimination against majority persons. Thus, implementation of the Act may generate new discrimination as well as relief. This new discrimination threatens both the general purpose of Title VII and the effectiveness of voluntary compliance.

Two recent decisions exploring the problem of reverse discrimination dramatize the extent of the problem and the absence of an appropriate and authoritative theory to adjust fairly the rights involved. The United States Supreme Court in *McDonald v. Santa Fe Trail Transportation Co.* held that white employees were entitled to sue their employer for isolated acts of reverse discrimination. However, the Court specifically avoided evaluating the permissibility of reverse discrimination where it is most likely to occur—in the context of an affirmative action program.

The United States District Court for the District of Columbia in *McAleer v. AT & T Co.* attempted to tackle one of the problems *McDonald* left undecided. The court concluded that the employer's compliance with quota provisions in a consent decree was not a

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Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to an individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

10. For a definition of "prohibited classifications" as used in this article, see note 7 supra.

11. For a definition of "majority person" as used in this article, see note 7 supra.

The term "reverse discrimination" refers to discrimination against whites and/or males, the traditional majority classes. However, in any particular instance, whites and/or males may not in fact constitute a majority of the employees. See EEOC No. 74-31, 7 FEP Cases 1326 (1973) where the work force was substantially black.


13. Id. at 2578 n.8.


15. *FEP MAN. (BNA)* § 431:73-123 (E.D. Pa. 1973), as supplemented, EEOC v. AT&T Co., 93 DAILY LAB. REP. (BNA) D-1 (E.D. Pa. 1975) [hereinafter cited as AT&T Consent Decree]. A consent decree is a court-sanctioned settlement which the parties agree is a just
defense to a reverse discrimination charge. The court’s reasoning suggests that any employer who is ordered to implement preferential treatment will incur liability for resulting reverse discrimination.

The employer whose work force does not mirror the racial or sexual balance of the relevant labor market faces an urgent and potentially costly dilemma. If he enters into a voluntary or court-approved affirmative action program which includes preferential treatment, he may be forced to compensate majority victims of his program. If he fails to institute a formal affirmative action program, the employer leaves himself open to suits from any individual or class of discriminatees. He then faces potential court-imposed quotas which may, in turn, lead to reverse discrimination suits. His failure to comply with the Act voluntarily also forces the courts to bear the entire burden of implementing Title VII.

This article will examine the sources and scope of the dilemma currently facing the employer. It will examine the discouraging effect this predicament may have on the voluntary compliance process. It will also suggest means which the courts and the EEOC could use to establish an employer’s obligation to reverse discriminatees and, hopefully, to provide employers with consistent standards with which to fashion effective, reliable affirmative action programs.

THE ACT AND ITS IMPLEMENTATION

Formal Remedial Procedures

In addition to remedying overt discrimination, courts interpreting Title VII extend relief where facially-neutral employment practices
have the effect of discriminating against a protected class, or where they perpetuate the effects of past discrimination. By broadly construing section 706(g)'s authorization of remedial powers, courts have awarded wide-ranging relief to victims of overt discrimination. Where past discrimination has been found, courts also have ordered or sanctioned such preferential practices as constructive competitive seniority, hiring ratios or the use of hiring halls, and freezes on white hiring. When fashioning such relief, courts have avoided section 703(j)'s prohibition against preferential treatment by restrictively interpreting the prohibition as applicable only when the imbalance complained of was not due in any part to the employer's past discriminatory practices. Some courts have justified preferential relief by a “make whole” construction of section 706(g); they contend that the section grants courts wide discretion to fashion the most complete relief in order to nullify the damage inflicted on victims of past discrimination.

24. See, e.g., Morrow v. Crisler, 491 F.2d 1053 (5th Cir. 1974). Many courts have ordered preferential treatment to correct the effects of past discrimination. For an exhaustive listing of the forms of preferential treatment, see articles cited at note 6 supra. See also Comment, Employment Discrimination—The Use of the “Bumping” Remedy to Alleviate the Effects of Past Sex and Race Discrimination, 28 Rutgers L. Rev. 1285, 1289-91 (1975).

The fact that the House rejected Representative Dowdy's proposed amendments to Title VII may indirectly support this restrictive interpretation of section 703(j). Dowdy's amendments would have expressly prohibited discrimination in favor of any person and would have specifically prohibited discrimination against Caucasian, white, and protestant American citizens. By rejecting these amendments, Congress arguably avoided committing itself unequivocally on the permissibility of quota relief. 110 Cong. Rec. 2727 (1964).

28. The “make whole” theory was enunciated in Albemarle Paper Co. v. Moody, 422 U.S. 450 (1975). The Supreme Court relied on legislative history to find that section 706(g) was intended to give courts wide discretion to fashion extensive equitable relief. This relief was designed to make victims whole by restoring them, as closely as possible, to the positions they would have enjoyed absent the unlawful discrimination. 118 Cong. Rec. 7168 (1972) (remarks of Sen. Williams).

See also Franks v. Bowman Transp. Co., 424 U.S. 747 (1976) where the Supreme Court applied the “make whole” theory. The Court granted constructive competitive seniority to
However, quota relief has not gone unchallenged. The argument that any preferential treatment violates Title VII finds substantial support in the legislative history of section 703(j). The section reads: "Nothing contained in this title shall be interpreted to require any employer . . . to grant preferential treatment to any individual or any group. . . ." However, the legislative history strongly suggests that the section was intended to expressly prohibit the use of preferential practices by employers.

