STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

AMIN HASAN, Complainant, BARDON RUBBER PRODUCTS COMPANY AND INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 627, Respondents.	Case I No. 29738 Ce-1947 Decision No. 19743-A

Appearances:

Mr. Charles Swanson, Attorney at Law, 1006 Washington Avenue, Racine, Wisconsin 53401, appearing on behalf of the Complainant.

Brown and Black, Attorneys at Law, On The Lake At Eleventh, Racine, Wisconsin 53403, by Mr. Harley Brown, appearing on behalf of Respondent Bardon Rubber Products Company.

Mr. Ralph Amerling, Staff Representative, 7435 South Howell Avenue, Oak Creek, Wisconsin 53150, appearing on behalf of Respondent Local 627, United Automobile, Aerospace and Agricultural Implement Workers of America.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Amin Hasan, having filed a complaint with the Wisconsin Employment Relations Commission on May 18, 1982, alleging that the above-named Respondents had committed unfair labor practices within the meaning of the Wisconsin Employment Peace Act; and the Commission having appointed Daniel L. Bernstone, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order, pursuant to Section 111.07(5) of the Wisconsin Employment Peace Act; and notice of hearing on such complaint having been mailed to the parties; and a hearing on said complaint having been held in Racine, Wisconsin on September 28, 1982 and January 12, 1983 before the Examiner; and a post-hearing brief having been filed only by Respondent Bardon Rubber Products Company, by March 3, 1983; and the Examiner having considered the evidence and arguments, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Amin Hasan, hereinafter referred to as the Complainant, is an individual presently residing at 1344 Liberty Street, Racine, Wisconsin.

2. That Bardon Rubber Products Company, hereinafter referred to as the Employer, is an employer which operates facilities at Highway 11, Union Grove, Wisconsin.

3. That Local 627, United Automobile, Aerospace and Agricultural Implement Workers of America, hereinafter referred to as the Union, is a labor organization maintaining offices at 2100 Layard Avenue, Racine, Wisconsin.

4. That at all times material herein, the Union has been, and is the collective bargaining representative of all production and maintenance employes working at the Employer's Union Grove plant; that in said relationship, the Union and the Employer have been parties to a collective bargaining agreement covering the wages, hours and working conditions of said employes, which agreement, by its terms, is in effect from November 9, 1981 through November 14, 1983; that said agreement provides in pertinent part as follows:

ARTICLE I - RECOGNITION

1.04 No Discrimination.

In the employment policies and practices of the Company and in the membership policies and practices of the Union, there shall be no discrimination as prohibited by law against any person.

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ARTICLE VII - Job Classifications and Rates

Section 7.01. Job classifications and classification rates shall be in accordance with Schedule "A" annexed hereto and made a part hereof.

Employees shall be paid in accordance with Schedule A. Employees' wages shall be increased accordingly.

All new negotiated wage increases shall be effective as of the date of this Agreement.

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EXHIBIT A

WAGES - NOVEMBER 9, 1981 AND NOVEMBER 8, 1982

Mill Operator & Compounder

	11-9-81	11-8-82
Start	5.43	5.76
30 Days	5.73	6.07
60 Days	5.94	6.30
4 Months	6.24	6.61
6 Months	6.90	7.31

Barwell Oper. & Matl. Handler

	11-9-81	11-8-82
Start	5.18	5.49
30 Days	5.46	5.79
60 Days	5.69	6.03
4 Months	5.96	6.32
6 Months	6.59	6.99

Die Cutter Machine Operator

	11-9-81	11-8-82
Start	4.06	4.30
30 Days	4.26	4.52
60 Days	4.45	4.72
4 Months	4.57	4.84
6 Months	5.10	5.41

Sand Blaster & Degreaser

	11-9-81	11-8-82
Start	4.01	4.25
30 Days	4.20	4.45
60 Days	4.43	4.70
4 Months	4.70	4.98
6 Months	5.29	5.61

