NOTE

Indirect Employer Liability: The Ninth Circuit Limits Liability for Racial Discrimination

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INTRODUCTION

In 2003, the Equal Employment Opportunity Commission ("EEOC") received 28,526 complaints of racial discrimination.[1] Employment discrimination based on race, however, is not a new occurrence.[2] In order to combat race discrimination in the workplace, Congress enacted Title VII of the Civil Rights Act of 1964 ("Title VII").[3] Congress designed Title VII to provide equal access to employment opportunities by discouraging employer discrimination based on race, color, religion, sex, or national origin.[4] Historically, the Ninth Circuit provided Title VII

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[1] U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, RACE BASED CHARGES FY 1992-FY 2003, *available at* http://www.eeoc.gov/stats/race.html (last modified Mar. 8, 2004).

[2] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 794 (1973) (discussing issue of employment discrimination after employee was laid off in 1964); Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971) (discussing employment discrimination based on employment policies from 1955); H.R. REP. No. 88-914, pt. 1, at 26 (1963) (indicating that employment discrimination is one type of discrimination that blacks experienced even 100 years after their emancipation).

[3] *See* H.R. REP. No. 88-914, pt. 1, at 26 (1963) (stating that Title VII's purpose is to eliminate employment discrimination); *see also* Kolstad v. Am. Dental Ass'n, 527 U.S. 526 (1999) (stating that Title VII's purpose is to provide redress for workplace discrimination and to avoid harm by adopting antidiscriminating policies); Swenson v. Potter, 271 F.3d 1184 (9th Cir. 2001) (citing Title VII and finding that employer may not discriminate with respect to compensation, terms, conditions, or privileges of employment).

[4] It shall be an unlawful employment practice for an employer to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(2) (2002); *see* H.R. REP. No. 88-914, pt. 1, at 26 (1963) (describing purpose of Title VII as "[t]o eliminate, through utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin"); *see also* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (stating that in Title VII phrase terms, conditions, or privileges of employment shows congressional intent to end disparate treatment of men and women in employment, including requiring people to work in discriminatorily hostile environments) (following Los Angeles Dep't of Water & Power v. Manhard, 435 U.S. 702, 707 n.13 (1978)); Merritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986) (following *Manhard*, 435 U.S. at 707 n.13); Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) (stating that Title VII assured equality of employment opportunities by eliminating those practices and other devices that discriminate on basis of race, color,

protection to any individual who experienced discrimination in the workplace by an entity that controlled the individual's employment.[5] In a recent Ninth Circuit case, however, the court departed from that long established rule.[6]

In *Anderson v. Pacific Maritime Ass'n*, the Ninth Circuit considered whether Title VII liability for workplace discrimination extends to a collective bargaining agent, an organization that bargains on behalf of employers with an employees' union.[7] The *Anderson* plaintiffs brought Title VII claims against a collective bargaining agent for subjecting them to a racially hostile environment at the employers' worksites.[8] They asserted that the collective bargaining agent subjected them to an environment of racial slurs, racially charged physical threats, and derogatory training manuals.[9]

Under the collective bargaining agreement, the agent was to ensure that employers did not discriminate in the workplace.[10] Although the agent did not fulfill this obligation, the *Anderson* court ruled that the collective bargaining agent did not violate Title VII.[11] The court reasoned that Title VII did not apply because the collective bargaining agent did not have sufficient control over the employers and did not interfere with the employment relationship.[12]

This Note argues that the *Anderson* decision is incorrect. Part I discusses the state of the law prior to *Anderson*, including Title VII and its purpose, Title VII liability when the defendant did not commit the discriminatory act, and Title VII application to indirect employers. Part

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religion, sex, or national origin); *Griggs*, 401 U.S. at 429-30 (stating that congressional objective in enacting Title VII was to achieve equality of employment opportunities and remove barriers that favored white employees over other employees).

[5] See Ass'n of Mexican–Am. Educators v. California, 231 F.3d 572, 581 (9th Cir. 2000) (noting that Title VII is applicable outside direct employment relationships and includes employment agencies and labor organizations); Lutcher v. Musicians Union Local 47, 633 F.2d 880, 883 (9th Cir. 1980) (stating that direct employment relationship is not prerequisite to Title VII liability); Sibley Mem'l Hosp. v. Wilson, 488 F.2d 1338, 1341 (D.C. Cir. 1973) (stating that Title VII reaches beyond immediate employment relationships).

[6] *See* Anderson v. Pac. Mar. Ass'n, 336 F.3d 924, 932 (9th Cir. 2003).

[7] *See id.* at 926-31 (considering whether entity controlled worksite).

[8] *See id.* at 926 (alleging subjection to racially hostile work environment while employed).

[9] *See id.* (alleging that jokes and racial innuendos were common, they were directly threatened, and that longshoremen training materials employed racist terms).

[10] *See id.* (stating general responsibility to ensure compliance with terms of collective bargaining agreement, which prohibits discrimination).

[11] *See id.* at 931 (finding that bargaining agents involvement did not constitute sufficient "interference" to impose liability).

[12] *Id.* at 932.

II discusses the facts and holding of *Anderson*. Part III argues that *Anderson* incorrectly applied previous Ninth Circuit decisions interpreting indirect employer liability, wrongly focused on the collective bargaining agent's lack of ability to stop harassment, and undermined the goals of Title VII.

I. BACKGROUND

In order for individuals to enjoy the right to freedom from employment discrimination based on race, Title VII has been given a broad interpretation.[13] This right has expanded beyond the typical employer-employee relationship, to indirect employers.[14] However, the Ninth Circuit, before finding an indirect employer liable for discrimination against an individual, wants to see that the entity had enough control over the individual's employment to stop the discrimination.[15]

A. Title VII

Congress designed Title VII to ensure that employers promote equality in employment opportunities.[16] Title VII defines an "employer" as

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[13] See Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1192 (9th Cir. 1998) (noting that Congress intended to interpret Title VII broadly); Nancy E. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75, 101 (1984) (arguing that judicial interpretation of Title VII reflects broad protection of individuals under Title VII); Kevin Finnerty, Comment, *The Ninth Circuit Does Its Homework and Leaves the Supreme Court With an Assignment: Settle the Question Whether Title VII's Anti-Discrimination Provisions Apply to States Requiring Public School Teachers to Pass Certification Examinations*, 95 Nw. U. L. Rev. 1569, 1580 (2001) (arguing that legislative history supports broad interpretation of Title VII to eliminate discrimination).

[14] *See* Ass'n of Mexican–Am. Educators v. California, 231 F.3d 572, 580-81 (9th Cir. 2000) (finding State of California liable as indirect employer); Gomez v. Alexian Bros. Hosp., 698 F.2d 1019, 1021 (9th Cir. 1983) (finding hospital liable as indirect employer despite having not been plaintiff's employer); Lutcher v. Musicians Union Local 47, 633 F.2d 880, 885 (9th Cir. 1980) (finding union liable as indirect employer).

[15] *See infra* note 28.