Senator Allott, in proposing an amendment that eventually became section 703(j) of Title VII, stated that the amendment would clearly establish that no quota system would be imposed under Title VII. Senator Dirksen, in response to questions by Senator Williams, declared that the House bill as amended by section 703(j) expressly provided that an employer would not have to maintain any employment ratio, regardless of the ratio in the community. In their interpretative memorandum on Title VII, Senators Clark and Case asserted that the Act made it unlawful for an employer to discriminate against any individual. Senator Clark further noted:

No Employer is required to maintain any ratio of Negroes to whites, Jews to gentiles, Italians to English, or women to men. On

an entire class of black job applicants and allowed the class to reapply for jobs with the defendant company. In permitting the entire class to reapply, the Court recognized that some of the class members might not have been actual discrimination victims. However, the Court found overinclusive class-wide relief necessary to make the victims whole. The Court contended that when the individuals reapplied, their status as actual discriminatees would be evaluated. The Court implied that an applicant might not receive full constructive seniority, but only if the employer could show that he had not been an actual victim. The essence of the relief, nevertheless, was to give the class the fullest opportunity to achieve all the job benefits they would have enjoyed had there been no original discrimination.

30. 110 Cong. Rec. 9881, 9882 (1964) (remarks of Sen. Allott). But see NAACP v. Beecher, 504 F.2d 1017, 1028 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975), where the court held that section 703(j) prohibits quotas only in those situations where the employer is not responsible for the imbalance. See also Blumrosen, Quotas, Common Sense, and Law in Labor Relations: Three Dimensions of Equal Opportunity, 27 Rutgers L. Rev. 675, 692 (1974), where the author suggests that section 703(j) may have been intended to have a narrow scope—it may imply only that employment opportunities should not be arbitrarily allocated on the basis of race, color, or sex without regard to the employer's culpability.
31. 110 Cong. Rec. 14329 (1964) (letter of Sen. Dirksen). In addition, Senator Dirksen wrote that the unamended bill could have been construed broadly enough to require an employer who had a work force of 100 white employees, but whose plant was located in an area with a 25 percent minority population, to fill subsequent vacancies with minority persons almost without regard for an individual's job qualifications. Similarly, the requirement that an employer's work force mirror the racial composition of the community would also apply if the percentages of whites and minorities were reversed. He stated that either arrangement would be discrimination in reverse, and that all applicants should be considered on the basis of their qualifications and not on the basis of race.
the contrary, any deliberate attempt to maintain a given balance would almost certainly run afoul of Title VII because it would involve a failure or refusal to hire some individual because of his race, color, religion, sex, or national origin. What Title VII seeks to accomplish, what the civil rights bill seeks to accomplish is equal treatment for all.  

Despite the frequency with which courts have awarded it, preferential relief has not been granted uniformly or without question. Some courts have recognized the dangers inherent in the present use of preferential treatment of minority persons to remedy past preferential treatment of majority persons. Several courts have attempted to balance the competing interests at stake in such proceedings, to carefully evaluate the affected employees’ “rightful places,” and to limit or prohibit preferential relief accordingly.

Several courts have, on occasion, rejected the use of quotas entirely. In so doing they have noted the adverse effects quotas might

33. 110 Cong. Rec. 7207 (1964) (remarks of Sen. Clark). See 110 Cong. Rec. 8921 (1964) where Senator Williams replies that:

The language of that title simply states that race is not a qualification for employment. . . . Some people charge that H.R. 7152 favors the Negro at the expense of the white majority. But how can the language of equality favor one race or one religion over another? Equality can have only one meaning, and that meaning is self-evident to reasonable men. Those who say equality means favoritism do violence to common sense.

The legislative history of Title VII is entitled to great weight, since Congress was particularly aware of the need for legislative history to guide the courts in interpreting and enforcing the Act. Vaas, Title VII: Legislative History, 7 B.C. IND. & COM. L. Rev. 431, 444 (1966).

34. See, e.g., Patterson v. Am. Tobacco Co., 535 F.2d 257 (4th Cir. 1976), where the court upheld a back pay award to minority grievants but rejected the district court’s orders to “bump” majority employees and to combine seniority rosters at American Tobacco’s two plants. In evaluating this relief, the court attempted to limit it to the actual victims and to those jobs which were actually involved in the past discrimination. The court actively attempted to balance the need for some relief against the effects it might have on innocent parties and against the adequacy of less drastic relief.

35. See, e.g., United States v. Navajo Freight Lines, 525 F.2d 1318 (9th Cir. 1975), where the court concluded that an investigation of the employees’ “rightful places” was the best means of balancing the interests at stake. Normally, persons selected for over-the-road driver positions had to give up any accumulated seniority, but the court here allowed minority applicants to retain their seniority. The court contended that compensation to wronged minorities could not be obtained at the expense of the jobs of non-minority incumbents, but that the discriminatees could achieve their rightful places at the expense of certain seniority expectations of such incumbents.

36. For example, the Court of Appeals for the Second Circuit rejected the use of permanent quotas for hiring and promotion in civil service jobs in Kirkland v. N.Y. State Dept’ of Correctional Servs., 520 F.2d 420 (2d Cir. 1975). The Fourth Circuit reversed district court-ordered “bumping” and refused to require an employer to combine seniority rosters at his two plants. Patterson v. Am. Tobacco Co., 535 F.2d 257 (4th Cir. 1976).

37. See, e.g., Harper v. Kloster, 486 F.2d 1134 (4th Cir. 1973) (denied quota relief to fire department employees); Bridgeport Guardians, Inc. v. Civ. Serv. Comm., 482 F.2d 1333 (2d Cir. 1973) (rejected quotas for higher level police officers); Commonwealth v. O'Neill, 473
have on the underlying principles of Title VII, on the reasonable career expectations of white employees, and on racial tension at the place of employment.

