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The Partial Factor Test in Title VII Discrimination, King v. Laborer’s International Union of North America, Union Local 818, 443 F.2d 273 (6th Cir. 1971)

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Plaintiff King brought a civil action, under Title VII of the Civil Rights Act of 1964, alleging discrimination by Local 818 of the Laborers International Union of North America. King claimed that the Union had refused, because of his race, to give him an equal opportunity to picket, and that this was a violation of the Union's obligation under the Act not "to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color . . . ." The trial court instructed the jury that the plaintiff could recover if the jury found that the Union's refusal to allow King to picket was "solely on account of his race . . . ." (emphasis added). The jury returned a verdict for the defendant Union. Plaintiff appealed on the ground that the jury was erroneously instructed. The
Sixth Circuit reversed and remanded, holding that the jury should have been charged that if race was, *in part*, a causal factor in the Union's determination not to use King on the picket lines, he was entitled to recover. The court did not cite any cases in support of this proposition, but indicated simply that the language of the act compelled this result.

42 U.S.C. § 2000e-2(c)(1) is aimed specifically at union discrimination against union members. This provision makes it unlawful for a union "to exclude or expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin." Other sections of Title VII use substantially identical language to prohibit discrimination by employers and employment agencies. In suits brought under Title VII, a plaintiff is clearly entitled to relief if he can prove that his employer dismissed him or that his union excluded him solely on account of his race. Frequently, however, the evidence shows that the defendant acted for more than one reason, only one of which involved discrimination. In this situation, it is less clear that the conduct is prohibited.

The language of the act is silent on the extent to which discrimination must be present to make a defendant's conduct unlawful, and no Title VII case prior to *King* has confronted this problem. However, the legislative history of the act gives a clear indication of congressional intent on this point. In 1964, the Senate and the House of Repre-

5. *King v. Local 818, Laborers Int'l*, 443 F.2d 273, 278 (6th Cir. 1971). In finding that the trial court's instructions unduly limited the plaintiff's right to recover, the court held that when two reasons may be established for the Union's conduct, one lawful and the other discriminatory, the plaintiff will be entitled to recover unless the union shows that the lawful reason was the sole factor in its conduct, *Id.* at 278-79.

6. *Id.* at 279.

(a) It shall be an unlawful employment practice for an employer—
(1) to fail or refuse to hire or to discharge any individual or other-
wise to discriminate against any individual . . . because of such in-
dividual's race, color, religion, sex, or national origin . . .

(b) It shall be an unlawful employment practice for an employment
agency to fail or refuse to refer for employment, or otherwise to dis-
 criminate against, any individual because of his race, color, religion, sex,
or national origin . . .


sentatives defeated a proposed amendment which would have added
the word *solely* to sub-sections a, b, and c of 42 U.S.C. § 2000e-2. Sen-
ate debate prior to rejection of the amendment reflects a determination
that such an amendment would defeat the purpose of the Act by placing
an excessive burden on the plaintiff to prove discrimination. The
failure of the proposed amendment to pass either chamber indicates that
the Congress viewed Title VII as prohibiting conduct based, in whole
or in part, on the consideration of discriminatory factors.

Discrimination problems analagous to the one faced by the court in
*King* have been considered by courts interpreting the National Labor
Relations Act (NLRA), and many of the cases have reached the
same result as the court in *King*, i.e., that unlawful discrimination may
be proved even if it is only a part of the reason for the defendant's
action. While the Civil Rights Act of 1964 protects against discrimi-
nation because of "race, color, religion, sex, or national origin", the
NLRA prohibits discrimination against employees for organizing or
bargaining collectively. In the absence of Title VII cases in point,
cases arising under the NLRA serve as useful precedent in analyzing
the type of discrimination problem in *King*. The two statutes share
similarities in statutory language and a similar interest in the elimi-


12. In debate over the amendment introduced by Senator McClellan, Senator Case
remarked: "[t]he difficulty with this amendment is that it would render Title VII
totally nugatory. If anyone ever had an action motivated by a single cause, he is a
different animal than any I know of. But beyond that difficulty, this amendment
would place upon persons attempting to prove a violation of this section, no matter
how clear the violation was, an obstacle so great as to make the title completely
worthless." 110 Cong. Rec. 13,837 (1964). Senator Magnuson also opposed the
McClellan amendment on the ground that ensuing court interpretation would be an
impediment to the Act: "The difficulty is that a court interpretation of the word
'solely' would so limit this section as probably to negate the entire proposal of what
we are trying to do." 110 Cong. Rec. 13,837 (1964).


