

**THE IMPORTANCE OF INTEREST GROUP  
INVOLVEMENT IN EMPLOYMENT  
DISCRIMINATION LITIGATION**

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Reprinted from  
**HOWARD LAW JOURNAL**  
Volume 25, Number 4  
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# The Importance of Interest Group Involvement in Employment Discrimination Litigation

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Since enactment of Title VII of the Civil Rights Act of 1964,<sup>1</sup> employment discrimination litigation has been utilized by many interest groups and organizations as a means by which to secure their often widely divergent policy goals and objectives.<sup>2</sup> Most studies of employment discrimination litigation focus on the cases themselves, their legal aspects, or their ramifications for further litigation or policy-making.<sup>3</sup> Here we examine the extent of interest group participation in fifty-two employment discrimination cases<sup>4</sup> and the impact

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The authors would like to express their appreciation to Stephen L. Wasby, Thomas G. Walker, Clement E. Vose and Allen McDonough who made excellent comments on an earlier version of this paper that was delivered at the annual meeting of the Law & Society Association (June 11, 1981).

1. 42 U.S.C. § 2000e-e17 (1976).

2. See Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 VAND. L. REV. 905 (1978) [hereinafter referred to as Belton]; BERGER, LITIGATION ON BEHALF OF WOMEN, AN ASSESSMENT; FORD FOUNDATION REPORT (1979) [hereinafter referred to as BERGER]; K. O'Connor and L. Epstein, An Overview of Interest Group Participation in Gender and Racially Based Employment Discrimination Litigation (June 11, 1981) (paper delivered at annual meeting of the Law & Society Association).

3. See, e.g., B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION AND THE LAW (1976); *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1166 (1971); Rabin, *The Individual in the Workplace: Directions of the Burger Court as Revealed in Its 1978-1979 Employment Decisions*, 30 SYRACUSE L. REV. 825 (1979); Symposium on Title VII, *The Second Decade of Title VII Refinement of Remedies*, 16 WM. & MARY L. REV. 433-566 (1974-1975).

4. We include for discussion only the cases resulting in a written opinion from the Court. Thus, *per curiam* decisions have been excluded.

of that involvement.<sup>5</sup>

#### WHY INTEREST GROUPS LITIGATE

Employment discrimination is a costly and complex area of the law. Many of those aggrieved by discriminatory employer practices have limited resources. In Galanter's terminology, these aggrieved employees are "one-shotters"—those for whom the outcome of the case may be critical. According to Galanter, however, these persons may not have the resources necessary to assert their rights via the judicial system.<sup>6</sup> Thus, for these individuals, interest group or union support may be critical. Many interest groups and even some unions appear mindful of this representational role. For example, the International Union of Electrical, Radio, and Machine Worker's (IUE) attorneys have noted that "unions can provide sorely needed financial and legal assistance" as well as "moral support and valuable information" when an employee alleges a discriminatory employment practice.<sup>7</sup>

In contrast, employers often incur only limited start-up costs when forced to defend themselves against charges of discrimination. Generally, they have retained in-house counsel knowledge in the art of delay (which many individual plaintiffs cannot afford), and more specifically, the employment discrimination area. Particularly when a large company or the United States government is a party to a suit, the employer/defendant is a classic "repeat player."<sup>8</sup> While private

5. See *infra* notes 41 and 87. While differentiating between direct sponsorship of cases and submission of *amicus curiae* briefs in our discussion of interest group participation, both are included for study. A group's involvement as an *amicus* may be minimal, but cannot be ignored. For instance, there is evidence that Justices look to *amicus* briefs in writing their opinions; see *Roe v. Wade*, 410 U.S. 113 (1973). Thus, while *amici* lack the status of a direct litigant, they may affect the ultimate outcome of a case. And, many organizations (whether correctly or not) take credit for successes of direct sponsorship and find the *amicus* role as an important part of their overall litigation activities. See Hull, *Advocates As Amicus Curiae: Friends of the Court Effecting Change*, *AMICUS* Jan./Feb. 1978, at 27; Karp, *From Roth to Rohauer: Twenty Years of Amicus Briefs—The Seventh Donald C. Brace Memorial Lecture on Copyright Law*, *Bulletin*, Copyright Society of the U.S.A. (1977); S. Puro, *The Role of Amicus Curiae in the United States Supreme Court: 1920-1966* (1971) (unpublished Ph.D. dissertation at SUNY/Buffalo).

6. Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, *L. & Soc'y REV.* 98 (1974) [hereinafter referred to as Galanter].

7. Newman & Wilson, *The Union Role in Affirmative Action*, 32 *LAB. L. J.* 323 (1981) [hereinafter referred to as Newman & Wilson].

8. Repeat players who participate in the litigation system over time accrue many advantages because of that status. These include "advance intelligence," "expertise," "informal rela-

attorneys retained by aggrieved plaintiffs may be skilled in litigation of employment discrimination claims, the importance of technical and often highly statistical information, and the costs involved in such litigation often places an employee (or prospective employee) plaintiff at a severe disadvantage.<sup>9</sup> For these reasons, in race and gender-based employment discrimination litigation, interest groups have played an unusually prominent role. Moreover, at least at the level of the United States Supreme Court, interest groups advocating both employee and employer positions have made employment discrimination litigation a battleground of competing ideological and financial interests.

Hundreds of local, state, and national organizations exist to fight race and sex discrimination. Major national organizations including the National Association for the Advancement of Colored People (NAACP)<sup>10</sup> and the National Organization for Women (NOW)<sup>11</sup> have created special tax-exempt<sup>12</sup> legal defense funds to lobby and/or to litigate. Those organizations and the many other groups involved in litigation have found the judiciary to be more receptive to their claims than state or national legislators.<sup>13</sup> The Justices of the United States Supreme Court have also recognized and legitimized the utility of groups' use of the courts. Speaking for the Court in 1963, Justice Brennan wrote: "Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts . . . . And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances."<sup>14</sup>

tionships with institutional incumbents," credibility (and interest in perpetuating this "bargaining reputation"), ability to "play the odds," and an ability "to play for rules as well as immediate gains." Galanter, *supra* note 6, at 97-100.

9. Note, *Employment Discrimination: Statistics Preference Under Title VII Cases*, 30 *LAB. L. J.* 748 (1979); *Evidence: Statistical Proof in Employment Discrimination Cases*, 28 *OKLA. L. REV.* 885 (1975). See also BERGER, *supra* note 2.