The separate opinion of Justice Powell in *Franks v. Bowman Transportation Co.* summarizes several of the major problems with preferential relief under Title VII. First, Justice Powell suggests that the equitable remedies authorized by the Act should be a blend of what is necessary, what is fair, and what is workable. Quotas may be relatively easy to implement, *i.e.*, workable. Second, however, Justice Powell notes Congress recognized that total restitution might not be feasible under Title VII. If the Act does not mandate total restitution, quotas may not be necessary remedies. Third, he concludes that a grant of constructive competitive seniority to an entire class of minority grievants is not always an appropriate equitable remedy, as it penalizes innocent white workers. In other words, quotas may not be fundamentally fair.

Hiring quotas have also been criticized as being both overinclusive and underinclusive; the beneficiaries of preferential treatment


38. See, e.g., Commonwealth v. O'Neill, 4 FEP Cases 1286, 1289-90 (3d Cir. 1972), where the court attacked quotas in police hiring, stating: “[O]pening the doors long shut to minorities is imperative, but in so doing, we must be careful not to close them in the face of others, lest we abandon the basic principle of non-discrimination that sparked the effort to pry open those doors in the first place.”

39. See, e.g., Bridgeport Guardians, Inc. v. Civ. Serv. Comm., 482 F.2d 1333, 1341 (2d Cir. 1973), where the court rejected police force quotas for ranks above patrolman partly because such quotas would discriminate against those whites who embarked on their police careers with reasonable expectations of advancement. See also Note, *Employment Discrimination: The Promotional Quota as a Suspect Remedy*, 7 Rut.-Cam. L.J. 506, 518-19 (1976), for a discussion of policy reasons for avoiding promotional quotas. The author suggests that the courts should weigh the potential of promotional quotas for achieving the goal of economic equality against the potential disturbing effects the quotas might have on productivity and against the discriminatory impact they would have on majority workers. *Id.*

40. See, e.g., Bridgeport Guardians, Inc. v. Civ. Serv. Comm., 482 F.2d 1333, 1341 (2d Cir. 1973), where the court felt that police force quotas for ranks above patrolman would exacerbate racial tension. The Second Circuit noted viable alternatives to quota relief. The court suggested shortening the time lapse necessary to move from one level to the next and also suggested eliminating or decreasing the effect of a 10 percent weighing of seniority in promotion.


42. *Id.* at 790. (Powell, J., concurring and dissenting).

43. *Id.* at 791 n.9 (Powell, J., concurring and dissenting).

44. *Id.* at 790-91 (Powell, J., concurring and dissenting).
are not the actual victims of the past discrimination, and those
disadvantaged by the quotas normally have not been responsible for
the past discrimination and have not profited from it.\textsuperscript{45} Given the
legislative history of section 703(j) and the inconsistent application
of quota relief in recent court decisions, there is considerable confu-
sion as to the scope and underlying appropriateness of preferential
relief in employment discrimination.\textsuperscript{46}

**Voluntary Compliance**

Sections 705 and 706 of Title VII\textsuperscript{47} demonstrate Congress' intent
to emphasize voluntary compliance as a vital means of implement-
ing the goals of the Act.\textsuperscript{48} These two sections created the Equal
Employment Opportunity Commission and provided means by
which it was to promote an atmosphere conducive to voluntary com-
pliance.\textsuperscript{49} Only after prescribed attempts at voluntary compliance


\textsuperscript{46} See the discussion in Comment, Title VII and 42 U.S.C. § 1981: Two Independent
Solutions, 10 U. R慈. L. Rev. 339, 350 (1976), where the author submits that: "it is impossible
to reconcile a 'no preference' rule with quotas. However, it is perhaps equally impossible to
reconcile quota systems with constitutional guarantees, an anomaly with which the courts
have chosen not to deal."


\textsuperscript{48} The House Judiciary Committee demonstrated this intent:
No bill can or should lay claim to eliminating all of the causes and consequences
of racial and other types of discrimination against minorities. There is reason to
believe, however, that national leadership provided by the enactment of Federal
legislation dealing with the most troublesome problems will create an atmosphere
conducive to voluntary or local resolution of other forms of discrimination.
Ad. News 2393.

Several courts have also recognized this intent. See, e.g., Hutchings v. United States
Indus., Inc., 428 F.2d 303, 309 (5th Cir. 1970); Dent v. St. Louis-San Francisco Ry. Co., 406
F.2d 399, 404 (5th Cir. 1969), appeal after remand sub nom., Hyler v. Reynolds Metal Co.,
434 F.2d 1064 (5th Cir. 1970), cert. denied, 403 U.S. 912, rehearing denied, 404 U.S. 875
(1971).

\textsuperscript{49} 42 U.S.C. §§ 2000e-4(f)(3), (4) (1970) provide that the EEOC shall have power:
(3) to furnish to persons subject to this subchapter such technical assistance as
they may request to further their compliance with this subchapter or an order
issued thereunder; (4) upon the request of (i) any employer, whose employees or
some of them, or (ii) any labor organization, whose members or some of them, refuse
or threaten to refuse to cooperate in effectuating the provisions of this subchapter,
to assist in such effectuation by conciliation or such other remedial action as is
provided by this subchapter.

which provides in pertinent part:
If the Commission determines after such investigation that there is reasonable
cause to believe that the charge is true, the Commission shall endeavor to eliminate
such alleged unlawful employment practice by informal methods of conference,
conciliation, and persuasion. Nothing said or done during and as a part of such
have failed is the EEOC authorized to bring suit against the employer.50 EEOC regulations51 and its guidebook for employers52 clarify the procedures the Commission will use to conciliate and establish standards for effective affirmative action programs. The United States Supreme Court has attested to the importance of voluntary compliance by according great weight to EEOC pronouncements.53 In addition to its informal conciliatory powers, the EEOC can further voluntary compliance by negotiating consent decrees in its prosecutorial capacity.54 Though the Commission has no adjudicatory powers of its own, its ability to investigate charges, conciliate, and issue regulations and other forms of guidance can potentially save many grievants from expensive litigation. However, this goal of voluntary compliance is currently being threatened by court-ordered quotas, recent reverse discrimination decisions, and the EEOC itself.

