Fordham Urban Law Journal

Volume 5 | Number 2 Article 6

1977

Employers' Garnishment Policies - Do They Engender Racial Discrimination in Violation of Title VII and the Civil Rights Act of 1866?

Amy S. Vance

EMPLOYERS' GARNISHMENT POLICIES—DO THEY ENGENDER RACIAL DISCRIMINATION IN VIOLATION OF TITLE VII AND THE CIVIL RIGHTS ACT OF 1866?

I. Introduction

Before 1970, employers frequently discharged employees who had incurred a single wage granishment.[1] In that year, Congress placed limitations on this practice through the Consumer Credit Protection Act.[2] At present, twenty-six jurisidctions have enacted legislation with more stringent requirements.[3] The remaining jurisdictions, however, provide little[4] or no[5] protection, and many

1. *See In re* Jackson, 424 F.2d 1220, 1221 (7th Cir.), *cert. denied sub. nom.* Jackson v. International Harvester Co., 400 U.S. 911 (1970).

2. 15 U.S.C. § 1674(a) (1970).

3. *See* COLO. REV. STAT. ANN. § 5-5-106 (1973); CONN. GEN. STAT. ANN. § 52-361(h) (Cum. Supp. 1976); DEL. CODE ANN. tit. 10, § 3509 (1974); D.C. CODE ENCYCL. ANN. § 16-584 (Cum. Supp. 1976); FLA. STAT. ANN. § 222.11 (1961) (discharge provision not necessary since 100 percent of wages of head of family exempt from garnishment); HAWAII REV. STAT. § 378-32(1) (Special Supp. 1975); IDAHO CODE § 28-35-106 (Cum. Supp. 1976); IND. ANN. STAT. § 24-4.5-5-106 (Burns 1974); IOWA CODE ANN. § 642.21.2(c) (Cum. Supp. 1976); KAN. STAT. ANN. § 60-2311 (Cum. Supp. 1975); ME. REV. STAT. ANN. tit. 9A § 5.106 (Supp. 1976); MICH. COMP. LAWS ANN. § 600.4015 (Supp. 1976); MINN. STAT. ANN. § 571.61(1) (Supp. 1976); MONT. REV. CODES ANN. § 41.305.1 (Supp. 1975); N.Y.C.P.L.R. § 5252 (McKinney Supp. 1975); N.C. GEN. STAT. § 1-362 (1969) (discharge provision not necessary since 100 percent of debtor's wages earned sixty days before garnishment order is received, are exempt when it can be proved they are necessary for the support of the family); OKLA. STAT. ANN. tit. 14A § 5-106 (1972); ORE. REV. STAT. § 23.185(7) (1975); PA. STAT. ANN. tit. 42 § 886 (1966) (discharge provisions not necessary since garnishment not permitted on wages); CODE OF S.C. § 8-800-336 (Cum. Supp. 1975); S.D. COMPILED LAWS ANN. § 15-20-12 (1967) (discharge provision not necessary since 100 percent of wages earned sixty days before the garnishment order is received, are exempt when it can be proved they are necessary for the support of the family); TEX. CONST. art. 16, § 28 (current wages for personal services not subject to garnishment), *see also* TEX. REV. CIV. STAT. ANN. art. 4099 (1966); VT. STAT. ANN. tit. 12, § 3165 (1973); WASH. REV. CODE ANN. § 46A-2-131 (1976); WIS. STAT. ANN. § 425-110(1) (1974); WYO. STAT. ANN. § 40-5-106 (Supp. 1975).

4. The following state statutes provide minimal restrictions, most no harsher than the federally imposed limitation of prohibiting discharge for only one garnishment: CAL. LABOR CODE § 2929(b) (West Supp. 1976); GA. CODE ANN. § 46-303 (Cum. Supp. 1976); ILL. ANN. STAT. § 62-88 (Supp. 1976); KY. REV. STAT. ANN. § 427.140 (1970); MD. COMM. LAW CODE ANN. § 15-603 (1975); MO. ANN. STAT. § 525.030(5) (Vernon Cum. Supp. 1976); NEB. REV. STAT. § 25-1558(6) (1975); OHIO REV. CODE ANN. § 2715.01 (L) (Page Supp. 1975); UTAH CODE ANN. § 70B-5-106 (Supp. 1975); VA. CODE ANN. § 34-29(f) (1970).