10. See J. GREENBERG, *JUDICIAL PROCESS AND SOCIAL CHANGE* (1977) [hereinafter referred to as GREENBERG]; C. VOSE, *CAUCASIONS ONLY* (1959) [hereinafter referred to as VOSE].

11. See NOW Salutes NOWLEDF, *NATIONAL NOW TIMES*, June 1981, at 1.

12. See generally Note, *The Tax-Exempt Status of Public Interest Law Firms*, 45 *CALIF. L. REV.* 228 (1972).

13. D. TRUMAN, *THE GOVERNMENTAL PROCESS* (1959); VOSE, *supra* note 10; Cortner, *Strategies and Tactics of Litigants in Constitutional Cases*, 17 *J. OF PUB. L.* 287 (1968).

14. *NAACP v. Button*, 371 U.S. 429, 430 (1963).

To achieve their goals through litigation, some groups are forced to seek out prospective plaintiffs.<sup>15</sup> Other groups generally are amenable to the claims of potential plaintiffs who ask for their assistance. However, when an organization involved in litigation cannot find a suitable plaintiff, or afford to actually handle litigation from the trial court stage, it often submits an *amicus curiae* brief to apprise the Court of its beliefs, to bring new information to the justices' attention, or to buttress the claims of a like-minded organization.<sup>16</sup>

Both conservative and business interests appear to be increasingly participating in discrimination claims through the use of *amicus curiae* briefs. Particularly since the mid-1970's, conservative interest groups have regularly submitted friend of the court briefs to counter the claims made by their more liberal counterparts. For example, the Chamber of Commerce often appears as *amicus curiae* to present the Court with strong pro-business stands.<sup>17</sup>

*Amicus* participation, however, often lacks one element that may be critical in employment discrimination litigation—control. In Professor Robert Belton's study of public and private enforcement efforts under Title VII, he found that the NAACP Legal Defense Fund's (LDF) success in *Griggs v. Duke Power Co.*<sup>18</sup> was largely attributable to its control of the case as it was readied for appeal to the United States Supreme Court.<sup>19</sup> This kind of control has been the hallmark of the LDF's strategy. Generally, the LDF prefers to sponsor cases from the trial court level.<sup>20</sup> This provides its staff lawyers with the control that they feel is crucial to the success of a Supreme Court appeal.

15. In *In re Primus*, 436 U.S. 412 (1978), the Supreme Court upheld the right of an attorney affiliated with the American Civil Liberties Union to solicit clients without sanction so long as she did not do so for personal gain. The Court found that South Carolina's reprimand of the attorney violated the first and fourteenth amendments.

16. See generally C. VOSE, CONSTITUTIONAL CHANGE (1972); Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L. J. 694 (1963).

17. See *infra* pp. 710-13, 714-15.

18. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

19. See Belton, *supra* note 2.

20. See Westin, *Someone Has to Translate Rights into Realities*, 2 CIV. LIB. REV. 117 (1975).

### *Organizations that Litigate*

The NAACP and the LDF have long resorted to the courts to seek redress from discriminatory practices. Several scholars have traced their successes in the restrictive covenant,<sup>21</sup> school desegregation,<sup>22</sup> capital punishment,<sup>23</sup> and employment discrimination areas.<sup>24</sup> Since its initial appearance before the United States Supreme Court in 1915,<sup>25</sup> the NAACP, and later the LDF's expert staff and use of the test case strategy have brought it to the forefront of civil rights litigation and allowed it to stand as a model for other groups both to imitate and to improve upon. It is a regular repeat player before the Court in the employment discrimination area, as well as in most other areas involving some aspect of race discrimination.

The American Civil Liberties (ACLU) also litigates in race, as well as in gender-based employment discrimination. The efforts of the ACLU, however, which appear in equally as many if not more cases than the NAACP or the LDF, have been the object of less scholarly attention. We suspect that this is because of its involvement in a far wider variety of issues,<sup>26</sup> the media's attention to its first amendment crusades, and the Union's preference to enter cases at the appellate, rather than trial court stage.<sup>27</sup> However, the creation of a special Women's Rights Project (WRP) has altered that preference in some areas of sex discrimination, as will be discussed. While the WRP has sponsored more sex discrimination cases heard

21. See VOSE, *supra* note 10.

22. R. KLUGER, SIMPLE JUSTICE (1976); GREENBERG, *supra* note 10; Wasby, *Interest Group Litigation in An Age of Complexity* (1981) (paper delivered at the annual meeting of the Midwest Political Science Association) [hereinafter referred to as Wasby]; J. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM (1978).

23. M. MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT (1973).

24. Belton, *supra* note 2; Wasby, *supra* note 22.

25. *Ginn v. United States*, 238 U.S. 347 (1915).

26. See generally F. SORAU, THE WALL OF SEPARATION: THE CONSTITUTIONAL POLITICS OF CHURCH AND STATE (1976); S. Halpern, *Assessing the Litigative Role of ACLU Chapters*, reprinted in S. WASBY, CIVIL LIBERTIES: POLICY AND POLICY MAKING (1976); Rabin, *Lawyers for Social Change—Perspectives in Public Interest Law*, 28 STAN. L. REV. 207 (1976); Comment, *Private Attorneys-General: Group Action in the Fight for Civil Liberties*, 58 YALE L. J. 575-81 (1949) [hereinafter referred to as Comment, *Private Attorneys-General*].

27. Comment, *Private Attorneys-General*, *supra* note 26.

by the Supreme Court than any other interest group,<sup>28</sup> its participation generally has been limited to filing *amicus curiae* briefs in the employment discrimination area.<sup>29</sup>

Although in the larger area of sex discrimination litigation, the WRP comes closest to being an LDF-type litigator, it lacks many of the LDF's advantages. Even though there is a greater consensus among women on the employment discrimination issue than in any other area of sex discrimination, there has been a proliferation of women's rights organizations that deal with the problem of sexual discrimination as well as other women's rights issues.<sup>30</sup> The large number of groups has affected the WRP's ability to function as consistently as the LDF. First of all, resources in this area have been divided among several groups.<sup>31</sup> Although the WRP is probably the best funded and consequently, the best staffed of the women's rights litigators, it has been unable to capture the large share of funds enjoyed by the LDF. Secondly, since it has been almost impossible for a single group to bring cases in a well-ordered manner, this plethora of women's rights organizations has made the adoption of a true test case litigation strategy difficult. Thus, sometimes the WRP, has been forced to assist groups or private lawyers whose cases have been accepted by the Court, when in terms of overall strategy, these cases were brought out of sync. At times, this loss of control has resulted in defeats for women's rights advocates.<sup>32</sup> Additionally, the WRP

28. K. O'CONNOR, WOMEN'S ORGANIZATIONS' USE OF THE COURTS (1980) [hereinafter referred to as O'CONNOR].

29. See *infra* pp. 723-25.

30. Women's rights groups that have been involved in litigation before the United States Supreme Court include: Equal Rights Advocates, Federally Employed Women, Human Rights for Women, National Association for Women in Mathematics, National Federation of Business and Professional Women, National Women's Political Caucus, National League of Women Voters, National Organization for Women, Women Employed, Women's Equity Action League, Women's Legal Defense Fund, Women's Law Fund, Women's Law Project, Working Women, and Women's Rights Project of the American Civil Liberties Union.