The McDonald Decision and the McAleer Response

The decision in McDonald v. Santa Fe Trail Transportation Co.55 stands for one positive proposition and one disclaimer. The proposition is that both Title VII and 42 U.S.C. § 1981 proscribe discrimination in private employment against any individual, including a majority person. The standards for proving a prima facie case and for rebutting a defense, which were enunciated in McDonnell-Douglas Corp. v. Green,56 apply equally to majority as well as to...
minority grievants.\footnote{McDonnell-Douglas also holds that after plaintiff establishes a prima facie case, the burden shifts to the employer to give a business necessity justification. Thereafter, the plaintiff has the opportunity to demonstrate that the employer's justification was merely a pretext for discrimination. 96 S. Ct. at 2577-78.} Two white men, McDonald and Laird, and a black man, Jackson, participated in the theft and resale of company-owned anti-freeze. McDonald and Laird were discharged, allegedly for their misconduct. Jackson was retained. Santa Fe contended that it did not act under an affirmative action program\footnote{Id. at 2578.} and that it discharged the white employees for the commission of a serious criminal offense.\footnote{Id. at 2578 n.8.} The company disclaimed any discriminatory intent.\footnote{We emphasize that we do not consider here the permissibility of such an affirmative action program, whether judicially required or otherwise prompted. The Court's use of the term "permissibility" is doubly confusing to the employer faced with a reverse discrimination suit as a result of his affirmative action program. He does not know whether his program is lawful or not. Even if it is held lawful, or permissible, he does not know whether such a finding will preclude liability to reverse discriminatees.} Alternatively, Santa Fe claimed that if race were a factor in its decision, it merely was allowing Jackson a "break" and not discriminating against the white men.\footnote{Id. at 2578.}

The Court decreed that Title VII prohibited racial discrimination against whites and applied the same standards to them as would have applied had the races been reversed.\footnote{57. 96 S. Ct. at 2577-78.} When an employer engages in isolated discriminatory actions that are not based on any formal affirmative action program, \textit{McDonald} grants injured majority individuals the same Title VII rights as are accorded minority individuals.

The \textit{McDonald} court expressly avoided any decision on the permissibility of similar preferential treatment implemented pursuant to an affirmative action program.\footnote{58. Brief for Respondent at 19 n.5, McDonald v. Santa Fe Trail Transp. Co., 96 S. Ct. 2574 (1976).} However, reverse discrimination suits are most likely to arise in the context of some sort of voluntary, judicially-sanctioned, or judicially-ordered affirmative action program, not in the context of isolated actions. By this disclaimer, the Supreme Court has avoided a significant opportunity to clarify the rights and duties of those employers most likely to need the information.

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The \textit{McDonald} court expressly avoided any decision on the permissibility of similar preferential treatment implemented pursuant to an affirmative action program.\footnote{60. Santa Fe insisted that it was motivated by McDonald's and Laird's conduct, not their race. Id. at 2578.} However, reverse discrimination suits are most likely to arise in the context of some sort of voluntary, judicially-sanctioned, or judicially-ordered affirmative action program, not in the context of isolated actions. By this disclaimer, the Supreme Court has avoided a significant opportunity to clarify the rights and duties of those employers most likely to need the information.
In McAleer v. AT & T Co., the District Court for the District of Columbia announced standards that could govern those situations avoided by McDonald. AT & T was bound by a consent decree which required it to implement an affirmative action override—a preferential promotion plan—when other means were insufficient to meet its goals and timetables for achieving a racially and sexually balanced work force. The consent decree specifically stated that AT & T admitted no wrongdoing. The district court, however, relying on statements by AT & T's counsel at oral argument and statements by the judge who entered the consent decree, found that AT & T had in fact violated Title VII.

Utilizing the override, AT & T promoted a woman with less seniority than plaintiff McAleer to a position for which McAleer was at least as well qualified, and to which he was entitled under the collective bargaining agreement. The court awarded McAleer damages on a "rough justice" basis. However, the court denied him the promotion, holding that the woman was entitled to her promotion.

The court gave two justifications for its conclusion that McAleer was entitled to damages. First, the court found that he was a blameless third party and that the entire burden of remedying past sex discrimination should fall on the employer whenever possible. Second, the court analogized to the contract doctrine of impossibility of performance, holding:

64. 416 F. Supp. 435 (D.D.C. 1976). The McAleer case was decided two weeks before McDonald. Nevertheless, it dealt with a type of situation that McDonald avoided, and that generates an urgent current dilemma for employers.
65. AT & T Consent Decree, supra note 15, at § 431:117.
66. Id. at § 431:73.
68. Id. at 437.
69. Id. at 440. The court did not have an opportunity to clarify the meaning of "rough justice," as the parties later agreed to a settlement giving McAleer $7,500 in damages and $6,500 in attorneys' fees. 181 DAILY LAB. REP. (BNA) A-1 (Sept. 16, 1976).
70. The court relied on Franks v. Bowman Transp. Co., 424 U.S. 747 (1976) in upholding the woman's promotion. They found that AT & T had in fact been guilty of past discrimination as had the defendant in Franks. As the Franks decision authorized broad relief including constructive seniority, the McAleer court concluded that constructive seniority in the form of an affirmative action override was an appropriate remedy. Therefore, the woman's promotion pursuant to that provision was appropriate.
71. 416 F. Supp. at 439-40. But see Comment, The Myth of Reverse Racial Discrimination: An Historical Perspective, 23 CLEV. ST. L. REV. 319, 328-29 (1974) for the alternative theory that although one in a position similar to McAleer's might be innocent of any intentional wrongdoing, he might have unjustly benefited from the prior discriminatory practices that allegedly precipitated the consent decree.
Ordinarily one who acts pursuant to judicial order or other lawful process is protected from liability arising from the act. . . . But such protection does not exist where the judicial order was necessitated by the wrongful conduct of the party sought to be held liable.73

For the first half of this proposition, the court relied on the theory that one who acts pursuant to an administrative ruling may be exempt from criminal liability for his actions74 or may be discharged from conflicting contractual obligations.75 However, as the court noted, this impossibility doctrine generally applies only when the supervening force causing the conflict was not triggered by the defendant's own wrongdoing.76

In the McAleer consent decree, AT & T specifically disclaimed any wrongdoing.77 Ignoring the decree's language and function, the court reasoned that it was in fact brought about by AT & T's initial discriminatory actions.78 The court, as a result of this apparent finding of wrongdoing, rejected the impossibility doctrine as a defense to plaintiff's charge and held AT & T liable for injuries caused by its compliance with the decree. If this reasoning is appropriate, any

73. Id. at 440.
74. See United States v. Mancuso, 139 F.2d 90, 92 (3d Cir. 1943).
75. See PepsiCo, Inc. v. FTC, 472 F.2d 179, 190 (2d Cir. 1972). The impossibility doctrine has traditionally been applied to exempt individuals from private contractual obligations which conflict with a binding judicial decree. McAleer would use the doctrine to evaluate an employer's liability to reverse discriminatees whose statutory rights conflict with the employer's implementation of a consent decree or court order. Whether or not the doctrine would protect an employer in any given situation, it is arguably inappropriate to use the doctrine at all in employment discrimination cases. The doctrine may relieve a person of private, voluntary contractual obligations when they conflict with a supervening and more authoritative court-imposed obligation. Involuntary statutory obligations are at stake in employment discrimination cases. It is at best questionable whether such congressionally-mandated obligations should be subordinated in any situation to an individual judicial decree. See text accompanying notes 108-09 infra for an alternative exemption that does not place judicial decree above statutory rights.
76. See, e.g., Taylor v. Caldwell, 3 B. & S. 826, 122 Eng. Rep. 309 (1863), where the defendant was discharged from a contractual agreement to furnish a music hall to the plaintiff when the music hall burned down through no fault of the defendant. The defendant's contractual obligation would also be excused where, through supervening legislative action, the underlying obligation of the contract was deemed illegal or contrary to public policy. See generally Note, The Doctrine of Impossibility of Performance and the Foreseeability Test, 6 Loy. Cm. L.J. 575 (1975).
77. See AT & T Consent Decree, supra note 15, at § 431:73 for AT & T's specific disclaimer of wrongdoing. In addition, a consent decree is not by nature an arrangement based on judicially-recognized wrongdoing. It is a settlement by the parties which is sanctioned by the court, but it does not operate as an admission of wrongdoing even in the absence of a formal disclaimer.
78. See text accompanying note 67 supra. These actions precipitated the initial charge by the EEOC which led to the consent decree in question.
court-ordered quota relief would subject the employer to reverse discrimination suits because quota relief has only been granted when wrongdoing, in the form of past discrimination, is established. Any employer who institutes a voluntary affirmative action program or agrees to a consent decree utilizing preferential treatment could be vulnerable to reverse discrimination attacks on the same theory the court here espoused: there would have been no need for preferential treatment had the employer not engaged in prior discrimination. The McAleer court’s application of the impossibility doctrine gives the employer no protection from reverse discrimination claims. In fact, an employer’s good faith effort to comply with Title VII may generate as many problems as it solves.

THE EMPLOYER’S DILEMMA

Recent decisions ordering preferential relief support the proposition that the employer must bear the entire burden of remedying his past discriminatory practices. McDonald stands for the proposition that an employer is liable for isolated discriminatory acts against any individual. McAleer suggests that he may be liable to majority individuals who are injured by his compliance with any affirmative action program that was precipitated by his wrongful conduct. Nevertheless, Title VII’s focus is on voluntary compliance. The employer whose work force does not mirror the relevant labor market faces a pressing dilemma. He has several available options, but each has serious drawbacks.

The employer’s initial option is to institute a voluntary affirmative action program. This alternative furthers Title VII’s goal of voluntary compliance and provides the employer with the opportunity to fashion, free from court intervention, a program tailored to his needs and resources. He may rely on the EEOC Guidelines, the EEOC Guidebook for employers, or the provisions of recent con-

79. See, e.g., recent cases in which quota relief has been denied because there was an insufficient finding of past discrimination. In Chance v. Bd. of Examiners, 534 F.2d 993 (2d Cir. 1976), the Second Circuit reversed a district court-ordered quota for a teacher “excessing” plan on the ground that the original plan did not in fact disproportionately affect minorities. In Weber v. Kaiser Aluminum & Chem. Corp., 415 F. Supp. 761 (E.D. Pa. 1976), the court struck down a provision in a collective bargaining agreement authorizing quota hiring on the ground that there was no evidence of past discrimination. The court held that absent any court decree, an employer could not implement a quota system that operated to discriminate against whites. In Brunetti v. City of Berkeley, 12 FEP Cases 937 (N.D. Cal. 1975), the court held that the “extreme” remedy of quotas under a voluntary affirmative action program was not appropriate where there was no definite finding of prior discrimination and no prior challenge to the city’s prior practices.