Metal Prep/Painter

	11-9-81	11-8-82
Start	4.05	4.29
30 Days	4.26	4.52
60 Days	4.40	4.66
4 Months	4.60	4.88
6 Months	5.14	5.45

Metal Prep Utility

REP Pres Utility

	11-9-81	11-8-82
Start	5.03	5.33
30 Days	5.18	5.54
60 Days	5.71	6.05

Lab Helper

	11-9-81	11-8-82
Start	3.96	4.20
30 Days	4.17	4.42
60 Days	4.31	4.57
4 Months	4.50	4.77
6 Months	5.03	5.33

Shipping Helper

	11-9-81	11-8-82
- - - -	5.25	5.57

Press Operator
Wheelabrator, Air Mac Oper.
Press Room Utility Set-up Person
Shipping/Receiving Person

	11-9-81	11-8-82
Start	5.28	5.60
30 Days	5.57	5.90
60 Days	5.79	6.14
4 Months	6.08	6.44
6 Months	6.73	7.13

Project Molder

	11-9-81	11-8-82
- - - -	6.98	7.38

Injection Press Operator

	11-9-81	11-8-82
Start	4.91	5.20
30 Days	5.08	5.38
90 Days	5.65	5.99

Injection Press Relief Oper.

	11-9-81	11-8-82
Start	4.54	4.81
30 Days	4.72	5.00
90 Days	5.25	5.57

	11-9-81	11-8-82
Lead Person	6.98	7.38
Lead Person REP	5.90	6.24
Maintenance A	8.08	8.56
Maintenance B	7.53	7.98

Trimmer/Sorter

	11-9-81	11-8-82
Start	3.82	4.05
30 Days	4.02	4.26
60 Days	4.15	4.40
4 Months	4.35	4.61
6 Months	4.86	5.15

Quality Control Inspector

	11-9-81	11-8-82
A	5.92	6.06
B	5.31	5.63

Janitor/Utility Person

	11-9-81	11-8-82
Start	5.05	5.35
30 Days	5.22	5.53
60 Days	5.77	6.12

	11-9-81	11-8-82
Tool Room A	10.99	11.65
Tool Room B	9.68	10.26

ARTICLE XII - General Provisions

Section 12.01. The Company shall continue to make and improve provisions for the safety and health of its employees during the hours of their employment and provide protective devices and other personal protective equipment as required by law for the protection of employees from injury and sickness.

The employees shall comply with all reasonable safety, sanitary and fire regulations of the Company, and with requests to visit the Company's First Aid Department on Company time with regard to examinations and treatments for the prevention and cure of illness and injury. Records of all industrial sickness and accident cases will be made available to the Union, when requested in writing. Any dispute arising from the application of this Section shall be settled under the grievance procedure.

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ARTICLE III - GRIEVANCE PROCEDURE

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THIRD STEP. If a satisfactory settlement of the grievance does not result in the Second Step, it may be referred to the Third Step, provided it is so referred in writing within three (3) working days after receipt of the Company's answer in the Second Step. At the Third Step of the grievance, the Union may call in an International representative or representatives, after notifying the Company. Any employee

who is called to participate in such meeting will be paid by the Company for his attendance which does not exceed thirty (30) minutes, if such employee is needed for a longer period of time, he must clock out and he will not be paid by the Company.

The Company's answer will be given in writing within three (3) working days following the Third Step meeting. It is the intention of the parties that the Third Step meeting will be held promptly after a grievance has been submitted to the Third Step. The goal will be to meet within five (5) calendar days of the referral, but it is recognized that this will not always be attainable due to difficulties which may arise in coordinating the schedules of all the participants.

FOURTH STEP. If no satisfactory settlement has been reached in the first three steps, the grievance may be submitted to arbitration by the Union, by written notice given, within five (5) claendar days after delivery of the Company's Third Step answer.

