# The Failure of the Integrated Enterprise Test: Why Courts Need To Find New Answers to the Mnltiple-Employer Pnzzle in Federal Discrimination Cases

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We live in a society of increasingly complex relationships, where even basic concepts and paradigms are subject to scrutiny and change. The employment relationship has not been spared the complexity that marks these modern times. The increase in independent and temporary work, the proliferation of tiny technology-based firms, and the creation of new corporate forms have altered the world of work forever.[1]

Many employees no longer punch a time clock for the traditional employers who formed the core of American work for years. In short, the world of employment courts deal with today is simply not what it was when Congress passed the landmark Civil Rights Act of 1964.[2] Title VII of the Act forbade employers from discriminating against employees on the basis of race, gender, religion, or national origin.[3] That seemingly simple statement has been complicated by the complex corporate employment systems of today. Many American workers can no longer answer a simple question: Who is my employer?[4]

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1. *See, e.g.*, THE 1996 EXECUTIVE FILE: HOT EMPLOYMENT ISSUES 77-78 (1996). According to the Equal Employment Opportunity Commission ("EEOC"), the number of workers in new, temporary employment arrangements has continued to rise and includes a new class of professional workers. *See* Equal Employment Opportunity Comm'n, *EEOC Notice 915.002 (Dec. 3, 1997)* (visited Mar. 6, 2000) <http://www.eeoc.gov/docs/conting.txt>; *see also* U.S. DEP'T OF LABOR, COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, REPORT AND RECOMMENDATIONS 39-40 (1994) ("[M]any federal statutes limit employer status to those parties responsible for hiring or firing, setting schedules, or actually issuing the worker's paycheck. This model of the employment relationship is badly out of date ...."). However, fear of increased complexity in the employment relationship does not appear to be wholly new, as a Brookings Institute report bemoaned the existence of new employment structures a scant five years after Title VII's passage. *See* RICHARD P. NATHAN, JOBS & CIVIL RIGHTS: THE ROLE OF THE FEDERAL GOVERNMENT IN PROMOTING EQUAL OPPORTUNITY IN EMPLOYMENT AND TRAINING 67 (1969) ("Discrimination today is much more subtle than in the past. Increasingly, the EEOC must handle cases involving institutionalized and highly sophisticated systems for selecting and promoting workers.").

2. 42 U.S.C. § 2000e (1994).

3. *See id.* § 2000e-2(a)(1) ("It shall be an unlawful employment practice for an employer [to discriminate against an individual] because of such individual's race, color, religion, sex, or national origin.").

4. This confusion is only exacerbated by the circularity and uncertainty embedded in the actual definitions of employer and employee in Title VII. Employer is defined as "a person engaged in an industry affecting commerce who has fifteen or more employees." *Id.* § 2000e(b). An employee is "an individual employed by an employer." *Id.* § 2000e(f). Taken as

This Note analyzes one of the various tests courts have created to answer this question—the integrated enterprise test. The test analyzes "whether the management, ownership, and operations of nominally separate business entities are, in fact, so interrelated that for purposes of Title VII they should be treated as a single employer."[5] Under this analysis, courts consider a variety of factors in determining whether two or more distinct entities should be liable for the same discriminatory conduct.[6] This Note aims to show that this test is an over-extension of liability under employment discrimination statutes and should be reformulated to accurately reflect the nuances of federal discrimination law.[7]

To this end, Part I will set out the general scope of the integrated enterprise test and will place the test in context by illustrating the ways in which it arises in federal court cases. Next, Part II will detail the history of the test, including its growth in National Labor Relations Board ("NLRB" or "Board") cases, its place in the legislative history of Title VII, and the subsequent importation of the test into the employment discrimination context. Part III will then examine the arguments for and against application of the test in the discrimination context, including an examination of the key distinctions between labor and discrimination law. This analysis will lead to the conclusion that the test is misapplied in cases of discrimination because it leads to liabilities wholly outside of Congress's intent and inappropriate to discrimination cases. Finally, Part IV of this Note will suggest several key alternatives to the integrated enterprise test so that the courts may fashion appropriate remedies for complex multiple-employer problems. Special attention is paid to an alternative promulgated by the Fifth Circuit that aims to allow courts to focus their analysis on actual discrimination and not corporate formalities.

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a whole, the definitions shed little light on the matter. This confusion in the statutory definitions has hardly gone unnoticed. *See, e.g.*, U.S. DEP'T OF LABOR, *supra* note 1, at 36. ("[T]he definition of employee in labor, employment and tax law should be modernized, simplified and standardized.").

5. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION COMPLIANCE MANUAL app. 605-G at 3 (1995).

6. *See, e.g.*, Rogers v. Sugar Tree Prods., Inc., 7 F.3d 577 (7th Cir. 1994); Johnson v. Flowers Indus., 814 F.2d 978 (4th Cir. 1987); Rittmeyer v. Advance Bancorp, Inc., 868 F. Supp. 1017 (N.D. Ill. 1994).

7. Title VII has played a leading role in most employment discrimination doctrines, and the integrated enterprise test is no exception. However, the integrated enterprise analysis is equally applicable (and has in fact been applied) to the full range of federal employment discrimination statutes. *See* Sharpe v. Jefferson Distrib. Co., 148 F.3d 676, 678 (7th Cir. 1998) ("Many a case applies to the employment-discrimination laws (Title VII, the ADA, the ADEA, and so on) the same approach the National Labor Relations Board uses to determine whether multiple corporate entities should be treated as one employer."). This consistency stems mostly from the fact that subsequent employment discrimination statutes have shared Title VII's remedial purposes as well as similar if not identical definitions of employer. *Compare* 42 U.S.C. § 2000e(b) (setting forth Title VII's definition of employer), *with* Age Discrimination in Employment Act, 29 U.S.C. § 630 (1994) ("ADEA") (defining employer almost precisely the same as Title VII). Thus this Note will treat application of the test as the same under all federal employment discrimination statutes.

## I. THE INTEGRATED ENTERPRISE FRAMEWORK: FACTORS AND APPLICATION

The integrated enterprise test, which in older cases is often referred to as the single employer test,[8] is simple in its components but complex in the contexts in which it arises. The explicit language of the test is clear and courts have consistently relied on the same fundamental factors when applying the integrated enterprise test.[9] However, the true power and importance of the test lies not in its text but in the situations in which it is invoked. Thus, to truly examine the significance of the test, one must analyze both its factors and the circumstances in which it is applied.

### *A. The Factors of the Integrated Enterprise Test*

The integrated enterprise test is aimed at allowing courts to consider two possible employers as a single entity. In determining whether two entities are sufficiently integrated, courts have regularly invoked four factors: interrelated operations, control over labor relations, common management, and common ownership.[10] These four factors form the heart of the test, but courts have also set out guidelines as to how to apply them. First, most courts have made clear that no single factor is dispositive.[11] The courts have also held that the test is meant to be "flexible" to fit the situation facing the court and not rigidly applied.[12] In addition, courts have stated that the factors are intended to be used to portray a business enterprise that is "highly integrated with respect to ownership and operations."[13] These concerns animate the federal courts' application of the integrated enterprise factors, which will now be dealt with in turn.

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8. *See* Armbruster v. Quinn, 711 F.2d 1332, 1335 (6th Cir. 1981).

9. *See* Frank v. U.S. West, Inc., 3 F.3d 1357, 1362 (10th Cir. 1993); *Armbruster*, 711 F.2d at 1336.

10. *See Sharpe*, 148 F.3d at 679; *Rogers*, 7 F.3d at 581; *Frank*, 3 F.3d at 1357, 1362-63; *Johnson*, 814 F.2d at 981; York v. Tennessee Crushed Stone Ass'n, 684 F.2d 360, 362 (6th Cir. 1982); *Armbruster*, 711 F.2d at 1332, 1335; Baker v. Stuart Broad. Co., 560 F.2d 389, 391-92 (8th Cir. 1977); Richard v. Bell Atl. Corp., 976 F. Supp. 40, 43 (D.D.C. 1997); *Rittmeyer*, 868 F. Supp. at 1020. The Supreme Court has accepted the test in cases arising under the National Labor Relations Act. *See* Radio & Television Broad. Technicians Local Union 1264 v. Broadcast Serv. of Mobile, Inc., 380 U.S. 255, 256 (1965) (per curiam) (expressing the test in terms of the NLRB's jurisdiction). No Supreme Court case has applied the test in an employment discrimination setting. Indeed, academics seemingly have also ignored the test as there appears to be a dearth of scholarship addressed to it.

11. *See* Swallows v. Barnes & Noble Book Stores, Inc., 128 F.3d 990, 994 (6th Cir. 1997) ("None of these factors is conclusive, and all four need not be met in every case."); *Rogers*, 7 F.3d at 582 ("[T]he presence or absence of any one factor is not controlling.").

12. Cook v. Arrowsmith Shelburne, Inc., 69 F.3d 1235, 1240 (2d Cir. 1995).

13. *Armbruster*, 711 F.2d at 1338.

### 1. Centralized Control of Labor Relations and Personnel

Most courts applying the integrated enterprise test have come to the conclusion that the labor control factor is the most important.[14] The courts generally require that the control exercised by one entity over another must be unusually strong or outside the typical relationship. For example, the Tenth Circuit has held that "[t]o satisfy the control prong, [the] parent must control the day-to-day employment decisions of the subsidiary."[15] This control must transcend the mere promulgation of general employment policies, and must reach the level of employment decisions affecting employees of the second entities.[16] The Fifth Circuit has held that "[s]uitable evidence of centralized labor and employment decisions includes parental control of hiring, firing, promoting, paying, transferring, or supervising employees of the subsidiary."[17]

A typical application of the control prong is found in the Second Circuit case of *Cook v. Arrowsmith Shelburne, Inc.*[18] The case centered on whether a parent company could be considered a single employer along with its subsidiary in a Title VII gender discrimination suit.[19] In holding that the facts of the case satisfied the control prong, the court focused on the fact that all applications for employment with the subsidiary were passed along to the parent.[20] The court also noted that the parent controlled all major human resources decisions of the subsidiary.[21] Most importantly, according to the court, the plaintiff herself had been hired by an employee of the parent and fired by a manager paid by the parent.[22] This type of control in the basic, direct employment affairs of another entity is sufficient to meet the control prong of the integrated enterprise test.

### 2. Interrelation of Operations

When courts analyze interrelation of operations, their focus tends to be, as in the control prong, on the level of day-to-day authority exercised by the second entity over

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14. *See Swallows*, 128 F.3d at 994; *Rogers*, 7 F.3d at 582; *Rittmeyer*, 868 F. Supp. at 1023; *cf. Armbruster*, 711 F.2d at 1338 ("All four criteria need not be present in all cases and even when no evidence of common control of labor relations is presented, the circumstances may be such that the . . . single-employer doctrine is applicable."). The Fifth Circuit has taken this control analysis one step further and held that the relevant control must relate to the actual discriminatory conduct over which the litigation arose. *See* Lusk v. FoxMeyer Health Corp., 129 F.3d 773, 777 (5th Cir. 1997). This important change to the basic integrated enterprise framework will be explored *infra* Part IV during the discussion of alternatives to the interrelated enterprise test as usually applied.