81. See, e.g., EEOC Guidebook, supra note 52.
sent decrees.\textsuperscript{82} The Guidebook suggests that he establish long range and intermediate goals and timetables for integrating underutilized groups into his workforce.\textsuperscript{83} Practically, of course, preferential treatment is necessary to insure the success of these programs. As one means of meeting these timetables, the Guidebook suggests compiling a Remedial Action File of minority persons who are qualified for promotions and using that file \textit{first} to fill available promotions.\textsuperscript{84} The Guidebook further notes that union referrals must be made without discrimination. Notwithstanding this instruction, however, it cites with apparent approval decisions which have ordered preferential union referrals.\textsuperscript{85} These Guidebook suggestions seemingly condone preferential treatment.

The employer may also look to consent decrees as models for his affirmative action program. He may find that they also condone preferential treatment. The AT & T consent decree, for example, includes an affirmative action override\textsuperscript{86}—a program for preferring minorities for promotions if necessary to meet goals and timetables.

If the employer relies on either of these sources he will hopefully eliminate minority discrimination, but he may thereby generate a new group of majority discriminatees. The \textit{McAleer} rationale offers him no protection from reverse discrimination suits. \textit{McAleer}'s impossibility defense would apply, if at all,\textsuperscript{87} only when the employer acts pursuant to a judicial decree. McAleer settled for $7,500. Using that figure as a yardstick, such suits may be very costly.

If the employer chooses not to enter into any formal program, he is vulnerable to suit by any individual or class that can prove a

\begin{footnotesize}
\begin{enumerate}
\item See, e.g., AT & T Consent Decree, supra note 15. If the employer is a government contractor he is also subject to Exec. Order No. 11246, 3 C.F.R. 169 (1974), reprinted in 42 U.S.C. § 20000e, at 10294 (1970) and will be subject to the regulations of the Office of Federal Contract Compliance, 41 C.F.R. §§ 60.1-60-60.9 (1975).
\item EEOC Guidebook, supra note 52, at 26-28.
\item One commentator remarked that goals and timetables themselves often closely resemble quotas. Unless an employer can resort to preferential treatment, neither he, nor the EEOC, nor the courts can ensure that the goals and timetables will be achieved. Sape, \textit{Use of Numerical Quotas to Achieve Integration in Employment}, 16 WM. & MARY L. REV. 481, 487 (1975).
\item EEOC Guidebook, supra note 52, at 50.
\item Id. at 58.
\item AT & T Consent Decree, supra note 15, at § 431:117.
\item Despite the \textit{McAleer} court's conclusion that AT & T's actions were not protected by the impossibility doctrine, the court implied that the doctrine was a viable means of evaluating the consequences of AT & T's compliance with a consent decree. There is no judicial involvement in the voluntary program described in this section, so the impossibility doctrine is of no value to the employer. See note 75 supra for a discussion of why this doctrine may never be an appropriate method for evaluating an employer's responsibilities to reverse discriminatees.
\end{enumerate}
\end{footnotesize}
prima facie case against him. The courts have consistently awarded broad relief to minority victims of discrimination. McDonald asserts that, at least where there is no affirmative action program, the employer is also potentially liable to majority individuals. Santa Fe posited that if race was a factor in its decision to retain Jackson, it was merely giving him a "break." The Court found that such action, regardless of label, constituted discrimination. Therefore, if the employer attempts to informally aid minorities, he will be liable under McDonald if majority individuals are thereby disadvantaged. In addition, his inaction retards the process of eradicating discrimination and frustrates Title VII's objective of voluntary compliance.

If a minority person files a charge with the EEOC, the employer may enter into a consent decree and set up an affirmative action program to remedy his alleged misconduct. If the EEOC concludes that the employer has been perpetuating the effects of past discrimination, the consent decree may include quota requirements similar to the affirmative action override in the AT & T consent decree. If the employer complies with the decree, he necessarily disadvantages majority individuals. McAleer suggests that he may be liable for damages to those persons, even though he is bound to comply with the decree. Unless the employer cannot afford the immediate cost of continuing the suit, he may be reticent to enter into a potentially expensive and dangerous judicially-enforceable decree. He is likely instead to fight the case in court or to protract the settlement process as long as possible. This result thwarts the voluntary compliance process and shifts the burden of implementing the Act onto the courts and the EEOC. The EEOC has a current backlog of approximately 106,000 cases. Protracted settlements or increases in the number of suits proceeding to trial can only further burden the Commission and the courts, thereby delaying relief and severely retarding the very process that preferential treatment was designed to expedite.

Finally, if the employer does choose to go to court, recent cases suggest that the court may impose a program including preferential

88. See notes 22-28 supra and accompanying text for a discussion of the types and scope of relief awarded.
90. See notes 47-54 supra and accompanying text which discuss Title VII's emphasis on voluntary compliance.
91. AT & T Consent Decree, supra note 15, at § 431:117.
92. 416 F. Supp. at 440.
93. 93 LAB. REL. REP. (BNA) No. 1, News and Background Information 1 (Sept. 6, 1976) (remarks of acting chairperson Ethel Bent Walsh).
A quota forces the employer to evaluate applicants or employees on the basis of classifications prohibited by Title VII. He is bound to comply, though he has no control over the scope or inclusiveness of the quota. In addition, under the McAleer reasoning, his compliance with the order will be no defense to reverse discrimination suits because such orders are only issued to remedy past discrimination. The burden of compensating reverse discriminatees is an additional cost he must bear. Unless the employer is reasonably certain that he can prove his practices are non-discriminatory in effect or justifiable by a non-pretextual business purpose, it may be dangerous to go to court. Additionally, litigation, unlike voluntary compliance, is a time consuming process. It undermines Title VII's goal of providing prompt relief from discrimination. Whether the employer chooses a voluntary method or litigation, he faces substantial liability.