31. BERGER, *supra* note 2. Also, see generally O'CONNOR, *supra* note 28, ch. 5.

32. For example, although Kahn v. Shevin, 416 U.S. 331 (1974) was an ACLU case, lawyers at the WRP were unaware of it until after Kahn's lawyer filed a jurisdictional statement with the United States Supreme Court. Consequently, when the case was placed on the Court's docket, the WRP offered its assistance to Kahn's lawyer. WRP attorneys, however, would have preferred that the case not be heard by the Court because they were then in the process of preparing Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), for appeal. Thus, they feared that Kahn could produce a loss for women's rights advocates instead of building on the four Justices block that had found sex to be a suspect classification in Frontiero v. Richardson, 411 U.S. 677 (1973).

often has been forced to act as *amicus curiae* and in that capacity to provide the Court with a fall back position to blunt the magnitude of a direct sponsor's defeat. This has happened most frequently when WRP lawyers have recognized that the Court would be unlikely to accept the position of the majority party.<sup>33</sup> WRP briefs have tended to minimize losses,<sup>34</sup> but at times, have resulted in bad feelings among women's rights litigators that have made cooperation difficult—a problem that LDF has not often had to face.<sup>35</sup>

Like the ACLU, unions have also engaged in legal proceedings regarding race and gender-based employment discrimination, in addition to their litigation in the unfair labor practice cases. Although there are several excellent histories of the union movement in general,<sup>36</sup> and of particular unions,<sup>37</sup> little has been written about union litigation activities,<sup>38</sup> particularly when discriminatory practices are at issue. Nevertheless, the AFL-CIO, the IUE, and several smaller unions often participate in Supreme Court litigation and consider it an important part of their "lobbying" activities.<sup>39</sup> Unlike the LDF or the ACLU, as will be discussed, unions do not always support

33. In *Dothard v. Rawlinson*, 433 U.S. 321 (1977), where a challenge to Alabama's refusal to hire female prison guards was made, the WRP filed an *amicus curiae* brief urging the Justices to construe the bona fide occupational qualification exception to Title VII very narrowly, if the Court was to uphold the Alabama practice.

34. See *infra* pp. 723-25.

35. As noted *infra*, the LDF has faced few competitors in the race discrimination area. Moreover, relations with the Lawyers Committee for Civil Rights Under Law, which also frequently litigates in this subject area, are very cordial (see *infra* pp. 718-20). The two organizations regularly confer about cases and assist each other whenever possible. Interview with Peter Sherwood, LDF staff attorney, (June 1981) [hereinafter referred to as Sherwood interview].

36. P. FONER, WOMEN AND THE AMERICAN LABOR MOVEMENT (1979); W. FOSTER, AMERICAN TRADE UNIONISM (1947); E. LIBERMAN, UNIONS BEFORE THE BAR (1950); M. MILLER, WORKING LIVES: THE SOUTHERN EXPOSURE HISTORY OF LABOR IN THE SOUTH (1974).

37. J. BABISH, UNION AND TELEPHONES: THE STORY OF THE COMMUNICATIONS WORKERS OF AMERICA (1952); L. ULMAN, THE RISE OF THE NATIONAL TRADE UNION (1955); S. BRILL, THE TEAMSTERS (1978); L. LEVINE, THE WOMEN'S GARMENT WORKERS (1924); E. LEVY & T. RICHARDS, STRUGGLE AND LOSE, STRUGGLE AND WIN: THE UNITED MINE WORKERS (1977).

38. But see Note, *Union Liability for Employer Discrimination*, 93 HARV. L. REV. 702 (1980); Note, *The Union as Title VII Plaintiff: Affirmative Obligation to Litigate*, 126 PENN. L. REV. 1388 (1978); Newman & Wilson, *supra* note 7.

39. See *supra* note 38, and W. GOULD, BLACK WORKERS IN WHITE UNIONS (1977); H. HILL, BLACK LABOR AND THE AMERICAN LEGAL SYSTEM (1977); Heeman, *Fighting the "Fly-Me" Airlines*, 1976-1977 CIV. LIB. REV. 48; Weiss, *Federal Remedies for Racial Discrimination by Labor Unions*, 50 GEO. L. J. 457 (1962); Sherman, *Unions' Duty of Fair Representation and the Civil Rights of 1964*, 49 MINN. L. REV. 771 (1965). See also *United States v. International*

those who claim race discrimination.<sup>40</sup>

## CASES WITH INTEREST GROUP PARTICIPATION

### *Race Discrimination*

All thirty-one of the race discrimination employment cases decided by the Supreme Court between 1970 and 1981 involved some form of interest group participation.<sup>41</sup> In general, 58 percent (n=18) were decided in favor of the parties alleging racial discrimination.<sup>42</sup> The Court decided against the position advanced by civil rights advocates in 35.4 percent (n=11) of the cases<sup>43</sup> and reached mixed re-

Longshoreman's Ass'n, 460 F.2d 497 (4th Cir. 1972); *Evans v. Sheraton Park Hotel*, 5 FEP 393 (1972).