16. Both the NLRA and Title VII make discrimination in the labor context unlawful. 29 U.S.C. § 158(a)(3) (1935), 42 U.S.C. § 2000e-2 (1970). An analogy between the tests for discrimination arising out of NLRA cases and a possible test under Title VII has two limitations: (1) there is no language in the NLRA which ex-
actly parallels the Title VII prohibition of discrimination by a union against its mem-
ers; the NLRA prohibition against discrimination is aimed at employers, and only
indirectly at unions. But see 29 U.S.C. § 158(b)(2) (1965) which prohibits a union
from causing an employer to discriminate illegally against non-union employees;
(2) the motive behind the discrimination made unlawful by the NLRA is the em-
nation of obstructions to commerce;\(^\text{17}\) furthermore, the subject matter common to both acts is discrimination in the employment context.\(^\text{18}\)

In NLRA cases, courts have taken three approaches when the evidence indicates that the employer acted for more than one reason, at least one of which was discriminatory. The first allows a finding for the complainant only if the sole reason for the conduct is illegal.\(^\text{19}\) Under the second test, the complainant can recover if the illegal reason is the dominant or motivating factor in the decision.\(^\text{20}\) The third test, the partial factor test, is substantially identical to the one used in *King*. It allows the complainant to recover if unlawful discrimination is even a partial factor in the challenged conduct.\(^\text{21}\)
It is helpful to consider the application of the three tests to a hypothetical situation. A discharged black who had been consistently late for work must prove under the first test that his tardiness had no bearing on the dismissal and that the employer's action was based entirely on race or color. Under the second test, the employee must prove that race or color was the dominant reason for his discharge and that this tardiness was no more than a secondary consideration. Under the partial factor test, the employee must prove only that race or color was considered in his dismissal; the existence of other reasons would not affect the finding of unlawful conduct by the employer.

NLRA cases applying the partial factor test are essentially of two types. First, courts consider whether the employer's legally permissible reasons were sufficient alone to justify the discharge. In one such case, an employer discharged an employee who had been active in the union. The employer maintained that the employee had been discharged because he was not needed and did not have a license and therefore could not operate the company autos. The court answered per curiam:

"The evidence sufficed (sic) to "provide a reasonable basis for inferring that the permissible ground alone would not have led to the discharge, so that it was partially motivated by an unpermissible one." NLRB v. Dazzo Products, Inc." 22

In the second type, a court finds for the complainant if an unlawful reason was considered by the employer, even if an entirely sufficient reason for discharge exists. In this latter case, the complainant must satisfy a difficult burden, because the employer's proof of the existence of a wholly sufficient reason for discharge creates a strong presumption of validity in his conduct. 23


22. 358 F.2d 136, 138 (2d Cir. 1966). In NLRB v. Park Edge Sheridan Meats, Inc., 341 F.2d 725, 728 (2d Cir. 1965), the court stated that proof could be made by showing that the permissible ground was insufficient for discharge or that other employees, who had committed similar acts, but were not known to be engaged in union activity, had not been discharged. This would establish an inference that had the discharged employees not engaged in union activities they would not have been discharged.

23. "... If the discharge was motivated, even in part, by union activity, it is
The partial factor test as applied by the King court establishes an approach for courts to use in deciding on the extent to which discrimination must be present to make a defendant's conduct unlawful. Use of the partial factor test may be criticized on the ground that permissible reasons for an employer's conduct, although compounded by discriminatory ones, should be controlling in light of the legitimate business interest in removing from employment those who do not properly perform their jobs. On the other hand, the national interest in preventing racial discrimination is better served by prohibiting employers and unions from allowing a factor irrelevant to job performance to affect the terms and conditions of employment. In a Title VII action, the latter interest should prevail.

Although the result in King is sound, the court overlooked compelling reasons available to support its holding, and relied instead on the unexplained language of the act. A better reasoned opinion might have pointed to congressional intent, analogous case law under the NLRA, and strong policy considerations to support the result reached.

illegal despite the existence of adequate cause for firing her.” NLRB v. Historic Smithville Inn, 414 F.2d 1358, 1361 (3d Cir. 1969). The court found that the employee's chronic tardiness would have been an entirely legitimate reason for discharge, but it appeared from the evidence that the court had also considered her union activity. Cf. Wonder State Mfg. Co. v. NLRB, 331 F.2d 737, 738 (6th Cir. 1964); NLRB v. Symons Mfg. Co., 328 F.2d 835, 837 (7th Cir. 1964); NLRB v. Electric City Dying Co., 178 F.2d 980, 983 (3d Cir. 1950).