
The Sting: “Testers” May Sue Under Title VII, Circuit Court Rules

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*Fair employment agencies have been using employment “testers” for years, that is, individuals who apply for employment with the sole purpose of gathering evidence of discriminatory hiring practices and then suing the employer. However, for the first time, a federal circuit court of appeals has ruled that paid employment testers who have no bona fide intention of accepting a position with the employer nevertheless have standing to file suit under Title VII. As such, it can be expected that the number of employers subject to tester lawsuits will increase. This article describes employment testing and examines the case law surrounding its development. It also reviews the Seventh Circuit’s recent decision in *Kyles v. J.K. Guardian Security Services, Inc.*, 222 F.3d 289 (7th Cir. 2000), which granted testers standing under Title VII, and comments on the court’s reasoning. Finally, this article provides employers with important practical suggestions to avoid liability from tester lawsuits.*

During the last three decades, responsible employers have recognized that discrimination in the workplace will not be tolerated, and have struggled to embrace equal employment opportunity practices and policies. Notwithstanding these efforts, the number of discrimination charges and complaints remains substantial. Some plaintiff attorneys and equal rights advocates argue that although employers have abandoned blatant discriminatory employment practices, they have embraced subtle and/or sophisticated discriminatory employment practices, especially in hiring, which are more difficult to detect and remedy. As a means to uncovering covert discriminatory practices, fair employment organizations have used “employment testers” to assist in the detection of discrimination.

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Testers are individuals who apply for employment with the sole purpose of gathering evidence of discriminatory practices. Testers are not bona fide applicants for employment and have no intention of accepting employment if offered to them during the course of the hiring process. The fair employment organization pairs the white and minority testers together and sends them to apply for the same job. The white and minority testers are given false credentials, with the minority tester having equal or better qualifications than the white tester. The testers note whether they are treated differently through the hiring process and report their experiences to the organization. The organization then decides whether there is a basis for any legal action. If such a legal basis exists, a suit may be brought under Title VII of the Civil Rights Act of 1964 and under other federal or state discrimination statutes.

The use of testers to detect employment discrimination has been utilized for many years. However, until recently, the few federal courts that have dealt with testers' claims have found that they have no cause of action. This past summer, however, the Seventh Circuit Court of Appeals found that testers who apply for jobs in order to detect discrimination in hiring practices, with no bona fide interest in attaining the position, have standing to sue under Title VII, in *Kyles v. J.K. Guardian Security Services, Inc.*, 222 F.3d 289 (7th Cir. 2000). The *Kyles* decision challenges employers to be wary of employment testers and mindful of the way they conduct the selection and hiring of applicants.

This article first examines the law surrounding the use of testers prior to the Seventh Circuit's decision in *Kyles*. Next, it examines the Seventh Circuit's decision and questions the court's legal analysis. Finally, this article offers suggestions for employers to avoid being entrapped in a testers case.

THE LAW PRIOR TO *KYLES*

Despite the use of testers for at least three decades, few courts have addressed what rights "test" plaintiffs may have under Title VII.¹ The main theory used to argue for dismissal of the test plaintiffs' Title VII claims has been that these plaintiffs do not have a genuine interest in employment with the defendant and cannot establish a prima facie case of discrimination.² The specific issue of whether a tester had standing to sue for employment discrimination under Title VII was not directly addressed by these courts.

Prior to *Kyles*, only one federal appellate court has come close to addressing the issue of whether employment testers have standing to

sue under Title VII.³ In 1994, in *Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.*, 28 F.3d 1268 (D.C. Cir. 1994), the United States Court of Appeals for the District of Columbia held that testers had no cause of action for damages and lacked standing to seek prospective relief under Title VII. The Council and two African-American testers sued BMC alleging that BMC had discriminatory employment practices. The lawsuit was based on the fact that the two African-American testers, equipped with fake credentials, were not given the same consideration for employment (that is, referrals by BMC) as their white tester partners.