Clarifying the Employer's Liabilities to Reverse Discriminatees

There is little doubt that courts will hold employers responsible for almost all costs of eradicating past and present employment discrimination. The justification for placing this burden on employers is that the primary purpose of Title VII is to eliminate any and all employment discrimination. The principal issue, however, is not whether this burden is theoretically justifiable, but whether the burden is practically desirable when balanced against: (1) the potential impairment of the voluntary compliance process, and (2) inherent inconsistencies in quota relief both in theory and as applied by the courts.

Considering the enormous current EEOC backlog, voluntary com-

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94. See notes 6 and 23-25 supra and accompanying text for examples of court-ordered quota relief.
95. It is difficult for an employer to rebut a prima facie discrimination case. He must establish a legitimate business justification for his actions. The courts have very narrowly construed the scope of appropriate business purposes. Even if the defendant is successful in establishing a defense, the plaintiff has the opportunity to defeat the defense by showing that it is merely a pretext for discrimination.
96. Santa Fe stated the dilemma more caustically: if the employer promotes a program to assist minorities, he gets a pat from the EEOC and a suit by whites. If he refuses to implement an affirmative action program, he incurs the wrath of the EEOC. Brief for Respondent at 22, McDonald v. Santa Fe Trail Transp. Co., 96 S. Ct. 2574 (1976).
Compliance is essential to ensure prompt relief to discriminatees. Without it, the backlog can only increase, postponing relief even further and frustrating the EEOC's function as a conciliatory agency. The threat to the voluntary compliance process caused by the current burden on employers weighs heavily in any efforts to evaluate the practicality of continuing the burden.

As to the second balancing factor, preferential treatment as suggested by the EEOC and as imposed by the courts is subject to serious question. As previously discussed, some courts doubt the appropriateness of quota relief in any situation. In addition, commentators have recognized inconsistencies between preferential relief, its consequences, and the goals of Title VII. One question that has arisen is whether racial quotas actually reflect the correct class of disadvantaged persons. It has been suggested that cultural disadvantage is the real discriminatory factor. If so, racial quotas used to eliminate that discrimination may be both overinclusive and underinclusive; not all persons are equally culturally disadvantaged, and not all persons affected by cultural disadvantage may be members of racial minorities. Another theory is that courts which order quota relief are implicitly deciding that work force integration

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98. There has been considerable debate as to whether the arbitration process can absorb some of the cases, ease the burden on the EEOC, and provide an inexpensive, prompt, specialized forum for grievants. The Supreme Court in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) held that arbitration of a Title VII claim did not preclude an employee's redress to the courts. However, the case did suggest that the Court might defer to the arbitrator's award if the arbitrator conducted the proceeding in accordance with certain procedural safeguards. Id. at 60 n.21. The arbitration process should not be discounted as a potential tool for alleviating some of the EEOC's current backlog. See generally Edwards, Arbitration of Employment Discrimination Cases: A Proposal for Employer and Union Representatives, 27 LAB. L.J. 265 (1976); Note, The Potential Of Expanded Arbitration In Resolving Title VII Claims In Light Of Alexander v. Gardner-Denver And New Equal Employment Opportunity Commission Policy, 7 LOY. CHI. L.J. 334 (1976).

In addition, the EEOC recently announced that it was beginning to implement accelerated procedures to resolve some of the older claims. 93 LAB. REL. REP. (BNA) No. 1, News and Background Information 1 (Sept. 6, 1976). The short-range goal of that plan is to wipe out approximately 12,000 cases, so a crushing backlog still exists.

99. See notes 37-44 supra and accompanying text.


101. See Kaplan, supra note 100, at 374, where the author suggests replacing racial quotas with preferential treatment of an "underclass" based on cultural disadvantage. Evaluation based on that classification would not violate Title VII. See also Posner, supra note 100, at 12-13, where the author notes the further problem of how to define race for the purposes of racial quotas. Whether race is defined in terms of physical characteristics, surnames, racial or national ancestry, or standards set by the racial group itself, such determinations are at best inexact and open to considerable abuse.
should proceed more rapidly than is possible through non-discriminatory hiring. If courts are acting under this assumption, they are apparently ignoring those portions of the legislative history and text of Title VII which specifically proscribe preferential treatment.\footnote{See notes 29-33 \textit{supra} and accompanying text for discussion of section 703(j) and its legislative history.}

No factor may outweigh the importance of holding the employer responsible for all costs of eliminating discrimination. However, the inequities inherent in quota relief mandate a careful re-evaluation of the permissible scope of preferential treatment. The recent decisions in \textit{McDonald} and \textit{McAleer} demonstrate an urgent need to clarify the effect of preferential treatment on an employer's liability for reverse discrimination claims, especially claims precipitated by an employer's compliance with voluntary, court-sanctioned, or court-ordered affirmative action programs. In short, there is a demonstrable need for the courts and the EEOC to take action regarding the types of reverse discrimination not addressed in \textit{McDonald}.