5. That the Complainant commenced his employment with the Employer on January 23, 1980 as Mill Operator/Barwell; that he resigned on May 19, 1982; that the Employer operates two mills at its plant; that a mill consists of two rollers which mix rubber and chemicals; that the barwell is an extrusion machine; that the barwell is the ram piston which forces a batch of stock through a die face; that prior to using a barwell, the Employer used a tuber, which performed the same functions as a barwell; that the tuber is a rotary screw which forces stock through the die face; that prior to employing a barwell operator, the Employer employed a tuber operator; that the capacity of the mills is limited; that when the demand for rubber from the Employer exceeds the capacity per hour of the mills on the first shift, the Employer extends the hours into a second shift; that the second shift was originally created, and continues to exist, in order to satisfy an increase in orders placed with the Employer for rubber; that the second shift exists to accomodate an overflow in the production capacity of the mills; that on the average, it takes between forty-five minutes and one hour to mix a batch of stock from scratch, adding the ingredients on the mill; that it then takes five minutes to run the stock through the barwell in order to form an end of strand which is then run through an automatic injection press; that these two processes are not performed by an employe simultaneously; that the barwelling takes place after the milling; that if the Employer used two employes on the second shift, one operating the mill and the other operating the barwell, the latter would have nothing to do for at least forty-five minutes, while the stock was being milled; that the Employer therefore combined these functions on the second shift and utilized one employe to perform both functions; that before the Employer acquired the barwell, one employe, a mill operator, would run both the mill and the tuber; that there are other jobs at the Employer's plant which combine functions; that, for example, employes who perform a sandblasting function also perform a degreasing function and employes who are involved in shipping and receiving also trim parts; that because of the relatively small size of the Employer's operation and the resulting necessity for combining job functions, the Employer and the Union, during contract negotiations, discussed the matter of what rate of pay would apply when an employe performed two functions; that the Employer and the Union agreed that in such cases the higher of the two applicable rates of pay would be paid to such employe; that the hourly pay rate for a mill operator is higher than the hourly rate of pay for a barwell operator; that whenever the Employer has utilized an employe to operate both the mill and the barwell, the

reference to Schedule "A" is actually a reference to Exhibit A; that Exhibit A of the agreement is only a listing of all jobs performed in the Employer's plant along with the applicable hourly rates of pay for those jobs; that whenever the hourly rates of pay are identical for two or more job classifications, those job classifications are listed on Exhibit A above the applicable hourly rates of pay for those job classifications.

6. That as operator of the mill and the barwell on the second shift, the Complainant was required to use certain chemicals; that one of the chemicals is zinc sterrite; that zinc sterrite is commonly used in the rubber industry; that zinc sterrite is a separation agent; that it is a fatty acid material which allows uncured rubber to contact itself without sticking; that it is used throughout the Employer's plant on both the first and second shifts; that it is not used any more on the second shift than on the first shift; that the use of zinc sterrite and other chemicals on the second shift did not create a hazardous condition; that each of the Employer's mills is equipped with a hood, with air evacuation; that the hood carries any dust or compounds away from the mill operator's face; that the Complainant was provided with a mask which served as a barrier to dust particles; that throughout the Complainant's employment, the mills were equipped with hoods and a mask was available for his use; that at all times relevant herein, the Employer never received any complaints from any employes who operated the mill or barwell concerning their safety and health; that the Complainant was experiencing health problems during his employment by the Employer; that he sought medical attention from several physicians and that he never received a written report from any physician stating that his health was affected in any way by his employment.

7. That from June of 1976 until May of 1982, seven (7) employes, including the Complainant, operated the mill on the second shift; that all seven (7) employes, including the Complainant, operated both the mill and the barwell on the second shift; that the Complainant and one (1) other employe, Complainant's immediate predecessor, are black, and the other five (5) employes are white; that since the Complainant resigned his position with the Employer, the Employer hired a temporary employe to operate the mill and the barwell on the second shift and that said employe is white.