15. *Frank*, 3 F.3d at 1363.

16. *See id.*; *Rittmeyer*, 868 F. Supp. at 1023.

17. *Lusk*, 129 F.3d at 780 n.8.

18. 69 F.3d 1235 (2d Cir. 1995).

19. *See id.* at 1237.

20. *See id.* at 1241.

21. *See id.*

22. *See id.* at 1242.

the first.[23] The major difference is that this analysis centers on control of general business operations and not matters of labor relations.[24] The prong essentially amounts to an examination of shared business functions. The EEOC has advised analyzing such evidence as

> the sharing of management services, such as check writing, the preparation of mutual policy manuals, and the completion of business licenses; the sharing of payroll and insurance programs; the sharing of serviees of managers and personnel; using employees on the payroll of one entity to perform work [for] the benefit of another nominally separate entity; sharing the use of office space, equipment and storage; providing services principally for the benefit of another entity or operating the entities as a single unit.[25]

It should be noted, however, that the fact that managers of one entity report to managers of another is not dispositive of the interrelations prong.[26] As one court has noted, if the rule were otherwise this prong would be met in every case where the test was applied to a parent and subsidiary because the officers of a subsidiary are always in some sense responsible to those at higher levels of the corporate echelon.[27]

The court in *Rittmeyer v. Advance Bancorp, Inc.*[28] employed a typical interrelation of operations analysis.[29] In this ADEA case, the district court determined that three separate financial institutions were not an integrated enterprise.[30] In examining the companies' operations, the court first noted that they maintained separate facilities and separate staffs.[31] The court also noted that each company answered to a different regulatory agency.[32] Most important to the court, however, was the fact that the companies charged each other for services performed and equipment used.[33] This presented to the court a sufficiently arms-length operating system to preclude the application of this prong of the test.[34]

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23. *See* Rogers v. Sugar Tree Prods., Inc., 7 F.3d 577, 583 (7th Cir. 1994).

24. *See* Rittmeyer v. Advance Bancorp, Inc., 868 F. Supp. 1017, 1021 (N.D. Ill. 1994) (holding that control prong centers on "common officers, common record keeping, shared bank accounts and equipment").

25. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *supra* note 5, app. 605-G at 3 (citations omitted); *see also* Ratcliffe v. Insurance Co. of N. Am., 482 F. Supp. 759, 764 (E.D. Pa. 1980) (citing shared home offices in finding interrelated operations).

26. *See* Frank v. U.S. West, Inc., 3 F.3d 1357, 1362 (10th Cir. 1993).

27. *See id.*

28. 868 F. Supp. 1017 (N.D. Ill. 1994).

29. *See id.* at 1022.

30. *See id.* at 1024.

31. *See id.* at 1022.

32. *See id.* at 1022-23.

33. *See id.* at 1024.

34. *See id.* at 1022.

### 3. Common Management

The common management prong looks to see if the two entities share the same directors, officers, managers, or other key personnel.[35] As such, the common management prong of the test can easily become a numbers game. However, courts do not simply count up managers to bind two entities together, especially when a parent-subsidiary relationship is involved.[36] Courts applying the test often note that these last two prongs of the test cannot, without more, convert superficially separate entities into an integrated enterprise.[37] Thus common management is a necessary—but not sufficient—criteria of an integrated enterprise: it alone will not meet the integrated enterprise test, but its absence can defeat it.

An interesting application of the common management prong occurred in *Richard v. Bell Atlantic Corp.*[38] The district court in that case held that Bell Atlantic was sufficiently integrated with its subsidiaries to be considered a single employer with them.[39] One hurdle the court had to clear in reaching this conclusion was that there was apparently only one common manager and "few common officers" between the two entities.[40] There was also a case from the Tenth Circuit stating that one common manager does not establish an integrated enterprise.[41] The *Richard* court, by stressing the paucity of shared management, seemed to acknowledge that at least numerically the case before it was below what courts generally require in integrated enterprise cases.[42] However, the court took an approach to the problem that was more nuanced than numerical. The court noted that the single manager was in a crucial position in terms of labor relations and the court stressed that *who* shared managers are, not *how many* there are, is the crucial common management analysis.[43] As the court put it: "While [Bell Atlantic] and its subsidiaries have few common officers and do not have interlocking Boards of Directors, the area where there is overlap is too central to the allegations in this case to ignore."[44] But not all courts have been as generous, and *Richard* likely represents the outer limits of the common management analysis.

### 4. Common Ownership or Financial Control

Common ownership is the most straightforward factor of the integrated enterprise test. Courts applying this prong simply look to see if there is some nexus of shared

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35. *See id.* at 1023 (finding no integrated enterprise despite fact that holding company shared five directors with one bank and six with another).

36. *See* Lusk v. FoxMeyer Health Corp., 129 F.3d 773, 778 (5th Cir. 1997).

37. *See* Rogers v. Sugar Tree Prods., Inc., 7 F.3d 577, 583 (7th Cir. 1994) (holding that "more is needed" than common ownership and management); Frank v. U.S. West, Inc., 3 F.3d 1357, 1362 (10th Cir. 1993).

38. 976 F. Supp. 40 (D.D.C. 1997).

39. *See id.* at 48-49.

40. *Id.* at 48.

41. *See Frank*, 3 F.3d at 1364.

42. *See Richard*, 976 F. Supp. at 47-48.

43. *See id.*

44. *Id.* at 48.

financial ownership or control between the separate entities.[45] As with common management, this factor alone cannot establish an integrated enterprise.[46]

The reason this factor is not dispositive is amply demonstrated by the Seventh Circuit case of *Sharpe v. Jefferson Distributing Co.*[47] The defendant in that case was a venture capitalist who financed a start-up software firm and had little day-to-day control over the new firm.[48] The plaintiffs claimed that the court should consider the Illinois firm as an integrated enterprise with a beverage distribution company in West Virginia, both of which were owned in part by the venture capitalist.[49] The court said the investment by the venture capitalist was the only realistic tie between the two companies.[50] "[N]either Title VII nor any other federal law lumps together as one firm all businesses owned by a single person."[51] This is especially important in light of the fact that a main limit to Title VII is its inapplicability to small business, the entities most likely to be run by single owners.[52]

### *B. The Application of the Integrated Enterprise Test in Real World Settings*

In a vacuum the integrated enterprise test seems neither valuable nor powerful. Its analysis of organizational structures seems more mundane than momentous. But the worth of the test arises in the crucial situations in which it is invoked. First, as already alluded to, the test frequently arises in the parent-subsidiary context.[53] Second, the test is often invoked to allow plaintiffs to meet the statutory minimum number of employees found in almost all employment discrimination statutes.[54] The test similarly aids plaintiffs in eluding the strict procedural requirements of Title VII and other discrimination statutes.[55] The test is also commonly applied in the context of temporary employees, an increasingly important part of the economy. Finally, and more subtly, the test not only allows plaintiffs to find deeper pockets in defendants,

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45. *See* Sharpe v. Jefferson Distrib. Co., 148 F.3d 676, 678 (7th Cir. 1998).

46. *See* EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *supra* note 5, app. 605-G at 5 ("[I]t is also the Commission's view that, when the only interrelationship between two nominally separate entities is common ownership, the entities, generally, will not be considered to be an integrated enterprise.").

47. 148 F.3d 676.

48. *See id.* at 677.

49. *See id.*

50. *See id.* at 678.

51. *Id.* A particularly persuasive example of common ownership and management is presented by *Baker v. Stuart Broadcasting Co.*, 560 F.2d 389, 391 (8th Cir. 1977), where two companies were owned and operated by a single family.

52. *See* 110 CONG. REC. 5877 (daily ed. Mar. 21, 1976) (statement of Sen. Byrd) ("I doubt that in the history of the Congress has legislation been seriously proposed with more drastic effects [on small business]"; discussing effect Title VII would have on a small manufacturing plant). This aspect of the legislative history of Title VII will be discussed *infra* text accompanying notes 64-70.

53. *See* Richard v. Bell Atl. Corp., 976 F. Supp. 40, 43 n.3 (D.D.C. 1997).

54. *See Sharpe*, 148 F.3d at 677.

55. *See* 42 U.S.C. § 2000e-5(f)(1) (1994).

but allows them to target the entity that they feel is actually responsible in an individual case.

### 1. Parent-Subsidiary Context

The most common situation where the integrated enterprise test arises is the parent-subsidiary relationship.[56] This is not overly surprising as the test was developed by the NLRB as a way to deal with complicated business arrangements under its jurisdiction.[57] The parent-subsidiary relationship does not generally change the courts' application of the integrated enterprise test, thus making this analysis more descriptive than substantive.

One key difference that the parent-subsidiary context does make is that some courts apply an analogy to state law "piercing the corporate veil" concepts.[58] The fact that the test arises in the parent-subsidiary context prompts these courts to require that the parent exercise "a degree of control that exceeds the control normally exercised by a parent corporation."[59] For example, in *Frank v. U.S. West, Inc.*,[60] the court considered the fact that a parent acted as the subsidiary's pension plan administrator when it analyzed the measure of control the parent exerted over labor relations.[61] The court found that "it is not beyond the normal parent-subsidiary relationship for the parent to serve as ERISA Plan Administrator for the subsidiary."[62] Moreover, in the parent-subsidiary context, courts occasionally require that the corporate entity be so obviously structured to avoid Title VII liability that it amount to a "sham," similar to the requirements necessary to pierce the corporate veil.[63] Thus the parent-subsidiary structure can affect the depth of the analysis involved in integrated enterprise cases.

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56. *See* Lockard v. Pizza Hut, Inc., 162 F.3d 1062 (10th Cir. 1998); Lusk v. FoxMeyer Health Corp., 129 F.3d 773 (5th Cir. 1997); Schweitzer v. Advanced Telemarketing Corp., 104 F.3d 761 (5th Cir. 1997); Cook v. Arrowsmith Shelburne, Inc., 69 F.3d 1235 (2d Cir. 1995); Rogers v. Sugar Tree Prods., Inc., 7 F.3d 577 (7th Cir. 1994); Frank v. U.S. West, Inc., 3 F.3d 1357 (10th Cir. 1993); *Richard*, 976 F. Supp. 40; Rittmeyer v. Advance Bancorp, Inc., 868 F. Supp. 1017 (N.D. Ill. 1994). While many applications of the integrated enterprise test deal with parents and subsidiaries, it should be noted that the test arises in other contexts as well. *See, e.g.*, Mukhtar v. Castleton Serv. Corp., 920 F. Supp. 934 (S.D. Ind. 1996) (applying integrated enterprise test to separate networks of immediate care centers).

57. For an in-depth exploration of the development of the test, see *infra* Part II.A.

58. *See Lusk*, 129 F.3d at 778 ("Only evidence of control suggesting a significant departure from the ordinary relationship between a parent and its subsidiary—domination similar to that which justifies piercing the corporate veil—is sufficient."); Sargent v. McGrath, 685 F. Supp. 1087, 1088-89 (W.D. Wis. 1988) ("In the absence of special circumstances, a parent corporation is not liable for the Title VII and section 1981 violations of its . . . subsidiary.").