[16] It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1) (2002); *see also* Franks v. Bowman Transp. Co., 424 U.S. 747, 763 (1976) (noting that Title VII was enacted to prohibit all practices that create inequality in employment opportunity due to discrimination based on race, religion, sex, or national origin); *Griggs*, 401 U.S. at 429 (finding that purpose of Title VII is "to achieve equality of

someone who engages in an industry affecting commerce and has fifteen or more employees.[17] Courts refer to such employers as "direct employers" of employees.[18]

When an employer directly discriminates against its own employee, it violates Title VII.[19] Congress made Title VII applicable outside the direct employment context by including employment agencies and labor organizations in the statute's coverage.[20] To qualify as a "labor organization" under Title VII, two characteristics must exist.[21] First, the entity must engage in an industry affecting commerce.[22] The entity is engaged in an industry affecting commerce if it maintains or operates a center that procures either employees for an employer, or opportunities for employees to work for an employer.[23] Second, the entity must exist for the purpose of handling employee grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment.[24]

Courts interpret Title VII's extension to employment agencies and labor organizations as evidence of Congress' intent to apply Title VII to entities controlling an individual's access to employment.[25] Courts label

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employment opportunities and remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees.").

[17] 42 U.S.C. § 2000e(b) (2002); Clackamas Gastroenterology Assocs. v. Wells, 538 U.S. 440 (2003); Anderson v. Pac. Mar. Assoc., 336 F.3d 924, 929 (9th Cir. 2003).

[18] *See Ass'n of Mexican-Am. Educators*, 231 F.3d at 580 (noting that there is no direct employment relationship between plaintiffs and defendants because plaintiffs are employees of school districts, their direct employers); *Lutcher*, 633 F.2d at 883-85 (discussing plaintiffs claim against Union when there was no direct employment relationship); Sibley Mem'l Hosp. v. Wilson, 488 F.2d 1338, 1340 (D.C. Cir. 1973) (noting lack of direct employment relationship).

[19] *See* 42 U.S.C. § 2000e-2(a)(1) (2002); *Ass'n of Mexican-Am. Educators*, 231 F.3d at 579 (citing Title VII, which states that it is unlawful for employer to discriminate against individuals); *Lutcher*, 633 F.2d at 884 (stating that Title VII imposes duty on employers to not discriminate).

[20] 42 U.S.C. § 2000e(b)-(c) (2004) (applying Title VII to labor organizations and employment agencies); *see Ass'n of Mexican-Am. Educators*, 231 F.3d at 581; *Sibley*, 488 F.2d at 1341. Title VII defines "employment agency" as any person regularly undertaking to procure employees for employer. 42 U.S.C. § 2000e(c) (2002).

[21] 42 U.S.C. § 2000e(d)-(e) (2004).

[22] *Id.* § 2000e(d); *see* Robinson v. Shell Oil Co., 519 U.S. 337, 343 n.3 (1997); Yerdon v. Henry, 91 F.3d 370, 375 (2d Cir. 1996).

[23] *See* 42 U.S.C. § 2000e(d) (2004); *Robinson*, 519 U.S. at 343 n.3; *Yerdon*, 91 F.3d at 375.

[24] 42 U.S.C. § 2000e(d) (2004); *see also* McConnell v. FEC, 540 U.S. 93, 349 (2003) (citing definition of labor organization in United States Code); United Ass'n of Journeymen v. Local 334, United Ass'n of Journeymen, 452 U.S. 615, 622 (1981) (same).

[25] *Ass'n of Mexican-Am. Educators*, 231 F.3d at 581 (noting Congress' extension of Title VII to entities that control access to job markets); *Sibley*, 488 F.2d at 1341; *see* Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1192 (9th Cir. 1998) (finding that Congress' intent was to interpret Title VII broadly).

such entities "indirect employers."[26] An indirect employer that uses its control to discriminatorily interfere with an individual's employment opportunity violates Title VII.[27]

Interference occurs when an indirect employer uses its control to change the conditions of the employment relationship between an individual and his or her direct employer.[28] Indirect employers are said to possess the requisite control when a "visible nexus" between the creation and continuance of direct employment relationships exists between the indirect employer and third parties.[29] As will be seen in the following section, the United States Supreme Court also extends Title VII protection to individuals aggrieved by discriminatory practices, even when the entity never employed the harassed individual.[30]

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[26] *See* Gomez v. Alexian Bros. Hosp., 698 F.2d 1019, 1021 (9th Cir. 1983) (holding that entity that is not direct employer may be liable under Title VII as indirect employer); Lutcher v. Musicians Union Local 47, 633 F.2d 880, 883 (9th Cir. 1980) (finding that direct employment relationship is not prerequisite to Title VII liability); *Sibley*, 488 F.2d at 1340 (concluding that defendant was subject to Title VII liability even when he was not direct employer).

[27] *See Gomez*, 698 F.2d at 1021 (stating that indirect employer violates Title VII if it discriminatorily interferes); *Lutcher*, 633 F.2d at 884-85 (finding indirect employment liable under Title VII when union was able to control Lutcher's ability to work for Symphony); *Sibley*, 488 F.2d at 1342 (finding hospital as indirect employer when it controlled employee's access to patients and controlled premises where services took place).

[28] *See Ass'n of Mexican-Am. Educators*, 231 F.3d at 580 (finding discriminatory test to interfere with employment opportunities); *Gomez*, 698 F.2d at 1021 (finding that discrimination based on national origin denied him employment opportunities, thus altering employment conditions); *Lutcher*, 633 F.2d at 885 (finding altering of employment conditions because of discriminatory deprivations).

[29] *See Ass'n of Mexican-Am. Educators*, 231 F.3d at 583 (finding indirect employer if highly visible nexus with creation and continuance of direct employment relationships exists between third parties, further basing its conclusion of indirect employer relationship on degree of control California had over school districts); EEOC v. Illinois, 69 F.3d 167, 169 (7th Cir. 1995) (indicating that indirect employer liability under Title VII is successful when defendant so far controlled plaintiff's employment relationship that it was appropriate to regard defendant as de facto or indirect employer of plaintiff); *Lutcher*, 633 F.2d at 884-85 (finding indirect employment relationship when union was able to control Lutcher's ability to work for Symphony); *Sibley*, 488 F.2d at 1342 (finding hospital as indirect employer when it controlled employee's access to patients).

[30] *See Ass'n of Mexican-Am. Educators*, 231 F.3d at 580-81 (arguing that although Title VII applies to "employees," Congress extended protections of "statute to 'any individual' who suffers discrimination: nowhere are there words of limitation that restrict references in Title VII to 'any individual'" as comprehending only employee of employer); *Duffield*, 144 F.3d at 1192; *see Sibley*, 488 F.2d at 1341 (quoting Title VII that "[i]t shall be unlawful employment practice for employer . . . to discriminate against any individual.").

B. Application of Title VII When the Defendant Failed to Remedy a Discriminatory Environment

1. The United States Supreme Court in *Goodman v. Lukens Steel Co.*

In *Goodman v. Lukens Steel Co.*, the United States Supreme Court held a union, although not a direct employer, liable for discrimination after the union refused to file grievances regarding worksite discrimination.[31] Employees of Lukens Steel Company ("Lukens") brought suit against Lukens and the United Steelworkers of America ("Union") asserting claims of racial discrimination under Title VII.[32] The collective bargaining contract contained an express nondiscrimination clause barring the employer and Union from discriminating on the basis of race.[33] Lukens, however, discharged African Americans at a disproportionately higher rate than it did Caucasians.[34] Although African Americans complained to the Union, the Union refused to file any grievances.[35] The Union also ignored allegations of racial harassment.[36]

The District Court for the Eastern District of Pennsylvania found both Lukens and the Union guilty of discriminatory practices.[37] In particular, the court found that the Union had violated Title VII because it failed to challenge discriminatory discharges and refused to assert instances of racial discrimination as grievances.[38] Thus, both Lukens and the Union were found to have tolerated and encouraged racial harassment.[39]

The Third Circuit Court of Appeals and the United States Supreme Court affirmed the judgment against the Union.[40] Both courts rejected the Union's argument that it lacked control over Lukens and found Title VII liability.[41] The Supreme Court found that the collective bargaining

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[31] *See* Goodman v. Lukens Steel Co., 482 U.S. 656, 669 (1987) (finding that Title VII does not permit union to refuse to file grievances).