8. That the Complainant filed a grievance dated March 27, 1981 in which he alleged the Employer violated Article VII, Section 7.01 of the parties' collective bargaining agreement; that the grievance was received by Complainant's foreman on March 31, 1981; that the grievance alleged the Complainant was operating both the barwell and the mill and that the agreement does not provide for such a combined job classification; that the grievance alleged the grievant was performing two (2) jobs but was only being paid for one job; that the grievance requested that Complainant only be required to operate the mill; that the grievance procedure contained in the parties' agreement provides that any grievance, except a discharge grievance, "not presented in writing within three (3) working days from the date the alleged cause for complaint occurs will be barred"; that the grievance procedure further provides that if no satisfactory settlement of a grievance is reached in its first three steps the Union may submit the grievance to arbitration; that the instant grievance was denied by the Employer at the first step as not being timely filed; that the Union appealed to step two and the Employer, on April 10, 1981, reaffirmed its answer at step one; that the Union appealed to step three on April 13th; that at the third step of the grievance procedure the Union called in its International Representative; that at that point Mr. James Kohlman, the Union's Unit Chairman for the Bardon Rubber Products Company's bargaining unit, met with the Union's International Representative, the Union's Membership Committee and the Employer; that thereafter Mr. Kohlman, the Committee and the Union International Representative discussed the grievance and decided to withdraw it and take up the matter raised by the grievance during the negotiations for the 1981 collective bargaining agreement; that Kohlman and Don Gourdoux, the Union Steward, then advised the Complainant of that decision; that the Complainant did not express agreement or disagreement with the decision; that the decision to withdraw the Complainant's grievance was not the result of any racial discrimination exercised by the Union with respect to the Complainant; that prior to the negotiations which led to the parties' 1981 collective bargaining agreement, the mill operator on the second shift was required to also operate the barwell and was paid the mill operator's hourly rate and that during the 1981 contract negotiations the parties agreed that the mill operator on the second shift would continue to be required to operate the barwell and would continue to be paid the hourly rate for a mill operator.

9. That the Constitution of the International Union contains an internal procedure under which a bargaining unit member may challenge a decision made by the Union at any step of a contract's grievance procedure; that under this internal procedure contained in the International Union's Constitution, a grievant who disagrees with a decision made at the first step by the Union Steward may challenge that decision by appealing it to the Chairman of the bargaining unit; that if the grievant disagrees with the Chairman's decision he may appeal it to the membership of the local union; that if he disagrees with the decision of the membership of the local union, the grievant may appeal to the International Union; that said internal procedure was not followed by the Complainant in this case; that the Union did not prosecute the Complainant's grievance beyond step three of the grievance procedure because in the Union's judgment no violation of the collective bargaining agreement by the Employer existed with respect to the Complainant.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. That Respondent, Local 627, United Automobile, Aerospace and Agricultural Implement Workers of America, did not commit any unfair labor practices within the meaning of any provision of the Wisconsin Employment Peace Act (WEPA) by refusing to proceed to final and binding arbitration of the grievance filed by the Complainant on March 27, 1981.

2. That, since the above-noted grievance was resolved by the good faith refusal of Local 627, United Automobile, Aerospace and Agricultural Implement Workers of America to proceed to final and binding arbitration thereon, the Examiner will not exercise the Commission's jurisdiction to determine whether Respondent Bardon Rubber Products Company violated the collective bargaining agreement existing between it and Local 627 with respect to the Complainant, in violation of Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDER 1/

IT IS ORDERED that the complaint of Complainant Amin Hasan filed herein be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 9th day of June, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Daniel L. Bernstone, Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition (Continued on Page Seven)

1/ (Continued)

with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The complaint raises the following issues:

1. Whether the Respondents violated Article VII, Section 7.01 of the collective bargaining agreement by requiring Complainant to operate both the mill and the barwell on the second shift without compensating him in accordance with that provision of the agreement?