59. Johnson v. Flowers Indus., 814 F.2d 978, 981 (4th Cir. 1987).

60. 3 F.3d 1357 (10th Cir. 1993).

61. *See id.* at 1363.

62. *Id.*

63. *See* RONALD R. COLLINS & KIERAN SHARPE, FEDERAL REGULATION OF EMPLOYMENT SERVICE § 1:12 (1982) ("[A] parent corporation and its subsidiary are not a single employer for purposes of Title VII of the Civil Rights Act of 1964, where the affairs of each corporation are handled separately and the subsidiary corporation is not a sham.").

### 2. Statutory Minimums

Federal discrimination statutes only apply to employers larger than a certain minimum size.[64] These minimums are usually attached to the definition of employer and require that the employee demonstrate that the employer had a certain number of employees during a given period.[65] For example, a Title VII plaintiff must show that the defendant had at least "fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year."[66] While this limitation might seem trifling, it has played a role in the development of federal employment law. The limitation on Title VII's coverage was one compromise that led to the bill's passage.[67] For example, the language concerning the number of calendar weeks in which the fifteen-employee status must be met was part of a noted Senate amendment to the original House bill that eventually became the Civil Rights Act of 1964.[68] This extra protection for small employers arguably added crucial votes during the Senate debate on Title VII.[69]

For plaintiffs filing Title VII lawsuits in 1999, however, the upshot of these limitations is that the named defendant must employ at least fifteen or more employees. This motivates plaintiffs to make their employer "bigger" by characterizing the employer as part of an integrated enterprise. For example, the plaintiff in *Sharpe v. Jefferson Distributing Co.*[70] invoked the test because the software firm she worked for had only two employees.[71] When the plaintiff's integrated enterprise argument failed, so did any possibility of a federal discrimination suit against the venture capitalist defendant.[72] Similarly, the plaintiff in *York v. Tennessee Crushed Stone Ass'n*[73] needed to establish the existence of an integrated enterprise as her direct employer was a trade group with two employees.[74] Again, the failure of the integrated enterprise test in that case disposed of any discrimination suit against her employer.[75] Thus the integrated enterprise test is a vital device for plaintiffs working in firms with low numbers of employees.

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64. *See, e.g.*, 42 U.S.C. § 2000e(b) (1994).

65. *See id.*

66. *Id.*; *see also* Equal Pay Act, 29 U.S.C. § 206(a) (1994).

67. *See, e.g.*, Armbruster v. Quinn, 711 F.2d 1332, 1337 n.4 (6th Cir. 1981) (discussing a similar compromise in 1972 to change Title VII minimum number of employees from 25 to current 15).

68. *See* EQUAL OPPORTUNITY EMPLOYMENT COMM'N, LEGISLATIVE HISTORY OF TITLE VII AND TITLE IX OF THE CIVIL RIGHTS ACT OF 1964, at 3049 (amendment of Sen. Dirksen).

69. *See id.* at 3103, 3108 (comments of Sen. Willis and Sen. Humphrey).

70. 148 F.3d 676 (7th Cir. 1998).

71. *See id.* at 677.

72. *See id.* at 679.

73. 648 F.2d 360 (6th Cir. 1982).

74. *See id.* at 362.

75. *See id.*

### 3. Procedural Requirements

Employment discrimination suits, particularly under Title VII, are replete with procedural pitfalls. For example, suits under Title VII must be filed within ninety days after a plaintiff receives a right-to-sue letter from the EEOC.[76] The scope of the suit is limited to the parties named in the EEOC complaint: "Ordinarily, a party not named in the EEOC charge cannot be sued in a subsequent civil action."[77] Other common procedural miscues include failing to meet the EEOC filing deadline, requesting excessive remedial relief, failing to specify type of discrimination in the EEOC charge, failing to exhaust contractual remedies, and failing to avoid workers' compensation bar.[78] Stringent procedures such as these make bringing an employment discrimination claim perilous for the uninitiated plaintiff, and this danger is often not lost on the civil defense bar.[79] The integrated enterprise test may help plaintiffs avoid the harsh results these procedures can achieve by giving them a second chance against a fresh defendant.[80]

### 4. Temporary Employees

As noted previously, the temporary employment market is an economic sector of growing importance.[81] The integrated enterprise test is useful here mostly to alleviate confusion, and not necessarily out of pure need for numbers or to avoid procedural necessities. The problem lies in that often neither the temporary employment agency nor the company using the employment service is clearly the employer of the temporary employees claiming discrimination. "Staffing firms may assume that they are not responsible for any discrimination or harassment that their workers confront at the clients' work sites. Similarly, some clients of staffing firms may assume that they are not the employers of temporary or contract workers assigned to them . . . ."[82] The integrated enterprise test can help clarify this situation in cases where the staffing

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76. *See* 42 U.S.C. § 2000e-5(f)(1) (1994).

77. Virgo v. Riviera Beach Assoc., 30 F.3d 1350, 1358 (11th Cir. 1994); *see also* Hassell v. Harmon Foods, Inc., 336 F. Supp. 432, 433 (W.D. Tenn. 1971) (denying application of integrated enterprise test when plaintiff failed to include defendant in EEOC charge).

78. *See* Jana Howard Carey, *Defending Sexual Harassment Claims, in* AVOIDING AND LITIGATING SEXUAL HARASSMENT CLAIMS 38-46 (Jana Howard Carey ed., 1998).

79. *See id.* at 39-40.

80. It should be noted that the *Virgo* court, as well as others, followed equitable and remedial principles in declining to apply the bar on suits against defendants not included in the EEOC charge. *See Virgo*, 30 F.3d at 1358. But not every court has been this generous, and plaintiffs would be wise to follow the technicalities set out in the statutes. *See, e.g.*, St. Louis v. Alverno College, 744 F.2d 1314, 1316 (7th Cir. 1984) (holding that 90-day period to file suit begins to run upon *attempted* delivery of right-to-sue letter, not actual receipt).

81. *See, e.g.*, Equal Employment Opportunity Comm'n, *EEOC Notice 915.002 (Dec.3,1997)* (visited Apr. 21, 2000) <http://www.eeoc.gov/docs/conting.txt>.

82. *Id. See generally* Gil A. Abramson & Mark S. Saudek, *Guidance Issued on Application of EEOC Laws to Temp Workers*, EMPLOYMENT L. STRATEGIST, Jan. 1998, at 1, *available in* LEXIS, HR Library, LEA EMP file (discussing EEOC release on temporary employees and federal discrimination law).

agency and its client have an inordinately close relationship, especially since courts do not always require a showing of common ownership.[83]

### 5. Deep Pockets, Deeper Emotions

Finally, a subtle undercurrent of strategy runs through almost all integrated enterprise cases. Many plaintiffs have more in mind in choosing a defendant than getting around statutory minimums or making up for past procedural miscues. Surely many plaintiffs target their suits based on the capitalization of the company and seek the "deep pockets" that will make their suit sting. Many also surely feel deep scorn towards the allegedly discriminatory corporation, and thus attempt to serve their deeper emotions through the suit. For example, in *Richard v. Bell Atlantic Corp.*,[84] the parent company undoubtedly had more attractive resources than the smaller subsidiary, as the parent had a net income of just under $3 billion in 1998.[85] While some of the search for deep pockets is mitigated by statutory caps on damages, a little defendant shopping is not an inherently bad result in the context of the integrated enterprise test. If the test is in fact aimed at discouraging corporations from setting up "sham" structures to avoid liability, courts should encourage plaintiffs to seek the deepest pocket, as that entity is most likely the one that set up the "sham" to protect itself.[86]

Perhaps more important to many plaintiffs is the "deeper emotions" at play in discrimination suits. The type of discrimination envisioned by the federal statutes can have severe traumatic effects on its victims. As one scholar has noted, "[t]he psychological symptoms and effects of sexual harassment include anger, fear, depression, anxiety, irritability, loss of self-esteem, feelings of humiliation, embarrassment, shame and alienation, and a sense of helplessness and vulnerability."[87] Several integrated enterprise cases present situations where there is no objective reason why the plaintiffs would need the defendant in question in the suit except as an outlet for deeper emotional scorn. A notable example of this occurred in *Swallows v. Barnes & Noble Book Stores, Inc.*[88] The plaintiffs in that case were former employees at an on-campus bookstore that was once owned by the

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83. The temporary employment relationship could gain even more prominence if the courts were to more heavily emphasize the joint employer alternative. *See* Brent Giddens, *Sexual Harassment, Other Discrimination Suits and the Temporary Employee*, SEXUAL HARASSMENT LITIG. REP., Mar. 1997, at 22, *available in* LEXIS, HR Library, ANDSHR File; Henry W. Sledz, Jr. & John J. Lynch, *The Legal Ramifications of Using Independent Contractors, Temporary Agency Employees, Leased Workers*, 9 CBA REC. 20 (1995); *infra* Part IV.A.

84. 976 F. Supp. 40 (D.D.C. 1997); *see also* Lusk v. FoxMeyer Health Corp., 129 F.3d 773, 777 (5th Cir. 1997) (applying integrated enterprise test where subsidiary declared bankruptcy).

85. *See Media Kit Fact Sheet* (visited Mar. 31, 2000) <http://www.bellatlantic.com/invest/financial/annual98/>.

86. *See, e.g.*, U.S. DEP'T OF LABOR, *supra* note 1, at 40.

87. Claudia Withers, *Preventing Sexual Harassment in the Workplace*, *in* AVOIDING AND LITIGATING SEXUAL HARASSMENT CLAIMS, *supra* note 78, at 109, 113.

88. 128 F.3d 990 (6th Cir. 1997).

university but was subsequently leased to Barnes & Noble.[89] While the plaintiffs named the book retailer in the suit, they also named the university.[90] There is no hint that the plaintiffs faced a procedural problem, nor was there any doubt that Barnes & Noble had more than fifteen employees.[91] Perception underlies the plaintiff's suit against the university. The plaintiffs must have perceived that the university, which had originally hired many of them, had participated in the discrimination and should be held to the fire in federal court. *Swallows* is certainly not the only case to present this type of perception-based use of the integrated enterprise test. In *Lockard v. Pizza Hut, Inc.*,[92] the plaintiff was a former waitress at a Pizza Hut restaurant.[93] To her, the nationwide chain—not the individual franchise—was her employer and the target of her scorn.[94] This kind of emotion and perception is another useful purpose that plaintiffs have found for the integrated enterprise test.

## II. DEVELOPMENT OF THE INTEGRATED ENTERPRISE TEST

Any worthwhile critique of the integrated enterprise test and its application to federal employment discrimination law would not be complete without tracing the test's birth and subsequent development. Accordingly, this Part begins by focusing on the formative applications of the test by the NLRB in the late 1940s and 1950s. The focus then shifts to the legislative record of Title VII's enactment in the 1960s to discover what intent, if any, Congress harbored toward the application of this test in discrimination cases. Finally, this Part discusses the last stage of this development, the application of the test in EEOC administrative determinations and federal court discrimination cases in the early 1970s, focusing on what distinctions, if any, these early administrative and court cases drew between the test in the employment discrimination context and its usefulness in labor law cases.