[32] *Id.* at 658.

[33] *Id.* at 666.

[34] *See id.* at 668 (noting that Union knew that African Americans were being discharged at higher rate than Caucasians).

[35] *See id.* at 666 (noting that Union refused to do anything about known discrimination).

[36] *Id.*

[37] *See* Goodman v. Lukens Steel Co., 580 F. Supp. 1114, 1160 (E.D. Pa. 1984).

[38] *See id.*

[39] *See id.*

[40] *Id.* at 669.

[41] *Id.* at 668 (rejecting Unions' argument that workers' case involved discrimination by company and not union).

agreement gave the Union control by entitling employees to the protection of the nondiscrimination clause.[42] Thus, the collective bargaining agreement gave the Union the power to protect the employees.[43] The Court stated that requiring African Americans to continue to work in less desirable jobs violated the collective bargaining agreement and Title VII.[44] Ultimately, the Court stated, a collective bargaining agent cannot refuse to file claims of racial discrimination without violating Title VII, even when the agent did not control the discriminatory environment.[45]

2. The Ninth Circuit in *Little v. Windermere Relocation, Inc.*

In *Little v. Windermere Relocation, Inc.*, the Ninth Circuit imposed Title VII liability on an employer that failed to remedy a situation involving the employer's client harassing the employer's employee.[46] Windermere Relocation Services ("Windermere") employed plaintiff Maureen Little as a Corporate Services Manager.[47] Little's position required that she develop ongoing business relationships with corporations in order to obtain corporate clients.[48] During her employment, Little received only positive feedback.[49] As part of her employment, Little began working with the Starbucks Corporation's Human Resources Director, Dan Guerrero.[50] Gayle Glew, the Windermere President, told Little to do "whatever it took" to get the account.[51] Little had at least two business lunches with Guerrero in order to build the business relationship.[52] Little later accepted an invitation from Guerrero to discuss the account at a restaurant.[53] After eating dinner, Little suddenly became ill and passed

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[42] *See id.* (agreeing with District Court that employees were entitled to protection of collective bargaining agreement).

[43] *See id.*

[44] *Id.*

[45] *See id.* at 668-69 (noting that collective bargaining agent could not refuse to file discrimination claims because they thought claims were unworthy).

[46] *See* Little v. Windermere Relocation, Inc., 301 F.3d 958, 969 (9th Cir. 2001) (stating that employer will be liable for hostile work environment if it failed to take immediate corrective action once it knew or should have known that client raped employee).

[47] *Id.* at 964.

[48] *Id.*

[49] *Id.*

[50] *See id.* (noting that Starbucks Corporation was one of Windermere's clients and that Little was to provide Starbucks with relocation services).

[51] *Id.*

[52] *Id.*

[53] *Id.*

out.[54] Little awoke a few times throughout the night to find Guerrero raping her in his car, as well as at his apartment.[55]

After returning to work, Little hesitated to tell anyone about the rape because she knew how important the Starbucks account was to Glew.[56] Little first told a co-worker about the rape, who advised her not to tell management.[57] Nine days after the rape, Little reported the rape to Peggy Scott, the Vice President of Operations and the complaint-receiving manager.[58] Scott told Little to put the incident behind her and stop working on the Starbucks account.[59] Little eventually told Glew, who immediately ordered Little not to discuss the rape with anyone except for Glew's attorneys.[60] At that point, Glew reduced Little's salary.[61] After Little told Glew that she found the pay cut unacceptable, Glew told Little to leave.[62] Little brought suit against Windermere for violation of Title VII.[63] The District Court for the Western District of Washington granted summary judgment in favor of Windermere.[64] On appeal by Little, the Ninth Circuit found that the district court erred in granting summary judgment because issues of material fact existed.[65]

To determine whether there were genuine issues of material fact, the Ninth Circuit considered whether Windermere ratified or acquiesced to the harassment by not taking immediate and/or corrective actions, when it knew or should have known of the conduct.[66] The Ninth Circuit found, taking the facts in the light most favorable to Little, that Windermere had failed to take appropriate measures to correct the situation.[67] Therefore, on remand, liability would exist not for creating a hostile work environment, but for failing to ensure that something was

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[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.* at 965.

[59] *Id.*

[60] *See id.* (noting that Glew did not want to hear anything and that Little would have to respond to his attorneys).

[61] *Id.*

[62] *See id.* (noting that Glew at first gave Little two days to think about pay cut but that once she refused to accept it, Glew suggested she leave).

[63] *Id.*

[64] *Id.* at 965-66.

[65] *Id.* at 969.

[66] *Id.* at 968; *see also* Folkerson v. Circus Circus Enters., Inc., 107 F.3d 754, 756 (9th Cir. 1997).

[67] *Little*, 301 F.3d at 969.

being done to ameliorate the hostile work environment.[68]

The Ninth Circuit based its decision on several compelling facts.[69] First, Glew instructed Little to "do anything" to get the account.[70] Second, a co-worker advised Little not to report the incident to management.[71] Third, after Little reported the rape, she was not removed from the account.[72] Lastly, Glew demoted and then terminated Little after she informed him of the rape.[73] Therefore, the court found that Windermere violated Title VII by ignoring complaints and failing to take immediate and effective corrective action.[74]

The development of Title VII employer liability demonstrates that more than just direct employer discrimination can create liability for workplace discrimination. As discussed, a collective bargaining agent, when given control through a collective bargaining agreement, can be liable for discrimination if it refuses to handle employee grievances.[75] Further, a direct employer can be liable for discrimination if it fails to ensure that an employee's work environment is not hostile.[76] Besides these examples, liability for workplace discrimination may exist when there is an indirect employment relationship.

C. *Application of Title VII to Indirect Employers*

1. Development of Indirect Employer Liability in the D.C. Circuit Case *Sibley Memorial Hospital v. Wilson*

With respect to indirect employer liability under Title VII, the Ninth Circuit follows the rationale created by the D.C. Circuit.[77] In *Sibley Memorial Hospital v. Wilson*, the D.C. Circuit Court found a hospital liable for discrimination under Title VII for failing to refer a nurse for an

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[68] *See id.* at 968-69 (stating that no evidence suggested that Windermere took steps to prevent contact between Little and Guerrero after rape occurred).

[69] *Id.* at 968.

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *See id.* (noting that Windermere failed to take steps to prevent contact between Little and Guerrero and that this failure to take action ratified rape).

[75] *See* Goodman v. Lukens Steel Co., 482 U.S. 656, 668-69 (1987).

[76] *Little*, 301 F.3d at 968-69.

