Washington University Law Review

Volume 1972 | Issue 2

January 1972

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)

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)

Plaintiff King brought a civil action, under Title VII of the Civil Rights Act of 1964,[1] 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 . . . ."[2] 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 . . ."[3] (emphasis added). The jury returned a verdict for the defendant Union. Plaintiff appealed on the ground that the jury was erroneously instructed.[4] The

1. 42 U.S.C. § 2000e (1970) [hereinafter cited as Title VII]. Plaintiff proceeded under § 2000e-5.

2. 42 U.S.C. § 2000e-2(c) (1970). Plaintiff first filed his charge with the Equal Employment Opportunity Commission (EEOC) pursuant to § 2000e-5(a). The EEOC found "reasonable cause" to believe that the defendant union had violated its statutory duty. Plaintiff's private civil action was brought after the EEOC failed to obtain voluntary compliance through conciliation. King v. Laborers Int'l Local 818, 443 F.2d 273, 275 (6th Cir. 1971).

3. In the trial court's instructions, it was noted that the "defendant admits that the plaintiff has not been used as a picket in some instances but that this action has been based upon the plaintiff's condition, attitude or actions while used as a picket and that he has never been denied such picket rights because of his race." 443 F.2d at 275.

4. The trial judge also charged the jury that for the plaintiff to prevail the union must have intentionally followed a practice or pattern of discrimination against him by reason of his race and that an isolated instance of discrimination was not sufficient. *Id.* at 275. The plaintiff contended that these two instructions were also defective since, in a private suit, an isolated instance of discrimination is sufficient to establish a violation of Title VII. The Sixth Circuit Court of Appeals ruled that the "private aggrieved party" is a vindicator of the public right and that his complaint under Title VII may be based on a single act of alleged discrimination. *Id.* at 278. *See also* St. Clair Teamsters v. Local 515, 422 F.2d 128 (6th Cir. 1969); Everett v. Trans World Airlines, 298 F. Supp. 1099, 1102 (W.D. Mo. 1970). The court found that even if an intentional pattern and practice to discriminate were required, the District Court erred in failing to explain that the intent may be inferred from the totality of the Union's conduct and the surrounding circumstances. 443 F.2d at 278.

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.[5] The court did not cite any cases in support of this proposition, but indicated simply that the language of the act compelled this result.[6]

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[7] and employment agencies.[8] 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.[9] 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[10] 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.

7. 42 U.S.C. § 2000e-2 (1970):

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

8. 42 U.S.C. § 2000e-2 (1970):

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

9. Griggs v. Duke Power Co., 401 U.S. 424 (1971); Marquez v. Omaha Dist. Sales Office, 440 F.2d 1157 (8th Cir. 1971); Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970).

10. 110 CONG. REC. 13,838 (1964).

sentatives[11] 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. Senate 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.[12] 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[13] (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 discrimination because of "race, color, religion, sex, or national origin",[14] the NLRA prohibits discrimination against employees for organizing or bargaining collectively.[15] 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[16] and a similar interest in the elimi-

11. 110 CONG. REC. 2728 (1964).

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).

13. 29 U.S.C. §§ 151-160 (1965).

14. 42 U.S.C. § 2000e-2 (1970).

15. 29 U.S.C. §§ 157-158 (1965).

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 exactly parallels the Title VII prohibition of discrimination by a union against its members; 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;[17] furthermore, the subject matter common to both acts is discrimination in the employment context.[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.[19] Under the second test, the complainant can recover if the illegal reason is the dominant or motivating factor in the decision.[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.[21]

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ployee's union association rather than his race, religion, or national origin. In this respect, the NLRA and Title VII are not directed at the same type of discrimination. Nonetheless, courts in NLRA cases have developed approaches to the problem of discrimination in the labor context. Since courts in Title VII cases must do so as well, an analysis of the former is relevant to consideration of the latter.

17. While the NLRA is aimed at employment discrimination inhibiting worker's freedom to organize and bargain collectively, it was enacted to eliminate the causes of obstructions of the free flow of commerce. 29 U.S.C. § 151 (1965). The Civil Rights Act of 1964, of which Title VII is a part, was also enacted under the commerce clause. *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294 (1964).

18. Both acts sought to eliminate discrimination in the terms and conditions of employment. "The Act [Title VII of the Civil Rights Act of 1964] . . . and the regulations of the EEOC are based on large part on the National Labor Relations Act and the regulations of the NLRB." I.B.E.W. Local 5 v. United States Equal Employment Opportunity Comm'n, 398 F.2d 248, 253 (3d Cir. 1968).

19. NLRB v. Ace Comb Co., 342 F.2d 841, 847 (8th Cir. 1965): ". . . we cannot find there is any substantial evidence in this record considered as a whole to support the conclusion that Woodriff was discharged *solely* because of his adherence to the union despite his objectionable behavior." (emphasis in original); Shattock Denn Mining Corp. v. NLRB, 362 F.2d 466, 470 (9th Cir. 1966); Fort Smith Broadcasting Co. v. NLRB, 341 F.2d 874, 878 (8th Cir. 1965).

20. This test seemingly allows for a balancing of the two reasons asserted and provides that the unlawful reason must be the stronger of the two, but not necessarily the sole reason.

> In order to supply a basis for inferring discrimination, it is necessary to show that one reason for the discharge is that the employee was engaging in protected activity. It need not be the only reason, but it is sufficient if it is a substantial or motivating reason, despite the fact that other reasons may exist.
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> Although the discharge of an inefficient or insubordinate union member or organizer is lawful, it may become discriminatory if other circumstances reasonably indicate that the union activity weighed more heavily in the decision to fire him than did dissatisfaction with his performance. NLRB v. Whitin Mach. Works, 204 F.2d 883, 885 (1st Cir. 1953).

21. NLRB v. Automotive Controls Corp., 406 F.2d 221, 226 (10th Cir. 1969); NLRB v. Arkansas Grain Corp., 392 F.2d 161, 167 (8th Cir. 1968); Betts Baking Co.

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*:

> [T]he evidence sufficied (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]

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v. NLRB, 380 F.2d 199, 205-06 (10th Cir. 1967); NLRB v. Barberton Plastics Prod., 354 F.2d 66, 68 (6th Cir. 1965); Tidwell v. American Oil Co., 332 F. Supp 424, 430 (D.C. Utah, 1971). *See also* NLRB v. Rubber Rolls, Inc., 388 F.2d 71, 74 (3d Cir. 1967). For a treatment of the employer's defense of business reasons or business necessity in Title VII cases *see* Robinson v. Lorillard Corp., 444 F.2d 791, 798-800 (4th Cir. 1971). For a discussion of the burden of proof in Title VII cases *see* Marquez v. Omaha District Sales Office, 440 F.2d 1157 (8th Cir. 1971).

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. ". . . [I]f 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, analagous case law under the NLRA, and strong policy considerations to support the result reached.

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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).