### *A. Developments in the NLRB*

The initial development and application of the integrated enterprise test came in National Labor Relations Board administrative law proceedings in the late 1940s and 1950s.[95] The test arose as a response to situations involving complex employment structures that skirted close to the NLRB's jurisdictional minimum.[96] Unlike the

89. *See id.* at 991.

90. *See id.*

91. *See id.* at 992-93.

92. 162 F.3d 1062 (10th Cir. 1998).

93. *See id.* at 1066.

94. *See id.* at 1070-71.

95. *See* National Hardware Corp., 80 N.L.R.B. 368 (1948); 21 NLRB ANN. REP. 14-15 (1956). Hints of the test's development were demonstrated almost since the Board's inception. *See* NLRB v. Lund, 103 F.2d 815, 819 (8th Cir. 1939) (discussing importance of labor control, "dependent operation[s]," in approving Board's finding that three employers could be treated as one).

96. *See* Moving Picture Mach. Operators Local No. 159, 115 N.L.R.B. 952 (1956) (applying integrated enterprise test to deny jurisdiction); Metco Plating Co., 110 N.L.R.B. 615,

employment discrimination statutes, the minimums for the NLRB focus on the volume of the defendant's interstate business.[97] For example, the Board currently asserts jurisdiction over a general company doing at least $50,000 in interstate business.[98]

Questions of jurisdiction were especially thorny for the NLRB at the time the integrated enterprise test came into full use because of the broad jurisdiction granted to the Board by Congress. The Board's jurisdiction is meant to have the broadest reach possible: "Because the National Labor Relations Act applies to all labor disputes that affect interstate commerce, the Board has consistently taken the position that Congress has given it jurisdiction that is coextensive with congressional legislative power under the Commerce Clause of the Constitution."[99] Thus during the formative days of the integrated enterprise test the NLRB was tentatively exploring the depth of its jurisdiction. Indeed, a 1959 amendment to the National Labor Relations Act allowed the Board to *expand* its jurisdiction but not to contract it.[100]

A corollary to this jurisdictional exploration and experimentation is the tendency in early cases to expand the applicability of the integrated enterprise test.[101] In these cases, the trial examiners, the lower courts of the NLRB process, rigorously applied the integrated enterprise factors and required them to be supported by a great deal of evidence.[102] As the Board's jurisdiction grew in other areas, the full Board seemingly began to experiment with expanding jurisdiction through the integrated enterprise test.[103] For example, in the often-cited case of *Sakrete, Inc.*,[104] the trial examiner declined to exercise jurisdiction despite evidence that would support a finding of an integrated enterprise today.[105] The Board reversed this lower level finding based on

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616 (1954) (applying integrated enterprise test to allow jurisdiction); 21 NLRB ANN. REP. at 14-15 (discussing integrated enterprise test in context of jurisdiction of the NLRB). The NLRB even then realized that the world of work was changing and corporate structures were becoming more complex. "The fact that the corporate setup here is more involved . . . can not be allowed to obscure its source and power." *Moving Picture Mach. Operators*, 115 N.L.R.B. at 955 (Murdock and Peterson, A.L.JJ., dissenting).

97. *See* BETTY W. JUSTICE, UNIONS, WORKERS, AND THE LAW 25 (1983); STANLEY R. STRAUSS & JOHN E. HIGGINS, JR., PRACTICE AND PROCEDURE BEFORE THE NLRB § 3.02 (5th ed. 1996); DAVID P. TWOMEY, LABOR LAW AND LEGISLATION 54 (7th ed. 1985).

98. *See* STRAUSS & HIGGINS, *supra* note 97, § 3.02.

99. *Id.* § 3.01 at 9; *see also* 29 U.S.C. § 160(a) (1994) (giving NLRB jurisdiction "to prevent any person from engaging in any unfair labor practice . . . affecting commerce").

100. *See* STRAUSS & HIGGINS, *supra* note 97, § 3.01 at 10.

101. *See* National Hardware Corp., 80 N.L.R.B. 368, 369 (1948) (finding integrated enterprise where officers and directors for two different companies were *identical*).

102. *See* Orkin Exterminating Co., 115 N.L.R.B. 622 (1956).

103. *See, e.g.*, Sakrete, Inc., 137 N.L.R.B. 1220 (1962); *Orkin Exterminating Co.*, 115 N.L.R.B. at 622.

104. 137 N.L.R.B. 1220.

105. *Compare Sakrete, Inc.*, 137 N.L.R.B. 1220 (finding, at trial examiner level, that two entities were not an integrated enterprise despite the fact that one person made virtually every management decision for both entities), *with* Frank v. U.S. West, Inc., 3 F.3d 1367, 1364 (10th Cir. 1993) (finding common management, integrated enterprise with just one common manager).

the amount of authority exercised by the parent.[106] The case involved an Ohio corporation, Sakrete, Inc., and a California subsidiary, Sakrete of Northern California.[107] The control exerted by the Ohio parent was definitely above ordinary. The subsidiary could not sell products or enter into contracts unless approved by the parent.[108] Moreover, the subsidiary did not even have the power to lay off its own employees.[109] As the Board noted, "management of both resides virtually in one man."[110] What is remarkable about this case is not that the review board found that the two companies were one under these facts, but that the trial examiner believed that the integrated enterprise test was so stringent that it was not met even under these facts. *Sakrete* lays down the gauntlet of jurisdictional expansion through an expanding integrated enterprise test. It is a signal that the test in its infancy was intended to have a broad and malleable reach, similar to the broad and malleable jurisdiction of the Board.[111]

### *B. Legislative History of Title VII*

When Congress was debating the Civil Rights Act of 1964, obscure administrative proceedings of the NLRB were not exactly foremost in its collective conscience. Thus the debates over Title VII never turned to the integrated enterprise test. The closest Congress came to debating the test came during its discussion of the definition of employer under the Act. As noted previously, the section of Title VII that contained the definition of employer was somewhat controversial.[112] One of the many compromises leading to the Act's passage was the Senate's alteration of the calculation of the number of employees[113] and the graduated system of applying Title VII to small business.[114] The actual definitions of employer and employee, the most instructive part of Title VII for purposes of the integrated enterprise test, were clouded during the debate by these more controversial proposals. The only discernable reference to the definition of employer during the debates on Title VII occurred during an oft-noted exchange of questions and answers between Senators

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106. *See Sakrete, Inc.*, 137 N.L.R.B. at 1223.

107. *See id.* at 1221-22.

108. *See id.* at 1222.

109. *See id.* at 1223.

110. *Id.*

111. *See* Orkin Exterminating Co., 115 N.L.R.B. 622, 626-27 (1956) (reversing trial examiner's refusal to apply integrated enterprise test where subsidiary managers had almost complete autonomy and relied on parent only for assistance with national level sales and some supplies); Modern Linen & Laundry Serv., Inc., 110 N.L.R.B. 1305, 1306 (1954) (finding integrated enterprise where companies did not exchange employees, share labor policies, or combine basic management functions); Venus Die Eng'g Co., 110 N.L.R.B. 336, 337 (1954) (finding integrated enterprise in company in which 95% of control and ownership rested in one family, but not in a single person). The Board was not always as expansive in its reading of the integrated enterprise test, however. *See* Moving Picture Mach. Operators Local 159, 115 N.L.R.B. 952 (1956).

112. *See supra* text accompanying notes 67-69.

113. *See* 110 CONG. REC. 12807, 12811-12 (1964) (amendment of Sen. Dirksen).

114. *See id.* at 6563 (statement of Sen. Kuchel).

Clark and Dirksen.[115] Senator Dirksen posed the question:

> Who is an employer within the meaning of [T]itle VII? I am not sure, the bill is indefinite, we have no committee hearings, no report. Can an employer readily ascertain from the language of the bill whether or not he is included? Employers with a large number of employees will have no difficulty, but what of the small businessman?[116]

Senator Clark attempted to answer this question by simply stating that "[t]he term 'employer' is intended to have its common dictionary meaning, except as expressly qualified by the act."[117] Taking Senator Clark at his word, it would appear that Congress's intent was to have courts turn to the dictionary to discern meaning from the statutory definition. *Webster's* defines employer as "one that employs something or somebody as . . . the owner of an enterprise (as a business or manufacturing firm)."[118] Employ is defined as "to provide with a job that pays wages or a salary or with a means of earning a living."[119] In this light, turning to the dictionary proves hardly more illuminating than the circular Title VII definition itself. At best, by focusing on "one," "an enterprise," and "a business," the dictionary seems to indicate that a person can have only one employer. But this is an extrapolation from what little light the legislative history sheds on this issue. The most helpful sentiment that can be gleaned from Senator Clark's definition is that common sense and common knowledge should guide the determination of employer status under Title VII. Like the dictionary definition, common sense would suggest that a person can have only one employer, and that is the immediate company for which they work. As one court has noted, "when one speaks of his or her 'employer,' as that term is commonly used, they are not generally referring to the parent corporations of the immediate business which pays their salary."[120]

While the direct authority is sparse and generally unhelpful, there are also two sources of indirect legislative history. First, one way to discern the intent of Congress is to examine the thoughts of those who *opposed* a particular statute and the record contains some opposition comments on point. Second, Congress was aware that more than half of the states had enacted their own employment discrimination statutes,[121] and the form these statutes took is relevant to Congress's intent in enacting Title VII.

For purposes of the integrated enterprise test, the most illuminating argument made by an opponent of Title VII came from Senator Robertson.[122] The Senator's speech compared Title VII to minimum wage legislation passed in the 1930s.[123] Senator

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115. *See id.* at 7216.

116. *Id.*

117. *Id.* Senator Clark's veritable dismissal of the complications arising out of this definition is proof that the drafters of Title VII did not foresee the complex employment schemes that would crop up in the subsequent 35 years.

118. WEBSTER'S THIRD NEW INTERNATIONAL UNABRIDGED DICTIONARY 743 (1981).

119. *Id.*

120. Armbruster v. Quinn, 498 F. Supp. 858, 861 (E.D. Mich. 1980), *rev'd*, 711 F.2d 1332 (6th Cir. 1983).

121. *See, e.g.*, 110 CONG. REC. 14249 (1964).

122. *See id.* at 5934.