[77] Anderson v. Pac. Mar. Assoc., 336 F.3d 924, 938 (9th Cir. 2003) (Fletcher, J., dissenting); Sibley Mem'l Hosp. v. Wilson, 488 F.2d 1338, 1338 (D.C. Cir. 1973).

employment opportunity with a patient.[78] At the hospital, when a patient needed specific services, the patient requested a nurse through an employment registry service.[79] The nurse reported directly to the patient, as opposed to the hospital.[80] Verne Wilson worked for an employment registry service which sent him to assist a patient at the hospital.[81] Wilson alleged that because of his sex, hospital workers prevented him from caring for the patient.[82]

Wilson brought Title VII claims against the hospital.[83] The hospital argued that because no employer-employee relationship existed, no liability existed under Title VII.[84] The District Court for the District of Columbia entered summary judgment for Wilson finding that the hospital violated Title VII.[85] The D.C. Circuit, however, reversed and remanded the case, holding that Title VII enforcement does not explicitly depend upon the existence of a direct employer-employee relationship.[86]

The circuit court stated that the hospital exposed itself to Title VII liability because of the degree of control the hospital had over the employment opportunities.[87] The hospital controlled the employee's access to patients and controlled the premises where the services were rendered.[88] The court found that the hospital's control formed a highly visible nexus between the hospital and the creation and continuance of direct employment relationships with third parties, such as Wilson.[89] The court also stated that indirect employer liability under Title VII can occur when labor unions or employment agencies interfere with the direct employment relationship.[90]

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[78] *See Sibley*, 488 F.2d at 1342 (finding indirect employer liability when employer controlled access to employment and denied access for discriminatory reasons).

[79] *Id.*

[80] *Id.*

[81] *Id.* at 1339.

[82] *Id.* at 1339-40.

[83] *Id.* at 1340.

[84] *Id.*

[85] Wilson v. Sibley Mem'l Hosp., 340 F. Supp. 686, 688 (D.C. Cir. 1972).

[86] *See Sibley*, 488 F.2d at 1343 (finding however that issue of fact existed as to what exactly happened because of discrepancy regarding whether hospital or patient denied employment).

[87] *See id.* at 1342.

[88] *Id.*

[89] *Id.*

[90] *See id.*

2. Development of Ninth Circuit Precedent Applying *Sibley*

In *Lutcher v. Musicians Union Local 47*, the Ninth Circuit applied the rationale of *Sibley* and held that Title VII applies even when no direct employment relationship exists.[91] Joe Lutcher, a professional musician and a member of the Musicians Union Local 47 ("Union"), converted to the Seventh Day Adventist Church.[92] Lutcher refused to pay dues to the Union because the Church prohibited union membership.[93] Lutcher eventually served as a business and personnel manager of the Watts Community Symphony Orchestra ("Symphony").[94] The Union's president, Max Herman, wrote to the conductor of the Symphony, asking that Lutcher not perform with Union musicians.[95] Lutcher continued with the Symphony, but remained ineligible to perform because he refused to pay union dues.[96] Lutcher brought a Title VII claim, alleging that the payment of union dues conflicted with his religion, that he had informed the Union of this conflict, and that the Union had refused him an opportunity to work for the Symphony because he did not pay the dues.[97] The District Court for the Central District of California granted summary judgment in favor of the Union.[98]

The Ninth Circuit reversed, holding that the Union had violated Title VII by forcing Lutcher to pay dues when it conflicted with his religion.[99] The Union had limited Lutcher's employment opportunities because he could not perform as a musician with the Symphony.[100] The court found that the Union's interference with the direct employment relationship between the Symphony and Lutcher made it liable under Title VII.[101]

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[91] *See* Lutcher v. Musicians Union Local 47, 633 F.2d 880, 883 (9th Cir. 1980).

[92] *Id.* at 882.

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *See id.* at 884 (stating that in order to establish prima facie case of religious discrimination under Title VII, Lutcher must show that: (1) he had bona fide belief that union membership and payment of union dues are contrary to his religious faith, (2) he informed his employer and Union about his religious views that were in conflict with Union security agreement, and (3) he was discharged for his refusal to join Union and to pay union dues).

[98] *Id.*

[99] *See id.* at 884-85 (noting that Union violated Title VII when it did not make good faith effort to accommodate Lutcher's religious beliefs).

[100] *See id.* at 885 (noting that Lutcher was denied opportunity to perform with Symphony).

[101] *Id.* (noting that Title VII makes it illegal to discriminatorily deprive individuals of opportunities).

The Ninth Circuit also applied *Sibley* in *Gomez v. Alexian Brothers Hospital*.[102] Gomez practiced medicine as an employee of the American Emergency Services Professional Corporation Medical Group ("AES").[103] Gomez submitted a contract proposal to the defendant hospital on behalf of AES.[104] The proposal involved operation of the hospital's emergency room, with Gomez serving as the director.[105] The hospital rejected the proposal.[106] Gomez brought a Title VII claim against the hospital because he believed that the hospital had denied AES's proposal for discriminatory reasons.[107] The District Court for the Northern District of California granted summary judgment to the hospital.[108] The court held that Title VII did not apply because AES was an independent contractor and Gomez was an employee of AES, rather than the hospital.[109]

The Ninth Circuit reversed, holding that the hospital was an indirect employer of Gomez because of its ability to interfere with the terms and conditions of Gomez's employment.[110] The court found that interference by the indirect employer occurs when the conditions of plaintiff's employment are different than they would have been had the discrimination not occurred.[111] Here, the conditions of Gomez's employment were different because, without the discrimination, AES would have employed Gomez as the emergency room director.[112]

Most recently, in *Association of Mexican-American Educators v. California* ("*AMAE*"), the Ninth Circuit explained the rationale behind indirect-employer liability under Title VII.[113] In *AMAE*, the Ninth Circuit imposed liability on the state of California because it had influenced the employment policies and practices of local school districts.[114] In *AMAE*, plaintiffs challenged California's use of a skills test as a prerequisite to

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[102] Gomez v. Alexian Bros. Hosp., 698 F.2d 1019, 1021 (9th Cir. 1983).

[103] *Id.* at 1020.

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *Id.* (alleging that defendant's legal counsel told Gomez that proposal with too many brown faces would be rejected to prevent hospital from turning into Mexican Institution).

[108] *Id.*

[109] *See id.*

[110] *See id.* at 1021 (stating that conditions of plaintiff's employment are different because of discrimination).

[111] *Id.*

[112] *See id.*

[113] Ass'n of Mexican-Am. Educators v. California, 231 F.3d 572, 580-82 (9th Cir. 2000) (en banc).

[114] *See id.* at 582 (stating that by requiring challenged test, California created limited list of candidates for local public school districts to hire).

employment in the State's public schools.[115] The plaintiffs brought Title VII claims because the test allegedly had a disparate impact on minorities.[116]

Relying on *Sibley*, *Lutcher* and *Gomez*, the court found the State of California liable.[117] California had interfered with the plaintiffs' relationship with future employers because its test dictated whom the employers could hire.[118] The court based its conclusion on the degree of control California exercised over local school districts.[119] The California legislature had plenary authority over the education system.[120] In addition, California's involvement with public schools extended beyond general legislative oversight to day-to-day operations.[121] For example, California statutes regulated educational programs, instructional materials, and the rights and duties of school employees.[122]

The *AMAE* court also analogized the relationship between California and the local districts to the relationship between a corporate parent and its wholly-owned subsidiary.[123] They noted that with evidence that the parent participated in or influenced the employment policies of the subsidiary, the parent corporation subjected itself to the Title VII violations of the wholly-owned subsidiaries.[124] The court stated that California, the "parent," participated in and influenced the employment policies and practices of the local school districts, the "subsidiaries," and therefore, California was covered by Title VII.[125]

Indirect employer liability, as created by *Sibley*, establishes that an indirect employment relationship exists when an entity's control forms a highly visible nexus between the direct employer and the creation and continuance of direct employment relationships with third parties.[126] *Lutcher* helped to further define indirect employer liability by finding that an entity is labeled an indirect employer if it interferes with the direct employment relationship between the employee and direct

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[115] *Id.* at 577.

[116] *Id.* at 578.

[117] *See id.* at 580-81.

[118] *Id.* at 581-82.