5. Fourteen states maintain no restrictions on discharge whatsoever. They are: Alaska,

employers continue to suspend or discharge employees who incur large debts and multiple garnishments.[6]

Within the past several years, these employer policies have been subject to legal challenge by minority groups who claim that the policies are racially discriminatory. These groups insist that any practices which penalize poor workers will disproportionately affect racial minorities, who are more apt to be poor than white workers. Most policies have been contested under Title VII of the Civil Rights Act of 1964.[7]

Several litigants have also claimed that such practices violate 42 U.S.C. § 1981,[8] a modern codification of section 1 of the Civil Rights Act of 1866,[9] which forbids racial[10] discrimination in the making and

---

Alabama, Arizona, Arkansas, Louisiana, Massachusetts, Mississippi, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Rhode Island, and Tennessee.

6. There is little in the way of statistics to indicate on a national average how many employers maintain these restrictive policies. However, facts may be garnered from a 1967 study, D. CAPLOVITZ, CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT (1974). Of the 1,331 defaulting debtors who were surveyed in the cities of New York, Chicago, Detroit, and Philadelphia, *Id.* at 8, 54 percent of those interviewed stated that their employers maintained garnishment rules. *Id.* at 237.

7. Section 730(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1970), provides:

> It shall be an unlawful employment practice for an employer . . . 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 national origin . . . .

8. 42 U.S.C. § 1981 (1970). Section 1981 states:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Id.

9. Runyon v. McCrary, 427 U.S. 160, 168-70 (1976). The origin of section 1981 was vigorously disputed until the Supreme Court decision of Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1972). Prior to this decision, many courts had held that section 1981 was derived solely from the Civil Rights Act of 1870, ch. 114, § 816, 16 Stat. 144, which was passed after the fourteenth amendment, and thus required a showing of state action before a cause of action could be established. *See* Cook v. Advertiser Co., 323 F. Supp. 1212 (M.D. Ala. 1971), *aff'd on other grounds,* 458 F.2d 1119 (5th Cir. 1972); Winterhalter v. Three Rivers Motors Co., 312 F. Supp. 962 (W.D. Pa. 1970); Evans v. Local 2127, Int'l Bhd. of Elec. Workers, 313 F. Supp. 1354, 1362 (N.D. Ga. 1969). The Supreme Court in *Tillman* traced the language of section 1981 and its companion provision section 1982, prohibiting racial discrimination in the conveyance of property, to the Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27. *See* 410 U.S. 439-40 (1973). Finding that section 1981 stemmed from an act passed

enforcement of contracts.[11] These claims have not been resolved; litigants have abandoned their section 1981 claims on appeal,[12] or the court has found it unnecessary to decide the claim.[13]

This Note will evaluate the hypothesis that employment policies which mandate suspension or discharge for multiple garnishments are racially discriminatory. It will consider present methods of challenge, the lack of consensus between the courts and the Equal Employment Opportunity Commission (EEOC), and the issues which are emerging.

II. Historical Background and Present Methods of Suit

The controversy over the racial impact of employers' garnishment policies is a recent one. Almost no cases can be found before the 1970s. This situation can be explained by several facts. The federal government prohibits racial discrimination in employment through two major statutes: Title VII[14] and section 1981.[15] Title VII was not enacted until 1964. Section 1981 had become a forgotten statute until the 1967 Supreme Court decision of *Jones v. Alfred H. Mayer Co.*[16] Finally, controversies over garnishment practices were often

---

in furtherance of the thirteenth amendment, the Court stated that it could apply to private discrimination as well. *Id.*

10. Until the very recent Supreme Court case of McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976), there was considerable controversy whether section 1981 protected white persons as well as minorities. *McDonald* rejected the viewpoint which held that because of the phrase "as enjoyed by white citizens," *see* note 9 *supra*, the rights mentioned in section 1981 would only accrue to members of racial minorities. 427 U.S. at 286-27. After an exhaustive study of section 1981's legislative history, the Court held that the benefits of section 1981 were available to whites as well as minorities. *Id.* at 295-96.

11. *See* Young v. ITT, 438 F.2d 757, 760-61 (3d Cir. 1971); *see also* Comment, *Selecting a Remedy for Private Racial Discrimination: Statutes in Search of Scope*, 4 FORDHAM URBAN L.J. 303 (1976).

12. Robinson v. City of Dallas, 514 F.2d 1271 (5th Cir. 1975), *aff'g* 10 Fair Empl. Prac. Cas. 1233 (N.D. Tex. 1974); Wallace v. Debron Corp., 494 F.2d 674 (8th Cir. 1974), *rev'g* 363 F. Supp. 837 (E.D. Mo. 1973).