The testers sought damages and injunctive relief. However, at the time of the alleged discrimination, only equitable remedies were available under Title VII. Damages under Title VII were not available until the Civil Rights Act of 1991.⁴ Therefore, the testers had no cause of action for damages under Title VII.

In addition to damages, the testers sought an injunction or declaratory relief against BMC. The court explained that in order to seek such prospective relief, the testers had to allege a likelihood of future violations of their rights by BMC. However, the testers failed to allege future illegality by BMC. Since BMC was aware of the testers' deception and had no duty to continue considering the testers for referrals, and because it was unlikely that the testers would reapply with BMC, the court held that the testers had no standing to pursue prospective relief under Title VII. Because the court agreed with BMC's argument that the plaintiffs could not recover damages under Title VII and had no standing to seek prospective relief, they were able to avoid the issue of whether the testers would have standing to sue for damages under the current provisions of Title VII.

THE EEOC ENFORCEMENT GUIDANCE

Shortly after the *BMC Marketing Corp.* decision, the Equal Employment Opportunity Commission issued a revised enforcement guidance on the standing of employment testers.⁵ The guidelines reiterated the EEOC's long-held position that employment testers and organizations that send testers to employers have standing to sue for discrimination under Title VII. The guidelines examined the long history of using testers to uncover discrimination in public accommodations and the court decisions addressing tester standing under civil rights laws. In particular, the EEOC reviewed Title VIII, known as the Fair Housing Act, and the prominent housing discrimination cases that had bestowed standing on testers. The EEOC argued that the

language relied upon those courts in determining tester standing under Title VIII was parallel to language in Title VII. Although acknowledging that the issue of employment tester standing had not often been the subject of litigation, the EEOC made clear that it disagreed with the standing limitations that the D.C. Circuit placed on testers in its *BMC Marketing Corp.* decision.

In particular, the EEOC noted that the D.C. Circuit's limitations in *BMC Marketing Corp.* would no longer apply to conduct occurring after November 21, 1991, because as of that date, the Civil Rights Act of 1991 made damages available to plaintiffs under Title VII. The EEOC also criticized the D.C. Circuit for overlooking several important factors indicating that testers have standing to obtain injunctive relief. First, the EEOC noted that the D.C. Circuit's interpretations of the statute contradicted the statutory language of Title VII which indicated that injunctions are appropriate even when the discrimination has occurred in the past. Second, the EEOC concluded, in a cursory fashion, contrary to the D.C. Circuit, that individual testers have suffered very real injury. Finally, the EEOC concluded testers have standing because to rule otherwise would undermine the fundamental principle that individual Title VII plaintiffs function as private attorney generals. Regarding the remedies available to testers, the EEOC noted that testers may seek compensatory and punitive damages and appropriate injunctive relief, but are not entitled to reinstatement or back pay, or the costs associated with not getting the job, because they had no intention of accepting the job.

THE SEVENTH CIRCUIT'S KYLES DECISION

In *Kyles v. J.K. Guardian Security Services, Inc.*, the United States Court of Appeals for the Seventh Circuit held that testers have standing to sue for employment discrimination under Title VII. This is the first time that a federal circuit court of appeals has addressed the specific issue of standing for employment testers.

Facts of the Case

The Legal Assistance Foundation of Chicago (LAF) is a public-interest law firm that provides legal assistance to individuals who cannot afford private legal counsel. LAF operates an employment testing project that strives to detect discriminatory hiring practices by employers. In order to detect racial discrimination, LAF pairs a white tester with a non-white tester, provides them both with false credentials designed to be

equal in all pertinent respects (and perhaps more favorable to the non-white tester), trains them to interview similarly, and then sends them to apply for the same job with the same employer.

Two African-American college students, Kyra Kyles and Lolita Pierce, went to work in LAF's employment testing project for the summer. As a condition to being admitted into the project, both Kyles and Pierce agreed to refuse any job offered to them in the course of their testing activities. With the assistance of LAF, Kyles and Pierce prepared fictitious resumes, adding employment and educational experiences to make them more attractive to employers.