123. *See id.*

Robertson argued that both the wage legislation and Title VII were measures based on alleged horrible conditions, and were thought of as moderate, sober solutions to those problems.[124] He next noted that the definition under the 1938 Act was narrow, and intended to be limited.[125] But over time the scope of the bill swallowed more than it was ever intended to reach, "[t]hus, as in the terms of an old Eastern proverb: 'Did the nose of the camel enter the tent?' What now is in the coverage? Practically everything."[126] The import of Senator Robertson's words is clear: the scope of Title VII should be clearly defined and rigidly followed so as to avoid an unintended growth in its coverage, similar to that which occurred in the wage statute. As the Senator noted: "Inevitably, when one employer is brought under an FEPC [Fair Employment Practice Commission] law, he will demand that all competitors be placed under the same operating handicaps."[127]

A final source of congressional intent is found by turning to the various state provisions that regulated employment discrimination that were already on the books by the time Congress passed Title VII. Those heavily involved in the debate around Title VII were aware of these state statutes.[128] As one Senator said at the time: "Some 25 States already have such laws . . . . The coverage of such laws is generally as broad or broader than the coverage of [T]itle VII."[129] Unfortunately, none of these states offered a definition of employer any more detailed or illuminating than that found in Title VII. For example, Rhode Island defined employer as "any person in this state employing four (4) or more individuals, and any person acting in the interest of an employer."[130] California deemed an employer to be "any person regularly employing five or more persons, or any person acting as an agent of an employer."[131] New York's FEPC law simply stated that the "term 'employer' does not include any employer with fewer than four persons in his employ."[132] No state court applying these definitions found fit to apply the integrated enterprise test prior to the passage of Title VII. For example, Massachusetts did not incorporate the integrated enterprise test into its state law until 1993.[133] The most that can be gleaned from these laws is that the legislatures understood the term employer to have a plain meaning similar to that suggested by Senator Clark.[134] None of these states saw fit to pass elaborate

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124. *See id.*

125. *See id.*

126. *Id.*

127. *Id.*

128. *See id.* at 6562, 6563 (statement of Sen. Kuchel); *id.* at 6548 (statement of Sen. Humphrey).

129. *Id.* at 6548 (statement of Sen. Humphrey).

130. R.I. GEN. LAWS § 28-5-6(6)(i) (1956) (current version at R.I. GEN. LAWS § 28-5-6(6)(i) (1995)).

131. CAL. LABOR CODE § 1413(d) (1965) (current version at CAL. GOV'T CODE § 12926(d) (West 1999)).

132. N.Y. EXEC. LAW § 292(5) (Consol. 1951) (current version at N.Y. EXEC. LAW § 292(5) (Consol. 1993)).

133. *See* Daigle v. Alexander, No. 91-5588F, 1993 WL 818723 (Mass. Super. Ct. Nov. 5, 1993).

134. *See* CAL. LABOR CODE § 1413(d); N.Y. EXEC. CODE § 292(5); R.I. GEN. LAWS § 28-5-6(6)(i).

definitions of employer, and New York did not bother to provide a definition *at all*, but merely provided exclusions.[135] This suggests again that the best approach to multiple-employer problems is to rely on common sense and what a reasonable person would deem to be an employer.

### *C. Early Developments in Discrimination Cases*

The first appearance of the integrated enterprise test in the discrimination context came in EEOC administrative decisions during the early 1970s.[136] Interestingly, these cases often only listed three prongs of the test: common ownership, common management, and interrelation of operations.[137] There is no discussion as to why the central question of the test in modern integrated enterprise cases—the control over labor relations—was not imported at this time. Seemingly this factor has the most bearing on discriminatory conduct: two entities that share the same workforce management are much more likely to share in the same discriminatory practices against their employees. Also missing in these early cases is discussion of the motivation and authority for importing the test from the NLRB. Instead, these early cases simply lay out the structure of the test and cite a series of labor board cases for authority.[138]

At about the same time, the integrated enterprise test first appeared in federal court decisions. The first federal case to apply the test was *Williams v. New Orleans Steamship Ass'n*.[139] To be sure, the *Williams* court did present somewhat more detailed reasoning as to why the integrated enterprise test should apply in employment discrimination cases. The court's primary reason was reliance on the EEOC's interpretation of the statute it was created to enforce.[140] "[C]ourts ought to and do give great weight to an agency's interpretation of the statute that it administers."[141] The court held that the integrated enterprise test was sufficiently

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135. *See supra* text accompanying note 132.

136. *See* EEOC Decision No. 71-1677, 3 Fair Empl. Prac. Cas. (BNA) 1242 (Apr. 12, 1971); EEOC Decision No. 71-2598, 4 Fair Empl. Prac. Cas. (BNA) 21, 22 (June 22, 1970).

137. *See* EEOC Decision No. 71-1677, 3 Fair Empl. Prac. Cas. (BNA) at 1242; EEOC Decision No. 71-2598, 4 Fair Empl. Prac. Cas. (BNA) at 22.

138. *See* EEOC Decision No. 71-1677, 3 Fair Empl. Prac. Cas. (BNA) at 1242; EEOC Decision No. 71-2598, 4 Fair Empl. Prac. Cas. (BNA) at 22. The EEOC followed a similar pattern of importing a related test, that of joint employer liability. *See* EEOC Decision No. 72-1301, 4 Fair Empl. Prac. Cas. (BNA) 715, 716 (Mar. 8, 1972) (citing NLRB cases to apply joint employer test); EEOC Decision No. 72-0679, 4 Fair Empl. Prac. Cas. (BNA) 441 (Dec. 27, 1971) (same). The joint employer liability test is discussed *infra* Part IV.A.

139. 341 F. Supp. 613, 615 (E.D. La. 1972) ("[N]o case has been found where a court has applied this theory to a Title VII suit . . . .").

140. *See id.*

141. *Id.* It should be noted, however, that the one EEOC case *Williams* cited was in fact a *joint employer* case. *See id.* (citing EEOC Decision No. 71-1537, 3 Fair Empl. Prac. Cas. (BNA) 766 (Mar. 31, 1971)). The other authorities *Williams* relied on were NLRB determinations, and the NLRB has no power to interpret federal discrimination statutes. This flaw is not mentioned in cases relying on *Williams* as authority. *See, e.g.*, Baker v. Stuart Broad. Co., 560 F.2d 389, 392 (8th Cir. 1977).

established to warrant this level of deference and thus applied the test.[142] The court did not discuss the underlying validity or merit of the test, nor did it evaluate reasons why the discrimination cases might require a different analysis.

Although *Williams* can and has been fairly credited with establishing the integrated enterprise doctrine in federal discrimination litigation,[143] it was not the only significant early court case dealing with multiple-employer situations under federal discrimination laws. In *Hassell v. Harmon Foods, Inc.*,[144] the court reached a distinct result that temporarily proved influential. The *Hassell* court was faced with a plaintiff who had neglected to appropriately include all parties in the EEOC charge.[145] The court refused to pierce the corporate veil, holding that the defendant corporations could not be considered a "sham."[146] The court did not believe that it had the statutory authority to hold two employers simultaneously liable under Title VII:

> Thus the question sharply presented is whether, in an ordinary parent-subsidiary situation, can the fact that there are two corporations be ignored for present purposes and the corporations be treated as one? There is nothing in the statutory language or legislative history which supports the contention that you can and there is no case called to our attention that so holds.[147]

This strong rebuke of the integrated enterprise test held sway with some courts early on, but the integrated enterprise test quickly gained acceptance in federal courts.[148] *Hassell* is but an anachronism today. For example, the district court in *Armbruster v. Quinn*[149] relied on *Hassell* to limit the scope of parent corporation liability under Title VII.[150] The court of appeals overturned the district court, establishing the integrated enterprise test's applicability in the Sixth Circuit.[151]

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142. *See Williams*, 341 F. Supp. at 615.

143. *See* 1 FEDERAL REGULATION OF EMPLOYMENT SERVICE § 1:12 n.24 (rev. 1982).

144. 336 F. Supp. 432 (W.D. Tenn. 1971).

145. *See id.* at 433.

146. *Id.*

147. *Id.* (citations omitted). *Hassell* is still often cited for the proposition that a parent should not be held liable for the discriminatory conduct of its subsidiary unless the corporate structure amounts to a "sham." *See, e.g.*, EEOC v. Wooster Brush Co. Employees Relief Ass'n, 727 F.2d 566, 572-73 (6th Cir. 1984); Sargent v. McGrath, 685 F. Supp. 1087, 1090 (E.D. Wis. 1988).

148. *See* Baker v. Stuart Broad. Co., 560 F.2d 389, 391-92 (8th Cir. 1977) (applying integrated enterprise based on *Williams*, liberal interpretation of remedial statutes); EEOC v. Upjohn Corp., 445 F. Supp. 635, 638-39 (N.D. Ga. 1977) (importing integrated enterprise test to discrimination context without discussion).

149. 711 F.2d 1332 (6th Cir. 1983).

150. Armbruster v. Quinn, 498 F. Supp. 858, 860-61 (E.D. Mich. 1980), *rev'd*, 711 F.2d 1332 (6th Cir. 1983).

151. *See Armbruster*, 711 F.2d at 1335.

## III. CRITIQUING THE APPLICATION OF THE INTEGRATED ENTERPRISE TEST IN THE CONTEXT OF EMPLOYMENT DISCRIMINATION

From the preceding section it is clear that the EEOC and the federal courts have made the leap from applying the integrated enterprise test in labor cases to applying it in the discrimination context. With the factors, utility, and history of the test firmly in mind, this Part will attempt to show that this superficially simple transition is in fact fraught with pitfalls. To make this showing, this Part tries to do what the EEOC and the early federal courts apparently did not attempt: a systematic critique of the arguments for the applicability of the integrated enterprise test in discrimination cases and an exploration of the arguments against it.

### *A. Arguments for the Integrated Enterprise Test in Discrimination Cases*

The arguments supporting the integrated enterprise test in discrimination cases fall into two general categories. First, courts themselves have offered several arguments for the test, including: deference to administrative agencies, liberal treatment of remedial statutes, and the similarity between the definitions of employer in Title VII and the NLRA. A second group of arguments is more fundamental and strikes instead at the policy reasons for applying the test. These arguments center on the conceptualization of the separate entities as a single employer and the ease of judicial administration of the test.

#### 1. Arguments Invoked by the Courts

*Williams* itself made clear that its primary basis for applying the integrated enterprise test was the fact that the EEOC had applied the test in Title VII multiple-employer situations.[152] The theory behind this federal doctrine of deference to administrative proceedings is that administrative agencies are uniquely qualified to interpret the statutes they were created to enforce. The courts rely on this "expertise" so that they do not have to undertake the kind of probing analysis already completed by the administrative agency. As noted previously, the *Williams* court's deference was misplaced in that the EEOC cases it cited were in fact "joint employer" cases.[153] Moreover, the EEOC was still developing the integrated enterprise doctrine at the time *Williams* was decided,[154] and the test in discrimination cases was certainly not yet worthy of the generous deference the courts give to the expert practices of administrative bodies.

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152. *Williams*, 341 F. Supp. at 615.

153. *See supra* note 141.

154. For example, in 1971, the year before *Williams* was decided, the EEOC reported just two integrated enterprise cases. *See* EEOC Decision No. 71-2598, 4 Fair Empl. Prac. Cas. (BNA) 21, 22 (June 22, 1971); EEOC Decision No. 71-1677, 3 Fair Empl. Prac. Cas. (BNA) 1242 (Apr. 12, 1971).