13. Terry v. International Harvester Co., 8 Fair Empl. Prac. Cas. 905 (N.D. Ind. 1974).

14. 42 U.S.C. §§ 2000e-2000e(17) (1970), *as amended*, (Supp. V, 1975).

15. *Id.* § 1981 (1970).

16. 392 U.S. 409 (1968). Apparently, before 1967, section 1981 had fallen into disuse. *Jones* concerned a claim of racial discrimination in the sale of property under section 1982. *Id.* at 412. In a brief aside from the central question of the scope and constitutionality of section 1982, *Id.* at 412, the Court addressed itself to the origin of section 1981, indicating that it derived from section 1 of the 1866 Civil Rights Act, not solely from the Civil Rights Act of 1870, as had often been alleged. *Id.* at 441-42 n.78. This was significant since it opened the door to claims that, because section 1981 was based on the thirteenth amendment, it could

settled by arbitration in the 1960s.[17]

The focus, scope, and procedures of Title VII and section 1981 are very different. Title VII is not concerned with racial discrimination alone. Instead, it provides a comprehensive scheme "to assure equality of employment opportunity by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin."[18] Its prohibitions apply to employers in industries affecting commerce which have fifteen or more employees.[19] Title VII also extends to state and local governments[20] and certain divisions of the federal government.[21] It does not extend to Indian tribes[22] and bona fide private membership clubs.[23]

Before an aggrieved party may prosecute a suit under Title VII, he must exhaust his administrative remedies by filing a charge with the EEOC[24] and wait for a preliminary attempt at conciliation and persuasion.[25] Once the litigant brings suit, the court may appoint an attorney for him,[26] dispense with court costs,[27] or award attorneys' fees should he prevail.[28] If a violation of Title VII is proven, the court may order any affirmative action it deems necessary[29] and may award back pay[30] for the two years prior to the filing of the complaint with the EEOC.[31] Some authority holds that neither compensatory (other than back pay) nor punitive damages may be recovered under Title VII.[32]

In contrast to the broad sweep but cumbersome procedures of

---

be used to combat racial discrimination in private employment. *See* Waters v. Wisconsin Steel Works of Int'l Harvester Co., 427 F.2d 476, 482 (7th Cir. 1970).

17. *See, e.g.*, Dayton Tire & Rubber Co., 69-2 Lab. Arb. Awards 5483 (1969)(McPherson, Arb.); Union Carbide Corp., 64-2 Lab. Arb. Awards 5924 (1964)(Donaldson, Arb.).

18. Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974).

19. 42 U.S.C. § 2000e(b) (Supp. V, 1975), *amending* 42 U.S.C. § 2000e(b) (1970).

20. *Id.*

21. *Id.* § 2000e-16 (Supp. V, 1975), *amending* § 2000e (1970); *see also* Day v. Mathews, 530 F.2d 1083, 1084 (D.C. Cir. 1976).

22. 42 U.S.C. § 2000e(b)(1) (Supp. V, 1975), *amending* 42 U.S.C. § 2000e(b)(1) (1970).

23. *Id.* § 2000e(b)(2) (Supp. V, 1975), *amending* 42 U.S.C. § 2000e(b)(2) (1970).

24. *See* Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 719 (7th Cir. 1969).

25. 42 U.S.C. § 2000e-5(b) (Supp. V, 1975), *amending* 42 U.S.C. § 2000e-5(a) (1970).

26. *Id.* § 2000e-5(f)(1) (Supp. V, 1975).

27. *Id.*

28. *Id.* § 2000e-5(k) (1970).

29. *Id.* § 2000e-5(g) (Supp. V, 1975), *amending* 42 U.S.C. § 2000e-5(g) (1970).

30. *Id.*

31. *Id.*

32. *See* Johnson v. REA, Inc., 421 U.S. 454, 458 (1975).

Title VII, section 1981 attempts, with minimal procedural limitations, to eliminate racial discrimination solely in the area of contracts.[33] Because courts consider the employer-employee relationship a contractual one, they have extended section 1981 to both public[34] and private[35] employment situations.[36]

A litigant employing section 1981 need not exhaust administrative remedies through the EEOC before he files suit.[37] However, he may not avail himself of the statutory benefits of Title VII. There are no provisions for appointment of counsel, dispensation of court costs, or recovery of attorneys' fees.[38] But a section 1981 claimant may obtain compensatory and punitive damages, and unrestricted recovery of back pay-benefits possibly unavailable to Title VII litigants.[39]