The EEOC Guidebook is a potentially valuable aid to employers if it accurately reflects the standards the EEOC and the courts use to evaluate an employer's affirmative action program. However, current EEOC attempts at guidance may mislead the employer who wants to design a voluntary plan. The Guidebook condones preferential treatment both directly and indirectly.\footnote{See notes 81-85 \textit{supra} and accompanying text for examples of the Guidebook's approval of quotas.} Such treatment, if appropriate at all in the absence of a court finding of past discrimination, may induce costly reverse discrimination suits. If the Guidebook is to realize its potential and be worthy of trust, it should be updated to thoroughly inform employers of the consequences of following its suggestions.

One experienced practitioner\footnote{See 93 \textit{LAB. REL. REP.} (BNA) \textit{News and Background Information} 69 (Sept. 27, 1976), where R. Lawrence Ashe, an Atlanta attorney experienced in litigating Title VII claims, criticized the EEOC for its failure to utilize tools available to it to effectively guide employers in formulating affirmative action programs.} suggested that the EEOC has another tool to encourage voluntary compliance. The EEOC has the power to issue advisory interpretations and opinions; however, that power has been exercised only once in 11 years.\footnote{\textit{Id.} at 69.} Although the EEOC has no adjudicatory powers, such advisory opinions could provide useful public information to employers with unique employment problems. Additionally, the opinions could suggest the reason-
The courts, for their part, should clarify whether preferential treatment pursuant to consent decree or court order is permissible. Also, they should decide what effect such treatment will have on the employer's subsequent liability to reverse discriminatees. McAleer offers one possible answer: court-ordered preferential treatment may be an appropriate method of redressing the effects of past discrimination. However, the court order will be no defense to, and may provide justification for, subsequent reverse discrimination suits. McAleer suggests that the employer should pay all costs of his past wrongful conduct. The employer should, therefore, be liable to majority individuals whose Title VII rights are impaired when he implements the decree on the theory that such decrees will always be precipitated by his wrongful conduct. One difficulty with this strict liability theory, however, is that it is likely to discourage employers from voluntarily entering into consent decrees. A second difficulty is that an employer could be liable for injuries he did not cause, even indirectly. If class-wide preferential relief is ordered to remedy the effects of past discrimination, some majority individuals will likely be displaced by minority persons who were not actually victims of the past discrimination. Under McAleer, the employer may have to compensate majority individuals whose injuries did not result from his past discrimination, but from an overinclusive remedy.

There is, however, a way to encourage employers to enter into consent decrees without sacrificing relief to victims of discrimination. Employers instituting quotas pursuant to a consent decree or court order could, under certain circumstances, be exempted from reverse discrimination liability. This exemption might alleviate some of the discouraging effect reverse discrimination liability may have on employers' willingness to enter into consent decrees. More importantly, it would not impair the courts' ability to compensate minority victims of past discrimination.

106. It must be noted that McAleer does not serve as a binding precedent, as it was dismissed with prejudice in September, 1976 pursuant to a damage settlement after judgment. Nevertheless, the scope of AT & T's liability to reverse discriminatees under its consent decree will receive further treatment in the appeal from the district court decision in EEOC v. AT & T Co., 13 FEP Cases 392 (E.D. Pa. 1976). District Court Judge Higginbotham, who entered the original consent decree, upheld challenges to the decree's affirmative action override provision based on civil rights and labor statutes, an executive order for government contractors, and the Constitution.
107. See text accompanying notes 91-93 supra for a discussion of this discouraging effect.
The appropriate scope of this exemption, however, depends on the appropriate scope of the underlying quota. Given section 703(j)’s prohibition of quotas and similar warnings in the legislative history of the Act, courts should limit quota relief so as to benefit only those individuals actually injured by the past discrimination. If courts can avoid overinclusive quotas, those majority individuals whose positions are subsequently adjusted should be the ones who unjustly benefited from the original discrimination. If they have enjoyed the illicit benefits, or “windfall,” caused by mistreatment of others, it is arguable that they will not be injured by limited quota relief. Rather, they will be returned to their rightful places under terms and conditions which would have applied had there been no discrimination.\(^{109}\) This theory achieves its greatest utility in cases involving promotional, rather than hiring, quotas, as it is probably easier to narrow the impact of quota relief on all individuals where those individuals were identifiable at the time of the employer’s discriminatory action.

Under these circumstances, an exemption for employers makes both theoretical and practical sense. It does not conflict with Title VII’s goal of eliminating the effects of past discrimination. It does not deprive any legitimately injured individual of relief. Furthermore, the limit on the exemption should emphasize the courts’ and the EEOC’s responsibility to avoid overinclusive preferential relief which unnecessarily disadvantages majority persons.

**Conclusion**

The purpose of Title VII is to eliminate all traces of employment discrimination, to prevent it from recurring, and to compensate its victims. Voluntary compliance is a crucial means of achieving all of these ends. Courts have deemed quota relief an additional appropriate means of remedying past discrimination, and the EEOC has supported that stand in its efforts to guide employers. However, majority victims of formal and informal quotas have begun to complain. The Supreme Court has upheld their right to complain under Title VII. At least one district court has awarded damages to a majority person injured by his employer’s compliance with a quota provision in a consent decree.

Faced with quota relief and these two decisions, the employer is

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caught between the rock and the whirlpool. Whether or not he acts in good faith, whether or not he acts at all, he cannot effectively implement Title VII and protect himself from liability at the same time. Consequently, he is likely to take no action. That result thwarts the crucial voluntary compliance process and impedes the very remedial processes the Act was intended to expedite. The employer must know what kind of affirmative action he can take. He must know what his actions will cost him, but he should not be forced to pay for the overinclusiveness of a court-imposed quota. It is up to Congress, the courts, and/or the EEOC to give him this guidance. Finally, as voluntary compliance is vital, it is up to Congress or the courts to grant him some relief.

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