More fundamentally, it can be argued that such deference should not be blind. A misinterpretation of a statute is not transformed into bedrock law by its passage through the docket of an administrative agency. Judicial deference should not tolerate administrative error. If an administrative law doctrine is fundamentally flawed, courts should analyze and rectify the law. If, as this Note attempts to show, there are conceptual and practical flaws in the application of the integrated enterprise test to discrimination cases, courts should not rely on this veil of deference alone.

Unlike *Williams*, most federal courts rest their application of the integrated enterprise test on something more than mere deference. A common theme is the principle that remedial statutes should be given a liberal application to effectuate their underlying purpose.[155] The theory is that remedial statutes are aimed at attacking broad social problems and as such construction of them should keep a keen eye on facilitating those remedial purposes. As one court put it: "To effectuate its purpose of eradicating the evils of employment discrimination, Title VII should be given a liberal construction. The impact of this construction is the broad interpretation given to the employer and employee provisions."[156]

However, this reasoning, based as it is on broad notions of congressional intent, should not be used to reach conclusions that run counter to more specific indications of congressional intent. As noted previously, one of the core compromises leading to the passage of Title VII put small businesses beyond the Act's antidiscriminatory reach.[157] Moreover, the provisions limiting Title VII to employers with more than a certain number of employees are as much in effect today as they were when Title VII was passed in 1964. Congress's intent remains clear: small businesses should not be held to the hard standards of Title VII.[158] This intent is evident and should be taken seriously. Thus the truism of "remedial construction" should not be extended to a test which will override explicit indications of congressional intent.

Finally, several integrated enterprise cases have relied on the fact that the definition of employer in discrimination statutes strongly resembles that of employer in the NLRA.[159] The definitions do, in fact, bear a strong resemblance. Title VII offers the paradigmatic definition of employer for federal discrimination law: "The term employer means a person engaged in an industry affecting commerce who has fifteen or more employees."[160] The NLRA definition of employer states that "the term

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155. *See* Virgo v. Riviera Beach Assoc., 30 F.3d 1350, 1359 (11th Cir. 1994) ("Consistent with the purposes of the Aet we interpret the term 'employer' liberally."); Armbruster v. Quinn, 711 F.2d 1332, 1336 (6th Cir. 1983); Trevino v. Celanese Corp., 701 F.2d 397, 403 (5th Cir. 1983); Baker v. Stuart Broad. Co., 560 F.2d 389, 391 (8th Cir. 1977).

156. *Armbruster*, 711 F.2d at 1336 (citation omitted).

157. *See supra* text aecompanying notes 64-69.

158. Some courts make much of the fact that in 1972 Congress reduced the required number of employees from 25 to 15 and argue that this change indicates Congress's displeasure with the employee limitation on Title VII. *See, e.g.*, *Armbruster*, 711 F.2d at 1337. This reduction is capable of an equally persuasive but opposite reading: by lowering, but not eradicating, the restriction on employer size, Congress again endorsed this protection for small employers. Moreover, this revised limitation has now survived for 28 years.

159. *See* Rivas v. Federacion de Asociaciones Pecuarias de Puerto Rico, 929 F.2d 814, 820 n.15 (1st Cir. 1991); *Armbruster*, 711 F.2d at 1336.

160. 42 U.S.C. § 2000e(b) (1994).

'employer' includes any person acting as an agent of an employer, directly or indirectly."[161] These definitions certainly do share a common generality. Both are vague and do not offer specific standards to apply to specific settings. Both definitions leave it to the courts to craft particular solutions for the particular settings of labor and discrimination. But this vagueness merely begs the question. Since both definitions are general, what rules can courts establish to answer the specific needs of both bodies of law? This underlying inquiry cannot be eluded by reference to the similarity in the definitions. As mentioned earlier, the definition of employer in discrimination statutes has been criticized as vague and misleading.[162] Reliance on a similarly vague and misleading labor law definition is no answer to this problem. One generality should not support another.

### 2. Policy-Based Arguments

Several policy arguments, while not always explicitly offered in court opinions, can also be cited for support of the integrated enterprise test as a tool in discrimination cases. First, the federal courts need to find answers to legal problems in an efficient fashion. The first courts faced with multiple-employer situations surely searched for logical solutions to the puzzle and sought answers through analogy. The courts simply looked at how other judicial bodies facing related questions have solved their dilemmas. At least superficially, the integrated enterprise test appears as a logical solution to a complex riddle. Thus the test was in part promulgated for ease and efficiency. This argument is further buttressed by the fact that judges do not have time for those quandaries that attract academics. Moreover, many of the same courts that imported the integrated enterprise test were also faced with tough questions of substantive discrimination, which only naturally drew their close scrutiny away from the procedural topics.[163]

Obviously efficiency alone cannot support an expansion of Title VII, and the search for justifications for the integrated enterprise test must probe deeper. One powerful argument for the test is its conceptualization of the supposedly separate entities as a single employer. If the entities are inseparable, liability for one is indistinguishable from liability for the other.[164] The idea was expressed aptly in *Lusk v. FoxMeyer Health Corp.*: "Courts . . . have construed the term employer broadly to include superficially distinct entities that are sufficiently interrelated to constitute a single, integrated enterprise."[165] Thus at a certain level of integration two entities stop being separate and are considered one for purposes of the federal discrimination statutes. "[D]istinct entities may be exposed to liability upon a finding that they represent a

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161. 29 U.S.C. § 152(2) (1994).

162. *See supra* note 4.

163. *See, e.g.*, Swallows v. Barnes & Noble Book Stores, Inc., 128 F.3d 440 (6th Cir. 1997) (discussing agency issues and integrated enterprise).

164. This argument only works, however, for those situations where the defendants are parent and subsidiary. Many cases applying the integrated enterprise test appear wholly outside the parent-subsidiary context, and this argument should not apply to them. *See, e.g.*, York v. Tennessee Crushed Stone Ass'n, 684 F.2d 360, 362 (6th Cir. 1982) (applying integrated enterprise to see whether trade association, not corporate entity, was in fact a single employer).

165. 129 F.3d 773, 777 (5th Cir. 1997).

single, integrated enterprise: a single employer."[166] This analysis can be taken further with the unsurprising normative proposition that corporate entities should not be able to escape liability for their discrimination by shuffling their corporate structure.[167] Thus, even cases like *Hassell*, which rejected the idea of the integrated enterprise or *any* liability for multiple entities, would still hold liable a corporate system that is nothing more than a "sham."[168]

While certainly this core "single employer" analysis is the most persuasive argument for the integrated enterprise test, it too is not without flaws and limits. The primary problem with this "single employer" argument is that the test in application tends to focus strongly on the single employer *factors* while not examining the *realities* of the situations before them.[169] The idea behind the test is to prevent defendants from elevating form over substance and defeating liabilities by shuffling their corporate structure. But many of the courts applying the integrated enterprise test do not make this "shuffling" the central question in their analysis. Instead, the courts have held that the test looks mainly at the more superficial factors of highly integrated ownership and operations.[170] These inquiries, however, are not fully relevant to whether the corporation has structured itself to evade liability. The factors of the test alone will not reveal a sham corporate structure. Both integrated ownership and operations can exist in a perfectly legitimate corporate form. Thus the courts seem to rely too much on the legal fallacy that an integrated enterprise constitutes a "single employer" and not on the underlying activity of the corporate defendants. This analysis places liability for discrimination wholly in the hands of whether individual judges feel a corporation has crossed an arbitrary line through a series of only semi-relevant factors.

Moreover, this single employer showing has serious consequences when considered with the corporate law principles of limited liability. As noted in *Johnson v. Flowers Industries*, the primary purpose of establishing limited liability in the parent-subsidiary context is "to stimulate business investment by permitting individuals to take action in corporate form without the risk of direct liability or involvement."[171] Because of this legitimate purpose for limited liability, courts will pierce the veil of corporate structure only "'to the extent that the subservient corporation manifests no separate corporate interests of its own and functions *solely* to achieve the purposes of the dominant corporation.'"[172] While this presumption of limited liability should not act as a shield for sham corporate structures, federal courts should not run roughshod over this basic corporate law premise.[173] But this is exactly what occurs

166. Trevino v. Celanese Corp., 701 F.2d 397, 404 (5th Cir. 1983).

167. *See* U.S. DEP'T OF LABOR, *supra* note 1, at 38-40.

168. Hassell v. Harmon Foods, Inc., 336 F. Supp. 432, 433 (W.D. Tenn. 1971).

169. *See York*, 684 F.2d at 362.

170. *See supra* text accompanying note 13.

171. 814 F.2d 978, 980 (4th Cir. 1987).

172. *Id.* at 981 (emphasis added) (quoting Krivo Indus. Supply Co. v. National Distillers & Chem. Corp., 483 F.2d 1098, 1106 (5th Cir. 1973)).

173. The Seventh Circuit has recently noted an additional argument against this vein of the integrated enterprise test, one focusing on the *Erie* doctrine and choice of law principles. In *Sharpe v. Jefferson Distributing Co.*, 148 F.3d 676, 678 (7th Cir. 1998), the court noted that "an unresolved choice-of-law question lurks behind [integrated enterprise based] employment-

when the courts simply rely on the fallacy of a "single employer."

Even if the courts were to require a higher "sham" showing as in typical "corporate veil" cases, it is difficult to see how the NLRB factors alone can lead a court to assume that an entity is in fact a sham in the context of employment discrimination. The factors as promulgated by the NLRB focus on what is a very real problem in labor law—"double breasting."[174] This labor tactic involves transferring work from union shops to nonunionized entities in order to escape collective bargaining obligations.[175] This anti-labor practice was alive and well at the time the NLRB put the integrated enterprise test into full force.[176] The application of the test at that time focused on acts crucial to a determination that the entities had in fact attempted to evade the NLRB's jurisdiction through double breasting. For example, the fact that a parent and subsidiary shared facilities[177] or freely exchanged employees[178] both may establish the prongs of interrelated operations and labor control while also showing that a company had engaged in double breasting. It can be said that the integrated enterprise factors themselves are uniquely suited for a showing of sham liability in the labor context and developed as a response to a real problem in labor cases.

The same cannot be said of the integrated enterprise test in the discrimination setting. There is no statistical or anecdotal evidence that this kind of double breasting occurs in the employment discrimination context. Employers certainly have at least a superficial interest in limiting their exposure to discrimination suits. But a large measure of callousness attaches to structuring a corporation around avoiding liability for discrimination. This callousness does not attach in the purely economic context of labor relations. Discrimination is a social evil that employers are cognizant of and presumably do not turn a wholly blind eye towards.[179] Avoiding this type of liability through sham entities is different in kind from avoiding the purely monetary sting of labor law. Even if one is not willing to assume that America's corporate enterprises are keen on recognizing and eliminating discrimination, it is not a huge leap to suggest that corporations at least do not wish to harm their employees. Moreover, most employers (including the most sophisticated) are so well above the meager fifteen-employee limit that it would be almost impossible to structure themselves to

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discrimination cases." The court refused to address the issue as the parties had not briefed it. Presumably, Judge Easterbrook was alluding to the fact that corporate law is primarily the province of the states. Thus, the argument would go, the federal courts should follow state law principles in determining corporate law cases and not follow federal common law. This tricky *Erie* question is beyond the scope of this Note, but should not be dismissed as a plausible attack on the integrated enterprise test.