2. Whether the Respondents discriminated against the Complainant because he is of African-American descent, and thereby violated Article I, Section 1.04 of the collective bargaining agreement, by requiring him to operate both the mill and the barwell on the second shift?

3. Whether the Respondents violated Article XII, Section 12.01 of the collective bargaining agreement by requiring Complainant to engage in work which endangered his health and safety?

4. Whether Respondent Union breached its duty to fairly represent the Complainant by not prosecuting his grievance to the full extent provided for in the collective bargaining agreement? 2/

COMPLAINANT'S POSITION

The Complainant contends that he was employed as a mill operator and that the job of operating a barwell is separate and distinct from that of a mill operator. He asserts that he was required to operate both the mill and the barwell on the second shift, and that this meant he was performing work in two separate job classifications. He argues that the parties' collective bargaining agreement neither combines such job classifications nor their rates of pay. The Complainant contends that the Respondents therefore violated Article VII, Section 7.01 of the agreement.

The Complainant also argues that by being required to operate both the mill and the barwell on the second shift, he was discriminated against because he is of African-American descent. He therefore contends that the Employer and the Union violated Article I, Section 1.04 of the agreement.

The Complainant also contends that the Respondents violated Article XII, Section 12.01 of the agreement in that he was required to engage in work which endangered his health. The Complainant also alleges that Respondent Union breached its duty to fairly represent him by not prosecuting his grievance to the full extent provided for in the collective bargaining agreement.

EMPLOYER'S POSITION

The Employer maintains that at least since 1976, all employes who worked on the second shift, including the Complainant, operated both the mill and the barwell. It points out that the issue of what rate of pay would apply in that situation was discussed by it with the Union and the parties agreed that the higher rate of pay, that of a mill operator, would apply. It notes that both before and after the Complainant was hired, every employe who worked on the second shift was paid the higher rate of pay. It argues that the practice of [illegible] The Employer further alleges that there is no evidence it was guilty of

employes than black employes have been employed to operate both the mill and the barwell on the second shift. With respect to the Complainant's allegation that he was required to engage in work which endangered his health and safety, the Employer argues that the Complainant was not required to work under hazardous conditions and that it took all necessary safety measures at its plant. It further contends that there is no evidence that any of the medical problems complained of by the Complainant were work-related.

UNION'S POSITION

The Union argues that the Complainant's grievance was withdrawn because the Union concluded that the Employer did not violate the collective bargaining agreement with respect to the Complainant. The Union therefore contends that its withdrawal of the grievance was proper. Additionally, the Union points out that when the Complainant was advised by the Bargaining Unit Chairman and the Union Steward that the grievance was being withdrawn, the Complainant did not express agreement or disagreement with the decision and, in the absence of any further communication between the Complainant and the Union, the Union assumed the Complainant was not challenging its decision to withdraw the grievance by resorting to the internal procedure contained in the International Union's Constitution which exists for that purpose.

DISCUSSION

The Union correctly notes that the Complainant did not exhaust the internal Union procedure created by the Constitution of the International Union. In this connection, the United States Supreme Court, in a Section 301 action under the Labor Management Relations Act, has held that at least three relevant factors bear on the issue of whether exhaustion of such a procedure should be required of the employe. 3/ They are, first, whether union officials are so hostile to the employe that he could not hope to obtain a fair hearing on his claim; second, whether the internal union appeals procedure would be inadequate either to reactivate the employe's grievance or to award him the full relief he seeks under Section 301; and third, whether exhaustion of internal procedures would unreasonably delay the employe's opportunity to obtain a judicial hearing on the merits of his claim. The Court stated that if any of these factors are found to exist, it may properly excuse the employe's failure to exhaust the internal union procedure.