Despite differences between the two statutes, the criteria used to determine their violation through racial discrimination are the same.[40] The test was laid down by the Supreme Court in *Griggs v. Duke Power Co.*[41] Where a plaintiff can establish that an employment practice, even though neutral on its face, has a disproportionate effect on a racial group, *Griggs* holds that there is a prima facie showing of racial discrimination.[42] Unless the employer can prove that the practice is required by business necessity, the plaintiff will recover.[43] To operate as a business necessity, the employment practice must be related to job performance.[44]

There is some indication in *General Electric Co. v. Gilbert*,[45] that more than a disproportionate effect must be shown before a seemingly neutral employment practice can be labeled discriminatory.[46]

---

33. *Id.* at 459.
34. *See* Maybanks v. Ingraham, 378 F. Supp. 913, 916-17 (E.D. Pa. 1974).
35. Johnson v. REA, Inc., 421 U.S. 454, 459-60 (1975).
36. *See* note 11 *supra*.
37. Johnson v. REA, Inc., 421 U.S. 454, 460-61 (1975).
38. 42 U.S.C. § 1981 (1970).
39. Johnson v. REA, Inc., 421 U.S. 454, 460 (1975).
40. *See* Carter v. Gallagher, 452 F.2d 315, 323 (8th Cir. 1971).
41. 401 U.S. 424 (1971). In *Griggs*, the Court held defendant's facially neutral employment test discriminatory because the effect of the test was to deny blacks equal hiring and promotional opportunities. *Id.* at 431-32.
42. *Id.* at 430-31.
43. *Id.* at 431.
44. *Id.*
45. 97 S. Ct. 401 (1976).
46. *Id.* at 408.

In a brief aside from the central question of sex discrimination presented by General Electric's pregnancy disability policy,[47] the Supreme Court seemed to indicate that some showing of intent may be necessary to violate Title VII.[48] However, the Court's comment is very cryptic, and it is too early to tell whether *General Electric* will undermine the strict standards of *Griggs*.

There is a dearth of case law under section 1981 with respect to employers' garnishment practices. Although no explanation is ever offered as to why section 1981 is dropped by litigants[49] or ignored[50] by courts, the reason may lie in the greater flexibility of benefits offered under Title VII.[51] Absent decisions under section 1981, the discriminatory nature of such employment policies may be examined through a discussion of suits decided under Title VII.

III. Federal Cases Interpreting Title VII

The earliest Title VII suit was *Johnson v. Pike Corp. of America*.[52] Plaintiff black warehouseman was dismissed for failing to obey a company rule[53] against garnishments on employee wages.[54] He conceded that defendant never meant to engage in racial discrimination, but asserted that the actual effect of the rule was to discriminate against blacks.[55] The federal district court accepted plaintiff's contention[56] as to the discriminatory effect for several reasons.

Utilizing the *Griggs* approach, the court first inquired whether the company policy had a disproportionate effect on defendant's black

---

47. *Id.* at 404.

48. *Id.* at 408. The court merely stated:

> [O]ur cases recognize that a prima facie violation . . . can be established in *some circumstances* [emphasis added] upon proof that the *effect* of an otherwise facially neutral plan or classification is to discriminate against the member of one class or another . . . . Even assuming that it is not necessary in this case to prove intent to establish a prima facie violation . . . the respondents have not made the requisite showing of gender-based effects.

Id.; see also comments in the concurring opinions by Justices Stewart and Blackmun, *Id.* at 413, and in the dissenting opinion of Justices Brennan and Marshall. *Id.* at 417.

49. *See* note 12 *supra*.

50. *See* note 13 *supra*.

51. *See* text accompanying notes 24-39 *supra*.

52. 332 F. Supp. 490 (C.D. Cal. 1971).

53. Company Rule 6 stated: "Conduct your personal finances in such a way that garnishments will not be made on your wages." *Id.* at 492.

54. *Id.*

55. *Id.*

56. *Id.*

employees.[57] No statistics had been offered to show that defendant had discharged more black employees than white employees because of a no garnishment rule. However, the court relied on several studies[58] to conclude that minority groups suffered more from wage garnishment than whites.[59] Judge Warren J. Ferguson attributed this result to the over-representation of minorities in the "lower social and economic segments of our society."[60] Having concluded that such wage garnishment policies were apt to have a disproportionate effect on minority employees, the court addressed itself to the second element of the *Griggs* formula: the defense of business necessity.