In 1995, Guardian Security Services placed an ad in a newspaper soliciting employment applications for a receptionist position. LAF sent resumes from an African-American and a white applicant. Both resumes included information indicating the race of the applicant. The African-American's credentials were equal to, if not better than, the white applicant. Guardian did not respond to the African-American's application but called the white applicant three times.

Subsequently, LAF sent both Kyles and Pierce to apply for the receptionist position in person. LAF first sent Kyles to interview for the position. After interviewing with Guardian's director of human resources, Kyles was told that he would select three or four individuals for a callback for a second interview. However, when Kyles' white counterpart applied for the job a day later, she interviewed with the director of human resources, then the vice-president, returned to take a typing test a day later, and was ultimately offered the job on the spot. Although the white tester turned down the job, when Kyles called Guardian to check on the status of her application, she was told that no decision had yet been made on whom to call back for a second interview. Kyles never heard from Guardian again.

Soon thereafter, Pierce applied for the receptionist position. The director of human resources interviewed Pierce and told her he would be conducting follow-up interviews in the next couple of days and would call her in a day or two. Pierce's white counterpart applied for the job the same day, was interviewed by the director of human resources, and took a typing test. A week later, the white tester was called in for a second interview and offered the position. Around that same time, Pierce called to inquire about the status of her application and was told that the company was "running behind." Although the white tester turned down the job offer, Guardian never again contacted Pierce.

After filing charges with the Equal Employment Opportunity Commission and receiving right to sue letters, Kyles and Pierce filed

suit in the United States District Court for the Northern District of Illinois alleging that Guardian had engaged in racial discrimination in violation of Title VII and 42 U.S.C. Section 1981. Because Kyles and Pierce would not have accepted the position had it been offered by Guardian, the district court held that they did not suffer the type of personal, redressable injury, as required by the case and controversy requirement found in Article III of the Constitution. Furthermore, the judge concluded that Kyles and Pierce lacked standing because Title VII and Section 1981 conditioned the right to sue on a bona fide application for employment. As testers, Kyles and Pierce were not bona fide applicants for the receptionist position. Since they had no genuine interest in employment with Guardian, the district court granted summary judgement in the company's favor, reasoning that they lacked standing to sue.

The Seventh Circuit's Legal Reasoning

The Seventh Circuit began its discussion by explaining that a federal court only has jurisdiction over a lawsuit where the plaintiff has standing under Article III of the Constitution, which, according to the court, turns on one's personal stake in the dispute. In order for a plaintiff's case to satisfy Article III's standing requirement, the plaintiff must be able to show that: (1) he or she has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, and not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

The court further explained that a plaintiff's claim might satisfy each of these Article III criteria and yet run afoul of "judicially-imposed, prudential limitations on standing." For example, the court noted that the injury may be one that is indistinct from effects felt by many citizens, depriving the plaintiff of a unique stake in the controversy; or the claim may rest on the legal rights of third parties, rather than her own. The court concluded that these prudential considerations exist so that the courts may "avoid deciding questions of broad social import where no individual rights would be vindicated" and to limit disputes to litigants best suited to assert a particular claim.

The court also recognized that where federal statutory rights are at issue, Congress has considerable authority to shape the boundaries of standing, and could extend standing to the outermost limits

of Article III. The court explained that while Congress could not lower the threshold for standing below the minimum requirements of the Constitution, it could allow an individual who suffers an "injury-in-fact" to bring suit for a statutory violation even if that person would not normally be thought of as an intended beneficiary of the statute. Moreover, the court noted that Congress had the authority to "enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute."

As a result, in order to determine whether Kyles and Pierce had standing to bring their suit, the court stated that it was necessary to analyze the particular rights conferred by Title VII and Section 1981. The court then proceeded to examine the nature of those rights granted under both statutes.