[119] *Id.* at 581.

[120] *Id.* (citing San Francisco NAACP v. San Francisco Unified Sch. Dist., 484 F. Supp. 657, 662 (N.D. Cal. 1979)).

[121] *Id.* at 581-82.

[122] *Id.*

[123] *See id.* at 582.

[124] *Id.* (citing Watson v. Gulf & W. Indus., 650 F.2d 990, 993 (9th Cir. 1981)).

[125] *See id.*

[126] *See* Sibley Mem'l Hosp. v. Wilson, 488 F.2d 1338, 1342 (D.C. Cir. 1973).

employer.[127] In *Gomez*, the court stated that indirect employers can be liable for discrimination if their interference makes an employee's direct employment relationship different than it would have been had the discrimination not occurred.[128] Lastly, in *AMAE* the court found that authority over employment policies and practices creates sufficient control to deem an entity an indirect employer.[129]

A recent Ninth Circuit case distinguished itself from this precedent.[130] *Anderson v. Pacific Maritime Ass'n* suggests that for indirect employer liability to apply, the amount of control needed is much greater than ever before required.[131] *Anderson* involved a Title VII action brought by longshoremen alleging discrimination by a collective-bargaining agent.[132]

II. *ANDERSON V. PACIFIC MARITIME ASS'N*

A. Facts and Procedure

In *Anderson v. Pacific Maritime Ass'n*, the plaintiffs were African-American longshoremen and foremen who worked on the waterfronts of Seattle and Tacoma, Washington.[133] The plaintiffs belonged to the International Longshoremen's and Warehousemen's Union ("Union").[134] Each day, the plaintiffs reported to a center that, upon availability, would procure employment opportunities for them.[135] Pacific Maritime Association ("PMA"), a non-profit association consisting of maritime employers and shipping companies ("member-employers"), maintained the hiring hall, along with the Union.[136] PMA and the Union dispatched the appellants to worksites operated by member-employers.[137] The member-employers of PMA employed the longshoremen.[138] Executives

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[127] *See* Lutcher v. Musicians Union Local 47, 633 F.2d 880, 883 n.3 (9th Cir. 1980).

[128] *See* Gomez v. Alexian Bros. Hosp., 698 F.2d 1019, 1021 (9th Cir. 1983).

[129] *See* Ass'n of Mexican–Am. Educators v. California, 231 F.3d 572, 581 (9th Cir. 2000) (en banc) (stating that high degree of involvement in operation of local schools created indirect employer relationship).

[130] Anderson v. Pac. Mar. Ass'n, 336 F.3d 924, 931 (9th Cir. 2003) (finding that in this case defendants did not commit any discriminatory act).

[131] *Id.* at 927 n.4 (noting that ability to punish employer for maintaining hostile work environment was insufficient control to create indirect employer relationship).

[132] *See id.* at 926.

[133] *Id.* at 932-33.

[134] *See id.* at 926.

[135] *See id.* at 927.

[136] *Id.* at 926-27.

[137] *See id.* at 927.

[138] *Id.* at 926.

from the member-employer companies formed PMA's board of directors.[139]

PMA established and negotiated a collective bargaining agreement ("CBA") between the member-employers and the Union.[140] PMA bylaws gave PMA the power to discipline member-employers who violated the CBA.[141] The CBA explicitly prohibited discrimination based on race by the member-employers and the Union.[142]

The CBA also governed the terms and conditions of employment for the workers, including procedures for reporting and curing alleged discrimination.[143] First, the procedure required that the employee report the incident to a supervisor.[144] If the problem remained unsettled, the supervisor referred the problem to two designated officials.[145] If the problem remained unresolved, it went to a Joint Committee.[146] The CBA provided for binding arbitration if the problem remained unresolved.[147]

After being dispatched to various worksites, the plaintiffs encountered racial slurs, discriminatory training materials, and physical threats.[148] The plaintiffs also alleged that altercations took place at the center, where dispatchers were witnesses.[149] On one occasion, after being harassed at the center, plaintiff Richard Anderson confronted the harasser outside the center and the harasser threatened Anderson with a gun.[150] On another occasion, a dispatcher verbally harassed Anderson after he brought his son to the hiring hall.[151] The dispatcher ordered Anderson not to bring his son to the hall again, even though Caucasian

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[139] *See id.*

[140] *Id.*; *see* 5 U.S.C. §§ 7103(a)(8), (12) (2002) (defining collective bargaining agreement as agreement entered into as result of collective bargaining. Collective bargaining involves meeting of employer and employee representatives to bargain in good-faith effort to reach agreement with respect to conditions of employment).

[141] *See Anderson*, 336 F.3d at 926.

[142] *See id.* at 933 (providing that "in accordance with provisions of Title VII . . . employers and the union are forbidden to discriminate because of race . . .").

[143] *See id.* at 926.

[144] *Id.*

[145] *See id.*

[146] *See id.* (creating Joint Committee in which Union and member-employers appointed three people each).

[147] *See id.*

[148] *See id.* at 926, 935-36 (noting references to certain types of work as "nigger-rigging" or "nigger work" and stating that "all niggers should be shipped back to Africa in wooden boxes," and "only good nigger's a dead nigger").

[149] *See id.* at 936 (describing altercation between Anderson and another worker where worker called Anderson's wife "black jungle bunny bitch").

[150] *See id.*

[151] *See id.*

dockworkers frequently brought their children to the hall.[152]

Anderson and other employees fully expected PMA to respond to these events because they reported the discrimination directly to PMA officials.[153] Even though the CBA itself contained an arbitration provision, after a settlement agreement in a previous discrimination lawsuit, PMA had agreed to establish an expedited grievance procedure.[154] This expedited procedure required the longshoremen to file a form describing the discrimination to the area manager of PMA and to the president of the local chapter of the Union.[155] Both PMA and the Union had the discretion to call for a meeting to mediate the dispute.[156] Furthermore, PMA's managerial staff had collected information regarding the day-to-day operation of the docks.[157] The staff also ensured that the member-employers followed the CBA, including the anti-discrimination clause.[158] Racial grievances were directly reported to PMA officials.[159] PMA bylaws specifically stated that PMA had power to discipline the member-employers for violations of the CBA, which explicitly prohibited discrimination.[160] It also stated that PMA had the general responsibility to make sure that the member-employers followed the CBA.[161] Yet, despite the grievance procedure and all the grievance complaints submitted to PMA, PMA's area manager, Craig Johnson, would later testify that, although he knew of the complaints, he had no obligation to take action.[162]

Plaintiffs brought suit against PMA and the Union, claiming that PMA had violated Title VII because it had fostered a racially hostile work environment.[163] The district court granted summary judgment for

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[152] *See id.*

[153] *See id.* at 936-37 (noting that employees reported grievances directly to PMA officials).

[154] *See id.* at 935.

[155] *See id.* at 927.

[156] *See id.*

[157] *See id.* at 933.

[158] *See id.*

[159] *See id.*

[160] [I]f any member shall violate, directly or indirectly, any rule or policy established by this corporation, or procure, encourage or assist in any such violation by any other person . . . the Board of Directors shall have power, in its discretion, to suspend any such member for such period of time as the Board of Directors shall prescribe or to expel such member from membership in this corporation.

See id. at 933 n.4.

[161] *Id.* at 926.

[162] *Id.* at 937.