Defendant asserted that business necessity justified its practice.[61] The expense and time needed for its clerical staff to attend to garnishment claims, and the loss of efficiency by garnished employees mandated the policy.[62] The court rejected defendant's argument.[63] Conceding that the boundaries of the *Griggs* concept of business necessity were uncertain, the court nevertheless chose to make the standard used in *Griggs* an exclusive consideration, and to hold that a practice not related to the employee's ability to perform his job properly, could not be justified by business necessity.[65] Thus, considerations of inconvenience and cost were unacceptable.[66] Finally, the court gave slight attention to defendant's claim that garnished employees were apt to be less efficient since they were not receiving the fruits of their labor.[67] The court deemed such a hypoth-

57. *Id.* at 494.

58. WESTERN CENTER OF LAW AND POVERTY, WAGE GARNISHMENT, IMPACT AND EXTENT IN LOS ANGELES COUNTY (Los Angeles, 1970); D. CAPLOVITZ, THE POOR PAY MORE (1963).

59. 332 F. Supp. at 494.

60. *Id.* According to the Bureau of the Census, in 1970, 34 percent of black families and unrelated individuals had incomes below the "low" income line, while only 10 percent of white families and unrelated individuals did. U.S. BUREAU OF THE CENSUS, DEP'T OF COM., THE SOCIAL AND ECONOMIC STATUS OF NEGROES IN THE UNITED STATES 35 (1970).

61. 332 F. Supp. at 495.

62. *Id.*

63. *Id.*

64. *Id. See* text accompanying notes 43-44 *supra.*

65. 332 F. Supp. at 495. The soundness of this narrow formulation was criticized by many commentators. *See* Comment, *Title VII: Discriminatory Results and the Scope of Business Necessity*, 35 LA. L. REV. 146, 153 (1974); 85 HARV. L. REV. 1482, 1484-85 (1972); 37 MO. L. REV. 705, 707 (1972).

66. 332 F. Supp. at 495.

67. *Id.*

esis speculative, and declined to adopt it.[68]

Johnson was the first case to hold that employment practices requiring disciplinary sanctions for garnished employees were violative of Title VII. Other suits quickly ensued.

In *Wallace v. Debron Corp.*,[69] a black welder, who was discharged when his wages were garnished twice within one year,[70] alleged that the dismissal was due to a racially discriminatory employment practice in violation of section 1981, and Title VII.[71] Declaring that plaintiff had failed to show a racially discriminatory practice, the district court dismissed both claims.[72]

On appeal, plaintiff pursued only the Title VII claim.[73] The Eighth Circuit reversed.[74] It rejected the district court's conclusion that Title VII was inconsistent with the garnishment restrictions embodied in the federal Consumer Credit Protection Act.[75] The court of appeals also declined to adopt the defendant's interpretation of *Griggs* that facially neutral policies, not perpetuating racial discrimination, were not violative of Title VII.[76] Although the defendant had admitted the adverse racial impact of its employment practice on appeal,[77] the court of appeals seemed to base its decision on an EEOC determination[78] which had adopted the *Johnson*[79] holding.[80] Reasoning that many blacks were poor and thus more likely to be garnished than whites, the EEOC had declared discriminatory an employment practice similar to the one in *Debron*.[81] While never explicitly endorsing the hypothesis of the EEOC determination, the Eighth Circuit nevertheless went on to consider the defense of business necessity. This would seem to indicate that it believed a prima facie case had been established.

---

68. *Id.*
69. 363 F. Supp. 837 (E.D. Mo. 1973).
70. *Id.*
71. 363 F. Supp. at 838.
72. *Id.* at 839.
73. 494 F.2d 674, 675 n.2 (8th Cir. 1974).
74. *Id.* at 677.
75. *Id.* at 676-77.
76. *Id.* at 675-76.
77. *Id.* at 675.
78. EEOC Decision No. 74-27, 6 Fair Empl. Prac. Cas. 1248 (1973).
79. 332 F. Supp. at 490.
80. 494 F.2d at 675 n.4.
81. 6 Fair Empl. Prac. Cas. at 1248-49.

Defendant in *Debron* asserted the same justifications for its employment practice as did the defendant in *Johnson.* Perhaps aware of prior judicial disinclination to accept claims of cost and inconvenience, the defendant emphasized its belief that garnishment resulted in decreased employee efficiency.[83]

The court of appeals formally disavowed any intent to set further guidelines for determining business necessity.[84] Nevertheless, it proposed a new standard. To satisfy the defense of business necessity, the court declared an employer must show not only that "its garnishment policy fosters employee productivity . . . [but also] that there is no . . . acceptable alternative that will accomplish that goal 'equally well with a lesser differential racial impact.' "[85] Stating that a factual question remained with respect to the business necessity of defendant's policy, the court held the granting of summary judgment erroneous,[86] and remanded the case for a consideration of the business necessity defense.[87]