40. GOULD, *supra* note 39, at 15.

41. *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981); *Delta Airlines v. August*, 450 U.S. 346 (1981); *Delaware State College v. Ricks*, 449 U.S. 250 (1981); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Roadway Express v. Piper*, 447 U.S. 752 (1980); *New York Gaslight Club v. Carey*, 447 U.S. 54 (1980); *California Brewer's Ass'n v. Bryant*, 444 U.S. 598 (1980); *Board of Educ. of N.Y. v. Harris*, 444 U.S. 130 (1979); *United Steel Workers v. Weber*, 443 U.S. 193 (1979); *Los Angeles v. Davis*, 440 U.S. 625 (1979); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978); *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978); *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977); *East Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395 (1976); *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *McDonald v. Santa Fe Transp. Co.*, 423 U.S. 923 (1976); *Washington v. Davis*, 426 U.S. 229 (1976); *Chandler v. Roudebush*, 425 U.S. 840 (1976); *Brown v. GSA*, 425 U.S. 821 (1976); *NAACP v. FPC*, 425 U.S. 662 (1976); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976); *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975); *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975); *Mayor of Philadelphia v. Education Equity League*, 415 U.S. 605 (1975); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Love v. Pullman*, 404 U.S. 522 (1972); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

42. *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981); *Delta Airlines v. August*, 450 U.S. 346 (1981); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Roadway Express v. Piper*, 447 U.S. 752 (1980); *New York Gaslight Club v. Carey*, 447 U.S. 54 (1980); *Board of Educ. of N.Y. v. Harris*, 444 U.S. 130 (1979); *United Steel Workers v. Weber*, 443 U.S. 193 (1979); *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978); *IUE Local 790 v. Robbins and Myers, Inc.*, 429 U.S. 229 (1976); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *McDonald v. Santa Fe Trail Transp. Co.*, 423 U.S. 923 (1976); *Chandler v. Roudebush*, 425 U.S. 840 (1976); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976); *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1976); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Love v. Pullman*, 404 U.S. 522 (1972); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

43. *Delaware State College v. Ricks*, 449 U.S. 250 (1981); *California Brewer's Ass'n v. Bryant*, 444 U.S. 598 (1980); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978); *East Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395 (1977); *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); *Washington v. Davis*, 426 U.S. 229 (1976); *Brown v. GSA*, 425 U.S. 821 (1976); *NAACP v. FPC*, 425 U.S. 662 (1976); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975); *Emporium Capwell Co. v. Western Addition Community*

sults in the remaining 6.45 percent (n=2).<sup>44</sup>

### The NAACP Legal Defense Fund (LDF)

Several other patterns of interest group participation, and the groups' success, are evident when these cases are examined.<sup>45</sup> The LDF, for example, participated either as an *amicus curiae* or as a direct sponsor in 74.1 percent (n=23) of the racial discrimination cases.<sup>46</sup> This high rate of participation was nearly matched by the LDF's success rate. It won 65.2 percent (n=15) of its cases.<sup>47</sup> However, the LDF was more successful when it directly sponsored a case. In those ten instances,<sup>48</sup> the LDF won 70 percent (n=7)<sup>49</sup> as com-

*Org.*, 420 U.S. 50 (1975); *Mayor of Philadelphia v. Education Equity League*, 415 U.S. 605 (1975).

44. *See, e.g.*, *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977); *Los Angeles v. Davis*, 440 U.S. 625 (1979). We consider mixed cases to be either (1) cases where the court affirmed and reversed the decision in part, or (2) the Court vacated and remanded the case and neither party emerged as the victor at that stage.

45. The LDF is considered separately here from the NAACP. The NAACP has actually sponsored one race-based employment discrimination case—*New York Gaslight Club v. Carey*, 477 U.S. 54 (1980). It was the named party in *NAACP v. FPC*, 425 U.S. 662 (1976), but was represented by the Notre Dame Center for Civil Rights. The NAACP acted as *amicus curiae* in only five cases. Thus, because the two organizations now maintain separate agendas, only the LDF's activities are detailed herein.

46. *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Roadway Express v. Piper*, 447 U.S. 752 (1980); *New York Gaslight Club v. Carey*, 447 U.S. 54 (1980); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Los Angeles v. Davis*, 440 U.S. 625 (1979); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978); *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978); *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977); *East Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395 (1976); *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); *IUE Local 790 v. Robbins and Myers, Inc.*, 429 U.S. 229 (1976); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *McDonald v. Santa Fe Trail Transp. Co.*, 423 U.S. 923 (1976); *Washington v. Davis*, 426 U.S. 229 (1976); *Chandler v. Roudebush*, 425 U.S. 840 (1976); *Brown v. GSA*, 425 U.S. 821 (1976); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976); *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Love v. Pullman*, 404 U.S. 522 (1972); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

47. *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Roadway Express v. Piper*, 447 U.S. 752 (1980); *New York Gaslight Club v. Carey*, 447 U.S. 54 (1980); *United Steel Workers v. Weber*, 443 U.S. 193 (1979); *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978); *IUE Local 790 v. Robbins and Myers, Inc.*, 429 U.S. 229 (1976); *McDonald v. Santa Fe Trail Transp. Co.*, 423 U.S. 923 (1976); *Chandler v. Roudebush*, 425 U.S. 840 (1976); *Fitzgerald v. Bitzer*, 427 U.S. 445 (1976); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976); *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Love v. Pullman*, 404 U.S. 522 (1972); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

48. *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978); *IUE Local 790 v. Robbins and Myers, Inc.*, 429 U.S. 229 (1976); *Fitzpatrick v.*

quality legal representation in the areas of civil rights, education, and municipal services.<sup>56</sup> As part of its mission, the LCCRUL "has taken positions or expressed views on civil rights issues,"<sup>57</sup> often in the form of *amicus curiae* support of those alleging race discrimination in municipal government. Its *amicus* submission is frequently done after consultation at the request of the LDF, with which close ties exist.<sup>58</sup>

The LCCRUL has appeared as *amicus curiae* in 35.4 percent of the race discrimination cases discussed herein.<sup>59</sup> In the 10 LCCRUL filed *amicus* briefs, two were sponsored by the LDF; in five others the LDF also participated as *amicus curiae*. As a result of its total *amicus* participation, the LCCRUL was the prevailing party in seven cases.<sup>62</sup> In all but two of these cases the LDF was present either as a direct sponsor or as

co-sponsorship has been limited to two cases in this category. In the case it won, *Chandler v. Roudebush*,<sup>65</sup> its position

<sup>56</sup> For a discussion of the LCCRUL's activities in another area, see, Sherman, *The Role of Out of State Attorneys in Civil Rights Cases*, 1 HARV. C.R.-C.L. L. REV. 45 (1972); and Felds & Spector, *Opening Up the Suburbs: Notes on a Movement for Desegregation*, 100 HARV. REV. OF L. & SOC. ACT 330 (1972).

<sup>57</sup> Interview with William L. Robinson, Director, LCCRUL (July 8, 1981). See also Robinson, *supra* note 35.