[163] *See id.* at 928.

defendants.[164] The district court found that although a question of material fact as to whether plaintiffs experienced a hostile work environment existed, the court could not hold PMA liable for the discriminatory environment because PMA did not employ the plaintiffs.[165] Although this holding seemed to directly conflict with precedent, plaintiffs, for unknown reasons, did not appeal the summary judgment in favor of the Union.[166] However, they did appeal the summary judgment in favor of PMA.[167]

B. Holding and Rationale

The Ninth Circuit affirmed the summary judgment in favor of PMA.[168] The court held that Title VII liability could only apply to PMA as an indirect employer if two requirements were met.[169] First, the court required a showing that PMA had engaged in discriminatory interference between the plaintiffs and member-employers.[170] Second, the court required a showing that PMA had some control over the facility where the hostile work environment occurred.[171]

The court found that the interference requirement was not satisfied because PMA had not created the hostile work environment.[172] The court further found that PMA had insufficient control over the facility.[173] Specifically, PMA had limited power to stop the discrimination from occurring and it did not control the job sites where the harassment occurred.[174] The court also found that PMA's ability to punish member-employers for CBA violations was so discretionary that PMA was not legally required to investigate complaints or make any effort to resolve the problems.[175] Based on clear precedent to the contrary, the Ninth Circuit erred in its decision in *Anderson*.

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[164] *Id.*

[165] *See id.* (granting summary judgment to PMA, holding that because PMA was not employer it could not be liable for discrimination).

[166] *Id.*

[167] *Id.*

[168] *Id.* at 931.

[169] *See id.*

[170] *See id.* (noting that courts extend "Title VII coverage to indirect employers when those employers discriminated against and interfered with the employees' relationship with their employers").

[171] *See id.* (noting that employers, not PMA, controlled hostile work environment).

[172] *See id.*

[173] *See id.*

[174] *See id.*

[175] *See id.* at 927 n.4.

III. ANALYSIS

A. The Anderson *Court Erred by Requiring Too Great a Showing of Control Over the Employment Relationship*

The *Anderson* court wrongly applied indirect employer liability by requiring too great a showing of control over the employment relationship. The *Anderson* court stated that PMA did not have control over the direct employment relationship because the member-employers, not PMA, had the sole power to discipline the employees and sole control over the worksite where the harassment occurred.[176] By doing this, the *Anderson* court mistakenly focused on PMA's control over the employees, rather than PMA's control over the member-employers.[177] In *AMAE*, the court based its finding of an indirect employer relationship on the fact that California participated in and influenced the employment policies of the local school districts through regulation.[178] Similarly, in *Anderson*, PMA participated in and influenced the employment policies of the member-employers through its ability to punish member-employers for violating the CBA.[179] Thus, the *Anderson* court should have found PMA's control over the employment relationship to be sufficient, given prior precedent.[180]

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[176] *See id.* (noting that member-employers had sole ability to monitor and control worksites and employees).

[177] *See* Ass'n of Mexican–Am. Educators v. California, 231 F.3d 572, 582 (9th Cir. 2000) (en banc) (focusing on California's control over school districts in not giving them opportunity to hire certain individuals); Gomez v. Alexian Bros. Hosp., 698 F.2d 1019, 1021 (9th Cir. 1983) (focusing on hospital's control over AES, employer, in not having ability to hire Gomez); Lutcher v. Musicians Union Local 47, 633 F.2d 880, 884-85 (9th Cir. 1980) (focusing on union's control over employer in refusing to allow Lutcher to participate in Symphony).

[178] *See Ass'n of Mexican–Am. Educators*, 231 F.3d at 582 (considering factors such as California's control over budgets, its ability to regulate school districts through legislature, and its ability to dictate whom districts can hire).

[179] *See* Woodell v. Int'l Bhd. of Elec. Workers, Local 71, 502 U.S. 93, 102 (1991) (noting that employees have ability to require unions to enforce contracts in which they are involved); Finnegan v. Leu, 456 U.S. 431, 441 (1982) (finding that enforcement of terms of union constitutions, documents that prescribe legal relationship and rights and obligations between employers and unions, contributed to achievement of labor stability); United Ass'n of Journeymen v. Local 334, United Ass'n of Journeymen, 452 U.S. 615, 624 (1981) (noting that Congress intended union accountability to exist for violating agreements it was part of in order to further stability among labor organizations); Kinney v. Int'l Bhd. of Elec. Workers, 669 F.2d 1222, 1229 (9th Cir. 1981) (finding that union member had authority to sue union when union did not enforce rules of labor relationship).

[180] *See, e.g.*, Dowd, *supra* note 13, at 102 (proposing that courts examine balance of power in employment relationship to determine if employer can affect employment

One might argue that PMA's power was not sufficient to establish liability because that power was discretionary. Indeed, the *Anderson* court itself noted that although PMA did have the power to discipline member-employers for CBA violations, that power was discretionary.[181] Thus, PMA could not be responsible for every deviation from the CBA.[182]

PMA's power, however, was not as discretionary as it might appear from the majority's opinion. Although PMA's power was discretionary, PMA had a duty to exercise that discretion with good faith because it had the power, through its bylaws, to punish member-employers for CBA violations.[183] The *Anderson* court also conceded that PMA bylaws gave PMA the responsibility of ensuring that member-employers followed the terms of the CBA, including the grievance procedure.[184] By not recognizing this power, the *Anderson* court wrongly found that PMA had inadequate control over the member-employers to stop the hostile work environment.[185] The *Anderson* court erred in its analysis of PMA's

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opportunities through unlawful discrimination); *see Ass'n of Mexican-Am. Educators*, 231 F.3d at 583 (finding indirect employer if highly visible nexus with creation and continuance of direct employment relationships exists between third parties, further basing its conclusion of indirect employer relationship on degree of control California had over school districts); *Gomez*, 698 F.2d at 1021 (finding indirect employer relationship when hospital controlled Gomez's opportunity for employment); *Lutcher*, 633 F.2d at 884-85 (finding indirect employment relationship when union was able to control Lutcher's ability to work for symphony); *see also* E.E.O.C. v. Illinois, 69 F.3d 167, 169 (7th Cir. 1995) (indicating that indirect employer liability under Title VII is successful when defendant so controlled plaintiff's employment relationship that it was appropriate to regard defendant as de facto or indirect employer of plaintiff); Sibley Mem'l Hosp. v. Wilson, 488 F.2d 1338, 1342 (D.C. Cir. 1973) (finding hospital as indirect employer when it controlled employee's access to patients).

[181] *See Anderson*, 336 F.3d at 927 n.4 (stating that PMA bylaws afford PMA power to discipline member-employers that violate CBA, noting, however, that PMA does have discretion).

[182] *See id.* (stating that PMA bylaws do not make PMA responsible for every deviation of CBA).

[183] *See* Marquez v. Screen Actors Guild, 525 U.S. 33, 44 (1998) (noting union's duty to "avoid arbitrary conduct"); Vaca v. Sipes, 386 U.S. 171, 177 (1967) (stating that with respect to unions, there is duty "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct"); Humphrey v. Moore, 375 U.S. 336, 342 (1964) (noting that when bargaining agent negotiates collective bargaining contract it has responsibility to administer contract fairly).

[184] *Anderson*, 336 F.3d at 926 (stating that PMA has general responsibility for ensuring that member-employers comply with terms of CBA).

[185] *See* Finnegan v. Leu, 456 U.S. 431, 441-42 (1982) (finding that union bylaws that give president plenary authority to appoint agents of his choice were permissible although this controlled actions of union employees); Kinney v. Int'l Bhd. of Elec. Workers, 669 F.2d 1222, 1229 (9th Cir. 1981) (noting that union members can sue unions for violations of union bylaws when issue affects labor management relations); *cf.* United Ass'n of Journeymen v.

control over the member-employers.