Defendant in *Debron* conceded the racially discriminatory nature of its employment practice.[88] In spite of this concession, the court of appeals seemed to predicate its decision on the *Johnson* hypothesis that minorities, because they are poor, are more likely to suffer garnishment than whites.[89] Although not wholeheartedly endorsing the *Johnson* test of business necessity,[90] the court of appeals devised a stricter standard. Not only must the employer's practice foster productivity, but there must be no alternative which would accomplish the same goal with less racial impact.[91] The Eighth Circuit in *Debron* thus appears to have found that garnishment policies will

82. 332 F. Supp. at 495.
83. 494 F.2d at 677.
84. *Id.*
85. *Id.* This new standard appears to be an amalgam of the *Johnson* requirements of relation to job performance, 332 F. Supp. at 495, and a formula espoused in the prior Eighth Circuit decision of United States v. St. Louis-San Francisco Ry., 464 F.2d 301 (8th Cir. 1972)(en banc), *cert. denied*, 409 U.S. 1116 (1973). There, the court declared: "The system in question must not only *foster* safety and efficiency, but must be *essential* to that goal." 464 F.2d at 308.
86. 494 F.2d at 677.
87. *Id.*
88. *Id.* at 675.
89. *See* note 58 *supra* and accompanying text.
90. 332 F. Supp. at 495.
91. 494 F.2d at 677.

be violative of Title VII unless the defendant can prove that its practice is justified by overwhelming business necessity.

The reasoning employed by the courts in *Johnson*[92] and *Debron*[93] has not been universally accepted. One court ignored it altogether.[94] Others adamantly declined to adopt it.[95]

In *Terry v. International Harvester Co.*,[96] the United States District Court for the Northern District of Indiana confronted a factual situation similar to that in *Johnson*[97] and *Debron.*[98] A black employee had been suspended for two months for violation of a company policy against garnishments.[99] He asserted that both the employer and union which had negotiated the policy had violated Title VII since such a policy had a disproportionate effect on blacks.[100] In a very brief opinion, the court ignored both the *Johnson* and *Debron* cases.[101] Since it could find no racial irregularities in the application of the policy due to the absence of discriminatory intent, the court concluded that the practice did not violate Title VII.[102] Yet *Griggs* specifically held that the consequences of an employment practice, not the intent behind it, should be determinative of a Title VII violation.[103]

In *Robinson v. City of Dallas,*[104] the Fifth Circuit rejected the *Johnson*[105] formula. Plaintiff had resigned after being suspended for disobeying a city personnel rule requiring the payment of "just debts."[106] He was not actually garnished, since the Texas Constitution forbids garnishment.[107] However, after his creditor notified the

92. 332 F. Supp. at 490.
93. 494 F.2d 674 (8th Cir. 1974).
94. *See* text accompanying notes 96-103 *infra.*
95. *See* text accompanying notes 104-23 *infra.*
96. 8 Fair Empl. Prac. Cas. 905 (N.D. Ind. 1974).
97. *See* notes 52-68 *supra* and accompanying text.
98. *See* notes 69-91 *supra* and accompanying text.
99. 8 Fair Empl. Prac. Cas. at 906.
100. *Id.*
101. *Terry* was decided on August 26, 1974. *Id.* at 905. This was after both *Debron*, which came down on March 28, 1974, and *Johnson*, which was decided in 1971.
102. 8 Fair Empl. Prac. Cas. at 907.
103. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). *See also* text accompanying notes 45-48 *supra.*
104. 514 F.2d 1271 (5th Cir. 1975), *aff'g.* 10 Fair Empl. Prac. Cas. 1233 (N.D. Tex. 1974).
105. 332 F. Supp. at 494.
106. 514 F.2d at 1272.
107. TEX. CONST. art. 16, § 28.

city that a debt was outstanding, plaintiff was suspended.[108] Asserting a constructive discharge, plaintiff alleged violations[109] of section 1981 and Titles VI[110] and VII[111] of the Civil Rights Act of 1964. The district court, finding no evidence of racial discrimination, held for the defendant.[112]

On appeal, plaintiff abandoned all claims except that under Title VII.[113] The Fifth Circuit affirmed the no discrimination finding[114] and rejected both of plaintiff's methods of proof. Acknowledging that statistics alone may be sufficient to prove a prima facie case,[115] the court found that the statistics involving persons actually disciplined under the city policy[116] were insufficient to prove that the employment practice had a disproportionate effect on blacks.[117] The court then addressed plaintiff's second theory, *i.e.* the syllogism engendered by *Johnson.*[118] Plaintiff offered the following argument: (1) poor persons are more likely to be unable to pay their just debts than the non-poor; (2) blacks comprise a disproportionate percentage of the poor in Dallas; (3) thus, an employment practice which disciplines those who fail to pay their just debts will have a disproportionate effect on blacks.[119]