Testers Have Standing Under Title VII

The court first noted that Title VII provides that it is unlawful for an employer to refuse to hire an individual because of his or her race, as well as to limit, segregate, or classify applicants in any way which would deprive or tend to deprive the applicant of employment opportunities because of his or her race.⁶ Under the statute, Congress granted the EEOC authority to enforce the provisions of the statute and permitted individuals to pursue their own claims of employment discrimination by acting as "private attorneys general." In particular, the statute expressly permits a person claiming to be aggrieved to file a charge with the EEOC or a civil action in court.⁷ To the court, the statutory language signaled a congressional intent to extend standing to the outermost limits of Article III. The essential question identified by the court was whether a tester claiming to be aggrieved by discriminatory employment practices has suffered the injury-in-fact as required by Article III.

For guidance in answering this question, the court turned to Title VIII of the Civil Rights Act of 1968, otherwise known as the Fair Housing Act.⁸ Title VIII prohibits discrimination in housing because of race, color, religion, sex, familial status, or national origin. In explaining its reliance on Title VIII, the court pointed out that previous courts had recognized that Title VIII was the functional equivalent of Title VII and, therefore, the two statutes are given like construction and application.⁹ Similar to Title VII, Title VIII permits an aggrieved person to file a charge and civil action for a violation of the statute.¹⁰ Furthermore, both statutes take broad aim at eradicating discrimination in their respective areas.

The court noted under Title VIII, testers have been used to challenge a variety of unlawful housing practices. Unlike Title VII, federal courts have specifically addressed the issue of whether a tester has standing to sue for housing discrimination under Title VIII. The Seventh Circuit noted that the Supreme Court had construed Title VIII to confer standing on housing testers challenging unlawful housing practices, and that despite the Seventh Circuit's initial skepticism, it was now well established law.¹¹ In holding that testers have standing to bring suit under the Fair Housing Act, the courts have focused on Section 804(d), which makes it unlawful to give false information about the availability of housing to a member of a protected class.¹² By including this provision, Congress created a legal right for any person to sue if given false information regarding the availability of housing, regardless of that person's intent for inquiring about the housing.

The Seventh Circuit further noted that courts have expanded standing for housing testers to include violations for sections 804(a) and (b), which respectively, prohibit making housing unavailable to another because of the person's race, and discrimination in the provision of services in connection with the sale of a house.¹³ The court concluded that the fact that the tester did not have any intention of buying or renting a home did not negate the injury suffered. A tester who was given false information about available housing or was treated in a discriminatory fashion suffered an injury under the statute and, thus, has standing to sue for damages under the Fair Housing Act.

Although the Seventh Circuit acknowledged that Title VII contains no provision comparable to Section 804(d), it concluded that in other key respects the statutes were quite similar. The court noted that both statutes took broad aim at discrimination in their respective sectors and were functional equivalents of each other, authorizing "private attorney general" lawsuits. Analyzing the statute, the court explained that when a job applicant is not considered for a job because of her race, the applicant has been "limited, segregated or classified" in a way that would "tend to deprive" her of employment opportunities. The court reasoned that the tester suffers an injury "in precisely the form the statute was intended to guard against," similar to a tester that was given false information regarding housing availability. The tester therefore has standing to sue, even if she did not want the job and has not been harmed apart from a statutory violation.

The court also recognized that because proof of discrimination, especially in hiring, is quite difficult to obtain, testers have become a

valuable tool in providing evidence of unlawful employment practices. Noting that it was not bound by the EEOC's Enforcement Guidance, the court concluded that the Guidance "informs and supports" its decision.

Finally, the court rejected the district court's conclusion that unless the plaintiff was a bona fide applicant for employment, she lacked standing under Title VII. According to the court, the question of whether the applicant was bona fide is relevant to the tester's prima facie case, rather than the issue of standing.¹⁴ Furthermore, according to the court, unlike Section 804(a) of Title VIII, which makes it unlawful to refuse to sell after a bona fide offer, Title VII's language does not limit its protection to bona fide applicants. Rather the testers' lack of a bona fide interest in the position goes toward the nature and extent of their injuries, and the issue of what relief is appropriate, but does not completely rule out that they were injured.¹⁵ The court concluded by stating that the humiliation and embarrassment Kyles and Pierce alleged they suffered constituted cognizable and compensable harms stemming from the discriminatory conduct. Because Kyles and Pierce applied for work with Guardian and allegedly were treated in a discriminatory fashion, they had standing to sue Guardian under Title VII.