174. *See* 132 CONG. REC. 7844-45 (1986) (statement of Rep. Jeffords).

175. *See* JUSTICE, *supra* note 97, at 268.

176. *See* Moving Picture Mach. Operators Local No. 159, 115 N.L.R.B. 952 (1956) (applying integrated enterprise test to motion picture theater chain involving multiple levels of interlocking entities, each of which was beneath the jurisdictional minimum for the NLRB).

177. *See* Metco Plating Co., 110 N.L.R.B. 615, 616 (1954); Venus Die Eng'g Co., 110 N.L.R.B. 336, 337 (1954).

178. *See* Orkin Exterminating Co., 115 N.L.R.B. 622, 625 (1956); Central Dairy Prods. Co., 114 N.L.R.B. 1189, 1190 (1955).

179. *See generally* Withers, *supra* note 87, at 109, 112 (citing study that found sexual harassment costs a Fortune 500 company about $6.7 million a year in lost productivity).

avoid Title VII liability. For example, the court in *Richard v. Bell Atlantic, Inc.* held that Bell Atlantic was an integrated enterprise with its subsidiaries for purposes of summary judgment without once mentioning whether it believed the entity was a "sham."[180] Bell Atlantic employed over 139,000 people in 1998.[181] It would seem beyond question that the fifteen-employee limit in discrimination suits did not animate this corporation's structure. Without at least anecdotal evidence to the contrary, courts should not be quick to assume that companies have structured themselves to evade these liabilities and thus override the traditional notions of corporate liabilities.[182]

### *B. Arguments Against the Integrated Enterprise Test in Discrimination Cases*

The arguments against the application of the integrated enterprise test in the employment discrimination context essentially divide between arguments based on the differences between labor and discrimination law and those that are not based on these differences. The arguments based on the differences between labor and discrimination law include the nature of the different liabilities, the jurisdictional differences between labor and discrimination, and the usefulness of the factors in each context. The arguments not based on the labor-discrimination distinction include the common sense meaning of employer found in the legislative history of Title VII.

#### 1. Arguments Based on the Discrimination-Labor Distinction

The result of finding an integrated enterprise is vastly different in the labor and employment discrimination contexts. When the NLRB determines that an entity constitutes an integrated enterprise, it allows the Board to assert jurisdiction over a labor case.[183] The worst possible result is that a nonunion shop is suddenly forced to deal with a union. For example, the Kentucky exterminators in *Orkin Exterminating Co.* were faced with collective bargaining for the first time and the complexity of their employer-employee relations certainly increased.[184] However, as the test was used purely to determine the jurisdiction of the Board, it did not directly affect the substantive liabilities of the parties.[185] At worst it acted as a precursor to subsequent collective bargaining with a union. Conversely, the courts do not generally treat the question of employer status as jurisdictional in the context of discrimination

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180. 976 F. Supp. 40, 43 (D.D.C. 1997). In fact, the court found Bell Atlantic to be an integrated enterprise despite the fact that the plaintiffs presented no evidence at all on the interrelated operations prong. *See id.*

181. *See* Bell Atlantic, Media Kit Fact Sheet (statistical data as of Oct. 21, 1998) (copy on file with the *Indiana Law Journal*).

182. It also bears mentioning that if a plaintiff could show that a corporate structure was meant to avoid Title VII liability, the courts might grant the plaintiff a cause of action as the parent's discriminatory structuring itself might amount to a discriminatory act.

183. *See supra* text accompanying notes 95-98.

184. *See* Orkin Exterminating Co., 115 N.L.R.B. 622, 625 (1956).

185. *See supra* text accompanying notes 95-98.

disputes.[186] Instead, the test often arises in summary judgment motions or motions for dismissal concerning the substantive liabilities of the parties.[187]

These differences are critical in several respects. First, a test explicitly designed to function as a jurisdictional analysis is likely to be more superficial than an analysis aimed at holding parties to substantive liabilities. In the NLRB context, the test can only establish the jurisdiction of the Board, which might lead to mandatory collective bargaining. It does not, however, forever alter the position of the defendant corporation. A finding of integration in the labor context is merely a first step in the long path of negotiations leading to an eventual collective bargaining agreement. The corporation still has a strong nexus of control over this process and can protect its own fate under the NLRB proceedings and subsequent negotiations. The defendant in a discrimination suit, however, may be forced to accept liability. There are no negotiations for the loser. The company is simply stamped with the permanent liability for the purported discrimination. The difference between these liabilities is as basic as that between contract and tort. The labor defendant still has plenty of power to bargain in its process, and thus laws applying to it can rightfully be applied loosely. The discrimination defendant, however, is being held to a tortious liability and deserves the protection of certain and solid standards. This fundamental, conceptual distinction between labor and discrimination liabilities strongly militates against blindly importing labor concepts into the discrimination context.

A second argument based on this labor-discrimination distinction is that the test was created by the NLRB for the purpose of jurisdictional expansion, while its application in discrimination cases is in an area Congress intended to restrict—the definition of employer.[188] As noted previously, the integrated enterprise test was put into wide use at a time when the NLRB's already broad jurisdictional base was being greatly augmented.[189] The flexible integrated enterprise test was apparently one way to further this policy of jurisdictional expansion. The discrimination statutes, however, do not share this basic notion of expansiveness in scope.[190] The limit on the number of employees is an important restriction in the statutes. The integrated enterprise test derives much of its present power from its ability to allow plaintiffs to elude these statutory minimums. But these prerequisites are part of the compromise that made up Title VII and continue to be a fundamental part of discrimination law. This floor on the size of employers liable under Title VII remains as vital today as it did in 1964. The same can be said of the strict procedural requirements that also are embedded in discrimination statutes and form part of the usefulness of the test.[191] These seemingly strict standards are meant to be taken seriously and should not be easily evaded by plaintiffs. Thus the test's labor law purpose of *expanding* jurisdictional coverage is alien to important principles of the discrimination statutes.

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186. *See* Sharpe v. Jefferson Distrib. Co., 148 F.3d 676, 678 (7th Cir. 1998).

187. *See, e.g.*, Rogers v. Sugar Tree Prods., Inc., 7 F.3d 577, 581 (7th Cir. 1994).

188. *See supra* notes 67-68, 94-108.

189. *See supra* text accompanying notes 98-100.

190. *See* 110 CONG. REC. 6548-49 (1964).

191. *See, e.g.*, Moore v. Sunbeam Corp., 459 F.2d 811, 820-21 (7th Cir. 1972) ("As part of the compromise which made it possible to pass the Civil Rights Act of 1964, its sponsors agreed to the inclusion of provisions which impose an extremely short limitations period on private claims.").

As a tool for expanding the jurisdictional reach of labor cases, the integrated enterprise test is wholly inappropriate for the rather limited substantive scope of the discrimination statutes.[192]

A final argument against the test based on the differences between labor and discrimination is that the actual factors of the test bare little relevance to the core facts of a discrimination dispute.[193] In labor cases, an analysis of the business context and operations of the corporation is relevant to the dispute at hand. The Board, in making its jurisdictional determination, cannot avoid evaluating the business structure of the defendant as its jurisdictional mimimums are *based* on the volume of interstate commerce in which the defendant partakes.[194] In discrimination cases, however, analysis of ownership, business operations, and the like amount to a side show from the main issue—discrimination. Under the integrated enterprise test, discovery and pretrial motions focus not on the acts of the relevant parties but on seemingly irrelevant matters such as corporate financing, the hierarchy of officers, and the board of directors. Thus the integrated enterprise test amounts to a distracting exercise during the course of a discrimination lawsuit.

### *2. Arguments Not Based on the Discrimination-Labor Distinction*

Outside of the differences between labor law and discrimination law, the primary arguments against the integrated enterprise test stem from the legislative history of Title VII. First, as made clear by Senator Clark, the definition of employer is to be guided by common sense.[195] Stripping away veil-piercing concepts and legal fallacies concerning "single employers," common sense seems to dictate that a person with one job has one employer. As *Hassell* noted: "There is nothing in the statutory language or legislative history which supports the contention that you can [have two

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192. The Seventh Circuit recently emphasized this point in criticizing the integrated enterprise test:

> Where a focus on integration makes sense is in the original context of the four-factor test: the determination by the National Labor Relations Board of whether it has jurisdiction over an employer or, even more clearly, what the appropriate bargaining unit is. If the work forces of two affiliated corporations are integrated, there is an argument for a single bargaining unit covering both of them, and also an argument that they should be combined for purposes of determining whether the effect on commerce is substantial enough to justify the Board in asserting jurisdiction. But there is no argument for making one affiliate liable for the other's independent decision to discriminate. Courts that have borrowed the four-factor test for use in the discrimination context have, perhaps, been insufficiently sensitive to the bearing of context on the proper formulation of rules of affiliate liability.

Papa v. Karty Indus., 166 F.3d 937, 942-43 (7th Cir. 1999) (citations omitted).

193. *See id.* at 939 ("[T]he test was not custom-designed for answering exemption questions under the antidiscrimination laws, but instead was copied verbatim from the test used by the National Labor Relations Board to resolve issues of affiliate liability under the laws administered by the Board.").

194. *See* STRAUSS & HIGGINS, *supra* note 97, § 3.02.

195. *See supra* text accompanying note 117.

employers]."[196] The common sense determination that *Hassell* made is supported by the notion that the definition of employer in the statute is meant to reflect the common dictionary definition of employer.[197] As noted previously, the *Webster's* definition of employer focuses on the singular, and does not seemingly extend to the multiple-employer setting in which the integrated enterprise test arises.[198] Thus the integrated enterprise test defies both the common sense meaning of employer and its common dictionary meaning, both constituting clear violations of legislative intent.

A second legislative intent argument lies in that the scope of Title VII was not intended to have a continually expanding reach. Senator Robertson's comments on Congress's past experience with wage laws show that those who voted on Title VII feared an ever-expanding scope which would swallow the important limitations placed on the Act.[199] The continuing vitality of size restrictions and strict procedural requirements further the notion that the federal employment discrimination statutes were intended to contain limitations beyond which liability could not follow. While the temptation to aide plaintiffs falling into these harsh pitfalls is surely great, the federal courts do a great disservice to the congressional intent behind these provisions by allowing plaintiffs to employ a labor law test to avoid the standards of discrimination.

## IV. ALTERNATIVES TO THE INTEGRATED ENTERPRISE TEST

Even if courts fail to reject the integrated enterprise test in its entirety, at least some alternatives should be explored. Courts have applied a variety of other solutions to the problem of multiple-employer situations in discrimination cases. Keeping an eye on the already noted strengths and weaknesses of the integrated enterprise test, this Part will briefly sketch two possible alternatives to that test, and then suggest that a third alternative is the analysis that federal courts should follow. The first alternative is the joint employer test, another NLRB-based test sometimes applied in federal courts. A second option is to require courts to make a separate independent analysis of every named defendant in order to determine which one is, in fact, the true employer liable under the discrimination statute. Finally, a third, and arguably the most acceptable alternative is a subtle modification of the integrated test employed by the Fifth Circuit. This modification focuses the test on the employer's participation in the underlying discriminatory acts.