B. Anderson *is Inconsistent with* Goodman

By focusing on PMA's control over the employment relationship, *Anderson* is inconsistent with the United States Supreme Court's opinion in *Goodman*. Because it believed that PMA had little power, the *Anderson* court found it irrelevant that PMA had ignored complaints.[186] The *Goodman* court, however, held that even when a union has limited control over the discrimination, it has a responsibility to take action where a nondiscrimination clause in a CBA protects the employees and where the union is in a position to enforce the clause.[187] In this case, PMA was in a position to enforce the nondiscrimination clause in the CBA because its bylaws permitted it to punish member-employers for violations of the CBA.[188] Therefore, under *Goodman*, although PMA had limited ability to stop the harassment, it should have been held liable for not punishing member-employers that allowed discrimination.

Regardless of its limited power, PMA should have been held liable under *Goodman* because it took no action at all. In *Goodman*, the Supreme Court found union liability specifically because the union did not take action, regardless of the fact that the union had little power to stop the discrimination.[189] The facts in *Anderson* are strikingly similar to the facts in *Goodman*. In both *Goodman* and *Anderson*, the CBA expressly

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Local 334, United Ass'n of Journeymen, 452 U.S. 615, 624 (1981) (finding that suit against Union was permissible where Union controlled employee discharge through its union constitution).

[186] *See Anderson*, 336 F.3d at 931-32 (stating that PMA had no authority under formal procedure to correct harassment, PMA's role in expedited procedure was only discretionary, and PMA could not conduct its own investigations to curb harassment).

[187] *See* Goodman v. Lukens Steel Co., 482 U.S. at 668 n.13 (agreeing with District Court in rejecting union's argument that it had no control over discrimination because regardless, collective bargaining agreement entitled employees to protection from discrimination).

[188] *See, e.g.*, Dowd, *supra* note 13, at 84-86 (arguing that emphasizing employer's control over employee conflicts with goals of Title VII because it ignores worker's perspective and does not focus on nature of employment relationship); *see* Wooddell v. Int'l Bhd. of Elec. Workers, Local 71, 502 U.S. 93, 101 (1991) (finding that although there was collective bargaining agreement, employees were entitled to sue union and require that union enforce bylaws); *Finnegan*, 456 U.S. at 441-42 (noting that union bylaws, as opposed to collective bargaining agreement, gave president plenary authority); *United Ass'n of Journeymen*, 452 U.S. at 624 (noting Congress' intent that unions be made legally accountable for agreements they enter into because bylaws are important to contracts between labor organizations); *Kinney*, 669 F.2d at 1229 (finding that union member had authority to sue union when union violated its own bylaws and when union member alleged violation of legally protected right).

[189] *See Goodman*, 482 U.S. at 669 (stating that union ignored claims of discrimination on behalf of blacks knowing that employer was discriminating in violation of contract).

prohibited racial discrimination, the defendant was aware of discrimination by the employer, and yet the defendant ignored the grievances and took no action.[190] Therefore, following the Supreme Court's decision in *Goodman*, it was discriminatory for PMA to ignore CBA violations, even when there was limited power to stop the harassment at the worksite.[191]

The *Anderson* court reasoned that PMA could not be held liable because it was the wrong defendant. After all, PMA did not create the hostile work environment.[192] Thus, under this analysis, PMA did not interfere with the employment relationship and should not be held liable for discrimination.[193] Contrary to the *Anderson* court's reasoning, however, interference does not require the creation of a hostile work environment.[194] Ninth Circuit precedent supports a finding of interference by the indirect employer where the conditions of plaintiff's employment are different because of the discrimination.[195] In both *Gomez* and *Lutcher*, an employer who interfered with an individual's employment opportunity with another employer violated Title VII as an

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[190] *Compare id.* at 666 (noting that collective bargaining contract contained nondiscrimination clause, union was aware of discrimination, but union refused to do anything by filing grievances), *with Anderson*, 336 F.3d at 926-32, 936 (noting that CBA prohibits discrimination, plaintiffs reported grievances to PMA, but PMA failed to take corrective action).

[191] *See Goodman*, 482 U.S. at 669 (finding that union discriminated against plaintiffs by refusing to file discrimination claims, even when union had no control over alleged discrimination of employer); *see also* Faragher v. City of Boca Raton, 524 U.S. 775, 789 (1998) (stating that failing to take action or taking inadequate action signals authorization by employer); Swenson v. Potter, 271 F.3d 1184, 1192 (9th Cir. 2001) (noting that although employer has no power to stop harassing conduct, if employer fails to take corrective action after learning of harassing conduct, employer is deemed to have adopted offending conduct).

[192] *Anderson*, 336 F.3d at 932 (stating specifically that PMA did not cause hostile work environment).

[193] *See id.* (concluding that because PMA did not create hostile work environment and because it had no power to stop hostile work environment, PMA did not interfere with employment relationship).

[194] *See* Ass'n of Mexican-Am. Educators v. California, 231 F.3d 572, 582 (9th Cir. 2000) (en banc) (finding sufficient interference when state influenced employment polices); Gomez v. Alexian Bros. Hosp., 698 F.2d 1019, 1021 (9th Cir. 1983) (finding interference when altering of terms and conditions of employment occurred); Sibley Mem'l Hosp. v. Wilson, 488 F.2d 1338, 1342 (D.C. Cir. 1973) (finding interference where employer failed to refer plaintiff for employment opportunity).

[195] *Gomez*, 698 F.2d at 1021 (finding that discrimination based on national origin denied employment opportunities, thus altering employment conditions); *see Ass'n of Mexican-Am. Educators*, 231 F.3d at 580 (finding that discriminatory test interfered with employment opportunities); Lutcher v. Musicians Union Local 47, 633 F.2d 880, 885 (9th Cir. 1980) (finding that employment conditions were altered because of discriminatory deprivations).

indirect employer.[196] Specifically, in *Gomez*, the hospital had rejected AES's proposal for discriminatory reasons, thus interfering with Gomez's employment opportunity to lead the department.[197] In *Lutcher*, the union prevented Lutcher from performing, thus interfering with an employment opportunity.[198] In none of these cases did the court require a showing that the defendant had created the hostile work environment. Therefore, the *Anderson* court wrongly applied prior case law when it required the creation of a hostile work environment.

In *Anderson*, PMA failed to punish member-employers for continuous CBA violations.[199] This failure interfered with the plaintiffs' opportunity to work in a non-hostile work environment, thus altering employment conditions.[200] Under *Gomez* and *Lutcher*, this was sufficient to establish liability. The *Anderson* court erred by holding otherwise.

C. Anderson *Undermines the Goals of Title VII*

Anderson also undermines Title VII protection. Specifically, it creates loopholes for labor organizations. As a result, a labor organization's role in preventing discrimination and ensuring compliance with the CBA is lessened.

Anderson undermines Title VII by allowing labor organizations to discriminate. Under Title VII, an employee has a right to work in an environment free from discriminatory intimidation, ridicule, and insult.[201] Yet, under *Anderson*, even when a labor organization has

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[196] *See Gomez*, 698 F.2d at 1021 (finding ability to interfere because hospital could deprive persons of employment opportunity); *Lutcher*, 633 F.2d at 885 (finding ability to interfere and noting that Union discriminatorily deprived Lutcher of promotion or transfer); *Sibley*, 488 F.2d at 1340-41 (finding ability to interfere because hospital could control third parties' employment relationships).