Testers Do Not Have Standing Under Section 1981

Discrimination on the basis of race in the making and enforcement of contracts is prohibited by 42 U.S.C. Section 1981. Although this was not a case of first impression,¹⁶ few courts had considered the issue of whether employment testers had standing under Section 1981. In fact, most of those cases involved testers challenging housing discrimination under Section 1981.¹⁷ However, the court examined the D.C. Circuit's employment tester decision, *BMC Marketing Corp.*, noting that Section 1981 protects the rights to make and enforce contracts only. Further relying on *BMC Marketing Corp.*, the court concluded that, at most, the testers were deprived of the opportunity to refuse to enter into an employment contract with Guardian, an interest insufficient to confer standing under Section 1981.

In reaching its conclusion, the court noted that while Title VII and Section 1981 share the same purpose, the two statutes are different in important respects. Although Title VII takes aim at a wide range of discriminatory practices, Section 1981 simply protects the right to enter into a contractual relationship without discrimination. Furthermore, unlike Title VII, there is nothing in Section 1981's

language indicating that Congress intended to stretch standing to the limits of Article III. As a result, the court concluded that only those persons who actually wished to enter into a contractual relationship could sue for discrimination under Section 1981. Both Kyles and Pierce had no genuine interest in attaining employment with Guardian and neither would have accepted a position if it were offered to them. In fact, both testers signed an agreement promising not to accept employment with any of the firms that they tested.

In reversing in part and affirming in part the district court's grant of summary judgement, the Seventh Circuit concluded that employment testers have standing to sue for discrimination under Title VII, but not 42 U.S.C. Section 1981. The case was remanded back to the district court for trial on the Title VII allegations.¹⁸

Critique of the Seventh Circuit's Analysis

The court's analysis in concluding that testers have standing to sue for discriminatory employment practices under Title VII is subject to criticism. The opinion is based upon precedent holding that housing testers have standing to sue under Title VIII and that Title VII should be construed similarly to Title VIII. However, while the two statutes may be similar in some respects, they are different in others. One key difference, that the court itself admits, is that Title VII does not contain a provision comparable to Section 804(d) of the Fair Housing Act. The housing cases have based the testers' standing predominately upon Section 804(d)'s prohibition against giving untruthful information about the availability of housing. It is the statutory violation of providing false information that is, in itself, a violation of Title VIII. As the Supreme Court clearly stated in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982), a housing tester case cited by the Seventh Circuit in *Kyles*, when Congress enacted Title VIII, it conferred on "any person" a right to truthful information about the availability of housing. Title VII has no provision similar to Section 804(d) and does not confer the right to "any person" to bring suit for the misrepresentation of employment information to individuals. If Congress had intended to confer this right, it could have included the language in Title VII. Therefore, the court's reliance on Section 804(d) to give testers standing to sue under Title VII seems misplaced.

Given the Seventh Circuit's misplaced reliance on Section 804(d) of Title VIII, it is debatable whether an individual, who is not a bona fide applicant for employment, may have standing to sue under Title

VII. The court dismissed the idea that only a bona fide applicant may sue under Title VII, reasoning that the language of Title VII does not specifically limit its protection to bona fide job seekers, unlike Section 804(a) of the Fair Housing Act. Under Section 804(a), it is unlawful "[t]o refuse to sell or rent after the making of a *bona fide* offer."¹⁹ Title VII, on the other hand, prohibits employment practices directed at "employees" or "applicants" which deprive, or tend to deprive an individual of employment opportunities.²⁰ Although the language of Title VII does not state that it only protects "bona fide" applicants of employment, such can be inferred from the statute's use of the words "applicants" and "employees." Had Congress intended to grant standing to testers it could have used a broader more inclusive word, such as "person."