<sup>58</sup> *Chandler v. Roudebush*, 450 U.S. 346 (1981); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Board of Educ. of N.Y. v. Harris*, 444 U.S. 448 (1980); *United Steel Workers v. Weber*, 443 U.S. 193 (1979); *Los Angeles v. Davis*, 440 U.S. 625 (1979); *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978); *United States v. United States*, 433 U.S. 299 (1977); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Emporium Capwell Co. v. Community Org.*, 420 U.S. 50 (1975).

<sup>59</sup> *Chandler v. Roudebush*, 450 U.S. 346 (1981); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Board of Educ. of N.Y. v. Harris*, 444 U.S. 448 (1980); *United Steel Workers v. Weber*, 443 U.S. 193 (1979); *Los Angeles v. Davis*, 440 U.S. 625 (1979); *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978); *United States v. United States*, 433 U.S. 299 (1977); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

<sup>60</sup> *Chandler v. Roudebush*, 450 U.S. 346 (1981); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Board of Educ. of N.Y. v. Harris*, 444 U.S. 448 (1980); *United Steel Workers v. Weber*, 443 U.S. 193 (1979); *Los Angeles v. Davis*, 440 U.S. 625 (1979); *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978); *United States v. United States*, 433 U.S. 299 (1977); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

<sup>61</sup> *Chandler v. Roudebush*, 450 U.S. 346 (1981); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Board of Educ. of N.Y. v. Harris*, 444 U.S. 448 (1980); *United Steel Workers v. Weber*, 443 U.S. 193 (1979); *Los Angeles v. Davis*, 440 U.S. 625 (1979); *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978); *United States v. United States*, 433 U.S. 299 (1977); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

<sup>62</sup> *Chandler v. Roudebush*, 450 U.S. 346 (1981); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Board of Educ. of N.Y. v. Harris*, 444 U.S. 448 (1980); *United Steel Workers v. Weber*, 443 U.S. 193 (1979); *Los Angeles v. Davis*, 440 U.S. 625 (1979); *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978); *United States v. United States*, 433 U.S. 299 (1977); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

was supported by an LDF *amicus* brief. This joint effort led the Court to find that federal employees alleging race discrimination under section 717 of the Civil Rights Act of 1964 were entitled to a trial de novo on the merits and not simply judicial review of the administrative proceedings.<sup>66</sup>

While the LCCRUL enjoys an excellent success rate (61.5 percent, n=8), its victories cannot be attributed to control.<sup>67</sup> One important factor which contributes to its success may be the prestige of its membership. Two former United States Attorneys General, ten former presidents of the American Bar Association, and many well respected lawyers volunteer their services to the LCCRUL<sup>68</sup> making it a repeat player with the resultant advantages.<sup>69</sup>

Cooperation with the LDF also appears to be important. Interestingly, even though the Court decided outrightly against Black interests in only three cases in which the LCCRUL participated,<sup>70</sup> LDF presence was absent in all three cases. This nonparticipation of a frequent and well respected litigator could "cue" the Court as to the LDF's disinterest or discomfort with the issues presented.

## Unions

The litigation activities of unions in the race discrimination area are also interesting. Unlike the LDF and the LCCRUL, which always advocate the interests of persons claiming race discrimination,

66. *Chandler v. Roudebush*, 425 U.S. 840 (1976). *Chandler* was filed with *Salone v. United States*, 511 F.2d 902 (10th Cir. 1975), *vacated*, 426 U.S. 917 (1976), which was an LDF sponsored case. For additional impact, LCCRUL and LDF attorneys decided in advance to file their respective cases on the same day. The Court only accepted *Chandler*, which had the lower docket number, but this cooperation exemplifies the close relationship between the two organizations. Sherwood interview, *supra* note 35.

67. *Delta Airlines v. August*, 450 U.S. 346 (1981); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Board of Educ. of N.Y. v. Harris*, 444 U.S. 130 (1979); *United Steel Workers v. Weber*, 443 U.S. 193 (1979); *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Chandler v. Roudebush*, 425 U.S. 840 (1976); *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

68. Brief for the Lawyer's Committee for Civil Rights Under Law as *amicus curiae* submitted in *Mobile v. Bolden*, 436 U.S. 902 (1977).

69. Galanter, *supra* note 6.

70. *California Brewer's Ass'n v. Bryant*, 444 U.S. 598 (1980); *Mayor of Philadelphia v. Education Equity League*, 415 U.S. 50 (1975); *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975). Cases resulting in mixed results, *see supra* note 44, were *Los Angeles v. Davis*, 440 U.S. 625 (1979) and *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977).

the pattern of union involvement is inconsistent in terms of their support of race claims. Unions adopted "anti-black" positions in 55.5 percent (n=5) of the nine cases in which they participated.<sup>71</sup> In several cases, however, unions were charged with discriminating against black union members and thus forced to defend themselves or their procedures against charges of race discrimination.<sup>72</sup>

Regardless of whether unions adopted a pro or anti-black stance in the Court, they experienced success rates above those of all other repeat players in this area, including the United States government.<sup>73</sup> Whether unions were direct sponsors or *amicus curiae*, they won 88.8 percent of the nine cases in which they participated. They won all four of the cases in which they filed *amicus curiae*<sup>74</sup> and four of the five they sponsored.<sup>75</sup> Thus, control also does not appear necessary to union success. However, all of the four cases that unions appeared in as *amici* were sponsored either by an interest group, a business association, or the United States government.<sup>76</sup>

## Conservative Groups

Both the direction and nature of conservative groups' participa-

71. Cases with union participation include (anti-black positions denoted with an asterisk) *Fullilove v. Klutznick*, 448 U.S. 448 (1980); \**California Brewer's Ass'n v. Bryant*, 444 U.S. 598 (1980); \**United States Steelworkers v. Weber*, 443 U.S. 193 (1979); \**International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); *IUE Local 790 v. Robbins and Myers, Inc.*, 429 U.S. 229 (1976); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976); \**Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454; \**Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

72. *See Emporium Capwell Co.*, where Black employees wished to bargain independently with an employer concerning employment discrimination issues, and *Franks* where the union was charged with perpetuating discrimination by its collective bargaining agreement, and *International Bhd. of Teamsters*, where the Teamsters were charged with perpetuating the effects of past discrimination in their seniority system.

73. *See generally*, R. SCIGLIANO, *THE SUPREME COURT AND THE PRESIDENCY* (1971) and Puro, *supra* note 5. In the employment discrimination area, when race claims were at issue, the United States Government won 79.6 percent of the cases in which it appeared. O'Connor and Epstein, *supra* note 2 at 11.