The court of appeals agreed that blacks were more likely to be among the poor than whites.[120] However, the court stated that the plaintiff had failed to provide statistical evidence to prove his first contention.[121] In addition, the court found the theory questionable and refused to take judicial notice of such a phenomenon.[122] By rejecting this formula, the Fifth Circuit indicated that concrete sta-

108. 514 F.2d at 1272 n.5.
109. 10 Fair Empl. Prac. Cas. at 1234.
110. 42 U.S.C. §§ 2000d - 2000d-4 (1970).
111. *Id.* §§ 2000e - 2000e-17 (1970), *as amended*, (Supp. V, 1975).
112. 10 Fair Empl. Prac. Cas. at 1234.
113. 514 F.2d at 1272.
114. *Id.*
115. *Id.* at 1273.
116. Of the seven employees disciplined under the "just debts" rule of the City of Dallas between 1965 and 1973, only three were black. *Id.*
117. *Id.*
118. 332 F. Supp. at 494.
119. 514 F.2d at 1273.
120. *Id.*
121. *Id.*
122. *Id.*

tistical evidence of the discriminatory effect of employment policies would be required to establish a violation of Title VII.[123]

IV. EEOC Decisions

While the federal courts have differed in their acceptance of the *Johnson* rationale,[124] the EEOC has consistently endorsed it. In *EEOC Decision No. 74-27,*[125] complainant, a black male, charged his employer with maintaining a discriminatory garnishment policy in violation of Title VII.[126] The EEOC found reasonable cause to believe the policy was discriminatory.[127] Alluding to a survey, which appears to have been employed in *Johnson,*[128] the EEOC stated that minority groups were more likely to suffer garnishment than whites because they were more apt to be poor.[129] The commission then set out a general rule: due to their disproportionate effect, any such practices would in the future be in violation of Title VII, unless it could be shown that they were supported by a bona fide business necessity.[130] The commission defined this as: "demonstrably related to job performance and . . . otherwise predicated and supported by considerations of business necessity."[131]

Another commission decision, *EEOC Decision No. 74-34,*[132] openly endorsed the *Johnson* formula.[133] The commission also indicated that a business necessity would be very unlikely for such policies, since "the charging party, who had incurred several prior garnishments, and was employed for fifteen years . . . strongly suggests that garnishments are in no way related to successful job performance or that they affect efficiency or safety."[134]

V. Conclusion

An analysis of the case law and decisions of the EEOC indicates

123. *Id.*
124. *See* 332 F. Supp. at 494.
125. 6 Fair Empl. Prac. Cas. 1248 (1973).
126. *Id.*
127. *Id.* at 1249.
128. 332 F. Supp. at 494.
129. 6 Fair Empl. Prac. Cas. at 1249.
130. *Id.*
131. *Id.*
132. 6 Fair Empl. Prac. Cas. 1249 (1973).
133. *Id.* at 1250.
134. *Id.*

that a Title VII violation will occur only when the *Johnson*[135] reasoning is adopted. Otherwise, there is usually insufficient evidence to indicate the bias or non-bias of these policies in individual cases. In *Johnson*, no company-wide statistics were offered. The discrminatory impact was assessed only through the acceptance of generic studies. While the defendant in *Debron* was willing to concede the discriminatory effect of its practice,[136] no statistics were offered. The court seemed to justify its decision on the basis of *EEOC Decision No. 74-27,*[137] which was itself an adaptation of the reasoning in *Johnson.*[138]

In *Robinson v. City of Dallas,*[139] the actual statistics offered were inconclusive,[140] and the court based its finding of no discrimination on the rejection of the broad *Johnson* hypothesis.[141] The decision in *Terry v. International Harvester*[142] was poorly reasoned and ignored the question of statistical evidence completely. But both EEOC decisions on point, *No. 74-27*[143] and *No. 74-34,*[144] apparently based their conclusions on the *Johnson* syllogism, not on any individual statistics.

Because both the judicial and EEOC decisions turn on the reasoning set forth in *Johnson,* it becomes imperative to examine the accuracy of this syllogism. The most tenuous link in the *Johnson* chain is the premise that the poor are more likely to be garnished than the non-poor. There is ample evidence to document the second premise that minorities are more apt to be poor than whites.[145] A recent study,[146] by the same author relied upon by the *Johnson* court,[147] documents, albeit with rather dated statistics, the presumption that the poor are more likely to be garnished than the non-poor.