Base upon the foregoing, one may argue that an employer's employment practices cannot "deprive" or tend to "deprive" an "applicant" of employment opportunities when the person applying is not, in fact, an applicant, that is, a person who never had the intention of accepting the job. If the tester never intended to work for the employer, she was not an "applicant" as the word is used in the statute, and could not be deprived, nor could the employer tend to deprive her, of employment opportunities. In such a state, she could not suffer an injury, other than conjectural or hypothetical. Under such an analysis, it is difficult to perceive how the tester could have an injury that would provide standing under Title VII. This view is bolstered when one considers that as originally enacted by Congress, Title VII only provided limited equitable relief for real injuries, that is, make whole back pay awards, reinstatement, and injunctive relief.

THE AFTERMATH OF KYLES: WHAT THIS MEANS FOR EMPLOYERS

It remains to be seen whether other circuits will adopt the Seventh Circuit's analysis and find that testers have standing to sue under Title VII. However, the *Kyles* decision raises immediate and serious concerns for all employers under Title VII's jurisdiction. Employers must now be concerned not only with their policies and practices when selecting bona fide applicants for employment, but also whether they are being set up unwittingly for a lawsuit by employment testers. Accordingly, it is important for employers to revisit their hiring policies and practices. Employers need to ensure that these policies and practices are business-related and neutral, and do not discriminate against protected classes. In order to prevent and

defend against discrimination claims of testers, employers should do the following:

- Be sure to adopt and implement a well drafted equal employment opportunity policy declaring the employer's commitment to lawful selection processes, and warning that employees engaging in discrimination will be subject to discipline, up to and including discharge.
- Review all formal or informal hiring policies and practices to ensure that they are legal and business-related. Reformulate and redraft policies where necessary. This includes reviewing not only written policies, but also the unwritten hiring and recruiting practices of recruiters and managers charged with this responsibility. Where unlawful or questionable policies or practices are in place, they must be quickly eliminated and replaced.
- Thoroughly investigate all resumes and applications received for job openings. The *modus operandi* for testers is to submit false or otherwise fraudulent information about their employment history. For example, in describing work histories, not only have testers supplied the names of companies that have never existed, but they also list addresses that have never physically existed. Scrutinize all information provided on the applications and attempt to contact employment references with the telephone numbers provided. Cross-check telephone numbers with name and address services. Prepare recruiters to ask appropriate follow-up questions when the truthfulness of the employee's work history and particulars are in doubt. Consider hiring background investigative agencies where necessary. Keep in mind that testers most often strike in response to entry level job openings.
- Review the application process to ensure that all applicants are receiving the same consideration. Develop a business-related protocol for the interviewing process that will be applied uniformly to all candidates, regardless of whether they submit resumes or applications in person or by mail. As revealed by the *Kyles* decision, employers too often do not have a consistent interviewing and hiring methodology. Prior to soliciting applications or resumes, determine how many levels of interviews will be conducted, and who will be conducting the interviews and in what order.

Additionally, determine in advance whether any business-related and valid tests will be administered, who will administer the tests, and when they will be administered. Give consistent responses to questions concerning the time frame for follow-up interviews and when the decision making process will be completed. Following such protocols in a uniform fashion can protect employers from claims of discrimination.

- Train recruiters, managers, and supervisors in lawful and business-related hiring practices, and prohibited employment inquiries. Be sure to educate and train these employees in the concepts of equal employment opportunity and the employer's commitment to these principles. Employers should give examples of discrimination, blatant and subtle, and stress that it will not be tolerated in the workplace. Terminate any employee who demonstrates or indicates that they will not comply with the employer's equal employment opportunity commitments or selection protocols.

Although it is too soon to know whether other circuit courts will follow *Kyles*, it can be expected that the use of testers will continue and probably increase. Accordingly, employers must take steps to implement and enforce uniform, nondiscriminatory and business-related interviewing and hiring policies and practices to protect themselves from discrimination claims by testers. By failing to do so, employers are exposing themselves to needless and expensive liability.