74. *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *California Brewer's Ass'n v. Bryant*, 444 U.S. 598 (1980); *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

75. *United Steel Workers v. Weber*, 443 U.S. 193 (1979); *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); *IUE Local 790 v. Robbins and Myers, Inc.*, 429 U.S. 229 (1976); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975). The AFL-CIO was on the losing side in *Franks*.

76. *Griggs* was sponsored by the LDF, *Emporium Capwell Co.*, involved a business interest charged with discrimination by a local community organization, whereas *California Brewer's*, involved a trade association and *Fullilove*, concerned the United States government.

tion in Supreme Court race based employment discrimination litigation is in sharp contrast to the LDF's participation. Conservative groups consistently have advocated anti-employee, anti-plaintiff positions before the Court. And, unlike the LDF, their litigation activities have been limited to appearance as *amici curiae*. Both the Equal Employment Advisory Council (EEAC) and the Chamber of Commerce (the Chamber) have been particularly active in this area.

The EEAC was founded in 1976 by individual employers and trade associations to present their views to the judiciary "concerning equal employment opportunity and affirmative action."<sup>77</sup> It regularly submits *amicus curiae* briefs in employment discrimination cases where statistical information is in question. It has filed this type of brief in eight race discrimination cases<sup>78</sup> compiling a fifty percent success rate.<sup>79</sup> While not as high as the LDF's success rate, this figure is impressive given that the EEAC has had little time to build experience or prestige with the Court. Furthermore, its success stands in sharp contrast to that of the Chamber.

The Chamber is the largest association of business and professional persons in the United States, and as such, considers itself the "principle spokesman for the American business community."<sup>80</sup> However, its efforts, at least in terms of its ability to convince the Court to find for employers, have been uniformly unsuccessful. The Chamber filed *amicus curiae* briefs in eight cases.<sup>81</sup> In six of those cases, it adopted a pro-employer stance and sided with the losing

77. EEAC pamphlet (untitled, n.d.)

78. *Delta Airlines v. August*, 450 U.S. 346 (1981); *Delaware State College v. Ricks*, 449 U.S. 250 (1981); *California Brewer's Ass'n v. Bryant*, 444 U.S. 598 (1980); *Los Angeles v. Davis*, 440 U.S. 625 (1979); *Furnco Constr. Co. v. Waters*, 438 U.S. 567 (1978); *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978); *East Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395 (1977); *IUE Local 790 v. Robbins and Myers, Inc.*, 429 U.S. 229 (1976).

79. *Delaware State College v. Ricks*, 449 U.S. 250 (1981); *California Brewer's Ass'n v. Bryant*, 444 U.S. 598 (1980); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978); *East Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395 (1976).

80. *Amicus Curiae* brief of the Chamber of Commerce of the United States, *Marshall v. Barlow's Inn*, 436 U.S. 307 (1976).

81. *Christianburg Garment Co. v. EEOC*, 434 U.S. 421 (1978); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976); *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1974); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

party.<sup>82</sup> In one of the two cases won by the Chamber, it supported white employees who alleged racial discrimination when they were dismissed from their jobs and a similarly situated black employee was not dismissed.<sup>83</sup> Thus, although they were on the same side as the LDF in *Emporium Capwell Co. v. Western Addition Community Organization*,<sup>84</sup> they were clearly advocating the interests of white employees instead of an expansive reading of civil rights statutes.

The Chamber's low success rate may be due to its frequent advocacy of anti-civil rights positions, as well as its hard-line beliefs. Several groups in the race discrimination area, most notably the LDF appear willing to compromise.<sup>85</sup> Some groups even go so far as to provide the Court with a fall back position whether they sponsor a case or appear as an *amicus*.<sup>86</sup> In contrast, the Chamber is not known for its use of that particular tactic.

Thus, when race discrimination claims have been at stake, interest groups, unions and business associations have played major roles in taking those cases to the Supreme Court as sponsors and in presenting widely divergent views to the Justices. Some groups, most notably the LDF, LCCRUL and unions, have found the Justices to be particularly receptive to their arguments. And, perhaps most surprisingly, unions are highly successive litigators, even when, unlike the LDF or the LCCRUL, they adopt anti-civil rights stances.

#### *Gender-Based Discrimination Cases*

Since passage of the Civil Rights Act of 1964, several women's rights groups have litigated gender-based employment discrimination claims.<sup>87</sup> However, the form and extent of their participation

82. *Christianburg Garment Co. v. EEOC*, 434 U.S. 421 (1978); *Franks v. Bowman Transp. Co.*, 427 U.S. 273 (1976); *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

83. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976).

84. *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1974).

85. *See McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976).

86. *See supra* note 85; *Amicus Curiae* brief of the WRP, *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

87. *Company of Wash. v. Gunther*, 452 U.S. 161 (1981); *Northwest Airlines v. Transport Workers*, 451 U.S. 77 (1981); *Texas v. Burdine*, 450 U.S. 248 (1981); *General Tel. Co. v. EEOC*, 446 U.S. 318 (1980); *Personnel Admin. of Mass. v. Feeny*, 442 U.S. 256 (1979); *Davis v. Passman*, 442 U.S. 228 (1980); *Board of Trustees of Keene College v. Sweeny*, 439 U.S. 24 (1978); *Los Angeles v. Manhart*, 435 U.S. 702 (1978); *Nashville Gas Co. v. Satty*, 434 U.S. 136

has been more limited than that of the LDF in the race discrimination area. In fact, only the WRP has participated in a majority of the gender-based employment discrimination claims that have reached the United States Supreme Court.<sup>88</sup> While the National Organization for Women (NOW) is more widely known for its activities on behalf of women, it has co-sponsored only one Supreme Court case, *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*.<sup>89</sup> The attorney litigating on behalf of the Commission on Human Relations requested that NOW intervene at the Supreme Court level because he believed that this joint sponsorship would highlight the sex discrimination aspects of the first amendment case.<sup>90</sup> Thus, while NOW was listed as a co-sponsor of the case, it did not have the kind of input into the course of litigation that most sponsors, who try cases at the trial court level, actually possess.

NOW or its Legal Defense and Education Fund's participation as *amicus curiae* also has been less extensive than that of the WRP. It has participated as *amicus curiae* in seven sex discrimination employment cases.<sup>91</sup> In five of those cases, its participation was limited to signing on an *amicus curiae* submitted by another organization.<sup>92</sup> While this is evidence of interwomen's rights organizational cooperation, it does indicate that employment discrimination litigation has not been the focus of NOW's energies in the judicial forum.