[197] *See Gomez*, 698 F.2d at 1021 (agreeing that failure to award proposal because of national origin deprived him of employment as director, thus causing injury).

[198] *See Lutcher*, 633 F.2d at 885 (stating that Title VII prevents discriminatory deprivations of employment opportunities).

[199] *See* Anderson v. Pac. Mar. Ass'n, 336 F.3d 924, 937 (9th Cir. 2003) (noting that PMA area manager testified "that 'numerous individuals' had come to his office 'numerous times' to complain about racial discrimination" but that he did nothing because he had no obligation to pursue complaints).

[200] *See* Amtrak v. Morgan, 536 U.S. 101, 116 (2002) (holding that hostile work environment harassment affects terms and conditions of individual's employment); Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (requiring people to work in hostile environments violates Title VII); Goodman v. Lukens Steel Co., 482 U.S. 656, 668 (1987), *aff'g* 580 F. Supp. 1114, 1160 (E.D. Pa. 1984) (agreeing with lower court that to require blacks to continue to work in less desirable jobs discriminates against them and violates collective bargaining agreement and Title VII).

[201] Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (discussing Equal Employment

knowledge of discrimination and the power to discipline employers for discrimination, it will not be liable if it can show that its powers were discretionary.[202] In *AMAE* and *Gomez*, the Ninth Circuit interpreted Title VII's coverage to extend beyond direct employers, specifically because it believed Congress wanted to close any loopholes allowing indirect employers to discriminate in employment.[203] Nonetheless, *Anderson* creates such a loophole by giving labor organizations the discretion to choose whether to punish employers that maintain hostile work environments.[204]

Thus, *Anderson* lessens the role of labor organizations in preventing discrimination and ensuring compliance with the CBA. Yet, entities such as PMA act as representatives of employers and stand in a position to remedy discrimination.[205] Title VII should enforce their duties to serve

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Opportunity Commission's finding that employees have right to work in environment without discrimination); Woods v. Graphic Communications, 925 F.2d 1195, 1202 (9th Cir. 1991) (stating that Title VII gives employees right to work in environments free from discriminatory intimidation, ridicule, and insult); Ellison v. Brady, 924 F.2d 872, 876 (9th Cir. 1991) (stating that Equal Employment Opportunity Commission has concluded that Title VII gives employees right to work in environment free from discriminatory intimidation, ridicule, and insult).

[202] *See Anderson*, 336 F.3d at 927 n.3 (stating that because PMA only has discretionary power to discipline member-employers, PMA can not be responsible for member-employers that violate CBA).

[203] Ass'n of Mexican-Am. Educators v. California, 231 F.3d 572, 581 (9th Cir. 2000) (en banc) (stating that Congress intended to close loopholes in Title VII's coverage and to extend statute's coverage to entities that control access to job market, whether or not they are direct employers); Gomez v. Alexian Bros. Hosp., 698 F.2d 1019, 1021 (9th Cir. 1983) (noting that it would be contrary to Congress' intent regarding Title VII if indirect employers could discriminatorily interfere with individual's employment opportunities when it could not do so with its own employees); Sibley Mem'l Hosp. v. Wilson, 488 F.2d 1338, 1341 (D.C. Cir. 1973) (stating that Congress determined to prohibit labor organizations from exerting any power to foreclose any individual's access to employment).

[204] *See, e.g.*, Finnerty, *supra* note 13, at 1592 (pointing out that in *AMAE*, Ninth Circuit sought to close loopholes when California had employment interest beyond giving tests); *see Gomez*, 698 F.2d at 1021 (agreeing with *Sibley* that it would defy Congress' intent in Title VII to permit employers to use their power to discriminatorily interfere with individual's employment opportunities with another employer when it cannot do so with respect to employment in its own service); Lutcher v. Musicians Union Local 47, 633 F.2d 880, 885 (1980) (stating that unions have same duty not to discriminate as employers and it was discriminatory not to make good faith effort to ensure that Lutcher was not discriminated against based on religion); *Sibley*, 488 F.2d at 1341; *see also* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (stating that Congress intended to end disparate treatment of men and women in employment, including requiring people to work in discriminatorily hostile environment).

[205] *See* Vaca v. Sipes, 386 U.S. 171, 177 (1967) (stating that with respect to unions, there is duty to serve interests of all members without hostility or discrimination toward any, to exercise discretion with complete good faith and honesty, and to avoid arbitrary conduct);

the interests of their representatives and prevent discrimination.

The inconsistency of not enforcing such duties is apparent in the court's opinion. The *Anderson* court stated that one purpose of the PMA was to ensure that member-employers followed the CBA.[206] However, the court then decided that although PMA knew of the harassment, it had no responsibility to take any action at all because it was not involved in CBA grievance procedures.[207] This analysis is questionable: Why should an organization such as PMA be responsible to ensure that its member-employers follow the CBA, but not be responsible for ensuring that the member-employers do not operate a hostile work environment in accordance with the CBA? Consistent with the purposes of Title VII, when an organization such as PMA is responsible for ensuring that employers follow a CBA and prevent discrimination in the workplace, it should be held liable when it fails to do so.[208]

CONCLUSION

In *Anderson*, the Ninth Circuit held that PMA, a collective bargaining agent, was not liable for workplace discrimination, even though it had both the duty and the power to stop the discrimination.[209] However, the court required too strong a showing of control over the employment relationship, given the Ninth Circuit's previous holdings.[210] In addition,

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Little v. Windermere Relocation, Inc., 301 F.3d 958, 968 (9th Cir. 2002) (creating employer liability for acts of non-employee when employer did not take immediate and/or corrective action to remedy harassment); Swenson v. Potter, 271 F.3d 1184, 1193 (9th Cir. 2001) (stating that investigation can be powerful factor in deterring future harassment).

[206] *Anderson*, 336 F.3d at 926.

[207] *See id.* at 931-32 (stating that PMA's involvement in grievance procedure was too attenuated to qualify as failure to take corrective action).

[208] *See, e.g.*, Dowd, *supra* note 13, at 101 (arguing that judicial interpretation of Title VII reflects policy that Title VII was intended "to provide broad protection to individuals who may be affected by discrimination in order that substantive rights are not sacrificed to legal technicalities"); *see* Woodell v. Int'l Bhd. of Elec. Workers, Local 71, 502 U.S. 93, 101-02 (1991) (noting that employees have ability to require unions to enforce contracts in which they are involved); United Ass'n of Journeymen v. Local 334, United Ass'n of Journeymen, 452 U.S. 615, 624 (1981) (noting that Congress intended for union accountability to exist when union violates agreements it is part of, in order to further stability among labor organizations); Kinney v. Int'l Bhd. of Elec. Workers, 669 F.2d 1222, 1229 (9th Cir. 1981) (finding that union member had authority to sue union when union did not enforce rules of labor relationship).

[209] *See Anderson*, 336 F.3d at 926, 932 (noting that PMA had responsibility of ensuring that member-employers comply with CBA, PMA bylaws gave PMA power to discipline member-employers for CBA violations, but holding that PMA was not cognizable defendant under Title VII).

[210] *See supra* Part III.A.

Anderson is inconsistent with the United States Supreme Court's opinion in *Goodman*, given the reasoning and facts of that case.[211] The court erred by failing to find PMA liable for not punishing member-employers that allowed discrimination.[212] The court's decision undermines the purpose of Title VII by allowing labor organizations to turn a blind eye to employer discrimination, even when the labor organization has the power and duty to discipline the employers engaging in that discrimination.[213]

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[211] *See supra* Part III.B.

[212] *See id.*

[213] *See supra* Part III.C.