NOTES

1. See *Lea v. Cone Mills Corp.*, 438 F.2d 86 (4th Cir. 1971). In *Lea*, three African-American women applied for a position in order to test the defendant's employment practices. The court found that no vacancies were available, but that the testers were denied consideration. The court granted injunctive relief with respect to future applicants for employment and awarded attorneys' fees. The court's analysis is abbreviated.

2. See *Sledge v. J.P. Stevens & Co.*, 585 F.2d 625, 641 (4th Cir. 1978); *Parr v. Woodmen of the World Life Insurance Society*, 657 F.Supp. 1022, 1032-33 (M.D.Ga. 1987); *Allen v. Prince George's County, Maryland*, 538 F.Supp. 833, 841-43 (D.Md. 1982).

3. But see *Molovinsky v. Fair Employment Council of Greater Washington, Inc.*, 683 A.2d 142 (D.C. Ct. of App. 1996) (where the District of Columbia Court of Appeals held that testers had standing to sue for employment discrimination under the District of Columbia Human Rights Act).

4. Although the Civil Rights Act of 1991 expanded the remedies available under Title VII to include damages, such provisions cannot be applied to conduct occurring prior

to the enactment of the Act. See *Landgraf v. USI Film Products*, 511 U.S. 244 (1994).

5. See *Enforcement Guidance on Using Testers to File Charges and Litigate Employment Discrimination Claims*, May 22, 1996, superceding guidance issued Nov. 20, 1990, Fair Emp. Prac. Man. (BNA) 405:6899 (2000).

6. 42 U.S.C. §2000e-2(a).

7. 42 U.S.C. §2000e-5(b) and 2000e-5(f)(1).

8. 42 U.S.C. §3601 et seq.

9. See *E.E.O.C. v. Bailey Co.*, 563 F.2d 439 (6th Cir. 1977); *Waters v. Heublein, Inc.*, 547 F.2d 466 (9th Cir. 1976).

10. 42 U.S.C. §3610(a)(1)(A)(i); 3602(i).

11. See *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982); *Village of Bellwood v. Dwivedi*, 895 F.2d 1521 (7th Cir. 1990).

12. 42 U.S.C. §3604(d) (it is unlawful “[t]o represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available”); see *Havens Realty* (cited in note 11).

13. See *Dwivedi* (cited in note 11). However, it should be noted that giving testers standing to sue under Section 804(a) appears to go against the intention of that section. That section prohibits individuals from refusing to sell or rent *after the making of a bona fide offer* to a person based on race, color, religion, sex, familial status, or national origin. It is apparent that no tester can extend a bona fide offer to buy or rent and, therefore, it is questionable how this section may confer standing upon a tester.

14. Prior case law seemed to indicate that whether a plaintiff was a bona fide applicant did not affect the plaintiffs standing but went to whether the plaintiff could establish a prima facie case of employment. See *Parr*, 657 F. Supp. at 1032-33; *Allen*, 538 F.Supp. at 841-43.

15. See *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995).

16. See *Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.*, 28 F.3d 1268 (D.C. Cir. 1994)(where the court addressed the issue head-on and concluded that employment testers lack standing to sue for a violation of §1981).

17. See *Coel v. Rose Tree Manor Apartments, Inc.*, 1987 WL 18393 (E.D.Pa. Oct. 13, 1987); *Pumphrey v. Stephen Homes, Inc.*, 1994 WL 150947 (D.Md. Feb. 24, 1994); *Biggus v. Southmark Management Corp.*, 1985 WL 1751 (N.D. Ill. June 13, 1985).

18. The trial commenced Sept. 12 and concluded Sept. 15, 2000. The jury took approximately 90 minutes to render a verdict in favor of Guardian, whose defense consisted of presenting evidence that it did not discriminate in the hiring of minorities.

19. 42 U.S.C. sec. 3604(a).

20. 42 U.S.C. sec. 2000e-2(a)(2)