In contrast to NOW, the WRP, while also only sponsoring one

(1977); *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977); *United Airlines, Inc. v. Evans*, 431 U.S. 553 (1977); 431 U.S. 553 (1977); *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976); *Liberty Mutual Co. v. Wetzel*, 424 U.S. 737 (1975); *Turner v. Department of Employment Sec.*, 423 U.S. 44 (1975); *Schlessinger v. Ballard*, 419 U.S. 498 (1975); *Geduldig v. Aiello*, 417 U.S. 484 (1974); *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 881 (1973); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, *reh'g denied*, 414 U.S. 881 (1973); *Phillips v. Martin Marietta Co.*, 400 U.S. 542 (1971).

88. See *infra* notes 93 and 94.

89. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, *reh'g denied*, 414 U.S. 881 (1973).

90. O'CONNOR, *supra* note 28 at 104-05.

91. *County of Wash. v. Gunther*, 452 U.S. 161 (1981); *Personal Admin. of Mass. v. Feeny*, 442 U.S. 256 (1980); *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737 (1975); *Geduldig v. Aiello*, 417 U.S. 494 (1974); *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Phillips v. Martin Marietta Co.*, 400 U.S. 542 (1971).

92. *County of Wash. v. Gunther*, 452 U.S. 161 (1981); *Personnel Admin. of Mass. v. Feeny*, 442 U.S. 256 (1980); *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737 (1975); *Geduldig v. Aiello*, 417 U.S. 484 (1974); *Corning Glass v. Brennan*, 417 U.S. 542 (1971).

case, *Turner v. Department of Employment Security*,<sup>93</sup> appeared as an *amicus curiae* in 57 percent (n=12) of the gender-based discrimination cases.<sup>94</sup> In terms of success, it won *Turner* as well as 58.3 percent (n=7) of the cases in which it appeared as an *amicus curiae*.<sup>95</sup> Three of those losses, however, involved some aspect of pregnancy discrimination,<sup>96</sup> which has generated tremendous conservative interest group participation in opposition to women's claims.<sup>97</sup>

Interestingly, the chances of the Court adopting a pro-women's rights position in the employment discrimination area were reduced drastically when the WRP was not a participant. Of the seven cases where the WRP was not involved<sup>98</sup> the arguments of those alleging sex discrimination were accepted by the Court in only 42.8 percent (n=3) of the cases,<sup>99</sup> as compared to 61.5 percent success rate when the WRP was present. While this could mean that its lawyers stay out of cases they believe are "losers," this is not necessarily the case. For example, there is evidence that even when WRP attorneys believed that a case should not be before the Court, they filed *amicus curiae* briefs or lent support to the direct sponsor to lessen the negative impact of the potential decision.<sup>100</sup>

93. *Turner v. Department of Employment Sec.*, 423 U.S. 44 (1975).

94. *County of Wash. v. Gunther*, 452 U.S. 161 (1981); *Davis v. Passman*, 442 U.S. 228 (1980); *Los Angeles v. Manhart*, 435 U.S. 702 (1977); *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977); *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976); *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737 (1975); *Geduldig v. Aiello*, 417 U.S. 484 (1974); *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Phillips v. Martin Marietta Co.*, 400 U.S. 542 (1971) (This was an ACLU case litigated before creation of the WRP.); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 400 U.S. 542 (1971).

95. *County of Wash. v. Gunther*, 452 U.S. 161 (1981); *Davis v. Passman*, 442 U.S. 228 (1980); *Los Angeles v. Manhart*, 435 U.S. 702 (1977); *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 400 U.S. 542 (1971); *Phillips v. Martin Marietta Co.*, 413 U.S. 542 (1971). Mixed results occurred in *Dothard v. Rawlinson*, 433 U.S. 321 (1977) and *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977).

96. *General Elec. Co. v. Gilbert*, 429 U.S. 321 (1977); *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737 (1975); *Geduldig v. Aiello*, 417 U.S. 484 (1974).

97. See *infra* pp. 310-11.

98. *Northwest Airlines v. Transport Workers*, 451 U.S. 77 (1981); *Texas v. Burdine*, 450 U.S. 248 (1981); *General Tel. Co. v. EEOC*, 446 U.S. 318 (1980); *Board of Trustees of Keene College v. Sweeny*, 439 U.S. 24 (1978); *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977); *United Airlines Co. v. Evans*, 431 U.S. 553 (1977); *Schlessinger v. Ballard*, 419 U.S. 498 (1975).

99. *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77 (1981); *General Tel. Co. v. EEOC*, 446 U.S. 318 (1980); *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977).

100. See *supra* note 86. See also discussion of WRP sponsorship assistance to the Southern Poverty Law Center in *Frontiero v. Richardson*, 411 U.S. 677 (1973) and to private counsel in

## Unions

Union activity in the gender-based claims area is more consistent than was evidenced in the race area. Contrary to the mixed support for race claims, unions participated on the side of women's rights groups in every employment case they entered at the level of the Supreme Court. The IUE in particular, has been especially concerned with the effects of gender-based discrimination on its members. Even Lane Kirkland, the president of the AFL-CIO, has noted the leadership position that the IUE has taken through its efforts to alleviate wage discrimination.<sup>101</sup>

Union success rates in gender-based litigation, however, is far lower than that in the race area. Of the ten cases with union participation,<sup>102</sup> the Court adopted the resolution urged by the union(s) in only 50 percent (n=5).<sup>103</sup>

It should be noted, however, that several union losses involved pregnancy discrimination claims,<sup>104</sup> a type of gender-based discrimination that has been of particular concern to the IUE,<sup>105</sup> yet an issue that many of the Justices have been unwilling to recognize as sex-discrimination, thus limiting the opportunity for the IUE or other groups to win these cases. For example, the IUE sponsored *General Electric Co. v. Gilbert*, in which the Court concluded that "an exclusion of pregnancy from a disability benefits plan providing general coverage is not a gender-based discrimination at all."<sup>106</sup> This decision, while a major loss for the IUE and women's rights advocates,

Vorchheimer v. School Dist. of Phil., 430 U.S. 703 (1977). O'CONNOR, *supra* note 28 at 113, 124-25.

101. Newman & Wilson, *supra* note 7 at 324.

102. County of Wash. v. Gunther, 452 U.S. 161 (1981); Northwest Airlines v. Transport Workers, 451 U.S. 77 (1981); Los Angeles v. Manhart, 435 U.S. 702 (1977); Nashville Gas Co. v. Satty, 434 U.S. 136 (1977); United Airlines v. Evans, 431 U.S. 553 (1977); General Elec. Co. v. Gilbert, 429 U.S. 125 (1976); Liberty Mutual Ins. Co. v. Wetzel, 424 U.S. 737 (1975); Geduldig v. Aiello, 417 U.S. 484 (1974); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Phillips v. Martin Marietta Co., 400 U.S. 542 (1971).