---

135. 332 F. Supp. at 494.
136. 494 F.2d 674 (8th Cir. 1974).
137. *Id.* at 675 n.4.
138. *See* 6 Fair Empl. Prac. Cas. 1248, 1249 (1973).
139. 514 F.2d 1271 (5th Cir. 1975).
140. *Id.* at 1273.
141. *Id.*
142. 8 Fair Empl. Prac. Cas. 905 (N.D. Ind. 1974).
143. 6 Fair Empl. Prac. Cas. 1248 (1973).
144. 6 Fair Empl. Prac. Cas. 1249 (1973).
145. *See* note 60 *supra.*
146. *See* CAPLOVITZ, *supra* note 6.
147. 332 F. Supp. at 494.

In a 1967[148] survey of 1,331[149] defaulting debtors[150] in the cities of New York, Chicago, Detroit, and Philadelphia,[151] the author found that income was a significant factor in default.[152] The data showed that 78 percent of those defaulting had annual incomes of less than $8,000, while only 54 percent of non-farm families had incomes of less than $8,000.[153] Although the survey concerned defaulting debtors in general, and was not restricted to those who were garnished,[154] it does indicate that persons who fail to pay their debts tend to be poorer than the general population. In addition, a comparison of the occupational status of persons in the survey who actually were garnished, indicated that those who occupied lower positions on the job scale were more likely to be garnished.[155] Since job status is ordinarily related to income earned, this further points to the conclusion that the poor tend to be garnished more frequently than the non-poor.

The racial breakdown of the survey showed a much higher percentage of minorities affected by garnishment than whites. Of the debtors surveyed, 50 percent of the blacks and 59 percent of the Puerto Ricans had been subject to garnishment. Only 36 percent of the whites had been garnished.[156] Thus, the *Johnson* syllogism would seem to be accurate, and employment practices which penalize workers who are garnished would appear to have a disproportionate effect on minorities.

The remaining question is the issue of business necessity. The courts and the EEOC have not yet decided the appropriate standard. If the criteria advocated by the *Johnson* court are used, gar-

148. CAPLOVITZ, *supra* note 6, at 325.

149. *Id.* at 8.

150. Defaulting debtors were defined as those who failed to keep up with their credit payments. *Id.* at 1.

151. *Id.* at 8.

152. *Id.* at 14.

153. *Id. See* Table 2.1. *Id.*

154. This is especially true in Philadelphia, one of the cities surveyed, where no garnishment is allowed. *Id.* at 227.

155. *Id.* at 233. Of the high white collar debtors (professionals, technical and managerial personnel, officials and proprietors) surveyed, 37 percent had been garnished, as compared with 46 percent among lower white collar workers (clerical and sales personnel). Among the higher blue collar debtors (craftsmen and foremen) surveyed, 52 percent had been garnished and 48 percent of the lower blue collar debtors (operatives, private household, service and non-farm laborers) suffered the same fate. *Id.* at 17, 233.

156. *Id.*

nishment policies will violate Title VII, unless they can be shown to relate to an employee's ability to perform his job effectively.[157] The EEOC, in *EEOC Decision No. 74-34*,[158] has indicated its skepticism that garnishment will ever impair an employee's job performance.[159] However, the EEOC seems to favor some consideration of the cost and inconvenience to the employer.[160] The Eighth Circuit requires an even more formidable showing.[161] Not only must the practice be job related, but there must be no acceptable alternative with a lesser racial impact.[162] Until a consensus is reached, it will be exceedingly difficult to determine whether such policies violate Title VII and section 1981.

The legality of such employment practices is therefore left uncertain. At present, it would seem that adequate proof can be made that they have a disproportionate effect on minority employees. Yet, if a satisfactory showing of business necessity is presented, they will not be violative of Title VII or section 1981. What will be a satisfactory showing will continue to vary from jurisdiction to jurisdiction. The trend, however, is toward finding such practices racially suspect, and employers who maintain such policies would be wise to reconsider them.

Amy S. Vance

157. 332 F. Supp. at 495.
158. 6 Fair Empl. Prac. Cas. 1249 (1973).
159. *Id.* at 1250.
160. *See* EEOC Decision No. 74-27, 6 Fair Empl. Prac. Cas. 1248, 1249 (1973).
161. *See* Wallace v. Debron Corp., 494 F.2d 674 (8th Cir. 1974).
162. *Id.* at 677.