### *A. The Joint Employer Test*

The joint employer test is essentially a cousin of the integrated enterprise test in that it was also developed by the NLRB in multiple-employer cases and was only later applied to employment discrimination.[200] The joint employer analysis does not treat two entities as one, but focuses on joint control shared by two separate

196. Hassell v. Harmon Foods, 336 F. Supp. 432, 433 (W.D. Tenn. 1971).
197. *See supra* text accompanying notes 117-18.
198. *See supra* text accompanying note 118.
199. *See supra* text accompanying notes 124-27.
200. *See* 21 U.S. NLRB ANN. REP. 16 (1956).

employers. "In the case of the single employer doctrine, the two entities are essentially the same entity. In the case of the joint employer doctrine, the two share control of the employee to such an extent that they both function as an employer."[201] The test itself centers on the amount of control the entity in question has over the employee:

> The basis of the finding is simply that one employer while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer. Thus, the "joint employer" concept recognizes that the business entities involved are in fact separate but that they share or co-determine those matters governing the essential terms and conditions of employment.[202]

Thus courts applying the test are required to examine the amount of control the entities exercise over the employees in question.

Like the integrated enterprise test, the application of the joint employer test falls to several obvious criticisms. The first fault of this alternative is that it embodies many of the same weaknesses of the integrated enterprise test. It too was developed by the NLRB and is not wholly appropriate for the discrimination context. For example, the joint employer test can be seen as an expansion of liability violating the legislative intent of Congress and the statute's numerical limitations every bit as much as the integrated enterprise test does. Moreover, the joint employer test equally speaks nothing of the "sham" nature of the employment structure in dispute.

Besides its NLRB-based problems, the joint employer test also can be criticized conceptually because it does not address the core issues of liability under the discrimination statutes. The test claims to look at joint control over employees by two separate employers. The conceptual counterargument employers can make is that while two employers may share control, they might not share in discriminatory acts or practices. What one employer does with its control is not necessarily known or condoned by the other. Thus in a multiple-employer setting under the joint employer test, an employer could receive liability for an act completely out of its zone of control. Simply because two employers are linked by shared control does not mean strict liability should apply to an employer who has not participated in discrimination. Finally, the joint employer test's application in employment cases is greatly reduced by its seeming lack of utility. Very few situations would arise in which two employers would have the type of shared control necessary for this test, thus limiting its utility as an answer to the multiple-employer enigma.[203]

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201. Bonilla v. Liquilux Gas Corp., 812 F. Supp. 286, 289 (D.P.R. 1993).

202. NLRB v. Browning-Ferris Indus., 691 F.2d 1117, 1123 (3d Cir. 1982).

203. The utility of the joint employer test would most often arise in temporary employment cases. *See* Giddens, *supra* note 83, at 22.

### B. Individual Assessment

Federal courts have used a variety of tests to determine who counts as a direct employer in *single* employer settings.[204] For example, the Seventh Circuit has suggested looking at the "economic realities" of the employment relationship to see if it amounts to one of employment.[205] By extension, the federal courts could require that in each multiple-employer situation the plaintiffs must show that each defendant meets the general test for a single employer. At a minimum, this approach would not fall to the criticism of violating legislative intent, for it does comport with the common sense notion that each person has one employer. The problem with this application is that it does not fit any notion of judicial economy. This approach would require courts to make complex, sometimes controversial, findings in almost every multiple-employer case. Moreover, the courts have not agreed on a test for determining who is an employer in the single employer setting.[206] Plaintiffs would also be required to do twice as much meaningless discovery into corporate structures and the like than is required under the already distracting integrated enterprise test. Finally, this analysis also fails to duplicate the veil-piercing function the integrated enterprise test purports to contain. Corporate entities wishing to create sham structures could simply craft their subsidiaries in such a way to avoid the single employer tests and thus liability. This approach would simply change which sham structures corporations would set up. So the approach of requiring individual assessment of each purported employer also fails to meet some of the crucial concerus animating a critique of the integrated enterprise test.

### C. Fifth Circuit Modification

A reasonable solution to the quandary the integrated enterprise test poses is an approach adopted by the Fifth Circuit in its integrated enterprise cases. While not wholly abandoning the concept of the integrated enterprise, the Fifth Circuit has tied the test to an analysis of whether the parent company has in fact participated in the alleged discrimination or at least had direct control over the type of activity alleged in the action.[207] "This analysis ultimately focuses on the question whether the parent corporation was *a final decision-maker in connection with the employment matters underlying the litigation.*"[208] The Fifth Circuit has said that the integrated enterprise

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204. *See* Rogers v. Sugar Tree Prods., Inc., 7 F.3d 577, 581 (7th Cir. 1994); *see also* Frank v. U.S. West, Inc., 3 F.3d 1357, 1362 n.2 (10th Cir. 1993) (citing three tests other than the "economic realities" test for determining employer status under Title VII). A fuller exploration of the permutations applied by the federal courts is beyond the scope of this Note.

205. *Rogers*, 7 F.3d at 581.

206. *See Frank*, 3 F.3d at 1362.

207. *See* Skidmore v. Precision Printing & Packaging, Inc., 188 F.3d 606, 617 (5th Cir. 1999); Lusk v. FoxMeyer Health Corp., 129 F.3d 773, 777 (5th Cir. 1997); Chaiffetz v. Robertson Research Holding, Ltd., 798 F.2d 731, 735 (5th Cir. 1986); Trevino v. Celanese Corp., 701 F.2d 397, 404 (5th Cir. 1983).

208. *Lusk*, 129 F.3d at 777 (emphasis added); *accord* Frank v. U.S. West, 3 F.3d 1357, 1363 (10th Cir. 1997) ("What entity made the final decisions regarding employment matters related to the person claiming discrimination?"); *see also Trevino*, 701 F.2d at 404 ("This criterion has

factors are relevant "only as they bear on this precise issue."[209] Thus the Fifth Circuit has modified the basic integrated enterprise test to include an analysis of whether the second entity actually participated in the underlying employment matters and decisions at dispute in the case.

This approach is meritorious in almost every way in which the general integrated enterprise test fails. First, the Fifth Circuit modification does justice to the legislative intent underlying the definition of employer. While the modification would still allow one person to have more than one employer, it does not defy common sense to hold liable entities that actually *participate* in discriminatory employment decisions. This modification also respects the employee limits Congress placed on Title VII.[210] By requiring the parent to have actually participated in the discriminatory conduct or at least the fundamental employment matters related to it, the modification anchors the test in substantive discrimination and prevents a second entity from being swept incidentally into the liability of the first.[211]

Another major benefit of the Fifth Circuit approach is that it serves many of the veil-piercing purposes missing from modern integrated enterprise cases. By focusing not only on the factors themselves but also on participation in the relevant employment matters, this modification ensures that no sham entity will survive an integrated enterprise analysis. No matter what sham entities a corporation could devise, it could not participate in core employment matters without facing potential discrimination liability. This variation of the test allows courts to be certain that the complex corporate entities before them are not structured to avoid discrimination liability.

The Fifth Circuit modification also answers some of the concerns arising from the distinction between labor and discrimination.[212] As noted previously, the distinction between NLRB jurisdiction and discrimination liability mirrors the distinction between contract and tort. By focusing on actual control over employment decisions, the Fifth Circuit courts have held entities liable for their *own* conduct in areas where they exposed themselves to some degree of accountability.[213] This analysis prevents tort liabilities from being thrust upon entities which in no way participated in tortious conduct.

Finally, the Fifth Circuit formulation has the added advantage of answering concerns of judicial economy. By placing this extra step in the integrated enterprise process, the courts have realistically placed an initial question before plaintiffs. Any plaintiff invoking the integrated enterprise test must be able to demonstrate that the

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been further refined to the point that '[t]he critical question to be answered then is: What entity made the final decisions regarding employment matters related to the person claiming discrimination.'") (quoting Odriozola v. Superior Cosmetic Distribs., 532 F. Supp. 1070, 1076 (D.P.R. 1982)). The Seventh Circuit has also recently weighed in with critieism of the integrated enterprise test, and endorsed the Fifth Circuit analysis as one of a few acceptable alternatives to the mainstream use of the test. *See* Papa v. Karty Indus., 166 F.3d 937 (7th Cir. 1999).

209. *Lusk*, 129 F.3d at 777.

210. *See supra* text accompanying notes 67-68.

211. *See Lusk*, 129 F.3d at 773.

212. *See supra* Part III.B.1.

213. *See Lusk*, 129 F.3d at 773.

second entity was involved in the discriminatory employment matters. Because plaintiffs must evaluate the likelihood of meeting this step, they would be able to easily evaluate their likelihood of success before any deep discovery must be made into the structures of corporate defendants. This will often prevent discrimination disputes from falling into distracting excursions into corporate structure. Thus this Fifth Circuit modification answers many of the concerns which militate against the basic integrated enterprise inquiry.[214]

## CONCLUSION

This Note has attempted to make a systematic inquiry into the structure, application, and validity of the integrated enterprise test in the employment discrimination context. The test's power comes from the complexity of the modern employment scheme. Courts facing intricate multiple-employer settings are bound to search for solutions in relevant bodies of law. This Note has explored how the EEOC and the federal courts turned to labor law to apply the integrated enterprise test to the discrimination setting.

This Note has examined the development of the test in NLRB cases as well as the relevant legislative history of Title VII and the test's early development in EEOC cases. This historical development forms part of a critique of the benefits and a detailing of the weaknesses of the integrated enterprise test. The critique of the test focuses primarily on the federal courts' inability to apply the integrated enterprise test as a veil-piercing construct and the inappropriateness of the justifications that have been offered for the test. The arguments against the test divide on arguments based on the distinction between labor and discrimination law and those not based on this distinction. The central labor-based distinction is that the test is an expansive jurisdictional concept being applied in a setting where Congress has intended a different set of limits and liabilities. The nondistinction-based arguments focus mainly on the notion that dual-employer status violates the common sense approach Congress intended the Title VII definition of employer to have.

This Note concluded by offering several alternatives to the basic integrated enterprise test. The first two possibilities, joint employer liability and individual determination of employer status, were briefly sketched, as were arguments against such options. A final alternative, the Fifth Circuit modification of the integrated enterprise test, was offered as a reasonable means of determining multiple-employer questions. This alternative focuses on the control the entity in question exercised over the relevant employment decisions, and thus elevated the integrated enterprise test to a level more appropriate for the discrimination setting. This modification is a plausible solution to the difficulties presented by multiple-employer determinations in discrimination suits.

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214. Another added benefit of this test is that it serves the "deeper emotions" value of the integrated enterprise test. In a situation where an employer is exercising this much control over the relevant employment matters, the plaintiff is much more likely to feel that the parent, not the subsidiary, is the true source of the diserimination. As noted previously, the courts should not be blind to this instinct. *See supra* text accompanying notes 86-94.