103. County of Wash. v. Gunther, 452 U.S. 161 (1981); Northwest Airlines v. Transport Workers, 451 U.S. 77 (1981); Los Angeles v. Manhart, 435 U.S. 702 (1977); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Phillips v. Martin Marietta, 400 U.S. 542 (1971).

104. General Elec. v. Gilbert, 429 U.S. 125 (1976); Liberty Mutual Ins. Co. v. Wetzel, 424 U.S. 737 (1975); Geduldig v. Aiello, 417 U.S. 484 (1971).

105. As early as 1954, the IUE proposed a contract clause that called for employer paid hospitalization benefits that would cover pregnancy and childbirth. Newman & Wilson, *supra* note 7, at 326.

106. 429 U.S. 136.

however, triggered a massive lobbying effort that resulted in passage of the Pregnancy Disability Act, an amendment to Title VII, which nullified the Court's position in *Gilbert*.<sup>107</sup>

## Conservative Groups

Those groups supporting and/or representing women who allege sex discrimination have experienced considerable opposition from conservative groups. In particular, the Chamber of Commerce and airline companies consistently advocate positions against women's interests. The Chamber, for example, participated as *amicus curiae* in 35 percent (n=7) of the twenty cases.<sup>108</sup> And, the Chamber's success rate was higher than that achieved when race discrimination was at issue. In the gender-based discrimination area, the Chamber won 42.8 percent (n=3) of the time.<sup>109</sup>

While the Chamber participated in the full range of gender-based cases, airline companies generally limited their opposition to those involving pregnancy discrimination, an area in which an adverse decision could have far reaching industry-wide ramifications. Of the five cases with some form of airline participation,<sup>110</sup> 60 percent (n=3) involved pregnancy discrimination claims.<sup>111</sup> Two of those, *Liberty Mutual Ins. Co. v. Wetzel*,<sup>112</sup> and *General Electric Co. v. Gilbert*<sup>113</sup> challenged practices that if not sustained could have been costly to airlines. Thus, in each the airlines stressed the potential importance of the decision and ultimately won. Thus, airline involvement in an area in which the Court has been unwilling to find

107. 42 U.S.C. § 2000e (1976) amended by 42 U.S.C. § 2000e(k) (Supp. IV 1980).

108. Northwest Airlines v. Transport Workers, 451 U.S. 77 (1981); Occidental Life Ins. Co. v. EEOC, 432 U.S. 355 (1977); General Elec. Co. v. Gilbert, 429 U.S. 125 (1976); Liberty Mutual Ins. Co. v. Wetzel, 424 U.S. 737 (1975); Geduldig v. Aiello, 417 U.S. 484 (1974); Corning Glass Works v. Brennan, 417 U.S. 188 (1974); Cleveland Glass Works v. Brennan, 414 U.S. 632 (1974).

109. General Elec. Co. v. Gilbert, 429 U.S. 125 (1976); Liberty Mutual Ins. Co. v. Wetzel, 424 U.S. 737 (1975); Geduldig v. Aiello, 417 U.S. 484 (1974).

110. Northwest Airlines v. Transport Workers, 451 U.S. 77 (1981); United Airlines v. Evans, 431 U.S. 553 (1977); General Elec. Co. v. Gilbert, 429 U.S. 125 (1976); Liberty Mutual Ins. Co. v. Wetzel, 424 U.S. 737 (1975); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

111. General Elec. Co. v. Gilbert, 429 U.S. (1976); Liberty Mutual Ins. v. Wetzel, 424 U.S. 737 (1975); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

112. Liberty Mutual Ins. Co. v. Wetzel, 424 U.S. 737 (1975).

113. General Elec. Co. v. Gilbert, 429 U.S. 125 (1976).

sex discrimination, has given airline companies a combined success rate of 60 percent.

The success of airlines in Supreme Court litigation, however, may be due to another factor—cooperation.<sup>114</sup> In several of the cases in which business interests acted as direct sponsors, their cases were supported by numerous *amicus curiae* briefs. For example, in *General Electric Co.*, twenty-one airlines signed onto a brief supporting General Electric's position. This kind of cooperation, the economic resources that these companies can devote to litigation and the potential wide ranging impact of judicial extension of pregnancy benefits have contributed to airline success.

Thus, just as when race discrimination was alleged, claims of gender-based discrimination also have resulted in group conflict. The WRP is clearly the premier litigator in this area even though its participation has been limited to *amicus curiae*. NOW and the IUE have also appeared as *amicus curiae* in several cases, each, but their impact on the Court, at least in this area, has been negligible. Airlines, particularly in the pregnancy discrimination area, also have been repeat players, but far more successful than the IUE.

#### CONCLUSION

This paper examined the involvement of interest groups in gender and race based Supreme Court litigation. Interest group involvement was extensive. While interest groups represented parties in 100 percent of the cases, the nature and extent of their participation varied. And, although generally different groups emerged to support the claims of aggrieved blacks versus women, the Chamber of Commerce argued against both groups.

Additionally, while both sets of cases evidenced interest group activity, the nature of that activity was remarkably different but resulted in similar proportions of pro-rights decisions from the Court. In the race discrimination area, two groups, the LDF and the LC-CRUL play a major role. In contrast, only the WRP in the gender area can be characterized as a major participant even though its involvement was limited to that of *amicus curiae* in all but one case.

114. For the importance of cooperation, see BERGER, *supra* note 2; O'CONNOR, *supra* note 29; VOSE, *supra* note 10; and Shields and Spector, *supra* note 56.

While the WRP's success contradicts Belton's conclusions about the importance of control, its success and that of other groups representing those who claim gender-based discrimination may be due to the nature of the cases heard by the Court in the two related areas of employment discrimination. While the gender-based discrimination cases are clearly more difficult in terms of proof than those turning on constitutional questions (i.e. *Reed v. Reed*<sup>115</sup> or *Craig v. Boren*),<sup>116</sup> the cases involving extremely complicated issues of intent and/or procedure. Thus, control may be more important in the race area because of the complex nature of the cases.

115. *Reed v. Reed*, 404 U.S. 71 (1971).

116. *Craig v. Boren*, 429 U.S. 190 (1976).