The Commission, in a recent decision, noted that it is bound by the standards set forth in Clayton and that all three standards must be met before an employe's failure to exhaust internal union remedies becomes a valid defense available to a union. 4/ In the instant case, Complainant did not establish that the Union's officials were so hostile to him that he could not hope to obtain a fair hearing on his claim. Thus, the first standard has not been met. As to the second standard, it cannot be concluded on the basis of the record that the Union's internal procedure would have been inadequate to reactivate Complainant's grievance because the International Union's Constitution, which contains the procedure, was never made part of the record in this proceeding. Furthermore, no such claim was made by the Complainant. Additionally, Complainant never claimed the procedure would have been inadequate to award him the full relief he sought, and again, since the International Union's Constitution is not part of the record herein, it cannot be concluded that the procedure would have been inadequate in that respect. The second standard set out in Clayton was therefore not met. As to the third standard, there is no evidence in the instant case to support a finding that Complainant's exhaustion of the Union's internal procedure would have unreasonably delayed his opportunity to obtain a judicial hearing on the merits of his claim, nor was that contention made by the Complainant. Thus, none of the standards set out in Clayton were met in the instant case. The Complainant's failure to exhaust the internal procedure contained in the International Union's Constitution is therefore not excusable, and the Union's defense in that regard must be sustained.

3/ Clayton v. Automobile Workers, U.S. Sup. Ct. 1981, 107 LRRM 2385.

4/ Scaife v. J.I. Case Company and United Auto Workers Local 180, Decision No. 18324-B (1982).

The Examiner turns now to a consideration of whether the Commission's jurisdiction should be exercised to rule on the merits of Complainant's allegations that the Employer violated the parties' collective bargaining agreement and thereby violated Section 111.06(1)(f) of the Wisconsin Employment Peace Act (WEPA). The jurisdiction of the Commission will not be exercised in the absence of a clear and satisfactory preponderance of evidence showing that the Complainant attempted to exhaust the contractual grievance procedure but was frustrated in that attempt because of the Union's breach of its duty to fairly represent him. 5/ The question of whether a union has breached that duty is answered by determining if the Union's conduct toward a bargaining unit employe is arbitrary, discriminatory or in bad faith. 6/ A union has considerable latitude in deciding whether to pursue a grievance through arbitration. 7/ It is given a wide range of reasonableness in exercising its discretion in deciding whether to process a grievance. 8/ A union is required to make decisions as to the merits of grievances. 9/ Such decisions should take into account at least the monetary value of the employe's claim, the effect of a breach of contract on the employe and the likelihood of success in arbitration. 10/ The absence of evidence that these factors were taken into account by a union in making its decision as to the merits of a grievance does not show a breach of the duty of fair representation. The employe has the burden of proof. 11/ In the instant case, Complainant not only failed to satisfy that burden, there was no showing that the Union's conduct toward him was arbitrary, discriminatory or in bad faith. The Union withdrew his grievance because it determined there was no violation of the agreement by the Employer and that the grievance was therefore not meritorious. It so advised the Complainant. No further action was thereafter taken by the Complainant regarding the grievance. The Complainant's failure to exhaust the contractual grievance procedure was not caused by the Union's breach of its duty to fairly represent him.

Therefore, the Examiner will not rule on the merits of the Complainant's breach of contract claim and the complaint against the Respondents is hereby dismissed.

Dated at Madison, Wisconsin this 9th day of June, 1983.

By _____
Daniel L. Bernstone, Examiner

5/ Mahnke v. WERC, 66 Wis. 2d 524, 225 N.W. 2d 617 (1975); Scaife v. J.I. Case Company and United Auto Workers Local 180, supra.

6/ Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967).

7/ Mahnke, supra.

8/ Ford Motor Co. v. Huffman, 345 U.S. 330, 31 LRRM 2548 (1953).

9/ Vaca v. Sipes, supra.

10/ Mahnke, supra.

11/ University of Wisconsin - Milwaukee Housing Department, 11457-F (1977); Mahnke, supra; Vaca v. Sipes, supra.